

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

In the matter of an Appeal

Jayasooriya Kuranage Romold Dickson  
Sumithra Perera.  
New Road Wennappuwa.

**Plaintiff**

SC Appeal 110/2018  
SC/HCCA/LA 481/2017  
NWP/HCCA/KUR/198/2011(F)  
DC Marawila Case No. 1727/S

Vs-

1. Jayasooriya Kuranage Padma Jenat  
Jasintha Perera.  
Kolinjadiya, Wennappuwa.
2. Jayasooriya Kuranage Awanthi  
Nisansala Madushani Perera
3. Thalahitigamage Dona Rupika  
Priyadarshani.  
Both of Sadasarana Mawatha,  
Dummalakotuwa

**Defendants**

AND

Jayasooriya Kuranage Awanthi  
Nisansala Madushani Perera

**2<sup>nd</sup> Defendant-Appellant**

Vs

Jayasooriya Kuranage Romold Dickson  
Sumithra Perera.

New Road Wennappuwa.

**Plaintiff-Respondent**

1. Jayasooriya Kuranage Padma Jenat  
Jasintha Perera.  
Kolinjadiya, Wennappuwa.
  
3. Thalahitigamage Dona Rupika  
Priyadarshani.  
Sadasarana Mawatha,  
Dummalakotuwa, Dankotuwa

**1<sup>st</sup> and 3<sup>rd</sup> Defendant-Respondents**

AND NOW BETWEEN

Jayasooriya Kuranage Awanthi  
Nisansala Madushani Perera

**2<sup>nd</sup> Defendant-Appellant-  
Petitioner-Appellant**

Vs

Jayasooriya Kuranage Romold Dickson  
Sumithra Perera.

New Road Wennappuwa.

**Plaintiff-Respondent-**

**Respondent-Respondent**

1. Jayasooriya Kuranage Padma Jenat  
Jasinth Perera.  
Kolinjadiya, Wennappuwa.
3. Thalahitigamage Dona Rupika  
Priyadarshani.  
Sadasarana Mawatha,  
Dummalakotuwa, Dankotuwa

**1<sup>st</sup> and 3<sup>rd</sup> Defendant-Respondents-  
Respondents- Respondents**

Before: Sisira J. de Abrew, J  
L.T.B.Dehideniya J &  
S. Thurairaja PC, J

Counsel: M.C.Jayaratne PC with T.C.Weerasuriya A.M.Nilanthi Abeyratne,  
H.A.Nishari and H. Hettiarachchi for the 2<sup>nd</sup> Defendant-Appellant-  
Petitioner-Appellant.  
Hilary Livera with Gange Livera for the Plaintiff-Respondent-  
Respondent-Respondent

Argued on : 1.3.2019

Written submission

tendered on : 21.2.2019 by the 2<sup>nd</sup> Defendant-Appellant-Petitioner-Appellant

Decided on: 3.4.2019

Sisira J. de Abrew, J

The Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed this action against the Defendants praying, inter alia, that Deed No.11489 dated 23.8.1994 attested by A.A.Madurapperuma Notary Public be declared null and void on the basis that the 2<sup>nd</sup> Defendant who is the daughter of the Plaintiff-Respondent failed and neglected to look after him. The 1<sup>st</sup> Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the 1<sup>st</sup> Defendant-Respondent) prayed in her answer that that the 2<sup>nd</sup> Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the 2<sup>nd</sup> Defendant-Appellant) was holding the property in dispute on a constructive trust on behalf of the Plaintiff-Respondent. The 1<sup>st</sup> Defendant-Respondent is the sister of the Plaintiff-Respondent and the 2<sup>nd</sup> Defendant-Appellant is the daughter of the Plaintiff-Respondent. The 2<sup>nd</sup> Defendant-Appellant moved for a dismissal of the action of the Plaintiff-Respondent.

The learned District Judge by her judgment dated 27.12.2011, held that the 2<sup>nd</sup> Defendant-Appellant holds the property in dispute on behalf of the Plaintiff-Respondent on a constructive trust which is the relief sought by the 1<sup>st</sup> Defendant-Respondent. The Plaintiff-Respondent did not appeal against the said judgment. Being aggrieved by the said judgment of the learned District Judge, the 2<sup>nd</sup> Defendant-Appellant appealed to the Civil Appellate High Court and the said court by its judgment dated 28.9.2017 affirming the judgment of the learned District Judge dismissed the appeal. Being aggrieved by the said judgment of the Civil Appellate High Court, the 2<sup>nd</sup> Defendant-Appellant has appealed to this court. This court by its order dated 25.7.2018

granted leave to appeal on questions of law stated in paragraphs 9(b),(c) and (e) of the petition of appeal dated 8.11.2017 which are set out below.

1. Did their Lordships of the Civil Appellate High Court err in law by ignoring the principle enunciated in the case of Muthalibu Vs Hameed 52 NLR 97 whereas the Petitioner and the Plaintiff-Respondent-Respondent has a 'Loco Parentis' connection as the Plaintiff-Respondent-Respondent being the father of the Petitioner?
2. Did their Lordships of the Civil Appellate High Court err in law by not accepting the fact that the attendant circumstances establishing the case were verily proved that the said deed of transfer bearing No.11489 (P11) dated 23.08.1994 attested by A.A Madurapperuma, Notary Public, executed by the 1<sup>st</sup> Respondent-Respondent under the direction of the Plaintiff-Respondent-Respondent (Petitioner's father) was solely for the benefit, welfare and wellbeing of the Petitioner who was a minor, as at the time of said transfer.
3. Did their Lordships of the Civil Appellate High Court err in law by granting a relief as prayed for in the prayer (a) to the answer dated 22.11.2007 of the 1<sup>st</sup> Defendant-Respondent-Respondent, but in fact at the trial or thereafter she did not dare to raise an issue on her behalf and the learned District Judge of Marawila while dismissing the action of the Plaintiff-Respondent-Respondent granted a relief to a party who has not raised any issue in the trial?

The most important question that must be decided in this case is whether the 2<sup>nd</sup> Defendant-Appellant holds the property in dispute on behalf of the

Plaintiff-Respondent on a constructive. I now advert to this question. The Plaintiff-Respondent, who is the owner of the property in dispute, by Deed No.339 (P7) attested by M.J.M.D. Jayasinghe dated 1.2.1987 transferred the property in dispute to his sister, the 1<sup>st</sup> Defendant-Respondent. Later on 23.8.1994, the 1<sup>st</sup> Defendant-Respondent on the instructions of the Plaintiff-Respondent, by Deed No.11489 marked P11 attested by A.A Madurapperuma, Notary Public transferred the property in dispute to the 2<sup>nd</sup> Defendant-Appellant. It is undisputed that the possession of the property in dispute was not transferred to the 1<sup>st</sup> Defendant-Respondent or the 2<sup>nd</sup> Defendant-Appellant after the execution of Deeds Nos. 339(P7) and 11489(P11). According to the evidence of the Plaintiff-Respondent, he is in possession of the property in question. The 1<sup>st</sup> Defendant-Respondent in her evidence stated that the property in question was only nominally transferred to her and that she did not purchase the property although the consideration mentioned in Deed No.339 was Rs.30,000/- . According to her evidence, she did not pay the consideration mentioned in the deed. The Notary Public who attested the Deed No.339 too in his attestation states that the consideration did not pass in his presence. The 1<sup>st</sup> Defendant-Respondent in her evidence at page 94 further says that the property in question was transferred to her by the Plaintiff-Respondent by Deed No.339 for the purpose of obtaining a loan. From the above evidence, it is clear that the Plaintiff-Respondent has only nominally transferred the property in dispute to the 1<sup>st</sup> Defendant-Respondent and that he has not transferred the beneficial interest of the property in dispute to the 1<sup>st</sup> Defendant-Respondent.

Learned counsel for the 2<sup>nd</sup> Defendant-Appellant cited the judgment in the case of Muthalibu Vs Hameed 52 NLR 97 wherein Dias J (Swan J agreeing) held as follows:

*It is a well settled principle of Equity, which is recognized by section 2 of the Trusts Ordinance, that where a father or person in 'loco parentis' purchases property in the name of his child or wife there is a strong initial presumption that such transfer was intended for the advancement of such child or wife, and the provisions of section 84 of the Trusts Ordinance do not apply to such transaction.*

It is seen in the said case (Muthalibu Vs Hameed 52 NLR 97) the father bought the property in the name of his son. Therefore the facts of the above case are different from the facts of the present case. Thus the principle enunciated in the Muthalibu Vs Hameed (supra) has no application to the present case. In order to answer the question whether the 2<sup>nd</sup> Defendant-Appellant holds the property in dispute on behalf of the Plaintiff-Respondent on a constructive trust, it is necessary to consider section 83 of the Trust Ordinance which reads as follows.

*"Where the owner of 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 must hold such property for the benefit of the owner or his legal representative."*

In Piyasena Vs Don Vansue[1997] 2SLR 311 Wigneswaran J held as follows.

*“A trust is inferred from attendant circumstances. The trust is an obligation imposed by law on those who try to camouflage the actual nature of a transaction. When the attendant circumstances point to a loan transaction and not a genuine sale transaction the provisions of section 83 of the Trust Ordinance apply.”*

The Plaintiff-Respondent in his evidence says that he did not transfer the beneficial interest of the property in dispute to the 1<sup>st</sup> Defendant-Respondent (sister of the Plaintiff-Respondent). As I pointed out earlier, the Plaintiff-Respondent has only nominally transferred the property in dispute to the 1<sup>st</sup> Defendant-Respondent. The 1<sup>st</sup> Defendant-Respondent too in his evidence, at page 92, admits that she did not purchase the property in dispute. Therefore from the evidence of the 1<sup>st</sup> Defendant-Respondent, it can be safely concluded that she has not become the owner of the property in dispute. At the time the Deed No.339 marked P7 was executed no consideration was paid by the 1<sup>st</sup> Defendant-Respondent to the Plaintiff-Respondent. The Plaintiff-Respondent continued to be in possession of the property in dispute even after the Deed No.339 marked P7 and the Deed No.11489 marked P11 were executed. This position was not disputed by the 2<sup>nd</sup> Defendant-Appellant. At this stage it is relevant to consider the judgment in the case of Ehiya Lebbe Vs A. Majeed 48 NLR 357 wherein the Dias J observed the following facts.

*“Plaintiff, on P 1 of 1943, conveyed a certain land to the defendant. On the same day by P 2 non-notarial document, the defendant agreed to re-convey the land to the plaintiff on payment of the sum of Rs. 250 within two years. The defendant refused to re-transfer on tender of the money within the time. The*

*Commissioner found on the facts that when plaintiff executed P1, it was never in the contemplation of either party that the defendant was to hold the property as absolute owner but only till plaintiff's debt to the defendant of Rs. 250 was repaid.” Dias J held as follows:*

*“In the circumstances the defendant was a trustee for the plaintiff in terms of section 83 of the Trusts Ordinance.*

*To shut out the non-notarial document P 2 would be to enable the defendant to effectuate a fraud and that section 5 (3) of the Trusts Ordinance would apply;”*

Dias J at page 359 further held as follows:

*“There are certain tests for ascertaining into which category a case falls. Thus if the transferor continued to remain in possession after the conveyance, or if the transferor paid the whole cost of the conveyance, or if the consideration expressed on the deed is utterly inadequate to what would be the fair, purchase money for the property conveyed-all these are circumstances which would show whether the transaction was a genuine sale for valuable consideration, or something else.”*

In *Fernando Vs Thamel* 47 NLR 297 Howaed CJ observed the following facts.

*“By notarial deed the plaintiffs conveyed a land to the defendant. On the same day the defendant gave the plaintiffs an informal*

*document by which he undertook to give a retransfer of the land within a period of three years on payment of a certain sum. There were circumstances tending to show that the transfer of the land was to be in trust and establishing fraud on the part of the defendant. It was proved that no money was paid by the defendant on the day of transfer, that he merely undertook to free the property from a mortgage which it was subject to, that the plaintiffs were reluctant to grant the transfer and only did so on an agreement to retransfer and that there was gross disparity between the price and the value of the property.”*

Howard CJ held as follows: *“The informal document was admissible to prove that the defendant held the property in trust for the plaintiffs.”*

G.P.S. de Silva CJ in the case of Premawathi vs. Gnanawathi [1994] 2 SLR 171 held as follows:-

*“An undertaking to reconvey the property sold was by way of a non-notarial document which is of no force or avail in law under section 2 of the Prevention of Frauds Ordinance. However the attendant circumstances must be looked into as the plaintiff had been willing to transfer the property on receipt of Rs. 6000/- within six months but could not do so despite the tender of Rs. 6000/- within the six months as she was in hospital, and the possession of the land had remained with the 1st defendant and the land itself was worth Rs. 15,000/-, the attendant circumstances*

*point to a constructive trust within the meaning of section 83 of the Trusts Ordinance. The "attendant circumstances" show that the 1<sup>st</sup> defendant did not intend to dispose of the beneficial interest."*

In *Dayawathi and Others vs. Gunaskera and Another* [1991] 1SLR 115 the facts set out in the headnote are as follows:-

*The Plaintiff bought the property in suit in 1955. He started construction work in 1959 and completed in 1961. The Plaintiff, a building contractor, needed finances in 1966 and sought the assistance of the 2nd defendant with whom he had transactions earlier. This culminated in a Deed of Transfer in favour of the 1st Defendant, who is the mother of the 2nd Defendant and the 2nd Defendant being a witness to the Deed. The property was to be re-transferred within 3 years if Rs. 17,000/- was paid. The Plaintiff defaulted, in his action to recover the property, the Plaintiff succeeded in the trial Court in establishing a constructive trust. The Court of Appeal reversed the judgment on the sole ground that the agreement was a pure and simple agreement to re-transfer."*

This Court (His lordship Justice Dheeraratne) in the above case held as follows:

*"(i) 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.*

*(ii) Extrinsic evidence to prove attendant circumstances can properly be received in evidence to prove a resulting trust.”*

In order to consider whether a transaction mentioned in a deed attested by a Notary Public is a genuine sale transaction or whether the transferee holds the property in question on a constructive trust on behalf of the transferor, the following matters would be relevant.

1. The transferor continued to remain in possession after the execution of the deed by which the transferee claims ownership of the property.
2. If the transferor paid the whole cost of the conveyance.
3. If the consideration expressed on the deed is utterly inadequate when compared to the actual value of the property at the time of the conveyance.
4. On the day of the conveyance, the transferee, by a non-notarial document, agreed to re-convey the property to the transferor on fulfillment of certain conditions stated in the said non-notarial document.
5. If the transferor did not intend to pass the beneficial interest in the property to the transferee.

If the court, on evidence, finds that one or more of the aforementioned matters have been established, court is justified in holding that transferee holds the property on a constructive trust on behalf of the transferor.

In the present case, the Deed No 339 marked P7 was executed by the Plaintiff-Respondent in the name of the 1<sup>st</sup> Defendant-Respondent and after the execution of the said deed the Plaintiff-Respondent continued to be in possession of the property in dispute. The consideration of the said deed did not pass.

When I consider all the aforementioned matters and the legal literature, I hold that the 1<sup>st</sup> Defendant-Respondent has not become the owner of the property in dispute by Deed No 339 (P7); that she was only a trustee of the property in dispute; and that the 2<sup>nd</sup> Defendant-Appellant has not become the owner of the property in dispute. It has to be noted here that the 1<sup>st</sup> Defendant-Respondent being the trustee of the property in dispute could not have transferred the property in dispute to the 2<sup>nd</sup> Defendant-Appellant and as such the 2<sup>nd</sup> Defendant-Appellant has not become the owner of the property in dispute on the strength of Deed No11489 marked P11.

When I consider all the aforementioned matters, I hold that Section 83 of the Trusts Ordinance applies to the facts of this case and that the 2<sup>nd</sup> Defendant-Appellant holds the property in dispute on behalf of the Plaintiff-Respondent on a constructive trust. For the above reasons, I answer the 1<sup>st</sup> and the 2<sup>nd</sup> questions of law above in the negative. Learned counsel for the 2<sup>nd</sup> Defendant-Appellant at the hearing before us submitted that he would not support the 3<sup>rd</sup> questions of law above.

For the aforementioned reasons, I affirm the judgment of the Civil Appellate High Court dated 28.9.2017 and dismiss this appeal with costs.

*Appeal dismissed.*

Judge of the Supreme Court.

L.T.B. Dehideniya J

I agree.

Judge of the Supreme Court.

S. Thurairaja J

I agree.

Judge of the Supreme Court.