

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

In the matter of an Application for Leave to Appeal in terms of Section 5 C (1) of High Court of the provinces (Special Provisions) Act No. 19 of 1990 an amended and read with Chapter L VIII of the Civil Procedure Code.

Gonayamalamage Titus Sri Lal
Montany Aponsu,
Upper Katuneriya,
Katuneriya.

**SC Appeal 160/2014
NWP/HCCA/Kur/159/2004(F)
DC Marawila Case No. 1061/L**

Plaintiff

Vs.

1. Gamage Nihal Yasendra
Jayawardhana,
2. Warnakulasuriya Mary
Bridget Thamel,

Both of
Jansa Road,
Lower Katuneriya,
Katuneriya.

Defendants

AND

1. Gamage Nihal Yasendra
Jayawardhana,
2. Warnakulasuriya Mary
Bridget Thamel,

Both of
Jansa Road,
Lower Katuneriya,
Katuneriya.

Defendant-Appellants

Gonayamalamage Titus Sri Lal
Montany Aponsu,
Upper Katuneriya,
Katuneriya.

Plaintiff-Respondent

AND NOW BETWEEN

Warnakulasuriya Mary
Bridget Thamel,
Jansa Road,
Lower Katuneriya,
Katuneriya.

2nd Defendant-Appellant-Petitioner

Gonayamalamage Titus Sri Lal
Montany Aponsu,
Upper Katuneriya,
Katuneriya.

Plaintiff-Respondent-Respondent

Before : **Buwaneka Aluwihare, PC. J**
S. Thurairaja, PC. J
K. Priyantha Fernando, J

Counsel : Jagath Abeynayake for the
2nd Defendant-Appellant-Petitioner

Dr. Sunil Coorey with Diana
Stephanie Rodrigo for the Plaintiff-
Respondent-Respondent

Argued on : 16.06.2023

Decided on : 18.07.2023

K. PRIYANTHA FERNANDO, J

1. The plaintiff-respondent-respondent (hereinafter referred to as Plaintiff) sued the 1st defendant and the 2nd defendant-appellant-petitioner (hereinafter referred to as defendant) in the District Court of *Marawila* seeking for a declaration that the plaintiff is the owner of the property in dispute, judgment to hand over the vacant possession of the property by ejecting the defendants and for damages.
2. In his plaint, the plaintiff averred that, by deed No. 912 dated 01.02.1999 the defendants transferred the property in dispute to the plaintiff subject to a condition specified therein. The condition specified in the said deed No. 912 was that, the defendants have the right to pay a sum of Rs. 375,000/- within one year with a 48% interest per annum to the plaintiff and redeem the property in dispute. The condition further stated that, the defendants could possess the property until it is redeemed within that one year period.
3. The Plaintiff further averred that, as the defendants failed to pay the said amount or part thereof or the interest within the specified period it violated the said condition specified. As a result, the plaintiff has become the owner of the property in dispute.
4. The 2nd defendant-appellant-petitioner along with her husband the 1st defendant took up the position that, the 1st defendant obtained a loan of Rs. 375,000/- from the

plaintiff and the property in question was transferred to the plaintiff as security for the said loan. It was the position of the defendant that they never intended to transfer the beneficial interest of the premises to the plaintiff. They pleaded that the plaintiff held the premises in trust on behalf of the defendants.

5. After trial, the learned District Judge arrived at a judgment in favour of the plaintiff. The defendants appealed against the judgment of the learned District Judge and the learned Judges of the High Court of Civil Appeal dismissed the appeal affirming the judgment of the learned District Judge.
6. Being aggrieved by the said judgment of the High Court of Civil Appeal, the instant appeal was preferred to this Court. This Court on 10.09.2014 granted leave to appeal on the questions of law set out in paragraphs 15 (a), 15 (c) and 15 (e) of the petition of appeal dated 12.12.2013. The said questions of law are,
 - I. Have the learned Appellate High Court Judges erred in law by failing to evaluate the presence of the attendant circumstances admitted by the plaintiff respondent at the trial?
 - II. Have the learned Appellate High Court Judges erred in law by holding that the parole evidence is not permissible to show that the execution of the deed in question (P2) created a constructive trust, in terms of section 83 of the Trust Ordinance?
 - III. In the aforesaid circumstances, has the Judgment marked 'B' occasioned a grave miscarriage of justice?
7. At the hearing of this appeal, the learned Counsel for the 2nd defendant-appellant-petitioner submitted that, the learned High Court Judges of the High Court of Civil Appeal failed to appreciate that the notary's fee for the

attestation of the deed in question and the stamp fees were paid by the borrower. It was further submitted that, the first interest installment was deducted when the amount of Rs. 375,000/- was paid initially and that the defendants were in possession of the land. It is the contention of the learned Counsel for the 2nd defendant that, in the above attendant circumstances it is clear that the defendants did not have any intention to transfer the beneficial interest of the premises to the plaintiff.

8. Relying on the case of ***Dayawathie and Others V. Gunasekera and Another*** [1991] Sri L.R. page 115, the learned Counsel submitted that, when the transferor did not intend to pass the beneficial interest in the property, the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not bar parole evidence to prove a constructive trust.
9. The learned Counsel for the plaintiff submitted that, the deed P2 is clearly a conditional transfer and not a constructive trust. The defendants have violated the condition laid down in the deed P2 and therefore the attendant circumstances relied upon by the defendants has no application whatsoever as this is not a 'constructive trust' but a 'conditional transfer'. The learned Counsel for the plaintiff relied on the case of ***Shanmugam and Another V. Thambaiyah*** 1989 2 Sri.L.R. at page 151.
10. In ***Shanmugam*** (supra), their Lordships in the Supreme Court said;

“We have on ‘P1’ a legal obligation on the purchaser to retransfer upon fulfillment of the contract within 2 years. The terms of the deed show it is an outright sale or transfer of interest in the land subject to a condition to reconvey if the sum of Rs. 5000/- owned by the vendor is paid in full within the time stipulated. No question of trust

arises in such a context. Time is explicit. On the expiry of two years the purchaser is relieved of the undertaking to transfer the property. The true construction of the deed P1 is that the property has been offered as security for the payment of a sum of money within two years. It is not a pledge or mortgage.” Referring to what was said in case of Maggie Silva V. Sai Nona [1975] 78 N.L.R. page 313, their Lordships said further; “When the condition underlying the conditional transfer is not fulfilled the transferee becomes absolute owner in terms of the agreement of parties free from any obligation to retransfer.” Their Lordships further said; “After the two years lapsed the vendors remaining in possession of the property without fulfilling the condition rendered themselves liable to be ejected. ...”

11. In the instant case according to the condition specified in the deed No. 912 dated 01.02.1999, the defendants can get the property redeemed by paying Rs. 375,000/- with the stipulated interest within one year from the date of the deed. The defendants have clearly failed to fulfill the said condition. Even after the lapse of one year the plaintiff has given the defendants further time to pay the amount and redeem the property. The defendants have failed to do so.
12. Thus, as clearly stated in ‘**Shanmugam**’ (supra), as the underlying condition in deed P2 conditional transfer has not been fulfilled, the plaintiff has become the absolute owner in terms of the agreement of the parties. After the lapse of one year from the date of the deed P2, the plaintiff is also entitled to eject the defendants who are in possession. As referred to earlier, the attendant circumstances pleaded by the defendants have no application to the instant case and they are not entitled to claim a constructive trust and lead parole evidence in terms of section 83 of the Trust Ordinance. Hence,

questions of law No. 1 and No. 2 raised by the defendant-appellants have to be answered in the negative.

13. In the circumstances, I am of the view that no miscarriage of justice has occasioned to the appellant (question of law No. 3) and the said question is also answered in the negative.

14. The judgment of the High Court of Civil appeal dated 31.10.2013 is affirmed and the appeal is dismissed with costs in this Court and in the District Court.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE BUWANEKA ALUWIHARE, PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC.

I agree

JUDGE OF THE SUPREME COURT