

WIJESUNDERA
v.
NEELA WICKREMASINGHE

COURT OF APPEAL
WEERASURIYA, J. (P/CA) AND
DISSANAYAKE, J.
CA NO. 158/94 (F)
DC PANADURA NO. 2410/Spl
NOVEMBER 02, 2000
DECEMBER 01, 2000
JANUARY 06, 2001
FEBRUARY 23, 2001
APRIL 02, 2001
MAY 02 and 28, 2001
JUNE 29, 2001
JULY 25, 2001
OCTOBER 01, 2001

Trust Ordinance – Constructive Trust s. 84 – Ingredients – Transfer Mortgage to Bank same day – Who paid the loan instalments? – Vital issue.

The plaintiff-respondent instituted action seeking a declaration that the defendant-appellant was holding the property in trust for the plaintiff-respondent. The defendant-appellant denied the said contention and sought a declaration that he is the owner. It was the position of the plaintiff-respondent, that the property was purchased in the name of the defendant-appellant, and on the same day, it was mortgaged to the Bank and the plaintiff-respondent provided the money to the defendant-appellant to pay the instalments to the Bank.

The District Court held with the plaintiff-respondent. On appeal it was contended that it was the defendant-appellant who had paid the instalments, to the Bank.

Held:

- (1) Under s. 84, the plaintiff-respondent in order to succeed has to establish
 - (i) that the consideration was paid or provided by the plaintiff-respondent, though that property was transferred in the name of the defendant-appellant
 - (ii) that the plaintiff-respondent did not intend to pay or provide such consideration for the benefit of the defendant-appellant.

- (2) On the material available, it is difficult to reject the position that it was the defendant-appellant who had paid the instalments in respect of the loan secured by way of mortgage to the Bank.
- (3) The plaintiff-respondent failed to produce a single receipt relating to the payment of loan instalments from the commencement of payment. All the receipts were in the defendant-appellant's name. Even the advance payments to the seller had been affected jointly.

APPEAL from the judgment of the District Court of Panadura.

Rohan Sahabandu for the defendant-appellant.

Faiz Musthapa, PC with *Hemasiri Witanachchi* for plaintiff-respondent.

Cur. adv. vult.

July 01, 2002

WEERASURIYA, J. (P/CA)

The plaintiff-respondent brought this action against the defendant-appellant seeking, *inter alia*, a declaration that the defendant-appellant was holding the allotment of land described in Schedule B to the plaint and depicted in plan No. 2500A, dated 11. 12. 1962, in trust for the plaintiff-respondent. ¹

The defendant-appellant in his answer whilst praying for dismissal of the action sought a declaration that he is the owner of the allotment of land described in the Schedule B to the plaint.

This case proceeded to trial on 13 issues and at the conclusion of the case, learned District Judge by her judgment dated 28. 01. ¹⁰ 1994, entered judgment for the plaintiff as prayed in the plaint. This appeal is from the aforesaid judgment.

At the hearing of this appeal, learned Counsel for the defendant-appellant contended that learned District Judge has erred by failing to focus her mind on issues that are relevant on the question whether a trust has been created in favour of the plaintiff-respondent.

The case of the plaintiff-respondent was presented in the District Court on the following basis :

- (a) that the plaintiff-respondent got married to the defendant-appellant on 28. 01. 1980 after a long period of courtship²⁰ and in or about 1978 the plaintiff-respondent made arrangements to purchase lot No. 8 together with lot No. 13 for a sum of Rs. 40,000 from Uparis;
- (b) that as an advance payment, the plaintiff-respondent paid a sum of Rs. 2,000 on 03. 04. 1978 and another sum of Rs. 6,000 on 06. 04. 1978 to Uparis;
- (c) that lot No. 13 was purchased in the name of the plaintiff-respondent by deed bearing No. 1340, dated 06. 04. 1978;
- (d) that on the same day lot No. 13 was mortgaged to the National Savings Bank by indenture No. 126, for a sum of³⁰ Rs. 3,700;
- (e) that lot No. 8 was purchased by the plaintiff-respondent in the name of the defendant-appellant on deed of conveyance No. 1341, dated 06. 04. 1978 and on the same day, it was mortgaged to the National Savings Bank for Rs. 20,000 by indenture No. 127;
- (f) that Rs. 1,300 was paid to Uparis by the plaintiff-respondent at the time of the execution of the deed No. 1340 and Rs. 5,000 was paid to Uparis by the plaintiff-respondent at the time of execution of deed No 1341;

- (g) that the plaintiff-respondent took over possession of both allotments upon the execution of both deeds and continued to possess them;
- (h) that the plaintiff-respondent had provided money to the defendant-appellant to pay the instalments due to the National Savings Bank;
- (i) that the plaintiff-respondent had effected improvements to the house standing on lot 8 to the value of Rs. 80,000.
- (j) that the defendant-appellant had refused to accept money from the plaintiff-respondent to pay the loan instalments due to National Savings Bank with an intention to defraud her. ⁵⁰

The case of the defendant-appellant was presented in the District Court as follows :

- (a) that at the time of purchase of the said property, Rs. 5,000 was paid by the defendant-appellant and the loan of Rs. 20,000 was raised by him on mortgage of that property.
- (b) that the defendant-appellant had permitted the plaintiff-respondent and the members of her family to reside in the said house;
- (c) that the defendant-appellant after marriage resided in the said house and on 17. 03. 1981, he left this house having fallen out with the plaintiff-respondent; ⁶⁰
- (d) that the loan instalments were paid by the defendant-appellant from his own funds;
- (e) that the construction of the bathroom, toilet, upstairs room and parapet wall was carried out by the defendant-appellant.

It is apparent that the plaintiff-respondent sought to establish a constructive trust falling within the scope of the provisions of section 84 of the Trust Ordinance which reads as follows :

“84 – Where property is transferred to one person for a consideration paid or provided by another person and it appears that such person did not intend to pay or provide such consideration for the benefit of the transferee the transferee must hold the property for the benefit of the person paying or providing the consideration.” ⁷⁰

On the basis of the above provisions, the plaintiff-respondent in order to succeed in her action has to establish the following elements :

- (a) that the consideration was paid or provided by the plaintiff-respondent though the property was transferred in the name of the defendant-appellant. 80
- (b) that the plaintiff-respondent did not intend to pay or provide such consideration for the benefit of the defendant-appellant.

It was not in dispute that the need for a house was on the plaintiff-respondent, who was living with the members of her family in a relative's house. The defendant-appellant conceded that the plaintiff-respondent was prompting him to buy a house and initial discussions with the seller Uparis had been done by the plaintiff-respondent. It was revealed that the plaintiff-respondent had the intention to purchase both lot No. 8 and lot No. 13 which were contiguous lands as one entity. However, the position of the defendant-appellant was that he ⁹⁰ too wanted to buy the entire property for both of them. The need for a bank loan has arisen since the seller Uparis desired to dispose of both lots together, and the arrangement of the bank loan had been facilitated due to the initiative taken by the plaintiff-respondent. The plaintiff-respondent sought to assert that portion of the consideration which could not be met by her own funds, was arranged through the bank by her and the defendant-appellant was only a passive participant who lent his name to the loan application.

The plaintiff-respondent placed the following facts to buttress her claim that she and she alone was interested in buying the property and that every aspect of the matter was attended to by her to secure that objective :

- (a) that it was the uncontroverted testimony of Mr. Mathew, Notary, that it was the plaintiff-respondent who came to his office accompanied by her sister;
- (b) that the two allotments of the land were not physically divided on the ground;
- (c) that after execution of the deeds the vendor Uparis handed over the keys to the plaintiff-respondent in the presence of all parties;
- (d) that the plaintiff-respondent and members of her family went into occupation of the house on the day following the execution of the deed.

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It was not in dispute that the plaintiff-respondent and the defendant-appellant were planning to have a house of their own. Therefore, it would be natural for the plaintiff-respondent during the period of courtship to take the initiative to look for a land and to take steps to buy a house by way of arranging loan facilities.

However, the crucial question to be examined is the manner in which loan instalments in respect of the mortgage bond bearing No. 127, dated 06. 04. 1978 were paid.

The plaintiff-respondent sought to assert that she provided the money to the defendant-appellant to pay the loan instalments and the defendant-appellant with the intention to defraud her, refused to accept money in 1982.

To examine this question, it is necessary to consider the relationship that persisted between the plaintiff-respondent and the defendant-

appellant during the period of the execution of the mortgage bond and thereafter. It is common ground that from 1967 the plaintiff-respondent and the defendant-appellant were in love aspiring to get married. The disputed mortgage bond was entered into as evident from the said bond on 06. 04. 1978. The parties got married in 1980 and the separation occurred in 1981. Thus, the marriage was confined to the period between 1980 to 1981. 130

Therefore, on the assertion of the plaintiff-respondent, the period within which she alleged that she provided the money for the payment of loan instalments has to be identified as the period from 1978 to May, 1981. Thus, there cannot be a dispute on the fact that from May, 1981, upto redemption of the mortgage bond, the defendant-appellant has paid the loan instalments. 140

Nevertheless, the plaintiff-respondent failed to produce a single receipt relating to the payment of loan instalments from the commencement of payment in 1978. All the receipts which were produced by the defendant-appellant were in his name. If in fact, the plaintiff-respondent was paying the loan instalments, it is surprising that she has not taken the initiative to secure the receipts relating to such payments.

It is significant that even advance payments to Uparis reflected in documents P1 and P2 had been effected jointly by the plaintiff-respondent and the defendant-appellant. 150

Therefore, on the material available, it is difficult to reject the position that it was the defendant-appellant who had paid the instalments in respect of the loan secured by way of mortgage of lot 8 to the National Savings Bank by indenture bearing No. 127, dated 06. 04. 1978.

In terms of section 84 of the Trust Ordinance what is vital is to ascertain whether the consideration was paid or provided by a person other than a transferee. It is clear that Rs. 20,000 was paid to Uparis by mortgaging the property to the National Savings Bank and the money so obtained was paid to Uparis, transferor. Therefore, there was no 160

question that consideration was paid or provided by the plaintiff-respondent. The money having been secured by a mortgage to the National Savings Bank and the redemption of bond being the responsibility of the defendant-appellant by use of his resources, the intention of the plaintiff-respondent in respect of the transaction has no relevance.

On the material available, it is not justifiable to conclude that only the plaintiff-respondent was interested in securing this property, albeit it was a joint effort by the plaintiff-respondent and the defendant-appellant to secure a home to settle down presumably after marriage. 170

The fact that the loan facility was obtained due to active participation of the plaintiff-respondent is not sufficient to satisfy the requirements necessary for a constructive trust in terms of section 84 of the Trust Ordinance.

Learned District Judge has failed to consider the crucial issues in this case. She has failed to consider the applicability of section 84 of the Trust Ordinance to this transaction. In the circumstances, the plea of trust raised by the plaintiff-respondent within the meaning of section 84 of the Trust Ordinance cannot be sustained.

The learned District Judge has failed to make a finding on the question as to who effected the improvements to the house. It is to be borne in mind that the defendant-appellant has asked for a declaration that he be declared the owner of lot 8. In the absence of a finding as to who effected the improvements, which is vital on the question of compensation and matters arising therefrom, it is not prudent to consider the question of a declaration of title in favour of the defendant-appellant. 180

For the foregoing reasons, the judgment of the learned District Judge dated 21. 08. 1994 is set aside.

However, I make no order as to costs.

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DISSANAYAKE, J. – I agree.

Appeal allowed.