IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA

Case No. CA 212/97 (F)

DC Mt; Lavinia: 343/ZL

Akmon Wimalasiri
Devasurendra,
89/1. Templers Rroad,
Mt.Lavinia
Plaintiff-appellant

Vs.
Thamara Kumari
Wijesundera,
87, Templers Rroad,
Mt.Lavinia and another

Defendant-Respondent

Before : **A.W.A. Salam, J.**

Counsel : Wijedasa Rajapakshe PC with Rasika Dissanayake for the Plaintiff-Aappellant and Sumedha Mahawanniarachchi for the Defendant-Respondents

Written Submissions filed on : 12.09.2011

Decided on : 23.11.2011

A.W.A.Salam, J.

The facts relevant to this appeal briefly are as follows. The plaintiff-appellant entered into an agreement with the defendant-respondents for the sale of the subject matter of the action by agreement to sell bearing No 981 dated 27 May 1977 attested by Neville Amarasingha NP. The plaintiff-Appellant has fulfilled his obligation of the said agreement but the defendant-respondents had failed to execute a deed of transfer in the name of the former. The action was filed by the plaintiff-appellant seeking the sole relief of enforcing the agreement to sell by way of a direction issued by Court on the defendant-respondents to transfer the land in question by way of a deed. In other words, the action of the plaintiff-appellant was for specific performance of the agreement.

While the trial was in progress, the defendant-respondents defaulted in honouring a pre-payment order. This resulted in judgment and decree having to be entered in favour of the plaintiff-appellant. Being aggrieved with the said judgment, the defendant-respondents preferred an appeal to this Court in CA 757/86(F). By judgment dated 10.3.1995 this court allowed the appeal and set aside the said

judgment and directed the district judge to proceed to trial in accordance with the law.

Thereafter, when the matter came up before the learned district judge the trial was taken up *de novo* and issues were framed afresh. The learned trial judge then proceeded to decide issue No.8 having considered it to be a preliminary question of law, as regards the maintainability of the action and by the impugned judgment dismissed the plaintiff's action on the premise that agreement No.981 provides for payment of damages and not specific performance. This appeal has been preferred against the said judgment.

The learned President's Counsel has urged that the impugned judgment cannot be allowed to stand as the district judge had been directed by this court in CA.1244/86 to continue on the proceedings of 6.2.1986. Apparently, no information is available as to the nature of the proceedings in CA.1244/86. By reason of the fact that CA.1244/86 is not followed by the letter "(F)" as in the case of CA 757/86(F), it can safely be assumed that CA.1244/86 is an application for revision of the identical judgment the legality of which was challenged in CA 757/86(F). In CA 757/86(F) Ananda Coomaraswamy and Edussuriya JJ, on 10.3.1985 have set aside the judgment of the district judge and sent back the case to proceed to trial in accordance with the law. This judgment appears to be a

considered judgment whereas in CA 1244/86 the same Bench on the same day had decided as follows....

> "In view of the order in CA 757/86 (F), this application is allowed setting aside the judgment and decree dated 26.6.86 and direct District judge to continue on the proceedings of 6.2.86".

From the above it would be seen that the decision made in revision application No1244/86 is an incidental/consequential order following the decision entered in 757/86 (F). Hence, I am of the view that it was open to the learned district judge to either commence the proceedings *de novo* or continue with the trial.

In any event parties have not objected to the learned district judge taking proceedings afresh and therefore it is now too late in the day to complain of the learned district judge of not having adhered to the direction given in No1244/86.

As has been submitted by the learned counsel for the defendant-respondents in terms of section 48 of the Judicature Act No 2 of 1978 (as it stood then) the learned district judge had a discretion to commence the proceeding afresh or to continue with the trial.

The next point urged by the President's counsel is that issue No 8 should not have been taken up as a preliminary issue but decided at the conclusion of the case. In terms of section 147 of the Civil Procedure Code when issues both of law and of fact arise in the same

action, and the court is of opinion that the case may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until the issues of law had been determined.

In the case of Muthukrishna vs Gomes 1994 3 SLR 101, it was held that under Section 147 aforesaid for a case to be disposed of on a preliminary issue, it should be a pure question of law which goes to the root of the case. It was further laid down in the said case that the judges of origin courts should, as far as practicable, go through the entire trial and answer all the issues unless they are certain that a pure question of law without the leading of evidence (apart from formal evidence) can dispose of the case.

In this case, the learned district judge had shown tremendous confidence that the resolution of issue No 8 would dispose of the entire action. For reasons to be stated hereunder, I am not of the opinion that the discretion exercised by the learned district judge to decide issue No 8 is blameworthy.

It is common ground that the agreement to sell No 981 did not provide for specific performance. It only provided for payment of damages as a substitute for specific performance. In the case of Thaheer vs Abdeen

59 NLR 385 the Privy Council upholding the decision of the lower court reported in 57 NLR 1, stated the law as follows....

"The right to claim specific performance of an agreement to sell immovable property is regulated in Ceylon by the Roman-Dutch law. Under the Roman-Dutch law the prima-facie right of the purchaser to demand specific performance may be excluded by the terms of the contract between the parties, e.g, by its terms providing for the substituted obligation upon the vendor in the event of his failure to convey the whole property to the purchaser"

As far as the substantial question of law raised in this appeal is concerned the decision in Kanagamma vs Kumarakulasingham 66 NLR 529 is of vital importance. In that case it was held that where an agreement to transfer immovable property provides for an alternative mode of performance in lieu of the execution of the transfer specific performance cannot be insisted upon.

Taking into consideration the aforementioned legal position, I am of the firm opinion that the learned district judge cannot be faulted for deciding issue No 8 at the outset before he commenced the recording of evidence. As has been submitted by the Learned Counsel for the defendant-respondents even if the trial judge had gone through the entire trial, yet the conclusion he could have reached cannot be different to what he in fact did reach by the impugned judgment.

For the foregoing reasons I am of the opinion that this appeal merits no favourable consideration. Appeal dismissed without costs.

Judge of the Court of Appeal

MDS/-