

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

C.A.No. 1212/2000(F)

D.C.Negombo 2868/L

Aloysius Lazarus (Decd)

No. 7, Uluporanuwa Road

Kandana

Plaintiff

Vs

Leo Terrance Lazarus

No. 7 Uluporanuwa Road, Kandana

Presently at

No. 669 A.A.Nass Ice Plant

Manama, Bahrain

By her Attorney

D.J.M.Dona Dorathi Ranjani Lazarus,

No. 7 Uluporanuwa Road, Kandana

Substituted Plaintiff

Vs

Naullage Admund Silva,

No.162, Halpe Mawatha, Kandana

Defendant

AND BETWEEN

Naullage Admund Silva

No. 162 Halpe Mawatha, Kandana

Defendant-Appellant

Vs

Leo Terrance Lazarus,

No. 7 Uluporanuwa Road, Kandana

Presently at

No, 669, A.A.Nase Ice Place,

Manama, Bahrain

By her Attorney

S.J.M.Dona Dorathi Ranjani Lazarus

No, 7 Uluporanuwa Road, Kandana

Substituted-Plaintiff-Respondent

BEFORE: Deepali Wijesundura J

M.M.A. Gaffoor J.,

COUNSEL Dr. Sunil Cooray for the Substituted-Defendant-Appellant

H.D.J.Bandara for the Substituted Plaintiff-Respondent

ARGUED ON: 26.03.2015

DECIDED ON: 29.09.2015

Gaffoor J.,

The Plaintiff instituted this action against the Defendant stating that he is entitled to the land which is the subject matter of this action by Deed No. 2201 dated 28.12.1976 and attested by J.A.E.Amaratunga, Notary Public, which land he had transferred to the Defendant by Deed No. 2379(P3) dated 17.02.1977 and attested by J.A.E. Amaratunga, Notary Public, as a conditional Transfer with the condition that for the money he obtained, i.e. Rs. 2000/- to pay an interest of 15% per annum and to redeem the land within 5 years. The Plaintiff further says that the Defendant is holding the land in trust for him and asking for a declaration to that effect and to order the Defendant to re-transfer the said land by executing a conveyance in his name.

The defendant has filed his answer denying the averments in the Plaintiff and stating that the said transfer of the property was an outright transfer and the Defendant is seeking for a declaration that he be declared entitled to the said land and to dismiss the Plaintiff's action.-

The main contention of the Plaintiff is that he had no intention to dispose of the beneficial interest in the said property in dispute though the same was an outright transfer and the Deed P3 was executed as a security for a loan of Rs. 2000/- he obtained from the Defendant and that the value of the property is much more than Rs. 2000/-.

The Plaintiff having died after the trial was over, the substituted Plaintiff has been substituted in his place.

At the trial, three Admissions were recorded and the Plaintiff has raised 1-5 Issues and the Defendant has raised 6-10 Issues. Issues 1-3 are raised on the basis that the Plaintiff is the owner of the property and that he transferred it to the Defendant for Rs. 2000/- as a loan to be paid within 5 years together with 15% interest and that the Plaintiff and his family are living on this property. Issue No:4, is on the basis that the defendant is holding the property in trust and to re-transfer the property and that the transaction is subject to the principle of laesio enormis. The Issues 6-10 raised by the Defendant deal with his right on P3 and that he sent a notice to quit to the Plaintiff to vacate the property and if not to pay Rs. 50/- as damages per month.

The trial Judge has answered the Issues 1-5 in the affirmative and 6-10 in the negative and entered judgment in favour of the Plaintiff. The Defendant has appealed against this judgment to this Court. Both parties have filed their written submissions.

At the trial the Plaintiff has given evidence that when he retired he got a sum of Rs. 14,000/- and out of which he had bought this land for Rs. 8500/- by Deed No. 2201(P2) and after two months, he was short of some money for his chillie business and when he approached the Defendant to get a loan of Rs. 2000/-, he wanted the Plaintiff execute a Deed as an outright transfer with the understanding to repay the said Rs. 2000/- with 15% interest, within 5 years.

The Defendant has said in his evidence that he did not know anything about this transaction and it was effected by his brother and when P3 was

executed he was at Diyatalawa and his mother only gave the money to his brother to effect the transfer, and that he came to know that an action is filed against him after he received summons in this case. The trial Judge has rejected his evidence.

The question arises whether when a party alleges the transaction is based on constructive trust while the other party has proper title, what are the attendant circumstances available to prove constructive trust.

Section 83 of the Trusts Ordinance states :

'When the owner of the property transfers or bequeaths it and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representatives.'

The following attendant circumstances must be considered in this case, that the Plaintiff did not intend to dispose of the beneficial interest to the Defendant when he transferred the property by P3:

- i) The Plaintiff neither handed over vacant possession of the property nor did the Defendant take any steps to get the possession thereof. The Plaintiff and his family are still in possession of the property as they were before the said transfer. This indicates that the Plaintiff never intended to handover possession of the property;

- ii) The payment of the stamp fee and the Notary's fee on the execution of P3 were paid by the Plaintiff and not by the Defendant. It is the normal practice that when a person purchases a property he should pay the Notary's fee and the stamp duty because the Deed is executed in his favour and to his benefit. Only in the case of a Lease Agreement, both the Lessor and Lessee share the charges. It is evidence in this case, that the Defendant was not present at the time of the execution of P3 and his brother only was present and there is no evidence that the Defendant's brother had paid these charges
- iii) The Plaintiff has given evidence that he bought the property by P2 for a sum of Rs. 8500/- on 28.12.1976 and when he ran short of capital for chilie business in February 1977 obtained Rs. 2000/- as a loan from the Defendant. It is beyond any imagination that a person who bought the property for Rs. 8500/- cannot sell the same property for Rs. 2000/- in two months time. There is no evidence in this case that the value of this property has dropped drastically to Rs. 2000/-. If the Plaintiff actually intended to sell the p roperty, he should have sold it for a higher amount than Rs. 8500/- ;
- iv) The Plaintiff has led satisfactory evidence to the present value of the property. The evidence of Warnakulapatabendige Charles Perera, the Valuer has said that the value of this property in February 1977 was Rs. 13,850/-, the particulars of

which is stated in his Report marked "P1" According to this Report the value of the property in October 1984 is Rs. 34,656/- It is therefore unbelievable to say that the Plaintiff agreed with the Defendant to sell the property for a small amount of Rs. 2000/-. I am therefore of the view that the consideration mentioned in the Deed No. 2279(P3) Rs. 2000/- is utterly inadequate and cannot be accepted as the real value of the property and the property was transferred in trust. We are therefore satisfied that there is ample evidence to justify the finding of the trial Judge that the trust alleged in paragraphs 8 and 9 of the Plaint was established. The above attendant circumstances show that the Plaintiff did not intend to dispose of the beneficial interest in the property transferred.

In the case of Piyasena vs Don Vansue 1977(2) Sri Lanka L.R. 311, it was held that "Even though a transfer is in the form of an outright sale, it is possible to lead parole evidence to show that facts exist from which it could be inferred that the real transaction was either :

- i) Money lending, when the land is transferred as a security as in this case; or
- ii) The transfer in trust, in such cases Section 83 of the Trust Ordinance applies

In this case, in addition to constructive trust, the Plaintiff also pleaded unjust enrichment on the basis of *laesio enormis*. The trial Judge has answered Issue 4(a) on unjust enrichment in the

affirmative and therefore he has omitted the question of *laesio enormis* as it 'did not arise' in view of the answer to 4(a).

In the case of Paligu Menika vs Mudianse 50 NLR 566, Basnayake, J., (as he was then) held that, *"When the question is whether a transaction is a mortgage or transfer with an undertaking to re-sell within the specified time, the stipulation of interest and the retention of possession by the vendor are circumstance which go long way to negative the claim that the Deed is a factum de retrovendendo. If there is any doubt the Court should leave it to the side which claims the transaction to be a mortgage."*

In all the circumstance of this case, I hold that the Plaintiff had never intended to part with the property in suit and the Deed P3 was executed as a security for the loan of Rs. 2000/- which the Plaintiff had obtained.

For the foregoing reasons, we see no reason to interfere with the Judgment of the District Court. Accordingly, we dismiss the appeal and affirm the Judgment of the trial Judge and make no order as to costs.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL