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[2014] 1 SRI L.R. - PART 3

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ප්‍ර : හොඳට මතකද?

උ : ඔව්. 1977 දී

ප්‍ර : ඒ සාකච්ඡාවෙන් පස්සෙ මොකද වුනේ?

උ : ඒ ගොල්ලෝ මින්නිදෝරු මහත්තයෙක් අරන් ආවා.

The aforesaid evidence shows that the 6th defendant in the year 1977 had a discussion to partition the land amicably between the co-owners. Even though there is evidence to show that the said attempt to have an amicable partition was a failure, the fact remains that the 6th defendant had participated in the discussions to have an amicable partition. Such an attitude of the 6th defendant shows that she was acting, having accepted the rights of the other co-owners to the land during the year 1977. Such an acceptance of the rights of the other co-owners, stand in the way to establish the prescriptive claim she made since it will cut across the adversity which is a pre requisite when claiming prescription.

Therefore on one hand, the circumstances present in this case will become a bar to prove undisturbed and uninterrupted possession of the 6th defendant and on the other hand, the attempt to have an amicable settlement would prevent the 6th defendant claiming the benefit of the law referred to in those two decisions namely *Rajapakse vs. Hendrick Singho and Karunawathie v. Gunadasa (supra)* To my mind, those decisions are applicable, only after having established, not only exclusive and undisturbed physical possession for over very long period of time but also by proving that the claimant had acted without conceding the rights of the co-owners.

The facts of this case do not show such a position had prevailed in this instance. Therefore, I am not inclined to

presume ouster as decided in the two decisions referred to by the learned Counsel for the appellant though the 6th defendant had established her longstanding possession which ran for a period more than twenty years. Hence, the 6th defendant will not become entitled to have the benefit of the law pronounced in those two cases namely *Rajapakse vs. Hendrick Singho and Karunawathie v. Gunadasa (supra)* Accordingly, it is my considered opinion that the 6th defendant's prescriptive claim should fall as concluded by the learned District Judge.

One other matter I wish to mention is that even though the 6th defendant has claimed prescriptive title only to herself, she in her evidence-in-chief has clearly stated that 10th and the 12th defendant-respondents are also living in two houses found on the land sought to be partitioned. *(vide proceedings at page 200 in the appeal brief)* Those two parties have not filed an appeal challenging the judgment. In the event the prescriptive claim of the 6th defendant is upheld, it will negate the rights of those parties as well though they are the children of the 6th defendant-appellant, particularly because they are also to become entitled to a share of the land in terms of the decree to be entered in terms of the judgment delivered in this case.

Accordingly, I am not inclined to interfere with the decision of the learned District Judge. For the aforesaid reasons, this appeal is dismissed. Having considered the circumstances of this case, I do not wish to make an order as to the costs of this appeal.

Appeal dismissed.

ARTHER VS. AMEEN

COURT OF APPEAL
H.N. J. PERERA J.
CA 1078/99
DC KEGALLE 4821/L
MAY 21, 2013
SEPTEMBER 11, 2013

Rei vindicatio action – Alleged loan transaction – Plea of constructive trust – Attendant circumstances – Does silence amount to truth of the allegations – Jurisdiction of an appellate Court to review the record of evidence – When? Trust Ordinance – Section 83

The plaintiff – respondent instituted action seeking a declaration that he is the owner of the premises concerned and for ejectment of the defendant – appellants. The defendant – appellants in their answer maintained that the deed of sale was executed by him due to financial difficulties he was undergoing and that the plaintiff was holding the property in trust for him. The District Court held with the plaintiff.

Held:

[1] Silence of the defendant amounts to an admission of the truth of the allegations contained in the notice to quit; in certain circumstances the failure to reply to a letter amounts to an admission of a claim made therein.

[2] In dealing with the question of trust the attendant circumstances are considered very material. The defendant has agreed to vacate the premises upon finding an alternate place but failed to do so and a notice had been dispatched requiring the defendant to vacate, the defendant having admitted the receipt of the notice to quit failed to reply – this is a case which a reply is expected – the defendant's failure to do so supports the plaintiff's contention that it was an outright transfer.

Per H. N. J. Perera, J.

> "It is clear from the judgment of the learned District Judge that he accepted and was impressed by the evidence of the plaintiff-respondent and of the other witnesses who gave evidence on his behalf".

[3] The District Judge who saw and heard the witnesses and watched their demeanour had found for the defendants. Where the personality of the witnesses is an essential element the Appellate Court should not set aside the decision of the trial Judge save in the clearest of cases.

[4] Appellate Court will set aside inferences drawn by the trial Judge only if they amount to findings based on -

[a] inadmissible evidence or

[b] after rejecting admissible evidence and relevant evidence or

[c] if the inferences are unsupported by evidence or

[d] if the inferences or conclusions are not rationally possible or perverse.

Per H. N. J. Perera, J

> "I do not see that the findings and the inferences drawn are vitiated by any of these considerations. There is no justification for interfering with the conclusions reached which I perceive are warranted by the evidence that was before him."

APPEAL from the judgment of the District Court of Kegalle.

Cases referred to:-

(1) *Eleya Lebbe vs. Majeed* 48 NLR 357 at 395

(2) *Thisa Nona and others vs. Premadasa* 1997 1 Sri LR 169

(3) *Weideman vs. Walpola* 1891 2 QB 534

(4) *Saravanamuttu vs. De Mel* 49 NLR 529

(5) *Dharmatileka Thera vs. Buddharakkita Thera* 1990 1 Sri LR 211

(6) *M. P. Munasinghe vs. C. P. Vidanage* 69 NLR 98

(7) *Thomas vs. Thomas* 1947 AC 484 at 485 – 6

(8) *Gunawardane vs. Cabral and others* 1980 2 Sri LR 220

Rohan Sahabandu PC with *Chaturani de Silva* for defendant-appellant.

Faiz Musthapha PC with *Thushani Machado* for plaintiff – respondent.

06th August 2014

H. N. J. PERERA, J.

The plaintiff-respondent instituted this action in the District Court of Kegalle seeking a declaration, that the plaintiff-respondent is the owner of the premises described in the 1st, 2nd and 3rd schedule to the plaint, for the ejectment of the defendant-appellant and all those holding under the defendant-appellant, from the said premises. It was the position of the plaintiff-respondent that the defendant- appellant had by deed No:- 2514 dated 16.06.1986 attested by U. B. Wickemaarachchi Notary Public transferred the said property to them and has failed to handover vacant possession to date.

The defendant – appellants filed answer denying the averments in the plaint and maintained that the said deed of sale was executed by him due to financial difficulties he was undergoing at that time and that it was only a loan transaction and was not intended to be an outright transfer as he never intended to part with beneficial interest. It was also the position of the defendant-appellant that although the amount stated as consideration on the fact of the deed is 100,000/- the actual amount obtained by him was only Rs. 50,000/-. The defendant-appellant further alleged that the amount stated as Consideration is less than of the then actual market value of the property and thus the principle of *'laesio enormis'* applies and invalidates the deed of sale. The defendant-appellant prayed for a declaration that the plaintiff-respondents hold the property on a constructive trust and a

retransfer of the property in his name. After trial the learned District Judge delivered judgment in favour of the plaintiff-respondents as prayed for in the plaint. Aggrieved by the said judgment of the learned District Judge of Kegalle the defendant-appellant has preferred this appeal to this Court.

Section 83 of the Trust Ordinance is as follows:-

83. Where the owner of property transfer or bequeaths it, and it cannot reasonably be inferred consistency with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative."

In dealing with the question of trust the attendant circumstances are considered very material. In the case of *Elieya Lebbe v. Majeed*[1] at 359 Dias, J stated thus:-

"There are certain tests for ascertaining into which category a case falls. Thus, if the transferor continued to remain in possession after the conveyance, or if the transferor paid the whole cost of the conveyance or if the consideration expressed on the deed be utterly inadequate to what would be the fair purchase money for the property conveyed – all these are circumstances which would show whether the transaction was a genuine sale for valuable consideration or something else."

In the case of *Thisa Nona & 3 others V. Premadasa*[2], it was held that the following circumstances which transpired in that case were relevant on the question whether the transaction was a loan transaction or an outright transfer:- (a) the fact that a non-notarial document was admitted to have

been signed by the transferee, (b) the payment of the stamp duty and the Notary's charges by the transferor, (c) the fact that the transfer deed came into existence in the course of a series of transactions, and (d) the continued possession of the premises in suit by the transferor just the way she did before transfer deed was executed.

The plaintiff's are brothers and at the material time the 1st plaintiff was carrying on business in Molagoda in Kegalle whilst the 2nd plaintiff was employed in Saudi Arabia. The 1st plaintiff and the defendant were close associates and had engaged in several business transactions. The 1st plaintiff used to supply goods on credit to the defendant and they used to borrow from each other for their business needs. It was the position of the 1st plaintiff that the defendant had agreed to hand over the premises upon finding an alternate place but failed to do so and it became necessary to require him to vacate the said premises as the 2nd plaintiff who was resident abroad notified him that he intended to return to Sri Lanka by 1989 and wanted the defendant to vacate the premises to enable him to commence a business. accordingly the notice P5 had been despatched requiring the defendant to vacate the said premises.

The silence of the defendant amounts to an admission of the truth of the allegations contained in the said notice to quit. It has been held in *Weideman V. Walpola*(3) that in certain circumstances the failure to reply to a letter amounts to an admission of a claim made therein. Lord Esher, M. R there said:-

"Now there are cases – business and mercantile cases – in which the Courts have taken notice that, in the ordinary

course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it, if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other, 'but you promised me that you would do this or that, 'if the other does not answer that letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement."

In *Saravanamuttu v. De Mel*[4] Dias, J held that in business matters, if a person states in a letter to another that certain state of facts exists, the person to whom the letter is written must reply if he does not agree with or means to dispute assertions. Otherwise, the silence of the latter amounts to an admission of the truth of the allegation contained in that letter.

The defendant had admitted having received the notice to quit but failed to reply to the said notice. In all circumstances, I feel that this is a case which a reply to P5 is expected. The defendant's failure to do so supports the plaintiff's contention that it was an outright transfer.

The Notary has said that the consideration of Rs. 100,000/- was handed over to him by the 1st plaintiff and that he in turn handed over to the defendant and requested him to count it. He further testified that the defendant accepted the cash and did not complain that he had not received the full consideration. He had also stated that he thereafter explained the contents of the deed to the defendant and thereafter the defendant and the witnesses signed the deed in his presence. He also stated that no money was paid to the 1st plaintiff. This contradicts the defendant's

position that out of the consideration of Rs. 100,000/-, Rs. 50,000/- was returned to the plaintiff and the receipt V1 was obtained. This evidence of the Notary was not challenged in cross-examination. Therefore the contention of the Counsel for the defendant that a higher value has been entered in the deed as consideration as it was contended by the Notary that an amount as low as Rs. 50,000/- cannot be stated in the deed as the purchase price cannot be accepted.

Surveyor has valued the property at Rs. 7000/- a perch in 1986. The valuation report does not contain any reasons for the valuation. He has failed to give statistics of any comparable sales which is the standard form of valuation of property. He admitted that the property was shown to him, and the information supplied only by the defendant. The learned Trial Judge in his judgment has referred to the infirmities in the evidence of the Surveyor and had rejected his evidence and the defendant's plea of *laesio enormis*.

It was contended on behalf of the defendant that on this particular date on which the deed of sale was effected, Champika Mudalali was also present at the Notary's office and the defendant paid Rs. 40,000/- to Champika Mudalali and out of the balance Rs. 60,000/-, an amount of Rs. 50,000/- was paid back to the plaintiffs and the document marked V1 was prepared acknowledging the receipt of the said Rs. 50,000/- by the defendant. It was the plaintiffs position that three or four days prior to the transaction relating to the purchase of the land the 1st plaintiff had borrowed a sum of Rs. 50,000/- from the defendant for the purpose of business, The said receipt is dated 12.06.1986, which is four days before the date of the deed. According to the 1st plaintiff this receipt was executed at the office of Mr. Saheed Attorney-

at-Law where Wijeratne and Somapala had been employed as clerks and as such signed the document as witnesses. It is clear from the judgment of the learned District Judge that he accepted and was impressed by the evidence of the plaintiff-respondent and of the other witnesses who gave evidence on his behalf. In *Dharmatilleke Thero V. Buddharakkitha Thero*[5], it was held:-

"The District Judge who saw and heard the witnesses and watched their demeanour had found for the defendant where the personality of the witness is an essential element, the appellate court should not set aside the decision of the trial Judge save in the clearest of cases."

In *M. P. Munasinghe V. C. P. Vidanage*[6] it was held that the jurisdiction of an appellate court to review the record of the evidence in order to determine whether the conclusion reached by the trial Judge upon evidence should stand has to be exercised with caution.

"If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent

circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." – per Viscount Simon in Watt in *Thomas V. Thomas*[7] at 485-6)

Further in *Gunewardena V. Cabral and Others*[8], it was held that the appellate court will set aside inferences drawn by the trial Judge only if they amount to findings of fact based on:-

(a) inadmissible evidence; or

(b) after rejecting admissible and relevant evidence; or

(c) if the inferences are unsupported by evidence; or

(d) if the inferences or conclusions are not rationally possible or Perverse.

In the case before me I do not see that the findings of the learned District Judge and the inferences drawn by him are vitiated by any of these considerations. In my view there is no justification for interfering with the conclusions reached by the learned District Judge which I perceive are warranted by the evidence that was before him.

For the above reasons I see no reason to disturb the judgment of the learned District Judge. Accordingly the appeal of the defendant – appellant is dismissed with costs.

Appeal dismissed.

NELKA RUPASINGHE AND ANOTHER VS. NATIONAL DEVELOPMENT BANK

SUPREME COURT
TILAKAWARDENE, J.
SRIPAVAN, J.
WANASUNDERA, J.
SC 39/2010
HC [CIVIL] 274/2007/MR
COMMERCIAL HIGH COURT
SEPTEMBER 27, 2013

Parate execution – Lands of debtor and guarantor sold – Purchased by Bank – Parate executing guarantor's land – Valid? Who is the owner of the lands? Hypothecary action filed.

The 1st appellant mortgaged Lot 6 and the 2nd appellant mortgaged her land securing a loan obtained from the Bank. As the loan was not repaid, the Bank auctioned both lands and the Bank bought the lands and became the owner on a certificate of sale. The Supreme Court in another case held that the Bank could parate execute only the land belonging to the debtor. The Bank thereafter, on the basis that it cannot auction properties of the guarantor instituted hypothecary action to recover the balance due on the outstanding sum owed after the sale of the lands.

It was contended that the Bank has become the owner of the lands in view of the certificate of sale, and that in view of the 5 Bench decision of the Supreme Court, it cannot auction the guarantor's land.

Held:

[1] The Bank's decision to auction the properties of the guarantor to recover the loan taken by the borrower is legally wrong.

[2] The auction to sell the guarantor's land is not valid.

Per Eva Wanasundera, J.

> "I am of the view that the said certificate of sale should be amended to include only the borrower's land and forwarded for registration, thus specifically releasing the lands of the guarantor from the ownership of the Bank – the certificate of sale is valid against the First appellant only".

APPEAL from the judgment of the Commercial High Court.

Cases referred to:-

(1) *Chelliah Ramachandran and another vs. Hatton National Bank and others*

(2) *V. Aanandasiva and 12 others vs. Hatton National Bank and 3 others* – SC Appeal 9/2004

(3) *Ukwatte and another vs. DFCC Bank*

(4) *Karunawathie vs. DFCC Bank* – SC SLA 32/2004

Rohan Sahabandu PC for 1st and 2nd defendant-appellants.

Romesh de Silva PC with *Geethaka Gunawardane* for plaintiff-respondent.

Cur.adv.vult.

21st March 2014

WANASUNDERA, PC, J.

This appeal has come up to the Supreme Court as an appeal from a judgment of the Provincial High Court of the Western Province holden at Colombo and exercising Civil Commercial Jurisdiction, as provided in Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996. The judgment of the aforementioned Commercial High Court of Colombo is dated 09.09.2010.

The Plaintiff-Respondent (hereinafter referred to as the Respondent-Bank) is the National Development Bank PLC of No. 40, Navam Mawatha, Colombo 2 and the 1st and 2nd Defendant-Appellants (hereinafter referred to as the Appellants) are Nelka Rupasinghe (hereinafter referred to as the 1st Appellant and Ahangame Gamage Nandawathie (hereinafter referred to as the 2nd Appellant) from Ahangama.

The facts of this case play an important role in deciding this appeal and as such I will place them here in summary form. The 1st Appellant become the owner of Lot 6 in Plan 1243 of an extent of 34A Or 5P and Lot 8 of an extent of 15A 1R 30P by deeds of transfer No. 247 and 248. Altogether, the 1st Appellant was the owner of about 50 acres of land. The 2nd Appellant became the owner of Lot 4, Lot 9 and Lot 10 of Plan 1243 of an extent of 25A OR 27P. 1A 2R 18P and 25A 0R 27P by deeds of transfer 245, 249 and 250 adding up to again about 50 acres. The 1st Appellant applied for a loan of 7 million from the Respondent Bank for the project of replanting tea on her land and she mortgaged her land to the Respondent to get a loan of 7 million on 18.12.2000, by deed No 193. On the same day, i.e. 18.12.2000, the 2nd Appellant also mortgaged her property to morefully secure the same loan of the 1st Appellant to be received from the Respondent Bank by deed No. 184. So, the 2nd mortgage deed No. 184 was a 'further and additional mortgage' as very well indicated on top of the document, i.e. deed No. 184.

By January 2001, the Respondent Bank had disbursed Rs. 3.8 million to the 1st Appellant. She had continued to pay monthly the interest component for the month, but failed to pay off the loan capital component. Out of the full loan payment applied for by the 1st Appellant. Rupees 3.2 million was

never disbursed to her. As she failed to pay back the loan actually given to her. i.e. 3.8 million, the Respondent auctioned both the lands of the 1st Appellant and the lands of the 2nd Appellant, i.e. about 100 acres of land and the Respondent Bank bought the land for 1 million and issued a Certificate of Sale to the Respondent Bank itself and registered the Certificate of Sale dated 20.08.2003 in the Land Registry. The law requires that a Fiscal's conveyance be executed upon issuing a Certificate of Sale but this has not been done by the Respondent. Yet, it is registered in the Land Registry to establish the fact of ownership. The Certificate of Sale No. 443 include all the blocks of lands belonging to the 1st Appellant and all the blocks of lands belonging to the 2nd Appellant. But in the Schedule they are in two separate parts, namely Part 1 and Part II.

The main argument in this matter was in effect, questioning whether the Certificate of Sale obtained by the Respondent Bank on 20.08.2003 including the 1st Appellant's (the borrower) lands as well as the 2nd Appellant's (the guarantor, the 3rd party mortgator) lands, prohibits in law, the Respondent–Bank, from filing a hypothecary action to recover the monies due from the 1st Appellant. The Appellants argued that according to the registered Certificate of Sale, the Respondent Bank is the owner of the mortgaged lands and as such the Respondent Bank cannot file a hypothecary action to recover the money from the mortgagors. The Respondent Bank argued that the Certificate of Sale for the said lands obtained by it earlier, is a nullity in law as per the judgment in SC Appeal cases 05 and 09/2004 (1) decided on 01.04.2005 by the Supreme Court and thus the Respondent Bank is not the owner of the lands and therefore it can recover the monies due, by way of a hypothecary action.

I observe that the cause of action i.e. non-payment of the instalments of the loan, arose in Colombo because it was agreed that monies shall be paid at the head office of the Respondent – Bank. Therefore the Commercial High Court had jurisdiction to hear the case. The evidence before Court was that a loan of 7 million rupees was requested by the 1st Appellant from the Respondent – Bank and it was agreed that the loan would be given to replant tea on the estate that the 1st Appellant bought anew (Which is in Part 1 of the Schedule to the Certificate of Sale). The respondent Bank disbursed only Re. 3.8 million in 2 instalments. At the time of this case, the 1st Appellant had paid about 4 lakhs of rupees to stop the sale but finally the Respondent Bank auctioned the lands of both the Appellants and bought the same for 1 million rupees and issued a Certificate of Sale in favour of the Respondent – Bank itself. It was registered on 20.08.2003 at the Land Registry. So, on the face of the record the OWNER of the lands after 20.08.2003 was the Respondent-Bank.

Thereafter on 06.08.2007, the Respondent Bank filed this hypothecary action in the Commercial High Court. By this time, the Respondent Bank appeared to be the owner of the lands, according to the entries in the Land Registry. The lands of the Appellants were owned by the Respondent-Bank. In other words, the hands of the Appellants were tied up not allowing them to touch the lands even to find a way to pay the bank, the money due and owing to the bank from the fate of the certificate of Sale i.e. 20.08.2003. There's no way that the Respondent Bank can ever claim any interest from the Appellants after 20.08.2003 because in the minds of the Appellants the Respondent – Bank was the owner of the lands. In the eyes of the world, the Respondent-Bank was the owner of

the lands as the Certificate of Sale was registered in the Land Registry. The Respondent-Bank had closed the deal on 20.08.2003 and the Respondent – Bank could recover the dues with the property obtained, up to the maximum value of the land.

Thereafter, on 01.04.2005, which is 1 year and 8 months after the Certificate of Sale, the 5 Judge Bench judgment in 4 cases, taken up together, namely *Chelliah Ramachandran and another vs. Hatton National Bank and 3 others* (1), *V. Ananadasiva and 12 others Vs. Hatton National Bank and 3 others*(2) *C. Ukwatte and another Vs. DFCC Bank and Another*(3) and *M. D. Karunawathie and 5 others Vs. DFCC Bank and Another*(4) was pronounced by the Supreme Court.

By that judgment, it was held that **"The Provisions of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 will not apply in respect of a mortgage given by a guarantor or any person other than a borrower to whom a loan has been granted by a Bank for the economic development of Sri Lanka"** It was thus held that the impugned resolutions of the Board of Directors of the Bank to sell the lands of a 3rd party mortgagor were in excess of statutory power granted by Act No. 4 of 1990. The mortgaged property of the guarantors which did not belong to the borrowers should not be subject to parate – execution to recover the loan due from the borrower.

It was submitted to this Court in the instant case, by the Respondent-Bank that due to the aforementioned judgment of SC. Appeal Nos. 05 & 09/2004, and SC. Spl. LA. Nos. 31/2004 & 32/2004, the Respondent-Bank, on its own, decided that the Certificate of Sale in the instant case is a nullity. The Respondent-Bank further submitted that

this decision of the Respondent-Bank was informed to the Appellants by letter dated 20.03.2007 and thereafter the Respondent-Bank proceeded to file the present hypothecary action in the Commercial High Court.

The Respondent-Bank decided on its own, that the Certificate of Sale is a nullity. The Respondent-Bank did not want to let loose the property which they bought and already registered in the Land Registry. Instead, the Respondent-Bank wanted to go at the borrower and the guarantor a second time by way of a hypothecary action. The Respondent Bank could institute a hypothecary action to recover the balance due on the outstanding sum owed after the sale of the land in the 1st Schedule.

The Respondent-Bank's decision to auction the properties of the guarantor to recover the loan taken by the borrower is legally wrong as one can proceed by way of parate execution only against the borrower. They have, however, transgressed the boundaries when it comes to the guarantors in view of the decision in S. C. Appeal Nos. 5 & 9/2004 and SC. Spl. LA. Nos. 31 & 32/2004.

As such the auction to sell the guarantor's lands is not valid. The Respondent – Bank is entitled to auction only the borrower's properties which is in Part I of the Certificate of Sale.

By the Certificate of Sale No. 443 the Bank has legally become the owner of only the lands mentioned in Part 1 of the Schedule. I am of the view that the said Certificate of Sale should be amended to include only the borrower's lands and forwarded for registration, thus specifically releasing the lands in Part II of the Schedule from the owner-

ship of the Respondent-Bank. The Respondent-Bank shall be entitled to have and to hold the lands referred to only in Part I of the Schedule to the Certificate of Sale No. 443. The said Certificate of Sale is valid against the first Appellant only.

For the reasons set out in this judgment, I set aside the judgment of the Learned Judge of the High Court (Civil) of the Western Province holden in Colombo in case No. HC.(Civil) 274/2007/MR dated 09.09.2010, subject to the above. The 1st Appellant [borrower] is entitled for costs in a sum of Rs. 100,000 (One Hundred Thousand) payable by the Respondent Bank.

TILAKAWARDANE, J. – I agree.

SRIPAVAN, J – I agree.

GUNATHILAKA VS. MAYOR, MUNICIPAL COUNCIL KANDY AND TWO OTHERS

COURT OF APPEAL
CHITRASIRI, J.
MALANIE GUNERATNE. J.
CA [PHC] 63/09
PHC KANDY 11/2015 [WRIT]
JULY 16, 2014

Writ of Mandamus – Municipal Councils Ordinance – Section 73 – Section 77 – Removing of obstructions over Municipal passage ways? Was the passage under the control of the Kandy Municipality? Is there a public duty cast upon the Municipality to maintain passage way? Delay – fatal?

The petitioner sought a writ of mandamus directing the respondents to take all necessary steps to remove the obstructions found over the Municipal passage way. The respondents contended that the passage way is not under the control of the Kandy Municipality – and that it is a private access – and no public duty is cast upon the Municipality to maintain such a passage used as a private access. The High Court refused the writ prayed for. In appeal,

Held:

(1) The appellants have failed to establish that the passage had been under the control of the Municipality. In terms of Section 72 – Section 77 of the Municipal Council Ordinance it can remove obstructions that are under its control and maintain only road.

(2) Appellant has failed to establish that there had been a public duty to perform by the respondents. No mandamus would lie to direct or compel a person who exercises executive powers unless a "public duty" is cast upon on that person who exercises such a power.

(3) It is seen that there had been a delay which counts nearly three years – delay is fatal.

APPLICATION for a writ of mandamus.

Cases referred to:-

1. *Samaraweera vs. Minister of Public Administration* 2003 3 Sri LR at 64
2. *Sarath Hulangama vs. Siriwardane, Principal, Visaka Vidyalaya and others* 1986 1 Sri LR at 275
3. *Abdul Rahuman vs Mayor of Colombo* 659 NLR at 217

Dr. Sunil Cooray with *Arjuna Udawatte* for petitioner – appellant

Bharatha Abeynayake with *Malani Atthatage* for 1B-2- respondents – respondents

Isuru Balapatabendi for 3rd respondent-respondent.

29th August 2014

CHITRASIRI, J.

This is an appeal seeking to have the judgment dated 03.03.2009 of the learned High Court Judge in Kandy, reversed. By this appeal, the petitioner appellant also sought to have the reliefs that had been prayed for in the prayer to her amended petition filed in the High Court. In that prayer, she *inter alia* has an order directing the first two respondents to take all necessary steps to remove the obstructions and/or encroachments found over the Municipal passageway which is approximately 4 feet in width situated between the premises Nos. 74 and 72, Yatinuwara Veediya, Kandy. The said pathway is being morefully described in paragraph 32 in the amended petition dated 10.05.2006 filed in the High Court.

Learned Counsel for the appellant submitted that in terms of Sections 73 and 77 of the Municipal Council

Ordinance, the first two respondent-respondents are duty bound to take all necessary steps to remove obstructions found on the aforesaid passageway. Sections 73 and 77 in the Municipal Council Ordinance read thus:

> 73. (1) *Whenever it appears to a Municipal Council that any building, enclosure or obstruction has been raised or made in any street under the control of the Council, or on any waste or other land immediately adjoining such street and belonging to the State, it shall be lawful for the Council by written notice served on the person claiming to be the owner of the premises on which such building, enclosure, or obstruction has been raised or made, to demand the production of every deed, document, and instrument upon which such person founds such claim.*
>
> 77. (1) *It shall be lawful for the Council, through any person authorized by the Council in that behalf, to give order verbally or by notice in writing, to any person obstructing or encroaching upon any street under control of the Council, forthwith to remove or abate the obstruction or encroachment; and if any person to whom such order is given refuses or neglects to comply therewith within a reasonable time, or, if there be any doubt as to who is the proper person to whom such order should be given, after such notice has been fixed for a reasonable time to such obstruction or encroachment, it shall be lawful for the Council to cause any such obstruction or encroachment to be forthwith removed or abated.*

Accordingly, Section 73 and 77 empower Municipal Councils to remove obstructions and/or encroachments that are found over **any streets under the control of the Council.**

Therefore firstly, it is necessary to ascertain whether or not the appellant has established that the passage in question has been under the control of the Kandy Municipality.

The appellant has alleged that the obstructions that she seeks to remove are on a passageway controlled by the Municipality whilst the first two respondents have stated that the Municipality has no control over the said passage. Documents marked P1, P3 and P4 are some of the documents filed by the appellant to establish that the passageway is under the control of the Municipality. However, upon perusal of the contents of the said documents, it is clear that those documents do not support such a proposition since it contains the matters relating to the title of the premises referred to as Lot 49 in plan marked P5.

Furthermore, in the letter (at page 160 in the appeal brief) written on behalf of the Municipal Commissioner with a copy to the appellant, reference had been made to the Kandy Town street Plan No. 589 dated 22.06.1969 which was marked as P8. (at page 159 in the appeal brief) Even in that plan nothing is found to show that there had been a footpath or access road commencing from the main road, to reach the land to which the appellant claims title.

Moreover, no material is found to show that the Municipal Council in Kandy has exercised or performed any power or duty in respect of this pathway in order to consider it, as a roadway controlled by the Municipality. No evidence whatsoever is forthcoming too that the roadway had been acquired by the Municipality either.

Only document available to show that it had been a passage under the control of the Municipality is the Plan No.

2142 dated 13.06.1980, marked as P2. 9at page 146 in the appeal brief) It is a plan prepared on the instructions of the appellant to show that the premises bearing the assessment No. 72 belongs to her. It is a plan prepared pursuant to a private survey carried out on the instructions of the appellant to identify the premises belonging to her. Merely because the passage in dispute is identified as a Municipal passage in that private plan, such a remark will not support to establish that it was under the control of the Municipal Council in Kandy.

In the circumstances, it is clear that the appellant has failed to establish that the passage in question had been under the control of the Municipal Council in Kandy. Therefore, the appellant is not in a position to move for a Writ of Mandamus in terms of Sections 72 and 77 of the Municipal Councils Ordinance which provision of law empowers the Municipality to maintain only the roads that are under its control.

As mentioned hereinbefore, the appellant has failed to establish that the passage in question had been under the control of the Kandy Municipality. To the contrary preponderance of evidence is forthcoming to show that it is only a passage leading to three houses in a row, one of which is alleged to have been owned by the appellant. Therefore, it is clear that the passage to question is meant as a private access to those three houses. Accordingly, no public duty is cast upon the Municipality to maintain such a passage used as private access.

It is trite law that no mandamus would lie, to direct or compel a person who exercises executive powers, unless a "public duty" is cast upon, on that person who exercises

such a power. Also, it is necessary that the said public duty, sought to be enforced by way of a writ of mandamus shall not be of a private nature. This position in law has been discussed by Sripavan, J in *Samaraweera vs. Minister of Public Administration*[1] in that decision, he has held thus:

"To be enforceable by mandamus the duty to be performed must be of a public nature and not merely of a private character."

As mentioned hereinbefore, the appellant has failed to establish that there had been a public duty to perform by the first two respondents. Material before Court shows that the passage in question had been used by the respective parties for their private purposes. Accordingly, it is clear that the appellant is not in a position to seek for a writ of mandamus in this instance since no public duty is cast upon the first two respondents to maintain the passageway subjected to in this case.

The respondents also have pleaded that the appellant has failed to come to Court without undue delay. The issue of delay in coming to Court when moving for a prerogative writ such as a mandamus had also been discussed in the aforesaid case of *Samaraweera Vs. Minister of Public Administration. (Supra)* Also, in the cases of *Sarath Hulangama V. Siriwardena, Principal Visakha Vidayala, Colombo 5 and others*[2] and *Abdul Rahuman Vs. The Mayor of Colombo* [3] importance of seeking relief without delay had been highlighted.

I will now turn to examine whether or not there had been a delay in seeking relief by the appellant. The 3rd defendant who is alleged to have obstructed the passage has obtained

permission from the Municipality on 02.09.2004 to develop his land and to have a construction put up thereon. Immediately thereafter, he has commenced developing his land in accordance with the approval obtained from the Municipality. 3rd respondent alleged that obstructions over the passage in question had been in existence since then. It had not been denied by the appellant. Application for a Writ of Mandamus had been made by the Appellant to the Provincial High Court only on 10.05.2006.

In the circumstances, it is seen that there had been a delay which counts nearly two years, in coming to court by the appellant to seek redress. Reasons for such a delay have not been explained. It is a considerable period of time when applied to the circumstances of the given situation. The appellant has allowed the 3rd respondent to continue with his construction activities without coming to court for relief, for a long period of time. Accordingly, I am of the view that the learned High Judge is correct when he decided to dismiss the application of the petitioner-appellant due to laches on her part.

For the reasons set out above, I am not inclined to interfere with the findings of the learned High Court Judge. Accordingly, this appeal is dismissed with costs.

MALINIE GUNARATNE, J. - I agree.

Application dismissed.

SUBASHINI VS. OIC, POLICE STATION TISSAMAHARAMA AND ANOTHER

COURT OF APPEAL
ABDUL SALAM, J. (P/CA)
RAJAPAKSE, J.
CA PHC 128/2011
PHC HAMBANTOTA 7/2010
MC TISSAMAHARAMA 99595/09
FEBRUARY 18, 2014
SEPTEMBER 2, 2014

Primary Courts Procedure Act No. 44 of 1979 Section 66(1) (a) – Agricultural Development Act Section 90 – Interference with Cultivation Rights of owner cultivator or occupier – Could the jurisdiction conferred under Section 66 be exercised? – Special Tribunal created to give specific remedy – Resort to that Tribunal?

Held:

(1) Where a statute created a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement – a party seeking to enforce the right – must resort to that tribunal and not to others.

APPEAL from the Judgment of the Provincial High Court (Hambantota)

Cases referred to:-

1. *Mansoor vs. OIC Avissawella* 1991 2 SLR 75

Anuruddha Dammika with *Indika Jayaweera* for 1st Party Petitioner - Appellant

Gamini Premathilake with *Ranjith Henri* for 2nd Party Respondent

02nd October 2014

A. W. A. SALAM, J (P/CA)

This is an appeal preferred against the judgment of the learned High Court Judge of Hambantota. The learned High Court Judge in turn delivered his judgment, when the 1st Party Respondent petitioner Appellant sought a writ against the order of the learned Magistrate refusing to exercise jurisdiction over a dispute relating to paddy land with regard to right to cultivation and dispossession.

The learned Magistrate relying on Section 90 of the Agricultural Development Act has rejected the report filed under Section 66(1)(a) of Act No 44 of 1979, on the basis that the jurisdiction conferred under the said Section 66 cannot be exercised, when the Legislature has conferred a particular relief over such disputes.

The learned Judge of the High Court has affirmed the decision of the learned Magistrate on the same premise relied upon by the Magistrate.

Section 90 of the Agrarian Development Act reads as follows. . .

"INTERFERENCE WITH CULTIVATION RIGHTS OF OWNER CULTIVATOR OR OCCUPIER.

90.(1) Where a complaint is made to the Commissioner General by any owner cultivator or occupier of agricultural land that any person is interfering with or attempting to interfere with the cultivation rights, threshing rights, rights of using a threshing floor, the right of removing agricultural produce or the right to the use of an agricultural road of such owner cultivator or occupier,