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

In the matter of an Appeal from a judgment of the Civil Appellate High Court.

1. Navarajakulam Muthukumaraswamy, No.18, Lilly Avenue, Colombo 06.
2. Vaithilingam Muthukumaraswamy, No. 18, Lilly Avenue, Colombo 06.

Plaintiffs

SC APPEAL No. 122/2013.

SC HCCA (LA) No. 240/2012.

C.A. (FINAL) APPEAL No: WP/LACA/LA/116/06 Vs

D.C. Mt. Lavinia Case No. 1875/04/L

1. Suresh Thirugnanasampanthan, No. A/136, Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda.
2. Gowreshwary Suresh, No. A/136, Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda.

Defendants

AND

1. Navarajakulam Muthukumaraswamy, No.18, Lilly Avenue, Colombo 06.
2. Vaithilingam Muthukumaraswamy, No. 18, Lilly Avenue, Colombo 06.

Plaintiffs Appellants

Vs

1. Suresh Thirugnanasampanthan,
No. A/136, Maddumagewatte
Housing Scheme, Maddumagewatte,
Nugegoda.
2.Gowreshwary Suresh, No. A/136,
Maddumagewatte Housing Scheme,
Maddumagewatte, Nugegoda.

Defendants Respondents

AND NOW

1.Navarajakulam Muthukumaraswamy,
No.18, Lilly Avenue, Colombo 06.
2.Vaithilingam Muthukumaraswamy,
No. 18, Lilly Avenue, Colombo 06.

Plaintiffs Appellants Appellants

Vs

1. Suresh Thirugnanasampanthan,
No. A/136, Maddumagewatte
Housing Scheme, Maddumagewatte,
Nugegoda.
2. Gowreshwary Suresh, No. A/136,
Maddumagewatte Housing Scheme,
Maddumagewatte, Nugegoda.

Defendants Respondents Respondents

BEFORE : PRIYASATH DEP PC. CJ.
S. EVA WANASUNDERA PC. &
H. N. J. PERERA J.

COUNSEL : Harsha Soza PC with M. Jude Dinesh for the Plaintiffs Appellants Appellants.
Ikram Mohamed PC with S. Mithrakrishnan and Nadeeka Galhena for the Defendants Respondents Respondents

ARGUED ON : 20.03.2017.
DECIDED ON : 30.05.2017.

S. EVA WANASUNDERA PCJ.

This Court has granted leave to appeal on two questions of law contained in paragraph 19(a) and (g) of the Petition dated 25.06.2012. They read as follows:

1. Did the High Court err in law in holding that the said informal agreement P2 is enforceable in law, ignoring the fact that the said agreement was not duly attested by the Notary Public as required by Sec. 2 of the Prevention of Frauds Ordinance and as such was of no force or avail in law as expressly declared by Sec. 2 of the Prevention of Frauds Ordinance?
2. Did the High Court err in ordering specific performance of the informal agreement P2 without considering the submissions that it was not in any event a fit and proper case to order specific performance in view of the matters set out in paragraph 18(m) hereof?

Since the 2nd question refers to paragraph 18(m) it seems necessary to place herein the contents of the said paragraph. It reads as follows:

In any event the learned judge of the High Court erred in law in granting specific performance of the informal agreement sought by the Defendants totally disregarding the submission that,

(i) In any event, in the circumstances of the case after the intended date of performance, i.e. 22.09.1993, the said informal agreement stood

cancelled automatically, and thereafter no enforceable rights flowed from the said agreement. Hence the Defendants were not entitled to seek specific performance of the said agreement in 2004/2005.

(ii) Specific performance will not be granted when the Plaintiff has himself been guilty of delay in performing his part of the contract. In the instant case the Defendant (the party seeking specific performance) are themselves guilty of delay in performing their part of the contract.

(iii) Specific performance will not be granted unless it is fair and just. The price was agreed in 1993. To order the Plaintiffs to transfer the property for the same price after 20 years where the real value of Rs. 500,000/- is very much lower than what it was in 1993 is grossly unjust.

Mr. and Mrs. Muthukumaraswamy were living in No. 18, Lilly Avenue, Colombo 6 in 1993 and they have filed action on 04.06.2004 against Mr. and Mrs. Suresh Thirugnanasampanthan for a declaration of title to the Unit No. A/136, Maddumagewatte Housing Scheme, Maddumagewatta, Nugegoda and for ejectment of the Defendants.

By 2005, at the time evidence was placed before the trial court and even in 1993, Muthukumaraswamy and family had been living at No. 50, Brookmill Boulevard, Unit No. 34, Scarborough, Ontario, Canada. Mrs. Muthukumaraswamy entered into a sale agreement, No. 1147 dated 22.03.1993 to sell premises No. A/136, Maddumagewatte HousingScheme, Nugegoda to Mr. and Mrs. Thirugnanasampanthan. The agreed sale price was Rs. 750000/- and the purchasers agreed to complete payment within 6 months and paid as an advance Rs.250000. **Paragraph 7 of the said agreement provided for specific performance if the vendor failed to execute the deed.** However, the 1st Plaintiff had not received the title deed from her predecessor in title, namely the Commissioner of National Housing up until 13th December, 2002. So, **there was no title deed with the vendor to pass title to the purchaser** at the time of the sale agreement or even at the end of the 6 months period for payment by the purchaser or for the seller to execute the deed of sale.

Mr. and Mrs. Suresh Thirugnanasampanthan did not pay the balance Rs. 500000/- to Mrs. Muthukumaraswamy within six months because the seller who agreed to sell had no paper title in his hands. The Thirugnanasampanthan family has been

occupying the housing unit from 1993. Now the housing units have gone up in price. The seller who agreed to sell the housing unit does not want to sell the same to the agreed purchaser but wants the said agreed purchaser and his family who are occupying the premises, to be ejected. The Defendants claim that they are entitled to get specific performance effected from the 1st Plaintiff who agreed to sell. The position taken up **by the vendor who signed the sale agreement is that it is not a valid deed because it does not have a proper attestation.**

The District Judge held with the Defendants. The Plaintiffs appealed to the Civil Appellate High Court. The High Court affirmed the judgment of the District Court. Now the Plaintiffs are before this Court by way of an Appeal once again.

At the beginning of the trial, parties recorded the **admissions,** i.e. **paragraphs 1,3 and 4 of the Plaint**, **documents P3 and P4 and the fact that the 1st Plaintiff had received the title deed in December, 2002**. P3 is the letter of demand to vacate the premises and P4 is the reply to the same. Paragraph 1 of the Plaint states that the housing unit is owned by the 1st Plaintiff. Paragraph 3 states that the said housing unit was bought by the 1st Plaintiff from the National Housing Development Authority for Rs. 97500/- . The final instalment was paid in April 1991 but the **1st Plaintiff received the title Deed No. 893 dated 13.12.2002** which is marked as P1 with the Plaint. Paragraph 4 of the Plaint states **that " On or about 22.03.1993 the 1st Plaintiff entered into an Agreement with the *Defendant* and his wife whereby the Defendant and his wife agreed to purchase the aforesaid unit No. A/136 Maddumagewatte Housing Scheme, Maddumagewatte, Nugegoda from the 1st Plaintiff for a sum of Rs. 750000/-."**

Therefore, the stance taken up by the Plaintiffs, who are the Appellants in this case, is that **an agreement was entered into** between the 1st Plaintiff and the Defendants whereby the Defendants agreed to purchase the housing unit. I have noted that according to the proceedings in the District Court case, the Plaintiffs had moved court to add the 2nd Defendant who is the wife of the 1st Defendant who was the only Defendant when the case was originally filed. That application had been allowed and that is why both of them are parties to this action as Defendants.

The argument of the Plaintiffs at the trial was that the said agreement P2 dated 22.03.1993 is not a valid agreement in law because the Attorney at Law before

whom the document was signed has not attested the same in compliance with Sec. 2 of the Prevention of Frauds Ordinance. I find that the Attorney at Law has signed the said document in two places, once along with the parties, after the parties and the witnesses have signed and then at the end of the document mentioning in writing that " I certify that this document was signed in my presence".

Either party who has signed a document cannot claim at a later stage, that the document is not binding on either party taking advantage of the fact that the document was not duly attested. The basis of the Plaint commences with the admitted fact that Agreement P2 was signed by the parties. The intention of either party at the time of signing the same was to be bound by the terms and conditions of the same. Later by law they are estopped from claiming that the document is bad in law and that they are not bound by it.

The Plaintiffs Appellants Appellants (hereinafter referred to as Plaintiffs) argued that the said Agreement is not valid in law. They have, in their oral submissions as well as in their written submissions quoted from authorities, namely***, Kusumsiri Mohini Gunasekera Vs Nayavamitta Gunawathie Gunawardena and Others (unreported C.A.Appeal No. 77/88(F), G.P. Nathaniels Vs A.I.Nathaniels and three Others 2008 BLR 349 , Ausadahamy Vs Kiribanda Vol 5 CLW 57 and De Silva Vs De Silva Vol. 51 CLW 29.*** I have considered the material in the said cases.

Section 31 of the Notaries Ordinance provides that rules should be observed by the Notaries. Rule 20 of Section 31 deals with the form of the attestation. However, Section 33 of the Notaries Ordinance provides that " No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in Section 31 in respect of any matter or form. " In the case of ***Thiyagarasa Vs Arunodayam 1987 2 SLR 184*** it was held that the deed in question is not rendered invalid by an omission of the Notary to state the correct date in the attestation. ***In Wijeratne Vs. Somawathie 2002 1 SLR 19*** Justice Udalagama held that " non compliance with the rules in Sec. 31 of the Notaries Ordinance does not invalidate the Deed as provided for by Sec. 33 of the same Ordinance; that section protects the deed."

The facts of the case admittedly is that the Defendants Respondents Respondents (hereinafter referred to as the Defendants) had paid a sum of Rs. 250000/- and

the balance amount was due by 22.09.1993. The Plaintiffs claim that this sum was not paid to them before that date. The Defendants were placed in possession of the housing unit after the advance payment was done.

It is an admitted fact once again that the Plaintiffs did not possess a title deed at the time of the Agreement and the National Housing Development Authority had delayed in giving the title deed. The delayed Deed No. 893 dated 13.12.2002 is the basis of title of the housing unit claimed by the Plaintiffs. The 1st Defendant being the potential purchaser according to the Agreement cannot be expected to pay the balance of Rs.500000/- without getting a title deed. There was no title held by the Plaintiffs or no title deed or any form of passing title from the National Housing Development Authority to the Plaintiffs until the end of 2002 which was 9 years after the Agreement. In this scenario, there could never have been any way to pass title or receive title. The 1st Defendant cannot be expected to pay the balance and get no title. That was the reason for not paying the balance within six months from the date of the agreement.

Therefore I hold that the Defendants cannot be found fault with for not paying the balance. At the end of the trial when the Plaintiffs filed action to eject the Defendants, the trial judge held with the Defendants and dismissed the Plaint. At that time, the Defendants had deposited the balance Rs.500000/- in court. However the Plaintiffs Appellants Appellants have submitted that it is a serious omission on the part of the Defendants Respondents Respondents not to have deposited the money at the time this case was *instituted*. I hold that it is not an omission or a failure by the Defendants as the case was instituted by the Plaintiffs. The Defendants would not have expected the Plaintiffs not to pass title to them when the Plaintiffs finally received the title deed from the National Housing Development Authority in the year 2002. It is after nine years from the time the Defendants paid the advance to the Plaintiffs to buy the housing unit that in fact the Plaintiffs got title to the unit. Instead of passing title to the Defendants as agreed in 1993, the Plaintiffs had filed action to eject the Defendants. I am of the view that it was the first time and the first opportunity and the right time for the Defendants to deposit the money in the District Court when the Plaint was dismissed by the trial court. It has to be understood that they could not have deposited any money anywhere when they were not sure whether the vendor in the agreement, namely the Plaintiffs had in fact received title to the said property from the National Housing Development Authority.

Specific performance is what the Defendants had prayed for in their Answer to the Plaint. **The trial judge while dismissing the Plaint had granted the reliefs prayed for by the Defendants.** The District Judge had analyzed the evidence well and decided the case in favour of the Defendants. When the Plaintiffs appealed to the Civil Appellate High Court, the High Court Judges had also held with the Defendants Respondents by **affirming the judgment of the District Judge.** When the Agreement is valid in law, the parties should comply with the conditions as agreed. The Plaintiffs were living in Canada. The Defendants were in the housing unit. Possession was given when the advance was paid. There was no way to pay the balance and get title from the Plaintiffs simply because they did not have legal title to the said housing unit until the end of 2002. The passing of title was possible only at that time. The Defendants had been prevented from paying the balance and getting title to the housing unit due to the fact that the Plaintiffs had no legal title to transfer. I hold that it was not due to any fault of the Defendants that the balance purchase price got delayed to be paid. The balance could have only been paid at the time of the transfer deed being executed. **There was no opportunity created by the Plaintiffs to accept the balance and transfer the property due to the fault and lapses on the part of the Plaintiffs.**

The argument of the Plaintiffs that at the expiry of the six months from the date of the agreement which was the dead line for the transfer to take place, no legal right flow to either party is a fallacy. If that argument is upheld, no legal agreement could be given effect to. Anybody who wants to go against the conditions of any agreement, then , would only have to wait till the time limit passes by. I dismiss that argument as an invalid argument.

I also wish to state that whatever the arguments placed before the Civil Appellate High Court have been looked into prior to concluding the case. It may be that the counsel expect the judge to analyze each and every argument and specifically mention all the limbs of the argument and give reasons for setting each argument aside or holding up each argument right. This is an impossible task for a judge. The judge will definitely write the arguments which leads up to the conclusion. The Judge cannot be expected to break down each argument of each counsel. Counsel must remember that , the duty of the judge is to determine and decide the case to a conclusion. The Plaintiffs counsel has alleged that the arguments put

forward by him has not been considered. I hold that the High Court has considered all arguments and affirmed the judgment of the District Judge for good reasons.

After having considered the arguments and written submissions made by both parties, I answer the questions of law enumerated above at the commencement of this judgment, in favour of the Defendants Respondents Respondents. The Defendants are entitled to the reliefs prayed for in their answer in the District Court and get the Registrar of the District Court to execute and deliver a Deed of Transfer of the housing unit as they have already deposited the balance money to the credit of the Plaintiffs in the registry of the District Court. However the Defendants Respondents Respondents are further directed to deposit in the District Court, in favour of the Plaintiffs Appellants Appellants, legal interest on Rs. 500,000/- from the date on which the said balance money of Rs. 500,000/- was due to be paid, i.e. from 22.09.1993 up to the date hereof, prior to the execution of the Deed of Transfer.
The Appeal is dismissed. However I order no costs.

Judge of the Supreme Court

Priyasath Dep PC.
I agree.

Chief Justice

H.N.J. Perera J.
I agree.

Judge of the Supreme Court