

VAIDHIANATHAN AND ANOTHER
V.
IDROSS MOHIDEEN AND OTHERS

COURT OF APPEAL
DHEERARATNE J., AND
WJETUNGA J.
C.A. NO. 586/77 (F)
D.C.COLOMBO 12310/L.
JANUARY 19, 1988.

Trusts — Sale of land — Agreement to retransfer — Existing contract — Specific performance — Trusts Ordinance s. 93 and 3(K) — Prescription.

The 2nd defendant transferred the premises in suit to the 1st defendant by Deed No. 1389 dated 18.1.47 (P2/2D2). On the same day by Deed No. 1390 attested by the same Notary (and duly registered) the 1st defendant agreed to retransfer the said premises to the 2nd defendant at the end of 15 years from 18.1.47 on repayment of the consideration of Rs. 3000/-. On 7.4.57 however the 1st defendant transferred the said premises to the plaintiffs by Deed No. 1464 attested by the same Notary. On 18.4.63 the 1st defendant purported to transfer the same property to the 2nd defendant by Deed No. 4177. The 3rd defendant claimed to be tenant of the premises first under 1st defendant but later he had attorned to the 2nd defendant. On the death pending action of the 3rd defendant the 3A and 3B defendants were substituted in her room. They claimed to be tenants under the 2nd defendant. The plaintiffs claimed the land by purchase and prescription. The 2nd defendant claimed on the basis of trust and also re-purchase.

Held:

As the plaintiff had purported to acquire the premises from the 1st defendant with notice of an existing contract between the 1st defendant and 2nd defendant of which specific performance could be enforced the plaintiff held the property in trust to retransfer the property to the 2nd defendant, s. 93 of the Trusts Ordinance.

The agreement to retransfer (Deed No. 1390 — P.3) was an existing contract between the 1st and 2nd defendants in that the vinculum juris still remained unloosened at the time of action. The bond remained intact until the contract was performed or mutually cancelled or set aside by a competent court.

This "existing contract" between the 1st and 2nd defendants was a contract of which specific performance could be enforced. The plaintiffs bought with notice of this existing contract. A person is said to have notice of a fact either when he actually knows the fact, or when, but for wilful abstention or gross

negligence he would have known it — section 3(K) of the Trusts Ordinance. For the purposes of s. 93 of the Trusts Ordinance due registration is notice. The Deed P3 was duly registered and the plaintiffs would have got to know of P3 if they had caused a search to be made in the Land Registry before they bought. Hence they had notice. As the plaintiffs held the property in trust the plea of prescription fails. They must re-transfer the property to the 2nd defendant. Failing that the Registrar of the Court should execute the deed of re-transfer.

Cases referred to

1. *Thidoris Perera v. Eliza Nona* 50 NLR 176
2. *Silva v. Salo Nona* 32 NLR.81, 86

APPEAL from judgment of the District Judge of Colombo.

N.R.M. Daluwatte P.C. with *A. Chinniah* for plaintiff — appellants.
F.C. Perera for defendant — respondents.

Cur. adv. vult.

March 30, 1988

WIJETUNGA, J.

The plaintiffs-appellants filed this action seeking a declaration that they were entitled to the land and premises in suit and for ejectment of the defendants and damages.

The plaintiffs claimed that the 1st defendant who was entitled to the said land and premises by right of purchase and by prescription had transferred the same to them by deed No. 1464 dated 7.4.57 (P1) and that the plaintiffs and their predecessors in title had been in prescriptive possession of the same. They stated that the defendants who had no manner of right or title have been in wrongful possession of the same since May, 1966, to the plaintiffs' loss and damage at Rs. 35/- p.m.

The 1st defendant did not claim any right or title to the premises in suit and denied that he was in possession thereof. He sought to be discharged from the proceedings.

The 2nd defendant, while admitting the bare execution of deed No. 1464 dated 7.4.57 (P1), set out the circumstances in which

the execution of that deed took place. She stated that, as owner of the premises in suit, she sold and transferred the same to the 1st defendant by deed No. 1389 dated 18.1.47 (P2/2D2). On the same day, by deed No. 1390 (P3) attested by the same Notary and duly registered, the 1st defendant agreed to retransfer the said land and premises to the 2nd defendant at the end of 15 years from 18.1.47. With notice of the said agreement, the plaintiffs have purported to acquire the same by deed No. 1464 dated 7.4.57 (P1). The 1st defendant had thereafter retransferred the premises in suit by deed No. 4177 dated 18.4.63 (2D1) to the 2nd defendant. She claimed that the plaintiffs held the said land and premises under a constructive trust for her benefit and sought a declaration to that effect. In her claim in reconvention, she further prayed for a decree requiring the plaintiffs to transfer the premises in suit to her.

The 3rd defendant's position was that he was in occupation of the premises for over 15 years and was originally a tenant under the 1st defendant. Subsequently, in or about August, 1962 he attorned to the 2nd defendant as her tenant and continued to occupy the said premises bona fide and as her lawful tenant. He prayed that the plaintiffs' action be dismissed. The 3A and 3B defendants, who were substituted in place of the deceased 3rd defendant, agreed to abide by the answer of the 3rd defendant.

It was admitted that the 2nd defendant was the original owner of the premises in suit, that the said premises were transferred by the 2nd defendant to the 1st defendant on deed No. 1389 dated 18.1.47; that on the same day, agreement No. 1390 was entered into between the 1st and 2nd defendants, that the 1st defendant executed deed No. 1464 dated 7.4.57 in favour of the plaintiffs and that the 1st defendant executed deed of transfer No. 4177 dated 18.4.63 in favour of the 2nd defendant.

The learned District Judge, after trial, held that under the agreement P3 the 1st defendant was not entitled to transfer the premises in suit to any person until 1962 and any such purported transferee would be bound by the terms and conditions of P3 and would hold the said property in trust for the 2nd defendant. He further held that the plaintiffs did not get valid

title under P1 and that the 2nd defendant became entitled to the same under 2D1. He was of the view that the plaintiffs had neither valid paper title nor prescriptive title and that the 2nd defendant was entitled to have a deed of conveyance in respect of the said property executed by the plaintiffs in her favour, failing which the Registrar of the Court was authorised to execute such deed. He held with the 2nd defendant and dismissed the plaintiffs' action with costs. The present appeal is from that order.

Learned President's Counsel for the appellant submitted that as the agreement P3 contemplated a retransfer of the property in suit at the end of 15 years without claiming any money by way of consideration and as the attestation of 2D1 shows that the full consideration of Rs. 3,000/- had been paid in the presence of the Notary, it had no relevance to the original agreement P3 which apparently had got abandoned. But, 2D1 makes specific reference to 2D2 on which the 2nd defendant transferred the property in suit to the 1st defendant and the attestation of 2D2 refers to the agreement P3. All three instruments have been attested by the same Notary. One cannot lose sight of the fact that the property in question was being retransferred after 15 years, when land values had appreciated considerably and the 2nd defendant was paying only the original consideration on P2, viz. Rs. 3,000/-. This, in my view, indicates that the retransfer is referable to the agreement P3.

It was further submitted on behalf of the appellant that the learned trial judge was in error when he held that the plaintiffs held this property in trust for the 2nd defendant.

Under Section 93 of the Trusts Ordinance, "Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

Provided that in the case of a contract affecting immovable property, such contract shall have been duly registered before such acquisition."

The term 'existing contract' in Section 93 of the Trusts Ordinance came up for consideration in *Thidoris Perera v. Eliza Nona*, (1) where it was held that the term was used in the sense of a contract in which the vinculum juris still remains unloosened at the time of action. Wessels' Law of Contract in South Africa was quoted there that "until the contract has been performed or mutually cancelled or set aside by a competent court, the bond which unites the contracting parties remains intact."

Thus, in the instant case, there was an existing contract between the 1st and 2nd defendants, under and by virtue of agreement No. 1390 dated 18.1.47. (P3), requiring the 1st defendant to retransfer the said land and premises to the 2nd defendant.

This was a contract in relation to which specific performance could be enforced. Being a contract affecting immovable property, it should have been duly registered. The learned trial judge has examined the question of registration and was satisfied that P3 had been duly registered.

It was also necessary that the transferee, i.e. the plaintiffs in this case, should have had notice of the existing contract. Notice is defined in Section 3 (K) of the Trusts Ordinance. "A person is said to have 'notice' of a fact either when he actually knows that fact, or when, but for wilful abstention from inquiry or gross negligence, he would have known it" On the facts of the present case, but for wilful abstention from inquiry, the plaintiffs would have known that such a contract existed. The learned trial judge adverts to this aspect of the matter when he states that if the plaintiffs had caused a search to be made at the Land Registry, they would have become aware of the correct position. Due registration of a contract affecting land has been held, for the purposes of section 93 of the Trusts Ordinance, to be notice. — *Silva v. Salo Nona* (2)

All the elements essential for a trust to arise under Section 93 were therefore present in the instant case. Hence, the learned trial judge was right when he came to the conclusion that the plaintiffs held the property in question, in trust for the 2nd defendant.

Learned counsel for the appellant further submitted that the trial judge was in error when he came to the conclusion that the 1st defendant had duly retransferred the premises in suit to the 2nd defendant on 2D1 and consequently the plaintiffs have no title to the same. There is merit in this submission, although it does not affect the result of the case. P1, on which the plaintiffs rely for title had been duly registered and did give them legal title, subject to P3, the agreement to retransfer, which had been previously registered. At the time the 1st defendant executed 2D1 in favour of the 2nd defendant, purporting to retransfer the property, he was not competent to do so as the legal title was already with the plaintiffs. But, that is not to deny the right of the 2nd defendant to follow the property under the agreement P3. The resulting position is that she failed to get legal title under 2D1 and it is precisely for this reason that it became necessary for the 2nd defendant to pray for a decree requiring the plaintiffs to transfer the premises in suit to her, under a valid deed of conveyance.

The learned District Judge has rightly concluded that the plaintiffs, in whose favour the property was transferred by the 1st defendant on 7.4.57 by P1, did not have prescriptive title to the same.

Thus, the relief granted to the 2nd defendant to have a deed of conveyance executed by the plaintiffs in her favour, failing which the Registrar of the Court was to execute such a deed, is warranted by law, as the legal title which was with the plaintiffs would thereby be transferred to the 2nd defendant.

For the above reasons, I affirm the judgment of the court below dismissing the plaintiffs' action with costs and allowing the 2nd defendant's claim in reconvention.

The appeal is dismissed with costs.

DHEERARATNE, J.

I agree

Appeal dismissed.