

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

(Plaintiff)
Judgment Creditor

- and -

882432 N.W.T. LTD., ACTIVE SERVICE AND
MAINTENANCE LTD., ELIAS SARAVANJA and
MARIA SARAVANJA

(Defendants)
Judgment Debtors

AND:

IN THE MATTER OF an application pursuant to
Rule 421 of the Rules of Court:

BETWEEN:

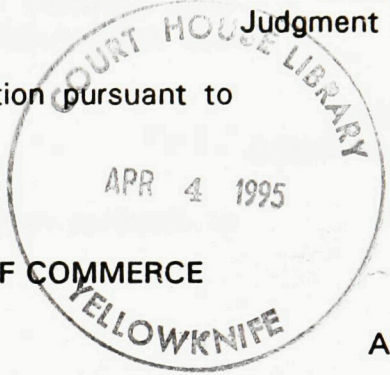
CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

- and -

ELIAS SARAVANJA and MARIA SARAVANJA

Respondents



Application by the judgment creditor for an order for sale of property purportedly sold by the respondent judgment debtors to a third party granted, pursuant to Rule 421 of the Rules of Court.

Heard at Yellowknife on November 12th 1993

Judgment filed: November 17th 1993

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Applicant,
Judgment Creditor:

G.K. Phillips, Esq.

Counsel for the Respondents,
Judgment Debtors:

G. McLaren, Esq.

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN
CANADIAN IMPERIAL BANK OF COMMERCE

Judgment
Judgment

PLAS SARAVALLA and MARIA SARAVALLA
vs
CANADIAN IMPERIAL BANK OF COMMERCE

Judgment
Judgment



Applicant

PLAS SARAVALLA and MARIA SARAVALLA

Respondents

Reasons for Judgment
Reasons for Judgment

Handed at Yellowknife on November 13th 1983

Judgment of the Court

REASONING RECOMMENDATION OF THE HONOURABLE MR. JUSTICE M. M. WELSDY



G.K. Pritchard, Esq.

Counsel for the Respondents
Judgment District

G. McLean, Esq.

Counsel for the Applicants
Judgment District

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

(Plaintiff)
Judgment Creditor

- and -

882432 N.W.T. LTD., ACTIVE SERVICE AND
MAINTENANCE LTD., ELIAS SARAVANJA and
MARIA SARAVANJA

(Defendants)
Judgment Debtors

AND:

IN THE MATTER OF an application pursuant to
Rule 421 of the **Rules of Court**:

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

- and -

ELIAS SARAVANJA and MARIA SARAVANJA

Respondents

REASONS FOR JUDGMENT

1 Should a trial of the issues be ordered in this contested application by Canadian Imperial Bank of Commerce ("the Bank") for an order for sale of property subject to a bill of sale by the respondents Elias and Maria Saravanja to a third party, their son Gaston Saravanja, pursuant to Rule 421 of the **Rules of Court**? That Rule reads as follows:

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

and

ROBERT H.W. LEE, ACTIVE CORP AND
MAINTENANCE LTD, ELIAS SARAVALLA and
MIRIA SARAVALLA

Respondents

IN THE MATTER OF an application pursuant to
Rule 431 of the Rules of Court.

BETWEEN

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

and

ELIAS SARAVALLA and MIRIA SARAVALLA

Respondents

REASONS FOR THE COURT

Should a trial of the issues be ordered in the contested application by
Canadian Imperial Bank of Commerce ("the Bank") for an order for sale of property and for
a bill of sale by the respondents Elias and Miria Saravalla to a third party, that sale
should be ordered pursuant to Rule 431 of the Rules of Court? The facts are

follows:

421. (1) Where it is alleged that there has been a conveyance of property to delay, hinder or defraud a creditor, it is not necessary to commence an action to set aside the conveyance but the court may, on motion by the judgment creditor served upon the judgment debtor and upon the persons to whom it is alleged the property was conveyed, order that property or part thereof be sold to realize the amount to be levied under execution.

(2) Where a judgment debtor has land or an interest in land which cannot be sold under legal process, but can be rendered available by proceedings for equitable execution by sale for satisfaction of the judgment, the court may, upon motion served upon such persons as may be directed, order that the land or the interest therein or a part thereof be sold to realize the amount to be levied under execution.

(3) Upon the return of a motion under this Rule the court may

- (a) determine the matter summarily, or
- (b) direct the trial of an issue to determine any question or questions.

(4) Pending the hearing of the motion or trial of the issue the court may grant an interim injunction to prevent the transfer or disposition of the property or interest therein or may appoint an interim receiver of the property or interest therein.

2

Gaston Saravanja, though duly served with notice of the Bank's application, did not appear to oppose it. His parents, the respondents Elias and Maria Saravanja, appeared by counsel. They oppose the application and ask for an order directing a trial of the issues.

3

A trial of the issues will be ordered where there are conflicts in the affidavit material which cannot be otherwise resolved. In the absence of significant conflict in the material, the application can ordinarily be determined summarily, thereby minimising the expense of a trial with its attendant inconvenience to the parties and their witnesses.

4

There is no dispute that the bill of sale was executed on July 17th 1992 by

1. The first condition is that the property to be transferred must be certain. This means that the property must be defined in such a way that it is possible to identify it. For example, 'my car' is a certain property, whereas 'my valuable property' is not.

2. The second condition is that the transferee must be certain. This means that the person to whom the property is to be transferred must be identified. For example, 'I give my car to John' is a certain transfer, whereas 'I give my car to someone' is not.

3. The third condition is that the transfer must be complete. This means that the property must be transferred to the transferee and the transferor must not retain any control over it.

4. The fourth condition is that the transfer must be voluntary. This means that the transferor must not be under any legal obligation to transfer the property.

5. The fifth condition is that the transfer must be for no consideration. This means that the transferee must not give anything of value in exchange for the property.

6. The sixth condition is that the transfer must be for the purpose of making a gift. This means that the transferor must intend to transfer the property to the transferee and to retain no control over it.

7. The seventh condition is that the transfer must be for the purpose of making a gift. This means that the transferor must intend to transfer the property to the transferee and to retain no control over it.

8. There is no dispute that the property to be transferred must be certain.

the respondents Elias and Maria Saravanja. It evidences, or purports to do so, the absolute sale of a 1971 Lynnbrook Mobile Home (14 by 68 feet), serial number 44C1744683V875 and wood frame addition together with certain equipment, furniture and other items of property by the respondents Elias and Maria Saravanja to Gaston Saravanja for a total consideration of \$40,000.00, "paid by the Grantee to the said Grantor at or before the selling and delivery of these Presents (the receipt whereof is hereby acknowledged)". The property referred to is said to be located at 217 Northland Mobile Home Park, Yellowknife, Northwest Territories. The bill of sale was executed under seal.

5 Nor is there any dispute that judgment in the sum of \$147,442.14 together with costs of \$10,817.73 was entered against the respondents Elias and Maria Saravanja, jointly and severally with the other judgment debtors in this action, on May 5th 1993, whereupon a writ of execution was forthwith issued in the total of those amounts. And there is no dispute that this action was commenced on June 17th 1992 by issuance of the statement of claim, which was personally served upon the respondents Elias and Maria Saravanja on June 23rd 1992.

6 It is not in dispute that the sum of \$40,000 mentioned in the bill of sale as the consideration or sale price of the property which it describes was in fact not paid at or before the execution of the bill of sale, as stated therein. The affidavit of Gaston Saravanja, filed on behalf of the respondents Elias and Maria Saravanja, acknowledges this. Gaston Saravanja deposes that he instead promised to pay the \$40,000 by contributing to expenses and by upgrading the property "as well as by cash investment".

The respondents filed and made payments... It is further... of records to do so, the... absolute sale of a 1971 Lincoln... (14 of 25 leaf, serial number... and other items of property by the respondents... to Boston... for a total consideration of \$40,000.00... to the sale... at or before the selling and delivery... which is... hereby acknowledged... The property... is to be located at 217... Middle Street, New York, New York... The bill of sale was executed... order was...

It is further... that judgment in the sum of \$147,441.14... with costs of \$10,917.73 was entered against the respondents... and made... jointly and severally with the other judgment debtors in this action... on May 21, 1963... whenever a bill of exchange was... in the total of these amounts... And... to declare that this action was commenced on June 17th 1963 by issuance of... the statement of claim, which was personally served upon the respondents... and... Made Service on June 23rd 1963.

It is further... that the sum of \$40,000... in the bill of sale... the consideration or sale price of the property which is... was in fact not paid at... of... the execution of the bill of sale; as stated... The... is... on behalf of the respondents... and... the... deposit that he intended... to pay the \$40,000 by... continuing to expenses and by updating the property, as well as by cash investment.

According to Gaston Saravanja, he has contributed to the expenses (rent, heating, water, power and telephone) a total of \$11,095.00 for a period of 13 months until now, of which one half (\$5,547.50) is to be attributed to the \$40,000.00 amount he has promised to pay. He also deposes that he has contributed a further \$2,550.00 by upgrading the property, so as to make a total equivalent payment of \$8,097.50 towards his equity in the property, thereby leaving \$31,902.50 outstanding. The municipal taxes on the property are, however, in arrears at the present time.

7

Gaston Saravanja also mentions a further \$1,600.00 which, according to the affidavit of Elias Saravanja, sworn on November 5th 1993, was credited to Gaston Saravanja on the sale, since that amount was then due and owing to Gaston Saravanja by the respondent Elias Saravanja from another transaction. If that amount is then credited to the sale price, there remains a balance of \$30,302.50 outstanding.

8

The above mentioned affidavit of Elias Saravanja states that he and his wife lived on the property described in the bill of sale from 1979 until July 1991, when they moved to another home in Yellowknife, leaving the property vacant until it was occupied by their son Gaston in or about July 1992, at which time the bill of sale was entered into. Elias Saravanja further deposes that he and his wife moved back onto the property in November 1992 since they were unable to afford continuing to live in the other home. Accordingly, they and several of their children, including Gaston, have lived there together since then.

9

With a single exception which deserves to be duly noticed, the affidavit

According to Gaston Saravaya, he has contributed to the extent of his financial resources, power and telephone a total of \$11,000.00 for a period of 15 months until now, which one half (\$5,500.00) is to be attributed to the \$10,000.00 amount he has promised to pay. He also deposes that he has contributed a further \$5,000.00 by upgrading the property, so as to make a total payment of \$16,000.00 towards his equity in the property, thereby leaving \$5,000.00 outstanding. The municipal taxes on the property are, however, in arrears at the present time.

Gaston Saravaya also mentions a further \$1,500.00 which, according to the affidavit of Elias Saravaya, sworn on November 24th 1982, was credited to Gaston Saravaya on the 24th, after that amount was then due and owing to Gaston Saravaya by the respondent Elias Saravaya from another transaction. If that amount is then credited to the sale price, there remains a balance of \$30,502.80 outstanding.

The above mentioned affidavit of Elias Saravaya states that he and his wife, Yvonne, purchased the property described in the bill of sale from 1974 until July 1982, when they moved to another home in Yellowknife, leaving the property vacant until it was occupied by the respondent Gaston Saravaya about July 1982, at which time the bill of sale was entered into. Elias Saravaya further deposes that he and his wife moved back onto the property in November 1982 since they were unable to afford continuing to live in the other home. Accordingly, they removed all their children, including Gaston, from the property together with their belongings.

With a single exception which deserves to be fully noted, the affidavit

material contains nothing of a conflicting nature. It includes three affidavits of Jim Weller, a real estate agent, showing that attempts to sell the property which is subject to the bill of sale have been made by Elias Saravanja since 1988. The exception which I have mentioned consists of exhibits "D", "E" and "F" to Mr. Weller's affidavit sworn on November 9th 1993, which show what appears to be the signature of Elias Saravanja as the owner or vendor of the property in documents listing it for sale since July 1992. This is clearly in conflict with the ostensible "absolute" sale supposedly evidenced by the bill of sale on July 17th 1992.

10 This inconsistency is not one between the material filed on behalf of the Bank and that filed on behalf of the respondents Elias and Maria Saravanja. It is an inconsistency only in the material filed by those respondents, throwing a very strong shadow over the credibility of their position in opposing this application. It is not, however, such an inconsistency as requires to be explored in a trial of the issues.

11 I therefore rule that a trial of the issues is not to be held. The issues are susceptible of summary but just determination on the affidavit materials filed, without any such trial. These issues are, quite simply:

1. Was the alleged sale of the property a conveyance to delay, hinder or defraud a creditor?
2. Should the property be sold to realize the amount to be levied under execution against the respondents Elias and Maria Saravanja?

metaphorically not only a political statement but also a statement of the writer's
a test case showing that the property which is subject to the bill
of sale have been made by this Government since 1988. The exception which I have
mentioned consists of articles 17, 18 and 19 to Mr. Wight's affidavit sworn on
November 19, 1988 which show what appears to be the signature of this Government
the owner or holder of the property in question being 1 or less than July 1988. This
is clearly in conflict with the earlier "affidavit" and is possibly voided by the bill
of sale on July 17, 1988.

The investigation is not the same as the previous one on behalf of the
Bank and that filed on behalf of the respondents since the latter is an
investigation only in the material filed by these respondents, giving a very strong
impression over the credibility of first party in opposing the application. It is not
however, clear in this investigation as regards to be applied in a trial of the facts.

Investigation into a trial of the facts is not to be held. The issues are
susceptible of remedy but not determination on the whole. The issues are
admitted. These issues are pure remedy.

1. What the alleged sale of the property a conveyance to
debtor, holder of the bill of sale?
2. Should the property be sold to satisfy the account to be
liquidated in relation to the respondents' bills and
this Government?

1. Was the alleged sale a fraudulent conveyance?

12 It is urged on behalf of the Bank that the transaction evidenced by the bill of sale bears the badges of fraud. These badges here consist of:

1. the transaction was between close relatives, i.e. parents and son;
2. no money changed hands;
3. the parents are again occupying the property allegedly sold to the son;
4. the transaction did not take place until the Bank had commenced its action against the parents, serving them with the statement of claim;
5. the action was undefended and in due course led to judgment against the parents.

13 I accept the submissions made on behalf of the Bank on these points, bearing in mind also that the natural consequence of the transaction, if it is held to be valid, would be to delay, hinder or defeat the creditors of the respondents Elias and Maria Saravanja. It falls to them, therefore, to show on the balance of probabilities that the transaction is genuine and should be upheld.

14 On the evidence, I am not satisfied on the balance of probabilities that the respondents Elias and Maria Saravanja have shown that they had other than a fraudulent intention to delay, hinder or defeat their creditor the Bank in its legitimate claims in this action. The principles on which this finding rests are well established: **Koop v. Smith** (1915), 51 S.C.R. 554; **Ferguson v. Lastewka**, [1946] O.R. 577, (1946) 4 D.L.R. 531

It is urged on behalf of the Bank that the facts are not established by the bill of exchange. These facts are:

1. The transaction was between the plaintiff and the defendant.
2. The money changed hands.
3. The parties are again conveying the property thereby.
4. The transaction did not take place with the Bank.
5. The action was brought by the plaintiff against the defendant.

I accept the submission made on behalf of the Bank on these points. It is urged that the nature of the transaction is such that it is to be treated as a loan. It is urged that the parties are again conveying the property thereby. It is urged that the transaction did not take place with the Bank. It is urged that the action was brought by the plaintiff against the defendant.

On the evidence I am satisfied that the transaction is to be treated as a loan. It is urged that the parties are again conveying the property thereby. It is urged that the transaction did not take place with the Bank. It is urged that the action was brought by the plaintiff against the defendant.

(Ont. H.C.J.); **Jeffrey v. Aagaard**, [1922] 2 W.W.R. 1201 (Man. C.A.); **Owen Sound G & M Hospital v. Mann**, [1953] O.R. 643 (Ont. H.C.J.); **Royal Bank of Canada v. Sullivan and Herr**, [1957] O.W.N. 68 (Ont. H.C.J.).

15 That being so, I find that the Bank must succeed on this application, since the burden of persuasion under Rule 421 of the Rules of Court has been met by the Bank, on the evidence before the Court, the evidentiary burden on the respondents remaining undischarged. In saying that, I draw a distinction between this type of civil proceeding and criminal prosecutions under section 392 of the **Criminal Code**, where different considerations arise in respect of proof of fraudulent intent.

2. Should the property be sold?

16 The fact that others besides the respondents Elias and Maria Saravanja are in occupancy of the property, including Gaston Saravanja, is not a sufficient reason to deny the relief sought by the Bank, given the circumstances.

17 The only question remaining is whether the son Gaston Saravanja, who appears to have been an innocent purchaser for value, having since contributed in excess of \$8,000 towards what he understood was his equity in the property, should be entitled to recover that equity, or a proportion of it, from sale of the property, bearing in mind that he would have had to obtain alternative accommodation if he had not been in occupancy of the property. The \$1,600.00 debt owed to him by Elias Saravanja should not enter into any such calculation. Nor should the unpaid municipal taxes, which are slightly in


10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

excess of that amount. In this connection, see **Lee v. Glenval Holdings Ltd.** (1988), 85 A.R. 394 (Q.B.).

18 That question was not discussed during the hearing of this application. Should counsel be unable to agree on the appropriate manner for its resolution, they may appear before me in Chambers for a ruling on that and any other point as to the terms of sale.

Conclusion

19 An order for sale shall issue accordingly. Costs on the scale of triple column 3 in the tariff shall be paid forthwith upon taxation by the respondents to the Bank.

A handwritten signature in black ink, appearing to read 'M.M. de Weerd', with a stylized flourish at the end.

M.M. de Weerd
J.S.C.

Yellowknife, Northwest Territories
November 17th 1993

Counsel for the Applicant,
Judgment Creditor:

G.K. Phillips, Esq.

Counsel for the Respondents,
Judgment Debtors:

G. McLaren, Esq.

...in the connection, see ...

...

That question was not discussed during the hearing of the application.

Should counsel be permitted to file an affidavit in support of their application, they may

report before me to ...

...

...

...in the event of a ...

...

[Handwritten signature]

...

...

...

...

...

...

1952

THE OFFICE OF THE
SHERIFF

STATE

IN THE COUNTY OF

...

...

...

...

...

...

...

...

...

...

...

...



CV 03932

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

(Plaintiff)

Judgment Creditor

- and -

882432 N.W.T. LTD., ACTIVE SERVICE AND
MAINTENANCE LTD., ELIAS SARAVANJA and
MARIA SARAVANJA

(Defendants)

Judgment Debtors

AND:

IN THE MATTER OF an application pursuant to Rule
421 of the Rules of Court:

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

- and -

ELIAS SARAVANJA and MARIA SARAVANJA

Respondents

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE M.M. de WEERDT

