

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

**In the matter of an Appeal
from the Civil Appellate High
Court of Kurunegala.**

Kotagedera Liyanage George
Patrick Perera, "Shanthi",
Ihala Katuneriya, Katuneriya.

Plaintiff

SC APPEAL 101/16
SC HCCA LA 240/2015
WP/HCCA/KUR/ 44/2012(F)
DC MARAWILA 1056/L

Vs

Meththasinge Arachchige Mary
Linette Fernando,
Ihala Katuneriya, Katuneriya.

Defendant

AND BETWEEN

Meththasinge Arachchige Mary
Linette Fernando,
Ihala Katuneriya, Katuneriya.

Defendant Appellant

Vs

Kotagedera Liyanage George
Patrick Perera, "Shanthi",
Ihala Katuneriya, Katuneriya.

Plaintiff Respondent

AND NOW BETWEEN

Kotagedera Liyanage George
Patrick Perera, "Shanthi",
Ihala Katuneriya, Katuneriya.

Plaintiff Respondent Appellant

1A Warnakulasooriya Weerakuttige
Mary Therese Fernando

1B Kotagedara Liyanage Disna
Mariyam Geethani Perera

1C Kotagedara Liyanage Shanthi
Kumar Perera

All of, "Shanthi", Ihala Katuneriya,
Katuneriya.

**Substituted 1A, 1B and 1C Plaintiff
Respondent Appellants**

Vs

Meththasinge Arachchige Mary
Linette Fernando,
Ihala Katuneriya, Katuneriya.

Defendant Appellant Respondent

BEFORE

**: Priyasath Dep PC, CJ.,
S. Eva Wanasundera PCJ. &
Vijith K. Malalgoda PCJ.**

COUNSEL

**: R. Chula Bandara with Mangala
Jeevendra for the substituted 1A, 1B
and 1C Plaintiff Respondent
Appellants
Ms. Sudarshani Cooray for the
Defendant Appellant Respondent.**

ARGUED ON

: 01.11.2017.

DECIDED ON

: 05.12.2017

S. EVA WANASUNDERA PCJ.

In this matter, leave to appeal was granted on 20.05.2016 on the following questions of law:-

1. Have their Lordships in the Civil Appellate High Court of Kurunegala erred in law;
 - (a) By coming to the conclusion that the Petitioner held the corpus under constructive trust on behalf of the Respondent?
 - (b) By failing to evaluate the evidence adduced before them?
 - (c) By admitting the oral evidence of the Respondent over and above the contents in the three deeds bearing Nos. 0512, 0513 and 0514?
 - (d) By deciding /presuming that the Respondent had signed P1 and P2 under duress?
 - (e) By holding that the Respondent remained in possession as there was a trust created in her favour?
 - (f) By holding that the Respondent was entitled to pay back to the Petitioner the amount she borrowed and retransfer the deeds in her favour?
 - (g) By holding that a claim of a 3rd party claiming that there is a constructive trust created in her favour when the contracting parties had no desire to do so?

The Plaintiff Respondent Appellant (hereinafter referred to as the Plaintiff) instituted action in the District Court against the Defendant Appellant Respondent (hereinafter referred to as the Defendant) praying that the Defendant be evicted from the property described in the Schedule to the Plaint dated 06.12.2000, which is of an extent **of 1 Rood and 18.5 Perches**. This land is described as **Lot 2 of Plan 3191** dated **16.01.1989**.

The said **Lot 2** had got blocked out into three allotments by **Plan 3191 A** dated **05.03.1991** by the same surveyor who had made Plan 3191 and naming the said allotments as **Lots 1, 2 and 3** which were **16.5 Perches, 22 Perches and 20 Perches**.

According to the title deed marked as **P6**, the owner of Lot 1 of Plan 3191 A of an extent of 16.5 Perches was Hettigodage Somapala as at 20.02.1998. Information contained in the title deed marked as P6 reveals that the owner of Lot 1 of Plan 3191 A, Hettigodage Somapala had obtained title to the same by Deed No. 14321 dated **03.04.1993**.

According to the title deed marked as **P4**, the owner of only a portion of 7 Perches from and out of the combined land encompassing Lots 2 and 3 of Plan 3191 A, was Marasinghe Pedige Wijayarathne as at 20.02.1998. He had obtained title by Deed No. 0031 dated **23.12.1995**.

Information contained in the title deed marked as **P5** reveals that the owners of a portion of 35 Perches from and out of the combined land encompassing Lots 2 and 3 of Plan 3191 A, were Hettiarachchilage Don Newton Francis Appuhamy and Jayasuriya Gonkarage Bernard Oswald Ramya Fernando together as at 20.02.1998 as well as the fact that they had obtained title by Deed No. 0270 dated **31.05.1997**.

The Plaintiff had bought the different portions of the land which together is one and the same land described in the Schedule to the Plaint, adding up to 1 Rood and 18.5 Perches from H. Somapala, M.P.Wijayarathne, H.D.N.F.Appuhamy and J.G.B.O.R.Fernando. These previous owners had owned the said portions of the land from the years 1993, 1995 and 1997. All the Deeds P4, P5 and P6 were executed on one and the same day, i.e. on 20.02.1998. At the time of execution of the said deeds, the Defendant and her son had been in occupation of the land in

question. The Defendant has signed as witness to the transaction in Deeds P4 and P6 and her son has signed as witness to Deed P5. The consideration paid to the vendors are altogether Rs. 370,000/-. The Notary has mentioned that it passed before him and in his presence, in the attestations of the Deeds.

According to the documentary evidence before the trial judge the land in the schedule to the Plaint has got transferred to the Plaintiff on 20.02.1998. The Plaintiff has also produced two documents marked as P1 and P2 signed by the Defendant granting a promise to leave the premises on or before 22.04.1998 and thereafter on or before 95.05.2000. The second promise is after the lapse of two years from the first promise. These two documents are not denied by the Defendant but in the answer it is alleged that the promises were taken under duress but such duress has not been proven at all.

The story which can be gathered by the evidence of the Plaintiff and the Defendant is that the Defendant had transferred the different parts of the property to others and borrowed money from them. When years went by, and the land prices were going higher, the Defendant, M.A.Mary Linette Fernando had requested the Plaintiff who had been living in the neighbourhood and who was known to her for quite some time, to buy all the portions of the land from those to whom she had alienated the same in the early years, keeping a profit to her. She had arranged to settle the dues to all of them on one and the same day; got them all down to the Notary's office on 20.02.1998 ; got down the Plaintiff also to the Notary's office after arranging with him to give her Rs.750,000/- to settle all the money which she had borrowed from the owners of portions of the property as at that time. She was quite successful. The Deeds were written in Sinhalese and everybody was aware that it was a transfer of the property to the Plaintiff, G.Patrick Perera. With the money she got as profit having arranged the transaction, Linette the Defendant is supposed to have bought another block of land somewhere else and had also sent her son abroad. The mother and son promised to leave the premises and the Plaint states that the son left even before the date promised. It can be taken as that he went abroad. Linette did not leave the premises. Patrick went to the Police and to the Mediation Board. Thereafter as it was not settled, Patrick the Plaintiff filed action in the District Court to evict her.

The Defendant pleaded that the Plaintiff held the property in trust for the Defendant. At the end of the trial the District Judge delivered judgment in favour of the Plaintiff. The Defendant appealed to the Civil Appellate High Court and the High Court held that the property in dispute had been held by the Plaintiff in trust for the Defendant and therefore it should be retransferred. Now the Plaintiff is before this Court in Appeal from the High Court Judgment.

Section 83 of the Trusts Ordinance reads as follows:-

“ Where the **owner** of a property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee of such property must hold such property for the benefit of the owner or his legal representative.”

In the first instance, it is **only the owner** of a property who held the property before transferring the same to another who can claim the benefit of Section 83 of the Trusts Ordinance. If person X transfers the property to person Y, if the attendant circumstances show that X did not intend to dispose of the beneficial interest therein, then , it can be held that Y had held the property for the benefit of X . If persons A,B and C transfer the property to person Y, how can X show any attendant circumstances that Y held the property for the benefit of X? There is no role for X to play. If at all , it is only A, B and C who could come into the scene and allege that attendant circumstances show that A,B and C did not intend to dispose of the beneficial interest to X.

In the case in hand, the Defendant had not even tried to plead or lead evidence to show any ownership to the land at any time. There is no valuable documentary evidence to demonstrate that the Defendant was the owner at any stage regarding the property. The evidence before court for the Defendant is her oral evidence and her daughter’s oral evidence and the electoral registers to prove residence in the house on the land. The Grama Niladari also had given evidence only to prove her residence. There is not a single deed to prove any ownership by her. She had not even pleaded or given evidence to show that the previous owners of the portions of land according to the deeds were holding the same on trust for her.

The Defendant had not been able to place evidence even with regard to possession of the land because she had admitted that the Plaintiff continued to pluck coconuts and she also plucked coconuts as the person living in the house on the land. The Plaintiff had got down the persons who collected the coconuts when he got them plucked every two months or so from the whole land, to come and give evidence in court. Duress was alleged against the Plaintiff with regard to getting a document signed giving a promise to leave but it was not proved by the Defendant. The Defendant had not even moved to try to prove the same.

The case law with regard to constructive trusts are contained in several authorities. In **Wickremaratne Vs Thavendraraja 1982, 1 SLR 21**, Justice Atukorale held that Sections 91 and 92 of the Evidence Ordinance cannot have any application unless there has been in the first instance a contract or a grant or any other disposition of property between the parties. In **Dayawathie Vs Gunasekera and Another, 1991, 1 SLR 115**, it was held that the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not bar parole evidence to prove a constructive trust and that the transferor did not intend to pass the beneficial interest in the property.

In **Thisa Nona and Three Others 1997 1 SLR 169**, the Court of Appeal held that when the attendant circumstances show that Appellant did not intend to dispose of the beneficial interest of the property transferred, the law declares that under such circumstances the Respondent would hold such property for the benefit of the Appellant. In **Piyasena Vs Don Vansue 1997 2 SLR 311** also the Court of Appeal held that even though a transfer is in the form of an outright sale, it is possible to lead parole evidence to show that facts exist from which it could be inferred that the real transaction was either money lending where the land is transferred as a security or a transfer in trust, in such cases Sec. 83 of the Trusts Ordinance would apply.

However, none of these case law can be applied in the case in hand simply because the transfer of the land to the Plaintiff was not done by the Defendant but by others who were the owners of the land at the time of the transaction. The Defendant has not proven her ownership to the land at any time by documentary evidence showing her title even before the portions of land were transferred to the people who owned the same at the time of the transfer which had taken place at the instance of the Defendant. The transfer to be looked into, to find whether it was held on trust or not, should be a transfer of property from the

Defendant to the Plaintiff. The transfer in this case was not from the Defendant to the Plaintiff. Therefore whether the land was held by the Plaintiff in trust for the Defendant does not arise in law.

I answer the questions of law aforementioned in the affirmative in favour of the Plaintiff Respondent Appellant and against the Defendant Appellant Respondent. I do hereby set aside the judgement of the Civil Appellate High Court dated 24.06.2015 and I affirm the judgement of the District Court dated 01.03.2007.

This Appeal is allowed. However I order no costs.

Judge of the Supreme Court

Priyasath Dep PC.

I agree.

Hon. Chief Justice

Vijith K. Malalgoda PC.

I agree.

Judge of the Supreme Court.