

FERNANDO
v
FERNANDO AND OTHERS

COURT OF APPEAL
WIJAYARATNE, J. AND
SRIPAVAN, J.
CALA 106/01 (LG)
DC PANADURA 1512/L
AUGUST 23, 2004

Minority – Minor – Transferring property to mother to enable mother to obtain a loan-Minor living with parents – Bank seeking to parate execute property – Minor challenging the Bank's right to sell – Is the transfer deed void? – Contract void prima facie? – Fraud on the part of parents?

The petitioner, minor daughter of the respondent transferred her land to her parents, to enable them to mortgage the land to raise a loan from the Bank; as there was default, the Bank sought to parate execute the property.

The petitioner (now a major) sought a declaration that, her deed to her parents and the mortgage bond be rendered void on the basis of minority of the petitioner at the time the property was transferred to her parents and sought injunctive relief preventing the Bank from alienating the property.

The District Judge refused the injunctive relief, drawing a presumption that as the plaintiff-petitioner is living at the same address as her parents, the petitioner is attempting a fraud to prevent the sale of the property.

Held:

- (1) In view of the very fact of the minority of the transferor the alleged transfer is a contract void prima facie.
- (2) The mere fact of her living with her parents and being silent for one and half years after attaining the age of majority is not capable of establishing any act of manifestation of her intention to ratify a transaction but a practice only in the culture of the society she lives in.
- (3) Whether the plaintiff-petitioner ratified such transfer even impliedly is a matter that should have been proved in relation to some act on her part manifesting her intention to ratify same.

Per Wijayaratne, J.

"Even if it is considered, without any proof of fact that the 1st and 2nd defendant-respondents who are the parents of the petitioner attempted a fraud on the Bank, in the absence of any proof of the plaintiff-petitioner joining in the same, there is no legal justifiable basis upon which the plaintiff-petitioner be denied her legal rights to vindicate her title and impugn the purported transfer in favour of her mother".

APPLICATION for leave to appeal from an order of the District Court of Panadura, with leave being granted.

Cases referred to:

1. *Kumarawardane Rajapaksa v Podi Appuhamy* – 1989 1 Sri LR 173
2. *Wickremasinghe v Corine de Soysa* – 2002 1 Sri LR 37

Kumara Hettige for plaintiff-petitioner.

A: *H. H. Perera* for 2nd defendant-respondent.

Rohan Sahabandu with *Sunethra Lakshmiweva* for 3rd and 4th respondents.

Cur.adv.vult.

September 27, 2004

WIJAYARATNE, J.

The plaintiff-petitioner filed a plaint in the District Court of Panadura against the 1st to 4th defendant-respondents seeking a declaration that deed No. 3952 dated 24.07.1993 attested by K.A.B.O. Perera, Notary Public, be declared void on the basis of the minority of the plaintiff, the transferor therein and seeking restitio in intergrum and for a further declaration that Mortgage Bond No. 474 dated 15.2.1994 be declared void and for the grant of an interim injunction and an enjoining order pending the grant of an interim injunction restraining the 3rd and 4th defendants from auctioning, selling, mortgaging or leasing the property described in the schedule II of the plaint, which the plaintiff-petitioner claimed title to. 01

The learned District Judge who refused to issue an enjoining order on the ground that there is no urgency, however issued notice 10

of injunction on the 3rd & 4th defendant-respondents who had shown objection to the grant and issue of interim injunction as prayed for. The learned District Judge having considered the application for the issue of interim injunction and the objections shown to it and the submissions made on behalf of respective parties, refused the interim relief sought by plaintiff-petitioner. In his order refusing the relief the learned District Judge has confessed that he is proceeding to refuse the application on his having concluded without considering any of the facts, that the plaintiff-petitioner who lives at the same address as the 1st and 2nd defendants who are her parents, is attempting a fraud to prevent the sale of the property and that the petitioner is acting in collusion with her parents. He also states that the party seeking injunctive relief from Court should come to Court with clean hands. 20

Being aggrieved by the order of refusal of injunctive relief, the plaintiff-petitioner filed this application, seeking to set aside the order of the learned District Judge and direct the learned District Judge to issue an interim injunction. When the inquiry into the application was taken up the Counsel representing the respective parties agreed that the substantive matter with regard to the question of law to be decided in appeal be disposed of by way of written submission. Accordingly I proceed to consider the written submission tendered and make order on the application. 30

It is an admitted fact that the plaintiff-petitioner was only 13 years of age at the time she is purported to have signed the impugned deed of transfer No. 3952 in favour of her mother the 2nd defendant-respondent. The fact of her minority at the time is also proved by the production of her Birth Certificate No. 5643 marked P5. In view of the very fact of the minority of the transferor the alleged transfer on deed No. 3952 impugned in the action the transfer purported to have taken place is a contract void *prima facie*. Vide *Kumaradasa Rajapakse v. Podi Appuhamy*⁽¹⁾ and *Wickremasinghe v Corine de Soyza*.⁽²⁾ 40

Whether the transfer was ratified by the minor on attaining age of majority is a matter the learned District Judge should have considered on evidence in the light of the objections of the 3rd and 4th defendant-respondents. The ratification permitted under 50

Roman Dutch Law may be express or implied manifest from some act by the minor, the plaintiff-petitioner, manifesting an intention to ratify. Vide *Wickremasinghe v Corine de Soyza (supra)*. The learned District Judge did not, as confessed by him in his order consider any of the facts. However he drew a presumption on the fact of the plaintiff-petitioner living at the same address as her parents the 1st and 2nd defendant-respondents, that the plaintiff is attempting a fraud to prevent the sale of the property. When the plaintiff-petitioner in her plaint prayed for the declaration that the Mortgage Bond no. 474 be declared void by reason of the mortgagor acquiring the rights she mortgaged on a transfer which is void, it is clear that the plaintiff-petitioner instituted proceedings with the sole intention of preventing the sale by way of parate execution at the hands of the 3rd and 4th defendant-respondents. However the fact that the petitioner, who attained the age of majority just one and half years prior to institution of action residing with her parents at the same address is no reason or justification for such a presumption, specially in considering the culture and the traditions in this country where a young female, irrespective of her age would live with and sometimes depend on her parents until she is given in marriage. 60 70

The learned Counsel for the 3rd and 4th defendant-respondents argue that the plaintiff-petitioner living with her parents had misrepresented as a major and at the age of 13 years she was in a position to understand the nature of her transactions. He in fact refers to the notaries attestation that the transferor is not known to the notary who has executed more than 3900 deeds, an exceptionally experienced notary by mere reason of such large number of attestations, who has certified that a sum of Rs. 100,000/= being paid in cash in his presence. In my view this is the beginning of the so-called fraud perpetrated on the plaintiff-petitioner. If the notary, who is also an attorney-at-Law, with such wide experience could not observe the very tender years of the plaintiff-petitioner at 13 years of age, the only possible conclusion is that either the notary was not stating the truth or that one who signed the deed in the name of the plaintiff-petitioner could have been someone impersonating her. However this is a matter of evidence and there is no justification in law to draw any presumption as to the execution without the same being proved by evidence. Equally suspicious is the role of the 3rd and 4th 80 90

respondents, who acting through their employees accepted a property valued at Rs. 150,000/- just six months before the same was offered as security for a loan of over Rs. One point Two Million, never probing into the question of the transferor being a minor at the time of acquiring the same as manifest on the deed in her favour. If the learned District Judge considered the obvious facts on documents, which he confesses not to have considered, he would not have presumed things without consideration of relevant facts. In any event it is not up to the learned Counsel for the 3rd and 4th respondents to enunciate law and say that at the age of 13, the plaintiff-petitioner was in a position to understand the nature of the transaction, when the law says that a minor does not have the capacity to understand the nature and effect of contracts. 100

The learned District Judge has concluded that the transferee who is the mother of the plaintiff-petitioner was fully aware of the minority of age of the transferor and he has held that fact against the plaintiff-petitioner simply because she lived with the parents since the execution of the deed to the time of institution of action. As referred to earlier in this order the mere fact of a minor child living with the parent even after attaining age of majority is not possible of an attribution of fraudulent intention unless there is some material evidence establishing her acting in concert with her parents to defraud the bank. More over the learned District Judge has interpreted the 1st and 2nd defendants-respondents failure or inability to repay the loan as an attempt to defraud the bank. He has simply overlooked the fact of the 1st and 2nd defendant-respondents having repaid over Rs. One point Two million to the 3rd respondent bank as admitted in their statement of objection (paras 10 and 11). Inability to meet one's liability in no way can be interpreted as an attempt or intention to defraud. The learned District Judge appears not to have had any clear view about what is fraud, and drawn a presumption without any basis either of law or of any fact. 110 120

He also has considered the fact that the plaintiff-petitioner has not sought to impugn the deed of partition. It appears that the learned District Judge has not paid any attention to the legal aspect of the matter and it is up to the plaintiff-petitioner only, to ratify or not to ratify a contract and in all the circumstances she may not choose to impugn what is advantageous or beneficial to her as she lawfully might. 130

Even if it is considered, without any proof of fact, that the 1st and 2nd defendant-respondents who are parents of the plaintiff-petitioner, attempted a fraud on the 3rd defendant-respondent bank, in the absence of any proof of the plaintiff-petitioner joining in the same, there is no legal or justifiable basis upon which the plaintiff-petitioner be denied of her legal rights to vindicate her title and impugn the purported transfer, in favour of her mother. Whether the plaintiff-petitioner ratified such transfer, even impliedly is a matter that should have been proved in relation to some act on her part manifesting her intention to ratify the same vide 140 *Wickremasinghe v Corine de Soyza (supra)*. The mere fact of her living with her parents and being silent for one and half years after attaining the age of majority is not capable of establishing any act of manifestation of her intention to ratify a transaction but a practice only in the culture of the society she lives in.

The learned District Judge has no basis justifiable in law or on facts, when he stated that the plaintiff-petitioner has not come to Court with clean hands. There is not a single fact established to justify a conclusion that that her hands are dirty with acts of fraud. In the circumstances of the matter under review, the learned District Judge should have appreciated the fact that a sale by the 3rd 150 respondent in parate execution would have tremendously prejudiced the rights of the plaintiff-petitioner to vindicate her rights. The mischief that is intended to avoid is the disposition by way of sale on the basis of an alleged transfer impugned in the proceedings before the learned District Judge, which should have been enjoined pending determination of the rights of the parties. The Learned District Judge has refused the same without any factual or legal basis but on mere presumption drawn and not supported by any evidence. 160

In these circumstances, and in view of the facts glaring in the face of injustice of the refusal, of interim relief, I allow the appeal and set aside and quash the order refusing the application dated 08.03.2001 and grant the interim injunction as prayed for in prayer (d) or (e) in the plaint. The plaintiff-petitioner is entitled to taxed costs as against the 3rd and 4th defendant-respondents.

It is also directed that the trial of the action before the District Court be heard and concluded by a judge other than the learned District Judge who made the impugned order.

The Registrar of this Court is directed to communicate this order 170 to the District Judge of Panadura.

SRIPAVAN, J. I agree.

Appeal allowed