

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

Ingrid Shriyani Nelum Kumari de Silva  
of Magallegama, Nikaweratiya.

PLAINTIFF

C.A. Case No.892/1997 (F)

D.C. Mahawa Case No.3570/L

-Vs-

Lamahewage Susila Kusumawathie  
of Rest House Road, Nikaweratiya.

DEFENDANT

AND NOW BETWEEN

Lamahewage Susila Kusumawathie  
of Rest House Road, Nikaweratiya.

DEFENDANT - APPELLANT

-Vs-

Ingrid Shriyani Nelum Kumari de Silva  
of Magallegama, Nikaweratiya.

PLAINTIFF - RESPONDENT

BEFORE

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

COUNSEL : Dr. Sunil Cooray for the with A.W. Diana Stephanie  
Rodrigo for the Defendant-Appellant  
Rohan Sahabandu, PC for the Plaintiff-Respondent

Decided on : 18.07.2018

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

The Plaintiff-Respondent (hereinafter sometimes referred to as “the Plaintiff”) filed this case in the District Court of Mahawa stating *inter alia* that:

- i. By Deed No. 11746 dated 11.10.1955 the plaintiff’s predecessor in title (one Catherine de Silva) bought for lawful money the land described in the schedule to the plaint.
- ii. The said Catherine de Silva and her husband built a house in the said land and such house was their “Maha Gedera”.
- iii. Catherine de Silva transferred all the rights in the said land to the Plaintiff by Deed No. 2646 dated 03.03.1980 attested by Kamala Menike Karunathileke Notary Public.
- iv. Thereafter the Plaintiff mortgaged the said land to the Defendant by Deed of Transfer bearing No. 34371 dated 31.12.1981 for Rs.6,000/-.
- v. The Plaintiff agreed with the Defendant to pay the said sum of Rs.6,000/- within one year and that for one year the Plaintiff is entitled to possess the land and for the said one year a lease agreement bearing No. 34372 attested by the same Notary was executed.
- vi. The Defendant had filed a case in the same District Court bearing No. 1988/Land maliciously to eject the Plaintiff from the property described in the schedule to the plaint.
- vii. The Plaintiff also averred *Laesio Enormis*.

The Plaintiff prayed that Deed of Transfer bearing No. 34371 dated 31.12.1981 be declared null and void and for costs.

The Defendant filed answer and stated that the Plaintiff sold or transferred her rights in the land in dispute by Deed of Transfer bearing No. 34371 and stated that it is not a Deed of Mortgage and even the intention of the Defendant was to transfer all the rights in the said land. The Defendant also stated that the Defendant already filed a case bearing No. 1899/L and that such case has already been decided against the Plaintiff in this case and in favour of the Defendant in this case.

Both parties admitted that paragraph 2 of the plaint, and admitted both Deed nos. 34371 and 34372 dated 31.12.1981 was executed.

The case proceeded to trial on the following issues:

#### **Plaintiff**

- i. On 31.12.1981 when Deed No. 34371 was executed is the amount appearing on the face of the Deed more than double the actual value as at 31.12.2981?
- ii. If the above issue is answered in the affirmative has given loss been caused to the Plaintiff?
- iii. If the 1<sup>st</sup> issue or the 2<sup>nd</sup> issue is answered in favour of the Plaintiff then can Deed No. 34371 dated 31.12.1981 attested by Karunathileke Notary Public be declared null and void?

#### **Defendant**

- iv. Is Deed No. 34371 a Deed of Transfer?
- v. If so can the Plaintiff maintain this action under the Law?
- vi. Is Plaintiff's action prescribed?
- vii. If so can the Plaintiff maintain this action?

It is axiomatic that a deed can never be declared null and void on the principle of *laesio enormis*. If that principle applies, all that can be done is for the Court to give to the transferee on the deed in question (namely the Defendant) the choice of either keeping

the property by paying the difference in value to the transferor (namely the Plaintiff), or returning the property after accepting the return of the purchase price which was paid on the deed. Therefore, to begin with, as a fundamental matter of law, the issues of the Plaintiff are incorrect.

On behalf of the Plaintiff, the Plaintiff herself gave evidence, and the Surveyor who was issued with a commission also gave evidence and the Plaintiff's case was closed with the marking in evidence of documents as P1 to P4.

On behalf of the Defendant, the Defendant only gave evidence and closed the case marking in evidence two documents as V1 and V2.

The Plaintiff in proving her case of *Lesio Enormis* called the Surveyor, but it is clear that the commission was taken out only in the year 1994 which is approximately more than 10 years after the deed and the valuation has been prepared *ex parte*. The said valuation has been prepared in 1994 and not in 1981 which is the relevant year in which the purported Deed was written. Accordingly there is no evidence of the value of the land in the year 1981 or within a reasonable time period. Therefore the Plaintiff has not established her case with respect to *Laesio Enormis*. Whereas the Plaintiff had conceded the then market price of the land in dispute and only pointed out the market price in 1994.

The Plaintiff's prayer is centered around the Transfer Deed No.3471. If it is to be null and void as it is prayed for, it is questionable as to the execution of the lease agreement No.34372 of 31.12.1981. Will a person execute a lease agreement for a premises owned by herself? This clearly indicates Plaintiff's intention to transfer the property described in the schedule to the plaint to the Defendant and it had not been a collateral for a mortgage as stated in the paragraph 7 of the plaint. Further the Defendant had allowed the Plaintiff to stay at the same premises until they found a house for themselves.

In the judgment delivered by the *Mahawa* District Judge, there is an erroneous decision on the facts pertaining to the Deed No.3471. In other words the deed is being categorized as a mortgage bond. However if it is the stand of the learned District Judge, still the

action instituted will be time bared. As the plaint says in paragraph 7 that it was to be paid off within a year, then that time will begin to run from from 31.12.1982 according to the judgment given by the, then learned District Judge of *Mahawa*. The Plaintiff had instituted the action in the year 1992. This clearly shows that the action is out of time going by the Section 10 of the Prescription Ordinance. Further the possession was continuing on the part of the Plaintiff under the lease agreement No.3472. Therefore Defendant has a right to rely upon the law of prescription despite of the explanation given in the impugned judgment.

Section 5 of the Prescription Ordinance makes mortgage debt or bond prescribed in 10 years and Section 6 makes any action invalid on any contract bargain or agreement or other written security other than the instruments in Section 5 (*i.e.*, mortgage debt or bond) unless such action is brought within 6 years from the date of the breach of such partnership deed or such written promise contract bargain or agreement or other written security. Section 7 also brings the documents in the same ambit and they get prescribed in 6 years. Therefore even if it is accepted by the learned District Judge that the Deed No.3471 is a mortgage bond, the cause of action is prescribed within 10 years. Even if it is any other written agreement the Plaintiff needs to reach courts in 6 years. She has taken more than 10 years to institute action. This clearly proves the time bar to institute such legal action.

Further, the action instituted Case No.1899/L by the Defendant of this case, who is the Plaintiff of that case, had submitted facts so as to state that the Plaintiff-Respondent is an over holding lessee. Thereby the case is decided in favour of the Defendant of this case *i.e.*, the Plaintiff of the 1899/L case.

On the point of prescription raised by the Defendant with respect to the plaintiff's case is clear that the Plaintiff knew very well of the Deed 34381 executed on 31.12.1981. The case was filed on 26.06.1992. Section 10 of the Prescription Ordinance states that in order to declare a Deed null and void such action should be filed within three years from the date

of the Deed. Therefore it is quite patent that the action of the Plaintiff is clearly out of time.

- a. 78 N.L.R page 2500-declaration that a notarially executed deed is null and void is prescribed within 3 years of the date of the execution of the deed-Section 10 of the Prescription Ordinance:-

*“An action for declaration that a notarially executed deed is null and void is prescribed within 3 years of the date of the execution of the deed in terms of Section 10 of the Prescription ordinance.”*

Section 44 of the Civil Procedure Code lays down the following rule which is absolutely mandatory where the action arose beyond the legal time period.

“If the cause of action arose beyond the period ordinarily allowed by any law for instituting the action, the plaintiff must show the ground upon which exemption from such law is claimed.”

However there is no such exemption sought in the plaint. Therefore there lies an impediment to the institution of this action and its continuation.

In the circumstances the action of the Plaintiff is time barred under Section 10 of the Prescription Ordinance and as the Plaintiff has failed to prove her case on *Laesio Enormis* I set aside the judgment dated 01.09.1997 and proceed to allow this appeal.

JUDGE OF THE COURT OF APPEAL