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

C.A. Case No. 967/2000 (F)

D.C. Colombo Case No. 18758/L

Rajapaksha Dawahannalage Percy Harald Rajapaksha

No. 339/1, Dippitigoda Road,

Hunupitiya,

Wattala.

PLAINTIFF-APPELLANT

-Vs-

P.K.P. Antony (deceased)

No. 20P, Dankanatta Road,

Mabola,

Wattala.

DEFENDANT-RESPONDENT

Bulathsinhalage Preca Dorin Metilda Perera

No. 20P, Dankanatta Road,

Mabola,

Wattala.

Substituted DEFENDANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Lakshman Amarasinghe for the Plaintiff-Appellant

L.D.N. Lenora with Sasika Kalugalla for the Defendant-Respondent

Written Submissions on:		26.02.2014 (Defendant-Respondent)
		05.09.2014 (Plaintiff-Appellant)
Argued on	:	14.07.2015
Decided on	:	20.05.2016

A.H.M.D. Nawaz, J.

The Plaintiff-Appellant, (hereinafter sometimes referred to as "the Plaintiff") instituted this action on 24.11.1999 in the District Court of Colombo, against the Defendant-Respondent, (hereinafter sometimes referred to as "the Defendant") for a declaration of title to the land morefully described in the schedule to the plaint and for a declaration that the Defendant was holding the said land on trust for the Plaintiff.

The Plaintiff states that he borrowed a sum of Rs.35,000/- from the Defendant and as security for this amount he had signed some blank papers and executed the Deed bearing No.1938 dated 12.08.1996 and attested by Alfred Jayamaha, Notary Public, with an understanding that the Defendant should re-transfer the said land to the Plaintiff on payment of the said amount. The possession of the said land remains with the Plaintiff and the Defendant has not taken possession. The Plaintiff had on 02.12.1999 obtained an enjoining order and notice of interim injunction against the Defendant.

The Defendant has filed his answer denying the statements of the Plaintiff and states that the said Deed No.1938 was an outright transfer, and not a security for the loan, and subsequently by Deeds Nos.927 and 928 dated 02.12.1999 attested by C. Gunawardene, Notary Public, he had gifted the said land, having divided it into two lots, to Sevvandika Nilangani and Tharula Madushani.

Later, the Plaintiff had applied to Court to add the new owners as Defendants and to dissolve the enjoining order issued against the Defendant and to withdraw the application for interim injunction. On 15.09.2000, on the plaintiff's application the

Court dissolved the enjoining order and ordered the Plaintiff to pay a sum of Rs.3,500/- as pre-payment of costs to the defendant **before the next date** as the Plaintiff moved for a postponement of the trial as he was not ready for trial on that date, and it was ordered that *"if the pre-payment of costs was not paid, the plaintiff's action shall be dismissed."* For the purpose of steps for addition of parties, the case was taken off the trial role and fixed to be called on 27.10.2000. The Defendant has consented to this order.

On 27.10.2000, when the case was called, the defendant's Registered Attorney-at-Law stated that the Plaintiff was granted another trial date on the condition that he should pay RS.3,500/- as pre-payment of costs but he failed to pay the prepayment of costs before next date and therefore the plaint should be dismissed. In response the Plaintiff's Attorney stated that the Plaintiff was ready to pay the costs but the Defendant refused to accept the cost on the ground that the costs should have been paid on the previous day and not on that particular day. The stance taken by the Defendant is wrong. When the cost is offered, it must be accepted without refusal.

The learned District Judge, without considering the principles of natural justice and the law, has made the following order: *"On the last date since the plaintiff was not ready for trial, he was granted* ***another trial date*** *on the condition that he should pay Rs.3,500 as pre-payment of costs. The plaintiff agreed, understood and signed the record to effect this prepayment before today, and if not so paid, the plaint would be dismissed. But the plaintiff failed to make the payment as ordered and therefore, the plaintiff's action is dismissed subject to taxed costs."*

The present appeal is against the order of the learned District Judge dated 27.10,2000, dismissing the plaint on the ground of non-payment of pre-paid costs ordered by Court. According to the Journal Entries and the proceedings of 15.09.2000 and 27.10.2000, the next date (27.10.2000) granted to the Plaintiff was **not a trial date** but a calling date to take steps for addition of the new owners as parties. The Attorney-at-Law for the Defendant and the Court have mistakenly stated in the proceedings of 27.10.2000 that the date granted was a trial date. It is not the correct statement of

facts. The next date was not a trial date but a calling date. The Defendant was not taken by surprise by the steps suggested by the Plaintiff.

The order made on 15.09.2000 clearly states that the pre-payment of costs must be made **before the next date**, and the case was postponed to 27.10.2000 to take necessary steps. Hence, the next date was 27.10.2000. According to the order of 15.09.2000, the pre-payment of costs must be made before 27.10.2000, and this does not mean that the payment should be made on 26.10.2000. There are several decision of our Courts on the point that if the prepayment of costs is ordered to be paid before the next date, the payment can be made on the next date itself and not necessarily on the previous day. In the present case the Court ordered the payment before the next date but no time was prescribed. Generally, Courts fixed the time as "before 10.00 a.m." If such a time is fixed, and the Plaintiff has not complied with that direction, then, of course, the Plaintiff will be considered to be in default. But in the instant case, the court has not fixed a particular time before which the payment should be made and therefore it acted purely on a technicality and dismissed the plaintiff's action. This is a wrong order and must be set aside.

If prepayment costs, ordered by Court, are not paid, does the Court have the right to dismiss the action? Several decisions of the Supreme Court indicate that the Court has no jurisdiction to dismiss an action on the ground of non-payment of the costs before the next date. The District Judge has no power to order the plaintiff's action to be dismissed in the event of his failure to pay the defendant's cost before the next date. The Civil Procedure Code nowhere gives such power to dismiss the action without adjudication merely because the Plaintiff has delayed the payment of costs. The impugned order is a glaring error which amounts to what has been called a "fundamental vice" that needs the intervention of this Court-See ***Rang Etena v. Appu*** 4 N.L.R. 185. In ***Sumanasara Unnanse v. Seneviratne 15 N.L.R 375***, the District Court made order that in the event of the defendant's taxed costs not being deposited in Court before the next date of trial, the plaintiff's action would be dismissed with

costs. Lascelles C.J. held, (with Ennis J. agreeing) that the Judge has no jurisdiction to make the order as he did.

It is common ground that if the Plaintiff was ready to make the payment on 27.10.2000, the day was not over and therefore there was still time for the Defendant to accept it. On 27.10.2000, the case was not fixed for trial but only a calling day, and therefore there were no extra costs incurred by the Defendant. When the Plaintiff was ready to make the pre-payment, the learned Judge should have ordered the Defendant to accept it, which she had failed. The Plaintiff has not failed to pay the costs to construe it as a default or non-compliance of the order of the court that warranted a dismissal in the absence of a fixed time before which the payment should have been made.

In the present case, the Defendant has gifted the land to two other persons, after the institution of this action, which the Plaintiff has brought to the notice of the Court, and the Court has granted the date for the Plaintiff to take steps to add them as parties. When the Court has allowed the Plaintiff to take steps to add the new owners as parties to the case, it is not proper for the Court to dismiss the plaintiff's action without going through the merits of the case.

It is clear from the pleadings in this case that there are two matters to be adjudicated by the Court, namely: (i) whether the Deed No.1938 was a conditional transfer or an outright transfer, and (ii) whether the new owners are *bona fide* purchasers who did not know the fact that the Plaintiff is in possession of the land in dispute. Apparently, the Defendant had gifted the land to the new owners after the institution of the action against him by the Plaintiff. If these matters are not gone into, and the case is dismissed on a technical ground, there will be a miscarriage of justice, which this Court cannot countenance and this Court enjoys the plenitude of power to rectify it.

In the circumstances, I am of the view that the learned District Judge's order dated 27.10.2000 dismissing the plaintiff's action should be vacated, and the case has to be

sent back for steps to be taken to add the new owners as parties and the Plaintiff must be permitted to pursue the case from the stage where it was stopped. Accordingly I allow the appeal and remit the case to the District Court for steps to be taken and the trial to proceed.

JUDGE OF THE COURT OF APPEAL