

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SCIOALIST**  
**REPUBLIC OF SRI LANKA**

In the matter of an application for Writs in the  
nature of Writ of Certiorari and Mandamus in  
terms of Article 140 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka.

Dr. G.G.N.A. Abeykoon,  
354, Harischandra Mawatha,  
1<sup>st</sup> Lane,  
Anuradhapura.

**Petitioner**

**Vs.**

01. The Administrative Appeals Tribunal,  
35, Silva Lane,  
Dharmaraja Place,  
Rajagiriya.

02. Justice N.E. Dissanayake,  
Chairman,  
The Administrative Appeals Tribunal,  
35, Silva Lane,  
Dharmaraja Place,  
Rajagiriya.

And others

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

S.A. Williamsingho,  
Thalliyadda, Dorawaka.

PLAINTIFF

C.A. Case No. 68/1999 (F)

-Vs-

D.C. Kegalle Case No. 4403/L

Marabhayalage Karunawathie,  
Thalliyadda, Dorawaka.

DEFENDANT

AND

Marabhayalage Karunawathie,  
Thalliyadda, Dorawaka.

DEFENDANT-APPELLANT

-Vs-

S.A. Williamsingho (Deceased),  
Thalliyadda, Dorawaka.

PLAINTIFF-RESPONDENT

1. Aruna Padma Samaraweera
2. Nayana Nandani Samaraweera

Substituted PLAINTIFF-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Mahinda Nanayakkara with Ms. Sandeepanie for  
the Defendant-Appellant  
Substituted Plaintiff-Respondents absent and  
unrepresented

Decided on : 14.12.2017

A.H.M.D. Nawaz, J.

The original Plaintiff-Respondent (hereinafter sometimes referred to as “the Plaintiff”) instituted this action in the District Court of *Kegalle* seeking the following reliefs.

The reliefs prayed for are seen at page 46 of the brief.

- 1) A judgment on the Defendant ordering him to execute a transfer in favour of the Plaintiff in respect of the land after having accepted a sum of Rs. 15,250/- which was due to the Defendant.
- 2) In the event the Defendant failed to execute the aforesaid deed of transfer, an order that such a transfer be effected through the Registrar.
- 3) Costs and
- 4) Any such other relief as to this Court shall seem meet.

The Defendant-Appellant (hereinafter sometimes referred to as “the Defendant”) filed her answer praying *inter alia*:-

- 1) The plaint be dismissed.
- 2) The Defendant be declared the owner of the land depicted in the schedule to the plaint.

The grounds for seeking a dismissal of the plaint are set out in the answer dated 19.10.1990 and principally paragraphs 4, 5 and 6 aver that the Plaintiff effected a

conditional transfer in favour of the Defendant in that a Deed bearing No. 724 and dated 13.12.1984 was executed by the Plaintiff reserving a right to redeem the land within 5 years by making a payment of Rs. 10,000/- with interest. The averments further assert that the Plaintiff made no attempt to make the payment nor did he request the Defendant to accept the payment and request a retransfer within the period of 5 years. Though the Defendant and her husband requested the Plaintiff orally to make the payment of Rs. 10,000/- and obtain a retransfer, the Plaintiff defaulted in the making of the payment.

The conditional Transfer bearing No. 724 which was marked as P1 embodies the condition in the deed itself-see p.151 of the appeal brief. The stipulation is that the Plaintiff must make a payment of the principal amount namely a sum of Rs. 10,000/- but with interest at 10% per annum. The possession was given to the Defendant only for a period of 5 years. Once the payment of the sum of Rs.10,000/- along with the interest due was completed within 5 years, an undertaking was given that the transferee would hand over vacant possession to the Plaintiff.

So the chronology of events goes as follows:-

Date of the deed	13.12.1984
The expiry of the period of 5 years	13.12.1989
Date of the plaint	....03.1990(sic)-see plaint at p57.

When the matter came on for trial on 05.02.1992, five issues were framed on behalf of the Plaintiff and three issues were framed on behalf of the Defendant. Cumulatively these issues engage the question whether there was a fulfillment of the condition embodied in the conditional deed. In fact Issue No. 7 raised by the Defendant raised the question-Has not the Defendant become the absolute owner of the property as a result of the lapse of the period stipulated in the deed?

When the trial commenced, the Plaintiff testified stating that though he wanted to settle the said amount together with the interest, the Defendant refused to accept the money.

It was in these circumstances he made a statement to the Grama Sevaka before the expiry of the period stipulated in the deed. He admitted in evidence that if the Defendant could not accept the money he could deposit it in Court.

The Plaintiff also admitted in cross-examination that he had disposed of the subject-matter to one Dissanayake-see Page 10 of the proceedings dated 28.11.1995. The relevant Deed of Disposition bearing No. 10192 and dated 25.07.1991 was marked as VI at the trial-see the Deed at page 145 of the appeal brief. It is then abundantly clear it was during the pendency of this action that the Plaintiff had made this transfer in 1991. The property described in the schedule to the said deed is the same as the property described in the schedule to the conditional transfer. This only shows that the Plaintiff sold the property for whose retransfer he had sought the assistance of Court. It would appear that the Plaintiff did not have title to the property when he sold it in 1991, as he had disposed of it by way of the conditional transfer in 1984. However this sale in 1991 cannot be held against the Plaintiff though he did not have title to the property at the time of sale. In the event this Court holds that he may be reinvested with title by a reconveyance from the conditional transferee, then that title will pass to the vendee to whom he sold the property in 1991, albeit without title. In that situation the principle *Exceptio rei venditae et traditae* would apply.

The argument was also made on behalf of the Defendant-Appellant that there was a partition action in respect of the same land, in which the Plaintiff-Appellant had not intervened. No doubt, if he had not intervened in the partition suit, his interest in the land was bound to be wiped out by a judgment *in rem*, but there is no evidence in this case as to what has come of the partition case. In such circumstances this Court has to make its conclusions on the facts that were led before the District Court and the law consequent upon it.

If one turns to the evidence of the Plaintiff, one finds that the Plaintiff took many steps to have the reconveyance of the land effected within the period of five years. The five year period of redemption were to end on 13.12.1909. But the Plaintiff arranged with the

Defendant to have the reconveyance executed on 20.11.1989 at a Notary's office in Warakapola. The Plaintiff narrated the tale of how he went to this office on the day in question and waited in vain till 3.00 pm with no sign of the Defendant or her husband showing up at the Notary's office. He had taken the principal sum of Rs. 10,000/- along with the interest to the Notary's Office, but as the Defendant did not turn up, the Plaintiff went to the residence of the Defendant and inquired of the husband as to the fate of the deed. He stated that the Defendant had gone to fetch the deed from the village and the following morning too, the Defendant came with her husband to the residence of the Plaintiff and stated that the deed was lying at the residence of a brother which had gone to *Ampara*.

The Plaintiff-Respondent further testified that though suspicions arose in his mind that the Defendant was keeping her at bay and warding off all her attempts to redeem the land, the Defendant-Appellant assured him that even if the period of redemption lapsed, she would reconvey the property. The Plaintiff further stated that the Defendant gave this promise even at a time when a period of 3 months had lapsed after the expiry of the redeemable period. The Grama Sevaka giving evidence corroborated the Plaintiff to the extent that the Plaintiff made a complaint to him about the efforts of the Defendant to avoid the payment and the consequent reconveyance. This complaint had been made on 12.12.1989-a day prior to the day the period of the conditional transfer ended.

The Grama Sevaka had also accompanied the Plaintiff to the office of the Notary on 20.11.1989 and he corroborates the testimony of the Plaintiff that though they waited at the Notary's office till 3.00 pm, the Defendant did not turn up.

It has to be pointed that the credibility of the witness as to these facts was not dented or shaken in cross-examination and it was only when the Defendant gave evidence she began to deny all that the Plaintiff had stated in his examination-in-chief. The Defendant giving evidence denied the efforts of the Plaintiff to return the money and further she stated that she was not told of the agreement to meet at the Notary's Office

in *Warakapola*. These positions were taken rather belatedly only in the evidence in chief of the Defendant and thus the testimonial creditworthiness of the Defendant suffers from an inconsistency *per se* in that the Plaintiff was not cross-examined on the matters spoken to by the Defendant nor were these matters suggested to the Plaintiff. Thus the learned District Judge was quite right in believing the Plaintiff that he made several attempts to return the money and obtain a retransfer of his property and the testimony of the Defendant that the Plaintiff did not do so does not inspire confidence in this Court.

So we come to a position where we have a Plaintiff who made strenuous attempts to return the money and have his land reconveyed within the redeemable period but the Defendant has warded off these attempts.

In the circumstances, this case had been instituted three months after 13.12.1989-the date on which the 5year period expired. Such a Plaintiff who was making all his attempts to obtain a reconveyance within the period of the conditional transfer but thwarted in his attempts is definitely entitled to have his land redeemed even if he comes to court long after the period for redemption stipulated in the deed has ended.

### **Conditional Transfer-Pactum de Retrovendo**

A conditional transfer is a transfer with a *pactum de retrovendo*, (an agreement to repurchase or a conditional transfer) and time is then of the essence of the contract so that tender of the price within the period agreed upon constitutes a condition precedent to the obtaining of a reconveyance. This assumption was reiterated in the case of *Appuhamy et al v. Silva* (1914) 17 N.L.R 238 wherein Lascelles C.J (with De Sampayo A.J agreeing) expressed some pertinent observations which are relevant to the case before me. The Court held that the Plaintiffs were not precluded from suing on the contract for specific performance by their failure to make a legal tender of the money, inasmuch as the Defendant by his own act in repudiating the contract had made actual tender unnecessary and meaningless. In other words it was held that the Defendant by announcing his refusal to accept the money had waived his right to a formal legal

tender. In *Narasingerji Jyanagerji (since deceased) v. Panuganti Parthasaradhi Rayanam Garu and Others* I.L.R (1924) 47 Mad. 729; (1924) 47 Mad LJ 809; AIR 1924 PC 226, a transaction was held to be conditional mortgage and the time mentioned in the deed providing for a reconveyance was allowed to be extended. In that case, however, the Privy Council (Coram: Lord Atkinson, Lord Shaw, Lord Blanesburgh, Sir John Edge and Ameer Ali, JJ) held that the intention to constitute a conditional sale with a collateral agreement for a resale clearly appeared on the face of the deeds.

In the circumstances I hold that when the conditional vendor made several endeavours to obtain a retransfer but the vendee was intransigent in warding off those efforts, equity will intervene to offer an opportunity to the vendor to seek the assistance of Court to obtain a retransfer, even if the redeemable period has long passed. The redeemable period would get extended in such a situation of intransigence on the part of the conditional vendee.

### **Equitable Right of Redemption**

I am fortified in this view by the prevalent trend in mortgage law as well. This is recognized as equity of redemption in mortgage law and this allows the borrower to repay the loan and have the title to the land restored in his name free from the mortgage even though the contractual date for repayment has passed. It is this right that is known as “equitable right to redeem” and I would hold that a hapless Plaintiff such as the one I have come across in this case must have the advantage of the above right, equally available to him in conditional transfers, when a recalcitrant vendee puts paid to all his attempts to repay the loan and reacquire his land. When all expectations engendered by a legally enforceable agreement are dashed and jeopardized by devious schemes of designing minds, law cannot just look on helplessly and stand as a mute bystander. If common law insists on the letter and terms of the conditional transfer to prevail namely it should be redeemed within the time stipulated, equity should step in to mitigate the rigidity of the covenant, if the conditional transferee himself renders that covenant incapable of execution.



**Equity regards as done that which ought to be done**

In fact, equity regards as done that which ought to be done. The equitable maxim is significant because it means that two parties contracting to perform certain legal actions will, in the eyes of equity, be considered to have carried out those actions from the moment of covenanting to do them, and when the Defendant promised to retransfer on tender of legal tender, equity will treat it as has been done upon tender of legal tender. No number of attempts to ward off the obligation will avail the Defendant.

In my view, I think it appropriate to employ these principles in a case of a conditional transfer such as this, because common law cannot be so rigid as to deny a Plaintiff his rights which are defeated by extra judicial stratagems.

**Equity is not past the age of child bearing**

In *Eves v. Eves* (1975) 1 WLR 1338 at p 1341, Lord Denning famously declared that “Equity is not past the age of child bearing...” and I take the view that a mortgagor’s right to equity of redemption must be available to a conditional transferor in certain given circumstances and equity will sire new progeny and nurture them to meet new situations as it is so fecund enough to rise to the occasion and the learned District Judge of *Kegalle* has declared in her judgment dated 16.10.1998 that the Plaintiff’s claim must be allowed on the facts and circumstances of the case and I see no reason to interfere with such finding. I accordingly proceed to affirm the judgment dated 16.10.1998 and dismiss the appeal.

**JUDGE OF THE COURT OF APPEAL**