

JAYASINGHE AND OTHERS

v.

JOTHIWARDANA AND OTHERS

SUPREME COURT

FERNANDO, J. WIJETUNGA, J. AND

GUNASEKARA, J.

S. C. (S. L. A.) No. 81/99

C. A. NOS. 496/93 & 497/93

D. C. RATNAPURA No. 7175/L.

26TH OCTOBER, AND

18TH NOVEMBER, 1999

Vindictory action - Purchase of land with notice of an existing agreement with another person for the sale of that property - Constructive trust - Section 93 of the Trusts Ordinance.

One Wadood was the owner of an undivided one sixth share of Razeena Estate about 60 acres in extent. His share vested in the Land Reform Commission (LRC) under the Land Reform Law No. 1 of 1972. Wadood desired to transfer a portion of the land to his three children by way of an inter family transfer under section 14 of the Law and to own the balance himself. According to a Plan No. 211 made in 1976 and amended in 1981 the extent which he wished to own eventually on a statutory determination under the Law was four acres whilst the extent which he proposed to transfer to his children was seven acres. The statutory determination of the four acres was made only in 1982 leaving out seven acres which the LRC allowed Wadood to transfer to his three children by way of an inter family transfer.

Pending the statutory determination by the LRC and the inter family transfer, Wadood and his children executed an agreement No. 19880 in 1976 to sell a defined eleven acre portion of Razeena Estate indicated in Plan No. 211 for the sum of Rs. 30,000/-. That agreement was duly registered. The full consideration was paid and the defendants were placed in possession. The agreement recited that the LRC had not made its determination indicating that Wadood and his children had no title to the corpus but that they were expecting to obtain title from the LRC. The agreement also provided that if within a month after Wadood and his children obtaining full title and powers of alienation, they failed to execute deeds of transfer of the property or if the said parties failed to

receive rights and powers from the LRC in respect of the said property, then they shall pay the defendants Rs. 30,000/- and a further sum of Rs. 10,000/- as penalty.

After they received necessary title and powers in virtue of the statutory determination and the permission to make the inter family transfer, Wadood and his children by Deed No. 7289 dated 25.4.1985 sold the property in dispute to the plaintiffs for a sum of Rs. 75,000/-. Thereafter, the plaintiffs instituted an action against the defendants for a declaration of title to the land and ejectment and possession.

Held :

- (1) The Court of Appeal had upheld the defendants' plea that agreement No. 19880 was an existing contract of which specific performance could have been enforced, and that therefore the plaintiffs held the land in trust for the defendants in terms of section 93 of the Trust Ordinance; and no substantial question of law arose in respect of that conclusion.
- (2) *Per* Fernando, J.

"..... it cannot be said that the obligation to repay the consideration, together with a penalty of Rs. 10,000/-, was a stipulation for the benefit of the vendors - to allow them an alternative to specific performance. On the contrary, it was intended to provide relief to the purchasers in the event that the LRC refused to release the land; and to give them the right to elect if the vendors defaulted in executing conveyances."

Case referred to :

1. *De Silva v. Senaratne* (1949) 50 NLR 313.

APPEAL from the judgment of the Court of Appeal.

Ms. Maureen Seneviratne, P. C. with *Eardley Seneviratne, J. B. L. Peiris and Gamini Senanayake* for the plaintiffs - respondents - petitioners.

L. C. Seneviratne, P. C. with *S. Mahenthiran* for the defendants - appellants - respondents.

Cur. adv. vult.

June 01, 2000

FERNANDO, J.

The land which is the subject-matter of this action was transferred to the five Plaintiffs-Respondents-Petitioners ("Plaintiffs") by Deed No. 7289 dated 25.4.85. It is admitted that the Plaintiffs then had actual (and not merely constructive) knowledge that their vendors had previously entered into a duly registered Agreement No. 19880 dated 2.6.76 to sell the same land to the three Defendants-Appellants-Respondents ("Defendants"). On 10.7.85 the Plaintiffs instituted this action for a declaration of title to that land, and for ejectment, possession, and damages. Although they succeeded in the District Court, that judgment was set aside by the Court of Appeal, which upheld the Defendants plea that Agreement No. 19880 was an existing contract of which specific performance could have been enforced, and that therefore the Plaintiffs held the land in trust for the Defendants in terms of section 93 of the Trusts Ordinance.

What we have now to decide in this application is whether a substantial question of law arises as to the correctness of the conclusion of the Court of Appeal that Agreement No. 19880 was indeed one of which specific performance could have been enforced. This application was supported last year, and the delay in the preparation of this judgment was because Counsel desired time till March this year to file written submissions.

The facts are not in dispute. One Wadood was the owner of an undivided one-sixth share of Razeena (or Assina) Estate about 60 acres in extent. His share vested in the Land Reform Commission ("LRC") under the Land Reform Law, No. 1 of 1972.

Wadood applied for permission to make transfers to his three children under section 14 of the Law. By letter dated 13.9.74 the LRC informed Wadood that his application for transfers within the family in respect of eight acres had

been approved. That was subject to numerous conditions: (Although the Law refers to such transfers as *inter-family* transfers, they are in fact *intra-family* transfers. However, Wadood did not fulfil the stipulated conditions, and execute such transfers, at that time.)

Plan No. 211 dated 7.3.76 was made by D. W. Ranatunga, Licensed Surveyor, in respect of an eleven-acre block of Razeena Estate. Lot 1 was three acres in extent, and was described as "Statutory Determination", while Lot 2 was eight acres in extent, and was described as "I. F. T. area".

It was thereafter that Wadood and his three children ("the vendors") entered into Agreement No. 19880 dated 2.6.76 to sell a defined eleven-acre portion of Razeena Estate (namely, Lots 1 and 2 in Plan No. 211 dated 7.3.76) to the three Defendants for a sum of Rs. 30,000/-; that Agreement was duly registered; the full consideration was paid; the Defendants were placed in possession; and, in terms of the Agreement, the Defendants took over the entire labour force as their employees, and took responsibility for the payment of wages and EPF benefits.

That Agreement recited that although the LRC had in its final determination recommended divesting that land (and other lands elsewhere) to the parties of the first part ("the vendors"), the statutory Gazette notification had not yet been published. Thus it was quite clear that the vendors had then no title to the corpus, and were expecting to obtain title from the LRC - but the Agreement did not specify *how*: whether by means of a Statutory Determination under section 19 of the Law, or *intra-family* transfers under section 14, or otherwise.

That Agreement is in Sinhala, and clauses 7 and 8 may be translated as follows:

"7. Further, if the parties of the first part did not, within one full month after receiving from the aforesaid LRC full title

and powers of alienation, cause to be executed in favour of the parties of the second part transfer deeds of the said property at the agreed price, or defaulted in so doing, or

if the parties of the first part fail to receive from the LRC the rights and powers which ought to be received in respect of the said property,

then there shall be paid by the four persons bound as parties of the first part to the persons bound as parties of the second part jointly and severally the sum of Rs. 30,000 paid by the parties of the second part together with a further sum of Rs. 10,000 as penalty, and the income derived from the said property during the said period shall be renounced in favour of the parties of the second part, and

further the parties of the first part shall not sell, mortgage, etc. to any outsider the property subject to this agreement to sell, or do any other act which will diminish the value of the said property.

8. Further, that all expenses of the deed of transfer to be executed during the said period, after the receipt from the LRC by the parties of the first part as aforesaid of approval and rights in respect of the said land, shall be borne by the parties of the second part.

I must observe that the vendors obligation to transfer arose only *after* they acquired "full title and powers of alienation".

Nothing happened for over five years. There was neither a Statutory Determination nor an intra-family transfer. On 9.9.81 Plan No. 211 was amended, by another surveyor, and the same eleven-acre corpus was sub-divided into Lot 1A, four acres in extent (consisting of Lot 1 and a portion of Lot 2), and Lot 2A seven acres in extent (being the remaining portion of Lot 2). Lots 1A and 2A were described as "Statutory determination" and I. F. T. area", respectively.

ERRATA

1. (2000) 1 Sri L. R., Part 5, Page 128, line 8, substitute for the words and figures "SC APPLICATION NO. 188/97", the following :

"SC APPEAL NO. 188/97"

2. (2000) 1 Sri L. R., Part 8, Page 209, line 1, substitute for the word "officer" the following words :

"officer. The learned D. S. G. stated"

Thereafter Wadood obtained title to a four-acre extent of "Assina" Estate, described as Lots 1106 and 1108 in the Surveyor-General's FVP Plan No 39, by virtue of the Statutory Determination dated 23.6.82 made under section 19 published in the Gazette of 23.6.82. Both Counsel have proceeded on the basis that this corresponded to Lot 1A in Plan No 211.

At this stage, the vendors only had title to Lot 1A - four acres in extent. It seems probable that the approval granted in 1974 for intra-family transfers had lapsed, and that the stipulated conditions had not been fulfilled. But even if it had not lapsed, the undisputed fact is that upto April 1982 Wadood had not transferred Lot 2A to his three children. Consequently, Wadood himself could not transfer Lot 2A to the Defendants, because - if at all - the LRC had given him only a right to transfer to his children; and his children could not transfer Lot 2A to the Defendants because they themselves had not yet acquired title from Wadood. Thus the vendors did not have "full title and powers of alienation" of the corpus.

Wadood then made an attempt to transfer title to his children. By Deed of Gift No 7139 dated 5.4.82 he purported to transfer to his three children an undivided one-sixth share of Razeena Estate, sixty acres in extent. That transfer was not described as an intra-family transfer, and Wadood made no claim to a right to transfer by virtue of section 14 of the Law or any authority from the LRC. The corpus was not described as Lot 2A in Plan No 211. Accordingly, the transferees acquired no title to Lot 2A.

Although the relevant document was not produced, it is not disputed that in 1983 the LRC had granted approval for intra-family transfers in respect of Lot 2A.

That did not validate Deed No 7139. Wadood then executed a Deed of Declaration No 1284 dated 26.9.84, which recited that by letter dated 20.7.83 the LRC had granted

permission to transfer Lot 2A, by way of gift, to his children. By that Deed Wadood declared that the undivided one-sixth share of Razeena Estate gifted by Deed No 7139 was "presently described as a divided portion as fully described in the second schedule" (i. e. Lot 2A), and that the "covenants and conditions in the said Deed of Gift No 7139 contained shall be applicable in respect of [Lot 2A]". Deed No 1284, read with Deed No 7139, amounts in my view to an intra-family transfer by Wadood to his three children.

Thus it was only on 26.9.84 that the vendors had "full title and powers of alienation", and were entitled to execute conveyances of the entirety of the eleven acres covered by Agreement No 19880.

There is no evidence that the vendors either informed the Defendants that they had obtained title to the entire corpus or called upon them to tender draft conveyances.

By Deed No 7289 dated 25.4.85, the vendors sold the corpus to the Plaintiffs for a sum of Rs. 75,000/-. The Plaintiffs then instituted this action on 10.7.85. The Defendants pleaded that the Plaintiffs had purchased the corpus with notice of an existing contract of which specific performance could have been enforced, and that therefore the Plaintiffs held the corpus in trust for the Defendants in terms of section 93 of the Trusts Ordinance.

I must digress at this stage to mention a matter which first arose only during the hearing. Although eleven acres had vested in the LRC, our attention was drawn only to the Statutory Determination which divested four acres. Further, the 1974 approval for intra-family transfers appeared to have lapsed. Was title to the remaining seven acres still vested in the LRC? If that was the position, two questions arose which I put to Counsel. First, the vendors had not acquired "full title and powers of alienation", and therefore the time for transfer in terms of Agreement No 19880 had not yet arrived, and the

period of one month specified in clause 7 had not expired, when Deed No 7289 was executed. Second, in any event, Deed No 7289 could not have transferred title in respect of the seven-acre Lot 2A.

However, it is now clear, upon a scrutiny of Deeds Nos 7139 and 1284, that the LRC did approve an intra-family transfer in 1983; and that Deed No 1284 was an intra-family transfer.

Learned President's Counsel for the Plaintiffs has dealt extensively in her written submissions with the question of title to the seven acres, maintaining that only four acres had been divested by the LRC; that the Plaintiffs now confine their claim to a declaration of title only to those four acres; and that the balance seven acres remain vested in the LRC. These submissions are mistaken. Either they assume that approval for an intra-family transfer is not enough, and must be followed up by a divesting of the land, or they fail to take note of the fact that Deed No 1284 (read with Deed No 7139) amounts to a valid intra-family transfer.)

Learned President's Counsel's contentions during the oral hearing were that special leave to appeal should be granted because (a) Agreement No 19880 provided for an alternative or substituted obligation in the event of default in performance, and thereby excluded specific performance; and (b) clauses 7 and 8 cast obligations on the Defendants to tender draft conveyances, etc, within one month after the vendors obtained title, which the Defendants had failed to do, and accordingly, in any event, they were no longer entitled to specific performance of the Agreement.

I entirely agree with the judgment of the Court of Appeal that Agreement No 19880 does not provide for an alternative or substituted obligation. The purchasers had done everything they possibly could: nothing more remained to be done by

them except to tender the draft conveyances when the vendors had acquired full title. In regard to the vendors, however, there was a total and absolute prohibition on alienating the property, and that was not restricted to the period of one month after acquiring full title. Taken in the context of the entire clause 7 (and the whole Agreement) it cannot be said that the obligation to repay the consideration, together with a penalty of Rs. 10,000, was a stipulation for the benefit of the vendors - to allow *them* an alternative to specific performance. On the contrary, it was intended to provide relief for the purchasers in the event that the LRC refused to release the land; and to give the purchasers the right to elect if the vendors defaulted in executing conveyances. *De Silva v. Senaratne*⁽¹⁾ is on all fours.

As for the second contention, clearly Agreement No 19880 made it the purchasers' responsibility to tender draft conveyances. However, they could do so only after they became aware that the vendors had acquired full title. In that context, was it the vendors' duty to inform the purchasers when they had acquired full title *or* did the purchasers have to find that out for themselves?

Agreement No 19880 is silent on that matter. The fact that they had acquired full title was a matter especially within the knowledge of the vendors. Indeed, it would be fair to say that it was *exclusively* within their knowledge, because there was no way in which the purchasers could be certain of finding that out within a month. The grant of approval for an intra-family transfer was a matter between the LRC and the vendors; and even when the vendors executed the conveyances the purchasers would not know. It is true that the purchasers could search the Land Registry at frequent intervals, but even monthly searches would not have ensured discovery within one month, as there was no obligation to submit the conveyances for registration, within one month or otherwise. It was suggested that the purchasers might have filed a

caveat - but although that might have delayed or prevented a transfer, that would nevertheless not have ensured them timely information as to the acquisition of title by the vendors.

I hold that it was an implied term of the Agreement that the vendors should notify the purchasers when they had acquired full title, and that the period of one month must be reckoned only from the date of such notice.

In accordance with the usual principles governing the burden of proof, the burden was not on the Defendants to prove that the vendors had *not* informed them; if the Plaintiffs desired to prove that the vendors *had* given notice to the Defendants, the burden of proving that was on the Plaintiffs. That they have failed to do.

On none of the above questions is there any doubt or difficulty. Special leave to appeal is therefore refused without costs.

WIJETUNGA, J. - I agree.

BANDARANAYAKE, J. - I agree.

Special leave to appeal refused.