

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

In the matter of an application for Appeal to the Supreme Court against the Judgment dated 24/02/2014 delivered by the High Court of the North Western Province in appeal bearing number NWP/HCCA/KUR/51/2009 (F); DC Marawila.

Rankothpedige Lalith Premathilaka  
Haalpanwila East,  
Near the Temple,  
Haalpanwila,  
Marawila.

**Plaintiff**

**SC Appeal No. 209/2014  
SC/HCCA/LA 162/2014  
NWP/HCCA/KUR/51/2009(F)  
DC Marawila Case 904/L**

**V.**

1. Hewasunderage Lionel Dasanayake  
Haalpanwila,  
Marawila.
2. Hewasunderage Gunadasa  
Maranda,  
Marawila.

**Defendants**

**AND BETWEEN**

1. Hewasunderage Lionel Dasanayake  
Haalpanwila,  
Marawila.
2. Hewasunderage Gunadasa

Maranda,  
Marawila.

**Defendants-Appellants**

**V.**

Rankothpedige Lalith Premathilaka  
Haalpanwila East,  
Near the Temple,  
Haalpanwila,  
Marawila.

**Plaintiff-Respondent**

**AND NOW BETWEEN**

Rankothpedige Lalith Premathilaka  
Haalpanwila East,  
Near the Temple,  
Marawila.

**Plaintiff-Respondent-Appellant**

1. Hewasunderage Lionel Dasanayake  
Haalpanwila,  
Marawila.
2. Hewasunderage Gunadasa  
Maranda,  
Marawila.  
(Deceased)

**Defendants-Appellants-Respondents**

- 2a. Hettiarachchige Janet Nona  
No. 112/A,  
Marandawella,  
Marawila.
- 2b. Hewasundarage Shayam Thisedha  
Hewasundara  
No. 112/A/2,

Marandawella,  
Marawila.

2c. Hewasundarage Thanushka Himali  
No. 112/A/2,  
Marandawella,  
Marawila.

2d. Hewasunarage Nirosha Lakmali  
No. 112/A/2,  
Marandawella,  
Marawila.

**Substituted 2a, 2b, 2c, 2d**  
**Defendants-Appellants-Respondents**

**Before** : **S. Thurairaja, PC, J**  
**A. L. Shiran Gooneratne, J**  
**K. Priyantha Fernando, J**

**Counsel** : Dr. Sunil Coorey instructed by Ms. K. A.  
Rhythmi M. Perera for the Plaintiff-  
Respondent-Appellant.

Dr. Romesh De Silva, PC with Hilary Livera  
instructed by Mrs. W. M. S. Gimhani Livera  
for the 1<sup>st</sup> Defendant-Appellant-Respondent.

**Argued on** : 28.10.2024

**Decided on** : 11.02.2025

**K. PRIYANTHA FERNANDO, J**

1. The instant appeal stems from the judgment of the High Court of *Kurunegala* dated 24.02.2014. The Plaintiff-Respondent-Appellant (hereinafter referred to as the plaintiff) in this case seeks that the judgment of the High Court be set aside and the judgment of the District Court *Marawila* dated 02.04.2009 be affirmed.

2. The plaintiff in his plaint states that, the 1<sup>st</sup> Defendant-Appellant-Respondent, *Lionel Dassanayake* (hereinafter referred to as the 1<sup>st</sup> defendant) has been the initial owner of the two blocks of land described in the 1<sup>st</sup> schedule to the plaint.
3. By deed bearing No. 5609 attested by H.J.M.D. Jayasinghe, Notary Public, the 1<sup>st</sup> defendant had sold the two blocks of lands aforementioned to one *Sujith Samantha Appuhamy*.
4. Thereafter, the said *Sujith Samantha Appuhamy* has amalgamated the two blocks of land described in the 1<sup>st</sup> schedule to the plaint. By deed bearing No. 2036 attested by J.P.S. Samarasinghe Notary Public, the said *Sujith Samantha* has transferred a portion of the said land to the plaintiff. The portion that was transferred to the plaintiff has been described in the 2<sup>nd</sup> schedule to the plaint. This portion forms the subject matter in this action.
5. The plaintiff further states that the land situated to the eastern boundary of the land described in the 2<sup>nd</sup> schedule has been a separate land that has been owned by the plaintiff.
6. The plaintiff states that, on 16.05.1998, the defendants had collusively erected a fence between the land originally owned by the plaintiff and the land that was transferred to the plaintiff by *Sujith Samantha* by deed bearing No. 2036.
7. The plaintiff states that the defendant has no entitlement whatsoever to the land described in the 2<sup>nd</sup> schedule to the plaint and that, by erecting a fence, has disturbed the peaceful possession of the plaintiff.
8. The plaintiff pleads that, he be declared as the lawful owner of the land described in the 2<sup>nd</sup> schedule to the plaint, to stop the defendants from disrupting his peaceful possession and to handover peaceful possession, for compensation and costs.
9. The defendants in their answer takes the position that, the 1<sup>st</sup> defendant is the owner of the land described in the 1<sup>st</sup> schedule to the plaint. The defendants also deny the averments in the plaint which states that the land was given to *Sujith Samantha*, and the averments with regard to amalgamation of the two blocks of lands by the said *Sujith Samantha* and the transfer of a portion of the land that was made to the plaintiff by way of deed bearing No.2036.

10. The defendants in their answer also state that, had the deed bearing No. 5609 by which the 1<sup>st</sup> defendant has allegedly sold the two blocks of lands to *Sujith Samantha* been entered into lawfully as a transfer deed, it would be subject to *laesio enormis*. The defendants state that the amount set out in the transfer deed is Rs. 50,000, however, the value at the time of the said transfer was more than twice the amount.
11. The defendants pleaded that, the plaintiff's claim be dismissed, the deed bearing No.5609 be nullified under *laesio enormis*, a decree that the owner of the land described in the 1<sup>st</sup> schedule to the plaint is the 1<sup>st</sup> defendant and costs.
12. After trial, the learned District Judge by judgment dated 02.04.2009, held in favour of the plaintiff while taking the position that *laesio enormis* does not arise.
13. Aggrieved by the judgment of the learned Judge of the District Court, the defendants preferred an appeal to the High Court. The learned Judges of the High Court delivering their judgment dated 24.02.2014 held in favour of the defendants on the basis that, there existed a constructive trust whereby, the defendant did not transfer the beneficial interest by way of deed bearing No. 5609.
14. Aggrieved by the judgment of the High Court, the plaintiff preferred an appeal to this Court. Leave was granted on the questions of law set out in sub paragraphs (a), (b) and (c) in paragraph 19 of the petition dated 31.03.2014.

### **Paragraph 19**

**(a) Since the existence of a constructive trust under section 83 of the Trusts Ordinance involves the leading of evidence of attendant circumstances which are questions of fact, did the High Court err in coming to a finding of constructive trust in appeal even though such a constructive trust had been neither pleaded nor put in issue at the trial.**

**(b) Has the Plaintiff Respondent Petitioner not been afforded a fair and adequate opportunity of being heard on.**

**(a) Whether the transfer by the 1 Defendant on deed No.5609 of 1994 in favour of Sujith Samantha Appuhamy was subject to a constructive trust; and if so,**

**(b) Whether the said constructive trust continued to attach to the land when it was conveyed to the Plaintiff on deed No.2306 in 1998.**

**(c) Whether the Plaintiff Respondent was a bona fide purchaser for consideration on deed No.2306 in 1998, so that no constructive trust can attach to the corpus in the hands of the Plaintiff.**

**(c) Did the High Court err in holding a constructive trust had arisen on deed No.5609 of 1994 in the hands of Sujith Samantha Appuhamy, without Sujith Samantha Appuhamy being made a party to the action.**

15. The learned Counsel for the plaintiff in his written submissions submitted that, the learned Judges of the High Court erred in taking the position that a constructive trust has arisen. The learned Counsel submitted that, the existence of a constructive trust under section 83 of the Trusts Ordinance cannot be established, as there exist no evidence on proof of attendant circumstances showing that the transferor intended to part with the beneficial interest in the land which he transferred by way of a notarial instrument.
16. The learned Counsel further submitted that, had such a question as to constructive trust been pleaded and put in issue by the defendants, the plaintiff would have been able to contest the attendant circumstances.
17. It is the submission of the learned Counsel that, the question as to the existence of a constructive trust was neither pleaded nor put in issue at the trial of this action. The High Court has erred in law by proceeding to consider and decide on the existence of a constructive trust without the matter being pleaded or put in issue at the trial.

18. Submissions were also made with regard to whether a question of constructive trust under section 83 of the Trusts Ordinance could be raised for the first time in appeal, without being raised at the trial.
19. Questions were raised as to whether the deed bearing No. 5609 was subject to a trust, whether the alleged constructive trust continued to attach to the land when it was conveyed to the plaintiff by deed bearing No. 2306 and whether the plaintiff was a bona fide purchaser for consideration in deed No. 2306 and if so, could a constructive trust attach on the plaintiff.
20. The learned President's Counsel for the defendants in his written submissions submitted that the attendant circumstances show that there was a constructive trust which arose in terms of section 83 of the Trusts Ordinance. It was further submitted that, the constructive trust does not permit *Sujith Samantha* to validly transfer the land to the plaintiff.
21. At the hearing of this appeal, the learned President's Counsel did not rely on the existence of a constructive trust or on the ground that the deed in issue (Deed bearing No. 5609) was null and void in terms of *laesio enormis* as originally relied on in the answer to the plaint. The learned President's Counsel instead, relied on the position that it was in fact a mortgage. It was his submission that, the deed in favour of the plaintiff's predecessor in title (deed bearing No. 5609) is in fact a mortgage.
22. The learned Counsel for the plaintiff in contention, submitted that, while the existence of a mortgage has been a novel position raised for the first time at the stage of appeal to this Court, a deed of transfer cannot be interpreted as a deed of mortgage.
23. In order to substantiate his position, the learned Counsel relied on several authorities. The learned Counsel for the plaintiff submitted the case of ***Fernando V. Coorey 59 NLR 169 at 171-172.***

*“... .Setuwa v. Ukku is a recent case decided by Gratiaen J. and Sansoni J. Most of the relevant Ceylon cases on this question have been referred to by Sansoni J. in his judgment in that case. The facts in that case are as follows:- In the year 1929 the 1st defendant borrowed a sum of Rs. 700 from the 1st plaintiff on a mortgage bond. In 1937 the 1st defendant sold the land in dispute and another land to the 1st plaintiff for a sum of Rs. 1,410 of which Rs. 1,350 was set off against the principal*

*and interest due on the mortgage and the balance was paid in cash. By a contemporaneous deed the 1st plaintiff agreed to retransfer the lands to the 1st defendant if she paid a sum of Rs. 1,410 within a period of 5 years. The 1st defendant failed to comply with the terms of the agreement and the 1st plaintiff in 1949, gifted the land in dispute to the 2<sup>nd</sup> plaintiff. In an action brought by the plaintiffs against the 1<sup>st</sup> defendant and 4 others for a declaration of title etc., the defendants pleaded that the deed of sale in favour of the 1st plaintiff though in form a transfer was in fact a mortgage for the repayment of Rs. 1,410 and that the 2nd plaintiff had no title to the land. In support of this contention evidence, both oral and documentary, of the circumstances surrounding the transaction of 1937 and the subsequent conduct of the parties was led by the defendants. After considering the numerous decisions on the matter, Sansoni J. observed, " If I may sum up the result of the authorities I have referred to I would say that it is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that it is a deed of mortgage."... "*

24. **Fernando V. Coorey 59 N.L.R. 169 at 175** also cited with approval, the cases of **Saverimuttu v. Thangavelautham 55 NLR 529** and **Perera v. Fernando 17 N.L.R. 486**.

*"In the case of Saverimuttu v. Thangavelautham [(1954) 55 N. L. R. 529.], a case decided by the Privy Council, the plaintiff sought to establish a trust by leading oral evidence. That oral evidence is admissible for the purpose of proving a trust is conceded. Their Lordships held that the oral agreement sought to be proved in that case amounted not to a trust but to an agreement to transfer immovable property which would be invalid as it contravenes the provisions of section 2 of the Prevention of Frauds Ordinance. Their Lordships also held that the decision in Perera v. Fernando [(1914) 17 N. L. R. 486.] sets out correctly the law of Ceylon. In that case it was held that where a person transferred a land on a notarial deed which on the face of it is a sale it was not open to the transferor to lead oral evidence to show that the transaction was in fact a mortgage because such evidence comes within the direct prohibition of section 92. It was also held there that evidence of subsequent conduct of parties was not admissible because "conduct can only corroborate the oral evidence as to the original agreement." "*



25. In light of the authorities that have been cited, it is my finding that, the defendants cannot later take the position that the deed bearing No. 5609 is a mortgage when it specifically states that it is a deed of transfer.
26. Although it was not relied on at the hearing of this appeal, a constructive trust under section 83 of the Trusts Ordinance also does not arise. The learned Judges of the High Court have erred in their finding to the contrary. Therefore, the question of law set out in sub paragraph (a) of paragraph 19 of the petition is answered in the affirmative.
27. In view of what has already been discussed, the questions of law set out in sub paragraphs (b) and (c) in paragraph 19 of the petition is also answered in the affirmative.
28. I affirm the judgment of the District Court dated 02.04.2009. The judgment of the High Court dated 24.02.2014 is set aside. The appeal is allowed.

*appeal is allowed*

**JUDGE OF THE SUPREME COURT**

**JUSTICE S. THURAIRAJA, PC**

I agree

**JUDGE OF THE SUPREME COURT**

**JUSTICE A. L. SHIRAN GOONERATNE**

I agree

**JUDGE OF THE SUPREME COURT**