

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

In the matter of an appeal under the provisions of
Section 755 of the Civil Procedure Code.

C.A. Appeal Case No. 807-
808 /2000 (F)

D.C. Horana Case No. 4935/P

1. Galagama Arachchige Don Prabha Megha
Jayawardena

2. Galagama Arachchige Don Prabha Priyantha
Jayawardena

Both of "Sathuta", Raigama,

Bandaragama.

PLAINTIFFS

-Vs-

1. Kumarage Sitohamy (Deceased)

1A. Thambawitage Dona Hemawathie

No.260, Anguruwathota Road, Raigama,

Bandaragama.

2. Hetti Kankanamage Peter Jayathilake (Deceased)

Raigama, Bandaragama.

2A. Hetti Kankanamage Jagath Kumara Jayathilake

Raigama, Bandaragama.

3. Wasantha Kumara Siripala Liyanaarachchi

No.26/17, Alubogahalandawatta,

Mawiththara, Piliyandala.

4. Thambawitage Dona Hemawathie

No.260, Anguruwathota Road, Raigama,

Bandaragama.

DEFENDANTS

AND NOW BETWEEN

1. Galagama Arachchige Don Prabha Megha Jayawardena
2. Galagama Arachchige Don Prabha Priyantha Jayawardena

Both of "Sathuta", Raigama,
Bandaragama.

PLAINTIFF-APPELLANTS

-Vs-

1. Kumarage Sitohamy (Deceased)
- 1A. Thambawitage Dona Hemawathie
No.260, Anguruwathota Road, Raigama,
Bandaragama.
2. Hetti Kankanamage Peter Jayathilake (Deceased)
Raigama, Bandaragama.
- 2A. Hetti Kankanamage Jagath Kumara Jayathilake
Raigama, Bandaragama.
3. Wasantha Kumara Siripala Liyanaarachchi
No.26/17, Alubogahalandawatta,
Mawiththara, Piliyandala.
4. Thambawitage Dona Hemawathie
No.260, Anguruwathota Road, Raigama,
Bandaragama.

DEFENDANT-RESPONDENTS

BEFORE

:

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

COUNSEL : Manohara De Silva, PC with Boopathy Kahathuduwa and Hirosha Munasinghe for the 3rd Defendant-Appellant.

J.A.J. Udawatta for the Plaintiff-Respondents in 807/2000 (F) and for the Plaintiff-Appellants in 808/2000 (F).

H. Withanachchi for the 1A Substituted Defendant-Respondent and 4th Defendant-Respondent.

Written Submissions on: 20.03.2018

Decided on : 08.11.2018

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

The Plaintiff-Appellants (hereinafter referred to as “the Plaintiffs”) instituted this action on 09.09.1992 in the District Court of *Horana* against the 1st to 4th Defendant-Respondents (hereinafter referred to as “the Defendants”) to partition a land called “Lot P of *Halarambawatta*”, which is morefully described in the Plaint and depicted in the Preliminary Plan No. 1393 dated 03.06.1993 made by Syril Wickramage, Licenced Surveyor, containing in extent 28.27 perches. The Plan and Report are marked as ‘X’ and ‘XI’ and filed of record.

Originally the Plaintiffs presented the plaint only against the 1st to the 3rd Defendants, setting out a devolution of title to wit: Plaintiffs are entitled to an undivided 1/10th share, 1st Defendant to an undivided 1/10th share, the 2nd Defendant to an undivided 1/10th share and the 3rd Defendant to an undivided 7/10th shares. The 3rd Defendant filed his statement of claim agreeing to this devolution.

The 4th Defendant who was added subsequently filed her statement of claim rejecting the devolution of title mentioned in the Plaint and claiming the ownership to the entirety of the land on prescriptive title and prayed for a dismissal of the plaint.

On 17.09.1996, when the case was taken up for trial, the averments in paragraphs 1 to 5 were admitted. The Plaintiffs raised two issues, the 3rd Defendant raised issues 3 to 10 and the 4th Defendant raised issues Nos.11 to 24.

By the judgment dated 15.05.2000 entered in this case, the learned District Judge dismissed the Plaintiff's action which resulted in the Plaintiff and the 3rd Defendant are not getting any portion of the land. The 4th Defendant was granted the entirety. Being aggrieved by the judgment, the 3rd Defendant and the Plaintiff have preferred separate appeals, bearing No.807/2000(F) and 808/2000(F) respectively. The hearing in both these appeals, of consent, were consolidated and one judgment will suffice for both.

The main contest put forward by the 4th Defendant is centered on two matters that have been set out in the issues 11 to 24 raised by the 4th Defendant. Firstly, whether Deed No. 20006 marked **P5** conveys any rights to Dona Meraya Siripala Liyanarachchi, the mother of the 3rd Defendant in view of the provisions of Settlement of Debts Law No. 27 of 1975, and secondly, Did Lauren Appuhamy bequeath his half share to Wilmot Appuhamy who had later obtained probate in testamentary Case No.2729 in the District Court of *Kalutara* and whether the said Wilmot Appuhamy acted on the basis of such probate.

The 4th Defendant took up the position that the Deed No.20006 marked **P5** is not valid in law in terms of Section 3(7) of the Settlement of Debts Law No. 27 of 1975.

Section 3(7) of the said Act states that a creditor referred to in subsection (1) fails to make an application for the settlement of a debt in accordance with the provisions of that subsection, thenand where such creditor is a transferee of immovable property on a conditional transfer, such transfer shall be null and void.

The question that arose was whether the 3rd Defendant's mother, Dona Meraya Siripala Liyanarachchi, the creditor on Deed **P5**, did make an application to the Conciliation Board for the settlement of the debt due on the said Deed No. 20006. In order to answer this question, there had to be in existence of a Conciliation Board. If there was none, then the question of making an application by the creditor to the Conciliation Board would not arise. The position of the 3rd Defendant was that there was no Conciliation Board in

existence at the relevant time. The 2nd and 4th Defendants did not lead any evidence to the contrary. In the absence of such evidence there is no burden cast on the creditor. If it had existed, it should have existed during the relevant time.

The purpose of enacting the Settlement of Debts Law No. 27 of 1975 is to assist the rural folks to settle their debts by the creditors making applications to the Conciliation Board situated in the area where the debtor resides, other than the Conciliation Board situated within the administrative limits of any Municipal Council, Urban Council or Town Council.

In terms Section 2(2) of this law, the Conciliation Board should be in existence of the area where Wilmot Appuhamy, the debtor was residing. The 4th Defendant must have proved it by cogent evidence. Even if there was a Conciliation Board, it should be in a rural area and not in a Municipality, or Urban Council or Town Council area to apply the provisions of the Act. In the absence of any such proof of the existence of a Conciliation Board, the court cannot come to the conclusion that P5 is null and void and that it cannot pass any title.

Section 101 of the Evidence Ordinance states: whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

Furthermore, the Deed No. 20006 had been executed on 30.06.1976 but the 4th Defendant speaks against it only in 1993 or 1994, i.e., after about 17 years. The Plaintiffs instituted this action on 09.09.1992 and until then the 4th Defendant had not raised the issue of the application to the Conciliation Board for settlement of the debt.

Furthermore, P5 had been executed with a condition that the grantor would repay the consideration of Rs.800 within five years from the date of the execution of the deed together with 10% interest by him or by his heirs. Since the deed has reserved the right of redemption till the end of five years, at the end of the period of five years, neither Wilmot Appuhamy nor his heirs made any attempt to redeem the property from the grantee or her son the 3rd Defendant.

In the case of *Palingu Menika v. Mudiyanse* (1948) 50 N.L.R. 566, Basnayake, J. had to consider the effect of a transfer of a land in the form of a deed of sale wherein the transferors reserved the right to repurchase the land within a period of 3 years on payment of a particular sum with interest. The disputed question was whether the transaction evidenced by the deed was a mortgage or a transfer with an undertaking to resell within a specified time. The learned Judge held that, “in order to determine the nature of the transaction the circumstances leading up to and surrounding the execution of the document under consideration and the language employed therein may all be taken into account”. This observation was based on the Privy Council decision in *Saminathan Chetty v. Vanderpoorten*, where it was held that if the transaction in question was in fact a mortgage the right of the debtor to redeem cannot be taken away even by express stipulation. The learned Judge then proceeded to consider whether the deed was a conditional transfer and stated that the deed is not the form in which a *pactum de retrovendendo* is expressed, for Voet says: ‘Nearly allied to the *pactum commissorium* is the *pactum de retrovendendo*, agreement for repurchase (or *Jus Redimendi*), the effect of which, when annexed to a purchase, is that the vendor may within or after a time fixed, or at any time, redeem or take back the thing sold, on restoring the same price he actually received for it, and not what may be the just price and equivalent to the commodity at the time of the redemption, unless it has been expressly agreed otherwise’. The stipulation of interest and the retention of possession by the vendor in that case were held to be circumstances which went a long way to negative the deed in question was a *pactum de retrovendendo*.

The learned District Judge has misconceived the applicability of the Settlement of Debts Law No. 27 of 1975 in this case and placing the burden of proof on the Plaintiff and the 3rd Defendant is, in my view, erroneous I therefore hold that the Deed No. 20006 (P5) by which Wilmot Appuhamy transferred his half share to the 3rd Defendant’s mother is a valid deed by which the 3rd Defendant gets title from his mother and all the transaction took place thereafter are also valid.

The next question is whether the probate obtained by Wilmot Appuhamy in case No.2729 in the District Court of *Kalutara* was after due publication and whether the said Wilmot Appuhamy acted on the basis of such probate.

This testamentary case had been filed in 1936 without any publication of the action though the value of the estate was over Rs.500/-. This case had been kept in the dark by Wilmot Appuhamy. No relatives or heirs of Lauren Appuhamy, who purported to have left a last will, were made parties to this case. Wilmot Appuhamy was appointed the executor in the case. The probate obtained in such a surreptitious manner negated the effect of the probate. There is no evidence that Wilmot Appuhamy ever acted on the basis of this probate.

If the said Wilmot Appuhamy secured the probate in his name and was the executor of the estate of the deceased Lauren Appuhamy, why he obtained a loan of Rs.800/- from the said Dona Meraya Siripala Liyanarachchi by P5 is a mystery.

If the said Deed No. 20006 is held to be valid, the devolution of title to the 4th Defendant cannot be accepted as proper. The learned Judge had failed to consider the enjoyment of the property by Meraya Siripala Liyanarachchi, the mother of the 3rd Defendant and after her by the 3rd Defendant. In my view the claim of the 2nd and 4th Defendants should be dismissed.

The trial in this case had been over on 12.10.1998 and written submissions of the parties were filed on 11.12.1998. The judgment has been delivered on 05.05.2000 after about an year and 6 months. By the time this judgment was delivered belatedly, the learned District Judge may have forgotten the demeanor, deportment and the impression created in the mind of the Judge. In *Kulatunga v. Samarasinghe* 1990 (1) Sri L.R.244, this Court held that; “A judgment delivered two years and four months after the tender of the written submissions cannot stand. The case depended on the oral testimonies of witnesses. The impression created by the witnesses on the Judge is bound to have faded away after such a long delay. The learned Judge was found to have lost the advantage of the impressions created by the witnesses whom he saw and heard and his recollections of the fine points in the case would have faded from his memory by the time he comes to write the judgment”.

Considering the evidence led in this case, and the submissions made on behalf of the parties, I am of the view that the position taken by the 4th Defendant cannot be allowed to stand. I am also of the view that the devolution of title submitted by the Plaintiff in his Plaint may be accepted as correct and judgment must be entered accordingly.

In the circumstances I allow the appeal by the Plaintiff in Appeal No. 808/2000(F) and the Appeal of the 3rd Defendant in Appeal No.807/2000(F) and accordingly I proceed to set aside the judgment entered in this case by the District Court of *Horana*.

The record is remitted to the District Court to enter a fresh interlocutory decree and to proceed thereafter to effect the partition of the corpus as directed in this judgment.

JUDGE OF THE COURT OF APPEAL