JAYASOORIYA
v
NANAYAKKARA & ANOTHER

SUPREME COURT.
TISSA BANDARANAYAKE, J.
DHEERARATNE, J.
WADUGODAPITIYA, J.
SC 12/92.
CA 349-350/79 (F).
DC COLOMBO 1949/L.
MAY 18, 1994.

Land Development Ordinance No. 19 of 1935 as amended by Act, No. 16 of 1969 – sections 2, 162, 162 (1) – Protected holding – Disposition with consent of Government Agent (G.A.) – Attestation – Should it be in conformity with section 162 – Implication of the amendment – Earlier attestation – Should refer to consent – Amendment silent? – Conforming to spirit of section 162.- exceptio doli.

The plaintiff sought to avoid a certain deed executed in 1965 (prior to the amendment) on the basis that it was attested by a Notary in violation of section 162. It was contended by the plaintiff that the impugned deed was void as there was no written consent of the Government Agent and such consent was not referred to by the Notary in the attestation of such deed. The District Court held with the plaintiff, the Court of Appeal took the same view, but upholding the equitable plea of *exceptio doli* – dismissed the plaintiff's action.

On appeal -

Held:

(1) The prior consent given by the Government Agent is referred to by the Notary in the recital but not in the attestation.

(2) The execution and attestation of the impugned deed have reasonably and sufficiently conformed to the spirit of section 162 though not to the very letter of section 162 as it stood then.

Per Dheeraratne, J.

"Prior consent given by the G.A. is referred to by the Notary in the recital but not in the attestation, one may wonder what extra sanctity was expected to be achieved by the requirement of referring to the G.A.'s document of consent in the attestation".

An **APPEAL** from the judgment of the Court of Appeal reported in 1989 – 1 Sri LR 366.

Case referred to:

Edwin de Silva v *Karunadasa de Silva* 56 NLR 1.

K.S. Tilakaratne for plaintiff-appellant.

Asoka Abeysinghe with *M.C. Jayaratne* for defendant-respondents.

Cur.adv.vult.

June 28, 1994

DHEERARATNE, J.

The plaintiff filed this action on 10.2.1975 against the 1st defendant seeking a declaration that deed No. 422 dated 30.12.1965 (P6) executed by him in favour of the 1st defendant transferring the land called Dambuwemukalana was null and void; a declaration that he was entitled to that land; and for other consequential relief. As it was found that the 1st defendant had transferred the land in dispute *pendente lite* to the 2nd defendant by deed No. 1618 dated 2.10.1975 (P8), the plaint was amended adding the 2nd defendant as a party.

The plaintiff became owner of the subject matter of this action by virtue of a crown grant executed in terms of the Land Development Ordinance No. 19 of 1935 by the State. Thus it was a protected holding within the meaning of section 2 of that Ordinance and as such any disposition by the plaintiff required the prior written consent of the Government Agent. The plaintiff did obtain such consent of the Government Agent Puttalam by letter No. LRO/ LM/67 dated 30.9.1965 to transfer the land to the defendant. The ground on which plaintiff was seeking avoidance of the deed P6 was that it was attested by a notary in violation of the provisions of section 162 (later amended by Act No. 16 of 1969). That section as it stood at the material time read as follows:

(1) A notary shall not attest any deed operating as a disposition of a protected holding unless the written consent of the Government Agent to such disposition shall have been previously obtained nor unless such deed shall have attached thereto the document by which the Government Agent granted his consent to the disposition sought to be effected by such deed. Such document of consent shall be specifically referred to by the notary in the attestation of such deed.

(2) A deed executed or attested in contravention of the provisions of this section shall be null and void for all purposes.

The trial judge gave judgment for the plaintiff on the basis that the deed P6 was null and void; the Court of Appeal took the same view on P6 but upholding the equitable plea of *exceptio doli* taken up for the first time appeal on behalf of the defendants, dismissed the plaintiff's action with costs.

The District Court as well as the Court of Appeal in declaring the deed P6 was a nullity as it contravened section 162 thought that they were bound by the reasoning of the Supreme Court in the case of *Edwin De Silva* v *Karunadasa De Silva*(1). According to section 162(1) no notary shall attest any deed operating as a disposition of a protected holding unless: – (a) the written consent of the GA shall have been previously obtained (b) such written consent is attached to the deed; and (c) such document of consent shall be specifically referred to by the notary in the attestation of the deed. In *Edwin De Silva's* case *(supra)* the consent of the GA was not referred to at all in the impugned deed. It was alleged that the document of consent was attached to the deed but the Supreme Court rejected this suggestion as it may well have been obtained and attached subsequent to the execution of the impugned deed (see page 2). In the present case there is no dispute (a) that the written consent was obtained previously and (b) such document of consent was attached to the original of deed P6. The prior consent given by the GA is referred to by the notary in the recital but not in the attestation. One may wonder what extra sanctity was expected

to be achieved by the requirement of referring to the GA's document of consent in the attestation. The purpose of the section appears to be clear, that is, the prevention of state land meant to 'provide for systematic development' (see preamble) falling into undesirable and unsuitable hands. I may further observe that the party who has cause to complain of any unauthorized alienation by a grantee of State land is the State itself. Far from raising any objection regarding the validity of deed P6 the State gave permission to 1st defendant, the grantee on P6, to alienate the land again to 2nd defendant by deed P8. It is material to note that the legislature in its anxiety to obviate the manifest rigours of the operation of section 162 as it stood, amended it to read as follows:-

> *"162(1) A notary should not attest any instrument operating as a disposition of a holding which contravenes the provisions of this Ordinance.*
>
> *(2) An instrument executed or attested in contravention of the provisions of this section shall be null and void."*

I hold that for the foregoing reasons the execution and attestation of deed P6 have reasonably and sufficiently conformed to the spirit of section 162 through not to the very letter and that therefore deed P6 is not null and void. In the view I have taken that P6 was validly executed and attested, the entire foundation of the plaintiff's action collapses and I need not go into the further question as to whether the plea of *exceptio doli* is available to the defendants to resist the action. The appeal is dismissed; judgments of both the District Court and the Court of Appeal are set aside. The plaintiff's action is dismissed and in view of the singular circumstances of this action the parties will bear their own costs of litigation in all courts.

TISSA BANDARANAYAKE, J. – I agree.

WADUGODAPITIYA, J. – I agree.

Appeal dismissed.

Plaintiff's action dismissed.