

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

In the matter of an Appeal from the
Judgment of the Civil Appellate
High Court of the Western Province
Holden at Gampaha

**SC Appeal No. 160 / 2013
SP/HCCA/ Gph / 316 / 2011
WP/HCCA/GPH 95/01
D.C.Negombo Case No. 4858/L**

Bharatha Wijesundera,
No. 116, Negombo Road,
Sayakkaramulla,
Marandagahamula

Plaintiff

Vs.

1. Nanedirige Sarath Thilakasiri,
"Srimali Rice Mill",
Weyangoda Road, Wegouva,
Minuwangoda.
2. Nanedirige Ananda Tilakaratne,
No. 427, Dematagolla,
Horampella.

Defendants

AND THEN

1. Nanedirige Sarath Thilakasiri,
"Srimali Rice Mill"
Weyangoda Road,
Wegouwa,
Minuwangoda.

2.Nanendirige Ananda Tilakaratne,
No. 427, Dematagolla,
Horampella.

Defendant Appellants

Vs.

Bharatha Wijesundera,
No. 116, Negombo Road,
Sayakkaramulla,
Marandagahamula.

Plaintiff Respondent

AND NOW

1. Nanendirige Sarath Thilakasiri,
"Shrimali Rice Mill",
Weyangoda Road,
Wegouva,
Minuwangoda.
2. Nanendirige Ananda
Tilakaratne,
 - 2a. Gamage Piyawathi.
 - 2b. Nanendirige Wasantha Lakmali
Tilakaratne.
 - 2c. Nanendirige Thilina Lakmal
Tilakaratne.
 - 2d. Nanendirige Tharindu Lakmal
Tilakaratne.

All of No. 427, Dematagolla,
Horampella.

Defendants Appellants
Appellants

Vs.

Bharatha Wijesundera,

No. 116, Negombo Road,
Sayakkaramulla, Minuwangoda.

Plaintiff Respondent
Respondent

BEFORE : **S.EVA WANASUNDERA PC J.**
B.P. ALUVIHARE PC J. &
K.T.CHITRASIRI J.

COUNSEL : S.N.Vijithsingh for the Defendant Appellant Petitioners
Sudarshani Cooray for the Plaintiff Respondent Respondent

ARGUED ON : 03. 02. 2016.

DECIDED ON: 21.03. 2016.

S.EVA WANASUNDERA PC J.

This is an appeal to be decided on one question of law contained in paragraph 13(d) of the Petition dated 12.08.2011., i.e. “ whether the High Court erred in law by not considering the fact that the parole evidence of the Respondents is sufficient to establish a constructive trust in the circumstances of this case”.

The land which is the subject matter of this case is of an extent of 34.5 Perchs. It is a part of Lot 2A2 in Plan No. 603 dated 18.06.1990. surveyed by licensed surveyor Fonseka. Lot 2A2 is of an extent of 3 Roods. The 1st Defendant Appellant Appellant (hereinafter referred to as the 1st Defendant), N.Sarath Thilakasiri got

title to this land by way of Amicable Partition Deed No. 70089 dated 2.1.1991. attested by Jaysekera Abeyruwan, Notary Public. This Deed was marked in evidence at the District Court trial.

The land of an extent of 34.5 Perches was marked on the document, the Plan No. 603 mentioning as “ an allotment marked and allotted as Lot 2A2 -1 “, on 25.04.1992, prior to executing **the Deed No. 8764** dated 19.07.1992 by which deed the 1st Defendant transferred the said **Lot 2A2 -1** to the Plaintiff. This is the deed that the Defendants are claiming to be a constructive trust and not intended to be a transfer of title of **Lot 2A2-1**.

It is evident that Lot 2A2-1 had not been physically demarcated on the ground at the time of the transfer. The Defendants are two brothers. They claim that the Plaintiff Respondent Respondent (hereinafter referred to as the Plaintiff) gave a loan of Rs.22500/- to the 1st Defendant in June, 1992 on 5% interest per month for which the security given was only a cheque for that amount. The 1st Defendant had been paying interest but had failed to pay the principal amount for some months. Then the Plaintiff had insisted that as security the 1st Defendant should transfer a piece of land since a cheque is not good enough security any more.

The 1st Defendant had then transferred Lot 2A2-1 by Deed 8764 to the Plaintiff who had promised that he will retransfer the land to the 2nd Defendant, the elder brother of the 1st Defendant. This promise was given in his handwriting by way of another document which was signed on a stamp. The Defendants claim that this document was written and given when the transfer deed was done in the Notary's office. This was marked in evidence as V1. By V1, the amount of the loan is given as Rs. 35000/- . The Plaintiff had promised to retransfer the property to the 2nd Defendant if the said Rs. 35000/- is repaid within 2 years from that date, i.e. from 15.7.1992 with interest at 5% per month. Yet he had not waited for 2 years but tried to fence the Lot 2A2-1 in Oct. 1993. It is then that the troubles had started when the 2nd Defendant had complained to the Police about the Plaintiff's attempt to fence the property. There had been a Primary Court Case under No. P 22177 filed under Sec. 66(1)B of the Primary Courts Procedure Act No. 44 of 1979 on the complaints made to the Police by the Defendants and the Primary Court by order dated 4.4.1994 had given possession to the Defendants who were in

possession of the land at that time and ordered the Plaintiff not to disturb them until the matter is resolved in the District Court in a civil action.

The Plaintiff has made both the 1st and 2nd Defendants as parties to the District Court action because the Primary Court had placed both of them in possession as they were the complainants in that case.

The Plaintiff's evidence before the District Court was that even though the amount mentioned in the Deed as purchase price is Rs. 35000/- , the actual amount paid by him to the 1st Defendant is Rs. 135000/-. The Plaintiff denied V1, the letter of promise to retransfer at the trial but later on, in cross examination said that it looks like his handwriting. Even in that letter the amount he had

mentioned is Rs. 35000/- and interest at 5% per month and not Rs.135000/-. He had mentioned in his statement to the Police that if Rs. 135000/- is paid to him, he is ready to retransfer the land then and there. Furthermore he had mentioned in his evidence that he wanted a land by the Negombo Road from the 1st Defendant but the 1st Defendant had transferred a piece of land in the 'jungle'. In my view, no proper buyer of a block of land would buy the same for good consideration without seeing and identifying the land prior to buying the same. Taking the answer of the Plaintiff, it is obvious that he had physically not seen the land prior to the execution of the Deed 8074. This affirms that it was taken only as security for the loan. When he was cross examined as to why he stated in his statement to the Police, that he would retransfer the land if Rs. 135000/- is given in the Police, he had answered that the Police had suggested that he could buy a land by the main road if Rs. 135000/- is given and that is the reason for his statement. I find it hard to believe that the Police would get involved in such discussion with the complainants and respondents before them. This statement of the Plaintiff suggests that at that time, the market value could have been somewhere around Rs.135000/- for a land of 34.5 perches, which he had got by way of a transfer deed for Rs. 35000/- only.

The statements to the Police reveals that there is a cadjan thatched small house on Lot 2A2-1 in which the 2nd Defendant had placed one Premasinghe and his family. This Premasinghe had refused to sign on a paper which he was asked to sign by the Plaintiff and further he is the person who had chased out the Plaintiff

from the land when he had come with four other people to fence the same in 1993. The troubles had arisen at that time.

I observe that the land belonging to the 1st Defendant was transferred to the Plaintiff on trust on the understanding that when Rs. 35000/- was paid back with interest at 5% per month within two years to the Plaintiff by the 1st Defendant, the land would be retransferred back to the 1st Defendant. Furthermore I observe that it was a promise that the land will be retransferred to the 1st Defendant on repayment as agreed.

In ***Dayawathie and others Vs Gunasekera and another, 1991, 1 SLR 115***, it was held that, “ The Prevention of Frauds Ordinance and Sec. 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. Extrinsic evidence to prove attendant circumstances can be properly received in evidence to prove a resulting trust.” In ***Premawathie Vs Gnanawathie, 1994, 2 SLR 171***, Hon. Chief Justice, G.P.S. de Silva held that “ 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 Sec. 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 6 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 15000/- , the attendant circumstances point to a constructive trust within the meaning of Section 83 of the Trusts Ordinance. The ‘attendant circumstances’ show that the 1st Defendant did not intend to dispose of the beneficial interest. “

According to the case law on the subject, such as *Dayawathie Vs. Gunasekera 91 1 SLR 115*, and *Premawathie Vs. Gunawathie 94 2 SLR 171*, the grounds on which a trust can be adjudged is as follows:

(a) on the oral promise and/or written informal promise to reconvey,

(b) the transferee having remained in possession and the transferor not having taken possession of the land, right after the transfer and

(c) the disparity between the proper value and the value placed in the Deed.

All these grounds are present in this case in hand which have come out in the evidence of the Plaintiff and the Defendants before the District Court and also in the statements made to the Police by them.

Both the District Judge and the High Court Judge have failed to analyze the evidence placed before them with a view to see whether there was parole evidence to support a constructive trust behind the transfer of land by Deed 8074. They have only analyzed the story of the Defendants narrating how they agreed to give a piece of land as security for the accumulated loan of Rs. 35000/- to the Plaintiff and the discrepancies in their evidence explaining title to the land. In fact, the owner of the land 2A2-1 was the 1st Defendant. This fact was proven with the Amicable Partition Deed No. 70089 and the covenants included in the Deed of Transfer No. 8074 and they were accepted facts.

The contest in the case is that, with the deed of transfer, the title did not pass because it was only security given for a loan on trust and that it will be retransferred if the loan was repaid with interest within two years. However the Plaintiff did not wait for two years and tried to demarcate the boundaries of the land on the ground without informing the 1st Defendant, at which time trouble started and a case was filed before the Primary Court to keep peace and the Defendants were given possession till the matter is settled in a case filed in the District Court. On a balance of probabilities of evidence placed before the District Court, to my mind, it is clear that it was security given for a loan of Rs. 22500/- with accumulated interest got collected upto a loan of Rs. 35000/- when the Plaintiff demanded a property be transferred to secure the loan.

I answer the question of law to be decided as aforementioned in the affirmative in favour of the Defendants Appellants Appellants. The learned Judges of the High Court and the District Court have not given sufficient consideration to the parole evidence in the case proving the constructive trust placed with the Plaintiff by

the 1st Defendant when Deed 8074 was executed. The learned judges have erred in their decisions.

I do hereby set aside both Judgements of the Civil Appellate High Court of Gampaha dated 05.07.2011 and the District Court of Negombo dated 30.01.2001. In view of the decision of this court, issues bearing Nos. 10 and 11 raised in the District Court are answered in favour of the Defendants. Accordingly decree should be entered as prayed for in the answer dated 14. 10. 1994. The Registrar of this Court is directed to return the District Court Record to the relevant District Court forthwith to enable parties to comply with this judgment.

The Appeal is allowed. However I order no costs.

Judge of the Supreme Court

B.P. ALUVIHARE PC J,

I agree.

Judge of the Supreme Court

K.T.CHITRASIRI J,

I agree.

Judge of the Supreme Court