GUNASEKERA
v.
AMERASEKERA

SUPREME COURT.
FERNANDO, J., RAMANATHAN, J. AND PERERA, J.
SC APPEAL NO. 72/92.
CA NO. 737/81 (F).
DC MT. LAVINIA NO. 419/2.
MARCH 12th, 1993.

Laesio enormis – Expert evidence – Value of land – Reduction of sale price for reasons of love and affection – Burden of Proof – Knowledge of value.

1. It is for the judge to determine whether the witness had undergone such a course of study or experience as will render him expert in a particular subject, and it is not necessary for the expertise to have been acquired professionally. There was no or inadequate evidence that the surveyor was an expert in valuation in the instant case.

2. While it may well be that the burden lies on the vendee (who resists a claim based on *laesio enormis*) to prove the vendor's knowledge of the true value, and/or that love and affection induced the vendor to agree to a reduced price, yet being a matter essentially within the knowledge of the vendor, circumstantial evidence would suffice *prima facie* to discharge that burden ; thereupon it will be for the vendor, affirmatively, to prove that he had no such knowledge, or that he did not fix a reduced price out of love and affection. In the present case, the evidence shows *prima facie* that a reduced price was fixed despite the availability of independent advice, and in circumstances pointing to the vendor having stipulated a reduced price out of affection for the recipient.

3. (*a*) The defendant had failed to prove that the true value of the property in suit was more than double the consideration shown on the face of the deed.

(b) Any reduction in value was motivated by love and affection.

Cases referred to :

1. *Jayawardene v. Amerasekera* (1912) 15 NLR 280, 281.
2. *Ponnupillai v. Kumaravetpillai* (1963) 65 NLR 241, 248.
3. *R. v. Silverlock* (1894) 2 QB 766.
4. *Tarrant v. Marikar* (1934) 36 NLR 145, 157.
5. *Sobana v. Meera Saibo* (1940) 5 CLJ 46.
6. *Coetzee v. Pretorius* (1903) TS 638, 641.

APPEAL from a judgment of the Court of Appeal.

R. K. W. Goonesekera with *D. F. H. Gunawardena* for plaintiff-appellant.

A. A. de Silva with *Miss S. N. Jayatilleke, M. C. Jayaratne* and *Prashantha de Silva* for defendant-respondent.

Cur. adv. vult.

April 02, 1993.

FERNANDO, J.

The defendant-appellant-respondent ("the defendant") a spinster in her sixties, transferred her property at No. 35, Albert Place, Dehiwela, by deed No. 154 ("P1") dated 13.1.79 to her nephew, the plaintiff-respondent-appellant ("the plaintiff"), for a consideration of Rs. 100,000. The plaintiff was employed abroad, and used to visit his aunt whenever he was in Sri Lanka ; they were undoubtedly on cordial terms, and he used to bring her gifts ; he was the sole remaining relative of the defendant, and had she died intestate, he would have been her sole heir. The property consisted of 35 perches of land, together with a rather old and dilapidated house, situated on a lane leading from the Galle road towards the sea. The day before the deed P1 was executed, by a document dated 12.1.79 it was agreed that the defendant would be allowed six months to vacate the house, in which she was then living. The defendant failed to do so, and the plaintiff's Attorney in Sri Lanka ("the Attorney") promptly instituted this action on his behalf on 29.10.79 to obtain possession. The defendant in her original answer dated 8.8.80 denied that the deed P1 was her act and deed, and pleaded, in the alternative, that the property was worth Rs. 650,000 and that her signature had been

procured by fraud and undue influence ; in her amended answer dated 8.3.81 she also pleaded *laesio enormis*. At the trial the deed P1 was admitted ; consequently the only remaining defence was *laesio enormis*. The plaintiff and the defendant each raised two issues, which were answered by the learned District Judge as follows :–

1.	Is the plaintiff the child of the Defendant's only sister?	Yes.
2.	Is the plaintiff entitled to the relief prayed for in the plaint?	Yes, but for damages at the rate of Rs.100 per month from13.7.79 till restored to quiet possession.
3.	At the time the deed (P1) was executed was there an agreement to purchase the premises in suit for five lakhs?	Not proved.
4.	If so, is this Court entitled in law to set aside that deed on the ground of *laesio enormis?*	Does not arise in view of answer to issue No. 3.

Only two witnesses gave evidence ; the plaintiff's Attorney, and a Surveyor called on behalf of the Defendant. The Attorney testified to the cordial relationship between the parties ; that the plaintiff used to visit the defendant on his trips to Sri Lanka, and that the Attorney accompanied him ; that on one such visit in late 1978 there had been a discussion at which the defendant agreed to sell the property for Rs. 150,000 ; that the defendant had not accepted another offer; that when the plaintiff asked for the title deeds, the defendant replied that these were with her lawyer, Mrs. L. C. Fernando of Julius & Creasy ; that the title deeds were then sent to the plaintiff's lawyer, who prepared a draft deed of transfer ; that the defendant's lawyer made some minor changes ; and that he had been present when the deed P1 was signed at Mrs. L. C. Fernando's residence, Mrs. Fernando being one of the attesting witnesses. In these circumstances it is not surprising that the original defences were not pursued. The Attorney also testified that when he learnt that the defendant had not found alternative accommodation, he had

attempted to help her ; that he had found a suitable place, but that she had been unable to move there because she wished to take her pet dogs, to which the landlord had not agreed. His evidence was not challenged in cross examination.

The defendant's surveyor testified that he was a licensed surveyor, as well as a Court Commissioner of many Courts ; and that he had five years' experience in "surveying land and valuing buildings". In evidence-in-chief he said nothing whatever about any special skill, qualification or experience in valuing land. As for the property in suit, he said it was a 50 to 60 year old house, 2,300 sq. ft. in area, built of brick, with a tiled roof and cement floors, and jak timber frames ; being of solid construction, despite damage caused by vandals and through neglect, he valued the house (as at January 1979) at Rs. 100,000. The land he valued at the rate of Rs. 15,000 per perch, i.e. Rs. 525,000. The property was thus worth Rs. 625,000 in his opinion. He did not give any explanation as to how he arrived at these figures. In cross examination he admitted that various parts of the house were in a state of disrepair; and he was unable to say whether concrete had been used in its construction, and whether there were toilets. He asserted that, in his opinion, in January 1979 land fronting the Galle road was worth Rs. 80,000 per perch in Kollupitiya, Rs. 40,000 to Rs. 50,000 per perch in Wellawatta, and Rs. 30,000 per perch in Dehiwela ; but he had not done valuations of land in any of these areas, nor did he testify as to any sales of land comparable to the property in suit. Perhaps advisedly, cross examining Counsel refrained from probing his qualification and competence, but there were two answers of some relevance thereto : that he had submitted valuation reports to the State Mortgage Bank, including reports in respect of residential sites ; and that he had recently submitted a valuation report to an institution in respect of property in Ratmalana. No further details were elicited in re-examination.

The learned trial Judge observed that it was essential for the defendant to give evidence that she had personally been unaware of the real value of the property, and that the consideration of Rs. 100,000 had been agreed upon due to her ignorance of that value ; that sometimes the price is fixed low, knowingly, in view of the affection or love of the vendor for the vendee ; that in this

case there was evidence of a very cordial relationship between the defendant and her sole intestate heir over a long period ; and therefore it was essential for her to show that the price had not been kept low on account of love or affection. There being no evidence from the defendant that she had been unaware of the true value, and that a lower consideration had not been fixed out of affection, the defendant was not entitled to relief on account of *laesio enormis.* Although the surveyor's evidence of value was referred to, the learned District Judge did not come to any finding thereon. Learned Counsel for the defendant contended that by implication that evidence had been accepted. I cannot agree, not only because it is unsafe to act on the basis of any such implication, but because of the answer to issue 3. If issue 3 was correctly recorded, the defendant was seeking to establish the value of the property by proving that she had entered into an agreement to sell for (or perhaps had received an offer of) Rs. 500,000. The surveyor's evidence was irrelevant to that question, and the answer "Not proved" is perfectly correct. On the other hand, if as the Court of Appeal observed, that issue had been incorrectly recorded, and the real question was whether the property had been worth over Rs. 500,000, then that answer meant that the learned trial Judge had found that this had not been proved.

The defendant's appeal to the Court of Appeal came up for consideration *ex parte,* the plaintiff being absent and unrepresented, and was allowed on 21.10.88. The plaintiff asked for relisting, seeking to explain his default. On 15.6.90 the appeal was relisted, because one of the judges who heard and allowed the appeal had been the District Judge who had heard and determined the action. On 8.7.92 the Court of Appeal allowed the appeal, holding that the surveyor's evidence that the property was worth Rs. 625,000 in 1979 had not been contradicted ; that there was no evidence to support the inference that the defendant had known the real value of the land when P1 was executed ; that the burden of proving that the consideration had been fixed at a lower figure out of love and affection was on the plaintiff, and not on the defendant, and that there was no evidence to that effect ; accordingly deed P1 was set aside, relying on the observations of Lascelles, C.J., in *Jayawardene v. Amerasekera,*[1].

" It is clearly laid down in Voet 18.5.17, that a proprietor who knows the value of his property is not entitled to rescission merely by reason of ihe fact that the price at which he sold the property is less than half its true value. The proprietor, in such a case, has only himself to thank for any loss he may have suffered..... The case is otherwise where the property is sold at a price grossly disproportionate to its true value. In that case the law is on the side of the party who stands to lose by the transaction, and not on the side of the party who stands to make an unconscionable profit ".

The submissions of learned Counsel for the defendant, on appeal to this Court with special leave, can be summarised as follows :

1. The surveyor's evidence as to value should not have been accepted, as there was no evidence that he was specially skilled in regard to the valuation of land, and it had not been established that, as a valuer, he was an "expert" within the meaning of section 45 of the Evidence Ordinance ; further, his valuation was a mere assertion, and there was no explanation as to how it was arrived at – whether by reference to comparable sales, or any of the other recognised methods of valuing built-up land ; and his valuation of the old house, with its many defects, at a round figure of Rs. 100,000, without any explanation, was clearly arbitrary.

2. The circumstances leading up to the execution of the deed P1 justified and required the inferences that :

   (*a*) the defendant had independent advice in regard to the transaction, including the value of the property, from a senior practitioner, Mrs. L. C. Fernando of Julius and Creasy, who was her regular legal adviser ; and therefore in the circumstances of this case she must be presumed (in the absence of contrary evidence from her) to have known its true value ; and

   (*b*) the special relationship between the plaintiff and the defendant justified the inference that the consideration had been reduced out of love and affection.

3. The *dictum* of Lascelles, C.J., in *Jayawardene v. Amerasekera* (at p. 281) that where the property is sold at a price which is not merely less than half of the true value, but is grossly disproportionate to the true value, the vendor's knowledge of the true value is irrelevant, is not the law.

In regard to the surveyor's evidence, learned Counsel for the defendant submitted that the surveyor's qualifications as an expert had been sufficiently established, and that he need not have explained the basis of his valuation. He referred to *Ponnupillai v. Kumaravetpillai* (2) where the Privy Council had acted upon the evidence of a surveyor in determining the value of land in order to apply the doctrine of *laesio enormis*. In that case there were several witnesses in regard to value, the surveyor having been also the Chairman of the local authority ; further, there is nothing to suggest that the necessary evidence to qualify him as an expert had not been led. Cross, Evidence (6th ed., p. 442) observes :

> "It is for the Judge to determine whether the witness had undergone such a course of special study or experience as will render him expert in a particular subject, and it is not necessary for the expertise to have been acquired professionally " (referring to *R. v. Silverlock* (3).

Similarly, Coomaraswamy, Evidence (2nd ed., vol. 1, p. 624) observes :

> " Any person who, from his circumstances and employment, possesses special means of knowledge, has given the subject particular attention, and is more than ordinarily conversant with its details, will be considered ' specially skilled ' for the purposes of this section ".

Learned Counsel for the defendant submitted that *laesio enormis* applied even if the vendor was aware of the true value, citing Wessells, Law of Contract, 2nd ed., vol. 2, page 1344, section 5100 :

> "There is a considerable dispute amongst the jurists whether the remedy applies in the case of a person who knows the true value of the thing, but nevertheless sells it for less than half, or

purchases property knowing that it is only worth half. Voet seems to consider that in both cases the remedy cannot be invoked (Voet, 18.5.17).

The better opinion, however, seems to be that it does not matter whether a vendor knew or did not know the true value. In either case the vendor can invoke the benefit of *laesio enormis"* (citing Vinnius, *Quaest Select*, 1.56).

He submitted that the views of Vinnius should be preferred to those of Voet. Weeramantry, Law of Contracts (Vol. I, P. 38), observes that of the Dutch jurists, Voet is the most highly considered in Sri Lanka (*Tarrant v Marikar*, [4] ; our Courts have observed that as in South Africa the opinions of Voet would usually (though not always) be followed in case of a conflict of authority. The *ratio decidendi* of *Jayawardene v. Amerasekera* (supra) is that an owner who knows the true value of his land is not entitled to plead *laesio enormis*. The views of Voet have thus been expressly approved eighty years ago. Counsel then sought to rely on the further observation of Lascelles, C.J., in that case, suggesting that knowledge is immaterial where the price is grossly disproportionate to the value, pointing out that this *dictum* was cited in Walter Pereira's Laws of Ceylon, 2nd ed., (1913), p. 657. However, that appears to be an *obiter dictum* not supported by the opinion of any Roman Dutch jurist ; and indeed does not appear in the first edition of Walter Pereira's work; it is also not cited by Weeramantry, in his discussion of *laesio enormis*. In *Sobana v. Meera Saibo* [5], it was held that the plea of *leasio enormis* could not be entertained where, assuming the land to have been worth Rs. 500, the plaintiff knew that fact at the time he sold the land for Rs. 100. Although *Jayawardene v. Amerasekera* was cited with approval, that *obiter dictum* was not applied. While there appears to be some substance in the contention that this *obiter dictum* does not correctly set out the Roman-Dutch law (and is possibly based on a misunderstanding of the concluding portion of Voet 18.5.17), the matter need not be decided now in view of my decision on the other questions arising in this case.

While it may well be that the burden lies on the vendee (who resists a claim based on *laesio enormis*) to prove the vendor's knowledge of the true value, and/or that love and affection induced the vendor to agree to a reduced price, yet being a matter essentially

within the knowledge of the vendor, circumstantial evidence would suffice *prima facie* to discharge that burden ; thereupon it will be for the vendor, affirmatively, to prove that he had no such knowledge, or that he did not fix a reduced price out of love and affection. In the present case, the evidence shows *prima facie* that a reduced price was fixed despite the availability of independent advice, and in circumstances pointing to the vendor having stipulated a reduced price out of affection for the recipient as in *Coetzee v. Pretorius,* [6] where the plea failed :

> " This is not a case where parties treated with one another at arm's length. It is a case in which family affection played a very important part. The object of Pretorius in selling this ground to his son-in-law was to benefit him and indirectly to benefit his daughter. I am satisfied that he was well aware of the value of his property, and that he knew that he was selling it for much less than it was worth ; but he accepted a low price because of his affection for his daughter."

I therefore hold that –

(1) the defendant has failed to prove that the true value of the property in suit was more than double the consideration shown on the face of the deed, and

(2) that any reduction in value was motivated by love and affection for the plaintiff.

The appeal is allowed, and the judgment of the District Court is affirmed for the reasons set out in this judgment. There will be no costs in the Court of Appeal and in this Court.

RAMANATHAN, J. – I agree.

PERERA, J. – I agree.

Appeal allowed.