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

In the matter of an appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5C of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, as amended by Act No. 54 of 2006.

SC Appeal No. 47/2020
SC (HCCA) LA Case No. 24/2020
WP/HCCA/KAL/061/2014(F)
DC Kalutara Case No. L/5776

Lellupitiyagama Ethige Roslin Hemalatha,
Karandagoda, Beruwala.

Plaintiff

vs.

1. Ihalahewage Don Lionel Ranasinghe,
   Mahagederawatta,
   Karandagoda, Beruwala.

2. Jagath Investment (Private) Limited,
   Owitigala, Matugama.

3. Koruwage Lalith Fernando,
   Bogalla, Beruwala.

Defendants

And between

Koruwage Lalith Fernando,
Bogalla, Beruwala.

3rd Defendant – Appellant

vs.

Lellupitiyagama Ethige Roslin Hemalatha,
Karandagoda, Beruwala.

Plaintiff – Respondent

1. Ihalahewage Don Lionel Ranasinghe,
   Mahagederawatta,
   Karandagoda, Beruwala.

2. Jagath Investment (Private) Limited,
   Owitigala, Matugama.

1st and 2nd Defendants – Respondents

And now between

Koruwage Lalith Fernando,
Bogalla, Beruwala.

3rd Defendant – Appellant – Appellant

vs.

Lellupitiyagama Ethige Roslin Hemalatha,
Karandagoda, Beruwala.

Plaintiff – Respondent – Respondent

1. Ihalahewage Don Lionel Ranasinghe,
   Mahagederawatta,
   Karandagoda, Beruwala.

2. Jagath Investment (Private) Limited,
   Owitigala, Matugama.

1st and 2nd Defendants – Respondents – Respondents

Before: **P. Padman Surasena, J**
Janak De Silva, J
Arjuna Obeyesekere, J

Counsel: Sanjeeva Dassanayake with Dilini Premasiri for the 3rd Defendant – Appellant – Appellant

Thanuka Nandasiri for the Plaintiff – Respondent – Respondent

Argued on: 6th April 2022

Written Submissions: Tendered on behalf of the 3rd Defendant – Appellant – Appellant on 6th January 2021

Tendered on behalf of the Plaintiff – Respondent – Respondent on 7th July 2021

Decided on: 4th October 2023

Obeyesekere, J

The question that arises for determination in this appeal is whether the Plaintiff – Respondent – Respondent [the Plaintiff] has conveyed to the 1st Defendant – Appellant – Appellant [the 1st Defendant] by Deed No. 4158, the beneficial interest in the land referred to in the said Deed. The answer to this question would then determine whether the said land is being held by the 1st Defendant in trust for the Plaintiff, as provided for by Section 83 of the Trusts Ordinance.

Facts in brief

By Deed of Declaration No. 3939 dated 16th August 2002, the Plaintiff declared as follows:

(a) The original owner of the land referred to in the said Deed is Kalawilage Don Odiris Appuhamy;

(b) The said land, which is in extent of 0A 1R 11.90P and depicted in Plan No. 731/2002 dated 19th May 2002, is situated within the limits of the Beruwala Pradeshiya Sabha;

(c) Upon the death of Odiris Appuhamy, Kalawilage Don Somipala, who is the son of Odiris Appuhamy and the husband of the Plaintiff, came into possession of the said land and occupied the said land for a long period of time;

(d) Don Somipala passed away in 1989 and thereafter, the Plaintiff has been in undisturbed and uninterrupted possession of the said land;

(e) By virtue of such long possession, she is the owner of the said land.

In June 2003, which is less than one year after the execution of the above Deed of Declaration, the Plaintiff had the said land sub-divided into two lots marked A1 and A2, as more fully depicted in Plan No. 554/2003. According to the said Plan, the house of the Plaintiff and the well used by her had been situated on Lot A2, while the toilet was situated on Lot A1.

On 21st September 2003, the Plaintiff executed the impugned Deed of Transfer No. 4158 attested by Nadeel Malagoda, Attorney-at-Law, by which she transferred to the 1st Defendant, who is a relation of hers and who lived close to her house, Lot A1 in Plan No. 554/2003, in extent of 0A 0R 25P. The purchase consideration has been stipulated as Rs. 50,000, with the Notary certifying that the consideration was not paid in his presence. It must be noted that Deed No. 4158 does not contain any condition relating to the re-transfer of the said land to the Plaintiff and on the face of it, was an absolute transfer.

By Deed of Transfer No. 4560 executed on 7th March 2004, the 1st Defendant had transferred Lot A1 to the 2nd Defendant – Respondent – Respondent [the 2nd Defendant] for a sum of Rs. 60,000. The 2nd Defendant is said to be a company engaged in money lending. On 2nd October 2006, the 3rd Defendant – Appellant – Appellant [the 3rd Defendant] purchased from the 2nd Defendant the said land by way of Deed of Transfer No. 221 attested by Nirosha Silva, Attorney-at-Law, for a sum of Rs. 65,000, with the 1st Defendant signing as a witness and the Attorney-at-Law certifying that the consideration had been paid prior to the execution of the said Deed.

The Plaintiff claims that in 2007, she had requested the 1st Defendant to re-transfer the said land to her on payment of Rs. 50,000, which is the sum of money that the Plaintiff received from the 1st Defendant, together with interest, but that the 1st Defendant rejected the said request. The Plaintiff says that it is at this point that she was informed by the 1st Defendant that he had *mortgaged* the land to the 2nd Defendant. The Plaintiff states that her Attorney-at-Law had thereafter carried out a search at the Land Registry which revealed the execution of the aforementioned Deeds in favour of the 2nd Defendant and the 3rd Defendant.

On 20th October 2009, which is six years after the initial conveyance to the 1st Defendant, and two years after the Plaintiff found out about the execution of the aforementioned deeds in favour of the 2nd and 3rd Defendants, letters of demand have been sent on behalf of the Plaintiff to all three Defendants claiming that Deed No. 4158 was in fact only a mortgage, that the said Deed did not seek to convey the beneficial interest in the said land to the 1st Defendant, that the beneficial interest in the said land remains with the Plaintiff and that the 1st Defendant is holding the said land in trust for the Plaintiff. The said letters of demand went on to state that the value of one perch of the said land was Rs. 125,000 and that the Plaintiff has continued to remain in possession of the said land. None of the Defendants have responded to the said letters of demand, with the result that the claim of the Plaintiff that she continues to be in possession of the said land, has not been rejected by any of the Defendants at the first available opportunity.

<u>Action in the District Court</u>

On 7th December 2009, the Plaintiff instituted action in the District Court of Kalutara against all three Defendants. In her plaint, while reiterating the aforementioned matters contained in the letters of demand, the Plaintiff stated that she had been in urgent need of money to settle a loan that she had taken [ලබාගෙන තිබූ නයක් භදිසියෙන් ගෙවීමට සිදු වූ බැවින්] and that she had borrowed a sum of Rs. 50,000 from the 1st Defendant to settle the said loan. The Plaintiff had averred that although she had executed Deed No. 4158 as a transfer, it was in effect a mortgage and that she did not intend to transfer the beneficial interest in the said property to the 1st Defendant and further, that the 1st Defendant was in fact holding the said property in trust for her. The Plaintiff was therefore seeking to

contradict the terms of Deed No. 4158, which, as I have noted already, did not contain any terms or conditions to support the claim of the Plaintiff and was, on the face of it, an absolute transfer.

The position taken up by the Plaintiff in her plaint thus brought into focus fairly and squarely the provisions of Section 83 of the Trusts Ordinance, which provides a Court with a mechanism to decipher the real intention of the owner of a property who later claims that he or she did not intend to transfer the beneficial interest in the property to the transferee, by considering the attendant circumstances surrounding the said transfer.

The Plaintiff had accordingly sought the following reliefs in her plaint:

(a) A declaration that Lot A1 in Plan No. 554/2003 is held in trust by the 1st Defendant in favour of the Plaintiff;

(b) A direction that the 1st Defendant re-transfer the said land to the Plaintiff;

(c) A declaration that the 2nd and 3rd Defendants are not entitled to the said land on the Deeds executed in their favour.

While the 1st and 3rd Defendants filed their answers, the 2nd Defendant did not file an answer and the trial against the 2nd Defendant proceeded *ex parte*. In his answer, the 1st Defendant denied the version of the Plaintiff and took up the position that Deed No. 4158 was an outright transfer, a position from which he resiled at the trial. He admitted that he had mortgaged the property to the 2nd Defendant in order to raise a loan and that the said loan had been settled by him. While stating that he was in possession of the said land, the 1st Defendant sought a declaration that he was entitled to the beneficial interest in the said land. The 3rd Defendant claimed in his answer that he had paid Rs. 170,000 to the 1st Defendant at the office of the 2nd Defendant to enable the 1st Defendant to settle the loan that he had taken and for the 2nd Defendant to transfer the said land to him. The 3rd Defendant therefore claimed that he was a bona fide purchaser and that he is in possession of the said land. Thus, the principal issue raised on behalf of the Plaintiff and the 1st Defendant revolved on the true nature of Deed No. 4158.

At the trial, the Plaintiff gave evidence on her behalf and led the evidence of the Grama Niladhari of the area and a Valuer, while the 3rd Defendant gave evidence on his behalf. The Attorney-at-Law for the 1st Defendant, having informed Court that the 1st Defendant was accepting the position of the Plaintiff, closed the case for the 1st Defendant without leading any evidence.

Judgment of the District Court

By judgment dated 12th May 2014, the learned District Judge, having applied the provisions of Section 83, found that the Plaintiff had been in possession of both lots A1 and A2 at all times and that the consideration she received from the 1st Defendant did not accurately reflect the true value of the land. The learned District Judge, having concluded that,

(a) the Plaintiff did not intend to transfer the beneficial interest in the said land to the 1st Defendant;

(b) there existed a constructive trust between the Plaintiff and the 1st Defendant; and

(c) no ownership rights passed to the 2nd and 3rd Defendants by virtue of the deeds executed in their favour,

delivered judgment in favour of the Plaintiff and directed the 1st Defendant to re-transfer the said land, i.e., Lot A1, to the Plaintiff upon the payment of Rs. 50,000 by the Plaintiff.

The appeal filed by the 3rd Defendant against the said judgment in the High Court of the Western Province holden in Kalutara exercising Civil Appellate jurisdiction [the High Court] was dismissed by the High Court by its judgment delivered on 5th December 2019.

Questions of Law

The 3rd Defendant thereafter sought and obtained leave to appeal from this Court on 10th June 2020 on the following two questions of law:

(1) Have the learned Judges of the High Court failed to consider the fact that the learned Trial Judge has erred in law by failing to appreciate the necessary ingredients applicable in establishing a constructive trust?

(2) Have the learned Judges of the High Court as well as the learned Trial Judge failed to consider and apply attendant circumstances required to establish a constructive trust in its proper perspective?

In answering the above questions of law, I would consider the findings of the learned District Judge and the learned Judges of the High Court in the light of the test laid down in Section 83 and the evidence that was available to the learned District Judge.

Reception of oral evidence of an instrument

There are two laws that I must refer to at the very outset, in order to give context to Section 83.

The first is the Prevention of Frauds Ordinance, of which Section 2 (prior to its amendment by the Prevention of Frauds (Amendment) Act No. 30 of 2022) provided as follows:

> "*No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, and no notice, given under the provisions of the Thesawalamai Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be in force or avail in law* ***unless the same shall be in writing*** *and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses."* [emphasis added]

The second is the Evidence Ordinance of which Sections 91 and 92 are relevant and are re-produced below:

Section 91

> "*When the terms of a contract, or of a grant, or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and* ***in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such*** *contract, grant, or other* ***disposition of property****, or* ***of such matter, except the document itself****, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained*. …" [emphasis added]

Section 92

> "*When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms*. …" [emphasis added]

None of (a) the exceptions to Section 91 and (b) the provisos to Section 92 arise for consideration in this appeal.

The cumulative effect of the above provisions is that while the disposition of any immovable property must be reduced to writing, proving the terms of a deed by which any immovable property has been transferred can be done only by producing the deed itself or where permissible by way of secondary evidence and in the manner provided therefor in the Evidence Ordinance, and no oral evidence can be given to *inter alia* contradict the terms of such deed. The resultant position is that oral evidence relating to any instrument relating to land that seeks to contradict, vary, add to, or subtract the terms contained in such deed cannot be received by a Court.

Section 83 of the Trusts Ordinance

Section 83 of the Trusts Ordinance, however, acts as an exception to the said rule laid down in Section 92, and 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*." [emphasis added]

In **Muttammah v Thiyagarajah** [62 NLR 559] H.N.G. Fernando, J (as he then was) referring to Section 2 of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance, stated as follows at page 571:

> *"The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise, but only to establish an "attendant circumstance" from which it could be inferred that the beneficial interest did not pass. Although that promise was of no force or avail in law by reason of Section 2 of the Prevention of Frauds Ordinance, it is nevertheless a fact from which an inference of the nature contemplated in Section 83 of the Trusts Ordinance properly arises. The Prevention of Frauds Ordinance does not prohibit the proof of such an act. If the arguments of counsel for the appellant based on the Prevention of Frauds Ordinance and on section 92 of the Evidence Ordinance are to be accepted, then it will be found that not only section 83, but also many of the other provisions in Chapter IX of the Trusts Ordinance will be nugatory. If for example "attendant circumstances" in Section 83 means only matters contained in an instrument of transfer of property it is difficult to see how a conveyance of property can be held in trust unless indeed its terms are such as to create an express trust."*

A similar view was expressed in **Krishanthy Balasubramanium and Another v Vellayar Krishnapillai and Wife and Another** [SC Appeal No. 28/2008; SC minutes of 24th May 2012] where Sripavan, J (as he then was) referring to the judgment in **Dayawathie and Others v Gunasekera and Another** [(1991) 1 Sri LR 115] stated at page 10 that this Court

has "*held that the provisions of 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 such a case, extrinsic evidence to prove attendant circumstances can be properly received in evidence to prove a resulting trust*."

In **Fernando v Fernando and Another** [SC Appeal No. 175/2010; SC minutes of 17th January 2017], Sisira De Abrew, J reiterated at page 10 that, "… *Section 2 of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not operate as a bar to lead parole evidence to prove a constructive trust and to prove that the transferor did not intend to dispose of beneficial interest in the property*."

Section 83 thus being an exception, it has been held that in applying Section 83, Courts must exercise great caution. In **Senadheerage Chandrika Sudarshani v Muthukuda Herath Mudiyanselage Gedara Somawathi** [SC Appeal No. 173/2011; SC minutes of 6th April 2017], Prasanna Jayawardena, PC, J stated at page 15 that:

> "*The Court has to keep in mind that, a notarially attested deed of transfer should not be lightly declared to be a nullity. The Court must also guard against allowing a false or belated claim of 'Trust' made by a transferor who has transferred his property and then had second thoughts or seeks to profit from changed circumstances. Dalton J's observations made close to 90 years ago in Mohamadu vs. Pathuamma [11 CLR 48 at page 49], (that) "It is becoming not uncommon by the mere allegation of a trust to seek to evade the very salutary provisions of (the Evidence) Ordinance to which I have referred," continues to remain a salutary caution*."

What is an attendant circumstance?

The application of the test laid down in Section 83 would enable the Court to decide whether the owner of the property intended to dispose of the beneficial interest in the said property when he transferred it. Accordingly, the intention of the owner must be reasonably inferred from, and be consistent with, the attendant circumstances surrounding the transfer.

Aluwihare, PC, J in **Watagodagedara Mallika Chandralatha v Herath Mudiyanselage Punchi Banda and Another** [SC Appeal No. 185/2015; SC minutes of 4th December 2017] emphasised [at page 8] that, "*One needs to bear in mind that where a constructive trust within the meaning of Section 83 of the Trust Ordinance is asserted, it is incumbent on the court to meticulously examine the evidence placed before the court, the reason being, on the face value the evidence placed may give the appearance of a straight forward transaction of a sale but the real intention of the parties can only be gleaned from a close scrutiny of the circumstances under which the transaction was effected. And the intention of the parties is of paramount importance."*

What, then, would be an attendant circumstance? In **Muttammah v Thiyagarajah** [supra; at page 564], Chief Justice Basnayake who delivered the minority opinion, referring to Section 83 stated as follows:

> "*The section is designed to prevent transfers of property which on the face of the instrument appear to be genuine transfers, but where an intention to dispose of the beneficial interest cannot reasonably be inferred consistently with the attendant circumstances.* ***Neither the declaration of the transferor at the time of the execution of the instrument nor his secret intentions are attendant circumstances. Attendant circumstances are to my mind circumstances which precede or follow the transfer but are not too far removed in point of time to be regarded as attendant which expression in this context may be understood as "accompanying" or "connected with".*** *Whether a circumstance is attendant or not would depend on the facts of each case*." [emphasis added]

In **Senadheerage Chandrika Sudarshani v Muthukuda Herath Mudiyanselage Gedara Somawathi** [supra; at page 14], Prasanna Jayawardena, PC, J prior to referring to the above passage of Basnayake, CJ with approval, stated that, "*The words 'attendant circumstances' can be broadly described as meaning the facts surrounding the transaction. In Black's Law Dictionary (9th Edition) the words 'attendant circumstance', as used in the American Law, have been defined as "A fact that is situationally relevant to a particular event or occurrence*."

Over the years our Courts have identified different circumstances as being attendant circumstances, and emphasised that, what an attendant circumstance is and the weight that must be attached to such circumstance in reasonably inferring the intention of the owner, would depend on the facts and circumstances of each case. It would also mean that a circumstance which is attendant in one case may not be an attendant circumstance in another.

Dias, J stated thus in **Ehiya Lebbe v Majeed** [48 NLR 357 at 359]:

> "*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 **Thisa Nona and Three Others v Premadasa** [(1997) 1 Sri LR 169] Wigneswaran, J held that the following circumstances which transpired in that case were relevant on the question whether the transaction was a loan transaction or an outright transfer:

(1) The fact that a non-notarial document was signed by the transferee contemporaneous to the impugned deed of transfer, agreeing to transfer the land if the sum of Rs. 1,500 referred to in the deed was paid within six years;

(2) The payment of the stamp duty and the Notary's fees by the transferor;

(3) The fact that the transfer deed came into existence in the course of a series of money transactions;

(4) The continued possession of the premises in suit by the transferor in the same manner as she did before the transfer deed was executed.

In **Carthelis v Ranasinghe** [(2002) 2 Sri LR 359] it was held at page 369 that, "*If it was a pure and simple transfer, one would expect the title deeds and all other old deeds to be in the hands of the transferee having obtained them from the transferor, for the purpose of preparing the deed of transfer*."

I am therefore of the view that it is in the light of the sequence of events and the nature of attendant circumstances peculiar to a case that a Court must arrive at its conclusion on whether Section 83 of the Trusts Ordinance applies to that particular case or not.

The burden of proof

It is clear that the burden of proof lies on the person who claims that he or she did not intend to transfer the beneficial interest in the property to the transferee. In **Watagodagedara Mallika Chandralatha v Herath Mudiyanselage Punchi Banda and Another** [supra] Aluwihare, PC, J cited with approval the following passage from '**The Reception in Ceylon of the English Trust**' (1971) by L.J.M. Cooray – *"Where a person has a notarial conveyance in his favour, courts have placed a heavy burden on the transferor to prove facts bringing himself within Section 83."*

The manner in which the Court must be satisfied that the said burden has been discharged was considered in **Senadheerage Chandrika Sudarshani v Muthukuda Herath Mudiyanselage Gedara Somawathi** [supra], where this Court held as follows:

> "…. *the use of the aforesaid words in Section 83 require that, the Court applies an objective test when determining the intention of the owner from the attendant circumstances. Therefore,* ***if the claim of a Constructive Trust is to succeed, the attendant circumstances must make it plainly clear to the 'reasonable man' that, the owner did not intend to part with his beneficial interest in the property.*** *A secret or hidden intention to retain the beneficial interest will not do.* ***The attendant circumstances must be such that they would have demonstrated to the transferee that the owner intended to retain the beneficial interest in the property.*** *The transferee is judged here as standing in the shoes of the 'reasonable man'. If a 'reasonable man' must have known from the 'attendant circumstances' that the*

owner intended to retain his beneficial interest in the property, the transferee is deemed to hold the property upon a Constructive Trust in favour of the owner. However, if a 'reasonable man' may not have drawn such an inference from the attendant circumstances, the transferee holds the property absolutely, since no Constructive Trust can be deemed to have arisen. Further, the burden of proof lies firmly on the person who claims a Constructive Trust to prove it." [page 15; emphasis added]

At the trial, the learned Counsel for the Plaintiff relied on two principal circumstances in order to establish his position that the Plaintiff did not intend to transfer to the 1st Defendant the beneficial interest in the said land – firstly, that the Plaintiff has continued to remain in possession of the said land; and secondly, that the value of the land was much higher than what was paid to her by the 1st Defendant. These are the two grounds relied upon by the learned District Judge, as well.

However, prior to considering these two grounds, I shall set out the background to the transaction as it transpired before the learned Trial Judge, as the said background places in context the said two grounds urged by the Plaintiff.

<u>The explanation of the Plaintiff for the execution of the Deed</u>

The first matter that I wish to refer to is the purpose for which the Plaintiff required the money, which in her own words is as follows:

"එවැනි ගණුදෙනුවක් කිරීමේ අරමුණ වුනේ, මගේ ස්වාමියා අවුරුදු 12 ක් එක තැන ඉදලා නැති වුන වෙලාවේ ගත්ත ණය. පැවරීම කරල තිබෙන්නේ 2003 වර්ෂයේ. මේ ඔප්පුව ලියන්න රු. 50,000/- ක් ලබා ගත්ත. මේ ගණුදෙනුව කරන අවස්ථාවේ එයාට ඉල්ලුවාම මම ඔයාට ලියන්නම් හදිසියට පිරිමහන්න, සල්ලි සොයාගෙන පස්සෙ මම බේර ගන්නම් කියන පොරොන්දුව පිට දුන්නේ 1 වත්තිකරුට. සල්ලි අවශ්‍යතාවයක් වුනේ."

Thus, the Plaintiff's position was that she had a specific purpose to obtain a sum of Rs. 50,000 as a loan. Whether her evidence on this issue is credible or not is an issue that I shall consider in detail, later in this judgment.

The second matter that I wish to refer to, which explains the reason for the Plaintiff to have approached the 1st Defendant to fulfil her immediate need for money, and the long time taken for her to seek redress from Court, is the blood relationship that existed between the Plaintiff and the 1st Defendant, who in addition was personally known to her and lived about ten houses from where she lived. This relationship in turn appears to have given rise to the implicit trust that the Plaintiff claims that she had in the 1st Defendant, and prompted her to sign a deed of transfer, even though she allegedly had no intention of transferring the land.

Referring to Deed No. 4158, the Plaintiff has stated that:

> "මේ ලේඛණය විකුණුම්කරයක් ලෙස ලියලා තියෙන්නේ. විකුණුම්කරයක් ලෙස ලිව්වේ මට ලොකු විශ්වාසයක් මත ලියලා මම එයාගෙන් රුපියල් 50000 ක් ගත්තා. **විශ්වාසයක් තිබුනා එයා මේක විකුණනවා නම් මට පිටින් දෙන්නේ නැහැ කියලා විශ්වාසය නිසාම රු.** 50000 **ක් ගත්තා.**" [emphasis added]

The Plaintiff thereafter stated that:

> "මේ ඔප්පුව විකුණුම්කරයක් ලෙස ලිව්වට මෙම ඉඩම විකුණන්න අදහස් කලේ නැහැ. 1 වෙනි විත්තිකරු කියන්නේ ඥාතියෙක්. ඔවුන් අද ආවා. මගේ පුතා ඥාති සහෝදරයකුගේ පුතා පොඩි කාලේ සිට මගේ ගෙදර ඉදලා වැඩිලා හිටියා මා විශ්වාසය මත ලිව්වේ. මේ ඔප්පුව ගණුදෙනුවක් සිද්ධ වුන නිසා විකුණුම්කරයක් ලෙස ලිව්වා.
>
> මම 1 වෙනි විත්තිකරුට කිව්වා මෙම ගණුදෙනුව මොන වගේ ගණුදෙනුවක්ද කියලා. විශ්වාසය මත ගොඩ නගාගෙන මම නැවත මුදල් දුන්නහම මට නැවත මේක දෙනවා කියලා එයා කිව්වා ලොකු විශ්වාසයක් මත ලිව්වේ විශ්වාසයක් ගොඩ නගා ගත්තා. මම ඔහුට කියා සිටියා නැවත මුදල් දුන්නහම දෙන්න කියලා."

To my mind, the first answer reflects the thinking of the Plaintiff at the time she executed the Deed – that is, the 1st Defendant would hold the said land in trust for her and that the land would not be sold to a third party without first offering it to her or, in other words, that the Plaintiff would be entitled to a right of first refusal and a re-transfer of the property. The second answer makes it clear that the land was to be re-transferred to her. The Plaintiff has however not been cross-examined on whether she was entitled only to a right of first refusal and not a re-transfer of the said Deed as of right.

Although a secret intention on the part of the Plaintiff will not be an attendant circumstance, the explanation of the Plaintiff demonstrates that she has clearly communicated her intention to the 1st Defendant and gives context not only to what transpired thereafter, but to the attendant circumstances that prompted the learned District Judge to hold in favour of the Plaintiff.

The position of the Plaintiff can therefore be summarised as follows:

(a) The Plaintiff requested a sum of Rs. 50,000 from the 1st Defendant, who was related to her and whom she trusted, in order to settle debts she had incurred.

(b) While agreeing to give her the money, the 1st Defendant had wanted the said land transferred in his name.

(c) The 1st Defendant had agreed to re-transfer the said land upon the re-payment of the money.

(d) Due to the relationship and the trust that she had in the 1st Defendant, and having clarified with the 1st Defendant that the property would be re-transferred upon re-payment, she agreed to the course of action proposed by the 1st Defendant and thereafter executed the said Deed as an outright transfer, without having specified any conditions relating to the re-transfer of the land.

<u>Possession of the land by the Plaintiff</u>

I have already stated that none of the Defendants responded to the letters of demand in which the Plaintiff claimed that she was in possession of the land. Although the 1st Defendant had stated in his answer that he was in possession of the said land, no evidence was placed during the trial to support this position. This applies to the 3rd Defendant as well. Unlike the 1st Defendant, the 3rd Defendant was a stranger to the Plaintiff and therefore should have taken steps that a *bona fide* purchaser would ordinarily take, such as having a search of title carried out by an Attorney-at-Law, having a fresh survey carried out to determine the exact extent of the land especially since the two lots, A1 and A2,

had not been physically separated, having the land fenced soon after purchasing the land and having his name registered in the register at the local authority. Even though the 3rd Defendant gave evidence, he did not state if he did any of the above, except that he used to clean the said land regularly.

On the contrary, the position of the Plaintiff that she has been in possession of the land at all times has been supported by the evidence of the Grama Niladari. I have already stated that the Plaintiff had the land sub-divided into two lots three months prior to the execution of the impugned Deed, and that it is only one lot, namely A1, that is the subject matter of this appeal. Although Plan No. 554/2003 was produced and marked by the Plaintiff, the Plaintiff did not explain the reason or the necessity for the sub-division of the land into Lots A1 and A2, nor was she cross-examined on this issue by any of the Defendants. The learned Counsel for the 3rd Defendant has raised before this Court the issue of the land being sub-divided just three months before the execution of the impugned Deed in order to support his position that the intention of the Plaintiff was to transfer the beneficial interest in the lot referred to in the said Deed. However, I am unable to draw any adverse inference in the absence of this issue having been raised during cross-examination.

What is important is the evidence of the Plaintiff that the two lots were not separated by a fence and that she continued to occupy and possess both lots of land even after the transfer was executed in favour of the 1st Defendant. The Grama Niladari stated that the Plaintiff occupied the entire land and that in fact, until he was cross-examined on this issue, he did not even know the land had been sub-divided into two lots for the reason that there was no physical demarcation of the lots on the ground. The Plaintiff also stated that even though her house was situated on Lot A2, her toilet was situated on Lot A1, a fact which has been corroborated by the evidence of the Valuer. None of the Defendants have questioned the Plaintiff on her sanitation facilities being situated on Lot A1 and whether she had alternative arrangements on Lot A2. The Plaintiff stated further that she had a chicken pen on Lot A1 and that it was she who enjoyed the fruits of the said lot of land.

The learned District Judge has considered the above evidence and concluded as follows:

> "තවද පැමිණිලිකාරිය වෙනුවෙන් සාක්ෂි කැඳවූ එකි ග්‍රාමනිලධාරිවරයාගෙන් හෝ තක්සේරුකරුගෙන් හෝ පැමිණිලිකාරියගෙන් 1 විත්තිකරු හෝ 3 වන විත්තිකරු හරස් ප්‍රශ්න නගමින් පැමිණිලිකාරියගේ පදිංචිය අභියෝගයට ලක් කර නැති අතර 3 විත්තිකරු ඔවුන් ඉඩම මිලදි ගත් පසුවද 1 විත්තිකරු එයට පෙර පැ. 3 ඔප්පුවෙන් මිලදි ගත් පසුවද ඉඩමෙහි පදිංචියට ගිය බවට පදිංචිය සනාථ කරමින් කිසිදු සාක්ෂියක් ඉදිරිපත් කර නොමැති අතර 3 විත්තිකරුද සාක්ෂි දෙමින් ඉඩමට ගොස් සුද්ද පවිත්‍ර කරනවා යයි කියා තිබුණද එකි කරුණු පිළිබඳ ග්‍රාම නිලධාරිවරයා හරස් ප්‍රශ්නවලට භාජනය කරන අවස්ථාවේදි වත් තහවුරු වන ආකාරයට කරුණු ඉදිරිපත් කර නොමැත.
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> ඒ අනුව වර්ෂ 2003 සිට මෙම නඩුව පවරන දින වන වර්ෂ 2009 දක්වා අදාල විෂය වස්තුවෙහි බුක්තියෙහි පැමිණිලිකාරිය සිටි බව පැහැදිලි වන අතර පැ. 3 ඔප්පුව ලියා අත්සන් කිරීමෙන් පසුව දේපලෙහි බුක්තියෙහි පැවරීමක් සිදුවී නොමැති බව තහවුරු වේ. ඒ අනුව අර්ථලාභි අයිතියක් පැමිණිලිකාරිය විසින් 1 විත්තිකරුට පැවරීමේ අදහසකින් පැ. 3 දරණ ඔප්පුව ලියා අත්සන් කොට ඇති බවට තහවුරු නොවේ."

The learned Judges of the High Court have affirmed the judgment of the District Court only after considering the above evidence. I am in agreement with the above conclusion and take the view that the Plaintiff has established that she continued to be in possession of the property at all times, thereby giving rise to a reasonable inference that she did not intend to transfer the beneficial interest in the said land to the 1st Defendant.

Value of the property

The second ground relied upon by the Plaintiff was that the consideration of Rs. 50,000 that passed from the 1st Defendant to her did not reflect the true value of the land. The consideration of Rs. 50,000 amounts to Rs. 2,000 per perch. With regard to the value, the Plaintiff stated that the land was worth Rs. 125,000 per perch at the time she signed the impugned Deed. The Plaintiff had also obtained through Court a Commission on D.I. Danthanarayana, an Incorporated Valuer, to ascertain the current market value as well as the value that prevailed at the time the impugned Deed was executed. He had reported that the current market value of one perch of the said land was Rs. 30,000 while the market value at the time the said Deed was executed was Rs. 20,000 per perch. Thus, even though there was a glaring disparity between the value given by the Plaintiff and the Court-appointed Valuer, the fact remains that the land was worth well over Rs. 2,000 per

perch, thus supporting the version of the Plaintiff that she only obtained a loan from the 1st Defendant and that she did not intend to transfer the beneficial interest in the said land to the 1st Defendant. The Plaintiff and the Valuer have been cross-examined extensively on behalf of the 3rd Defendant but mostly with regard to the locality of the land and the facilities available in the said locality, and not with regard to any specific aspect of the valuation. It is on this basis that the learned District Judge has concluded that the consideration set out in the said deed does not reflect the true value of the said land. These findings have been considered by the High Court, and I see no reason to disagree with the said findings.

Other attendant circumstances

There are two other circumstances which in my view are attendant circumstances and confirm the position of the Plaintiff. The first, which has not been considered either by the District Court or the High Court, is that the original of the Deed of Declaration and the impugned Deed are with the Plaintiff, and not with the 3rd Defendant, as claimed in the written submissions filed on behalf of the 3rd Defendant. I say this for the reason that it was the Plaintiff who produced and marked the originals of the Deed of Declaration and the impugned Deed as P1 and P3, respectively. The originals are available in the case record and I have examined same. The simple position here is that if P3 was an absolute transfer, then, in the absence of any explanation to the contrary, the originals of P1 and P3 should have been handed over to the 1st Defendant. Furthermore, any *bona fide* purchaser, which the 3rd Defendant claims he is, would have sought the originals of the previous Deeds, especially as he was purchasing the land from the 2nd Defendant. No explanation has been given by the 3rd Defendant why he did not do so.

The second matter is that the consideration has not passed in the presence of the Attorney-at-Law before whom the impugned Deed was signed, which supports the position of the Plaintiff that the transaction was purely monetary and that the execution of the Deed was nominal.

Grounds urged on behalf of the 3rd Defendant

In addition to the submissions on possession and value, the learned Counsel for the 3rd Defendant presented two other arguments to support his position that a reasonable inference cannot be drawn that the Plaintiff did not intend to transfer the beneficial interest in the land to the 1st Defendant.

The first is with regard to the purpose for which the money was required. In the Plaintiff's own words, the money was required for the following purpose:

> "මම ඉන්න නිවසට අදාළ ඉඩම මට රු. 50000 ක මුදල් අවශ්‍යතාවයක් නිසා මගේ ස්වාමිපුරුෂයා අවුරුදු 12 ක් ඔත්පොලවෙලා හිටියා එයා නැති වුනා. ණය ගත්ත ඒවා වගයක් තිබුනා ඒවා ගෙවා ගන්න තමයි මම ඒක ලිව්වේ.
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> ඉඩම ලිව්ව මගේ විශ්වාසය මත රු. 50,000 ට දෙන්නේ නැහැ, **අන්ත අසරණ වී සිටියේ.** ස්වාමියා නැති වෙලා ඉන්න අවස්ථාවේ මගේ ඥාති පුත්‍රයා ට රු. 50,000 ක් ගත්ත එයාට ලියලා ආපහු ඉඩම දෙන බවට."

As observed by the learned District Judge, the Plaintiff did not produce any further details with regard to the above-mentioned loans that she had taken, including the dates when she had taken such loans, from whom she had taken the loans or whether she used the money to settle such loans. These details become important in view of the fact that in the Deed of Declaration, the Plaintiff has stated as follows:

> "එකී කාලවිලගේ දොන් සොම්පාල යන අය වර්ෂ 1989 දී මිය යාමෙන් අනතුරුව මෙහි ප්‍රකාශකාරිය වන මා විසින් එකී දේපල වැඩී දියුණු කර අඛණ්ඩව නිදහස්ව නිරවුල්ව භුක්ති විඳගෙන එනු ලැබේ.
>
> මේ අනුව මෙහි ප්‍රකාශකාරිය වන මාගේ ස්වාමිපුරුෂයා විසින් පිය උරුමයට අයත්ව ඉතා දිර්ඝ කාලයක් භුක්ති විඳගෙන එනු ලැබූ බැවින්ද, මෙහි ප්‍රකාශකාරිය වන මාගේ ස්වාමිපුරුෂයා වර්ෂ 1989 දී මිය යාමෙන් අනතුරුව එතැන් පටන් මා විසින් අඛණ්ඩව නිදහස්ව නිරවුල්ව භුක්ති විඳගෙන එනු ලබන බැවින්ද."

In my view, the Plaintiff should have been cross-examined on her explanation as to the need for the money, especially since her husband is said to have expired in 1989 and the loan was being raised much later [2003]. However, in the absence of the evidence of the

Plaintiff being challenged in cross-examination, it is not possible for this Court to consider the first argument of the learned Counsel for the 3rd Defendant.

The second is with regard to the arrangement for the repayment of the money. The learned Counsel for the 3rd Defendant submitted that if Rs. 50,000 was taken as a loan, there ought to have been an arrangement between the Plaintiff and the 1st Defendant with regard to the re-payment of the said money and the payment of interest. It must be noted that neither the plaint nor the letters of demand sent on behalf of the Plaintiff contained any details with regard to the rate of interest, the period within which the monies should be repaid etc. During cross-examination, the Plaintiff was questioned in this regard and her position was that she had not paid any interest to the 1st Defendant. The Plaintiff however claims that when she wanted to repay the money in 2007, she offered to do so with interest which demonstrates the intention on the part of the Plaintiff to pay interest. In my view, given the relationship that existed between the Plaintiff and the 1st Defendant, the failure to agree on the payment of interest, the rate of interest and the period of re-payment cannot displace the strong attendant circumstances referenced above, that had been established by evidence and which were relied upon by the learned Judges of the District Court and the High Court.

Conclusion

Having carefully considered the judgments of the learned District Judge and the learned Judges of the High Court, I am of the view that:

(a) both Courts have analysed and applied the evidence in light of the test laid down in Section 83; and

(b) it cannot reasonably be inferred, consistently with the attendant circumstances, that the Plaintiff intended to dispose of the beneficial interest that she had in Lot A1, to the 1st Defendant by way of Deed No. 4158.

In the said circumstances, I would answer in the negative the aforementioned questions of law raised by the 3rd Defendant.

I therefore direct that the Plaintiff shall pay to the 1st Defendant a sum of Rs. 50,000 together with legal interest thereon, from 21st September 2003 until the payment of the said sum of Rs. 50,000 is made. The 1st Defendant shall execute in favour of the Plaintiff a deed of transfer in respect of Lot A1 in Plan No. 554/2003 upon the aforesaid payment by the Plaintiff. If the 1st Defendant fails to execute a deed of transfer, the Registrar of the District Court of Kalutara shall execute a conveyance in favour of the Plaintiff, upon the Plaintiff depositing the aforementioned sum of money with the Registrar of the District Court of Kalutara.

Subject to the above, the judgments of the District Court and the High Court are affirmed and this appeal is dismissed, with costs.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, J

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva, J

I agree.

JUDGE OF THE SUPREME COURT