

GHANI
v.
NADARAJA

COURT OF APPEAL.
EDUSSURIYA, J.
C.A. 509/92(F).
D. C. COLOMBO 15045/L.
MARCH 03, 1997.

Rei Vindicatio Action – Pactum Commissorium – Roman Dutch Law – Legality of such an Agreement.

One 'A' had sold and conveyed the land in dispute by P1, to the plaintiff-appellant for a sum of Rs. 300,000/-. According to the attestation clause Rs. 50,000/- had been paid to the Vendor and the balance was secured by a Mortgage Bond, (P3). On the same day the appellant and 'A' entered into an agreement (P2) by which it was agreed that if the balance consideration was not paid on or before a certain date the Deed shall be null and void, and it was further agreed that the premises which was sold to the appellant by P1 shall revert in the vendor 'A' absolutely.

The balance consideration was not paid. 'A' conveyed (D1) the land to 'S', on whose death it devolved on his wife and children, and they by D2 conveyed the premises to the respondent. The learned District Judge held in favour of the respondent and dismissed the plaintiff-appellant's action on the ground that P1, P2, P3 formed one transaction and that the plaintiff appellant did not have title to the land. On appeal,

Held:

(i) Pactum Commissorium is an Agreement that if the debt be not paid within a certain time the creditor can retain as his own the thing pledged for the debt. Under the Roman Dutch Law an agreement for forfeiture in the event of non-payment is not permitted. Therefore the agreement P2 is illegal and of no force or avail in law.

(ii) Although P2 is illegal, the Mortgage Bond P3 has still not been discharged. Therefore Deeds D1, D2 do not operate as sales but as assignments of the Mortgagee's rights under P3 firstly to 'S' by D1 which also refers to the illegal Agreement P2 and then to the defendant respondent and the plaintiff-appellant is entitled to redeem the premises on the payment of the balance sum (without interest).

APPEAL from the Judgment of the District Court of Colombo.

Cases referred to:

1. *Saminathan Chetty v. Vander Poorten*
2. *John v. Trimble* I.T.H. (Witwaters, and H.C.) 146.
3. *Siribohamy v. Rattaranhamy* 1 Ceylon L. R. 36.

Faiz Musthapha, P.C. with *Amarasiri Panditharatne* for the plaintiff-appellant.

Bimal Rajapakse for defendant-respondent.

Cur. adv. vult.

March 14, 1997.

EDUSSURIYA, J.

This is an appeal from the judgment of the learned Additional District Judge of Colombo in an action instituted by the plaintiff-appellant (appellant) for a declaration of title to the land described in the schedule to the plaint, ejection of the defendant-respondent (respondent) therefrom and damages.

One Gamini Perera Abeywardena had sold and conveyed the land in dispute to the appellant by deed No. 2087 of 17th August, 1979 (P1) for a sum of Rs. 300,000/-. According to the attestation clause on 'P1', a sum of Rs. 50,000/- had been paid to the vendor at the execution of 'P1' and the balance sum of Rs. 250,000/- was secured by Mortgage Bond No. 788 of 17th August, 1979 (P3) by which said Bond the appellant mortgaged the land in dispute to Gamini Perera Abeywardena.

On the same date the appellant and the said Gamini Perera Abeywardena entered into Agreement No. 2088 (P2) by which it was agreed that if the balance consideration of a sum of Rs. 250,000/- on deed 'P1' was not paid on or before 31st October, 1979, the deed shall be null and void. It was also agreed that the land, building and premises in dispute which was sold and conveyed to the appellant on deed 'P1' shall revert in the vendor (Gamini Perera Abeywardena) absolutely.

It is conceded that the balance consideration of Rs. 250,000/- was not paid as agreed. It is the respondent's case that Gamini Perera Abeywardena conveyed the land and premises in dispute to one Reckmond de Silva by deed No. 438 of 07th December, 1982 (D1) and that said Reckmond de Silva died leaving an Estate which was administered in the District Court of Colombo/Testamentary Case No. 3047 and that thereafter his widow and his five children conveyed the land and premises in dispute to him (respondent) by deed No. 92 of 28th October, 1982 (D2). At the trial the documents P1 and P3 and D1 and D2, were marked in evidence and thereafter issues 1 to 12 were raised by the parties. Counsel informed Court

that they were not leading oral evidence, and tendered written submissions to enable the court to answer the issues.

The learned District Judge in his judgment held in favour of the respondent and dismissed the plaintiff-appellant's action, on the ground that the documents P1, P2 and P3 formed one transaction and that therefore the plaintiff-appellant did not have title to the land in dispute.

At the hearing of this appeal it was contended on behalf of the plaintiff-appellant that the agreement 'P2' was a Pactum Commissorium which is illegal and as such it is of no force or avail in law. In support of this contention Counsel for the appellant referred this Court to the following authorities. **Roman Dutch Law by Lee, 5th Edition, page 200 (3rd Edition page 210)** where it sets out that an agreement for forfeiture in the event of non-payment is not permitted, **Wille on Principles of South African Law 7th Edition page 243**, where it sets out "an agreement that on the mortgagor's default the mortgagee keeps the mortgaged property known as the Pactum Commissorium, is absolutely illegal, as being harsh and replete with injustice, but there is no objection to an agreement that mortgagees may take over the property at a fair valuation", **Maasdorp's Institutes on South African Law – Law of Things Volume II, 8th Edition, page 185** which stated the Pactum Commissorium is an agreement that if the debt be not paid within a certain time the creditor can retain as his own the thing pledged for the debt and that such an agreement has been held to be illegal.

In the Privy Council decision of *Saminathan Chetty v. Vander Poorten*⁽¹⁾, their Lordships observed that the "policy of the Roman Dutch Law being the law which governs in Ceylon, so far at any rate as this case is concerned appears to be against allowing the mortgaged property to become the property of the creditor if the mortgage debt is not paid off within the specified time", and so saying Their Lordships referred to the case of *John v. Trimble*⁽²⁾ decided in the Transvaal High Court, where Innes C.J. in his judgment accepted the view that the policy of the law was against allowing an agreement between debtor and creditor to the effect that if the debt be not paid at the proper time the property was to become the property of the creditor and held that the transfer by the creditor to the defendant in that case could not operate as a sale so as to defeat the debtor's rights to redeem the property.

In that case the debtor agreed with the creditor that the mortgaged property should be re-conveyed if the debt was paid off within two years, but that otherwise the creditor to be free to sell and pay himself. More than two years after the agreement the debtor sought to redeem, but the creditor nevertheless sold to the defendant.

The Privy Council also observed that "So far as Ceylon is concerned the case of *Siribohamy v. Rattaranhamy* seems to Their Lordships to indicate that the benevolence of the Roman Dutch Law towards the mortgagor is not less in Ceylon than it is in South Africa". Therefore I hold that the agreement 'P2' is illegal and of no force or avail in law.

In the case of *John v. Trimble (supra)* Innes C.J. held that the debtor's (mortgagor's) agreement with the creditor that he was free to sell and pay himself if the debt was not paid within two years does not operate as a sale to the creditor but that the stands (mortgaged property) are still pledged to him for the amount of the debt due to him by the plaintiff (debtor), that the defendants in that case who purchased the stands from the creditor as cessionaries of the creditor, cannot get any greater rights than the creditor had, and that the plaintiff (debtor) is entitled to the stands, together with the transfers and title deeds thereof, and all other documents appertaining thereto, upon payment to the defendants, as cessionaries of the creditor, of the moneys due by the plaintiff (debtor) to the creditor.

In the present case, although the agreement 'P2' is illegal and is of no force or avail in law, the Mortgage Bond 'P3' has still not been discharged.

Therefore the deeds 'D1' and 'D2' do not operate as sales but as assignments of the mortgagee's rights under 'P3' firstly, to Reckmond de Silva by 'D1' which also refers to the illegal agreement 'P2' and then to the respondent (defendant) and the appellant (plaintiff) is entitled to redeem the land and premises in suit on payment of the sum of Rs. 250,000/- because the mortgagee Gamini Perera Abeywardena and the assignees were in possession of the mortgaged property and hence no interest is due on the Bond 'P3'.

Besides, since 'D1' referred to 'P2' Reckmond de Silva was aware of the title which Gamini Perera Abeywardena claimed he had. Similarly, the defendant too, would have been aware of that title claimed by Gamini Perera Abeywardena if he had examined the title deeds.

For the abovementioned reasons the appeal is allowed and the judgment of the District Court is set aside and the appellant is declared entitled to the land and premises in suit subject to the mortgage. However the appellant will be entitled to possession of the land and premises in suit only on the amount on the Mortgage Bond (P3) being paid to the defendant and Bond 'P3' cancelled.

Parties will bear their costs.

Appeal allowed.
