SANMUGAM AND ANOTHER
v.
THAMBAIYAH

SUPREME COURT
H. A. G. de SILVA, J. BANDARANAYAKE, J. AND KULATUNGA, J.
S.C. APPEAL NO. 18/87
AUGUST 01, 02 AND 08, 1989.

Conditional transfer – Payment by promissory note as consideration for re-transfer – Validity of endorsement by holder of note purportedly to transferee – Failure of consideration – Constructive Trust – Trusts Ordinance, Section 93 – Notice.

By way of dowry, a land was transferred by V.S. to his sister and brother-in-law subject to the condition that the land would be re-transferred on payment of Rs. 5000/- within two years. Three days later a promissory note was given to his sister by V.S. This note given to V.S. by one R was endorsed to his sister by V.S. but the name on the note was not V.S. but V.A. After the lapse of two years the transferees conveyed the land to the present plaintiff who filed a vindicatory suit. Earlier a caveat had been registered in the Land Registry.

Held –

1. The promissory note is invalid because the endorsement by V.S. was unsatisfactory and the note had not been accepted as payment.
2. No repayment of the consideration having been made within the two years, the transferee (plaintiff) was the absolute owner.
3. There was no constructive trust as after the lapse of the two years there was no contract to re-transfer.
4. The notice contemplated in S. 93 of the Trusts Ordinance is not only of matters appearing on the face of the registers in the Land Registry. Knowledge gathered from other sources is also relevant. Here however the plaintiff was entitled to buy and get good title as after the lapse of two years his vendors had become the absolute owners.

Thiodoris Perera vs. Elisa Nona, (2)and *Vaidhinathan vs. Idroos Mohideen* (3) distinguished.

Cases referred to:

1. *Fonseka* vs. *Appuhamy* 1978-79 – 2 Sri L.R. 276
2. *Thiodoris Perera* vs. *Elisa Nona* 50 N.L.R. 176
3. *Vaidhinathan* vs. *Idroos Mohideen* 1988 2 Sri L.R. 55 (CA)
4. *Sumangala Thero* vs. *Caledonian Tea and Rubber Estates Co. Ltd.* 33 N.L.R. 49, 52.
5. *Sandanam* vs. *Jamaldeen* 74 N.L.R. 145, 146
6. *Alikapachetty* vs. *Karuppan Chetty* 22 N.L.R. 417
7. *Saverimutty* vs. *Thangavelanathan (P.C.)*55 N.L.R. 529, 533, 535
8. *Saminathan Chetty* vs. *Vander Poorten* 34 N.L.R. 287
9. *Fernando* vs. *Cooray* 59 N.L.R. 169, 174

10. *Maggie Silva* vs. *Sai Nona* 78 N.L.R. 313
11. *Fonseka* vs. *Candappa* 1988 2 Sri L.R. 11.

APPEAL from judgment of Court of Appeal reported in 1987(1) Sri L.R. 357.

P.A.D. Samarasekera, P.C. with *Mrs. Lalitha Seneviratne* for Defendants-Petitioners-Appellants.

Dr. H.W. Jayewardene, Q.C. with *S. Mahenthiran, Harsha Amarasekera* and *Harsha Cabraal,* for Plaintiffs-Respondent-Respondent.

Cur. adv. vult.

October 09, 1989.

BANDARANAYAKE, J.

The plaintiff-respondent-respondent, K. Thambiaiyah sued the defendants-petitioners-appellants, V. Sanmugam and his wife Maheswary for ejectment from the allotments of land described in the schedule to the plaint, for judgment and for further damages. The plaintiff averred that the defendants had by Deed No. 374 of 4th January 1964 marked P1, sold and transferred their interests on the said allotments of land to K. Pirapathy and his wife Parameswary subject to the condition that the purchasers shall retransfer the said land to the defendants-petitioners-appellants on payment of a sum of Rs. 5,000/- within a period of 2 years.

The plaintiff further averred that the defendants failed and neglected to pay the said sum of Rs. 5,000/- within the said period and that Pirapathy and Parameswary became entitled to the said lands absolutely and that by Deed No. 24 dated 17 August 1970 marked "P2" Pirapathy and Parameswary sold and conveyed their interests in the land to the plaintiff. The plaintiff also averred that contrary to the agreement in Deed No. 374 of 4.1.64 aforesaid the defendants have failed and neglected to quit and deliver vacant possession of the said lands to the plaintiff although so demanded.

Maheswary and Parameswary are sisters and Sanmugam is Parameswary's brother-in-law. This dispute is about a dowry question that arose when Parameswary the younger sister married in 1963.

It would be convenient at this point to set out the positions taken by the parties at the trial before the District Court. Parameswary was the only witness for the plaintiff whilst Sanmugam and two others testified for the defendants. It was Parameswary's evidence that her marriage to K. Pirapathy was registered on 10.11.63. Her father had

died earlier and her mother and brother-in-law Sanmugam the 1st defendant attended to her marriage.

According to her the dowry she was to get was:

(1) an undivided half share of land belonging to her mother situated at Uliyankulam. A deed was written on 10.11.63 transferring the said land to her.

(2) Cash Rs. 20,000/- made up as follows:

(a) Cash Rs. 10,000/-

(b) Half share of Aiyadurai Stores, premises situated at 161, Malay Street, Colombo 2, where her father had run a business. Maheswary had not got a share from this business as it was not in existence when she was dowried in 1948. Therefore Sanmugam offered her Rs. 10,000/- in lieu of the half share of Aiyadurai Stores to which she was entitled and she agreed. Thus she was to get another Rs. 10,000/- in this regard.

Consequent to this arrangement the defendants asked her and her husband to sign document D1 which they did. By D1 Parameswary and Pirapathy have acknowledged receipt of dowry:

(a) jewellery to value of Rs. 3000/-;

(b) cheque drawn for a sum of Rs. 7000/- by Mrs. Prasoody;

(c) Promissory Note executed by V. Sanmugam and Maheswary for a sum of Rs. 3000/- at 12% interest payable within 1 year totalling to Rs. 10,000/-

This document has been made in November 1963. The exact date is not mentioned.

Parameswary states that the sums of money totalling Rs. 10,000/- mentioned in "D1" was in respect of the value of half share of the shop Aiyadurai Stores aforesaid. On 10.11.63 she was in fact only given the cheque. Parameswary goes on to state that by Deed No. 374 of 4.1.64 the defendants transferred their interests in the land to her and her husband and she agreed that if they pay her Rs. 5000/- within 2 years she would retransfer the land to them. There is next a Promissory Note for Rs. 5000/- given to her by Sanmugam on 7.1.64. This Note had been drawn on 26.12.63 by one C. Rajaratnam who owed money to Sanmugam and Sanmugam says he endorsed and

gave it to Parameswary. However Parameswary says it had nothing to do with the conditional transfer on Deed 374 dated 4.1.64 but was part payment of the Rs. 20,000/- due to her. As the money due on the Promissory Note as dowry was not paid by Sanmugam although demanded, she and her husband filed action in this respect in D.C. Colombo Case No. 29203/S on 15.3.69 – vide – document marked "D10" and the affidavit filed by the 2nd defendant Sanmugam in that case "D4". This Promissory Note has not been produced and marked in the instant case as it was production in Case No. 29203/S aforesaid. In that case the plaintiffs were Parameswary and Pirapathy and the defendants were C. Rajaratnam and V. Sanmugam. During the proceedings in Case No. 29203/S on the application by the 1st defendant for leave to appear and defend the action unconditionally it was discovered that the endorsement on the back of *the summons* read *V. Arumugam* and not *V. Sanmugam.* The Court then examined both documents (ie) the Promissory Note itself and the Summons and the Court held – quote – "I have looked at the note and the endorsement is not clear as to whether it is Arumugam or Sanmugam". "The endorsement on the back of the summons is by V. Arumugam". The Court granted leave to appear and defend the action unconditionally. In the circumstances Parameswary and Pirapathy withdrew the action. Sanmugam the 2nd defendant admitted the claim but Rajaratnam the 1st defendant contested the endorsement.

As against above, the position taken by Sanmugam was as follows: Parameswary's father died in November 1962. There was a proposal of marriage made to Parameswary by himself, Sabapathipillai, Dr. C. Rajaratnam and Mrs. Prasoody. Sanmugam states he was responsible for the dowry. The dowry was to be:

(a) an undivided half share of land owned by her mother at Uliyankulam;

(b) jewellery worth Rs. 3000/-;

(c) Rs. 10,000/- in cash. (not Rs. 20,000/- as stated by Parameswary).

He further states he agreed at the start to give only Rs. 5000/- but as Dr. Rajaratnam who is a relative who owed him Rs. 5000/- promised to repay that sum, he agreed to give Rs. 10,000/- as dowry. However as Rajaratnam did not attend the marriage registration on 10.11.63 and did not give the money as promised, witness was compelled to

make temporary arrangements. Hence he and his wife gave a Promissory Note for Rs. 3000/- and Mrs. Prasoody gave a cheque for Rs. 7000/- vide – "D1" aforesaid. His mother-in-law transferred her interests in an undivided half share of land Uliyankulam.

Sanmugam states that as Rajaratnam could not give cash he gave Sanmugam a Promissory Note dated 26.12.63 for Rs. 5000/- Sanmugam tried his best to assign that note to Parameswary and Pirapathy but the bridegroom's parents wanted more tangible security. Therefore Sanmugam and his wife Maheswary gave a conditional transfer on Deed No. 374 dated 4.1.64 for Rs. 5000/- ("P1"). Sanmugam says he endorsed Rajaratnam's Promissory Note for Rs. 5000/- three days later on 7.1.64 and gave it to Parameswary in satisfaction of the conditional transfer. In his affidavit in Case No. D.C. Colombo 29203/S he admitted liability for Rs. 5000/-. He also testified that he has over a period of time in instalments paid Rs. 10,000/- in full to Parameswary.

According to Counsel for the Appellants the first question to be decided is whether the arrangement of the Promissory Note made on 7.1.64 is for the discharge of the conditional transfer on Deed No. 374 or not. Counsel complained that the District Judge had failed to consider the evidence and decide the matter. The District Judge did not come to a finding whether the Promissory Note was given in lieu of a shop share or a dowry deed. The District Judge dealt with it on an assumption that it was for this deed P1, but that there was a failure of consideration. Prior to purchase a caveat had been entered. Parameswary and husband were living in plaintiff's house at the time of transfer deed "P2". The plaintiff thus bought the land after caveat had been entered. Counsel also complained that the District Court had not discussed the evidence of the witnesses or given any reasons for its decision. It was submitted that if the Promissory Note was indeed for the discharge of the conditional transfer then it is valuable consideration in full settlement of the amount due on Deed 374 and that Parameswary and Pirapathy were holding the property on "P1" in trust for the defendants and the transfer of the property on Deed "P2" was void and that specific performance to have the land retransferred to them was available to the defendants.

Regarding the Promissory Note for Rs. 5000/- aforesaid Appellant's Counsel submitted that it was only on the back of the summons issued in the application for leave to appear and defend – "D10" –

that the endorsement reads as V. Arumugam (ie) a mistake on the summons; but that on the note itself the endorsement has been correctly made by V. Sanmugam. (I have already referred to the writing on the note itself as noted by the District Judge in that case.)

As for the Court of Appeal judgment Counsel made two submissions:

(i) the Court of Appeal has not considered the evidence as to whether there was a valid discharge of the obligation created by "P1" on 4.1.64 by delivery of the Promissory Note on 7.1.64; it is a question of fact for what the Promissory Note was given; instead the Court of Appeal stuck upon a different point that was not argued in the appeal and ignoring all else came to a wholly untenable and wrong view of the law adverse to the appellant. If the tests laid down in *Fonseka v. Appuhamy* (1)were correctly applied the Court would have concluded that the fact that action in D.C. Colombo Case No. 29203/S was withdrawn and money was not recovered does not mean that in law there was a failure of consideration.

(ii) the judgment of the Court of Appeal centred around issues 7 and 8. They can be conveniently telescoped thus.... "If the defendants have settled the sum of Rs. 5000/- referred to in "P1" is the plaintiff holding the said undivided half share of the land in trust for the defendants?" The Court of Appeal came to the conclusion that there was no trust; its reasoning was:

(a) that the search of registers would not have disclosed an existing contract affecting the property (ie) because it took the view that once the period of two (2) years elapsed in 1966 there was an end to the contract.

It was submitted that the correct legal position (ie)of whether there was an existing contract, is set out in the cases of *Thidoris Perera v. Elisa Nona*(2) followed in *Vaidhinathan v. Idroos Mohideen*(3).

(b) that 'notice' contemplated in s.93 of the Trusts Ordinance was only notice of matters appearing on the face of the Registers – and that any other knowledge which the purchaser might have gathered is totally irrelevant and must be ignored. It was submitted that this view was far too narrow and completely wrong. The correct principle has been laid down by the Supreme Court in the case of *Sumangala Thero v. Caledonian Tea and Rubber Estates Co., Ltd.*(4).

The Court of Appeal has also ignored the provisions of s.3(k) of the Trusts Ordinance.

It was submitted that by fact of possession by the defendants the purchaser was put upon inquiry and inquiry would have revealed the facts. In the instant case the people who gave the conditional transfer – P1 – were still in possession; they had also registered a caveat so that the buyer was put on inquiry. Parameswary and Pirapathy had lived in the house of the plaintiff. The case of *Sandanam v. Jamaldeen*(5) was also relied upon – Submission:- The Court of Appeal was wrong on this single point of law raised by itself which dealt with the whole matter and ignored all the other matters. Counsel submitted that if this part of the Court of Appeal Judgment was set aside one is left with point (i) which related to questions of fact. Counsel urged that once the Promissory Note was accepted there was a new debt; the old debt on the conditional transfer was discharged and Rajaratnam and Sanmugam became liable. It was contended that by delivery of the Promissory Note there was payment the law would recognise; the obligation to retransfer was discharged. As such the question of the failure of consideration was not relevant. Thus if the Promissory Note was given in fulfilment of the obligation and accepted can Parameswary go back on it? It was a question of fact both lower Courts have ignored. It was submitted that this matter came within s.93 of the Trusts Ordinance and that there was a substantial question of law to be determined as both lower Courts had ignored essential facts. The case of *Fonseka v. Candappa*(6) was cited.

Learned Counsel for the respondent pointed out that the mistaken name 'Arumugam' is not only on the summons but also on the note itself. If so the Note is void. Rajaratnam too was not liable consequently and in fact he had challenged the endorsement. Further, 'P1' contained *a conditional transfer* and therefore a party to the transaction had no right and the law does not permit him to say this was a case of trust – vide – *Alikapachetty v. Karuppan Chetty* (7); *Saverimutty v. Thangavelanathan* (P.C.)(8); *Saminathan Chetty v. Vander Poorten* (9); *Fernando v. Cooray* (10); and *Maggie Silva v. Sai Nona* (11). There must be an existing contract for s.93 of the Trusts Ordinance to operate. There was no such existing contract. No demand or action brought for retransfer of this property; thus the right to obtain a retransfer had long lapsed and there was no binding

agreement to retransfer when "P2" was executed. Counsel argued that in any event delivery of the Promissory Note on 7.1.64 was not a valid payment at all as the contract on "P1" was "whereas the Vendors have agreed .... for the assignment to .... the purchaser .... the said land ....for the price of a sum of Rs. 5000/- *of lawful money of Ceylon* ... within two years ...." Money means cash and what parties contemplated was money. For example, under s.73 of the Bills of Exchange Ordinance, Cap. 82, a cheque is a Bill of Exchange drawn on a banker payable on demand. A Promissory Note is an unconditional promise in writing ....engaging to pay on demand (etc) a sum certain in money.... The essential difference between them is that in the one case it is an order to pay and in the other a promise to pay. A Promissory Note is therefore no payment of money. Payment by a Promissory Note was never even contemplated by the parties. The Vinculum Juris or binding clause was a covenant to retransfer to the Vendors within two years. That time had long lapsed. There was never any valid tender of consideration. Counsel submitted the case of *Fonseka v. Appuhamy* (Supra) cited for appellant had no application and could be distinguished as there had been payment made by cheque by the Bank in that case. In the instant case the Promissory Note had not been honoured and there had been no payment of money and consequently conveyance was not given.

On 15.3.69 by "D4" his affidavit filed in D.C. Colombo Case No. 29203/S Sanmugam said he is only a salaried servant of Government – Assistant Assessor in the Income Tax Department – on a monthly salary of Rs. 800/- and with a wife and 5 children to support he had no money to settle the debt of Rs. 5000/- except by instalments of Rs. 100/- per month. That too was not done.

Respondent's Counsel agreed that the Court of Appeal went into another area of law unnecessarily. Counsel submitted it was unnecessary to consider the law of Trust here, as in a conditional transfer as in this instance there is no trust. The Court of Appeal Judgment was a result of misconception and wrong application of s.93 of the Trusts Ordinance and there was no substantial question of law to be decided by the Supreme Court. Even if there was, the appellant should have first asked for leave before the Court of Appeal which he had failed to do. Nor was this a fit case for review. Counsel submitted that there were concurrent findings of fact in his favour.

An examination of the judgment of the District Court shows that the learned Judge has distilled the question to be decided on the facts confronting him as "the issue on facts is whether the endorsement on the Promissory Note was sufficient to discharge liability on the conditional transfer", and proceeded to answer that question against the defendants. Indeed the question whether the Promissory Note given on 7.1.64 was for the discharge of the conditional transfer on "P1" does not arise if the endorsement on the Note made on 7.1.64 was held to be unsatisfactory and therefore invalid. The Court found upon the evidence that the endorsement which Sanmugam says he made was not acceptable to Court as valid. The Judge referred to the proceedings in D.C. Colombo Case No. 29203/S – 'D10' – where that Court had noted upon examination of the Promissory Note itself that the endorsement bore either the name of V. Arumugam or V. Sanmugam. It was not clear. Rajaratnam the maker of the Note had challenged the endorsement. Rajaratnam would not be liable on the note if the endorsement was invalid. If endorsement is by "Arumugam" the holder has no legal title in this case. Indeed in the light of this discrepancy the Promissory Note itself should have been placed in evidence for the scrutiny of this Court. This was not done. In the result Sanmugam's mere acceptance of endorsing the note is not enough. The Judge had rightly to consider the question of fraud. Sanmugam has not paid money and said he has no money. The Note could be useless. The learned Judge held that the defendants had not proved the Promissory Note as being validly assigned by Sanmugam on 7.1.64. That finding of fact the Court could properly have reached upon the evidence before it and cannot be assailed. Once the trial Judge came to this conclusion (ie) invalid Promissory Note and money not paid within time he considered it a failure of consideration. In the circumstances and facts of this case I am unable to fault that decision.

Coming now to the judgment of the Court of Appeal, in my opinion the Court was mistaken in coming to the view that the 'notice' contemplated in s.93 of the Trusts Ordinance meant only notice of matters appearing on the face of the Registers and that knowledge gathered from other sources was irrelevant. Such a view is too restrictive and not a proper view of the law.

In the light of the finding by the trial Judge that the Promissory Note referred to in the evidence before him has not been proved as

valid in spite of Sanmugam's acceptance of it and the view I take that no question of trust arises in this case the question of whether on the facts of this case there was an existing contract between Parameswary and Pirapathy and the defendants arising out of 'P1' assuming consideration had been paid by reason of the acceptance of a Promissory Note on 7.1.64 is academic. Argument was placed in these proceedings on this aspect of the case by both sides. Counsel for the appellant relied on the decisions in *Thidoris v. Elisa Nona* (2) and *Vaidhinathan v. Indroos Mohideen* (3) to show there was a trust upon an existing contract. Both these cases can however be distinguished on the facts and are inapplicable. The facts of these cases clearly showed an existing contract. In Thidoris Perera's case the consideration on the transfer has been paid in full and the purchaser had entered upon possession after Final Decree but the vendor made no conveyance within three (3) months as required to. In Vaidhinathan's case the 1st defendant covenanted to retransfer the property to the 2nd defendant in 15 years from 18.1.47 but in the meantime, after the lapse of 10 years on 7.4.57 he conveyed the property to a third party. This was held to be invalid as there was an existing contract as at 7.4.57. The facts of the instant case are quite different. Here the binding clause to retransfer was 2 years from 4.1.64. Upon the evidence placed before Court, this was not fulfilled, and the time for payment has long lapsed. There was thus no existing contract when 'P2' was executed.

We have on "P1" a legal obligation on the purchaser to retransfer upon fulfilment of the contract within 2 years. The terms of the deed show it is an outright sale or transfer of interests in land subject to a condition to reconvey if the sum of Rs. 5000/- owned by the vendor is paid in full within the time stipulated. No question of trust arises in such a context. Time is explicit. On the expiry of two years the purchaser is relieved of the undertaking to retransfer the property. The true construction of Deed 'P1' is that property has been offered as security for the payment of a sum of money within 2 years. It is not a pledge or mortgage. It is well to remember the evidence of Sanmugam that the bridegroom's parents wanted tangible security. The two years for obtaining a retransfer lapsed on 4.1.66. It was held by the Supreme Court in *Maggie Silva v. Sai Nona* (Supra) that – quote – "when the condition underlying the conditional transfer is not fulfilled the transferee becomes absolute owner in terms of the agreement of parties free from any obligation to retransfer". After the

two years lapsed the vendors remaining in possession of the property without fulfilling the condition rendered themselves liable to be ejected. On 4.1.66 the purchaser became absolute owner of the property and consequently the plaintiff got good title on "P2" executed in 1970. In the premises the District Judge was correct in entering judgment and decree for the plaintiff as prayed for with costs. The appeal is dismissed with costs in this Court and in the Court of Appeal.

H. A. G. de SILVA, J. – I agree.
KULATUNGA, J. – I agree.

Appeal dismissed