

LEBBE
v.
UMMA

COURT OF APPEAL.
WEERASEKERA, J.,
WIGNESWARAN, J.
CA NO. 42/95 (F).
DC KALMUNAI NO. 1604/L.
OCTOBER 16, 1997.

Land Development Ordinance, S. 2, s. 161, s. 162 – Permit holder – Gift – Transfer to third party – Written consent of Government Agent prior to transfer – Prescriptive title – Evidence Ordinance, s. 115 – Estoppel – Caveat Emptor.

The plaintiff-respondent became entitled to the land on a gift from his father – original Permit-Holder – approved by the State. Thereafter, he executed a conditional transfer but the defendant-appellant refused to retransfer the property back to him. It was contended by the plaintiff-respondent that since written consent of the Government Agent had not been obtained prior to the execution of the Deed of Transfer the said deed was invalid and sought an order directing the defendant-respondent to retransfer the land back to him. The defendant-appellant pleaded that the plaintiff-respondent is estopped from claiming any reliefs and further pleaded that he has prescribed to the land in question. The District Court held in favour of the plaintiff-respondent.

Held:

- (1) The Deed of Transfer was executed contrary to law and therefore of no effect in law being null and void.
- (2) Defendant-appellant's long possession does not give him any prescriptive rights – S. 161.
- (3) Since the Deed of transfer was *ab-initio void*, the defendant-appellant is not entitled to get the benefit of the equitable principle of estoppel.

- (4) Even if the plaintiff-respondent committed a fraud he could not be called upon to give title to something over which he had no right of alienation.

APPEAL from the judgment of the District Court of Kalmunai.

Cases referred to:

1. *Ranasinghe v. Silva* – 78 NLR 500.
2. *Nanayakkara v. Jayasooriya* – [1989] 1 Sri L.R. 366.

Nizam Kariappar with *T. L. A. Munaf* and *M. C. M. Nawas* for defendant-appellant.

Respondent absent and unrepresented.

Cur. adv. vult.

February 26, 1998.

WIGNESWARAN, J.

By amended plaint dated 04.10.1989 the plaintiff-respondent prayed for –

- (i) a declaration that deed No.1065 dated 10.10.1974 attested by M. H. M. Jaufer, Notary Public of Batticaloa, by which the plaintiff-respondent himself had transferred a land to the defendant-appellant, was invalid or in the alternative that it created a trust in his favour.
- (ii) for an order directing the defendant-appellant to accept Rs. 10,000 and retransfer the land to the plaintiff-respondent.
- (iii) damages at Rs. 200 per cultivation season and
- (iv) costs.

The plaintiff-respondent's position was that his father had been granted a permit in respect of the land in question under the Land Development

Ordinance and that he was entitled to the said land on a gift from his father approved by the State. Since, he borrowed a sum of Rs. 10,000 in 1974 from the defendant-appellant he had executed the above said deed No. 1065 and had agreed to pay back the sum of Rs. 10,000 and obtain a retransfer. Meanwhile, the defendant-appellant was to cultivate the said land and obtain the income therefrom in lieu of interest. When he arranged to pay back the sum of Rs. 10,000 the defendant-appellant had refused to accept the money nor consent to retransfer.

The basis of the plaintiff-respondent's claim for a declaration was that since written consent of the Government Agent in terms of the law had not been obtained prior to the execution of Deed of Transfer No. 1065 the said deed was invalid and no title therefore could have passed to the defendant-appellant:

The defendant-appellant on the other hand pleaded that a valid transfer took place on deed No. 1065 for valid consideration and that the plaintiff-respondent in any event was estopped from claiming any reliefs since he himself had executed the deed. It was also pleaded that the plaintiff-respondent could not derive benefits from his own fraudulent acts if the deed was executed contrary to law. Also the claim was said to be prescribed.

The Additional District Judge, Kalmunai, after trial, by judgment dated 22.02.1995 held in favour of the plaintiff-respondent.

This is an appeal from the said judgment. Meanwhile, the plaintiff-respondent having died his widow has been substituted in his place. Despite notice neither the substituted plaintiff-respondent nor her Attorney-at-law were present in Court on the date of hearing.

Counsel for the defendant-appellant argued that –

- (i) deed No. 1065 was valid in law and the defendant-appellant had been in possession of the land from the time of execution of the said deed.

- (ii) the act of executing the said deed of transfer estopped the plaintiff-respondent from now seeking to set it aside.
- (iii) the action was prescribed since it was not brought within 3 years of execution (*Ranasinghe v. Silva*⁽¹⁾ – referred to).
- (iv) the plaintiff-respondent having himself violated the condition laid down in the permit granted under the Land Development Ordinance cannot now get the benefit of his fraudulent act.

These submissions would now be examined.

(1) Is deed No. 1065 valid in law?

Covenant 5 of P1 (Crown grant) states as follows: "The lessee and his aforewritten shall not sublet, sell, donate, mortgage or otherwise dispose of or deal with his interest in this lease or any portion thereof, without the written consent of the lessor or of the Government Agent, Eastern Province, for the time being acting for and on behalf of the lessor and every such sublease, sale, donation or mortgage without such consent shall be absolutely void".

This was a 99-year Crown lease (vide part II of the schedule to P1). The original lessee assigned all his right, title and interests to the father of the plaintiff-respondent with the written consent of the Vanniya Mudaliyar dated 26.10.1931 of Sammanthurai. The plaintiff-respondent's father transferred the said land to his said son with the written permission of the Government Agent, Batticaloa District, dated 21.06.1956. The execution of deed No. 1065 did not take place with such written permission obtained from the authorities.

Section 162 of the Land Development Ordinance amended by Act No. 16 of 1969 states as follows:

- "162 (1) A notary shall not attest any instrument operating as a disposition of a holding which contravenes the provisions of this Ordinance.

- (2) An instrument executed or attested in contravention of the provisions of this section shall be null and void."

"Holding" in this section means land alienated by grant under the Land Development Ordinance and includes any part thereof or interest therein (vide section 2 of the Land Development Ordinance).

Thus, deed No. 1065 was clearly executed contrary to law and therefore of no effect in law being null and void (vide *Nanayakkara v. Jayasooriya and Another*⁽²⁾).

With regard to the defendant-appellant's long possession, law does not give him any more rights because of such possession since section 161 of the Land Development Ordinance states as follows:

"No person shall, by possession of any land alienated on a permit, acquire any prescriptive title thereto against any other person or against the State."

Thus, the submission that deed No. 1065 is valid under the law cannot be accepted.

(2) Estoppel

Section 115 of the Evidence Ordinance states as follows:

"115. When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

In the instant case there was no intentional nor false declaration nor similar act or omission which made the defendant-appellant believe that the land belonged to the plaintiff-respondent while in fact it did not. The title was with the plaintiff-respondent as a lessee of the State.

But, he was prohibited by law from alienating his rights under the permit granted under the Land Development Ordinance. In cross-examination the defendant-appellant at page 69 of the brief has said that he had seen the previous title deed No. 2116 predecessor to the impugned deed No. 1065 and had noticed that permission from government was essential for the due execution of such deed. His evidence thereafter gives the impression that despite such prohibition on alienation he had nevertheless purchased many lands. Thus, the defendant-appellant seems to have gone into this transaction with full knowledge of the nature of plaintiff-respondent's rights and was not in any way fraudulently misled by the plaintiff-respondent.

In any event it must be noted that "caveat emptor" is the maxim that applies and not "caveat vendor". The defendant-appellant had tried to make out in his evidence that the vendor was responsible for any wrong he may have committed in transgressing the express provisions of the Land Development Ordinance. (vide page 68 of the brief). Our law expected the defendant-appellant to have checked title before parting with his money.

Furthermore, since deed No. 1065 was *ab-initio void*, the defendant-appellant is not entitled to get the benefit of the equitable principle of estoppel. In other words even if the plaintiff-respondent committed an intentional fraud he cannot thereby be forced to give to the defendant-appellant what he could not give. It is only in a case where he was capable of giving a benefit either immediately or at a future date that he could be brought within the ambit of estoppel. Not where he could not transfer any benefit at anytime without the intervention of a third party over whom he had no control. Thus, the principle of estoppel would not apply to the facts of this case.

(3) Does prescription apply?

As pointed out earlier section 161 of the Land Development Ordinance states as follows:

"No person shall, by possession of any land alienated on a permit, acquire any prescriptive title thereto against any other person or against the State."

Even by long possession land alienated on a permit cannot give title to the person who possessed it without a proper alienation in his favour in terms of the provisions of the Land Development Ordinance. *Ranasinghe v. Silva (supra)* would, therefore, have no bearing to the facts of this case.

(4) Could the plaintiff get the benefit of his own fraudulent act?

As pointed out earlier there was no fraud involved in this case *inter se*. Out of a necessity for money the plaintiff-respondent had transferred his Land Development Ordinance permit land to the defendant-appellant who seems to have knowingly purchased it without obtaining permission from the relevant authorities. Such transfer was prohibited by law. In fact, a notary who knowingly attested such transfer deed is guilty of a punishable offence under section 163 of the Land Development Ordinance. The transaction appears to have been a usufructuary mortgage camouflaged as a transfer since the defendant-appellant wanted it that way as a security for his money.

Even if the plaintiff-respondent committed a fraud he could not be called upon to give title to something over which he had no right of alienation. Not to grant him any relief would mean legitimising an illegal transaction. He could of course be committed to make good what he had benefited from the defendant-appellant.

The learned Additional District Judge, Kalmunai, has therefore come to a correct conclusion in his judgment dated 22.02.95. Since, the defendant-appellant has had the benefit of possessing the land and receiving the income therefrom in lieu of interest upto date of judgment, the learned Additional District Judge found that only a sum of Rs. 10,000 need be paid by the plaintiff-respondent to obtain a retransfer. The learned Additional District Judge for good reason has refused to grant damages and presumably costs too to the plaintiff-respondent. We, therefore, confirm the judgment dated 22.02.1995 of the learned Additional District Judge of Kalmunai and make order that on the plaintiff depositing a sum of rupees ten thousand only

(Rs. 10,000) to the credit of this case the defendant-appellant must within one month of such deposit at the expense of the plaintiff-respondent retransfer the land in question to the plaintiff-respondent. If the defendant-appellant fails to so retransfer, the registrar of the District Court, Kalmunai, is hereby authorised to retransfer the land in question to the plaintiff-respondent at the expense of the plaintiff-respondent. After the deed in favour of the plaintiff-respondent is executed either by the defendant-appellant or the registrar as the case may be and peaceful vacant possession is handed over to the plaintiff-respondent, the defendant-appellant is entitled to withdraw the sum of Rs. 10,000 deposited to the credit of this case.

If peaceful vacant possession is not granted by the defendant-appellant within one month of the deposit of rupees ten thousand (Rs. 10,000), the plaintiff-respondent after execution of the deed in his favour by the registrar as above said would be entitled to take out writ of possession together with writ of execution for the expenses involved in obtaining the right of possession. Thereafter, the defendant-appellant would be entitled to withdraw the sum of rupees ten thousand (Rs. 10,000) but only after noticing the plaintiff-respondent who shall be heard by Court if necessary. There shall be no costs of this appeal payable.

WEERASEKERA, J. – I agree.

Appeal dismissed.