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

Wasantha Mahindarathna Devpura, of Adurapotha, Kegalle.

PLAINTIFF

-Vs.-

C.A. Appeal No: 403/ 97

D.C. Kegalle: 3582/ L

H.A. Premadasa, of "Electric Workshop" No. 22, Siddhartha Mawatha, Kegalle.

DEFENDANT

AND NOW BETWEEN

Wasantha Mahindarathna Devpura, of Adurapotha, Kegalle.

PLAINTIFF-APPELLANT

-Vs.-

H.A. Premadasa. of "Electric Workshop", No. 22, Siddhartha Mawatha, Kegalle.

DEFENDANT-RESPONDENT

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

COUNSEL : Dr.Sunil Coorey with Sudharshani Coorey forthe Plaintiff-Appellant

Javed Mansoor for the Defendant-Respondent

Decided on : 27.08.2018

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

The Plaintiff by filing his plaint dated 31/ 03/ 1986 asserted that he had purchased the property- the subject matter of the action in this case from one Velaudham Pillai by a deed bearing No. 2773 on 12 /12/1985. The deed and the Plan depicting the property were produced at the trial as **"P1"** and **"P2"**. The Plaintiff averred that before Velaudham Pillai sold the Property to him in 1985, he had given a mortgage of this property to the Defendant-Respondent (hereinafter sometimes referred to as the "Defendant") by a deed bearing No. 1337 and dated 19th October 1984 for a sum of Rupees five Thousand (Rs. 5000.00/-). The Plaintiff averred in the plaint that when he purchased this property from Velaudham Pillai on 12th December 1985, there was a prior mortgage allegedly executed by Velaudham Pillai by way of a deed bearing No. 1337 and dated 19th October 1984. In other words the Plaintiff asserted that he has purchased the Property subject to that mortgage. The Plaintiff further averred in his plaint that he made a request of the Defendant to accept the sum of Rupees Five Thousand (Rs. 5000.00/-) owed by Velaudham Pillai and annul the Mortgage bond but the Defendant refused to accede to the request for redemption. It was in those circumstances that the Plaintiff averred that a cause of action accrued to him to institute the action against the Defendant seeking the following reliefs.

- For a declaration demanding the Defendant to accept Rs. 5000/- and cancel the Deed of Mortgage No. 1337 and dated 19/10/1984;
- If the Defendant is refusing to accept the said sum of Rs. 5000/- the Plaintiff is ready to deposit the said sum in the Court and therefore to cancel the said Deed of Mortgage No.1337 and dated 19/10/1984;

- After the cancellation of the said Deed of Mortgage, to eject the Defendant and all those holding under him and to obtain peaceful possession of the premises described in the plaint;
- As damages a sum of Rs. 100/- from December 1986 until peaceful possession of the said premises is given;
- For a declaration that the Plaintiff is the sole owner of the premises described in the schedule to the Plaint;
- For damages and such other further relief as to the Court seems meet.

A two storied building constitutes the Property which was in possession of the Defendant. This was the case presented by the Plaintiff before the additional District Court of Kegalle.

As opposed to above version of the Plaintiff the Defendant took up the defense of tenancy rights under Velaudham Pillai- the predecessor in title of the Plaintiff. The Defendant averred that he had been in occupation of the building *qua* a tenant of Velaudham Pillai paying him rent and in the premises he was protected under the Rent Act. The Defendant also made a cross claim from the Plaintiff for a sum of Rupees Twenty Thousand (Rs. 20, 000.00/-) as damages occasioned by the acts of the Plaintiff as described in paragraph 08 of the answer. In a nutshell the Defendant stated in his answer the following *inter alia*;

- The Defendant is unaware of the Plaintiff's ownership;
- The Defendant is the lawful tenant of Velaudham Pillai;
- That there was no Deed of Mortgage that was ever written between the Defendant and Velaudham Pillai;
- The Plaintiff with the assistance of Velaudham Pillai is in collusion trying to eject the Defendant unlawfully from the premises in suit;
- The Mortgage bond No.1337 is a forgery;

The Defendant prayed in his answer, *inter ilia* for a dismissal of the action of the Plaintiff and also for a cross claim of Rs. 20,000/- as damages.

In the face of the allegation of the Defendant that the Mortgage Bond bearing No. 1337 and dated 19/10/1984 is a forgery, the question of granting a declaration that the Defendant must accept Rs. 5000/- and cancel the Deed of Mortgage No. 1337 and dated 19/10/1984 would not arise provided that the allegation of fraud made by the Defendant is established at the trial.

At the trial 13 issues were raised consequent upon the pleadings of the Plaintiff and the Defendant. In order to understand the oral evidence that transpired at the trial, it is apposite to itemize the documents that were marked at the trial. On behalf of the Plaintiff the following documents were marked and produced.

- **P1**- Deed No. 2773 dated 12/12/1985 attested by A. Mutunayaka, by which the Plaintiff obtained title to the Land in dispute;
- **P 2**- Plan No. 1143 dated 11/11/1985 depicting the land in dispute;
- **P3**- The disputed Deed No. 1337 dated 19/10/1984 attested by A.D. Ambadeniya the Notary Public;
- **P4**- Deed No. 988 dated 29/07/1982 attested by A.D. Ambadeniya the Notary Public which is a usufructury mortgage between Velaudham Pillai as the Mortgagor and the Defendant as the Mortgagee, in which there is a condition as follows; 'in lieu of the interest to the said sum of Rs. 2000/- the Defendant is entitled to occupy the premises in suit and if the sum in the said Deed No.988 which is Rs. 2000/- is paid by Velaudham Pillai within 2 years from writing of this Deed, the Defendant must accept the said sum of Rs. 2000/- and hand over possession of the said premises to Velaudham Pillai;
- Pe 5- Deed No. 1252 dated 16/05/1984 and attested by A.D. Ambadeniya the Notary Public, where the Defendant writes back the disputed premises to Velaudham Pillai in accordance with the usufructury Deed No.988;

- Pe 6- Deed of Lease No.1428 given by Velaudham Pillai to one Malsinhalage Somasiri;
- Pe 7- Deed of Lease No. 2772 given by the Plaintiff to Malsinhalage Somasiri;
- Pe 8- Certificate of non-settlement issued by the Secretary of Debt Concilliation Voard;
- Pe 9- A certified copy of the register of assessment No.22, Sidhartha Mawatha, Kegalle, maintained at Municipal Council Kegalle.

The mortgage Bond bearing No. 1337 and dated 19th October 1984 was marked subject to proof. In other words the pivotal document "P3" whose cancellation the Plaintiff sought in his Plaint was strenuously contested by and its due execution challenged by the Defendant-Respondent. The Defendant-Respondent testified that he never obtained a mortgage from Velaudham Pillai in respect to the building. In other words he never gave a loan to his landlord Velaudham Pillai. He never paid the consideration of Rs. 5000/- for Velaudham Pillai to execute the mortgage Bond. Premadasa the Defendant-Respondent testified that Velaudham Pillai acted in collusion with the Notary Ambadeniya in the execution of the Mortgage Bond- an exercise which the Defendant alleged was a sham or a stratagem to have him evicted from the premises. He cried foul of the mortgage as fictitious and asserted that it never existed.

As this Deed was marked subject to proof, the Plaintiff summoned the Notary to establish the due execution of the Deed. The Notary was subjected to a long drawn-out cross examination in the course of which the following items of evidence which remain unassailed as regards the execution of the alleged mortgage bond emerged.

- Mortgage Bond (P3) does not refer to a consideration paid in the presence of the Notary Public,

- Mortgage Bond (P3) that was produced in Court was a document certified by the Notary Public and NOT a Certified Copy issued by the Land Registry,
- There was no independent evidence that a copy of the purported instrument was ever given to the Respondent,
- Folio extracts showing registration of the purported Mortgage Bond were also not produced.

The last item strengthens the assertion that the mortgage bond was not registered.

The Defendant told the Court that he learnt about the purported Mortgage Bond for the first time on 2.6.1986 when the Notary Public informed him and asked him to collect such a document. After the said incident he made a complaint to the police on 26/07/1986 pertaining to the incident. The Defendant denied having given a sum of Rs. 5000/- to Velaudham Pillai. The Respondent clearly asserted that the purported Mortgage Bond was a forged document.

The boundaries as described in the Transfer Deed (P1) in favour of the Plaintiff are inconsistent with the boundaries described in the purported Mortgage Bond (P3) in favor of the Defendant.

These facts and the Plaintiff-Appellant's reluctance to produce the best possible evidence render the said instrument (the purported mortgage bond-P3 dated 19/10/1984) suspicious or unworthy of credibility in the overall circumstances of the case, in light of the fact that the Defendant denied the existence of such an instrument or that there was a "mortgage" of the premises as claimed by the Appellant. The learned Additional District Judge of Kegalle has rightly concluded that the purported instrument is a forgery that cannot be acted upon by Court. (see; page 165 of the Appeal Brief).

From the foregoing it is my view that the learned Additional District judge came to the correct finding that the Mortgage Bond bearing No,1337 dated 19th October 1984 was a fraudulent instrument and I see no reason to disturb that finding.

Having thus disposed of the question whether the mortgage bond (**P3**) as alleged by the Plaintiff existed at all in the first place, I would perforce conclude that there was no mortgage bond *in esse* that could be annulled or redeemed.

I would now turn to another interesting argument advanced by both Dr Coorey and Ms. Sudarshani Coorey. This argument, if it were to be upheld, will have the effect that the relationship of landlord and tenant between Velaudham Pillai (the predecessor in title of the Plaintiff) and Defendant came to an end as far back as 29/07/1982 when Velaudham Pillai the landlord effected a conditional transfer in favor of Premadasa-the tenant-see the Deed bearing No 988 dated 29/07/1982 marked as **P4.**

Confusio

This argument owes its origin to the taxonomy of *confusio* and the Counsel for the Plaintiff-Appellant have both cited the following passage.

> *"Confusio, as a mode of extinguishing a right, occurs when two incompatible rights are united in one and the same person.*
>
> *Discharge of a contractual obligation by confusion or merger is not based on performance or on waiver, but on the principle that a person cannot in the same capacity be his own creditor and debtor.*
>
> *Thus, under a contract of tenancy, the obligations of the tenant would be extinguished by operation of law if the title to the leased premises vests in the tenant, after the contract is entered into. Once the acquisition of title by the tenant is shown to have taken place, the capacities of landlord and tenant become united in one person, so that there is no longer any scope for recognition of a contract of tenancy" **G.L. Peiris "Landlord and Tenant" Vol. 2, page 548 Chapter 28.***

This position was also upheld in ***V. Visvalingam vs. D. De S. Gajaweera*** 56 NLR 111 "where the Plaintiff Appellant had let certain premises to the Defendant Respondent on a non-notarial document. Admittedly he was not the owner of the premises. He brought the present action to have the Defendant ejected on the

ground that rent was in arrears. Defendant pleaded that he had purchased from the owners a portion of the premises and taken on lease the remainder and that, consequently, the capacity of landlord and tenant had become merged in him. *Held that, even assuming that the Defendant had become owner of the entire premises, it was not open for him to refuse to surrender possession to his landlord. He must first give up possession, and then it would be open to him to litigate about the ownership*".

It was contended on these lines that even if the Mortgage Bond bearing No 1337 and dated 19th October 1984 **(P3)** did not exist, the Defendant could not plead the defense of tenancy as tenancy between Velaudham Pillai and the Defendant had come to a halt on 29th July 1982 on account of the conditional transfer evidenced in the deed bearing No. 988.

But it would appear that there was a re-conveyance of the premises when the Defendant re-transferred the disputed premises to Velaudhan Pillai in fulfillment of the condition stipulated in deed of conditional transfer bearing No. 988. This deed bearing No. 1253 dated 16/ 05/ 1984 **(P5)** shows that the title of the premises reverted to Veludhan Pillai in 1984. And therefore the question becomes moot whether the Roman Law concept of confusio would ever apply to the reversible nature of the relationship that arose between Velaudham Pilai and the Defendant, because of the conditional transfer.

In general, the doctrine of *confusio* related to corporeal property and it was the Roman term for the mixtures of goods in such a way that it was not readily reversible. In other words the temporary transfer of title to the tenant was not a true instance of a not readily reversible mixture-*(si mixti essent, ita ut discerni non possent)*

The Romans did in fact use the term *confusio* for corporeal things, but in a more limited sense: where the right and liability came to vest in the same person (see, e.g. W.W. Buckland, A Text-*Book of Roman Law from Augustus to Justinian*, 3rd ed. rev. P. Stein (Cambridge 1963), 563-64), such as where one party was the heir (*heires*)

of the other. Similarly, servitudes could be terminated when the same person became the *dominus* of both the dominant and the servient land *nemini res sua servit.* D.8.6.1. (Gaius 7 Ed. prov.) and J.A.C. Thomas, *Textbook of Roamn Law* (Amsterdam 1976), 201. The same principle applied to a debt.

Therefore, on the facts before this court there was never any *confusio*, only a substitution for each other for two years. The conditional transfer was not an irreversible mixture. (see. Lords Hoffman and Hope in invoking *confusio* in the case of ***Foskette vs. McKeown*** 2001 1 A.C. 190 (House of Lords). Leaving aside the *confusio,* there is evidence in the case which attests to the revival of tenancy rights in favor of the Defendant if at all he had lost that right owing to the conditional transfer.

It so happened that after the Defendant re-transferred the property on 16/05/1984 the landlord Velaudham Pillai refused to accept the rent but, the Defendant testified that he sent the rent by money order under registered post with a covering letter for each money order stating the period for which it was paid. Such letters, money orders and registered articles were produced marked as වී 2 to වී 22. When these documents were produced, the counsel for the plaintiff took up an objection to these documents on the ground that since there is no proof that these documents reached the Plaintiff they should be marked subject to proof, and the court has allowed that application. (See- proceedings dated 18/06/ 1992). Under section 16 of the Evidence Ordinance it is sufficient that a letter is posted and if proof is adduced to prove the posting, further proof is not necessary. (See- Section 16 of the Evidence Ordinance and illustration (b).) The Illustration (B) denotes thus;

> *"The question is whether a particular letter reached "A" that it was posted in due course and was not returned through the dead letter office are relevant"*

This section has been interpreted in, **Sawarimutthu vs. Edwin De Silva 75 NLR 394** .

In this case the question was whether the quite notice was given to the tenant. Samarawickrema J. held *"that having regard to section 16 and 114(e) of the Evidence Ordinance, the facts proved gave rise to the presumption that the notice to quite was served on the Defendant"*

In these circumstances a presumption is drawn by court under section 114(e) of the Evidence Ordinance. It says thus;

"That the common course of business has been followed" in a particular case"

This presumption was indeed drawn by Justice Samarawickrema in the above mentioned case. When a letter is posted, the presumption is the common course of business namely the delivery had occurred. In the present case as well, the defendant had produced postal registered articles to prove the posting of his letters and money orders. The copies of letters and money orders were also produced. Once the proof of posting is tendered the presumption is that the letter has been delivered, unless the person who posted it says they were returned undelivered. In this case the defendant has not said that they were returned. He said he did not receive it back. Therefore, these documents වී 2 to වී 22 need not be proved by calling any other witness, in terms of Sections 16 and 114(e) of the Evidence Ordinance and in the light of the authority cited above, although they have been marked subject to proof, the fact that rent was received by Velaudham Pillai remains proved. The presumptive evidence in regard to these documents that arises in terms of Section 114 (e) of the Evidence Ordinance has been not be rebutted and as such presumptive evidence has turned conclusive in proof of the tenancy between Velaudham Pillai and the Defendant. The proof of tenancy was also advanced by the Defendant's witness one Guneratne. He testified that he was the tenant of premises No.26, under the Velaudham Pillai. He also paid Rs. 40.00/- as rent for his occupation. The Defendant had been in his occupation of premises No. 22 as a tenant under Velaudham Pillai paying a monthly Rent of Rs. 40.00/.

Thus there is overwhelming evidence to prove that the Defendant-Respondent had been a tenant under Velaudam Pillai. The Appellant was unable to shake the overwhelming evidence that was available to show the Respondent's long tenancy at the said premises.

I am in complete agreement with the learned Additional District Judge of *Kegalle* that the mortgage bond bearing No 1337 and dated 19.10.1984 was not a mortgage in fact and in law. Therefore the conclusion reached by the learned Additional District Judge of *Kegalle* that this mortgage bond which was fraudulently executed is incapable of being cancelled as it did not act *in esse*, is unassailable.

In the circumstances the appeal of the Plaintiff-Appellant has to be disallowed subject to an observation. The Plaintiff had sought in his plaint a declaration of title on the strength of the deed bearing No 2773 executed on 12.12.1985 **(P1)**. In fact Issue No 1 raised by the Plaintiff was based on this averment and the learned Additional District Judge answer this issue in favour of the Plaintiff. But the learned Additional District Judge did not make a pronouncement of declaration of title in favour of the Plaintiff. The learned Additional District Judge straightaway dismissed the act filed by the Plaintiff.

In view of the fact that **P1** was admitted by the Defendant, this Court varies the judgement of the court *a quo* in that the declaration of title sought by the Plaintiff has to be allowed. To this extent the appeal of the Plaintiff is partially allowed.

In the overall context, subject to the variation above, the judgement of the learned Additional District Judge delivered on 6.12.1996 is affirmed and the appeal of the Plaintiff-Appellant 's dismissed.

JUDGE OF THE COURT OF APPEAL