

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

Indu Nilmini Urmila Ethapane *nee* Bodinagoda
No. 17, Don Carolis Mawatha,
Colombo 05.

PLAINTIFF

C.A. Case No. 450/2000 (F)

D.C. Colombo Case No.
13856/MR

-Vs-

Nihal Indrajith Ethapane
No. 08, Botheju Avenue,
Colombo 05.

DEFENDANT

AND NOW

Indu Nilmini Urmila Ethapane *nee* Bodinagoda
No. 17, Don Carolis Mawatha,
Colombo 05.

PLAINTIFF-APPELLANT

-Vs-

Nihal Indrajith Ethapane
No. 08, Botheju Avenue,
Colombo 05.

DEFENDANT-RESPONDENT

BEFORE

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

COUNSEL

:

Parakrama Agalawatte for the Defendant- Appellant.
Athula Bandara Herath with Madubashini Rajapaksha
and Shashika De Silva for the Plaintiff-Respondent.

Decided on

:

12.12.2018

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

By a plaint dated 9th September 1993 the Plaintiff-Respondent (the Plaintiff-Respondent, (hereinafter sometimes referred to as "the Plaintiff") sought a declaration that the purchaser of his land namely *Percy Mendis* the Defendant-Appellant (hereinafter sometimes referred to as "the Defendant") be ordered to pay an outstanding sum of Rs Four Hundred Thousand (Rs.400,000/-) and the plaint further averred that at the time of execution of the deed of sale bearing No 992 on 4th February 1992, the Defendant (the vendee on the deed) had paid the Plaintiff (the vendor) only a sum of Rs. Hundred Thousand (Rs. 100,000/-) out of the purchase price of Rs. five Hundred Thousand (Rs.500,000/-).

The Defendant filed his amended answer dated 21 July 1994 denying some of the averments in the plaint and traversed that he had paid the Plaintiff Rs.400,000/- and the only amount that was outstanding was a sum of Rs. 100,000/-.

Two admissions were made at the trial. The first is an admission of paragraph 2 of the plaint which recites that the Plaintiff secured rights to the property by a deed bearing No 20 and which had been executed in Plaintiff's favour on 8th October 1990. As it turned out, this deed was marked at the trial as P1 which was a deed of gift executed by a sister of the Plaintiff. It is the right of the Plaintiff on this deed which was sold by the aforesaid deed No 992 (P2) to the Defendant.

The 2nd admission related to the sale of the land described in the schedule to the plaint for a consideration of Rs 500,000. In other words the fact that the parties agreed to transact over the land for a consideration of Rs 500,000 was admitted.

Some of the material issues that were framed by the parties were as follows;

- a) Did the Defendant and the Plaintiff agree to enter into the sale of the land belonging to the Plaintiff on the condition that the Defendant would make a payment of Rs. 100,000/- initially and thereafter he would make the balance payment of Rs.400,000/- within a period of three months?
- b) Was the possession of the land in question handed over to the Defendant upon the acceptance of a sum of Rs. 100,000/- and on this condition pursuant the deed of sale bearing No. 992 and executed by Notary Public S.I. Weersuriya?
- c) Has the Defendant failed to make the balance payment of Rs.400,000/- within three months from the date of 4th February 1992 (the date of execution of the deed)?
- d) Was a letter of demand dispatched by the Plaintiff to the Defendant on 13/05/1993 demanding the payment?
- e) Has the Defendant failed to make the payment of Rs. 400,000/- even after the letter of demand?

All these issues have been answered in the affirmative for the Plaintiff. The material issue which is significantly relevant to the defense of the Defendant appears as issue No 11(ε).

Has the Defendant, as averred in paragraph 5 of the answer made a payment of Rs. 400,000/- to the Plaintiff?

This issue has been answered by the learned Additional District Judge of Colombo against the Defendant.

As the aforesaid issues indicate, the parties were essentially at variance on one material fact – How much out of the total consideration of Rs. 500,000/-, was exchanged at the time of execution of the deed of sale? Was it only Rs. 100,000/- as the Plaintiff alleged or was it Rs. 400,000/- as the defendant traversed?

The learned Additional District Judge of Colombo by his judgment dated 19th June 2000 has found for the Plaintiff upholding his case that the Defendant had paid him only Rs 100,000 and the balance sum of Rs 400,000 was yet outstanding from the Defendant. Thus the learned Additional District Judge of Colombo allowed the claim of the Plaintiff that Defendant should pay him Rs 400,000 together with interest. It is against this judgment dated 19.06.2000 that the Defendant has appealed.

The original Plaintiff (the vendor on the deed of sale) herself did not give evidence in the case but her brother Shantha Shri Mallikaarachchi who was the witness to the deed of transfer was called to testify on behalf of the Plaintiff. The witness testified to the Defendant meeting him and suggesting the sale on the conditions that were framed on the issues as aforesaid namely he would pay Rs. 100,000/- on the day of the execution but would settle the balance sum of Rs. 400,000 within three months. This was the evidence of this witness who also testified that it was in conformity with this agreement that the Defendant paid the Plaintiff Rs 100,000 promising to tender the balance sum of Rs 400,000 within three months from the date of execution. Mallikaarachchi who was also a witness to the deed of sale categorically confirmed that a sum of Rs 400,000 was outstanding from the Defendant Appellant and this evidence was not impugned as uncreditworthy by the Defence. The fact that the plaintiff did not give evidence does not detract from the effect of the testimony of Mallikaarachchi as he gave truthful evidence and there was no serious challenge to his testimonial creditworthiness. In any event no particular number of witnesses shall in any case be required for the proof of any fact-Section 134 of the Evidence Ordinance. Evidence has to be made but not counted-see *Mulluwa v State of Madhya Pradesh* AIR 1976 S.C 989. Therefore failure to give evidence on the part of the Plaintiff does not detract from the probative value one finds in the evidence of the witnesses.

Notary's evidence

Shrya Indrani Weerasuriya testified that the execution of the deed No 992 on 04.2.1992 was a genuine transaction and that the consideration mentioned in the deed and the payment attributed were all legally transacted. No doubt, the Defendant-Appellant

contended that the payment of consideration referred to in the attestation clause of the notary was untrue in so far as his payment was a sum of Rs.400,000 and his obligation was only to pay a sum of Rs 100,000.

It has to be noted that at the inception of the trial, the deed bearing No 992 was admitted and therefore the Defendant-Appellant cannot be heard to controvert the contents of the deed. Section 58 of the Evidence Ordinance makes it clear that the plaintiff's assertion that only a sum of Rs 100, 000 was paid has been admitted formally and there was no further burden on the part of the plaintiff to establish this fact.

Mr. Athula Bandara Herath relied on section 92 of the Evidence Ordinance which prohibits the adduction of *parol* evidence for the purpose of contradicting, varying, adding to, or subtracting from its terms.

Section 92 now contains the law as to the admissibility of *parol* evidence, when the terms of any contract, grant, or other disposition of property have been reduced to the form of a document. In such a case it enacts, subject to certain provisos, that no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from the terms of the document.

Proviso (1), however, allows any fact to be proved "which would invalidate any document, or which would entitle any person to any decree or order relating thereto." (see illustrations (d) and (e)).

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 or law.

This proviso gives the following instances:-

- (a) Fraud – S.92 Illustration (d)
- (b) Intimidation.
- (c) Illegality.

- (d) Want of due execution. (Prevention of Frauds Ordinance).
- (e) Want of capacity in any contracting party, e.g. minority.
- (f) That fact that it was wrongly dated.
- (g) Want or failure of consideration.

It is settled law that notwithstanding an admission in a deed of sale that the consideration is stated to have been received, it is open to the vendor to prove that no consideration has been actually paid, *Sha Lal Chand vs. Indrajit*, ILR 22 All. 370. Thus, a consideration different from that recited in the deed can be proved. *Ramratan vs. Ramtapesuwar* (1969) Jab J. 164.

However the Defendant Appellant would be hard put to rely on this exception as the contents of the deed have been admitted when issues were sought to be raised see also *William Fernando v Roslyn Cooray* 59 N.L.R 169 and *Sangarakitta Thero v Buddharakitta Thero* 53 N.L.R 457.

Since the deed has not been challenged by the Defendant Appellant, it would not lie in the mouth of the Defendant to contend that the deed does not represent the true consideration. Such a contention will offend against the rule that no one can approbate and reprobate. The deed too was read and explained before execution and the learned District Judge was quite correct in his assessment and evaluation of evidence that the contents of the deed were within the knowledge of the Defendant Appellant.

Upon a consideration of all items of evidence that have been led in this case, I take the view that the learned District Judge of Colombo came to the correct conclusion and I see no reason to depart from the findings of the original court.

In the circumstances I affirm the judgement dated 19.06.2000 and dismiss the appeal with costs

JUDGE OF THE COURT OF APPEAL