

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Appeal

1. Leif Heling
2. Kristine Heling
Both of No. 3070, Sanday, Norway

Appearing through their power of Attorney
holder Pothupitiya Kankanamge
Udaya Gunabandu.

“If”
Thalpe, Galle.

Plaintiffs

SC Appeal 91/2013
SC (SPL) LA No.260/2012
CA No.1303/98(F)
DC Galle No.12813/L

Vs-

1. Yasawathi Abeywickrama Weerasinghe.
2. Kumarapperuma Arachchige Carolis Gunapala
Both of Liyanagewatta, Thalpe, Galle.

Defendants

AND BETWEEN

1. Yasawathi Abeywickrama Weerasinghe.

Liyanagewatta, Thalpe, Galle.

2. Kumarapperuma Arachchige Carolis Gunapala
(Deceased)

2A. Kumarapperuma Arachchige Kumara.
Liyanagewatta, Thalpe, Galle.

Defendant-Appellants

Vs

1. Leif Heling
No. 3070, Sanday, Norway
2. Kristine Heling
No. 3070, Sanday, Norway

Appearing through their power of Attorney
holder Pothupitiya Kankanamge
Udaya Gunabandu.

“If”

Thalpe, Galle.

Plaintiff-Respondents

AND BETWEEN

Yasawathi Abeywickrama Weerasinghe.
Liyanagewatta, Thalpe, Galle.

1st Defendant-Appellant-Petitioner

Vs

1. Leif Heling
No. 3070, Sanday, Norway
2. Kristine Heling

No. 3070, Sanday, Norway

Appearing through their power of Attorney
holder Pothupitiya Kankanamge
Udaya Gunabandu.

“If”
Thalpe, Galle.

Plaintiff-Respondent-Respondents

Kumarapperuma Arachchige Carolis Gunapala
(Deceased)

Kumarapperuma Arachchige Kumara.
Liyanagewatta, Thalpe, Galle.

2A Defendant-Appellant-Respondent

AND NOW BETWEEN

Yasawathi Abeywickrama Weerasinghe.
Liyanagewatta, Thalpe, Galle.

**1st Defendant-Appellant-
Petitioner-Appellant**

Vs

1. Leif Heling
No. 3070, Sanday, Norway
2. Kristine Heling
No. 3070, Sanday, Norway

Appearing through their power of Attorney
holder Pothupitiya Kankanamge

Udaya Gunabandu.

“If”
Thalpe, Galle.

**Plaintiff-Respondent-
Respondent-Respondents**

Kumarapperuma Arachchige Carolis Gunapala
(Deceased)

Kumarapperuma Arachchige Kumara.
Liyanagewatta, Thalpe, Galle.

**2A Defendant-Appellant-
Respondent-Respondent**

Before: Sisira J. de Abrew, J
S. Thurairaja PC, J
Gamini Amarasekara J

Counsel: Anuruddha Dharmaratne with Indika Jayaweera
for the 1st Defendant-Appellant-Petitioner-Appellant
Faisz Musthapha PC with Athula Perera and M.S.E. Nadhiya for the
Plaintiff-Respondent-Respondent-Respondents

Argued on : 18.12.2019

Written submission
tendered on : 15.8.2013 by the 1st Defendant-Appellant-Petitioner-Appellant
3.10.2013 by the Plaintiff-Respondent-Respondent-Respondents

Decided on: 26.2.2020

Sisira. J. de Abrew, J

Plaintiff-Respondent-Respondent-Respondents (hereinafter referred to as the Plaintiff-Respondents) filed an action against the 1st Defendant-Appellant-Petitioner-Appellant and the 2nd Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the 1st and 2nd Defendants) seeking a declaration to eject the 1st and 2nd Defendants from the property in dispute; for peaceful possession of the property in dispute and for damages as prayed for in the plaint. The Plaintiff-Respondents filed this action on the basis that they are the owners of the property in dispute. The 1st and 2nd Defendants moved for a dismissal of the action. After trial, the learned District Judge by his judgment dated 8.5.1998, held the case in favour of the Plaintiff-Respondents. Being aggrieved by the judgment of the learned District Judge, the 1st and 2nd Defendants appealed to the Court of Appeal and the Court of Appeal by its judgment dated 22.10.2012 dismissed the appeal. Being aggrieved by the said judgment of the Court of Appeal, the 1st Defendant has appealed to this court. This court by its order dated 14.6.2013 granted leave to appeal on questions of law set out in paragraphs 16 (b), (c), (d), (e) and (f) of the Petition of Appeal dated 21.12.2012 which are set out below in verbatim.

1. Did His Lordship of the Court of Appeal fail to consider that the issue No.6 was raised by the Defendants as a preliminary issue of law on the ground of prescription was answered in the negative on the ground that Plaintiff/Respondents were not in possession of the property and not on the ground that it was a declaratory action?
2. Did His Lordship of the Court of Appeal err in law when he came to an erroneous conclusion that the consideration of the Deed produced marked as P1 is only Rs.75,000/- when the learned District Judge has clearly stated that

the actual consideration is Rs.785,000/- and said finding was never challenged by the Plaintiff/Respondents?

3. Did His Lordship of the Court of Appeal err in law when His Lordship stated in his judgment that the only remedy available to the 1st Defendant/Petitioner and 2A Defendant/Respondent was to initiate a separate action to recover the balance consideration against the Plaintiff/Respondents which is legally impossible when he has held the consideration is only Rs.75,000/-?
4. Did His Lordship of the Court of Appeal also fail to consider that the Plaintiff/Respondents' action was prescribed in law in terms of Section 6 of the Prescription Ordinance as the said action has been filed 7 years and two months after the cause of action arose on the ground that it was not raised as a preliminary issue at the commencement of trial?
5. Did His Lordship of the Court of Appeal also fail to consider that the 1st Plaintiff/Respondent waved his right which he had under the document produced marked P3 by which the Defendants have agreed to vacate the premises whereas by document produced marked P6 which was dated 13.6.1987 the 1st Plaintiff/Respondent has agreed that the Defendants could possess the property until the balance consideration is paid by their Attorney Mrs.Charlotte Seneviratne and therefore the Plaintiff/Respondents did not have a cause of action to institute this action?

The Plaintiff-Respondents filed this action on the basis that they are the owners of the property in dispute. According to the evidence led by the Plaintiff-Respondents, they purchased the property in dispute from the 1st Defendant by

Deed No.3128 attested by C.Seneviratne Notary Public marked P1. The consideration stated in the said deed was Rs.75,000/-. The 1st and 2nd Defendants, by way of an admission, admitted that they signed the deed marked P1. The position taken up by the 2nd Defendant in his evidence was that although his wife signed the deed marked P1, the agreed amount for the sale of the property in dispute was Rs.1,500,000/- but they (1st and the 2nd Defendants) got only Rs.550,000/-. However, the position taken up by the 1st and the 2nd Defendants in their answer was that Plaintiff-Respondents had agreed to buy the property in dispute for a sum of Rs.850,000/- and that the Plaintiff-Respondents paid Rs.550,000/-. The 2nd Defendant has stated, in his evidence, that he and his wife (the 2nd Defendant and 1st Defendant are husband and wife) would leave the property in dispute if the entire amount is paid. However, the 2nd Defendant has stated in his evidence that he had received Rs.550,000/- from the Plaintiff-Respondents when the property in dispute was sold to the Plaintiff-Respondents. The 1st and 2nd Defendants have admitted that they signed the Deed No.3128 attested by C. Seneviratne Notary Public. The main point urged by learned counsel for the 1st and 2nd Defendants was that the Deed No.3128 attested by C. Seneviratne Notary Public marked P1 is invalid since the consideration stated in the said deed is fraudulent. However, learned counsel for the Plaintiff-Respondents contended that the consideration stated in the said deed marked P1 was only Rs.75,000/- and the said deed is a valid deed since the consideration mentioned in the said deed has been paid and that if the agreed amount has not been paid there should be a separate action for recovery of the said amount. I now advert to these contentions.

There is no evidence to suggest that the consideration stated in the Deed No.3128 attested by C. Seneviratne Notary Public marked P1 was fraudulent. Document marked P2 which is a valuation report signed by F. Guruge Licensed Surveyor and Valuer states that the value of the property in dispute is Rs.65,000/-. Considering above matters, I reject the above contention of learned counsel for the Defendant-Appellants that the consideration in the said deed is fraudulent.

Assuming without conceding that the consideration stated in the Deed marked P1 was Rs.850,000/- and not paid to the 1st Defendant by the Plaintiff-Respondents, does it mean that the said Deed marked P1 would become invalid. I may in another way present this question in the following manner.

Even if the consideration mentioned in a deed of transfer is not paid to the seller, does the deed of transfer become invalid?

In order to answer the above question, I would like to consider certain judicial decisions.

In Jayawardena Vs Amarasekara 15 NLR 280 Lascalles CJ held as follows.

“On the execution of a notarial conveyance the sale is complete, and the mere fact that the whole of the consideration has not been paid cannot, in the absence of fraud or misrepresentation, afford ground for the rescission of the sale and the cancellation of the conveyance.”

In Mohamadu Vs Hussim 16 NLR 368 Pereira J held as follows.

“Where a person obtains a conveyance of property without fraud, but afterwards fraudulently refuses to pay the consideration stipulated for, the

grantor is not entitled to claim a cancellation of the conveyance, but his remedy is an action for the recovery of the consideration.”

Applying the principles laid down in the above judicial decisions, I hold that a deed of transfer executed without fraud by a Notary Public in accordance with the provisions of the Notaries Ordinance does not become invalid if the consideration stated in the deed of transfer is not paid to the seller. I further hold that in such a situation, remedy of the seller of the property is to file a separate action for the recovery of the consideration. Considering all the above matters, I hold that the Plaintiff-Respondents are the owners of the property in dispute and that they became the owners upon the execution of the Deed No.3128 attested by C. Seneviratne Notary Public marked P1.

The next question that must be considered is whether the Plaintiff-Respondents in this case could seek ejectment of the 1st and the 2nd Defendants from the property in question without a specific prayer for declaration of title. I now advert to this question. The answer to this question is found in the judicial decisions in the case of Jayasinghe Vs Tikiri Banda [1988] 2 CALR 24 wherein Viknaraja J held as follows:

“Where title to the property has been proved, as in this case the fact that one had failed to ask for a declaration of title to the property will not prevent one from claiming the relief of ejectment.”

In Dharmasiri Vs Wickramatunga [2002] 2 SLR 218 Weerasuriya J held as follows.

“Even though the plaintiff has not asked for a declaration of title it does not prevent him from seeking the relief for ejectment.”

In the case of Pathirana Vs Jayasundara 58 NLR169 at page 172 Gratiaen J held as follows.

“In a rei vindicatio action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation.”

Applying the principles laid down in the above judicial decisions, I hold that in an action for ejectment of the defendant from the property in dispute, once the plaintiff's title to the property is proved, he (the plaintiff) is entitled to ask for ejectment of the defendant from the property even though there is no prayer in the plaint for a declaration of title.

In the present case the Plaintiff-Respondents, in the body of the plaint, have pleaded their title to the property in question and issue No.1 which was accepted by trial court was whether 1st Defendant by Deed No.3128 transferred the property in dispute to the Plaintiff-Respondents. The learned trial Judge answered this issue in the affirmative. When I consider the evidence led at the trial, I hold that the decision of the learned trial Judge in answering the above issue in the affirmative is correct and that the Plaintiff-Respondents are the owners of the property in dispute. When I consider all the aforementioned matters, I hold that the Plaintiff-Respondents are entitled to seek ejectment of the Defendant-Appellants even though there is no separate prayer in the plaint for a declaration of title.

Learned counsel for the Defendant-Appellants next contended that the action of the Plaintiff-Respondents should fail on the basis of Section 6 of the Prescription Ordinance which reads as follows.

“No action shall be maintainable upon any deed for establishing a partnership, or upon any promissory note or bill of exchange, or upon any written promise, contract, bargain, or agreement, or other written security not falling within the description of instruments set forth in section 5, unless such action shall be brought within six years from the date of the breach of such partnership deed or of such written promise, contract, bargain, or agreement, or other written security, or from the date when such note or bill shall have become due, or of the last payment of interest thereon.”

I now advert to this contention. The Plaintiff-Respondents have filed this action on the basis that they are the owners of the property in dispute on the strength of the Deed No.3128 attested by C Seneviratne Notary Public marked P1. The action has not been filed on the basis of a document mentioned in Section 6 of the Prescription Ordinance. Further I note that there was no specific issue at the trial whether the action should fail on the basis of Section 6 of the Prescription Ordinance. The 1st and the 2nd Defendants have raised an issue at the trial to the effect that whether the action of the Plaintiff-Respondents has been prescribed. This issue was tried as a preliminary issue. The learned trial Judge, by his order dated 31.5.1996, answered the above issue in the negative and decided that this action was not a possessory action. The 1st and the 2nd Defendants have not filed an appeal against the said judgment in the Court of Appeal.

In a possessory action person who claims the possession of the property must prove that he was dispossessed from the property. The action should be filed within one year from the alleged dispossession. In the present case, according to the Plaintiff-Respondents, after the execution of Deed No.3128 attested by C.Seneviratne Notary Public marked P1, they never got possession of the property in dispute. The Plaintiff-Respondents in their plaint have sought an order for ejectment of the 1st and 2nd Defendants and their agents from the property in dispute. The Plaintiff-Respondents filed this case on the basis that they are the owners of the property in dispute. When I consider all the above matters, I hold that this is not a possessory action. The learned District Judge has considered the above matters in his order dated 31.5.1996 and decided that this action was not a possessory action. Considering all the aforementioned matters, I hold that the learned District Judge has come to the correct conclusion in his order dated 31.5.1996.

Considering all the above matters, I reject the above contention of learned counsel for the 1st and the 2nd Defendants.

His Lordship of the Court of Appeal while dismissing the appeal of the 1st and 2nd Defendants has made an order to the effect that the Plaintiff-Respondents should pay Rs.300,000/- to the 1st and the 2nd Defendants when the property in dispute is handed over to the Plaintiff-Respondents. I would reproduce below the order of the Court of Appeal. It is as follows.

*However, I hold with the trial Judge's ruling that the Plaintiff need to pay a sum of rupees three hundred thousand which is the balance sum due on **the***

transaction, and Defendants would be entitled to the said sum on handing over the vacant possession.

I would like to note that the 1st and the 2nd Defendants have, in their answer, not sought such a relief. The 2nd Defendant in his evidence has admitted that he received Rs.550,000/- from the Plaintiff-Respondents when the property in dispute was sold to the Plaintiff-Respondents and that they (1st and 2nd Defendants) would leave the property in dispute once they receive the entire amount. Thus, the amount of Rs.300,000/- appears to be the balance amount that they expected. I have earlier held that the Plaintiff-Respondents have, upon the execution of the Deed of Transfer No.3128 attested by C. Seneviratne Notary Public marked P1, become the owners of the property in dispute. If the Plaintiff-Respondents are the owners of the property in dispute, the 1st and the 2nd Defendants cannot, in this action, be permitted and are not entitled to succeed in a condition that they would leave the property in dispute once Rs.300,000/- is paid OR that the Plaintiff-Respondents should pay Rs.300,000/- to the 1st and the 2nd Defendants when they hand over vacant possession of the property in dispute to the Plaintiff-Respondents. However, the 1st and the 2nd Defendants may have a separate cause of action to recover the said amount in a separate case. It will have to be decided according to the law of the land. Upon the execution of the Deed of Transfer No.3128 attested by C. Seneviratne Notary Public marked P1, the sale is complete. I therefore hold that the above order of the Court of Appeal, that is to say that the Plaintiff-Respondents should pay Rs.300,000/- to the 1st and the 2nd Defendants when they hand over vacant possession of the property in dispute to the Plaintiff-Respondents cannot be permitted to stand. I therefore set aside the aforementioned order of the Court of Appeal relating to payment of Rs.300,000/- by the Plaintiff-Respondents to the 1st

and the 2nd Defendants. Subject to the above variation, I affirm the judgment of the Court of Appeal and dismiss this appeal. The Plaintiff-Respondents who are the owners of the property in dispute are entitled to eject the 1st and the 2nd Defendants from the property in dispute and for peaceful possession of the property in dispute. The learned District Judge is directed to enter decree in accordance with this judgment.

For all the aforementioned reasons, I answer the 1st, 2nd, 3rd and 4th questions of law above in the negative. The 5th question of law does not arise for consideration.

Appeal dismissed.

Judge of the Supreme Court.

S. Thurairaja PC J

I agree.

Judge of the Supreme Court.

Gamini Amarasekara J

I agree.

Judge of the Supreme Court.