

**NADARAJAH**

**v.**

**GHANI**

SUPREME COURT  
S.N. SILVA, C.J.  
P.R.P. PERERA, J. AND  
BANDARANAYAKE, J.  
SC APPEAL NO. 25/98  
SC (SPL) LA NO. 138/97  
C.A. NO. 509/92(F)  
D.C. COLOMBO NO. 15045/L  
15<sup>TH</sup> JANUARY, 2001

*Vindictory suit - Lex Commissoria and Pactum Commissorium -  
Conditional transfer or mortgage.*

The plaintiff - respondent ("the plaintiff") instituted action in the District Court for declaration of title and ejectment of the defendant-appellant ("The defendant") from the property in question. The District Judge dismissed the action. The Court of Appeal allowed the plaintiff's appeal.

The original owner of the property, one Gamini Perera, transferred the property to Ghani, the plaintiff by Deed of Transfer No. 2087 dated 17.08.1979 attested by M.Y.M. Nizar, Notary Public (P1), the plaintiff's Notary, for the consideration of Rs. 300,000/- out of which only Rs.50,000- was paid. By Deed No. 2088 of 17.08.1979 attested by M.Y.M. Nizar, Notary Public (P2), it was stipulated that if the balance sum of Rs.250,000- was not paid to the vendor on or before 31.10.1979, title would revert to the vendor, and the sum of Rs. 50,000/- paid on P1 would be forfeited by the vendor and the plaintiff shall not be entitled to claim the same.

The plaintiff also executed a Mortgage Bond No. 788 dated 17.8.1979 in favour of the vendor attested by D.J.B. Fernando, Notary Public (P3), the vendor's Notary, to secure payment of the balance consideration on P1.

The plaintiff failed to pay the balance sum of Rs. 250,000/- before 31.10.1979. Thereafter the vendor transferred the property to one D.H.R de Silva by Deed of Transfer No. 438 dated 7.12.1982, attested by S. Kumarasinghe, Notary Public (D1). The said D.H.R. de Silva died. His estate was administered in D.C. Colombo case No. 3047/T and the property was transferred to the defendant by the widow by Deed of Transfer No. 92 dated 28.10.1987 attested by T. Kanagasabai, Notary Public (D2).

It was argued for the plaintiff before the Supreme Court that P2 cannot be regarded as a *lex commissoria* added to P1 but it was the mortgagee under P3 who could become the owner if the mortgagor (the plaintiff) failed to pay the debt secured by P3.

**Held :**

P1 and P2 should be read together; and the stipulations in P2 would operate as to the payment of the balance consideration and the consequence of the default be valid as *lex commissoria*.

*Per* Bandaranayake, J.

“it appears that P3 was attested by the seller’s notary out of an abundance of caution to strengthen the position of the seller. It certainly cannot detract from the reversion of the title to the seller upon the failure to pay the balance consideration as stated above.”

**Cases referred to :**

1. *Dingiri Naide v. Kirtmentke* (1955) 57 NLR 559
2. *Manks v. Whiteley* (1912) 1 Ch. 735
3. *W.D. Batya v. K.D.A. Karunasekera* (1954) 56 NLR 265
4. *Macedo v. Strand* (1922) AC 330 at 337
5. *Thambipillai v. Muthucumarasamy* (1955) 58 NLR 387

**APPEAL** from the judgement of the Court of Appeal.

*P.A.D. Samarasekera*, PC with *Dr. Jayantha de Almeida Gunaratne* for appellant.

*Faisz Musthapha*, PC with *G. Jayakody* for respondent.

*Cur. adv. vult.*

**Editor’s Note**

*Vide* Weeramantry (1967) Vol. II p. 727 foot note 65 where the author defines “*pactum commissorium*” as an agreement, annexed to a mortgage, for forfeiture in the event of non-payment.

May 24, 2001

**SHIRANI A. BANDARANAYAKE, J.**

The Plaintiff-Appellant-Respondent (hereinafter referred to as respondent) instituted action in the District Court, Colombo for a declaration of title and to eject the Defendant-Respondent-Appellant (hereinafter referred to as the appellant) from the property in question. The Additional District Judge, Colombo by his order dated 12.10.1992 dismissed the respondent's action. The respondent appealed to the Court of Appeal and by judgment dated 14.03.1997, the Court of Appeal allowed the respondent's appeal. The appellant appealed to this Court and Special Leave to Appeal was granted on the question "whether the Court of Appeal erred in holding that the agreement 'P2' was illegal."

The facts of this case are briefly as follows:

The original owner of the property, one Gamini Perera Abeywardene, transferred the property to the respondent by Deed of Transfer No. 2087 dated 17.08.1979, attested by M.Y.M.N. Nizar, Notary Public, for the consideration of Rs. 300,000/- (P1). The respondent paid a sum of Rs. 50,000/- and executed a Mortgage Bond No. 788 dated 17.08.1979 attested by D.J.B. Fernando, Notary Public (P3). The parties also entered into a notarial agreement No. 2088 dated 17.08.1979 attested N.S.M. Nizar, Notary Public which contained the following stipulations (P2) :

- i. if the respondent fails to pay the said balance sum of Rs. 250,000/- due to the vendor on P1 on or before 31.10.1979, the said transfer effected by P1 would be invalidated and title would revert to the vendor ;
- ii. the sum of Rs. 50,000/- paid by the respondent to the vendor would be forfeited by the vendor and the purchaser shall not be entitled to claim and recover same.

The respondent failed to pay the said sum of Rs.250,000/- before 31.10.1979 as stipulated in P2. Thereafter the vendor transferred the property to one D.H.R. de Silva by Deed of Transfer No. 438 dated 07.12.1982 attested by S. Kumarasinghe, Notary Public (D1). The said D.H.R de Silva died thereafter. His Estate was administered in the District Court, Colombo (Testamentary Case No. 3047) and the property was transferred to the appellant by the widow, by Deed of Transfer No. 92 dated 28.10.1987 attested by T. Kanagasabai, Notary Public (D2).

The only question that arises in this matter is whether the Court of Appeal erred in law in not considering or failing to consider, the principle of *lex commissoria*, when it applied the principle of *pactum commisorium*.

Learned President's Counsel for the respondent contended that the Deed of Transfer marked P1 is an absolute and an unconditional sale which transferred the title of the property by the seller to the buyer. He took up the position that P1 was attested by the buyer's Notary whereas P3 was attested by the seller's Notary. In these circumstances, learned President's Counsel contended that the agreement P2 cannot in law be regarded as a *lex commissoria*, as the pact was not added to or included in the contract of sale (P1). His position is that P1 does not make any reference to P2 or any intention of entering into an agreement in the nature of P2. Further, learned President's Counsel submitted that the attestation clause of P1 refers to P3 by which the balance purchase price was secured and the stipulations in P2 provide that the mortgagee could become the owner of the mortgaged property if the mortgagor fails to pay the debt mentioned in P3. Therefore the position of the respondent is that, P2 is a separate agreement which has no status in law as it is illegal and the principle of *lex commissoria* does not apply in this situation. Learned President's Counsel for the respondent relied on Sir J.W. Wessels, (*The Law of Contract in South Africa*, Edited by A.A. Roberts,

2<sup>nd</sup> edition, Butterworth (Africa) pp. 432-433) who had stated that,

“The *lex commissoria* is a pact added to a contract of sale, to the effect that unless the price is paid within a certain time, it is to be considered as if there had been no sale.”

He also cited Wille in *Principles of South African Law*, (5<sup>th</sup> edition, p. 377) where it was stated that,

“Where the time for performance has been fixed in the contract, the debtor in *mora* if he fails to perform his obligation by such time, but the creditor is not entitled to cancellation of the contract unless-

1. there was an express agreement between the parties that default of performance by the day fixed would entitle the other party to cancel the contract. Such an agreement when annexed to a contract of sale or of lease is known as the *lex commissoria*.”

Based on the above authorities, learned President's Counsel for the respondent contended that the essence of the principle *lex commissoria* is that the 'commissary pact should be a term in the agreement of sale or annexed thereto.' His position is that deed No. 2088 (P2) is a separate agreement which has no status in law as it is illegal and therefore the principle of *lex commissoria* does not apply.

Learned President's Counsel for the appellant submitted that P1, P2 and P3 must be regarded as one transaction in order to ascertain its true nature. According to him all three (3) deeds were executed with the full knowledge of parties and in terms of the requirements of law. He cited *Dingiri Naide v. Kirtmenike*<sup>(1)</sup> where it was held, quoting Fletcher-Moulton, L.J. in *Manks v. Whiteley*<sup>(2)</sup> that,

“Where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all others being executed also and is intended to speak only as part of the one transaction and if one is seeking to make equities apply to the parties, they must be equities arising out of the transaction as a whole.”

*Lex commissoria* is ‘a pact annexed to a purchase at the time it is contracted to the effect that, unless the price be paid at a certain time, the thing shall be considered as unbought.... [It] is valid even though it provides that the seller may keep any portion of the purchase price received as a penalty for the buyer’s default’ (C.G. Weeramantry, *The Law of Contracts*, Volume II, 1967, p. 918).

Deeds No. 2087 (P1) and No. 2088 (P2) were attested by M.Y.M. Nizar, Notary Public on 17.08.1979. The Mortgage Bond No. 788 (P3) was also executed on the same day, but by M.D.J.P. Fernando, Notary Public. Deed No. 2087 (P1) contains elements of a sale, but it cannot be contended that title was absolutely and unconditionally transferred thereby from the seller to the buyer, since only Rs. 50,000/- of the total consideration of Rs. 300,000/- was paid at the time of its execution. Consideration is the vital element in the sale and the omission in P1 to provide for the terms and conditions for the payment of the balance consideration is supplied by Deed P2, executed on the same day. Hence, Deeds P1 and P2 should be read together. Stipulations (i) and (ii) contained in P2, set out above, would be operative as to the payment of the balance consideration and the consequence of default be valid as *lex commissoria*. The mortgage P3 only creates a security for the discharge of the obligation to pay the balance consideration. It has no bearing on the title to the property. When P1 becomes invalidated in terms of P2, upon the failure to pay the balance consideration, title would revert to the vendor and the mortgage P3 would *ipso*

*facto* cease to be operative as security. It appears that P3 was attested by the seller's Notary out of an abundance of caution to strengthen the position of the seller. It certainly cannot detract from the reversion of the title to the seller upon the failure to pay the balance consideration as stated above.

In *W.D. Baiya v. K.D.A. Karunasekera*<sup>(3)</sup> it was held, quoting *Macedo v. Strand*<sup>(4)</sup> that,

"A deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only."

In *Thambipillai v. Muthucumarasamy*<sup>(5)</sup> referring to a sale subject to conditions, it was stated that,

"Neither of these conditions is in any way inconsistent with the incidence of a contract of sale (as opposed to a contract of mortgage). The first condition constituted a '*pactum de retrovendendo*' which is well recognised in Roman-Dutch Law. Voet 18-3-7. The second condition represents an agreed and perfectly permissible departure from the normal right of a purchaser to obtain immediate possession of the property sold to him."

Explaining the meaning of '*lex commissoria*' Wille stated that,

"... the creditor may cancel the contract if 'time was of the essence of the contract', or was made so by a notice of rescission. Time is of the essence when the parties expressly or impliedly agreed that default of performance by the day fixed would entitle the other party to cancel the contract. An express clause to this effect is known as a *lex commissoria*." (*Principles of South African Law*, 8<sup>th</sup> edition, p. 506)

When the respondent failed to pay the balance purchase sum of Rs. 250,000/- on or before 31.10.1979 as stipulated in P1, the transfer became invalid and the title reverted to the vendor. The vendor sold it to D.H.R. de Silva (D1) and upon his death his Estate was administered and the property in question, was transferred to the appellant by D.H.R. de Silva's widow (D2), who is now vested with title.

The deed marked P2 stipulated that the sum of Rs.50,000/- paid by the respondent to the vendor would be forfeited by the vendor in the event the respondent failed to pay the balance purchase price of Rs. 250,000/- on or before 31.10.1979. As mentioned earlier the respondent failed to pay the balance purchase price as stipulated. In this kind of a situation, Wille has pointed out that,

"A *lex commissoria* is valid even though it provides that the seller may keep any portion of the purchase price that he has received as a penalty for the purchaser's default, in which case, however, the latter may retain the fruits of the property in the intervening period. The fact that a forfeiture clause contains penal claims in addition to a *lex commissoria* does not prevent the seller from enforcing the claims under the *lex* only." (*Principles of South African Law*, 5<sup>th</sup> edition, 316)

In the circumstances, the respondent is not entitled to recover the said sum of Rs. 50,000/- and the clause regarding the forfeiture of the money is valid. The appeal is accordingly allowed, the judgment of the Court of Appeal dated 14.03.1997 is set aside and the judgment of the District Court, Colombo dated 12.10.1992 is affirmed. There will be no costs.

**S.N. SILVA, C.J.** - I agree.

**PERERA, J.** - I agree.

*Appeal allowed.*