

GUNASEKERA AND ANOTHER

v,

UYANGODAGE

COURT OF APPEAL.

JAMEEL, J. AND ABEYAWIRA, J.

C.A. 329/74 (F).

D.C. COLOMBO 12617/L.

DECEMBER 1 AND 5, 1986.

Trusts – Transfer by deed – Ss. 91 and 92 of Evidence Ordinance – Oral evidence of trust – Constructive trust.

The plaintiff executed a transfer in the name of 1st defendant all arrangements for the transaction being made by the 2nd defendant. The plaintiff sued the defendants for a declaration that they held the property in trust for her alleging an oral agreement to retransfer the property to her within three years on payment of Rs. 17,000. In the meantime the plaintiff was to remain in possession and service the housing loans while the defendants would assist her to raise a loan from a third party if the need arose. Although the consideration on the deed in favour of the 1st defendant was stated to be Rs. 17,000 only Rs. 10,000 was paid in terms of the agreed arrangement. The plaintiff's suit was filed after the lapse of the three years and no tender of the money had been made within the three years.

Held—

Apart from the fact that ss. 91 and 92 of the Evidence Ordinance do not permit the receipt of evidence to vary the terms of a notarially executed deed so as to superimpose on a simple transfer deed characteristics such as mortgages or agreements to retransfer yet even on the facts no trust can be held to have been established. Time was of the essence of the alleged oral agreement and the constructive trust yet there was no evidence that the money was even tendered in time.

Cases referred to:

- (1) *Perera v. Fernando* – (1914) 17 NLR 486.
- (2) *Adaicappa Chetty v. Caruppen Chetty* – (1921) 22 NLR 417 (P.C.).
- (3) *Setuwa v. Ukku* – (1953) 56 NLR 337.
- (4) *William Fernando v. Roslyn Cooray* – (1957) 59 NLR 169.
- (5) *Siriwardena v. Sarnelis* – (1957) 59 NLR 182.
- (6) *Saminathan Chetty v. Vendor Poorten* – (1932) 34 NLR 287 (P.C.).
- (7) *Vallyammai Atchi v. Majeed* – (1947) 48 NLR 289.
- (8) *Saverimuttu v. Thangavelautham* – (1954) 55 NLR 529 (P.C.).

APPEAL from judgment of the District Court of Colombo.

Dr. H. W. Jayewardene, Q.C. with *T. B. Dillimuni, Miss Keenawinna and Miss Wattege* for defendant-appellants.

J. W. Subasinghe, P.C. with *Miss Saman Seneviratne and Miss K. de Silva* for plaintiff-respondents.

Cur. adv. vult.

January 20, 1987.

JAMEEL, J.

The plaintiff-respondent by his deed No.359 (P1) of 19.8.1986 transferred the corpus in this case to the 1st defendant-appellant who is the mother of the 2nd defendant-appellant.

On the face of it deed P1 is a simple outright unconditional transfer of this land for a sum of Rs. 17,000. Both the attestation by Notary U. R. Wijetunga to this deed and so also his evidence given in this case shows that out of the consideration of Rs. 17,000 only Rs. 10,000 had been paid in cash at the time of the execution of the deed. The balance Rs. 7,000 was said to have been 'previously received'.

The plaintiff has admitted the execution of this deed. His position is that he neither handed over the deed P1 nor the possession of the land to the defendants. The 2nd defendant admitted that it was he who negotiated this sale and it was he who had requested the notary to make the necessary search in the Land Registry. According to the 2nd defendant it was to be an outright sale for Rs. 35,000 as he had undertaken the burden of settling a National Housing loan of Rs. 18,000. He further alleged that Rs. 7,000 had been paid earlier and that after the execution of the deed the plaintiff had agreed to hand over vacant possession within three months with a promise to pay Rs. 600 as rent for those three months. It transpired in evidence that this money was not paid nor was mother or son placed in possession of the premises as promised.

The plaint in this case has been filed on 17.12.1969. Thereafter the appellants have paid Rs. 5,200 to the Commissioner of National Housing in part liquidation of the loan (Vide: D6 to D9). It is the plaintiff's case that there was no requirement for the defendants to have paid any part of that loan. Indeed, the plaintiff's case is that this

deed was written in that form at the request of the 2nd defendant from whom, he the plaintiff, had obtained a loan of Rs. 10,000. The plaintiff denied that he had ever agreed to give vacant possession of the premises at any time to any one and further denied that he had agreed to pay any rent whatsoever. On the contrary his position was that he had agreed to repay Rs. 17,000 within three years of the execution of the deed P1, that is to say on or before 10.8.1969 and obtain a retransfer of the premises.

The 2nd defendant does admit that about three weeks after the execution of P1 the plaintiff did come to him and had requested the retransfer of the land. It is the 2nd defendant's position that he had very reluctantly agreed to do so only if the money was repaid in a very very short time. The next time he heard from the plaintiff was when the plaintiff came with a retransfer agreement deed drafted by the same notary Mr. Wijetunga. The 2nd defendant refused to sign that deed. Notary Wijetunga speaks of having drafted such a deed at the request of the plaintiff, and that he had done so shortly after the execution of deed P1. Nevertheless that 2nd defendant had then agreed to effect the retransfer should the plaintiff repay the money within a week. However he had categorically denied the plaintiff's claim that there had been such an agreement either before or at the time of the execution of P1.

The evidence quite clearly reveals that the 1st defendant in whose name the deed had been written had had no part in the negotiations, nor in the drafting of the deeds. We have only the 2nd defendant's statement that she had provided the cash Rs. 10,000 that had been paid in the presence of the Notary. Apparently she had not been consulted when the 2nd defendant had agreed to the retransfer in the circumstances as admitted to and deposed to by him. She appears to be no more than a nominee of the 2nd defendant for the purposes of circumventing the financial regulations. It does not appear, on the evidence, that even the 2nd defendant had intended that the beneficial interests should pass on to the 1st defendant.

According to the plaintiff the beneficial interest was not to have passed even to the 2nd defendant. The full agreement as stated by the plaintiff was that:—

- (1) The plaintiff would be paid Rs. 10,000 which he was urgently in need of at that time,

- (2) That within three years of the execution of the deed the plaintiff was to repay Rs. 17,000,
- (3) That the deed would therefore be prepared as for a consideration of Rs. 17,000, and in favour of the 1st defendant,
- (4) That the defendants will render to the plaintiff all assistance needed to enable the plaintiff to raise a loan from a third party if the need to do so arises, and
- (5) That in the meantime the plaintiff will keep paying all instalments that fall due for payment on the housing loan.

It is the existence of these terms, says the plaintiff, that imposes on the defendants the obligation to hold the property in trust for him. The learned District Judge has accepted this position and has entered judgment for the plaintiff. It is from that judgment that the defendants have preferred this appeal.

Learned Queen's Counsel for the appellants strongly relied on the decisions of the Privy Council and of our Supreme Court in the cases of *Perera v. Fernando* (1), *Adaicappa Chetty v. Caruppen Chetty* (2), *Setuwa v. Ukku* (3), the 5-bench decision in the cases of *William Fernando v. Roslyn Cooray* (4) and *Siriwardena v. Sarnelis* (5). It appears from these decisions that while parole evidence is always available to prove a trust (vide the Privy Council decisions in *Saminathan Chetty v. Vendor Poorten* (6), *Vallyammai Atchi v. Majeed* (7) and *Saverimuttu v. Thangavelautham* (8) and while the courts will not permit the Statute of Frauds to be used so as to perpetuate a fraud sections 91 and 92 of the Evidence will not permit the receipt of evidence to vary the terms of a notarially executed deed which on the face of it (as in P1) is a simple straightforward transfer and more particularly will prevent parole evidence being led to superimpose on a simple transfer deed characteristics such as mortgages or agreements to retransfer—even when those agreements between those parties are contained in contemporaneous non-notarially executed documents. However as this appeal can be disposed of on the facts a detailed analysis or review of the principles enunciated in these decisions is unnecessary.

At the best, the conditions which the plaintiff seeks to have superimposed on the deed and accordingly the duty which he seeks to impose on the defendants is that they should have, for a period of three years from the date of P1, namely, 10.8.1966, held the property in trust and that he the plaintiff had a right to reclaim it on the payment of Rs. 17,000 to the second defendant. The plaintiff also urges that the defendants should have given him a letter addressed to the State Mortgage Bank indicating that they were prepared to transfer the premises to him. He states that this letter would have helped him to negotiate a loan from the Bank and so pay off the defendants. The defendants had not acceded to his request. At the most, such a refusal could give rise only to an action for damages for breach of contract (as stated in P10 itself). It cannot be an excuse for not finding the money otherwise and so paying off the defendants on or before 10.8.1969. Thus, the plaintiff has failed to do what he had to do even if that condition is enforced. There is no evidence that he had even tendered the money prior to the appropriate date. This plaint has been filed only on 17.12.1969, that is to say, after the lapse of three years. Time, was of the essence of that alleged oral agreement and the Constructive Trust, if at all cannot be a trust contrary to the terms of the agreement itself. In the circumstances therefore, the plaintiff has failed to redeem his property in time and thus his action must fail.

Accordingly, we set aside the judgment and decree and enter judgment dismissing the plaintiff's action but without costs. There will be no judgment for the defendants in reconvention.

ABEYAWIRA, J. – I agree.

Appeal allowed.

Plaintiff's action dismissed.