

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

**C.A. No. 08/2014(RV)  
D.C.Mt Lavinia 737/96/L**

**Ariyaratne Kandanhena  
“Jaysuriyawatta”  
Willegoda, Eheliyagoda**

**Plaintiff**

**Vs**

- 1. J.M.Enterprises (Pvt) Ltd.,  
88A Sunethradevi Road, Kohuwala**
- 2. Vernon Tillakeratne  
50 Wijerama Road, Nugegoda  
(Discharged from proceedings)**
- 3. J.W. Gunasekera  
7 Dutugemunu Mawatha  
Battaramulla**

**Defendants**

**AND NOW BETWEEN**

- 4. J.W. Gunasekera  
No.7 Dutugemunu Mawatha  
Battaramulla**

**3<sup>rd</sup> Defendant Petitioner**

**vs**

**Ariyaratne Kandahena  
“Jayasuriyawatta” Willegoda  
Eheliyagoda**

**Plaintiff Respondent**

**J. M. Enterprises (Pvt) Ltd.,  
88A Sunethradevi Eoad,  
Kohuwala**

**1<sup>st</sup> Defendant Respondent**

**BEFORE :** Deepali Wijesundera J., and  
M.M.A. Gaffoor J

**COUNSEL:** Thishya Weragoda with Niluha Dissanayake for the  
Petitioner

W.K. Amarasuriya for the Plaintiff Respondent and  
the 1<sup>st</sup> Defendant Respondent

**ARGUED ON:** 06.07.2015

**DECIDED ON:** 10.12.2015

**Gaffoor J.,**

This is an application for Revision filed by the 3<sup>rd</sup> Defendant Petitioner (hereinafter referred to as the 3<sup>rd</sup> Defendant) seeking to set aside the judgment dated 30.04.2008 of the District Court and allowing the 3<sup>rd</sup> Defendant to receive the sum payable by the Plaintiff Respondent (hereinafter referred to as “the Plaintiff”) in terms of the said Judgment and ordering the Plaintiff to deposit the same in Court.

The Plaintiff instituted this action in the District Court of Mount Lavinia on 04.11.1996 stating inter alia that :

- i) the property bearing Assessment No. 154 was purchased by him on Deed No. 1099 dated 14.02.1995 attested by W.M.S. Wijemanne, N.P and he had rented it out to the Eheliyagoda, Post Office/
- ii) after purchase he had been in continuous possession of this premises;

- iii) towards the end of the year 1993 he faced financial difficulties and he had gone to the office of the 1<sup>st</sup> Defendant company to obtain a loan;**
- iv) The 1<sup>st</sup> Defendant company agreed to grant Rs. 500,000/- loan on a conditional transfer interest fixed at 35% per annum; and he agreed to get the loan on the aforesaid terms and conditions;**
- v) He was asked to come to Hultsdorp on 19.10.1993 to effect the alleged deed of transfer.**
- vi) He was asked to sign on several blank papers and was handed over two cheques for Rs. 500,000/-**
- vii) In the meantime the property had been transferred in the name of the 3<sup>rd</sup> Defendant ;**
- viii) When the Plaintiff went to redeem the mortgage he came to know that they had inserted a sum of Rs. 900,000/- instead of Rs. 500,000/-and he was asked to pay Rs. 900,000/- together with interest**
- ix) The plaintiff informed the Defendant that he wanted to settle the amount he had actually taken as a loan.**
- x) The 1<sup>st</sup> Defendant company demanded a sum of Rs, 17,00,000/- to be paid within a week**
- xi) The plaintiff made several attempts to pay the sum of Rs. 500,000/- together with interest but that request was turned down by the 1<sup>st</sup> Defendant company;**
- xii) The Plaintiff pleaded that a cause of action has accrued to the Plaintiff to ask for an order for cancellation of Deed No. 1946 dated 5.11.1993 attested by Vernon Tilakaratne, N.P**

**subject to the payment of the principal and interest thereon in default to transfer the property through the Registrar of the Court.**

**Counsel for the 1<sup>st</sup> Defendant company filed its Answer and inter alia stated : :**

- i) that the Plaintiff's plaint is in violation of Section 14 of the Civil Procedure Code;**
- ii) Plaintiff has admitted that the Defendant is the owner of this property and hence this action cannot be proceeded with;**
- iii) No cause of action has arisen to the Plaintiff;**
- iv) The Defendant purchased the property which is the subject matter of this action by Deed No.1946 attested by Vernon Tilakaratne N,P.,**
- v) As there was no condition to re-convey the property to the Plaintiff this action should be dismissed;**

**By order dated 30.4.2008 the learned District Judge gave Judgment allowing the reliefs prayed for in the plaint and ordering the Defendant to re-convey the land on payment of principal and interest due thereon, failing which the Registrar of Court to convey the property by a Deed of conveyance.**

**Being aggrieved by the said order the 3<sup>rd</sup> Defendant preferred an appeal to the High Court (Civil) of the Western Province holden at Mt Lavinia.**

**In his Petition of Appeal to the High Court (Civil), the 3<sup>rd</sup> Defendant stated :**

- i) That on or about 22.7.1999 the Plaintiff made an application in terms of Section 18 of the C.P.C that the 3<sup>rd</sup> Defendant had purchased the land in suit on or about 8<sup>th</sup> October 1996 by virtue of Deed of Transfer No. 47 attested by M. Salpitikorale, N.P and to add him as a party to the action;**
- ii) That on or about 9<sup>th</sup> June 2000. the 3<sup>rd</sup> Defendant filed Answer seeking to dismiss the Plaintiff's action and for an order for ejecting the Plaintiff and for vacant possession of the land in suit;**
- iii) That on 29.10.2001 Admissions and Issues were recorded;;**
- iv) that he verily believes that the Plaintiff may proceed to deposit moneys ordered to be paid in the judgment dated 30..4.2008 and the 1<sup>st</sup> Defendant may recover the said moneys from court and as a result grave and irremediable loss would be caused to him who is a bona fide purchaser of the land in dispute;**
- v) that he prayed that the court be pleased to grant interim relief staying the proceedings in the District Court of Mt Lavinia case No. 737/96/L until the determination of this application;**
- vi) the deed of transfer No. 1946 was not duly completed at the time the Plaintiff signed the said document and in the circumstances it is null and void;**

**High Court (Civil) Mt Lavinia dismissed the appeal by its Judgment dated 23.08.2012 with costs fixed at Rs 5000'-.**

**By Petition dated 2.10.2012 the 3<sup>rd</sup> Defendant filed a leave to appeal application to the Supreme Court stating inter alia, that :.**

- i) the Plaintiff Respondent admitted that he obtained a loan from the 1<sup>st</sup> Defendant and as security the land was conditionally transferred and when the money is paid back he will transfer the property;**
- ii) It was the Plaintiff's case that P3 was an outright transfer as opposed to a conditional transfer as he was led to believe.**
- iii) The deed in question No. 1946 dated 5.11.93 was produced and marked P3. Therefore there is no question of having to prove the deed.**
- iv) The deed was signed by him in the presence of a Notary and witnesses. Thus all the legal requirement set out in the Prevention of Frauds Ordinance have been complied with;**
- v) P3 is a printed document the contention that he signed on blank papers in any event becomes a clear falsehood**

**The 3<sup>rd</sup> Defendant raised the following questions of law:**

- i) that the High Court had erred in ignoring the legal position enunciated in the judgments of Perera vs Fernando – 17 NLR 486, and Sethuwa vs Ukku – 56 NLR 337 ;**

- ii) that the High Court erred in permitting the Plaintiff Respondent to convert a deed of transfer into a conditional transfer;
- iii) Have the High Court erred in affirming the learned trial Judge's view that the 3rd Defendant Petitioner is not a bona fide purchaser;

The 3<sup>rd</sup> Defendant prayed that the judgment dated 23.08.2012 of the District Court and 30.04.2008 of the High Court be set aside and to dismiss the Plaintiff's action with costs.

The Supreme Court by its order dated 20.11.2013 refused leave and the application for leave to appeal was dismissed..

The 3<sup>rd</sup> Defendant Petitioner further pleaded that:

- i) the Plaintiff never intended land in suit to be transferred to the 1<sup>st</sup> Defendant company, and only intended to mortgage the said land for a sum of Rs. 500,000/-;
- ii) the Deed of Transfer No. 1946 was not intended to be a Deed of Transfer but a Mortgage Bond yielding 35% interest per annum;
- iii) the Deed of Transfer No. 1946 was not duly completed at the time of signing the deed and hence it is null and void;

The learned High Court (Civil) Judge of the High Court of Mt. Lavinia in her Judgment had stated that :

*"The learned District Judge has also adverted to the fact that the nature in which the alleged transaction took place. It is noted*

*that the document marked P2 the Notary has mentioned the fact that a sum of Rs 900,000/- was paid to the Plaintiff and also in the Deed which was executed about 3 weeks later the Notary has stated that the consideration for the said amount was passed in his absence. Hence such position taken up by the Notary arouses suspicion and will attack the credibility of the version of the Defendant.*

*In dealing with the claim of the 3<sup>rd</sup> Defendant the learned Judge was of the view that he is not a bona fide purchaser as he has bought this land in suit when there had been a caveat registered in order to stop any transaction in respect of the said land.*

*In the said backdrop the learned District Judge was of the view that the 3<sup>rd</sup> Defendant is not entitled to the claim as prayed for in the Answer”.*

**Consequently the High Court dismissed the appeal of the 3<sup>rd</sup> Defendant.**

**Now the 3<sup>rd</sup> Defendant filed this Revision Application wherein he prayed for a stay order on the District Court, set aside the judgment of the District Court and to enter judgment for him or in the alternative to permit the 3<sup>rd</sup> Defendant to receive the sum payable, inclusive of interest by the Plaintiff and to order the Plaintiff to deposit the sum within a specified time.**

**As against these pleadings the Plaintiff submitted that the following arguments :**



- i) the Petitioner has failed to explain to this court why the Petitioner did not go to the Western Province Civil Appellate High Court;**
- ii) Counsel further submitted that the jurisdiction is parallel between Court of Appeal and the Provincial Appellate High Civil High Court and the Petitioner has no option, but to go to the Provincial Civil Appellate High Court if he has a case on merits in a Revision Application . The Respondent further stated that the technical right has to be considered, in view of the fact the Supreme Court, having heard at length his application bearing No. HC/CALA 406/12 and leave was refused.**
- iii) Further the Supreme Court has decided that as “we are not inclined to interfere with the decision of Civil Appellate High Court”;**
- iv) In view of the above decision of the Supreme Court no other court will interfere with the said judgment of the Civil Appellate High Court;**

**Counsel for the Plaintiff Respondent submitted that the Petitioner is guilty of non-disclosure of following cases in respect of the same dispute:**

- i) the document P9 is available from pages 478-499 of document “X”. The case No. 7629 was before M.C. Avissawella between the Petitioner**

and the Respondent under Sec, 66 of the Primary Courts Act for possession of the corpus, which the Petitioner lost;

- ii) The Petitioner filed writ application No. 1111/99 in the Court of Appeal and withdrew; The Petitioner failed and neglected to disclose material facts.
- iii) The Petitioner in para, 2 of his petition pleaded to produce a true copy of the entire case record. In para 23 of the Petition he undertook to produce a certified copy from D.C.Mt Lavinia The Respondent states that he did not get the said copy upto now; and the Respondent believes that the Respondent had not filed such application and seeks the benefit of Rule 3(1)(6) of the Court of Appeal (Appellate Procedure) Rules of 1990;
- iv) The Respondent stated that Deed No 47 dated 8.10.1996 is not for valuable consideration;
- v) Further the Respondent pleaded that the Petitioner and the Chairman of the 1<sup>st</sup> Defendant are two brothers and Deed No. 47 is a collusive act between two brothers and it was executed inspite of a valid caveat in force; This fact is admitted by the Petitioner in para. 7 of the Counter objections of the Petitioner dated 29.08.2014;

- vi) **The Notary to Deed No. 1946 dated 5.11.1993 marked P3 is not included in the monthly list;**
- vii) **Respondent relied on Judgments in Wickremaratne vs Thavandraraja S.C. 1982(2) SLR 419 and Benedette Valangreenburg vs Hapuarachchige Anthony – S.C. 1990 (1) SLR 190;**
- viii) **Counsel for the Respondent states that the Petitioner has failed to disclose exceptional circumstances to succeed this application;**

**He further argued that in view of the above decisions of the Supreme Court no other court will interfere.**

**Considering the above submissions we see no reason to interfere with the judgments of the court already mentioned and therefore we dismiss this Revision Application without costs.**

**JUDGE OF THE COURT OF APPEAL**

**Wijesundera J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**