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Judgment
11, 1966

IN THE PRIVY COUNCIL No. 41 of 1964

ON APPEAL FROM THE SUPREME COURT OF CEYLON

MANIKPURA PEIRIS MUNASINGHE
Appellant

- and -

1. CYNTHIA PEARLINE VIDANAGE

- and -

2. BERTRAM CLIVE VIDANAGE
Respondents

CASE FOR THE APPELLANT

HATCHETT JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.

IN THE PRIVY COUNCIL No. 41 of 1964

ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N :-

MANIKPURA PEIRIS MUNASINGHE Appellant

- and -

1. CYNTHIA PEARLINE VIDANAGE 1st Respondent

- and -

2. BERTRAM CLIVE VIDANAGE 2nd Respondent

CASE FOR THE APPELLANT

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1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon dated the 21st day of December 1962 whereby the appeal by the 1st Respondent herein allowed and the Judgment and Decree of the District Court of Galle dated the 6th day of March 1960 set aside. pp 76-79 pp 41-46

2. By a plaint dated the 28th day of May 1959 the 1st Respondent claimed that she was entitled to certain premises (hereinafter called "the premises"), the ejectment of the Appellant therefrom and damages at the rate of Rs.150/- per month from the 1st day of November 1959 on the ground that the Appellant had by a Deed of Transfer dated the 1st day of November 1948 sold and transferred the said premises to the Respondent for the sum of Rs.20,500/- subject to the condition that if the Appellant or the 2nd Respondent herein was desirous of pp 13-16

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obtaining a re-transfer of the said premises at any time within 10 years from the date of the said Deed and should repay the sum of Rs. 20,500/- with interest at the rate of 6 per cent per annum, the said premises should be re-transferred; that the period of 10 years having expired on the first day of November, 1958 and the said sum of Rs. 20,500/- not having been paid and the Appellant being in possession of the said premises, he had failed to hand them over to the first Respondent on request. The 2nd Respondent herein was joined as a Defendant.

pp 16-18 3. The Appellant by an Answer dated the 28th day of September 1959 admitted signing the said document but denied due execution or the payment of consideration thereon; that he was induced to sign the said document by the 1st Respondent, her husband and brothers by the exertion of undue influence and had been made to understand that the execution was necessary in order to protect the said property from possible improvident hypothecation or alienation by himself; the step was represented to be necessary to insure that the Appellant was able to live in his ancestral house to the end of his life; he further alleged that the said representations by the 1st Respondent were fraudulent.

pp 18-19 4. The following issues were framed on the 7th day of March 1960.

(1) Is the plaintiff entitled to the premises described in the schedule to the plaint?

(2) Is the defendant in unlawful possession thereof since 1st November 1958?

(3) If so, what damages is the plaintiff entitled to?

(4) Was the 1st defendant made to sign document 1343 of 1st November, 1948 by the exercise of undue influence on him by the

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plaintiff, her husband and brother?

(5) Was document 1343 of 1-11-48 relied on by the plaintiff for her title, the act and deed of the 1st defendant?

(6) Was deed 1343 of 1-11-48 executed by the 1st defendant for valuable consideration?

(7) If issue No.6 is answered in the negative, did any beneficial interest in the property mentioned in the said deed pass to the plaintiff?

(8) Does the plaintiff hold the properties dealt with in the said deed in trust for the 1st defendant?

(9) Is the 1st defendant entitled to claim a re-transfer of the legal title to the properties dealt with in the said deed from the plaintiff?

(10) Did the plaintiff practise a fraud on the 1st defendant?

(11) If so, can she take advantage of her own fraud?

5. The Plaintiff's (1st Respondent herein) case was that in August 1948 she obtained a sum of Rs.20,500/- from her husband who was a wealthy trader and gave it to the Appellant in the presence of the 2nd Respondent who was her brother and one of her other brothers, in order to buy from one Peter Wijetunga the said property and that the Appellant instead of buying the property in her name had bought it in his own name and that of his sister; that when the 1st Respondent found fault with the Appellant he entered into the Deed of the 1st November 1948.

6. The Defendant's (Appellant herein) case was that the said property was part of family

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property which had passed into the ownership of the heirs of the estate of one Charles Samaranayake; that in 1945 he wished to re-obtain this property but not having the full amount of Rs.17,500/- he put up the sum of Rs.11,000/- and Peter Wijetunga had paid the balance and the property was transferred into his, Peter Wijetunga's name; that in August 1948 the said property was transferred to the Appellant by a Deed P2 and on the same day further properties were transferred to Lily, the sister of the Appellant by Peter Wijetunga; that he did not at any time obtain the sum of Rs.20,500/- from the 1st Respondent; that on the 1st day of November 1948 he transferred the said property to the 1st Respondent on the conditions set out in the Deed of Transfer because the 1st Respondent and her brothers and sisters and her husband got together and told him that he was getting aged and that he would run through this property by digging for plumbago; that there was no consideration for this conditional transfer.

pp 29-33 7. The 1st Respondent's husband was called as a witness on her behalf and gave evidence that he had advanced Rs.20,500/- to the 1st Respondent, but that he could not remember the day on which it was given nor was he fully aware of the purpose for which the money was given, that he did not know the lands in question and did not at any time investigate to see whether the property had been transferred into his wife's name; that he produced his Income Tax Returns for the years 1948-1957 showing a sum of Rs.20,500/- as money investigated by his wife on a primary mortgage given to the Appellant.

8. The learned judge of the District Court held as follows : -

pp 44-45 "The consideration in P2, the deed executed by Peter Wijetunga in favour of 1st defendant is Rs.15,000/-; the consideration in 1D3, the deed executed on

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the same day by Peter Wijetunga in favour of Lily is Rs.5,000/-, and the consideration in P1 is Rs.20,500/-, and plaintiff gave evidence that when Peter Wijetunga pressed for his money, 1st defendant wanted her to buy the properties and that she gave him the Rs.20,500/- in the presence of her two brothers to get a transfer of four lands from Peter Wijetunga in her favour.

By P2, Peter Wijetunga had transferred two lands to the 1st defendant and by 1D3 he had transferred four lands to Lily. Her brother, the 2nd defendant is a witness to deeds P2 and 1D3, and if her evidence is true, her brother had connived with the 1st defendant to defraud her.

1st defendant had brought up Plaintiff after her mother's death. 1D1 indicates that she was fond of him and at the time P2 was executed, she was staying in his house for her confinement; he is an old bachelor with none to provide, and I find it difficult to believe that 1st Ddefendant defrauded her by getting the properties transferred in his name and that of his sister.

I disbelieve the evidence of plaintiff that she gave 1st defendant a sum of Rs.20,500/- as consideration for the two properties transferred on P1.

No consideration passed in the presence of the Notary. In conversation with the Notary soon after the execution of the deed, he had told him that no money passed on the transaction, and that he had not jeopardised his interests by executing P1 as the dealing was between relatives.

Plaintiff or her representative did not give instructions to the Notary and all

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instructions were given by the 1st defendant. This indicates that P1 was executed at the instance of the 1st defendant and that no one had got him to do it.

From the time of his father, 1st defendant was living in the house which was one of the properties mortgaged to Bastian de Silva Samaranayake, and he was anxious to redeem it. His evidence that his cousin, Peter Wijetunga, helped him to pay off Bastian de Silva Samaranayake's heirs is supported by his witness, Wijetunga who had signed P2 and 1D3 as a witness, and who was, at that time, employed under Peter Wijetunga.

The reason why 2nd defendant was brought into P1 as a vendor has not been fully and satisfactorily explained. It may be that the 1st defendant wished his adopted son to own the two properties on his giving plaintiff a sum of Rs.20,500/- this is only a surmise.

I answer issues :-

1. No.

2. No.

3. Nil.

4. No.

5. Yes.

6. No.

7. No.

8. Plaintiff has no title to the properties or has no beneficial interest in them.

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9. Yes.

10. No.

I dismiss Plaintiff's action with costs."

9. The Respondent herein appealed to the Supreme Court of Ceylon which on the 21st day of December 1962 allowed the appeal holding that -

"The question of fact which the learned District Judge had to decide in this case was whether the plaintiff had with monies provided to her by her husband paid Rs.20,500/- to the 1st defendant prior to the date of the execution of the deeds P2 and 1D3 in August, 1948. The Plaintiff's case was that the family lands of her grandfather which had been sold in execution of a mortgage decree, were in 1948 held by one Peter Wijetunga and that her uncle, the 1st defendant, arranged to purchase the lands with monies to be provided by the plaintiff. In fact, by the deed P2 the 1st defendant himself got a transfer of the residing land and by 1D3 Peter Wijetunga transferred three other lands to the 1st defendant's sister. When the plaintiff found that the deed for the Plaintiff's residing land had not been obtained in her name, she states that she asked for a transfer to herself and that the deed P1 was thereafter executed in consequence of demands by her and her husband. It is stated in the deed P1 that the consideration was the sum of Rs.20,500/-. According to the Attestation and according to the Notary's evidence, the 1st defendant at the time of the execution of P1 acknowledged that the purchase price had previously been received by him. This constituted evidence of an admission by the 1st defendant of the truth of the plaintiff's evidence that she had some little time earlier advanced Rs.20,500/- to the 1st defendant. pp 76-77

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The story of the 1st defendant which the learned District Judge has believed is as follows : -

The 1st defendant said that when Peter Wijetunga purchased the lands in 1945 he had done so with monies, the greater part of which (Rs.11,000/-) had been provided by the 1st defendant and his sister. The deed in favour of Peter Wijetunga does not support this evidence, for it is there stated that the consideration was paid partly by cash and partly by a cheque for Rs.10,000/- drawn by Peter Wijetunga. According to the 1st defendant, when he got P2 in 1948 from Peter Wijetunga there was only a little cash to pay because the greater part of the consideration of Rs.15,000/- stated in P2 was already owing from Peter Wijetunga to the 1st defendant. The best method of testing the truth of this evidence was to examine the attestation clause in P2 which, if the 1st defendant's evidence be true, should have stated that although a part of the consideration was paid at the time of the execution the major balance part had previously been paid to or was owing by the vendor, Peter Wijetunga. But on this matter again the 1st defendant is contradicted by the attestation clause which is to the effect that the consideration was paid in cash at the time of the execution. It seems to us that these two points were sufficient to compel the District Judge to reject the 1st defendant's evidence.

The learned District Judge has referred in his judgment to the financial position of the plaintiff's husband and has apparently formed the conclusion that the plaintiff's husband could not have afforded to provide in 1948 a sum of Rs.20,500/- for the purchase of this

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property. We find, however, that in looking at the accounts of the business of the plaintiff's husband the learned District Judge has only been impressed by debit items and not by credit items. For instance, in regard to the year 1949 he points out that the plaintiff's husband has executed a mortgage bond for a loan of Rs.15,000/-. But the learned District Judge failed to notice that in that same year the plaintiff's husband had purchased an estate for Rs.45,000/-. It is not necessary to refer to other minor points which have influenced the Judge against the case for the plaintiff, but we are satisfied that none of them are supported by the evidence.

In the exercise of our powers in revision we set aside the decree appealed from and order that decree be entered declaring the plaintiff entitled to the premises described in the two schedules to the plaint and to the ejectment of the 1st defendant therefrom. In view of the relationship between the parties, there will be no order for damages except as from the date of the decree of this Court. The damages should be fixed at the authorized rent of the premises which will be determined by the District Judge when the record is returned to the District Court. The plaintiff will be entitled to costs in both Courts."

10. The Appellant was granted Final Leave to appeal to Her Majesty in Council by Order of the Supreme Court of Ceylon dated the 23rd day of May, 1963. p 90

11. The Appellant humbly submits that this appeal should be allowed, the judgment and order of the Supreme Court of Ceylon be set aside, the judgment of the Trial Court affirmed and the Respondent be ordered to pay the costs in the Supreme Court of Ceylon and of

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this appeal for the following among other

R E A S O N S

1. BECAUSE the Supreme Court failed to apply the correct approach to the consideration of a decision on fact by a court of first instance.

2. BECAUSE the Supreme Court failed to consider whether or not the advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

3. BECAUSE the Supreme Court ignored the trial judge's finding that he disbelieved the evidence of the 1st Respondent.

4. BECAUSE the Supreme Court has reversed the trial judge's decision on an incomplete and inaccurate examination of the evidence.

5. BECAUSE on a correct application of the duties of an Appelate Court there were no grounds for reversing the trial judge's decision.

6. BECAUSE the trial judge was right.

THOMAS O. KELLOCK

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