WIJEYAKOON

v.

WIJEYAKOON

COURT OF APPEAL.
G. P. S. DE SILVA, J. (PRESIDENT, C.A.) AND GOONEWARDENA, J.
C.A. 231/81 (F)-D.C. KALUTARA 2473/L.
APRIL 28 AND 30, 1986.

(Written submissions of appellant on 26.6.1986)

Rectification–Can deed of rectification be executed unilaterally?–Reception of fresh evidence at appeal stage.

Any act of rectification by deed executed unilaterally must be construed as effective to bind only the executant and not others who are not parties to such act.

Reception of fresh evidence in appeal may be justified if it can be shown that the evidence could not have been obtained with reasonable diligence at the trial. If the evidence could have been led at the trial if reasonable diligence had been exercised, such evidence will not be permitted to be led at the appeal stage.

Case referred to:

(1) *Ratwatte v. Bandara-(1969) 70 N.L.R. 231, 234.*

APPEAL from the judgment of the District Judge of Kalutara.

Sanath Jayatilake for plaintiff-appellant.

Ian Wickremanayake with *Miss Priyanthi Gamlath* for defendant-respondent.

Cur. adv. vult.

July 31, 1986.

G. P. S. DE SILVA, J. (President, C/A)

The plaintiff brought this action for a declaration of title to the land and premises described in the second schedule to the amended plaint, for the ejectment of the defendant and for damages. The case for the plaintiff was: that by virtue of final decree in D.C. Kalutara case No. 22004 Charlis Appuhamy was allotted lot 1 of the land called Koswatte described in the first schedule to the amended plaint; that Charlis Appuhamy on P1 dated 29.11.56 transferred a portion of the said lot 1, about 21 perches in extent, described in the second schedule to the amended plaint to three persons, namely, Arthur Wijekoon who was the deceased husband of the defendant, Ameratunga Wijekoon and the plaintiff, Sirisena Wijekoon; that Arthur Wijekoon, Ameratunga Wijekoon and the plaintiff Sirisena Wijekoon are brothers; that Arthur Wijekoon transferred on P2 (also marked as D1) dated 29.3.1961 his 1/3 share to Aponsu Perera reserving the right to himself to re-purchase the same within a period of 2 years on payment of a sum of Rs. 1,000 together with interest at 15% per annum; that on P3 (also marked as D2) dated 6.6.1962. Aponsu Perera transferred all the right, title, interest, claim and demand whatsoever accruing to him upon P2 to the said Arthur Wijekoon; that by a bona fide error the name of Arthur Wijekoon had been inserted as the vendee on P3 although it was the plaintiff who had paid the sum of Rs. 1,000 referred to in P3 to Aponsu Perera; that the plaintiff subsequently detected the error in the name of the vendee as given in P3 and caused to be executed the deed of rectification P4 dated 9.12.63 where the name of the plaintiff is inserted as vendee; that on P5, P6 and P7 the title to the entirety of the land and premises described in the second schedule to the amended plaint passed to the plaintiff; that since 5.3.77 the defendant is in unlawful occupation of the land and premises described in the second schedule to the amended plaint.

The defendant, on the other hand, claimed title to an undivided 1/3 share of the land and the entirety of the building thereon and asked for the dismissal of the plaintiff's action. After trial, the District Judge held with the defendant and dismissed the plaintiff's action. Hence this appeal now preferred by the plaintiff.

The case proceeded to trial on the following issues:–

1. Is the plaintiff entitled as set out in the amended plaint to the land and the building described in the second schedule?
2. Is the defendant in unlawful and illegal occupation of the said building since 5.3.1977?
3. If the aforesaid issues are answered in the affirmative is the plaintiff entitled to the relief claimed in the amended plaint?
4. Is Arthur Wijekoon entitled to 1/3 share of the land and the building described in the second schedule to the amended plaint?
5. If so did Arthur Wijekoon's interests devolve on the defendant and her children as stated in her answer?
6. If so should the plaintiff's action be dismissed?

The District Judge answered issues 1, 2 and 3 in the negative and the other issues which were raised by the defendant were answered in the defendant's favour.

The real question which arises for decision on this appeal relates to the effect of P4 dated 9.12.63 which purports to be a deed of rectification. According to the plaintiff, the consideration on P3 was paid by him and not by his brother, Arthur Wijekoon. It was his case that by reason of a bona fide error, the name of Arthur Wijekoon was inserted as the vendee on P3 and with a view to rectifying that error P4 was executed. It was the contention of counsel for the defendant-respondent that nothing passed on the alleged deed of rectification, P4. This contention advanced on behalf of the defendant-respondent commends itself to me. In the first place, although P4 purports to be a deed of rectification, Arthur Wijekoon who was the vendee on P3 was not a party to P4. In my view, therefore, P4 was not binding on Arthur Wijekoon and his successor in title, namely, his widow the defendant. Secondly, at the time Aponsu Perera executed P4 he had no right title or interest for he had already divested himself of whatever right, title or interest he had by reason of

the execution of P3. No proceedings were instituted to set aside P3. By his unilateral act in executing P4 he could not set at naught the effect of P3. Therefore P3 remained unaffected by the execution of a purported deed of rectification.

To my mind any act of rectification by deed executed unilaterally must be construed to have effect so as to bind the executant only and not others who are not parties to such act. Thus the binding effect of P4 would be limited to Aponsu Perera and would not extend to Arthur Wijekoon. To hold otherwise would mean with respect to a transaction such as the one we are here concerned with, that after a sale of property by deed whereupon title has passed to the vendee, a vendor so minded could defeat the title of the vendee to such property by a purported deed of rectification subsequently executed unilaterally by the vendor whereby the name of someone else is sought to be substituted for the true vendee. A buyer of property and perhaps in certain circumstances even a successor in title to such buyer then would never be safe after his purchase and would be at the mercy of the seller, a situation which cannot be lightly countenanced. I accordingly hold that P4 was ineffective to convey title to the plaintiff and the findings of the trial judge on issues 1, 2 and 4 are correct.

Counsel for the plaintiff-appellant has in his written submissions contended at length that the trial judge was in serious error when he reached the finding that the plaintiff had fraudulently caused P4 to be executed in his favour when there was no such plea taken up in the answer and the question of fraud was never put in issue at the trial. While it is correct that the plea of fraud was not put in issue at the trial, and it may not have been open to the trial judge to reach a finding in respect of fraud, yet for the reasons given above, plaintiff's action had to fail. In my view, the finding of fraud in respect of P4 does not vitiate the other findings of the trial judge as reflected in his answers to the issu nor does it affect the ultimate conclusion of the trial judge that the defendant is entitled to a 1/3 share of the land and premises in suit.

Counsel for the plaintiff-appellant next submitted that there was no need for Arthur Wijekoon to have been a party to P4 because, to use Counsel's own words, "Rectification has to be done by the person who has made the error and by no one else". I do not agree, for, as stated earlier, title had already passed on P3 to Arthur Wijekoon and unless Arthur Wijekoon had joined in P4, P4 would not be binding on him and his successors in title.

Finally, I wish to advert to an application made at the hearing before us on behalf of the plaintiff-appellant to read in evidence an affidavit of Mr. A. I. M. Kaleel, the Notary who executed P3 and P4. This was strongly objected to by counsel for the defendant-respondent. In my view, this objection must be upheld. Reception of fresh evidence in appeal may be justified if it can be shown that the evidence could not have been obtained with reasonable diligence at the trial (*Ratwatte v. Bandara* (1)). The evidence of Mr. Kaleel could have been led at the trial if the appellant had exercised reasonable diligence.

For these reasons, we affirm the judgment of the District Court and dismiss the appeal with costs fixed at Rs. 210.

GOONEWARDENA, J. – I agree.

Appeal dismissed.