763/99(F)

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Menikrama Mudalige Sriya Malani

Piyadasa,

N0.1, Kumarapaya, Meepitiya,

Nawalapitiya.

Defendant-Appellant

C.A.Case No:- 763/99(F)

D.C.Gampola Case No:-2342/2

V.

Kuda Banda Dunuwila,

55/12, Bawwagama, Nawalapitiya.

Plaintiff-Respondent

Before:- H.N.J.Perera, J.

Counsel:-J.C.Boange for the Defendant-Appellant

Upendra Walgampaya for the Plaintiff-Respondent

Argued On:-03.03.2014/01.04.2014

Written Submissions:-05.05.2014/12.05.2014

Decided On:-10.06.2015

H.N.J.Perera, J.

The plaintiff-respondent instituted the present action against the defendant-appellant praying, inter alia, for

(a)A declaration that Deed of Transfer No. 13221 by which the land described in the schedule to the plaint was purportedly transferred was in fact not a transfer but executed as a security in lieu of a loan transaction,

(b)A direction that the defendant accept the capital and reasonable Interest thereon and to re-transfer the land described in the Schedule to the plaint to the plaintiff,

(c)A declaration that the plaintiff is the owner of the land described In the plaint.

It was the position of the plaintiff-respondent that he was the owner of the premises described in the schedule to the plaint. A friend of the plaintiff one D.A.Chandarsena was in urgent need of money to send two of his relative's abroad and approached plaintiff to obtain the said sum of money. To raise the said sum of money the plaintiff executed Deed No. 13221 in favour of the defendant-appellant transferring the said land to the defendant-appellant. The plaintiff obtained Rs. 30,000/- from the defendant-appellant on the condition that he would repay the said sum of money. The plaintiff gave the money received from the defendant-appellant to Chandrasena. The said Chandrasena failed to return the said sum of money to the plaintiff-respondent as promised and the plaintiff-respondent made every effort to return the money to the defendant-appellant with reasonable interest thereon but he defendant-appellant refused to agree to same.

The plaintiff-respondent thereafter by letter dated 21.07.1993 addressed to the defendant-appellant requested the defendant-

appellant to accept the sum of Rs.30,000/- and reasonable interest thereon, and transfer the said property to the plaintiff-respondent, but the defendant-appellant has failed to do so.

It was further pleaded in the plaint that the plaintiff-respondent to date enjoys and possess the said land and the defendant-appellant has not at any stage claimed the right to possess the said land. The said transaction is not a transfer but actually a loan transaction secured by immovable property and the defendant-appellant is estopped from denying the same. Further the land described in the schedule to the plaint is over two acres in extent and at the time of the execution of the Deed No.13221 was worth around Rs.200,000/-, which is much more than the value disclosed in the said Deed.

The defendant-appellant filed answer and prayed, inter alia, for a dismissal of the plaintiff's action and declaration that the defendant-appellant is the owner of the said land and pleaded inter alia, that the said Deed executed by the plaintiff-respondent in favour of the defendant-appellant is a pure transfer and there was no loan transaction as alleged by the plaintiff-respondent. The defendant-appellant further averred that he is in possession of the said land and enjoying the fruits of the cultivation thereon.

After trial the learned District Judge of Gampola delivered judgment on 17.05.1999 in favour of the plaintiff-respondent. Aggrieved by the said judgment of the learned trial Judge of Gampola the defendant-appellant had preferred this appeal to this court.

The plaintiff-respondent throughout the case maintained that it was a loan transaction and was not intended to be an outright transfer as he never intended to part with beneficial interest. The plaintiff-respondent further alleged that the amount stated as consideration is very much less

than the actual market value of the property and that throughout he was in possession of the subject matter.

The learned District Judge has held that the evidence establishes that Deed N0.13221 was executed as security for money lent to the plaintiff-respondent by the defendant-appellant. The learned trial Judge has held that the evidence of the Notary who executed the Deed No. 13221 is balanced and unbiased and thereupon can be relied upon. The Notary in her evidence has stated that Rs. 25,000/- was transacted in her presence and the defendant-appellant stated that Rs. 5,000/-was paid prior to the transaction. She has further stated that the defendant-appellant intended to re-transfer the said property to the plaintiff-respondent.

The learned trial Judge has further held that the land described in the schedule to the plaint is two acres and six perches in extent and is situated within the Nawalapitiya Urban Council limits and therefore it cannot be accepted that two acres of land in the said Nawalapitiya Urban Council will be sold for Rs. 30,000/- in 1987.

Although the plaintiff-respondent has failed to specifically plead and pray for a declaration that the defendant-appellant hold the property on a constructive trust the evidence led by the parties in this case clearly indicates that the plaintiff-respondent did not intend to transfer the beneficial interest to the defendant-appellant , and the said transaction was only a loan transaction between the parties.

The plaintiff-respondent has very clearly stated that he is in possession of the land. The defendant appellant has stated that both the plaintiff-respondent and he are not in possession of the said land.

Section 83 of the Trust Ordinance is as follows:-

"Where the owner of property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances

that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative."

In dealing with the question of trust attendant circumstances are considered very material. In the case of Eliya Lebbe V. Majeed 48 N.L.R 357, at page 359 Dias, J stated thus:-

"There are tests for ascertaining into which category a case falls. Thus, if the transferor continued to remain in possession after the conveyance, or if the transferor paid the whole cost of the conveyance or if the consideration expressed on the Deed be utterly inadequate to what would be the fair purchase money for the property conveyed- all these are circumstances which would show whether the transaction was a genuine sale for valuable consideration or something else."

In the case of Thisa Nona and 3 others V. Premadasa [1997] 1 Sri L.R 169, it was held that the following circumstances which transpired in that case were relevant on the question whether the transaction was a loan transaction or an outright transfer.

(a)The fact that a non–notarial document was admitted to have seen signed by the transferee,

(b)the payment of the stamp duty and the Notary's charges by the Transferor,

(c)the fact that the transfer Deed came into existence in the course Series of transactions; and

(d)the continued possession of the premises in suit by the transferor Just the way she did before the transfer Deed was executed.

It was further held in that case that the attendant circumstances show that the transferor did not intend to dispose of the beneficial interest in the property transferred.

It is clear from the judgment of the learned District Judge that he accepted and was impressed by the evidence of the plaintiff-respondent and other witnesses who gave evidence on his behalf.

The defendant-appellant has taken up the position that the plaintiff-respondent's action is prescribed in terms of section 10 of the Prescription Ordinance as the action was not within three years of the execution of the Deed. The plaintiff-respondent has in his evidence clearly stated that he made several requests to the defendant-appellant to accept the principal sum with interest and to transfer the said property in plaintiff-respondent's name. Thereafter plaintiff-respondent by a letter dated 21.07.1993 addressed to the defendant-appellant requested the defendant-appellant to accept Rs. 30,000/- and reasonable interest thereon and transfer the said property to the plaintiff-respondent, but the defendant-appellant has failed to comply with the terms set out in the said letter. The said letter had been marked as P2 at the trial without any objection from the defendant-appellant. Further the defendant-appellant has not cross examined the plaintiff-respondent regarding this letter. The defendant-appellant has only denied receiving the same while giving evidence. The learned District Judge has correctly held that the period of three years does not commence on the date of execution of the Deed but instead commences on the date the defendant-appellant refused to re-transfer the said land.

It was further contended by the Counsel for the defendant-appellant that section 9 of the Evidence Ordinance prohibits the receipt of any oral agreement or statement for the purpose of varying a disposition of property which is required by law to be reduced to a document unless

the circumstances set out in the proviso to the section have been established.

Sec 92 of the Evidence Ordinance reads thus:-

"When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms.

Proviso (1). Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact and law."

Woodroffe and Ameer Ali on Evidence, 9th Edition page 660 States thus:-

"The section prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract, but does not prevent a party to a contract from showing that there was no consideration or that the consideration was different from that set out in the contract."

In Perera V. James Appuhamy 3 C.W.R 241, where the plaintiff sued the defendant for re-conveyance of premises conveyed to the defendant on a Deed – the Deed on the face of it purported to be a sale, but the plaintiff was held entitled to lead evidence to show that no consideration passed, and the conveyance was on trust.

I am of the opinion that the claim to lead oral evidence in this case for the purpose of showing that no sufficient consideration passed and that

the transaction is in fact is a loan transaction and not a sale as alleged by the defendant-appellant can be permitted.

In Dharmatilleke Thero V. Buddarakkitha Thero [1990] 1 Sri L.R 211, it was held:-

"The District Judge who saw and heard the witnesses and watched their demeanor had found for the defendant. Where the personality of the witnesses is an essential element, the Appellate Court should not set aside the decision of the trial Judge save in the clearest of cases.

In M.P.Munasinghe V. C.P.Vidanage 69 N.L.R 98, it was held that the jurisdiction of an Appellate Court to review the record of the evidence in order to determine whether the conclusion reached by the trial Judge upon evidence should stand has to be exercised with caution.

"If there is no evidence to support a particular conclusion (and this is really a question of law) the Appellate Court will not hesitate so as to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion been arrived on conflicting testimony by a tribunal which saw and heard the witnesses, the Appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."-per Viscount Simon in Watt in Thomas V. Thomas (1947) A.C. 484 at page 485-6).

Further in Gunewardene V. Cabral and others (1980) 2 Sri L.R 220, it was held that Appellate Court will set aside inferences drawn by the trial Judge only if they amount to findings of fact based on:-

(a)Inadmissible evidence; or

(b)after rejecting admissible and relevant evidence; or

(c)if the inferences are unsupported by evidence; or

(d)if the inferences or conclusions are not rationally possible or perverse.

In the case before me I do not see that the findings of the learned District Judge and the inferences drawn by him are vitiated by any of these considerations. In my view there is no justification for interfering with the conclusions reached by the learned District Judge which I perceive are warranted by the evidence that was before him.

For the above reasons I see no reason to disturb the judgment of the learned District Judge. Accordingly the appeal of the defendant-appellant is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL