

DISSANAYAKAGE MALINI
v.
MOHAMED SABUR

SUPREME COURT
G. P. S. DE SILVA, CJ.,
PERERA, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 124/97
C.A. NO. 490/92 (F)
D.C. KEGALLE NO. 2798/L
DECEMBER 10, 1998

Prevention of Frauds Ordinance – Section 2 of the Ordinance – Transfer of land by deed – Informal agreement to retransfer the property – Relevance of such agreement where fraud is established.

The plaintiff alleged that as a result of a fraud practised by the 1st defendant and her father (the 2nd defendant), he transferred to the 1st defendant by a deed (P1) 3 acres of rubber land for Rs. 6,000. In his evidence the plaintiff stated *inter alia*, that on the day the transfer was executed, the 1st defendant also executed informal writing (P2) witnessed by her father agreeing to retransfer the land to the plaintiff upon the plaintiff tendering the sum of Rs. 6,000 within a period of 4 years. The 1st defendant refused to retransfer the property as agreed; and that the actual value of the land was Rs. 30,000. The plaintiff alleged that the deed P1 was invalid on the ground of fraud.

Held:

P2 being a non-notarial document was of no force or avail in law in view of section 2 of the Prevention of Frauds Ordinance. However, in a case where fraud is pleaded, put in issue and is established by the evidence on record, it is open to the court to take into consideration such document.

Per G. P. S. de Silva, CJ.

"The rigour of the provisions of section 2 of the Prevention of Frauds Ordinance may, on proof of fraud as in the present case, be relaxed on the principle that "the Statute of Frauds may not be made an instrument of fraud."

Cases referred to:

1. *Setuwa v. Ukkuwa* – 56 NLR 337.
2. *Fernando v. Cooray* – 59 NLR 169.

APPEAL from the judgment of the Court of Appeal.

Surath Piyasena for 1st defendant-appellant.

D. A. E. Thewarapperuma with *Mrs. S. Rajoo* for plaintiff-respondent.

Cur. adv. vult.

January 18, 1999.

G. P. S. DE SILVA, CJ.

The plaintiff by deed of transfer No. 185 dated 15th March, 1975, attested by S. Wickremasuriya, Notary Public, (P1) transferred the land in suit to the 1st defendant for a sum Rs. 6,000. The 2nd defendant is the father of the 1st defendant. On the same day (15. 3. 75), the 1st defendant executed an informal writing by which he agreed to retransfer the said land to the plaintiff upon the plaintiff tendering the sum of Rs. 6,000 within a period of 4 years. The informal writing dated 15. 3. 75 was marked as P2 at the trial. The 2nd defendant was one of the witnesses to P2.

The plaintiff instituted these proceedings against the 1st and 2nd defendants seeking, *inter alia*, an order directing the retransfer of the land conveyed on P1 on payment of the sum of Rs. 6,000 by the plaintiff to the 1st defendant, and a declaration that P1 is null and void on the ground of fraud.

At the trial the plaintiff raised, *inter alia*, the following issues (as translated) :

1. Did the deed bearing No. 185 dated 15.3.75 which stated that the consideration was a sum of Rs. 6,000 reflect the true nature of the transaction between the parties?
2. If issue No. 1 is answered in the negative, has the plaintiff been fraudulently deceived?

3. If so, is the plaintiff entitled to a retransfer of the land morefully described in the schedule to the plaint and the aforesaid deed dated 15.3.75?

After trial, the District Court answered issue No. 1 in the negative and issues Nos. 2 and 3 in the affirmative and entered judgment in favour of the plaintiff. The appeal of the defendants to the Court of Appeal was unsuccessful; hence the present appeal by the 1st defendant to this court against the judgment of the Court of Appeal.

The plaintiff in his evidence stated *inter alia* –

- i. That in January, 1975, he was in urgent need of a sum of Rs. 10,000 to redeem a mortgage and for some other purpose.
- ii. He contacted a broker named Dias Abeysinghe and had told the broker that the only land he had was a rubber land of 3 acres in extent.
- iii. The broker had contacted the 2nd defendant who told the plaintiff that his daughter, the 1st defendant, had the required money, but the money cannot be given on a conditional transfer of the land. The 2nd defendant insisted on an outright transfer of the land.
- iv. The plaintiff was reluctant to execute an outright transfer of the land but the 2nd defendant had informed the plaintiff that the 1st defendant would retransfer the property to the plaintiff within a period of 4 years provided the plaintiff repaid the consideration of Rs. 6,000.
- v. The aforesaid promise to retransfer the property was set out in the informal writing P2 which was signed by the 1st defendant with the 2nd defendant being one of the witnesses.
- vi. As agreed by P2, the plaintiff has within the stipulated period of 4 years requested the 1st defendant to retransfer the property; the 1st defendant refused to accede to this request.
- vii. Although the consideration set out in P1 was only Rs. 6,000, the actual value of the land was Rs. 30,000.

The crucial issue in the case was whether the 1st defendant together with her father, the 2nd defendant, had practised a fraud upon the plaintiff. On this issue the District Court, upon a careful consideration of the evidence, accepted the plaintiff's evidence. The finding of the District Court was that the defendants together have acted with a fraudulent intention in avoiding the plaintiff's repeated attempts to tender the sum of Rs. 6,000 within the stipulated period of 4 years. At the trial the 1st defendant who was the vendee on P1 did not give evidence. It was only the 2nd defendant who gave evidence and his evidence that the plaintiff failed to tender the sum of Rs. 6,000 within the stipulated period of 4 years was rejected by the trial Judge. The Court of Appeal affirmed the finding of the trial Judge that the defendants have together committed a fraud upon the plaintiff. On a consideration of the totality of the evidence, I am of the opinion that the concurrent findings on the issue of fraud must remain undisturbed.

Mr. Piyasena for the 1st defendant-appellant relied strongly on the case of *Setuwa v. Ukkuwa*⁽¹⁾, as well as the case of *Fernando v. Cooray*⁽²⁾. It is to be noted that no fraud was alleged in these two cases and hence these judgments are of little assistance in deciding the present appeal. (see *Fernando v. Cooray (supra)* at 173, 2nd paragraph).

It is true as submitted by Mr. Piyasena for the appellant that P2 is a non-notarial document and is of no force or avail in law in view of section 2 of the Prevention of Frauds Ordinance. However, in a case where fraud is pleaded, put in issue, and is established by the evidence on record it is open to the court to take into consideration the non-notarial document P2. The rigour of the provisions of section 2 of the Prevention of Frauds Ordinance may, on proof of fraud as in the present case, be relaxed on the principle that "the Statute of Frauds may not be made an instrument of fraud". It seems to me that on the proved facts and circumstances of this case the application of this principle is warranted.

For these reasons the appeal fails, and is dismissed with costs.

PERERA, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.