CARTHELIS
v.
RANASINGHE

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.
CA NO. 393/96 (F)
DC COLOMBO NO. 6233/ZL
SEPTEMBER 15, 2000
OCTOBER 30, 2000
NOVEMBER 30, 2000

Trusts Ordinance – Constructive Trust S. 83 – Attendant circumstances – Beneficial interests – Tests to be applied – Notaries Ordinance S. 20 (c), S. 31 (10) – Duties of a Notary.

The plaintiff-respondent instituted action seeking a declaration of title to the land in question and the ejectment of the defendant-appellant. The defendant-appellant sought the dismissal of the action, and in recovention sought an order to set aside the Deed of Transfer or in the alternative a declaration that the property is held in trust by the plaintiff-respondent. The District Court held with the plaintiff-respondent. On appeal it was contended that the tial Judge failed to consider the applicability of s. 83 Trust Ordinance.

Held:

(1) Applying the tests laid down in decided cases and considering the attendant circumstances it would be clear that the defendant-appellant did not intend to part with the beneficial interest in the property.

Per Dissanayake, J.

"It is of significance to observe that the Notary failed to give a plausible explanation regarding the substantial amount of space left between the schedule of the deed and the place where the defendant-appellant and the witnesses have signed. This gives credence to the version of the defendant-appellant that their signatures were obtained on blank sheets of paper and later converted to a Deed of Transfer."

Per Dissanayake, J.

"There is a duty cast on the Notary under S. 20 (*c*) Notaries Ordinance to state whether the consideration or part of it passed before him or not. The fact that this provision has been blatantly disregarded by the Notary who is also an Attorney-at-Law, is another factor that is indicative of the fact that the deed was not attested in the manner as testified to by him, the plaintff-respondent and her witness."

(ii) The trial Judge has failed to indulge in a proper evaluation of the evidence, she has also failed to consider the evidence, on the question of a constructive trust in terms of s. 83.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to :

1. *Eliya Lebbe v. Majeed* – 48 NLR 357.
2. *Thisa Nona and 3 Others v. Premadasa* – 1997 1 SRI LR 169.
3. *Premawathie v. Gnanawathie Perera* – 1994 2 SRI LR 171.

Sunil F. A. Cooray with *Malaka Herath and S. A. D. S. Suraweera* for the defendant-*appellant.*

Wijayadasa Rajapakse with *Kapila Liyanagamage* and *Rasika Dissanayake* for the plaintiff-respondent.

Cur. adv. vult.

June 15, 2001

DISSANAYAKE, J.

The plaintiff-respondent by her plaint dated 01. 12. 1989 and amended 1
subsequently, filed this action seeking a declaration of title, to the land described in the schedule to the plaint, ejectment of the defendant-appellant therefrom and damages at Rs. 5,000 per month from 01. 12. 1989 until the plaintiff-respondent is placed in possession of the said land.

The defendant-appellant by his answer daed 29. 08. 1990 whilst praying for dismissal of the plaintiff-respondent's action, made a claim in reconvention seeking (*a*) an order setting aside the deed bearing No. 882 dated 01. 08. 1986 (*b*) or in the alternative a declaration that the property in suit is held in trust by the plaintiff-respondent until retransfer of the same on repayment of the loan.

The case proceeded to trial on 17 issues and after the conclusion of the trial, the learned District Judge by her judgment dated 26. 07. 1996 entered judgment for the plaintiff-respondent as prayed for in the plaint.

It is from the aforesaid judgment that this appeal has been lodged.

Learned Counsel for the defendant-appellant contended that the learned District Judge has misdirected herself in entering judgment for the plaintiff-respondent, on the following grounds :

(*a*) that the learned District Judge has not embarked on a proper evaluation of the evidence; and

(*b*) that the learned District Judge failed to consider the applicability of provisions of section 83 of the Trusts Ordinance.

The plaintiff-respondent's case was that N.P. Bertie Perera, who was known to her had come to her house with the defendant-appellant and introduced him to her husband as one who wanted to sell his house and property situated at Kotte and that the defendant-appellant had offered to sell it for a consideration of Rs. 260,000. The plaintiff-respondent agreed and subsequently the defendant-appellant had obtained a sum of Rs. 75,000 as an advance payment and thereafter on two occasions had obtained Rs. 50,000 and Rs. 75,000 and finally on 01. 08. 1986, the day on which the impugned deed was signed she obtained the balance payment of Rs. 60,000.

The plaintiff-respondent sought to assert that the deed No. 882 dated 01. 08. 1986 (P1) attested by S. W. Premaratna, Notary Public, was a duly executed deed of transfer. She testified that the defendant-appellant continued to occupy the premises with her leave and license up to 30th October, 1989.

The plaintiff-respondent's position was that the defendant-appellant was in wrongful possession of the said premises since 30. 10. 1989, after termination of the license causing her damages in a sum of Rs. 5,000 per month. She sought ejectment of the defendant-appellant from the said premises.

The defendant-appellant's case was that since a marriage was aranged for his 4th son he was in need of some money. He came to know Major Ranasinghe, the plaintiff-respondent's husband through Bertie Perera, who agreed to give Rs. 60,000 as a loan, to him.

The defendant-appellant, his wife and Bertie Perera went to the residence of the plaintiff-respondent on 24. 12. 1985 and obtained a sum of Rs. 60,000 as a loan. He sought to assert that Major Ranasinghe obtained his signature on 3 blank sheets of paper purporting it to be a document signed as security for the loan taken.

The defendant-appellant elaborating the placing of his signature on the 3 blank sheets of paper stated that he was given the 3rd page of deed bearing No. 882 dated 01. 08. 1986 (P1) to be signed. The said 3rd page of the said deed was in blank and was folded when given to him for signature. Except the numbers 1 and 2 he did not observe any other letters there. The words witnesses or N.P. were not found in the said 3rd page of 'P1' at the time he placed his signature. His position was that his wife and Bertie Perera too signed the said blank sheets of paper thereafter.

The defendant-appellant testified that he had never seen S. W. Premaratne, the notary public before, until he saw him in Court when he (Premaratne) gave evidence. Although he admitted to signing 3 sheets of paper in blank on 24. 12. 1985, he denied having signed deed No. 882 (P1) on 01. 08. 1986 as a deed of transfer.

The defendant-appellant's position was that for the loan he obtained from Major Ranasinghe he paid interest at the rate of Rs. 3,000 per month to him but he was never issued with any receipts for the said payments.

The defendant-appellant denied that he received letter dated 30. 10. 1984 (P4).

His position was that he never received a sum of Rs. 260,000 either from the plaintiff-respondent or from her husband.

Therefore, the crucial issues that arise for decision in this case are :

(*a*) Whether the defendant-appellant signed deed No. 882 dated 01. 08. 1986 (P1), as a deed of transfer or he signed P1 as a result of a fraud that was perpetrated on him by the plaintiff-respondent's husband who is said to have obtained his signatures on 3 blank sheets of paper which was purported to be a document given as security for the loan, or in the alternative.

(*b*) Whether, under the circumstances of this case a constructive trust had been created in favour of the defendant-appellant.

It is of significance to observe that the Notary S. W. Premaratne failed to give a plausible explanation regarding the substantial amount

of space left between the schedule of the deed and the place where the defendant-appellant and the witnesses have signed at page (3) of deed P1. This gives credence to the version of the defendant-appellant that their signatures were obtained on blank sheets of paper and later converted to a deed of transfer.

The Notary's failure to mention the fact of payment of Rs. 60,000 before him and his failure to mention anything at all regarding the consideration in the attestation clause is another factor that belies his evidence that he attested the deed in the presence of the defendant-appellant and the witnesses.

There is a duty cast on the Notary under section 20 (*c*) of the Notaries Ordinance to state whether the consideration or part of it passed before him or not. The fact that this provision has been blatantly disregarded by the Notary who is also an Attorney-at-Law is another factor that is indicative of the fact that deed P1 was not attested in the manner as testified to by him, the plaintiff-respondent and her witness.

According to section 31 (10) of the Notaries Ordinance, unless either the executant or the 2 witnesses are known to the Notary he cannot attest a deed. But, according to the testimony of the defendant-appellant he only saw the Notary for the 1st time in Court when he came to give evidence in this case. Bertie Perera was emphatic that he did not know the Notary before. If the defendant-appellant has not seen the Notary before, it is not likely that his wife, the other witness, would have known the Notary. However, Notary Premaratna's position was that he had known the defendant-appellant for a period of about 7 months before the deed was attested.

The following discrepancies and infirmities were also observed in the evidence led on behalf of the plaintiff-respondent :

(1) Bertie Perera stated that the defendant-appellant, his wife, and he went to Panagoda Army Quarters of Major Ranasinghe to discuss the said transaction for the first time with the plaintiff-respondent.

But, the testimony of the palintiff-respondent was that defendant-appellant, his wife and son came to Sanchiarachchi Gardens, Colombo 12, when they first came to discuss the transaction.

(2) Bertie Perera's testimony was that only Rs. 60,000 or Rs. 70,000 was paid as the 1st instalment to the defendant-appellant. Whereas, the plaintiff-respondent was emphatic that Rs. 75,000 was paid as the 1st instalment. Bertie Perera also asserted that a sum of Rs. 75,000 was paid before the Notary Public, thereby contradicting the testimony of the plaintiff-respondent who stated that a sum of Rs. 60,000 was paid on the day when the deed was executed.

(3) Witness Bertie Perera in the course of his evidence admitted that he was a broker. However, he changed his evidence subsequently and stated that he did not work as a broker. He even denied the fact that he said so in evidence.

Before I proceed to examine the question whether in view of the peculiar circumstances of this case, a constructive trust had been created in favour of the defendant-appellant, it is necessary to examine the definition of a constructive trust as found in section 83 of the Trusts Ordinance.

Section 83 reads thus :

"Where the owner of property transfers or bequeaths it, and it cannot be reasonably be inferrred consistently with the attendant circumstances, that he intended to dispose of the beneficial interest therein. The transferee or legatee must hold such property for the owners or his legal representative."

In dealing with the question of a trust the attendant circumstances are considered very material. In the case of *Eliya Lebbe v. Majeed*[1] at 339 Dias, J. stated thus :

"There are certain tests for ascertaining into which category a case falls. Thus, if the transferor continued to remain in possession after the conveyance, or if the transferor paid the whole cost of the conveyance or if the consideration expressed on the deed is utterly inadequate to what would be the fair purchase money for the property conveyed – all these are circumstances which would show whether the transaction was a genuine sale for valuable consideration or something else."

In the case of *Thisa Nona and 3 Others v. Premadasa*[2] it was observed, that the following circumstances which transpired in that case were relevant on the question whether the transaction was a loan transaction or an outright transfer (1) the fact that a non-notarial document was admitted to have been signed by the transferee, (2) the payment of the stamp duty and the Notary's charges by the transferor, (3) the fact that the transfer deed came into existence in the course of a series of transactions, and (4) the continued possession of the premises in suit by the transferor just the way she did before the transfer deed was executed.

It was further held in the said case that the attendant circumstances show that the transferor did not intend to dispose of the beneficial interest in the property transferred. Law, therefore, declares under such circumstances that the transferee would hold such property, for the benefit of the transferor.

I shall now discuss whether the tests laid down above could be applied to ascertain the true nature of the present transaction.

(1) The continued possession by the defendant-appellant of the premises in suit, after the execution of deed No. 882 (P1) on 01. 08. 1986 upto the date of filing of action.

The explanation given by the plaintiff-respondent that since the defendant-appellant's wife expired after deed (P1) was executed and he wanted some time to leave, is untenable as the plaintiff-respondent allowed him to be in possession for a period of over 3 years and 2 months until she filed this action to eject him.

(2) The consideration of Rs. 60,000 mentioned in deed P1 is clearly inadequate as fair purchase money for 17. 30 perches of land together with an old house at Kotte in 1985.

Although the plaintiff-respondent took up the position that the consideration was Rs. 260,000 but the consideration of Rs. 60,000 was inserted in deed P1 in order to reduce the stamp duty, this position was not supported by Notary Premaratne.

The plaintiff-respondent failed to produce the receipts allegedly taken from the defandant-appellant for payment of the earlier instalments. The explanation adduced by her that after the execution of deed P1 the receipts were destroyed by her husband is unacceptable.

If the consideration that was paid by the plaintiff-respondent was Rs. 260,000 the question may arise as to why, this fact was not averred in the replication dated 07. 11. 1990. It was only averred later in the amended replication dated 21. 08. 1991. There was no plausible explanation for the delay.

The plaintiff-respondent who valued the land, the subject-matter of the action at Rs. 100,000 in paragraph 10 of the plaint, later amended it to Rs. 260,000 after filing of the amended replication.

These circumstances go to show that the position that Rs. 260,000 being paid as consideration has been an after thought on the part of the plaintiff-respondent.

Even if one were to assume that the consideration for the transaction was Rs. 260,000, in view of the admission of the plaintiff-respondent, under cross-examination that the value of a perch of land in Kotte in 1985 was Rs. 50,000 (*vide* proceedings at page 385 of the brief), the total value of 17.30 perches of land at Rs. 50,000 per perch would be over Rs. 800,000.

Therefore, even a consideration of Rs. 260,000 is clearly inadequate, as fair purchase money for 17.30 perches of land at Kotte in 1985.

(3) The failure of the plaintiff-respondent to cause an examination of the title of the property by making a search at the land registry, by her Notary.

When one invests money on land, especially for the purpose of building a house, one has to be mindful of the title to the property. Therefore, examining the title by doing a search at the Land Registry is necessary for the vendee to be satisfied – that the vedor has good title to sell and additionally that the said title is acceptable to a lending institution.

Even though the plaintiff-respondent asserted that she intended to purchase this land for building a house, it appears

that she has not done an examination of the title by getting a search being done at the Land Registry.

(4) The failure of the plaintiff-respondent to produce the tiltle deed bearing No. 538 dated 29. 10. 1984 (D1) and other old deeds which were produced by the defendant-appellant to wit : deed No. 2130 dated 31. 12. 1957 (D2) and deed bearing No. 1130 dated 04. 07. 1971 (D3). If it was a pure and simple transfer, one would expect the title deeds and all other old deeds to be in the hands of the transferee having obtained them from the trasferor, for the purpose of preparing the deed of transfer.

Applying the aforementioned tests and considering the attendant circumstances it would be clear that the defendant-appellant did not intend to part with the beneficial interest in the property.

In such circumstances in terms of section 83 of the Trusts Ordinance plaintiff-respondent would hold such property for the benefit of the 1st defendant-appellant (*vide* case of *Premawathie v. Gnanawathie Perera.*[3]

Upon consideration of the totality of the evidence of this case, it would appear that the signatures of the defendant-appellant had been obtained on 3 blank sheets of paper, purporting it to be a document as security for the loan of Rs. 60,000 obtained by him, to be held, until the repayment of the said loan. This document has been later converted as a deed of transfer of the property in suit.

Thus, the learned District Judge has failed to indulge in a proper evaluation of the evidence. She has also failed to consider the evidence, on the question of a constructive trust in terms of section 83 of the Trusts Ordinance.

The learned District Judge was in error when she entered judgment for the plaintiff-respondent.

Since the relief prayed for by the defendant-appellant in the answer is in the alternative and as I have already come to a finding on the question of a constructive trust, relief in terms of prayer (B) of the prayer to the answer of the defendant-appellant is not necessary.

Therefore, I set aside the judgment dated 26. 07. 1996 and the decree and direct judgment be entered dismissing the action of the plaintiff-respondent.

I further direct that judgment be entered in favour of the defendant- 270
appellant in terms of prayer (C), and (D) of the answer of the defendant-appellant.

The appeal is allowed with costs.

WEERASURIYA, J. – I agree.

Appeal allowed.