GNANASAMBANDAM
v.
BIN ADAHAM AND ANOTHER

COURT OF APPEAL
WEERASEKERA, J. &
WIGNESWARAN, J.
C.A. NO. 791/88 (F)
D.C. AVISSAWELLA NO. 17610/L
JANUARY 20 AND FEBRUARY 10, 1997

Conditional transfer – Deed not signed by vendee – Rights to obtain retransfer.

Held:

A deed of transfer of a land embodying a condition to retransfer on payment of the purchase price plus interest within five years binds the vendee to retransfer the land on being paid the purchase price and interest within the stipulated time although the vendee had not signed the deed.

The property was transferred with a condition attached to it. The condition cannot be disengaged from the property. The failure of the defendant-appellant to sign the deed does not entitle him to wriggle out of his obligation to retransfer. The obligation was intrinsic in the transfer itself.

Cases referred to:

1. *Ratnam v. Ratnam* 79 (2) NLR 433, 438, 439.
2. *Sasson & Sons Ltd. v. International Banking Corporation* (1927) AC 7.
3. *Rochefoucauld v. Boustead* (1897) 1 Ch 196.
4. *Booth v. Turfe* (1873) 16 Eq. 182.

APPEAL *from judgment of the District Court of Avissawella.*

S. Mahenthiran for defendant-appellant.

Ikram Mohamed with *Ian Fernando* for the plaintiff-respondent.

Cur. adv. vult.

June 02, 1997

WIGNESWARAN, J.

The plaintiff-respondents by P1 (deed No. 520 dated 9.10.1982 attested by H. R. P. Abeywickrema, Notary Public of Avissawella) transferring the land and premises described in the schedule to the said deed to the defendant-appellant for a sum of Rupees Fifty Thousand only (Rs. 50,000/-) signed and executed the said deed.

The *habendum* clause of the deed stated as follows:

> "To have and to hold the said premises hereby sold and conveyed with the rights and appurtenances thereto belonging unto the said vendee and his aforewritten absolutely for ever subject however to the condition that if within a period of five (5) years from date hereof the aforesaid vendors or their heirs, executors, administrators and assigns pay unto the said vendee or his aforewritten the said sum of rupees fifty thousand (Rs. 50,000) together with interest calculated at twenty per centum (20%) per annum from date hereof the vendee shall retransfer all the interests in the land and premises described in the Schedule hereto to the said vendors or their aforewritten.

The attestation clause to the said deed referring to the payment of consideration stated as follows:

> "And I further certify and attest that of the consideration herein expressed a sum of rupees ten thousand (Rs. 10,000) was paid in cash in my presence, rupees twenty thousand (Rs. 20,000) was paid by cheque No. C/28-165459 drawn on the Bank of Ceylon, Avissawella and the vendors acknowledged prior receipt of rupees twenty thousand Rs. 20,000) . . ."

The five year period for retransfer mentioned earlier was to be over on 8.10.1987.

The plaintiff-respondents instituted this action No. 17610/L in the District Court of Avissawella on 12.9.1984 well before 8.10.1987 to obtain a retransfer of the premises in suit on the basis that the defendant-appellant had in breach of the condition in transfer deed

No. 520 (P1) refused to accept the sum of Rs. 50,000 plus interest due thereon and to retransfer the said premises to the plaintiff-respondents.

The defendant-appellant denied any liability to retransfer since (i) he was not a signatory to P1 and (ii) the condition thereon did not bind him. He also took up the position that P1 was an outright transfer.

At the trial two admissions were recorded, viz (i) the execution of P1 (ii) that Rs. 69,167 consisting of Rs. 50,000 mentioned as consideration in P1 plus interest at 20% per annum from the date of deed upto end of August, 1984, calculated in terms of the said condition on P1 had been deposited to the credit of the case.

The only issue in view of the above admissions was whether the defendant-appellant was bound to retransfer the property in suit as per the terms of P1 to the plaintiff-respondents.

The learned District Judge without recording any evidence but after hearing submissions only, delivered judgment on 30.9.1988 holding with the plaintiff-respondents as per their prayers set out in the plaint.

This appeal is against that judgment.

The learned counsel for the defendant-appellant has taken up the following matters in appeal:-

1. P1 is not a conditional transfer. It is an outright transfer.
2. The defendant-appellant was not a signatory to the deed. A stipulation by the vendors in their deed did not bind him.
3. The insertion of a stipulation on the deed was a unilateral act of the plaintiff-respondents. There was no assent given by the defendant-appellant.
4. According to section 2 of the Prevention of Frauds Ordinance an agreement in writing notarially attested was necessary to bind the defendant-appellant to retransfer the premises.
5. There exists no valid and legally enforceable right that binds and compels the defendant-appellant to transfer the premises.

6. Estoppel is not a cause of action by itself and it does not create one.
7. The decision in *Ratnam v. Ratnam*[1] referred to, implying that the plaint in this case disclosed no enforceable cause of action since section 2 of the Prevention of Frauds Ordinance was not conformed with.

These submissions would now be examined.

A deed generally consists of the following parts: (1) the premises or recitals (ii) the *habendum* clause (iii) the *tenendum* clause (iv) the *reddendum* clause (v) the conditions and (vi) the covenants.

The *habendum* clause in a conveyance indicates the property or estate that is to be taken over by the grantee. As a general rule, when the quantum of the interest conveyed is mentioned the *habendum* may qualify, enlarge, lessen or explain the property or estate granted.

The *tenendum* clause in English law indicated the tenure by which the grantee was to hold the land of the grant or but which now simply says that the land is to be held by the grantee without mentioning of whom.

Most deeds now have both clauses coupled and as such the relevant part of the deed says: "To have *(habendum)* and to hold *(tenendum)*".

The *reddendum* clause refers to that which is to be paid or rendered.

Conditions are stipulated before the covenants.

In P1 the *habendum* and *tenendum* clauses have been amalgamated and the property or estate which was handed over to and taken over by the defendant-appellant was the premises sold and conveyed absolutely for ever but subject to a condition. The property was transferred with a condition attached to it. The condition cannot be disengaged from the property. If the condition was not stipulated in the deed it would be safe to presume that the vendors (the plaintiff-respondents) would not have gone ahead with the transfer. It must be taken for granted that the contract which gave rise to the transfer

deed had the condition of reserving the right of retransfer central to it. Thus the title to the property or premises transferred on P1 was of a restricted nature. It had a condition subsequent attached to it whereby on the happening of an event within 5 years from the date of deed P1, the purchaser's right got divested or destroyed. It behoved the defendant-appellant to enjoy all the rights of an owner until anytime within 5 years from the date of execution of P1 the plaintiff-respondents made available to the defendant-appellant the purchase price on P1 with the stipulated interest, in which event it was incumbent on the defendant-appellant to retransfer the property or premises back to the vendors. The form of the deed was a deed poll as most transfer deeds are.

It certainly would have been better in this instance for the deed of transfer to have been formulated as an indenture. If the deed was an indenture this case would not have arisen. But the failure of the defendant-appellant to have signed the deed of transfer does not entitle him to wriggle out of his obligation to retransfer which was an obligation intrinsic in the transfer itself. In other words what was sold or granted to the defendant-appellant on P1 was a property or premises encumbered with a condition subsequent. The defendant-appellant cannot be heard to say that he was unaware of the condition stipulated in P1 since the attestation clause refers to his active participation in the transaction. No contrary evidence was led in court.

It is regrettable that at least some limited evidence was not led in this case to find out as to who paid the stamp duties, Notary's fees and other charges and as to who were present at the time of signing of the deed. Generally, evidence relating to payment of stamps and other charges would give a clue as to the intention of parties with regard to the deed signed. For example where the transaction is a mortgage couched in the form of an absolute transfer the vendor is generally called upon to pay all these charges. In a real transfer deed it is the purchaser who bears the burden. Sometimes the vendor is called upon to pay *half charges* since at the end of the period stipulated (5 years in this instance) if the vendors do not pay the principal and the interest, the vendee would take over the premises absolutely.

In the absence of this piece of evidence we must interpret the deed (P1) in accordance with the canons of construction laid down in the law.

Basically a document must be considered as a whole. It is from the whole of the document coupled with the surrounding circumstances that the general intention of the party or parties is to be ascertained.

When the defendant-appellant accepted the signatures of the plaintiff-respondents on P1 and was prepared to part with the consideration stipulated on the deed, it is to be presumed that the defendant-appellant acknowledged and accepted every term and condition laid out in P1 and agreed to abide by it. If he was not prepared to accept the deed of transfer with the condition subsequent stipulated therein he should have called off the transaction without fulfilling his part of the obligation by paying the consideration referred to in the deed. There is no evidence that the defendant-appellant at least subsequently but before the plaintiff-respondents offered to pay the transfer price and interest disputed the legality or the necessity for the condition inserted in the deed. This leads to the inevitable inference that the defendant-appellant was prepared to abide by the condition subsequent stipulated in P1.

Under such circumstances a court must lean towards that interpretation which will put an equitable construction and should not construe P1 in such a manner as to give either of the parties an unfair or unreasonable advantage over the other unless the intention of the parties to the contrary is manifest. This is known as the equitable interpretation rule. (vide page 428 E. R. S. R. Coomaraswamy's "The Conveyancer and Property Lawyer" volume 1 part II (first edition) 1949).

P1 was a printed transfer deed form used for the sake of convenience in which there were blank spaces to be filled according to circumstances – a common practice in Sri Lanka. In these cases more attention must be given to the words filled in rather than to the printed word since the written or typed words were chosen for the particular occasion while the printed words were general words for all occasions. (*Sasson & Sons Ltd. v. International Banking*

Corporation [1927] AC 7[2]. The written or typed portions are presumed to have commanded the strictest attention of the parties and the written or typed words must prevail in case of irreconcilable conflict.

Having examined the rules of interpretation generally with reference to a case of this nature let us now discuss the submissions made by the learned counsel for the defendant-appellant.

(1) P1 is an outright transfer

P1 when viewed from the standpoint of the *habendum* and *tenendum* clause and the circumstances of the transaction must be interpreted as a conditional transfer and not as an outright transfer.

(2) The vendee on P1 did not sign it

The question of the defendant-appellant signing P1 is not relevant since what was transferred to him was an encumbered title to the property in question and not absolute ownership for all times. On the happening of the condition subsequent the proprietary right of the defendant-appellant was bound to be destroyed or divested.

(3) No assent by vendee to the unilateral act by the vendors

The stipulation on P1 cannot be considered as an arbitrary unilateral act of the plaintiff-respondent. It is safer to presume under the circumstances of this case that the stipulation carried the consent and concurrence of the defendant-appellant and therefore the latter was duty bound to comply with it. Not to do so would amount to a fraud.

(4) Non conformity with section 2 of the Prevention of Frauds Ordinance

It is wrong to entwine section 2 of the Prevention of Frauds Ordinance to cases of this nature. The promise or agreement in this instance is implicit in the notarial document P1. When the defendant-appellant paid the consideration on P1 and accepted what was transferred to him by the plaintiff-respondents he impliedly undertook to retransfer the property on payment of dues as per stipulation set out

in P1. He had no alternative because his very ownership was dependant on accepting P1 with the condition subsequent incorporated deliberately and specifically therein. Not to accept P1 with such condition incorporated therein means the negation of his very document of title. If the deed is declared void for uncertainty, the title would vest back in the original vendors. The defendant-appellant therefore cannot be heard to approbate and reprobate at the same time taking cover under section 2 of the Prevention of Frauds Ordinance. The provisions of the Prevention of Frauds Ordinance cannot be used by a person to effectuate a fraud himself. (cf. section 5 (3) of the Trusts Ordinance). The principle underlying this pronouncement is that courts will not allow persons to take advantage of their own fraud. (vide *Rochefoucauld v. Boustead*[3]; *Booth v. Turle*[4]. In the present case by depending on P1 for his title when it carried an obligation on his part expressly provided for in the deed, the defendant-appellant perforce acknowledged the right of the plaintiff-respondents to obtain a retransfer within five years of the date of execution of P1. In denying the plaintiff-respondents' right and denying his liability to retransfer the defendant-appellant was attempting to withhold the property lawfully due to the plaintiff-respondents, despite the fulfilment of their part of the obligation by taking cover under the provisions of section 2 of the Prevention of Frauds Ordinance. This cannot be allowed and should not be allowed.

(5) Plaintiff-respondents have no legally enforceable right

A legally enforceable right of the plaintiff-respondents must be recognised under the circumstances in view of the specific condition subsequent in P1 which the defendant-appellant has refused to give effect to though having accepted title under P1 with the condition forming part of it. There has thus been a denial of a right. Such right is enforceable despite the provisions of section 2 of the Prevention of Frauds Ordinance since this section has no applicability in this instance due to the reasons earlier enumerated.

(6) Estoppel does not create a cause of action

Estoppel is not used here to create a *cause* of action. The obligation is real in this instance. Liability to retransfer is intrinsic in

P1. P1 is the only document the defendant-appellant has for his title. He cannot disown parts of his title document and get benefits from other parts. He is estopped from doing so. If the document is taken as a whole the obligation is patent on the deed. But the legal bar adumbrated is that the defendant-appellant did not declare his obligation in writing as required by section 2 of the Prevention of Frauds Ordinance.

Since it leads to the effectuating of a fraud the provisions of section 2 of the Prevention of Frauds Ordinance would hot apply to the facts of this case. Therefore the cause of action arises from the wrong committed by the defendant-appellant in refusing to retransfer, for the prevention or redress of which an action can be instituted.

(7) The decision in Ratnam v. Ratnam 1979(2) NLR 433(1)

The abovesaid decision has no relevance to the present case. Transfer deed P1 was a notarially executed document. What was transferred to the defendant-appellant was a property subject to a condition subsequent which was binding upon him. His acceptance of the deed carried with it an implied assent to conform to the condition subsequent. Hence the need to draw up a new notarially executed document or to even sign the document of title with a condition attached to it does not necessarily arise. He is bound by the condition whether he signed P1 or not.

Under the circumstances, this court finds no vaild reason to interfere with the judgment of the learned District Judge of Avissawella and accordingly dismisses the appeal with taxed costs payable by the defendant-appellant to the plaintiff-respondents.

WEERASEKERA, J. – I agree.

Appeal dismissed.