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

In the matter of an application for Leave to Appeal under Section 5C. (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with the Supreme Court Rules 1990 from the Judgment pronounced on 03.05.2011 by the High Court of the Western Province sitting in Kalutara in Civil Appeal No. WP/HCCA/KAL 18/2003 (F) in terms of Section 5A (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

SC. Appeal No. 157/2011

SC. HC. (Leave to Appeal)
Application No: 206/2011

H.C. Kalutara Civil Appeal
No. WP/HCCA/KAL 18/2003 (F)

D.C. Kalutara Case
No. 1290/L

Warnakulasuriyage Charlert
Kusumawathi Kulasuriya,
'Gangasiri",
Weragama,
Wadduwa.
Defendant-Respondent-Petitioner

-Vs.-

Don Wimal Harischandra
Gunathilaka
27, Circular Road,

Wadduwa.

Plaintiff-Appellant-Respondent

BEFORE : Tilakawardane, J.
Sathyaa Hettige, PC, J. &
Marasinghe, J.

COUNSEL : Chandana Prematilake for the Defendant-Respondent-Petitioner-Appellant.

Ranjan Gooneratne for the Plaintiff-Appellant-Respondent-Respondent.

ARGUED ON : 13.01.2014

DECIDED ON : 04.04.2014

SHIRANEE TILAKAWARDANE. J

Leave to Appeal was granted by this Court on 14.10.2011 against the judgment of the High Court of the Western Province holden in Kalutara dated 03.11.2011, on the following questions of law as enumerated in paragraph 11 (i) - (ix) of the Petition dated 13.06.2011:

(i) Did the Provincial High Court [exercising civil appellate jurisdiction] err in holding that the Learned District Judge had erred in arriving at the finding that a constructive trust had been created as a result of the transaction in P1 [i.e. Deed No. 7948 dated 15.07.1987]

(ii) Did the Provincial High Court err in concluding that it cannot reasonably be inferred consistently with the attendant circumstances that the defendant did not intend to dispose of the beneficial interest of the property concerned?

(iii) Did the Provincial High Court err in not even referring, leave aside evaluating, the attendant circumstances from which the Learned District Judge had concluded that the plaintiff was holding the land in issue as a constructive trust on behalf of the defendant and she had not intended to transfer beneficial interest by P1?

(iv) Did the Provincial High Court err in holding that the defendant's admitted, continued and uninterrupted possession [i.e. even after P1 and P2] and the documents V8-V11 being evidence of such possession do not render any assistance in establishing that the consideration in P1 was in fact a loan and the transaction in P1 had resulted in the creation of a constructive trust?

(v) Did the Provincial High Court err in insisting that failure to place evidence of the Notary Public and the witnesses involved in P1 militates against the defendant's position of a loan transaction and a resulting constructive trust in the teeth of other overwhelming evidence?

(vi) Did the Provincial High Court err in the teeth of other overwhelming evidence in suggesting that the absence of clauses on repayment of the money and re-transfer of the property in P1 parole evidence from the said Notary Public and the witness to the effect that P1 was only a security bond for the loan should have been led?

(vii) Did the Provincial High Court err in assuming that the defendant had not pleaded that there was a parole agreement between the parties to the effect that P1 was subject to a constructive trust in the light of paragraphs 3 and 11 of the answer where she had pleaded that she transferred the

property in trust for the loan obtained, never intended to transfer the title of possession to the Vendee in P1 and the plaintiff was therefore holding the property in constructive trust for her?

(viii) Did the Provincial High Court err in relying on inadmissible and irrelevant considerations such as the value of a perch of land as given by Counsel at the argument and the defendant's failure to file action against the plaintiff or his predecessor after the dismissal of District Court of Panadura Case No. 551/L in allowing the Appeal?

(ix) Did the Provincial High Court err in stating that Section 91 of the Evidence Ordinance is applicable to the facts of the instant case and that the defendant had failed to strictly rebut the contents in P1 which denotes a valid transfer?

The Counsel appearing for the Plaintiff-Appellant-Respondent also wished to raise the following question of law:

- Is the Judgment and Decree of dismissal of the District Court, Panadura Case No. 551/L res judicata against the Petitioner?

This case [S.C. Appeal 157/2011] relates to a block of land which was conveyed by Deed of Transfer bearing No. 7948 dated 15.07.1987 attested by B. H. Hemaratne Perera, Notary Public by Warnakulasuriyage Charlert Kusumawathie Kulasuriya [hereinafter referred to as the Petitioner] and Warnakulasuriyage P. Kulasuriya to Gamini Sarathchandra Mohotti for Rs. 10, 000/-. The premises in suit was later transferred by Gamini Sarathchandra Mohotti [hereinafter referred to as Mohotti] by Deed of Transfer bearing No. 10944 dated 12.09.1990 to Mastiyage Don Wimal Harischandra Gunathilake [hereinafter referred to as the Respondent] for Rs. 40, 000/-.

The main issue which led to the institution of this Action is the entry of the Petitioner into the premises in suit subsequent to removing part of the wire fence surrounding the property and the erection of two columns. The Respondent, in a Police

Complaint made to the Police Station in Wadduwa on 26.01.1998 [recorded on page 82, paragraph 324 of the Complaint Book] complained that the Petitioner had also brought panels of wood and reported that the Petitioner appeared to be constructing a small structure on the property.

On 05.02.1998, action was instituted in the District Court of Panadura by Case No. 1290/L by the Respondent to obtain a Declaration of Title and an order of ejectment to eject the Petitioner from the premises in suit. The Petitioner, in her Answer, took up the position that Deed No. 7948 was not in fact a Transfer, but was executed in favour of Gamini Sarathchandra Mohotti [hereinafter referred to as Mohotti] as security for a loan and that he was holding the premises in suit on a constructive trust for the Petitioner. She further claimed that he had transferred the land to the Respondent dishonestly and fraudulently in order to place the property beyond her reach and disallow the Petitioner to make the requisite payments and reconvey the property.

The Learned District Court Judge by the Judgment delivered on 14.07.2003 dismissed the Respondent's action. Aggrieved by this decision, the Respondent appealed to the High Court of Civil Appeals holden in Kalutara [hereinafter referred to as the High Court] where the Learned High Court Judge, on 03.05.2011, delivered Judgment in Case No. WP/HCCA/KAL 18/2003 allowing the Appeal.
Aggrieved by the aforesaid decision, the Petitioner appealed to this Court and was granted Leave to Appeal on 14.10.2011 and progressed on the abovementioned questions of law.

In the present case, the property in question was conveyed by the Petitioner to one Mohotti by a Deed of Transfer. This particular Deed, was an absolute transfer on the face of it, and made no mention regarding a conditional agreement or an agreement to re-transfer the property. Therefore, in the eyes of this Court, P1 is, prima facie, an absolute conveyance executed by a Notary Public upon which consideration of Rs. 10,000/- has passed. However, given the assertion of the Petitioner that the

property was conveyed as security for a loan, the Court finds it imperative to analyse the evidence placed before Court.

The only evidence that has been put forth by the Petitioner is oral in nature. In this regard, Ennis J in **Perera v. Fernando [1914]** *[17 NLR 486]* is pertinent as it summarises the applicable law surrounding the admissibility of oral evidence to establish a constructive trust.

> *"In order to prove the trust, oral evidence was admitted, and the admissibility of this evidence is the first question on the appeal. So far as I have been able to follow the argument of the plaintiff-respondent, this evidence is to show that the parties to the deed No. 89 were in the relationship of borrower and lender, and that the lands were really conveyed by way of mortgage.*
>
> *Such evidence, in my opinion, comes within the direct prohibition of section 92 of the Evidence Ordinance; it is oral evidence to show that the transaction was other than that disclosed by the deed and to contradict-the deed. It was then urged that it would be admissible under the second proviso to section 92, but evidence of a separate oral agreement under that proviso is only admissible when it is not inconsistent with the terms of the deed. Neither of these contentions give any ground, in my opinion, for the admission of the oral evidence.*
>
> *The deed purports to be a conveyance on sale, not a mortgage, and it is not alleged that Diego Perera did not use his own money, or that he acted as agent for another, or that he acted fraudulently, or any of the grounds upon which in Ceylon (Somasunderam Chetty v. Todd; [1] Pronchihamy v. Don Davith; [2] D. C. Jaffna, 7,409)* ***oral evidence is admissible to prove a trust not inconsistent with the deed****".* [Emphasis added].

While, according to the above reasoning, oral evidence is inadmissible to establish a trust when the Deed itself does not indicate as such, this Court notes that **Section 83** of the *Trusts Ordinance* allows taking attendant circumstances into account, which, if credible, can establish the existence of a constructive trust. Furthermore,

as held by Dheeraratne J in **Dayawathie v. Gunasekara [1991]** *[1 SLR 115]*, this Court agrees that **Section 92** of the *Evidence Ordinance* does not bar parol evidence to prove a constructive trust and that the transferor did not intend to pass the beneficial interest in property.

What must be clearly indicated is that parol evidence must be substantiated with *attendant circumstances* as allowed for under **Section 83** of the *Trusts Ordinance* which states 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 purpose of **Article 83** has been eloquently noted by Basnayake C.J in **Muttammah v. Thiyagaraja (1960)** *(62 NLR 559),*

> *"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."*

Therefore, the most important consideration in this case is whether the attendant circumstances are consistent with the inference that the Petitioner did not intend to dispose of the beneficial interest in the property when executing the conveyance.
While in **Muttammah v. Thiyagaraja (1960)** *(62 NLR 559)*, the Court further clarified the meaning and extent of *"attendant circumstances"* as

> *"….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'",*

In **Ehiya Lebbe v. Majeed [1947]** *[48 NLR 357]*, Dias J noted certain circumstances

which would indicate whether the transferor intended for the beneficial interest to pass or not as follows:

> *"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."*

Furthermore, in **Carthelis v. Ranasinghe [2002]** *[2 SLR 359]*, Dissanayake J noted that

"In the case of Thisa Nona and Three Others v. Premadasa, it was observed, 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 admitted to have been signed by the transferee,*
>
> *(2) the payment of the stamp duty and the Notary's charges by the transferor,*
>
> *(3) the fact that the transfer deed came into existence in the course of a series of transactions, and*
>
> *(4) the continued possession of the premises in suit by the transferor just the way she did before the transfer deed was executed".*

The judgment further continued to note that if, subsequent to considering the attendant circumstances, it would be apparent that the Appellant [in the stated case] "*did not intend to part with the beneficial interest in the property"* and thus, in terms of **Section 83** of the *Trusts Ordinance*, the Respondent would hold such property for the benefit of the 1st Appellant.

In analysing the present Supreme Court case in accordance with the tests and rules set out in the above cases, several factors such as there being a purported oral

agreement to re-transfer the property subsequent to payment of borrowed sum and interest, who claims possession of the property and the consideration paid appear pertinent questions whose answers can assist in the establishment of a trust.

One of the questions of law posed to this Court turns on the point of whether the High Court was incorrect to have taken into account the perch value at the time the conveyance was executed. This Court finds that this question is relevant in discussing whether the value of a perch amounts to an *attendant circumstance* under **Section 83**. As Dias J noted in **Ehiya Lebbe v. Majeed [1947]** *[48 NLR 357]*

> *"…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."* [Emphasis added].

Therefore, it is clearly established that the consideration that passed upon the execution of the conveyance of property is a very valid circumstance that can assist in establishing whether the transferor intended for the beneficial interest to pass to the transferee.

The High Court judgment took into account the fact that the market value of a perch in the area at the time of executing the Deed [in 1987] was between Rs. 750/- and Rs. 1, 000/-. As the extent of the land sold is 15.95 perches, the total market value of the property ranges between Rs. 11, 962.50 – Rs. 15, 950.00. Therefore, the sale of the land for a consideration of Rs. 10, 000 does not appear to be grossly inadequate. The passage of valuable consideration close to the market value of the property during the transaction indicates, if at all, that the conveyance intended the beneficial interest to pass to the transferee. Therefore, while the value of the property is a valid consideration in terms of an *attendant circumstance,* in the present case, it appears that there was a genuine sale for valuable consideration.

The purported continued possession of the Petitioner was also raised as a point of

contention, which, according to the judgment given in **Thisa Nona and Three Others v. Premadasa [1997]** [*1 SLR 169*] indicates that such continued possession of the premises by the transferor was a relevant consideration in assessing whether it was a loan or an outright transfer.

In the present case, the Petitioner has asserted that she remained in continuous occupation and has presented several documents marked V8, V9, V10 and V11 in support of this contention. The only document that affirms that she may have been in possession is V8 which is a permit issued on 20.06.1989 to cut down a jak tree, which indicates the Petitioner's name and the address of the premises in suit. However, V9, a police complaint lodged on 23.05.1990 indicates her address as being 'Gangasiri, Weragama, Wadduwa', and not the premises in suit.

Furthermore, the credibility of her assertion of being in continuous occupation of the premises in suit is seriously impaired in light of the fence erected by the Respondent, which was not controverted or challenged. In the eyes of this Court, the erection of the fence and the absence of any effort on the part of the Petitioner to take steps to report this development, and/or file legal action, indicate to the Court clear and cogent evidence that the Respondent was in possession of the premises.

In addition to considering whether the above circumstances can come within **Section 83** and concluding that they could not, it is further necessary to comment on several questions of law posed to the Court regarding the establishment of a constructive trust in favour of the Petitioner. The Counsel for the Petitioner has posed the questions whether the High Court erred in stating that failure to place evidence of the Notary Public and the witnesses militates against the contention that P1 was security for a loan.

In this regard, it is important to note that evidence by the Notary Public that attested Deed No. 7948 would've been of immense value to this case. This is especially so

as the Deed of Transfer, prima facie, indicates that the transaction was an absolute conveyance, with no mention of there being any indication of an agreement to reconvey the property, or that the premises in suit was security for a loan. Sworn testimony from the Notary Public would have clarified whether there was an agreement, when executing the conveyance, that the premises in suit was security for a loan and establish whether the Petitioner did in fact hand over Rs. 10, 000 as interest, in the presence of the transferee, to the Notary Public, which would have in turn established that the premises in suit was indeed security. However, though the Petitioner in the District Court indicated that she intended to call the Notary Public as a Witness [and the Notary was listed as a Witness as well], he was never called to place evidence before the Court. The assertions of the Petitioner would have also gained credibility if the individuals who signed as Witnesses in Deed No. 7948 had been called to place evidence before the Court.

This Court also notes that the Petitioner affirmed that she made the alleged payments of Rs. 10, 000/- on two separate occasions, once to the Notary Public, and the other to the father of the transferee, by borrowing from her siblings as she herself did not enjoy the financial capacity to do so. However, the Court cannot confirm the veracity of this statement without conclusive evidence from the siblings confirming the assertion which would've been achieved had they been called as Witnesses.

What is important to note here is that in the absence of concrete and conclusive evidence to support the assertions made by the Petitioner, it is impossible to assign veracity to them and in this instance, with the onus being on the Petitioner to establish that the premises in suit was indeed security for a loan.

Such evidence, even in the form of a notarial or non-notarial agreement, writing or document, would have amounted to an attendant circumstance that could have established a constructive trust. While such a document does not enforce the promise, a non-notarial writing is admissible to prove that the equitable estate under

a notarial transfer was intended to pass upon the non-fulfilment of a certain condition as held in **Carthelis v. Perera [1930]** *[32 NLR 19]*. This was affirmed in **Ehiya Lebbe v. Majeed [1947]** *[48 NLR 357]* where a non-notarial document signed on the same day as the transfer of property was held to give rise to a constructive trust under **Section 83** of the *Trusts Ordinance*. The utility of a non-notarial document to establish an '*attendant circumstance'* was further emphasized in **Premawathi v. Gnanawathi [1994]** *[2 SLR 171]* and **Thisa Nona and Three Others v. Premadasa [1997]** *[1 SLR 169].*

Therefore, the absence of a notarial instrument to establish the agreement to re-convey, or even a non-notarial agreement that could have been taken into account as an attendant circumstance, along with the fact that adequate consideration has passed, there is inconclusive proof of continued possession, makes it impossible for this Court to accept the existence of such an agreement to re-convey through which a constructive trust could be established.

While it is clear that a constructive trust cannot arise in the present case, if such a trust could have been established by attendant circumstances, this would give rise to a question of ownership as the premises in suit has already passed on to a third party to the original transaction, the Respondent. In this regard, **Section 65(1)** of the *Trusts Ordinance* enacts,

> *"Where trust property comes into the hands of a third person inconsistently with the trust, the beneficiary may institute a suit for a declaration that the property is comprised with the trust".*

However, **Section 65(1)** must be read with **Section 66(1)** which enacts,

> *"Nothing in Section 65 entitles the beneficiary to any right in respect of property in the hands of –*
>
> *a) A transferee in good faith for consideration without having notice of the trust, either when the purchase money was paid, or when the conveyance was executed, or*

b) A transferee for consideration from such a transferee".

What is relevant here is whether the Respondent constitutes a bona fide purchaser: if so, the premises in suit cannot be restored to the Petitioner. As discussed by ***L. J. M. Cooray*** in **'The Reception in Ceylon of the English Trust'** *"to take free of the trust, the transferee, under 66(1)(a) must prove that (i) he did not have notice and (ii) he paid consideration".*

In the present case, consideration amounting to a value of Rs. 40, 000 passed from Mohotti to the Respondent. Therefore, the next issue turns on the point of notice and as enacted by **Section 3(j)** of the *Trusts Ordinance:*

> *"A person is said to have "notice" of a fact either when he actually knows that fact, or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by any person whom the court may determine to have been his agent for the purpose of receiving or obtaining such information,"*

In the eyes of this Court, there is no evidence to support the contention that the Respondent had actual notice or constructive notice of such an alleged agreement between the Petitioner and Mohotti. For instance, if the Petitioner was in possession of the property, this could have been taken into account by this Court as a fact which should put the Respondent on inquiry. However, such physical possession has not been established and as discussed above, the address given by the Petitioner at several instances during this period of time is different from the premises in suit and this militates against the contention that the Respondent had constructive notice.

In the eyes of this Court, the Respondent certainly qualifies as a bona fide purchaser for there are no circumstances under which the Court can impute notice either as there are absolutely no features on the Deed of Transfer to show that it was anything other than a genuine sale of property. A title search would have

merely indicated that the premises in suit was sold by the Petitioner to Mohotti for Rs. 10, 000/- and that the transaction was legally sound. There was no feature to indicate to the Respondent that the transaction was conditional.

Having established that the Respondent is a bona fide purchaser, it is well established law that where the legal title has passed to a bona fide purchaser for value without notice, equity refuses to intervene to preserve any rights held by the former beneficial owner of the property. This is further affirmed by **Section 98** of the *Trusts Ordinance* which states that

> *"Nothing contained in this Chapter shall impair the rights of transferees in good faith for valuable consideration.."*

Therefore, even if a constructive trust could have been established, a prayer to grant possession of the property to the Petitioner will not stand as the property has already passed into the hands of a bona fide purchaser.

Finally, the Counsel for the Respondent raised the question as to whether the Judgment and Decree of dismissal of the District Court in Case No. 551/L operated res judicata against the Petitioner. Case No. 551/L was instituted by the Petitioner seeking a declaration that Mohotti was holding the premises in suit on constructive trust for her benefit and pleaded that the conveyance by Deed No. 10944 to the third party [the Respondent in the present case] be invalidated.. However, prior to the commencement of the trial, the Petitioner agreed to pre-pay the costs of the trial and if she failed to do so by a certain date, the action was to be dismissed.

As the Petitioner did in fact fail to pay said costs, the action was dismissed on 05.07.1994. The dismissal of the action due to non-payment of costs was subsequently affirmed by both the Court of Appeal on 02.10.1995 [Case No. 458/95] and the Supreme Court on 14.02.1997 [S.C. Appeal No. 32/96].

Therefore, the question is whether the decision in Case No. 551/L operates res judicata against the Petitioner.

As elucidated by Victor Perera J. in **Chulalankara Thero v. Lavendris and Others [1981]** [*1 SLR 226*]

> *"The term 'res Judicata' by its very words mean a matter upon which the Court has exercised its judicial mind and pronounced a decision in regard to the claim of the plaintiff or the defendant".*

Furthermore, it was enunciated in **M. Kandavanam v. V. Kandaswamy [1955]** [*58 NLR 413*] wherein it was held that

> ***"****If, therefore, an action had been dismissed on the merits in view of an adjudication as to a particular point of contest, that adjudication certainly operates as res judicata".*

However, the above dicta makes it clear that if the previous action was not dismissed on the merits of the case, the adjudication does not operate as res judicata. This reasoning is clearly supported in **Pannaloka Thero v. Saranankara Thero [1983]** [*2 SLR 523*] Sharvananda J held that

> *"..res judicata will not operate against the defendant for **there had been no adjudication on his claim in the earlier action**"* [Emphasis added].

In addition, in **Keokuk Ry. Co. v. Donnell [1889]** [*77 Iowa 221]*, it was held that in order for res judicata to operate

> *"…the Judgement in the former action must be on the merits".*

Thus, clearly, the operation of the principle of res judicata is governed by certain principles and the doctrine was clearly outlined and summarised by Thambiah J. in **Karunaratna v. Amarisa [1964]** [*66 NLR 567*] which is extracted as follows:

> *"The doctrine of Res Judicata, based on the two Latin maxims "Nemo debet vis vexari pro una et eadem causa " and " Interest republicae ut sit finis litium ", is a plea which bars subsequent action on the same cause of action between the same parties on the ground that the matter has been judicially determined and is a safeguard against unnecessary litigation over the same matter. The doctrine operates when the following essentials are present:-*

1. *There must be a judgment of a court of competent jurisdiction (Ibrahim Baay v. Abdul Rahim **[**1 (1909) 12 N. L. R. 177.**]***
2. *There must be a final judgment (Fernando v. Menika (2 (1906) 3 Bal. 115).*
3. *The case must have been decided on its merits (Annamalai Chetty v. Thornhill 3 **[**3 (1932) 34 N. L. R. 381 **]**).*
4. *The parties must be identical or be the representatives in interest of the original parties (Sivakolunthu v. Kamalambal **[**4 (79,53) 56 N. L. R. 52.**[**).*
5. *The causes of action must be identical (Dingiri Menika v. Punchi Mahatmaya 5 **[**5 (1910) 13 N. L. R. 59.**]**)".*

In analysing the present Supreme Court case in accordance with the above principles, it is clear that the present case was not decided on its merits but was dismissed as the Petitioner failed to prepay the costs as indicated above. What is noteworthy in Case No. 551/L is that there was no adjudication upon the issue which was raised. Thus, it appears that the doctrine of res judicata does not operate in the given instance. National courts have followed this line of reasoning and illustrative is the dicta in **Dingiri Amma v. Appuhamy [1969]** [*72 NLR 347*] by Sirimane J. held as follows:

> *"Where a partition action is dismissed ……… on the ground of the non-appearance of the plaintiff on the trial date and without any adjudication on the plaintiff's rights, the order of dismissal would not operate as res judicata in a subsequent action brought by the plaintiff for partition of the same land".*

In the above case, it is clear that, as there was no actual adjudication on the issue of the action and the dismissal was due to the non-appearance of the Plaintiff, the doctrine of res judicata does not apply. Similarly in the present Supreme Court case,

the dismissal of the action was due to the non-payment of costs and not on the adjudication of the issue.

It was further argued on the basis of **Jayawardene v. Arnolishamy [1966]** [*69 NLR 497*] that a consent decree supports a plea of res judicata, even though there was no adjudication by Court. On this basis, the Counsel argued that since there was a consent decree in Case No. 551/L, res judicata should operate.

However, this Court notes that Samarawickrema J at p. 500, in the same judgment, notes that this was *"because such a decree implies a decision upon the rights in dispute at the action by the parties".* It is the opinion of this Court that the above dictum that a consent decree should allow the doctrine to operate was in a context where a consent decree is entered where the rights in dispute are decided upon. In the present Supreme Court case, it is clear that there was no such decision and that the consent decree was solely a preliminary consideration which required compliance prior to the commencement of the trial.

Therefore, for the abovementioned reasons, this Court finds that, in the absence of a notarial document that confirms the existence of the agreement to reconvey, the passage of valuable consideration amounting to the market value of the premises in suit and the inability to conclusively establish continuous possession, a constructive trust in favour of the Petitioner cannot be established. Furthermore, even if such a trust could be established, the Respondent qualifies as a bona fide purchaser for value without notice, thereby placing the premises in suit outside the bounds of equity making restitution impossible.

Therefore, this Court affirms the decision of the High Court in Case No. WP/HCCA/KAL 18/2003, and the Appeal is dismissed. This Court also awards the Respondent costs in a sum of Rs 25,000/-

Sgd.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC, J.

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

Marasinghe, J.

I agree.

Sgd.

JUDGE OF THE SUPREME COURT