

RALEEHA
v
BEE BEE

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A.229/93(f)
D.C.COLOMBO 5301/ZL
APRIL 30,
JUNE 11 AND
SEPTEMBER 23, 2003

Laesio enormis – Conditional transfer – Does the principles of *laesio enormis* apply to conditional transfers? – Who has the right of election?

The plaintiff-respondent instituted action seeking a declaration of title to the land in question and ejection of the defendant-appellant on the basis that the defendant-appellant (transferor) had failed to comply with the conditions set out in the conditional transfer deed. The defendant-appellant sought the dismissal of the action and the cancellation of the deed on the ground of *laesio enormis*. The trial judge held with the plaintiff-respondent (transferee).

HELD:

- (i) Conditional transfers do not come within the exception to the principles of *laesio enormis*.
- (ii) A conditional transfer cannot be read to be in the nature of a specus nor is the value of the thing sold or consideration paid not capable of definite estimate.
- (iii) Where the principle of *laesio enormis* does apply the right of election as to restoring the thing or paying what is wanting to make up the just price is with the plaintiff respondent (transferee).
- (iv) In the instant case the plaintiff-respondent has failed to exercise this right of election; however it is not justifiable to deny that right – at this stage.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to :

1. *Jayawardena v Amarasekera* – 15 NLR 280
2. *Wijesiriwardena v Gunaratne* – 20 NLR 92
3. *Kingsley v African Land Corporation Ltd.*, 1914 P.D.666
4. *Couch v Lipschitz* – (1918) WLR 78
5. *Ponnupillai v Kumaravetpillai* – 65 NLR 241

P.A.D. Samarasekera, P.C., with *Kirthi Sri Gunawardena* for defendant-appellant.

Sunil Cooray with *Muditharo Prematilake* for plaintiff-respondent.

Cur.adv.vult

February 16, 2004

SOMAWANSA, J.

The plaintiff-respondent instituted the instant action seeking a declaration of title to the lands and premises described in the 1st and 2nd schedules to the amended complaint, ejection of the defendant-appellant and those under him from the said lands and premises and restoration to possession thereon and damages. 01

The position taken by the plaintiff-respondent was that the defendant-appellant has failed and neglected to comply with the conditions as set out in the conditional transfer deed bearing No. 3128 dated 06.10.1971 attested by T.Chelvadurai, Notary Public marked P3, in that the defendant-appellant had defaulted to pay the sum of Rs. 51,000/- plus interest at the rate of 12% per annum on Rs. 36,000/- within 5 years from the date thereof and obtain a retransfer of the said property at her own cost and expense as stipulated in the said deed marked P3. 10

The defendant-appellant while admitting the execution of the deed of conditional transfer marked P3 prayed for the dismissal of the plaintiff-respondent's action and the cancellation of the said deed of transfer marked P3 on the ground of (a) *laesio enormis* or (b) unjust enrichment or (c) non payment to the defendant-appel-

lant the consideration due on the said deed and in the event the said deed marked P3 is not set aside for the recovery of a sum of Rs. 1,50,000/- as compensation for improvements and for the right of *jus retentionis* until compensation is paid. 20

At the commencement of the trial parties admitted that the defendant-appellant had been the owner of the said lands and premises in suit and that the defendant-appellant executed the said deed of conditional transfer marked P3. On behalf of the plaintiff-respondent 07 issues were raised while on behalf of the defendant-appellant 09 issues were raised. At the conclusion of the trial, the learned District Judge by his judgment dated 12.05.1993 held with the plaintiff-respondent. It is from the said judgment that the defendant-appellant has preferred this appeal. 30

At the hearing of this appeal the only matter canvassed by the counsel for the defendant-appellant was the question of *laesio enormis*. He contended that the defendant-appellant had raised the plea that she was entitled to have the deed marked P3 set aside on the ground of *laesio enormis* and the question of *laesio enormis* was put in issue in issues 07 and 08. But unfortunately the learned District Judge has not considered these two issues stating that they were not relevant and in answer to issue 12 raised by the plaintiff-respondent he has expressed the view that the rule of *laesio enormis* has no application to conditional transfers. 40

However it is argued by the counsel for the defendant-appellant that the learned District Judge has failed to realize that the conditional transfer is also a sale of property and on the execution of the deed, ownership of the property passed to the plaintiff-respondent subject only to the defendant-appellant's right of repurchase and that authorities relating to the subject of *laesio enormis* show that the learned District Judge's view that the principle of *laesio enormis* has no application to conditional transfer is incorrect and unsupported by authority. 50

Where a conditional transfer is effected the seller has a right to repurchase the property within an agreed time frame. However if the seller fails to repurchase the property within that time frame the seller loses the right of repurchase. In such a situation there

is no room for complaint by the seller so far as the value of the property sold is not more than double the purchase price paid for the sale. But if the value of the property so sold is more than double the purchase price paid, then the question whether the transaction is fair and equitable arises. In such circumstances it appears that the Roman Dutch Law remedy of *laesio enormis* is made available. However if the value of the property was not more than double the purchase price even though the seller may have suffered a great loss then he has no right to invoke relief on the basis of *laesio enormis*. 60

Walter Pereira in his book *Laws of Ceylon* 2nd edition page 657 states:

“If the seller or the purchaser has been prejudiced in the price to the extent of more than half the real value even though no fraud has been perpetrated on either side. The party so prejudiced may give the other the option either cancelling the sale or of increasing or reducing the price in accordance with the real value. This mode of restitution applies to almost all contracts. This is also the view taken by Grotius 3.17.1-5”. 70

In the case of *Jayawardena v Amarasekera* ⁽¹⁾ it was held:

“A person who knows the value of his property is not entitled to rescission of the sale merely by reason of the fact that the price at which he has sold the property is less than half its true value.

The case is otherwise where the property is sold at a price grossly disproportionate to its true value. In that case the law is on the side of the party who stands to lose by the transaction, and not on the side of the party who stands to make an unconscionable profit. 80

On the execution of a notarial conveyance the sale is complete, and the mere fact that the whole of the consideration has not been paid cannot, in the absence of fraud or misrepresentation, afford ground for the rescission of the sale and the cancellation of the conveyance.”

Per Lascelles, C.J. at page 281;

“It is not the law that where a proprietor, who is in position to 90

know the value of his property, sells it for less than half of what is afterwards held to be its true value, he is entitled to come into court and claim rescission. It is clearly laid down in Voet 18, 5, 17 that a proprietor who knows the value of his property is not entitled to rescission merely by reason of the value of his property is not entitled to rescission merely by reason of the fact that the price at which he has sold the property is less than half its true value. The proprietor, in such a case, has only himself to thank for any loss he may have suffered. As voet puts it, '*Neque damnum intelligatur esse, quod quis sua culpa sentit.*' "The case is otherwise where the *esse, quod quis sua culpa sentit.*" "The case is otherwise where the property is sold at a price grossly disproportionate to its true value. In that case the law is on the side of the party who stands to lose by the transaction, and not on the side of party who stands to make an unconscionable profit". 100

In the case *Wijesiriwardena v Gunasekera* (2) De Sampayo, J. was of the view that the principle of *laesio enormis* applied to leases as well.

It is submitted by the counsel for the plaintiff-respondent that the principle of *laesio enormis* can have no application to the facts of this case because deed P3 is not an absolute transfer but a conditional transfer for in the case of an unconditional sale the value of the thing sold can be ascertained on the basis of what price it would have fetched in the open market. However one cannot assess in money terms what price can be obtained on a sale subject to the condition that for example the transferor is entitled to reconveyance of the thing within 5 years on the payment of Rs.60,000/-. He contends that in such a conditional sale the transferee is in reality purchasing a chance, firstly, the possibility that the thing sold will be absolutely his in the event the stipulated amount is not tendered to him within the stipulated period and secondly the possibility that at the end of the stipulated period he will not be left with the thing sold but only with the stipulated sum of money which was tendered within the stipulated period. As to which of these two possibilities is more probable and which is less probable will depend on factors which cannot be ascertained at the time of the conditional sale but must necessarily be merely speculated upon and that it is only a guess as to what will happen 110 120

at the end of the stipulated period of five years. As such a guess cannot have an ascertainable market value. In this respect Counsel refers to Dr. C.G. Weeramantry on the "Law of contracts" vol.1 at pages 329-330 wherein the author lists eight instances in which the principle of *laesio enormis* does not apply. 130

"355. When the Action does not Lie. *Laesio enormis* does not lie in the following cases:

1. Where the thing sold is in the nature of a *spes*. Two reasons underlie this rule – the consideration that a man who purchases a chance must abide the consequences, and the difficulty of ascertaining the true value of a *spes* at the time of the sale. Thus the sale of rights in a gem pit in Ratnapura District would not give rise to the remedy of *laesio enormis*. 140

2.

.....

8. Where either the value of the consideration paid is not capable of definite estimate".

In this respect counsel also cited two South African cases referred to by Dr. Weeramantry in his book at page 329. *Kingsley v African Land Corporation Ltd.*⁽³⁾ and *Couch v Lipschitz*⁽⁴⁾. I am unable to see how these two decisions would support the argument of the counsel for the plaintiff-respondent. In fact these two decisions support the argument of the counsel for the defendant-appellant. 150

In *Kingsley v African Land Corporation Ltd. (supra)* facts were the plaintiff in that case was a farmer residing on the farm Groot fontein in Orange Free State Province which the defendant was an Incorporated Company with its head office in Johannesburg and was the owner of a certain township named Mountain View in the neighbourhood of Pretoria. On 27 August 1913 the plaintiff purchased from the defendant certain four lots in the said township at the rate of 50 Pounds each. The plaintiff paid to one Schraivesande the defendant's agent the sum of 200 Pounds as purchase together with 20 Pounds in payment of transfer fees. The said Schraivesande had induced the plaintiff to purchase the same by means of false and fraudulent representations as to their 160

situation, quality, development value and cost. The plaintiff had not yet taken transfer of the property. The purchase price of 200 Pounds was more than double the value of the said property at the date of sale and the plaintiff had therefore suffered *laesio enormis*. He therefore claimed a rescission of the sale together with a refund of the sum of 220 Pounds with interest and costs. It was held that the plaintiff was entitled to claim the rescission of the contract of sale and a refund of moneys paid thereunder on the ground of misrepresentation and *laesio enormis*. 170

Per De Villiers, J.P. at page 674 –

“Parties to a transaction of purchase and sale are allowed, as one authority puts it, to circumvent one another up to a certain point, and it was laid down that they can do so even up to half the value again. But anything which goes beyond that is considered to be unconscionable, and the person, whether he be the purchaser or the seller, is entitled to relief. This is upon the well-known principle of our law that one party is not allowed to enrich himself at the expense of another. Judging from the circumstances, which have come out in this case, there is no reason why the Court should seek to weaken any remedy or doctrine which is based upon equity and which has been introduced for the protection either of a purchaser or of a seller. I admit readily that there may be cases in which it would be difficult to ascertain the real value of a particular article or property which is sold. Our law makes the limitation that whenever an uncertain thing is sold (a spes, or a mine or a quarry, or marshy ground, as in the example given in the definition of Sande) the purchaser cannot afterwards be heard to complain. But when there is a definite piece of land upon which there are no uncertainties, which is not bought for its possible mineral value or because it is considered that it can afterwards be drained. I see no reason why the doctrine should not be equally applicable; even if the purchaser bought it for speculative purposes. To my mind, the object with which a party buys a particular thing is immaterial. Whether he buys land with the object of making a profit eventually or for residential purposes, he is equally to be protected by the law if he has been overreached to the extent of more than double the value”. 180 190 200

In the case of *Couch v Lipschitz (supra)* the facts were –

"The plaintiff alleged that he had purchased a quantity of second-hand steel rope from the defendant, and that the latter had failed to deliver more than a portion of this quantity. The defendant pleaded that the quantity delivered was the whole quantity purchased; and, in the alternative, if the quantity purchased was as claimed by the plaintiff, that he, the defendant, had suffered *laesio enormis* and was entitled to have the contract set aside on that ground". 210

Per Ward, J. at page 79 –

"(after dealing with the evidence and finding that the plaintiff's claim failed on the first defence pleaded): It is not necessary for me, therefore, to consider the alternative defence of *laesio enormis*, but I think I should state my findings of fact.

I come to the point which was argued, namely, that the principle cannot be applied to a speculative contract of which this is one. I think the authorities show that what is meant is that it cannot be applied in those cases where the just value of the thing sold at the time of the sale cannot be determined. Referring to a right of succession Pothier says (at page 121): "Such are all aleatory contracts; for, although the risk which is undertaken by one of the contracting parties may admit of appreciation, it must be admitted to be extremely difficult to determine what the just price is". 220

For the above reasons, I am unable to agree with the counsel for the plaintiff-respondent that a conditional transfer would come within the 1st or 8th exception to the principle of *laesio enormis* as enumerated Dr.C.G. Weeramantry in his book "The Law of Contracts" vol.1. Certainly conditional transfer cannot be read to be in the nature of a specs nor is the value of the thing sold or consideration paid not capable of definite estimate for in the instant case the thing sold is an immovable property of 50.9 perches in extent with buildings, the value of which could easily be estimated and as in fact been estimated by the Valuer and the price paid is a definite sum of money. 230

According to the evidence of Senarath Bandara Weerakoon, a Court Commissioner, Auctioneer and Valuer called by the defendant-appellant has valued the properties at Peer Saibo Street at 240

Rs.1,33,560/- and the properties at New Moor Street at Rs. 1,56,340/- both valuations being as at 1971. Thus the total value of the several properties in 1971 was Rs. 2,89,900/-. There was no other evidence as to the value of the properties and nothing on record challenging or contesting the accuracy of his valuation. The plaintiff-respondent did not get any valuation done and the evidence of the plaintiff-respondent was that she does not know what was the value of these properties. Thus the evidence of Weerakoon and his valuation report marked V1 and V2 remains uncontradicted. The consideration on the deed marked P3 is mentioned as Rs. 51,000/-.

Thus it could be seen that in the instant action as evidence reveal where the property was worth Rs. 2,89,900/- as at the date of the execution of the deed of conditional transfer marked P3 it is a grossly unfair and a unconscionable bargain made by the plaintiff-respondent. The plaintiff-respondent has got properties worth more than five times. It must also be mentioned that the admission by witness Weerakoon that his valuation was not concerned with a conditional sale but with an absolute sale does not alter the situation.

It is also contended by the counsel for the plaintiff-respondent that as suggested by issue no.13 the principle of *laesio enormis* does not entitle the defendant-appellant to a cancellation of deed marked P3 but entitles the defendant-appellant to compel the plaintiff-respondent to select either to pay the difference in value or to have the deed marked P3 cancelled and to get back the consideration he paid on the said deed marked P3. That what is important is that this right of election is available to the plaintiff-respondent who is the transferee on deed marked P3 and not to the defendant-appellant who is the transferor. In this respect he refers to Dr. C.G. Weeramantry's book on "The Law of Contracts" page 328 where he states:

"A contract may be avoided by Court on the ground of *laesio enormis* either when the purchaser pays more than double the true value of the thing or the vendor sells the thing for less than half its value. **The person sued has the option** of restoring the thing or paying what is wanting to make up the just price. Where the consideration is less than half (or more than twice) the value

of the property, the sale is voidable on the ground of *laesio enormis* unless there is some special consideration present in the case which bars the application of the principle. The difference in price must exist at the time of the transaction and not thereafter". 280

Counsel also cites the case of *Ponnupillai v Kumaravetipilla*⁽⁴⁾. While conceding that where the principle of *laesio enormis* does apply the right of election as to restoring the thing or paying what is wanting to make up the just price is with the plaintiff-respondent. It is to be noted that up to now the plaintiff-respondent has failed to exercise this right of election. However considering the circumstances of this case, I do not think it would be justifiable to deny the right of election even at this stage. 290

For the above reasons, I would allow the appeal subject to the right of election of the plaintiff-respondent either to pay the difference in value or to have the deed marked P3 cancelled and to get back the consideration paid by him. The judgment of the learned District Judge is set aside. The plaintiff-respondent will pay to the defendant-appellant Rs.10,000/- as costs of this action.

DISSANAYAKE, J. – I agree.

Appeal allowed.