

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

Algama Appuhamylage Don
Wasantha Lankanayake,
Bayawa, Awulegama.
Plaintiff

SC APPEAL NO: SC/APPEAL/57/2019

SC LA NO: SC/HCCA/LA/237/2018

HCCA KURUNEGALA NO: NWP/HCCA/KURU/80/2015/F

DC WARIYAPOLA NO: 09/SPL

Vs.

Algama Appuhamylage Don
Ananda Algama,
Hingurugamuwa,
Awulegama.
Defendant

AND BETWEEN

Algama Appuhamylage Don
Wasantha Lankanayake,
Bayawa, Awulegama.
Plaintiff-Appellant

Vs.

Algama Appuhamylage Don
Ananda Algama,
Hingurugamuwa,
Awulegama.
Defendant-Respondent

AND NOW BETWEEN

Algama Appuhamylage Don
Ananda Algama,
Hingurugamuwa,
Awulegama.
Defendant-Respondent-Appellant

Vs.

Algama Appuhamylage Don
Wasantha Lankanayake,
Bayawa, Awulegama.
Plaintiff-Appellant-Respondent

Before: P. Padman Surasena, J.
E.A.G.R. Amarasekara, J.
Mahinda Samayawardhena, J.

Counsel: W. Dayaratne, P.C., with Ranjika Jayawardene for
the Defendant-Respondent-Appellant.
Sapumal Bandara with Geethika Mannaperuma for
the Plaintiff-Appellant-Respondent.

Argued on: 10.03.2021

Written submissions:

by the Plaintiff-Appellant-Respondent on
08.09.2020.

by the Defendant-Respondent-Appellant on
07.01.2021.

Further written submissions:

by the Defendant-Respondent-Appellant on
27.04.2021.

Decided on: 10.06.2021

Mahinda Samayawardhena, J.

By way of Deed of Transfer No. 10950, the Plaintiff-Appellant-Respondent (Plaintiff) transferred some of her undivided rights to the land described in the schedule to the Deed to her brother, the Defendant-Respondent-Appellant (Defendant). The Plaintiff states that although this Deed is *ex facie* an outright transfer, it was in fact security for a loan obtained by her from the Defendant, and there was an oral agreement between them that the Defendant brother would retransfer the property once she repaid the loan with interest. The Plaintiff's position is that she never intended to pass the beneficial interest in the property to the Defendant thereby resulting in a constructive trust being created in her favour.

Section 83 of the Trusts Ordinance, No. 9 of 1917, as amended, 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.

The Defendant had also acquired undivided rights to this property by other Deeds. He filed a partition action to partition the larger land making the Plaintiff also a Defendant. The partition case was concluded without contest. The Plaintiff did not raise her claim to the constructive trust in the partition action.

The Plaintiff states that the Defendant continuously postponed the retransfer of the property and she was ultimately compelled to file this case as a last resort to vindicate her rights.

The Defendant denies this version of the Plaintiff. The defendant states that the transaction was an outright transfer of the property and he is not holding the property in trust for the Plaintiff.

After trial, the District Court held against the Plaintiff on the basis that the partition decree wiped out the constructive trust, if any.

On appeal, the High Court of Civil Appeal reversed the Judgment and directed the District Court to enter Judgment for the Plaintiff.

The Defendant is now before this Court against the Judgment of the High Court.

The Defendant raised several questions of law but this Court granted leave to appeal on two questions, which in essence is whether the High Court erred in law when it decided that a constructive trust is not extinguished by a decree for partition, notwithstanding that the Plaintiff, being aware of the partition action, did not claim such a right in the partition action.

In the Partition Ordinance, No. 10 of 1863, section 9 dealt with the conclusive effect of a partition decree and there was no express provision protecting constructive trusts after a decree for partition was entered. Hence there was an ambiguity as to whether constructive trusts survived a partition decree.

In cases such as *Babunona v. Cornelis Appu* (1910) 14 NLR 45, *Galgamuwa v. Weerasekera* (1919) 21 NLR 108, the Court held against the survival of a constructive trust, but in cases such as *Sultan v. Sivanadian* (1911) 15 NLR 135, *Weeraman v. De Silva* (1920) 22 NLR 107, the Court held in favour of the survival of a constructive trust despite a partition decree being entered.

However this question was set at rest by a Full Bench of the Supreme Court in *Marikar v. Marikar* (1920) 22 NLR 137 wherein the Supreme Court, having reviewed the conflicting previous decisions authoritatively held:

A trust, express or constructive, is not extinguished by a decree for partition, and attaches to the divided portion, which on the partition is assigned to the trustee.

The Full Bench of the Supreme Court took the view that section 9 of the Partition Ordinance was not intended to extinguish equitable interests, and the trustee, being the owner of the share, represents the beneficiary in respect of it, and a partition

decree in favour of the trustee will be conclusive against all those who may claim the same share or any interest therein but is not intended to shut out the beneficiary himself.

Dr. L.J.M. Cooray in his treatise *The Reception in Ceylon of the English Trust (1971)*, justifies this conclusion from a different perspective. He states at page 209 that notwithstanding the trust is wiped out by the decree for partition, “*He [the trustee] may be regarded as a trustee under a constructive trust (distinct from the old trust which the decree has wiped out) which constructive trust arises under section 90 read with section 53 [of the Trusts Ordinance], when he receives a partition title to the former trust property under the decree.*”

This Full Bench decision was followed in subsequent decisions such as *Punchimahatmaya v. Medagama (1949) 51 NLR 276*. Notably, the District Court Judgment in the instant case makes no reference to *Marikar v. Marikar*.

The Partition Act, No. 16 of 1951, succeeded the Partition Ordinance. Unlike the Partition Ordinance, the Partition Act made special reference to trusts. Section 48(1) of the Partition Act (which corresponds to section 9 of the Partition Ordinance) recognised the finality and conclusiveness of a partition decree. It stated that such a decree is free from all encumbrances whatsoever other than those specified in the decree. It further expounded:

In this subsection “encumbrance” means any mortgage, lease, usufruct, servitude, fideicommissum, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month, and the rights of a proprietor of a nindagama.

Although the Full Bench of the Supreme Court in *Marikar's* case held that a trust, be it express or constructive, would not be extinguished by a partition decree, the Partition Act enacted that a trust was extinguished by a partition decree unless specifically reserved in the decree or if it were a constructive or charitable trust.

When the Defendant in the instant case filed the partition action, the Partition Law, No. 21 of 1977, was in force. Similar to the Partition Act, section 48(1) of the Partition Law endowed partition decrees with finality devoid of encumbrances other than those specified in the decree. What is meant by "encumbrance" is defined in the Partition Law in the following manner:

In this subsection and in the next subsection "encumbrance" means any mortgage, lease, usufruct, servitude, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month.

Hence, similar to the Partition Act, the Partition Law spares constructive trusts despite a partition decree being final and conclusive.

The learned District Judge in this case has accepted that in terms of section 48(1), a constructive trust is not wiped out by the entering of a partition decree. But the District Judge qualifies this by stating that the beneficiary of a constructive trust can claim the benefit of the said provision only if the partition decree had been obtained without the beneficiary's knowledge, and not in an instance where he remained silent

having been fully aware of the partition action. The District Court took the view that as the Plaintiff had kept silent about the constructive trust after she was made a party to the partition action, the alleged constructive trust was wiped out by the partition decree and therefore the Plaintiff's action should fail. The District Court did not go into the merits of the Plaintiff's claim despite voluminous evidence being led on the question of the existence of a constructive trust.

This finding of the District Court is not correct and goes against the *ratio decidendi* of *Marikar's* case. Had the learned District Judge read the Judgment in *Herat v. Amunugama (1955) 56 NLR 529*, which he cites in his Judgment, he would have realised his mistake. In *Herat's* case, Gratiaen J. states at pages 534-535:

It has no doubt been authoritatively decided that Section 9 of the Partition Ordinance does not necessarily extinguish constructive trusts – Marikar v. Marikar (1920) 22 NLR 137.... In Marikar's case (supra) the beneficiary (although a party) had not put in issue the bare legal estate of the constructive trustee.

Learned President's Council for the Defendant submits that in *Marikar's* case there was a constructive trust but in the instant case the Defendant denies any such trust. This is also not correct. In *Marikar's* case there was no admitted trust. There was only "*an alleged constructive trust*".

Let me quote the first paragraph of the Judgment in *Marikar's* case to clear any doubts:

The question for determination in this case relates to an alleged constructive trust attaching to an undivided share

of a land which was the subject of a partition suit. The person beneficially interested under the alleged trust – though himself otherwise a party to the suit – did not assert a claim to his equitable right in the suit. Judgment was given, and a decree entered, without any reference to the trust. The question is therefore, whether, assuming the existence of the trust, it is extinguished by the decree, or whether it attaches to the share allotted in severalty.

I must emphasise that at the time *Marikar's* case was decided in 1920, there was no statutory safeguard to preserve constructive trusts and yet the Supreme Court interpreted section 9 of the Partition Ordinance (which stated that a partition decree is conclusive) liberally in order to protect trusts. Subsequent legislation expressly protected constructive trusts and therefore there cannot be any doubt on the matter. There is no necessity to rely on *Marikar's* Judgment any more.

The learned District Judge states that if a person is allowed to file a separate action to establish a constructive trust in respect of a portion of land which was the subject matter of a partition decree to which he was a party, it would lead to an “*absurd interpretation*” of section 48(4) of the Partition Law.

If two interpretations of a statute are possible and one leads to absurdity and the other is in harmony with common sense and justice, the Court has the option of selecting the latter. But if the language of a statute is plain, the Court cannot as a general rule give a different interpretation on the ground of absurdity. The intention of the legislature is clear when the legislature in express terms preserved constructive trusts despite finality of partition decrees in line with the dicta in *Marikar's* case.

The argument of learned President's Council for the Defendant is that the partition decree can be challenged before the District Court only on the grounds set out in section 48(4) of the Partition Law and nowhere in that section is it expressly stated that a partition decree can be challenged by a separate action filed on the ground of a constructive trust. This position is untenable because the challenge by the beneficiary is not against the partition decree but against the trustee.

Notwithstanding the Defendant proposed questions of law in relation to (a) prescription on a constructive trust, and (b) proof of the attendant circumstances in establishing a constructive trust, this Court did not grant leave on those questions. The High Court has adequately addressed (b) above and concluded that there exists a constructive trust as claimed by the Plaintiff.

I answer the two questions of law raised on behalf of the Defendant in the negative.

The Judgment of the High Court of Civil Appeal is affirmed and the appeal is dismissed with costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I agree.

Judge of the Supreme Court