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

In the matter of an application for Leave to Appeal under Article 128 of the Constitution read along with Section 5(1) (C) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006.

Liyana Athukoralalage Indrawathie,
1/418, Madugashandiya,
Mandawala.

Plaintiff

S.C. Appeal No. 190/2016
SC/HCCA/LA No. 263/2015
WP/HCCA/AV/1206/2011(F)
D.C. Pugoda Case No. 831/L

Vs.

1. Galolu Kankanamalage Dharmasena,
   Mee Ambawatte, Mandawala.

2. Gunarathna Arachchilage Don
   Linton Gunarathna, No. 208/A,
   Mahamera Road, Ihala Lunugama,
   Mandawala.

Defendants

AND

Liyana Athukoralalage Indrawathie,
1/418, Madugashandiya,
Mandawala.

Plaintiff-Appellant

Vs.

1. Galolu Kankanamalage Dharmasena,
   Mee Ambawatte, Mandawala.

2. Gunarathna Arachchilage Don Linton Gunarathna, No. 208/A, Mahamera Road, Ihala Lunugama, Mandawala.

Defendant-Respondents

AND NOW BETWEEN

Liyana Athukoralalage Indrawathie,
1/418, Madugashandiya,
Mandawala.

Plaintiff-Appellant-Appellant

Vs.

1. Galolu Kankanamalage Dharmasena, Mee Ambawatte, Mandawala.

2. Gunarathna Arachchilage Don Linton Gunarathna, No. 208/A, Mahamera Road, Ihala Lunugama, Mandawala.

Defendant-Respondent-Respondents

Before: Buwaneka Aluwihare, P.C., J.

A. L. Shiran Gooneratne, J.

Janak De Silva, J.

Counsel:

Dr. Sunil Coorey for Plaintiff-Appellant-Appellant

Seevali Amitrigala, PC with Pathum Wijepala for Defendant-Respondent-Respondents

Written Submissions:

06.02.2017 by the Plaintiff-Appellant-Appellant

09.03.2017, 27.12.2017 and 26.05.2023 by the Defendant-Respondent-Respondent

Argued on: 04.05.2023

Decided on: 02.10.2023

Janak De Silva, J.

The Plaintiff-Appellant-Appellant (Plaintiff) owns an undivided 1/3 share of land called Millagahawatta that is about R.2 P.3 in extent. The Appellant, by deed of transfer No. 5858 (P2) dated 14.12.2001 attested by M.A.N.A. Marasinghe, Notary Public, transferred an undivided 20 perches from the said land to the 1st Defendant-Respondent-Respondent (1st Defendant). On 27.05.2003, the 1st Defendant, by deed of transfer No. 105 (P3) attested by G.K. Gunasekera, Notary Public transferred the said portion to the 2nd Defendant-Respondent-Respondent (2nd Defendant).

On 31.07.2006 the Appellant instituted this action against the 1st and 2nd Defendants and sought a declaration that the 1st Defendant held the title to the said land subject to a constructive trust in favour of the Plaintiff, that deed No. 105 (P3) is null and void, or in the alternative that deed No. 5858 (P2) is null and void on the principle of *laesio enormis* and for the ejectment of the 2nd Defendant and those holding under him from the land described in the 2nd schedule to the amended plaint.

The case of the Plaintiff is that she sought a loan from the 1st Defendant in a sum of Rs. 50,000/= as she was in need of money. The 1st Defendant wanted her to bring a deed and agreed to reconvey the land once the loan was repaid with the interest. Accordingly, she obtained Rs. 40,000/= by executing deed No. 5858 (P2). The Plaintiff had repaid 7 instalments but failed to do so thereafter. The Plaintiff was not in a position to repay the loan when the 1st Defendant demanded repayment. Then the 2nd Defendant agreed to repay the outstanding loan to the 1st Defendant on behalf of the Plaintiff and accordingly deed No. 105 (P3) was executed. The 2nd Defendant agreed to retransfer the land upon the Plaintiff paying him back the loan with interest.

The versions of the 1st and 2nd Defendants are diametrically opposed to the case of the Plaintiff. They claimed that both deeds, i.e. Nos. 5858(P2) and 105(P3) were executed as outright transfers and that there was no agreement to reconvey.

The action was dismissed by the learned District Judge after trial, subject to costs. He primarily proceeded on the basis that deed No. 5858 (P2) was an outright transfer and that there was no express provision to be found, either in deed No. 5858(P2) or in deed No. 105(P3), regarding retransfer of the land to the Plaintiff.

Aggrieved by the judgment of the District Court, the Appellant appealed to the High Court of the Western Province (Civil Appeal) holden in Avissawella (High Court). The High Court dismissed the appeal subject to costs of Rs. 5000/=. The absence on the face of deed No. 5858(P2) or in deed No. 105(P3) about a loan and an agreement to reconvey also weighed heavily in the outcome.

Leave to appeal has been granted on the following questions of law:

1. Has the High Court failed to consider whether there were, and if so, what attendant circumstances there were, when deed No. 5858 was executed, from which it could be inferred that the Plaintiff did not intend to dispose of the beneficial interest on the interests conveyed by that deed?
2. Has the High Court and the District Court both erred in law by dismissing this action of the Plaintiff merely on the finding that there was no express provision to be found, either in deed No. 5858 or in deed No. 105, regarding retransfer of the land to the Plaintiff?
3. Whether the attendant circumstances having proved to establish a trust?

I will consider questions of law No. 2 and then No 1, in that order, as it examines the validity of the basis of the judgments of the District Court and High Court. Thereafter, I will examine question of law No. 3.

Question of Law No. 2

Issue Nos. 10, 11 and 12 read as follows:

(10) ඒ අනුව 1 වන විත්තිකරු අංක 5858 දරණ ඔප්පුවේ සඳහන් දේපළ පැමිණිලිකාරියගේ වාසියට වූ අනුමිත භාරයක් ලෙස දරා සිටින්නේද?

(11) මෙම නඩුවට අදාළ දේපළ 1 වන විත්තිකරු විසින් පැමිණිලිකාරියගේ වාසියට වූ අනුමිත භාරයක් ලෙස දරා සිටින අතරතුරදී එකී දේපළ අංක 105 හා 2003.05.27 දින දරණ පී. කේ. ගුණසේකර ප්‍රසිද්ධ නොතාරිස් තැනගේ ඔප්පුවෙන් 2 වන විත්තිකරුට පවරා ඇත්ද?

(12) 1 වන විත්තිකරු විසින් 2 වන විත්තිකරුට සිය දේපළ පවරන අවස්ථා වේදී 1 වන විත්තිකරු විසින් පැමිණිලිකාරියගේ වාසියට වූ අනුමිත භාරයක් ලෙස පැමිණිල්ලේ 2 වන උපලේඛනයේ සඳහන් දේපළ දරා සිටින බව 2 වන විත්තිකරු දැන සිටියේද?

It is evident that the Plaintiff's case was based on a constructive trust. Nonetheless, both the District Court and the High Court seem to have proceeded without fully comprehending the distinction between an express trust and a constructive trust.

Undoubtedly, Section 97 of the Trusts Ordinance declares that the duties, liabilities, and disabilities of a trustee under both an express and an implied trust are the same. There is no universal consensus on the meaning of express trust and constructive trust. Still, there is a distinction. The intention of the settlor to establish a trust is the foundation of an express trust. On the other hand, a constructive trust arises from the operation of law. As Birks states [Peter Birks, *An Introduction to the Law of Restitution* (Revised Ed. Oxford University Press, 1989, page 65)] "*[T]here is a fine but important distinction between [positive] intent conceived as creative of rights [for express trusts] … and [positive] intent conceived as a fact which, along with others, calls for the creation of rights [through a constructive trust]*". Hence, although it may be a fine difference, there is nevertheless a difference between an express trust and a constructive trust which must be recognized by court.

Accordingly, it is appropriate to begin by examining the provisions of the Trust Ordinance, which deal with express and constructive trusts relating to immovable property.

Express Trust and Constructive Trust over Immovables

Section 5(1) of the Trusts Ordinance reads:

> *"Subject to the provisions of section 107, no trust in relation to immovable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed."*

Accordingly, subject to the provisions of Section 107, a trust in relation to immovable property is valid only where it is so declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed. This is the way in which an express trust can be established for immovable property.

Nonetheless, the Trust Ordinance acknowledges a number of exceptions to this rule.

Section 107 reads:

> *"In dealing with any property alleged to be subject to a charitable trust, the court shall not be debarred from exercising any of its powers by the absence of evidence of the formal constitution of the trust, if it shall be of opinion from all the circumstances of the case that a trust in fact exists, or ought to be deemed to exist."*

Hence, notwithstanding the failure to comply with the formalities specified in section 5(1) of the Trust Ordinance, a charitable trust may be inferred by Court in relation to immovable property where it shall be of opinion from all the circumstances of the case that a trust in fact exists, or ought to be deemed to exist.

Nevertheless, this is not the only exception to Section 5(1) of the Trust Ordinance by which a trust can be held to be in existence in relation to immovable property notwithstanding the absence of a declaration in one of the documents referred to therein.

Section 5(3) contains another exception to Section 5(1) that reads:

> *"These rules do not apply where they would operate so as to effectuate a fraud."*

Thus, where the application of the rules in Section 5(1) would operate to effectuate a fraud, a trust over immovable property can be established notwithstanding the absence of a declaration by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed.

Hence, in ***Valliyammai Achi v. Abdul Majeed*** **(45 N.L.R.169)** and ***Ehiya Lebbe v. Majeed*** **(48 N.L.R. 357)** it was held that a trust was proved over land notwithstanding the absence of a declaration within the meaning of Section 5(1) of the Trust Ordinance as to ignore the existence of a trust was, in the circumstances of the cases, to effectuate a fraud.

Moreover, Chapter IX of the Trusts Ordinance contains provisions dealing with the creation of constructive trusts. Section 83 of the Trust Ordinance reads:

> *"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 properly for the benefit of the owner or his legal representative."*

It is evident from illustration (a) that constructive trusts can be formed over land. Therefore, Section 83 of the Trust Ordinance is an additional exception to the rule embodied in Section 5(1) of the Trust Ordinance. Thus, even where a deed does not expressly establish an express trust over immovable property, attendant circumstances can establish the creation of a constructive trust.

Thus, in ***Senadheerage Chandrika Sudarshani v. Muthukuda Herath Mudiyanselage Gedara Somawathi*** **(S.C. Appeal No.173/2011, S.C.M. 06.04.2017)** Prasanna Jayawardena J. noted (at page 11) that:

> "*… it is also a well-established rule that, parol evidence can be led to prove the existence of a Trust over a land which is the subject matter of what appears, on the face of it, to be a deed of transfer by which the land has been transferred.*"

Parol evidence was indeed led by the Plaintiff in order to establish a constructive trust. Nevertheless, both the learned trial judge and the judges of the High Court placed much emphasis on the absence on the face of the two deeds, i.e. deed Nos. 5858(P2) and 105(P3), any reference to a loan or undertaking to retransfer of the land to the Plaintiff on the payment of principal and interest.

No doubt, the contents of a deed of transfer is a matter which will have to be considered as one of the attendant circumstances from which it could be inferred whether beneficial interest did pass or not. Nevertheless, it is not the only matter. In ***Muttammah v. Thiyagarajah* (62 N.L.R. 559 at 571),** H. N. G. Fernando J. held:

> *"The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise but only to establish an 'attendant circumstances' 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****."*
> (emphasis added).

This statement was quoted with approval in ***Dayawathie and Others v. Gunasekera and Another* [(1991) 1 Sri. L. R. 115 at 118]**.

As Ying Khai Liew states (Ying Khai Liew, *Constructive Trusts in Sri Lanka: A Model for an Expansive Approach*, Australian Journal of Asian Law, 2020, Vol 20 No 2, Article 2: 1-17, page 295 at 298), "*while an 'improper' manifestation of intention to create a trust may not be enforced qua an express trust, it may nevertheless constitute one among a number of other facts that give rise to a constructive trust*." However, both the District Court and the High Court fell into error by dismissing the action of the Plaintiff merely on the finding that there was no express provision to be found, either in deed No. 5858(P2) or in deed No. 105(P3), regarding retransfer of the land to the Plaintiff. By doing so they conflated an express trust identified in Section 5(1) with a constructive trust identified in Section 83 of the Trust Ordinance.

For the foregoing reasons, I answer question of law No. 2 in the affirmative.

Question of Law No. 1

The jurisprudence of Court has identified various circumstances which must be considered as attendant circumstances in terms of Section 83 of the Trust Ordinance in ascertaining whether the owner of immovable property intended to dispose of his beneficial interest. They are:

1. Whether transferor continued to remain in possession after the conveyance;
2. If the transferor paid the whole cost of the conveyance;
3. If the consideration expressed on the deed is utterly inadequate to what would be the fair, purchase money for the property conveyed;

   [*Ehiya Lebbe v. Majeed* (48 N.L.R. 357 at 359)]
4. The relationship between the parties;

   [*Valliyammai Achi v. Abdul Majeed* (45 NLR 169 at 191)]

L.J.M. Cooray in *The Reception in Ceylon of the English Trust: An Analysis of the Case Law and Statutory Principles Relating to Trusts and Trustees in Ceylon in light of the Relevant Foreign Cases and Authorities* (1971) at pages 129 – 130, appears to take the view that where the purchase price has not been repaid, it might point to the parting of beneficial interest.

He states:

> "*If there is a trust, the contractual rule that time is of the essence of the contract would be relevant and it would be unnecessary to insist that the purchase money should be tendered within the specified period. If this is so, a trust under 83 will also arise where a person has transferred property subject to a notarial agreement because the period has elapsed. But if within a reasonable period the purchase price has not been repaid it may be assumed that the transferor has no intention of exercising the right of repurchase and has therefore parted with the beneficial interest.*"

The Plaintiff testified that she remained in possession of the corpus notwithstanding the execution of deed Nos. 5858(P2) and 105(P3). Both the learned trial judge and the judges of the High Court did not evaluate this evidence.

Moreover, the Plaintiff testified that the value of one perch of land in the area at the time of execution of deed No. 5858(P2) was around Rs. 20,000/= to 30,000/=. According to that deed the consideration paid for an undivided 20 perches was Rs. 40,000/=. The Plaintiff also called a valuer, Jagath Liyanaarchchi, to testify to the value of the corpus at the time of the execution of deed No. 5858(P2). According to him, the value of a perch of the corpus at that time was around Rs. 20,000/=. The learned trial judge makes a superficial statement about the value of the corpus without analysing the valuer's evidence. It amounts to a failure to properly evaluate whether the consideration expressed on the deed is utterly inadequate to what would be the fair purchase price for the property conveyed.

Accordingly, both the learned trial judge and the judges of the High Court failed to consider whether there were, and if so, what attendant circumstances there were, when deed No. 5858(P2) was executed, from which it could be inferred that the Plaintiff did not intend to dispose of the beneficial interest on the interests conveyed by that deed.

For the foregoing reasons, I answer question of law No. 1 in the affirmative.

Question of Law No. 3

In view of the answers given to the above questions, I must strive to analyse the evidence in order to ascertain whether the attendant circumstances establish a trust. The learned trial judge did not have any greater advantage in this endeavor. He was limited to seeing and hearing the evidence of the 2nd Defendant. The Plaintiff, the valuer Jagath Liyanaarchchi and the 1st Defendant testified before his predecessor.

It is necessary to evaluate the evidence in this matter based on firmly established rules of evidence.

In ***Senadheerage Chandrika Sudarshani v. Muthukuda Herath Mudiyanselage Gedara Somawathi*** **(supra)** Prasanna Jayawardena J. noted (at page 15) that:

> *"It is clear that, the use of the words "it cannot reasonably be inferred consistently with the attendant circumstances" in Section 83, impose a requirement on the Court to satisfy itself that, the attendant circumstances clearly point to the conclusion that the owner did not intend to dispose of his beneficial interest. If the attendant circumstances unequivocally point to that conclusion, a Constructive Trust would have arisen. However, if the attendant circumstances fail to unequivocally establish that the owner did not intend to dispose of his beneficial interest or, in other words, there is a doubt as to the conclusion which can be drawn from the attendant circumstances, a Court should, usually, reject the claim that, a Constructive Trust exists.*
>
> *[…]*
>
> *...the burden of proof lies firmly on the person who claims a Constructive Trust to prove it. In this case, that is the plaintiff.*
>
> *Thus, if the plaintiff is to succeed in this appeal, she should have furnished evidence which satisfies the Court that, it cannot be reasonably inferred from the attendant circumstances that she intended to part with her beneficial interest in the land.*
>
> *[…]*

*[…] [T]he Court has to apply an **<u>objective test</u>** when determining this question. Accordingly, the Court has to **<u>place more reliance on facts that can be ascertained from the evidence rather than unsubstantiated claims</u>** made from the witness box. The <u>Court has to keep in mind</u> that, **<u>a notarially attested deed of transfer should not be lightly declared to be a nullity</u>**. 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."*(emphasis added)

On the issue of possession, the Plaintiff maintained that she continued to be in possession of the corpus even after the execution of deed Nos. 5858(P2) and 105(P3). The 1st Defendant contested this and claimed that he had plucked the coconuts from the corpus. The 2nd Defendant claimed that he was in possession and that he started clearing the land to build a house in 2006 when the Plaintiff filed this action and obtained an enjoining order in the first instant. It was later dissolved.

In determining who was in possession of the corpus, an important fact that must not be overlooked is that it is part of a larger land that is co-owned property. As a co-owner, the Plaintiff sold an undivided 20 perches to the 1st Defendant.

No doubt both the 1st and 2nd Defendants claimed that what was sold to the 2nd Defendant was a divided and defined portion of land. This is untenable as a matter of law. There was no partition decree, deed of partition, or other method accepted in law that ended co-ownership. Hence, the corpus continued to be part of the co-owned property.

A co-owner's possession is in law the possession of all the other co-owners. Every co-owner is presumed to be in possession in his capacity as a co-owner. Therefore, even if the claim of the Plaintiff is accepted, she continued to possess as a co-owner and her possession is in law also the possession of the 1st and 2nd Defendants. I am therefore of the view that although the Plaintiff may be able to claim that she continued to be in possession of the corpus after deed Nos. 5858(P2) and 105(P3) were executed, her possession is also the possession of the 1st and 2nd Defendants.

In any event, the testimony of the Plaintiff of continued possession must be assessed in the context of the overall credibility of her evidence. She admitted knowledge of the transfer of ownership of the corpus to the 1st Defendant by deed No. 5858(P2). It was also admitted by the Plaintiff that M.A.N.A. Marasinghe, Notary Public who attested that deed was not informed of the alleged loan and arrangements to retransfer upon payment of principal and interest when the deed was executed.

Moreover, the Plaintiff claimed that the 2nd Defendant undertook to pay the amount due to the 1st Defendant from the Plaintiff. According to her deed No. 105(P3) dated 27.05.2003 was executed on that undertaking. The Plaintiff claimed that the 2nd Defendant informed her that she can pay him back in small sums over a period of 25 years. The 2nd Defendant denied this position and claimed that he bought the land to build a house for his son. It is inconceivable that the 2nd Defendant would agree to give the Plaintiff 25 years to pay back the debt. It is plausible if the parties were related. The Plaintiff and 2nd Defendants are not related.

No evidence has been led on whether the Plaintiff paid the whole cost of the conveyance for deed No. 5858(P2).

On the value of the land, there is the evidence of the valuer led on behalf of the Plaintiff. According to him, the value of a perch of the corpus at that time was around Rs. 20,000/=. However, he was not a valuer commissioned by Court and hence not an independent witness.

In ***Vandervell v. Inland Revenue Commissioners*** **[(1967) 1 All E.R. 1 at 7]** Lord Upjohn held:

> *"But if the intention of the beneficial owner in directing the trustee to transfer the legal estate to X is that X should be the beneficial owner I can see no reason for any further document or further words in the document assigning the legal estate also expressly transferring the beneficial interest; the greater includes the less. X may be wise to secure some evidence that the beneficial owner intended him to take the beneficial interest in case his beneficial title is challenged at a*

later date but it certainly cannot, in my opinion, be a statutory requirement that to effect its passing there must be some writing under section 53(l)(c)."

Although this pronouncement was upon the necessity to comply with section 53 of the Law of Property Act 1925 of England, the principle enunciated is applicable to the instant case. Where it can be shown that the beneficial owner directed the trustee to transfer the legal interest in the trust to a third party so that the third party becomes both the beneficial and legal owner, no further documentation is needed secure the title of the third party. Any trust that existed as between the trustee and the beneficial owner ceases to exist and the third party becomes the absolute owner of the trust property.

In the instant case, the Plaintiff admitted that she signed as a witness to the execution of deed No. 105(P3) dated 27.05.2003 whereby title was passed on to the 2nd Defendant. However, she claimed that her signature was obtained on a blank paper. The Plaintiff alleged that the notary who attested it, G.K. Gunasekera, Notary Public, had told her to sign since she admitted to borrowing money. She claimed that she got to know about this deed only when the 2nd Defendant began clearing the land in July 2006.

Nevertheless, the Plaintiff did not make any complaint against the said notary to either the Police or any other body. In fact, a copy of that deed was obtained by her from the said G.K. Gunasekera, Notary Public. Moreover, the Plaintiff had sold another portion of land to one Ravindra Tissalal in 2002 by deed No. 6053 (V1) which was attested by M.A.N.A. Marasinghe, Notary Public who attested deed No. 5858(P2). It appears that the said land was reconveyed to the Plaintiff by deed No. 107(P6) dated 31.05.2003 attested by the very same G.K. Gunasekera, Notary Public who attested deed No. 105(P3).

It is inconceivable that the Plaintiff would go to the same notary, who allegedly obtained her signature on a blank paper, four days thereafter to execute deed No. 107(P6) dated 31.05.2003 to get title reconveyed to her by Ravindra Tissalal.

I am of the view that the fact that the Plaintiff signed as a witness to the execution of deed No. 105(P3) supports an inference that she intended to part with her beneficial interest in the land. Hence even assuming that there was a constructive trust as between the Plaintiff and the 1st Defendant, it ceased upon the execution of deed No. 105(P3).

In ***Senadheerage Chandrika Sudarshani v. Muthukuda Herath Mudiyanselage Gedara Somawathi*** **(supra)** it was held (at page 15) that:

> *"If the attendant circumstances unequivocally point to that conclusion, a Constructive Trust would have arisen. However, if the attendant circumstances fail to unequivocally establish that the owner did not intend to dispose of his beneficial interest or, in other words, there is a doubt as to the conclusion which can be drawn from the attendant circumstances, a Court should, usually, reject the claim that, a Constructive Trust exists."*

The Plaintiff has failed to establish unequivocally that she did not intend to dispose of her beneficial interest. Hence, I answer question of law No. 3 in the negative.

For the foregoing reasons, I dismiss the appeal. Parties shall bear their costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

<u>Buwaneka Aluwihare, PC, J.</u>

I agree.

JUDGE OF THE SUPREME COURT

<u>A. L. Shiran Gooneratne J.</u>

I agree.

JUDGE OF THE SUPREME COURT