

SANMUGAM AND ANOTHER

v.

THAMBAIYAH

COURT OF APPEAL.

G. P. S. DE SILVA, J. (President, C/A) AND GOONEWARDENA, J.

C.A. No. 263/86.

D.C. MANNAR No. 559.

NOVEMBER 25, 26, 27 AND 28, 1986.

Contract – Conditional transfer – Payment for reconveyance by promissory note – Bona fide purchase for valuable consideration – Trust – Ss. 93 and 98 of Trusts Ordinance – Registration – Notice – Constructive notice – Neglect to make claim for several years.

The defendants sold their interests to P and his wife subject to the right to obtain a re-transfer within 2 years on payment of Rs. 5,000. The defendants claimed that the said sum of Rs. 5,000 was paid by way of a promissory note made for valuable consideration by one R in favour of the 1st defendant who duly endorsed and assigned it to P's wife. As P and his wife had thus received the consideration, they held the land in trust for the defendants. P and his wife however acting fraudulently and in collusion with the plaintiff conveyed it to plaintiff who sued the defendants for ejectment. The defendants while praying for a dismissal of the action asked for an order on the plaintiff to convey these interests back to them.

Held:

(1) The endorsement of the promissory was not valid. The assignment of the promissory note did not constitute payment as P's wife did not accept it as payment. There was failure of consideration even if the note was accepted as consideration.

(2) If a transferee has obtained property in good faith and for valuable consideration the property cannot in any case be followed into his hands and no decree for specific performance can be obtained against him. Nor can any one seeking specific performance against such purchaser invoke the assistance of s. 93 of the Trusts Ordinance.

Section 93 of the Trusts Ordinance imposes the following requirements: notice of an existing contract of which specific performance can be enforced and when the contract affects immovable property due registration. The object of the requirement in the proviso to s. 93 of registration is to give notice to any person desirous of acquiring such property of an existing contract affecting the property of which specific performance could be enforced.

Constructive notice can be defined thus: whatever is sufficient to put any person of ordinary prudence on inquiry is constructive notice of everything to which that inquiry might have led.

The object of registration is the protection of bona fide purchasers; a person searching the register has notice of what is on the register. A person who ought to search the register must be taken as having notice of what he would find there if he did search. Facts and circumstances that might thus be discovered will then be the subject of constructive notice. Constructive notice as much as actual notice may afford evidence of fraud or want of bona fides. Notice that another person had entered into an existing contract affecting immovable property can mean only the constructive notice that arises upon registration, that is, notice of facts and circumstances that would be found upon search of the registration and would not include notice of anything not to be found upon search of the registration of such contract.

Contracts contemplated by s. 93 when they relate to immovable property must be notarially executed.

If the plaintiff searched the registration he would have found that the period of two years stipulated for obtaining the re-transfer had long passed without a reconveyance having been obtained. Hence even if the contract to reconvey was existing when plaintiff purchased he must be deemed to have had no notice of it.

Cases referred to:

- (1) *Hall v. Pelmadulla Valley Tea and Rubber Co., Ltd.*—(1929) 31 NLR 55 (P.C.)
- (2) *Rajapaksa v. Fernando*—(1918) 20 NLR 301.
- (3) *Silva v. Salo Nona*—(1930) 32 NLR 81, 85.

APPEAL from judgment of the District Court of Mannar.

Nimal Senanayake, P.C. with *J. V. C. Nathaniel*, and *R. Jayendra* for defendant-appellants.

Dr. H. W. Jayewardene, Q.C. with *S. Mahenthiran* for plaintiff-respondent.

Cur. adv. vult.

January 28, 1987.

GOONEWARDENA, J.

The plaintiff-respondent filed this action in the District Court seeking on the strength of a title he claimed, to have the defendants-appellants ejected from the lands and premises in suit.

His case was that upon P 1 of 1964 the defendants themselves sold and transferred their interests in these properties to two persons Pirapathy and his wife Parameswary subject to a condition that they would re-transfer the same to them upon repayment within a period of

two years of a sum of Rs. 5,000, but that they having failed to do so the transferees became entitled to the premises free of such condition and that thereafter they upon P2 of 1970 sold and transferred to him the interests conveyed on P1, together with like interests they already held in the same premises. He contended that contrary to an undertaking contained in P1 the defendants failed to quit and deliver vacant possession of the properties thus rendering it necessary for him to file this action to obtain such possession.

The position of the defendants in essence was that the sum of Rs. 5,000 payable by them to secure a reconveyance of these interests was paid by way of a promissory note made for valuable consideration by one Dr. Rajaratnam in favour of the 1st defendant which was duly endorsed and assigned by the 1st defendant to the said Parameswary who therefore having received this consideration, together with her husband Pirapathy held these interests in trust for them. The defendants alleged that Pirapathy and Parameswary acting fraudulently and in collusion with the plaintiff entered into the transaction in P2. Consequently while asking for a dismissal of the plaintiff's action the defendants asked for an order on the plaintiff and/or the said Pirapathy and Parameswary to convey these interests back to them.

The District Judge at the conclusion of the trial held with the plaintiff principally on the basis that the endorsement of the promissory note and hence the promissory note itself (*vis-a-vis* Parameswary) lacked validity and also that the assignment of the promissory note did not constitute a payment of the sum payable for the retransfer, as Parameswary did not accept such promissory note as payment. Accordingly he gave judgment declaring the plaintiff entitled to the reliefs he sought and thus this appeal came to be filed.

Learned President's Counsel who appeared for the defendants at the hearing before us complained that the District Judge had failed to take into consideration and deal with certain items of important evidence which he argued supported the case of the defendants. Be that as it may, for reasons which will appear later, it will not be necessary to interfere with the District Judge's finding or to deal at length with the evidence in the case though some reference might usefully be made to the circumstances surrounding the transactions that had given rise to this litigation.

The 2nd defendant, the wife of the 1st defendant, is a sister of Parameswary and in the same way that the 2nd defendant had been given certain interests in these properties by their mother at the time of her marriage, Parameswary also was given like interests upon her marriage. At the time of the registration of the marriage of Parameswary a certain cash dowry was promised and according to the attestation in P1, as a substitute for part of it the conditional transfer on P1 was effected. It was the evidence of Parameswary that the conditional transfer went towards payment of the purchase price for her share of a business carried on by her deceased father called Iyadurai Stores, while it was the evidence of the 1st defendant that the conditional transfer was given to cover a sum of Rs. 5,000 being part of the said dowry promised. The 1st defendant testified that the promissory note I earlier referred to was negotiated to Parameswary as the consideration for the retransfer reserved on P1. The finding of the District Judge as stated earlier was that the endorsement on the promissory note was not valid (apparently having regard to certain proceedings which had taken place where Pirapathy and Parameswary sued the 1st defendant and Dr. Rajaratnam the maker of the note). His additional finding suggests that since no money was received or recovered upon such promissory note there was a failure of consideration for the retransfer, even if such note was accepted as consideration. It is these findings by the District Judge that were assailed by learned counsel for the defendants-appellants at the hearing before us, but he submitted no arguments with respect to the further findings relating to certain issues of prescription and the position arising in the case under the law of pre-emption.

The documentary evidence (D2) shows that Pirapathy and Parameswary sued Dr. Rajaratnam and the 1st defendant upon the promissory note and although the 1st defendant had filed answer admitting liability and stating that the note was endorsed by him in favour of Pirapathy and Parameswary in settlement of the sum of Rs. 5,000 paid as dowry, Dr. Rajaratnam had challenged such endorsement. However the plaintiffs in that case, Pirapathy and Parameswary had subsequently withdrawn that action and it cannot in my view be said that the District Judge misdirected himself in thinking that there was a failure of consideration for the retransfer, even if such promissory note was accepted as consideration.

There is however in my view another reason which when identified makes it inevitable upon the evidence that the appeal must fail. Of relevance in this regard are the issues numbered 7 and 8 adopted at the trial which read thus:

7. Have the defendants settled the said sum of Rs. 5,000 as set out in paragraph 6 (a) of the answer?
8. If so is the plaintiff holding the said undivided half share referred to in the schedule in trust, for the defendants?

The question arising upon such issues may for present purposes be formulated thus:

Even if the defendants are considered to have established that a sum of Rs. 5,000 being consideration for the retransfer had been paid and settled on 7.1.1964 by the assignment by them of the promissory note, yet can it be said upon the evidence led and the case presented that they have succeeded in establishing that the plaintiff is holding the property in trust for them and thus liable to transfer the same in their name?

The answer to such question must be looked for in the appropriate provisions of the Trusts Ordinance and those that have relevance here as far as I see, are sections 93 and 98 of which conveniently reference may be first made to the latter. The material part reads thus:

"98. Nothing contained in this chapter shall impair the rights of transferees in good faith for valuable consideration.....".

Since Section 93 occurs within the 'chapter' referred to in section 98, the provisions of the latter clearly override those of the former. Section 93 reads thus:

"Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specified performance could be enforced, the former must hold that 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".

These provisions seem to follow the principles applied in equity in England for decreeing specific performance. The effect of the authorities there are reflected in the following words in Dart on 'Vendors and Purchasers' 8th Edition, Volume II at page 883:

"Equity will enforce specific performance of the contract for sale against the vendor himself, and against all persons claiming under him by a title arising subsequently to the contract, except purchasers for valuable consideration who have paid their money and taken a conveyance without notice of the original contract".

The words 'in good faith' in section 98 are I think in the context of similar effect as the words 'without notice' in the English rule and this view seems fortified by the use of the words of allied import 'with notice' in section 93, though occurring there in the reverse form.

Having regard both to the principle in equity, which in my view is embodied in our legislation, as well as the language of section 98 of the Trusts Ordinance, it seems to me that if a transferee has obtained property in good faith and for valuable consideration the property cannot in any case be followed into his hands and no decree for specific performance can be obtained against him; and any one seeking specific performance against such purchaser cannot invoke the assistance of section 93 which then ceases to be applicable.

In the instant case the attestation in the transfer deed P2 in the plaintiff's favour bears a certification by the Notary that the full consideration of Rs. 35,000 was paid in his presence, a statement not challenged, and it cannot in my view be reasonably said upon a review of all the evidence, that the plaintiff was not a transferee in good faith. The remaining question then is as to whether the plaintiff had 'notice' within the meaning of section 93 having regard to the transaction on P2.

The provisions of the principal part of section 93 are in terms identical with section 91 of the Indian Trusts Act of 1882 (from which our provision is said to have been taken). However in the Indian section the proviso which is contained in our section has been omitted. Section 93 (without the proviso) imposes the following requirements, viz: (1) notice; (2) of an existing contract; and (3) of

which specific performance can be enforced. With respect therefore to contracts to which our proviso has no application one may say that any kind of notice of an existing contract of which specific performance can be enforced would suffice. What then is the position with respect to contracts to which the proviso does apply? Would any kind of notice be sufficient there as well? I venture to think not. The proviso imposes the requirement that when such contract affects immovable property it should have been duly registered. Thus when the proviso applied in addition to the other requirements I earlier referred to, due registration of the contract is also demanded. The question one must necessarily ask then is whether such registration is required to satisfy the law relating to registration or is it required to give notice to prospective purchasers and if the latter whether its effect is to exclude all other forms of notice which then become irrelevant, and to limit such notice only to what can be gathered from an examination of the appropriate registration entry.

The case of *Hall v. Palmadulla Valley Tea and Rubber Co., Ltd.* (1) was a decision of the Privy Council where the contract, the specific performance of which was sought though with respect to immovable property was not registered as it was not capable of registration. The Supreme Court took the view that the object of the proviso to section 93 was to secure compliance with the law as to registration and that as non registration of the contract involved no breach of the Registration Law, the proviso in such a case had no effect. Their Lordships of the Privy Council disagreed with this view. In his speech Lord Warrington (at page 58) said:

“On this point the Chief Justice said that in his view the object of the proviso was to secure compliance with the law as to registration and that as the non registration of the contract involved no breach of the Registration Law the proviso in such a case had no effect. Their Lordships are unable to concur in this view. The prior registration of the contract is made a condition of the application to it of the benefit conferred by the section Under these words (the words in the proviso) it is plain that the contract is one which does not satisfy the condition upon which alone it is entitled to the benefit conferred by the section.”

If the requirement as to registration contained in the proviso is not to secure compliance with the law as to registration as was thought by the Privy Council, what then is its object? In my view such object is to

give notice to any person desirous of acquiring such property of an "existing contract affecting the property of which specific performance could be enforced", as these words occur in section 93.

This brings me then to the concept of constructive notice – notice imputed by construction of law. It has been defined in the following terms: Whatever is sufficient to put any person of ordinary prudence on inquiry is constructive notice of everything to which that inquiry might have led.

In the case of *Rajapaksa v. Fernando* (2) Ennis, J. in dealing with the question of constructive notice arising by reason of registration stated (at pp. 304 and 305) thus—

"The object of registration is the protection of bona fide purchasers; it enables them by search to discover previous dealings with the property; and Hogg (on Deeds of Registration) page 99 enunciates the consequent rule as follows:

"The rule that a person searching the register has notice of what is on the register – in Lord Redesdale's words in *Bushell v. Bushell* if he searches he has notice – seems to supply the right principle on which to rest the further rule, that a person who ought to search the register must be taken as having notice of what he would find there if he did search. Facts and circumstances that might thus be discovered will then be the subject of constructive notice, and constructive notice, quite as much as actual notice, may afford evidence of fraud or want of bona fides".

To my mind "notice that another person had entered into an existing contract" referred to in the principal part of section 93 in the case of contracts affecting immovable property can mean only the constructive notice that arises upon registration of the existing contract required by the proviso, that is to say, notice of facts and circumstances that would be found upon search of the registration; and would not include notice of anything not to be found upon search of the registration of such contract.

Garvin, A. C. J. said in *Silva v. Salo Nona* (3) as follows :

"Indeed the reason for penalizing unregistered contracts affecting land would seem to be to insist upon such transactions being placed upon the registers which are designed and intended to give notice of every existing transaction relating to any land or lands to persons who may be desirous of acquiring any interests therein. In short, no form of notice other than due registration will suffice to admit a contract affecting land to the privileges of section 93."

Contracts contemplated by section 93 when they relate to immovable property in my view are necessarily of the kind which attract to themselves the provisions of section 2 of the Prevention of Frauds Ordinance which requires that transactions to which such section applies should in addition to being in writing be notarially attested as well. Any such notarially attested document relating to immovable property though contemplated by the Registration of Documents Ordinance as capable of registration under its provision does not make registration compulsory to give it validity; registration, taking on importance only when a question of completing deeds arises (vide section 7 (4) of the Registration of Documents Ordinance). Why then is registration made essential in the case of any contract falling within the proviso to section 93 only when not so with respect to all cases to which the provisions of section 2 of the Prevention of Frauds Ordinance applies? Could it be said that it is to give validity to such contract? Clearly not, since its validity as I pointed out is not dependant on registration and hence would without registration be of full force and effect against the person who entered into the contract and against whom specific performance could be enforced (referred to in that section as "another person"). But when section 93 is relied upon the person sought to be bound is not such person who directly entered into the contract but a third person who acquires such property and to my mind the clear purpose of the proviso then is to give such third person constructive notice of the existing contract in order that he may be considered to hold the property for the benefit of him who claims the right of specific performance.

In the instant case if prior to the execution of P2 in 1970 the plaintiff searched the registration entry reflecting the registration of the transfer P1 it would have led him to the document P1 itself, and upon its terms he would have observed that the period of two years

stipulated therein had long passed without a reconveyance having been obtained and it would not in my view be reasonable or possible to say that he should have had notice of any existing contract affecting the property to which the privilege of section 93 could have been attracted. In other words the document P1, if it had been examined prior to the execution of P2, could not be said to be reasonably capable of having shown that there was an existing contract of which specific performance could be enforced. Therefore even if the contract to reconvey was existing at the time of execution of P2 and was capable of being specifically enforced, to my mind the plaintiff must be deemed to have had no notice of it inasmuch as an examination of the registration entries leading up to P1 would not have revealed it; and even if there had been actual knowledge of any such existing contract which the plaintiff had gathered aliunde, to my mind such knowledge would be irrelevant and of no value for the purposes of attracting the privilege granted by section 93. Stated in other terms the plaintiff cannot be thought to have been in a position any worse or any different from that of any other, who might have purchased these interests in total ignorance of all the transactions preceding his purchase. It follows then that whatever information might have been gathered by reason of the caveats the defendants had registered, the position in this respect would be no different.

By way of counter claim the defendants had asked for an order to have these interests reconveyed. Assuming the truth of their assertion that the promissory note constituted the consideration for the retransfer of such interests yet (where for several years after the alleged payment of such consideration the defendants neglected to take proper steps to secure such retransfer by due process of law) whatever claims they may have against Pirapathy and Parameswary, there can in my view be no doubt that these interests cannot be followed into the hands of the plaintiff.

I am of the view that the issues numbered 7 and 8 must be answered against the defendants and that the plaintiff must get judgment. Thus the judgment and decree of the District Judge are affirmed and the appeal is dismissed with costs.

G. P. S. DE SILVA, J.—I agree.

Appeal dismissed.