

MERCANTILE CREDIT LTD
v.
SUMANAPALA AND ANOTHER

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
CA NO. 697/93
DC KALUTARA NO. 4015/L
DECEMBER 03, 2001

Registration of Documents Ordinance, sections 22 and 32 (4) – Caveat – Registration of a deed whilst caveat in operation – Action to be filed within 30 days of receipt of notice – Judicature Act, section 39 – Can a question of law be considered and decided by court any time before judgment even in the absence of an issue?

The plaintiff-appellant sought an order, pronouncing the registration of Deed No. 1024 which was presented for registration while a caveat had been registered alleging that the Deed is void for the reason that action bearing No. 94284/M was pending in the District Court of Colombo against the 1st defendant-respondent to recover a certain sum which was due on a contract of hire purchase.

The trial judge after trial dismissed the action, on the ground that the action has not been filed within 30 days from receipt of notice under s. 32 (4) of the Registration of Documents Ordinance, even though there was no issue framed or any evidence being led.

Held:

- (1) A question of law which is not dependent on facts can be considered and decided by the trial judge any time before judgment even in the absence of an issue or any evidence.
- (2) The plaintiff-appellant conceded that he received the notice under section 32 (4) on 14. 08. 1992. The plaint is dated 15. 06. 1992. The plaint had therefore being filed after 30 days of receipt of the said notice.
- (3) Section 39 of the Judicature Act does not apply to the facts of this case, the finding was not with regard to the jurisdiction of Court.

- (4) In the absence of a judgment or a decree in favour of the plaintiff-appellant against the defendant-respondent it cannot have and maintain the action.

APPEAL from the judgment of the District Court of Kalutara.

Case referred to :

1. *Strong v. Marikkar* – 35 NLR 145.

Upul Fernando for plaintiff-appellant.

Rohan Sahabandu for defendant-respondent.

Cur. adv. vult.

January 18, 2002

DISSANAYAKE, J.

The plaintiff-appellant by his plaint dated 15th June, 1992, filed this action seeking an order from the District Court, pronouncing the registration of deed No. 1024 dated 01. 04. 1992, which was presented for registration to the Land Registry while a caveat that had been registered was in force, alleging that the said deed is void or voidable and/or fraudulent as against the plaintiff-appellant and/or in derogation of lawful rights, for the reason that action bearing No. 94284/M was pending in the District Court of Colombo, against the 1st defendant-respondent to recover a sum of Rs. 83,342.88 which sum was due on a contract of hire purchase bearing No. 20/M/11237/MB. 10

The 1st and the 2nd defendants-respondents by their separate answers filed whilst denying the various averments in the plaint prayed for dismissal of the plaintiff-appellant's action.

The case proceeded to trial on 13 issues and at the conclusion of the trial the learned District Judge by his judgment dated 20th August, 1983, dismissed the plaintiff-appellant's action.

It is from the aforesaid judgment that this appeal is preferred.

Learned Counsel appearing for the plaintiff-appellant contended that the learned District Judge misdirected himself in dismissing the plaintiff-appellant's action for the following reasons:

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- (a) In the absence of any issue being framed or any evidence being led, the finding of the learned District Judge that the plaintiff-appellant cannot have and maintain this action as it has not been filed within 30 days from receipt of notice under section 32 (4) of the Registration of Documents Ordinance, was erroneous.
- (b) That after the defendants-respondents have already pleaded, by virtue of the provisions of section 39 of the Judicature Act the question of jurisdiction cannot be taken.
- (c) The finding of the learned District Judge that the aforesaid 30 instrument could be rendered void/voidable only if there had been a judgment in case No. 94284/M was erroneous.

It is to be borne in mind that a question of law which is not dependant on facts can be considered and decided by the learned District Judge, any time before judgment even in the absence of an issue or any evidence.

The plaintiff-appellant in paragraph 7 of the plaint has conceded that he received the notice under section 32 (4) on 14th August, 1992. The plaint is dated 15th June, 1992. The plaint has been filed after 30 days of receipt of the said notice. Therefore, the learned District 40 Judge was right in coming to the finding that action has not been filed within 30 days of receipt of the said notice.

Section 39 of the Judicature Act does not apply to the facts of this case. None of the defendants-respondents raised a question of jurisdiction of Court.

The finding of the learned District Judge was not with regard to the jurisdiction of Court. The finding by the learned District Judge was that in view of the fact that the plaint has been filed after 30 days of receipt of the notice under section 32 (4) of the Registration of Documents Ordinance, the plaintiff-appellant cannot have and maintain 50

this action. The testimony of Lawrence Antony Cooray the executive officer of the plaintiff-appellant company was to the effect that the plaintiff-appellant company instituted case No. 94289/M in the District Court of Colombo and while it was pending, the caveats produced marked (P1) to (P5) were registered in the Land Registry of Kalutara.

While aforesaid caveats were in force the plaintiff-appellant received notice by the Registrar of Lands, Kalutara, that deed bearing No. 1024 dated 1st April, 1992, attested by W. K. C. Dharmawardana, Notary Public, had been presented for registration where the 1st defendant-respondent had sought to transfer the property in favour of the defendant-respondent. ⁶⁰

The witness Lawrence Antony Cooray did not testify to the fact that he was in possession of a judgment or decree in favour of the plaintiff-appellant in case No. 94284/M of the District Court of Colombo. He asserted that the aforesaid action was filed against the 1st defendant-respondent in the District Court of Colombo, in respect of money due on a hire purchase agreement entered into with the plaintiff-appellant company.

In the case of *Strong v. Marikkar*,⁽¹⁾ it was held that section 32 ⁷⁰ of the Registration of Documents Ordinance does not entitle a creditor, who has not obtained judgment against his debtor, to enter a caveat to prevent alienation of property by his debtor in fraud of creditors. Thus, the learned District Judge has rightly concluded that in the absence of a judgment or a decree in favour of the plaintiff-appellant company against the 1st defendant-respondent it cannot have and maintain this action.

Therefore, there is no basis for this Court to interfere with the judgment of the learned District Judge. The appeal of the plaintiff-appellant is dismissed with costs. ⁸⁰

ANDREW SOMAWANSA, J. – I agree.

Appeal dismissed.