

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

D.C. Colombo Case No.14940/L

Court of Appeal No.CA 812/2000 (F)

In the matter of appeal under and in terms of Section 755 (3) of the Civil Procedure Code.

1. Thangeswararajah Prithiviraj
2. Rajaluxmy Prithiviraj
Both of No.300, K.K.S. Road,
Jaffna.

**Plaintiffs - Appellants
Vs.**

1. Martin Joseph Fernando
2. Minnathul Fowza Joseph Fernando
Both of No.137, 1st Cross Street,
Colombo 11.

Defendant - Respondents

And Now

1. Thangeswararajah Prithiviraj
(Deceased)

1A. Prithiviraj Arulkumaran

2. Rajaluxmy Prithiviraj
Both of No.300, K.K.S. Road
Jaffna

**Plaintiffs – Appellants
Vs.**

1. Martin Joseph Fernando
2. Minnathul Fowza Joseph Fernando
(Deceased)
- 2A. Martin Joseph Fernando
Of No.137, 1st Cross Street
Colombo 11.

Defendants-Respondents

Before: Janak De Silva J.

&

N. Bandula Karunarathna J.

Counsel: Nihal Jayamanna PC with Dilhanda de Silva for the Plaintiff - Appellant.

Faisz Musthapha PC with H. Withanachchi for the Defendant - Respondent.

Written Submissions: By the Plaintiffs- Appellants on 04/04/2018

By the Defendant- Respondents on 25/05/2018

Argued on: 03/06/2019

Judgement on: 16/11/2020

N. Bandula Karunarathna J.

The Plaintiffs and the Defendants carried on a business of selling certain articles and particular clothing, which items were provided by the Plaintiffs who are husband and wife and marketed by the Defendants. For the purpose of carrying on the business they purchased the property in suit jointly by Deed No.577 of 01.06.1982 (P1) and carried on the business in the said premises. Thus, they owned the partnership business and the said premises in suit in equal share.

It could be unveiled that within a short period of time thereafter the parties terminated their joint ownership. On terminating and allocating of the Partnership Business and in setting accounts the Defendants by deed No.834 (P2) transferred their half share to the Plaintiffs and the parties also terminated their Partnership Business by Deed of Retirement 849 dated 21.02.1983 (P3). The Parties of the First Part are the Defendants and the Parties of the Second Part are the Plaintiffs, in the said Deed of Retirement.

It is the Defendant's position that apart from the Deed of Transfer of the half share Deed No.834 of 10.02.1982 and the Deed of Retirement No.849, another document was executed at the same time by the same Notary Mr. Jegadeesan.

According to the Defendant the third document is an agreement to sell whereby the Plaintiffs agree to sell the property subject to certain conditions for the Defendant to pay the balance amount and have a transfer executed in their name.

The Plaintiffs' argue that this aforesaid document was not annexed to the answer and nor was it produced at the trial

It is on this mysterious purported Deed which was not produced that the Defendants had their claim in reconvention sought that the Plaintiffs are holding the property in trust.

Plaintiffs state that on a perusal of these issue that the Defendant is seeking to enforce an agreement whereby the Plaintiffs agreed to sell the property to the Defendant for 2.5 million rupees. They further state that having failed to produce a notarial document the Defendants have required the Court to presume the existence of such document and terms and conditions of this non-existing document.

Plaintiffs further state that the Defendants that are in unlawful possession after breaching the relevant conditions in the Notarial Executed Retirement Deed P3, and specially clause 8 and continuing to be in such possession and are still carrying out business, and had gained tremendous advantage over the Plaintiffs, and caused loss and damage to the Plaintiffs. Thus it is to the advantage of the Defendants to continue to possess on the basis of an imaginary agreement to sell.

The Defendants, as opposed to the previous argument state that it is true that the Plaintiffs retired from the business with effect from 10.02.1983 (P3) attested by K. Jegadeesan N.P., and by the said deed the Defendants were allowed to run the business for two years. However, upon retirement from the partnership, the agreement between the parties' consequent to an accounting was that the Defendants will pay to the Plaintiffs a sum of Rs.2.5Million.

The Defendant further states that towards settlement of this sum the Defendants have given to the Plaintiffs a promissory note to the value of Rs. 1,000,000/- and by Deed No.834 of 10.02.1983 attested by K. Jegadeesan N.P. (P2) the Defendants transferred their undivided half share in the said premises No.137, to the Plaintiffs by way of security.

The Defendants state that by a separate notarially attested agreement which cannot presently be traced the Plaintiffs agreed to retransfer the entirety of the said premises No.137, upon payment to them of the full sum of Rs.2.5 Million.

In my observations through the evidence led in court, the Defendants have already paid to the Plaintiffs the sum of Rs. 1,000,000/- due on the said promissory which thus stands discharged. Thereafter, the Defendants have paid to the Plaintiffs a further of Rs. 300,000/- and now the balance due to the Plaintiffs from the Defendants is Rs. 1,200,000/-.

I believe that the Plaintiffs are deliberately avoiding accepting the balance sum of Rs. 1,200,000/- which the Defendants are ready and willing to pay as the Defendants have tried several times to pay the Plaintiffs the said balance sum of Rs. 1,200,000/-

The Plaintiffs have both by virtue of the said notarial attested agreement which is presently not traceable and orally agreed to retransfer the said premises No.137 upon receiving the full payment of Rs.2.5 Million out of which a sum of Rs.1.3 Million has already paid.

Thus, it is my view that the Plaintiff's obligation is in the nature of a Constructive Trust in favor of the Defendants both under section 83 and 96 of the Trust Ordinance.

In the Privy Council case in Valliyammai Atch Vs Abdul Majeed {48 NLR 289} the law was settled that notwithstanding the provision in section 91 and 92 of the Evidence ordinance parole evidence is admissible to establish a trust in cases where immovable property is transferred absolutely by one person to another by a notarial attested Deed.

Thus, in this situation also, verbally agreeing to retransfer the said premises No. 137 may amount to a constructive trust.

The main matters that determine whether a constructive trust exists or not are:

- a. the inadequacy of consideration.
- b. retention of physical possession by the transferee; and
- c. the purpose of the transfer.

In this situation, no consideration was provided as the property was transferred as security, the retention of physical possession is with the Defendant and the property was transferred for the purpose of providing security for the monies due and payable [LKR 2.5 million]

It is well accepted that an Appellate Court will not disturb the findings of fact of the original Court except where such findings are perverse and unreasonable. With respect, such a criticism cannot be made in respect of the trial judge's findings in the instant case. Vide the cases of De Silva and others VS Seneviratne and another (1981) 2 Sri L.R. 7 and Munasinghe VS Vidanage 69 NLR 97 and Fradd VS Brown & Co Ltd 20 NLR 282.

It is very clear that the Learned Trial Judge has dealt with the central issue in the case, and that he has given reasons for his views. His conclusions, are correct, and his judgment has been written in compliance with the provisions of section 187 of the Civil Procedure Code. Further in terms of Article 138(1) of the Constitution, the Court of Appeal will not reverse or vary any judgment, decree or order of any Court on account of any error, defect or irregularity if such error, defect or irregularity has not prejudiced the substantial rights of the parties or occasioned a failure of justice- vide the case of Gunaseena VS Kandage and others 1997 3 Sri L.R. 393 at 400; The same view was expressed by the Court of Appeal in the case of Victor and another VS Cyril de Silva 1981 1 Sri L.R 41 at 46.

In the case of Balasundaram VS Raman 79 (1) NLR 361 Pathirana J delivering the judgment of the Supreme Court observed as follows at page 395 in regard to the essential requisites of a judgment of a Court:

"Even though the judgment may not on a reading on the face of it disclose that the Trial Judge has considered and subjected to examination and critical analysis the evidence of witness, but has chosen to act only on the documentary evidence, an Appellate Court can still uphold such a judgment if it is satisfied that that the reasons , however brief, and conclusions reached have been on the hypothesis that there had been a rational examination and analysis in his mind of relevant evidence and the rejection of what is irrelevant."

The judgment of the learned trial Judge in the Instant case amply satisfies the aforesaid test.

Bertram C. J. stated, in the case of Felalloon vs. Cassini 20 NLR 332 at page 335:

"With regard to this contention, it is sufficient to say that, while a Court of Appeal will always attach the greatest possible weight to any finding of fact of a Judge of first instance based upon oral testimony given before that Judge, it is not absolved by the existence of these findings from the duty of forming its own views of the

facts, more particularly in a case where the facts are of such complication that their right interpretation depends, not only on any personal impression which a Judge may have formed by listening to the witnesses, but also upon documentary evidence, and upon the inferences to be drawn from the behaviour of these witnesses, both before and after the matters upon which they gave evidence."

The circumstances in which an appellate Court would interfere with the findings of a trial judge were also considered by the Privy Council in the case of K. M. Perera vs. Martin Dias 59 NLR 1 where Their Lordships recalled the "wise words" of Lord Greene in M. R. in Yuill vs. Yuill 1 AER 183 at p.188-9:

"We are reminded of certain well-known observations of the House of Lords dealing with the position of an appellate Court when the judgment of the trial judge has been based in whole or in part on his opinion on the demeanour of witnesses. It can, of course, only be on the rarest occasions and in circumstances where the appellate Court is convinced by the plainest considerations that it would be justified in finding that the trial judge has formed a wrong opinion. But when the Court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction."

Due to the aforesaid reasons, I verily believe that the appeal should be dismissed and that the judgment of the Learned District Court Judge should be upheld.

Appeal dismissed with cost.

Judge of the Court of Appeal

Janak De Silva, J

I agree.

Judge of the Court of Appeal