

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

C A 160/96 F
DC Galle 10319/L

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P L Amarawathie,
No16, Central Road,
China Gardens,
Galle.

Plaintiff (Deceased)

Vs.

Bopage Susenthu,
No16, Central Road,
China Gardens,
Galle.

Defendant

And now between

Bopage Susenthu,
No 89, Central Road,
China Gardens,
Galle.

Defendant-Appellant

Vs

**Pitiwala Liyanage
Amarawathie, No16,
Central Road,
China Gardens,
Galle.**

***Substituted- Plaintiff-
Respondent***

Before : **W.L.R. Silva, J. and
A.W.A. Salam, J.**

Counsel : **Faisz Musthaffa PC** with Amarasiri Panditharatna for the defendant-appellant and **Maureen Seneviratna PC** with L B J Peiris for the plaintiff-respondent.

Argued on : 04.08.2010, 01.09.2010 and 31.03.2011

Written Submissions

filed on: : 29.06.2011

Decided on : 06.09.2011

Abdus Salâm J.

This is an appeal from the judgment dated 31.10.1995 of the Addl. district judge of Galle. By the impugned judgment, the plaintiff was declared entitled to the subject matter of the action viz. two blocks of land identified as Lots 14B1 and 14B morefully set out in schedules 2 and 3 of the plaint and ejection of the defendant therefrom.

The plaintiff maintained that the original owner of the subject matter was Etiligoda Vidanagamage William and that on a clear chain of title the rights of the said William had at last devolved on her upon deed of transfer No.2792 dated

15.8.1978 attested by J.P.Seneviratne N.P. Galle. As per admissions 1 to 16 recorded on 03.05.1990 the defendant admitted the title of the plaintiff to the subject matter. As a result, the plaintiff raised only two issues regarding her title to the subject matter and her right to obtain a declaration of title to it and whether the defendant is liable to be ejected therefrom. The defendant raised eight issues which centred round the defendant's prescriptive title to the subject matter and the alleged fictitious nature of the deeds of transfer on the chain of title of the plaintiff.

The learned trial judge in the end held *inter alia* that the acknowledgement of title by the defendant has deprived him of the right to set up prescriptive title and dismissed the claim made by the defendant to the subject matter and gave judgment for the plaintiff.

The learned President Counsel for the defendant submitted that the central issue in the case is whether deed of transfer No's.7073 (P6), 415 (P12) & 2792 (P13) which are essential links in the chain of title of the plaintiff are not instruments intended to be acted upon and therefore mere sham. He further complained that trial judge miscomprehended the central issue as being the question relating to the acquisition of prescriptive title and erroneously gave unnecessary weightage to the signing of the deed No.415 by the defendant as a witness. The other ground of appeal relied on that the trial judge was in error in holding that the acknowledgement of the title by the defendant deprived him of the plea of prescriptive title.

The defendant did not rely much on his prescriptive possession before us, but sought to argue that the deeds of transfer bearing No's 7073(P6), 415 (P12) and 2792 (P13) were not

intended to be acted upon and they are full of sham.

In this respect it is pertinent to advert to the issues suggested by the defendant and accepted by the court below. They are as follows...

- 3) Has that deed of transfer No 7073 dated 1970.08.10 been acted upon by the vendee as stated in paragraph 8 of the plaint?
- 4) Has the deed of lease No 7074 dated 1970.08.16 ever been acted upon as stated in paragraph 8 of the plaint?
- 5) Did Gamage Ariyadasa the transferee in the said deed ever possess the said plots of land?
- 6) Has deed No 2792 dated 1978.08.16 been acted upon by the plaintiff as stated in paragraph 10 of the plaint?
- 7) Did the plaintiff possess the said plots of land upon deed No 2792?
- 8) Has the defendant acquired a prescriptive title to the said plots of land by being in uninterrupted and undisturbed possession *ut dominus* for more than 10 years?
- 9) If so should the plaint be dismissed?

As regards the issue relating to the acquisition of prescriptive title the district judge has adequately considered the evidence and also analyzed it to the extent which is reasonably sufficient to come to the right conclusion. Further, his finding on that matter has not been seriously canvassed before us. Therefore I do not think it is necessary to delve further into it.

The contention made on behalf of the plaintiff was that the alleged existence of a constructive trust has been raised for the first time in appeal and therefore it should not be taken cognizance of as delayed plea of defence is not sustainable in law. As far as issues 3,4,5 and 6 are concerned, it is quite clear

that the defendant has put in issue the question as to whether the deeds 7073, 7074 and 2792 had been acted upon and if not whether it is a sham and therefore has no effect in law. As a matter of fact the defendant has not raised a plea of constructive trust but as stated above raised the question as to whether some of the deeds relied upon by the plaintiff were not intended to be acted upon.

No doubt, as has been contended by Miss Seneviratna PC, none is entitled to make at the trial a case materially different from what has been placed on record and which his opponent is prepared to meet. It is crystal clear from the proceedings that no question relating to a constructive trust has been pleaded by the defendant or put in issue. All what the defendant has put forward by way of defence are firstly the acquisition of prescriptive title to the subject matter which strictly does not arise for determination in this appeal by reason of the defendant abandoning it and secondly the issue relating to the transactions being fictitious. As has been correctly pointed out by Mr Musthafa PC, the learned district judge has failed to appreciate the importance of the issues relating to transactions purported to be sham. Consequently, he has neither analyzed the evidence relating to those issues nor has he attempted to answer them either way. This of course is unfortunate that the learned judge had neglected to answer the central issue thus adopting a lethargic attitude by simply saying that issues 3, 4, 5(a), 5(b), 6, 6(b) are irrelevant. The question then is how did it become relevant when the judge found those issues at the commencement of the trial as matters of fact and law on which the parties were at variance and relevant for the effectual determination of the dispute. In passing therefore I consider it as not being inappropriate to mention that this type of evasive method which tantamount to dereliction of duty should be

discouraged.

It is trite law that any transaction not intended to be what it really appears on the face of it to be and tainted with sham circumstances with the absence of any real intention to adhere to purported transaction is not a valid transaction at all. This has been recognized in several decided cases. Some of those authorities are as follows....

1. *Tyagaraja v. Vedathanni* 1931 AIR PC 70
2. *Hall v. Pelmadulla valley Tea & Rubber Co., Ltd* 31 N. L. R. 55.
3. *Wickramaratna vs Thevendaraja* SLR-1982 1 Page 21
4. *Fernando v. Cooray*, (1957) 59 N. L. R. 169.
5. *Penderlan v. Penderlan*, (1948) 50 N. L. R. 513

Admittedly the defendant was an attesting witness to document marked P12. By P12, D P Wijenarayana has transferred the subject matter of the action to Widanagamage Amaradasa, the immediate predecessor in title of the plaintiff. The learned district judge has taken the view that by subscribing his signature on P12, the defendant has acknowledged that he has transferred his rights in the land previously to the Mathes Wijenarayana which rights later devolved on D P Wijenarayana, the vendor on P12 by a right of paternal inheritance. It was urged on behalf of the defendant that the trial judge has erred in law when he came to a wrong conclusion that by signing as a witness to P12 the defendant acknowledged that he had previously transferred his rights to Mathes Wijenarayana. The learned president's counsel maintained that an attesting witness vouches for nothing more than the authenticity of the signature of the executant and that he is not even expected to know the contents of the deed.

According to the attestation appended to P12 the Vendor has read the contents himself and therefore the witnesses may not have had the opportunity of knowing its contents unlike in the

case of witnesses in whose presence such contents are read and explained to executant. Nevertheless, the defendant in this case ought to have known the nature of the transaction as he had already transferred the subject matter to the father of D P. Wijenarayana. Taking into consideration the attended circumstances under which the defendant has volunteered to be an attesting witness to P12, it is not unsafe to assume that in all probabilities the defendant knew or at least ought to have known what in fact the parties transacted on P12. Further, the defendant had known the vendee Amaradasa when he signed P12. He was also well acquainted with D P Wijenarayana at that time. D P Wijenarayana was a long-standing legal practitioner at the Bar and the defendant cannot be heard or expected to deny any knowledge of the transaction concerning P12. Particularly, when a lawyer of that standing had invited him to be a witness to a transaction, the defendant cannot by any stretch of imagination plead ignorance of what in actual fact took place.

This is evident from the attestation of the notary in P12. In that background he ought to have questioned both the vendor and vendee or at least one of them as to the nature of the transaction he was asked to witness. Taking into consideration all these matters, I regret my inability to subscribe to the view that the learned district judge had erred in law when he came to the conclusion that by signing as a witness to P12 the defendant was well aware that he had transferred his right to the father of D P Wijenarayana on an earlier occasion. The fact that the defendant volunteered to sign as a witness to vouch for the signature of the vendor, therefore in my opinion clearly negatives the allegation that P12 was a sham.

The application made by the defendant to the People's Bank for

redemption of the subject matter in terms of Act No 71 of 1963 loomed large at the trial. Admittedly the defendant has made the said application on the footing that he had transferred the property to D M Wijenarayana on deed No 7073. According to P 18 produced by the plaintiff at the trial, the defendant B Susenthu has in no unambiguous language, by the affidavit dated 1 February 1982 has *interalia* affirmed to the following facts.

- ❖ That he along with the wife sold and transferred the subject matter of the action to Mathes Wijenrayana for a sum of Rs 16,000/- on deed No 7073 of 19.8.1970 in order to discharge the mortgage bond No 10716.
- ❖ Upon the demise of Mathes Wijenrayana the subject matter devolved on D P Wijenrayana
- ❖ D P Wijenrayana sold and transferred the said property to V P Amaradasa on deed No 415 of 6.12.1973
- ❖ The said Amaradasa has sold and transferred the subject matter to P L Amarawathie (plaintiff) on deed No 2792 dated 15.08.1978 for a sum of Rs 25,000/-.

Upon the refusal by the People's Bank to acquire the subject matter as applied by the defendant, a writ application was filed seeking relief in this court in CA 143/82. The said application for the grant of writs in the nature of *certiorari* and *mandamus* was dismissed by this court on 7.10.1982. The admissions made by the defendant in the application made to the People's Bank and also to this court in proceedings No CA 143/82, categorically acknowledging the impugned transactions as being outright sale of the subject matter, totally militates against the plea raised to the effect that they were mere sham.

As regards the consideration passed on the deeds in question, there was no wide disparity between the actual value of the

subject matter and the consideration passed on the deeds. The consideration passed on deed No 7073 (P6) by which the defendant and his wife transferred rights in the land to Mathes Wijenarayana was 16,000/-. Thereafter at the execution of deed No 415 (P12) by D P Wijenarayana to Amaradasa the consideration passed was again 16,000/-. The last deed by which the plaintiff became entitled to the property by right of purchase from Amaradasa on deed No 2792 (P 13) the consideration passed was 25,000/-. In the circumstances, it cannot be assumed that the real price is lacking in the deeds, to warrant the conclusion that the price paid is trivial and so paid for the sake of appearance of a sale.

Another important aspect of the plaintiff's case is that immediately after Mathes Wijenarayana purchased the property from the defendant and his wife, the latter were allowed to continue in occupation on an indenture of a lease bearing No 7074 (P10) dated 19 August 1970. The defendant has sought to argue that even the indenture of lease is fictitious and therefore cannot have any force or avail in law. By reason of the admissions made as to the genuineness of the deeds in question in the application made to the People's Bank, in the application for writs to the Court of Appeal and on various other occasions necessarily warrant the irresistible inference against the assertion that true nature of the transactions do not reflect in the deeds of transfer.

Taking all these matters into consideration, despite the fact the transactions in question are clouded with some negligible semblance of doubt, on a balance of probabilities, particularly giving the due weightage to the admissions made by the defendant as to the genuineness of the deeds of transfer and his occupation of the subject matter which is consistent with

the indenture of lease, I am of the opinion that the plaintiff being victorious in the long drawn-out battle is not only justifiable in law but also consistent with the evidence led at the trial and there had been no evidence to show that the documents in question were a sham. In the result no meaningful purpose would be achieved by sending this case back for retrial to enable the learned district judge to answer the issues that he has failed to consider. In other words, even if he had considered the said issues the defendant would not possibly have succeeded in his defence.

For the foregoing reasons, the judgment of the learned district judge is affirmed and consequently the appeal preferred by the defendant is dismissed subject to costs.

Judge of the Court of Appeal

W L R Silva J

I agree

Judge of the Court of Appeal

Kwk/-