PODI MENIKA

v

HEEN MENIKE

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
CA 846/96 (F)
DC Kandy L/17260
APRIL 29, 2003
JUNE 5, 2003

Quatimet action – Share to be allotted in a partition case – Declaration that party is entitled to that interest – Laesio enormis – *Unjust enrichment – Void or voidable contract – Identification of the land – Civil Procedure Code, section 41 – Proof of passing of valuable consideration – Necessity? – Registration of Documents Ordinance section 7 (1) – Evidence Ordinance, section 16 – Omnia praesummuntuer rite essa acta.*

Quatimet action was instituted seeking a declaration that the plaintiff-appellant is entitled to the land interest being the interests the defendant-respondent was entitled to in P/9575 and that a declaration that she be entitled to such share that the defendant-respondent would be allotted by the final decree by virtue of rights flowing on two deeds.

The defendant-respondent denied the position taken up by the plaintiff-appellant. The trial Judge dismissed the action.

On appeal it was contended that, the trial Judge has misdirected himself in applying the principles of *laesio enormis* – Deed No. 32570, that, Court has failed to identify the land with certainty, and that there was no proof of payment of consideration in Deed – 32570.

Held:

Per Dissanayake, J.:

"*Laesio enormis* is a well recognised principle in the Roman Dutch Law to remedy injustice caused to a seller of a thing due to his ignorance or lack of knowledge. This principle could not apply to a situation where the seller was aware of the true value of the property at the time of execution of the deed.

(1) A transferor who institutes an action on the principle of *laesio enormis* has to do so without delay. The principle of *laesio enormis* is available as against a transferee of a deed and not against a third party who had become entitled to the property on a deed granted by the transferee.

(2) In order to succeed in an action for revision of a sale brought by the seller on the ground of *laesio enormis*, he must prove that the property was at the date of sale, worth double the price the defendant paid for it.

(3) As the defendant-respondent had admitted in her evidence that at the time of the execution of the deed she knew that the true value of the property was Rs. 60,000/- though the consideration in the deed being Rs. 20,000/- remedy under the principle of *laesio enormis* is not available to the defendant-respondent.

(4) The land has been described in the schedule to the plaint with its name by metes, boundaries and the extent – there is no violation of section 41.

Held further:

(5) Proof of the existence of a statement in the deed by the Notary that consideration was paid is not sufficient to establish the truth of the payment of such consideration.

Per Dissanayake, J.:

If a deed is on the face of it regular, it will be presumed that all formalities required by law were complied with in its execution. In the absence of an issue to the effect that the formalities required to be followed by law were not followed it cannot be taken up as an issue for the first time in the Court of Appeal.

APPEAL from the District Court of Kandy.

Cases referred to:

(1) *Gooneratne* v *Philip* – 5 NLR 268.

(2) *Jayawardane* v *Amarasekera* – 15 NLR 280.

(2) *Diyes Singho* v *Herath* – 64 NLR 492.

(3) *Tilakaratne* v *Samsudeen* – NLR 69.

Daya Guruge for plaintiff-appellant.

Dr. Jayantha de Almeida Gunaratne for defendant-respondent.

September 5, 2003

NIMAL DISSANAYAKE, J.

This is a quatimet action instituted seeking *inter alia*, a declaration that the plaintiff-appellant is entitled to the land interest described in the schedule to the plaint, being the interests the defendant-respondent who was the 2nd plaintiff in District Court of Kandy Partition Case No. P 9575 was entitled to get under the interlocutory decree, and a declaration that she is entitled to such share that the defendant-respondent would be allotted by the final decree in D.C. Kandy case No. 9575/P, by virtue of rights flowing on deed No. 8897 of 11.03.1988 and deed No. 32570 of 17.01.89.

The defendant-respondent by his answer whilst denying the averments in the plaint prayed for dismissal of the action.

The case proceeded to trial on 13 issues and at the conclusion of the trial the learned District Judge dismissed the action.

It is from the aforesaid judgment that the plaintiff-appellant has preferred this appeal.

In the petition of appeal filed by the plaintiff-appellant it has been contended that the learned District Judge had erred in dismissing the action on the grounds that the learned District Judge has misdirected himself:-

(a) in applying the principles of *Laesio-enormis* to the transaction based on the deed bearing No. 32570 of 12.10.1989.

(b) in concluding that he had failed to identify the land in suit with certainty in the plaint in violation of section 41 of the Civil Procedure Code.

In the arguments of the appeal before this Court learned Counsel appearing for the plaintiff-appellant has taken up a further ground of appeal, to the effect that there was no proof of passing of valuable consideration in respect of deed No. 32570 of 17.01.1987 (P2).

At the commencement of the trial execution of deed No. 8897 of 11.03.1988 of Notary Public K.B. Ranasinghe by the defendant-respondent has been admitted by the parties.

It is the plaintiff-appellant's case that the defendant-respondent was the second plaintiff in the District Court Kandy partition action bearing No. 9575/P. During the pendency of the said action the defendant-respondent had transferred her undivided shares or whatever share that she will be allotted in D.C. Kandy Partition case No. 9575 to Medagoda Herath Mudiyanselage Karunaratne Banda by deed No. 8897 dated 11.03.1988, attested by Notary Ranasinghe. (P1).

The transferee on deed No. 8897 (P1) by deed No. 32570 of 17.01.1989 (P2) attested by Notary Ritigahapola conveyed all rights in respect of land called Uguressapitiya Hena to the plaintiff-appellant and rights that will be allotted in case No. 9575/P.

The plaintiff-appellant testified in Court of her purchasing the above rights from Herath Mudiyanselage Karunaratne Banda on deed P2 for a consideration of Rs. 20,000/-' She produced the judgment in the District Court of Kandy partition action bearing No. P/9575 (P3), the interlocutory decree (P4) and the final scheme of partition (P5). The final plan was produced marked P6. These documents establish that the defendant-respondent who was the 2nd plaintiff in case No. 9575/P, had been allotted – Lot No. 10 with a portion of the house B2 and Lot No. 12 in the final partition plan No. 1227 (P6).

The defendant-respondent took up the position that the value of the property in suit was Rs. 60,000/- and she stated further that deed No. 8897 (P1) was executed as a result of a transaction that

was entered into by her late husband, and took up the plea of *laesio enomis* and unjust enrichment as against the plaintiff-appellant.

Laesio enormis has been described by Grotius as:

> "If the seller or purchaser has been prejudiced in the price to the extent of more than half the real value, even though no fraud has been perpetrated on either side the party so prejudiced may give the other the option of either cancelling the sale or of increasing or reducing the price in accordance with the real value. This mode of restitution applies to almost all contracts." Grot 3(17-1-5).

Laesio enormis is a well recognised principle in the Roman-Dutch law to remedy injustice caused to a seller of a thing due to his ignorance or lack of knowledge.

This principle will not apply to a situation where the seller was aware of the true value of the property at the time of the execution of the deed, however the property was sold at a lesser price.

The remedy available to an aggrieved party under this principle is not confined to cancellation of the contract but also damages. In such a situation the contract is not void but is voidable. Therefore a transferor who institutes an action on the principle of *Laesio Enormis* has to do so without delay. The principle of *Laesio enormis* is available as against a transferee of a deed and not against a third party who had become entitled to the property on a deed granted by the transferee.

It has been held in *Gooneratne* v *Philip*[1] that in order to succeed in an action for rescission of a sale brought by the seller on the ground of *enormis Laesio* the plaintiff must prove that the property was at the date of the sale, worth double the price the defendant paid for it.

The defendant-respondent in this case has failed to establish that the value of the property the time of sale was worth double the price the transferee paid for it.

Further the defendant-respondent had conceded in her evidence that she was aware of the value of the property to be Rs. 60,000/-. This principle is available only to remedy a party who had

been prejudiced owning to his ignorance or due to his lack of knowledge of the real value of the property. In the case of *Jayawardene* v *Amarasekera*(2) it was held that a person who knows the value of the property, is not entitled to a rescission of the sale, merely by reason of the fact that the price at which he has sold it, is less than half its true value.

The defendant-respondent in her evidence had admitted that at the time of execution of deed P1, she knew that the true value of the property was Rs. 60,000/-. Hence the remedy under the principle of *laesio enormis* is not available to the defendant-respondent in this case.

The land in suit has been described in the schedule to the plaint with its name, by metes, boundaries and the extent. This action is a quatimet action instituted to obtain the interests of the defendant-respondent who was the 2nd plaintiff in the partition action bearing No. 9575.

The plaintiff-appellant has produced the judgment, interlocutory decree (P4) the final partition decree (p5) and the final partition plan bearing No. 1272 (P6). In terms of the interlocutory and final decrees the defendant-respondent has been allotted Lots No. 10 and No. 12 along with a portion of a house being Lot B(2) of the partition plan No. 1272 (P6).

In the schedule to the plaint the land claimed by the plaintiff-appellant has been described by name, metes, boundaries and the extent. Partition plan No. 1272 (P6) has described the land in suit as Lot No. 10 and Lot No. 12, the extents of the two blocks of land is also depicted in plan (P6).

Therefore there is no merit in the arguments of the learned Counsel appearing for the defendant-respondent that the plaintiff-appellant had failed to identify the corpus and hence the plaint was in violation of section 41 of the Civil Procedure Code.

It shall now consider the additional point taken up by learned Counsel appearing for the plaintiff-appellant that there was no proof of payment of consideration in deed (P2).

It is of significance to note that there was no issue framed on this matter and the matter was not taken up before the District Court by

defendant-plaintiff. It has been taken up for the first time in the arguments of this appeal. Learned Counsel adverted attention of Court to the evidence of the plaintiff-appellant to the effect that he could not remember whether consideration was paid. However, the plaintiff-appellant's father stated to Court that the consideration was paid at the time of execution of the deed in the presence of the Notary Public. It is to be observed that this evidence of the plaintiff-respondent's father is contradictory to the attestation clause of the Notary who attested deed (P1) in which he had stated that no consideration passed before him. Learned Counsel for the defendant-respondent argued that therefore this Court shall set aside deed P1. He cited the decision in the case of *Diyes Singho* v *Herath*(3) where it has been held that the plaintiff is not absolved from proving that valuable consideration had been given. Learned Counsel further cited unreported case bearing No. CA/613/92 (F) in which the principle of *Diyes Singho* v *Herath (supra)* had been followed.

The decision in *Diyes Singho* v *Herath (supra)* is not applicable to the facts of this case. In that case the Supreme Court was considering the question under section 7(1) of the Registration of Documents Ordinance, whether an unregistered instrument is void as against a subsequent registered instrument and the question whether the later instrument has been duly registered as required by the Ordinance.

In terms of section 7(1) of the Registration of Documents Ordinance an instrument executed on or after the 1st day of January 1864 shall be void as against all parties claiming an adverse interest thereto on *valuable consideration* by virtue of any subsequent instrument which is duly registered under Chapter III of the Registration of Documents Ordinance (emphasis added.)

Therefore to establish prior registration where there are 2 competing deeds, under section 7(1) of the Registration of Documents Ordinance, it is mandatory for parties to establish that the instruments were executed for valuable consideration.

It was under the aforementioned circumstances that T.S. Fernando, J. held in *Diyes Singho* v *Herath (supra) inter alia* that although no issue was raised by either party in respect of valuable

consideration for the subsequent instrument, the absence of such an issue could not have the effect of absolving the plaintiff from proving that valuable consideration was given. Proof of the existence of a statement in the deed by the notary that consideration was paid is not sufficient to establish the truth of the payment of such consideration.

It is pertinent to observe that section 16 of the Evidence Ordinance provides that where there is a question whether a particular act was done, the existence of any course of business according to which it would naturally have been done is a relevant fact.

Evidence of the existence of the course of business is relevant as laying foundation for the presumption which the court may raise from the course of business when proved. The Court may then presume that the common course of business, has been followed in the particular case.

This presumption is an application of the wider rule, *Omnia preasummuntur rite essa acta.* It proceeds on the recognised fact that the conduct of men in official and commercial matters is to a very great extent uniform and therefore, there is a strong presumption that the general regularity will not in any particular instance be departed from. (E.R.S.R. Coomaraswamy (1955) edition at page 80). A man is likely to do or not to do a thing according as he is in the habit of doing it or not doing it. (Wigmore see 92)

It has been held in *Tilakaratne* v *Samsudeen*[4] that, if a deed is on the face of it regular, it will be presumed that all formalities required by law were complied with in its execution. It is interesting to note that Deed No, 8897(P1) is on the face of it regular. It is presumed that all formalities required by law were complied with in its execution. Therefore, I am of the view that in the absence of an issue to the effect that the formalities required to be followed by law were not followed cannot be taken up as an issue for the first time in the arguments of the learned Counsel in this Court.

The learned District Judge has erred in applying the principle of "*Laesio Enormis*" on to this case and further he had erred in holding that the plaintiff-appellant has failed to identify the *corpus.*

I set aside the judgment and decree of the learned District Judge and direct him to enter judgment for the plaintiff-appellant as prayed for in the plaint.

The appeal of the plaintiff-appellant is allowed with costs fixed at Rs.5000/-.

SOMAWANSA, J. – I agree.

Appeal allowed.