

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

Hettiarachchige Don Sugath
Nandana,
Meda Arambe,
Nawagamuwa,
Devalegama.
Plaintiff

SC APPEAL NO: SC/APPEAL/18/2021

SC LA NO: SC/HCCA/LA/477/17

HCCA KEGALLE NO: WP/HCCA/KEG/12/2016/F

DC KEGALLE NO: 6847/L

Vs.

Caroline Hewa Abewickrama,
Pussella,
Devalegama,
Kegalle.
Defendant

AND BETWEEN

Caroline Hewa Abewickrama,
Pussella,
Devalegama,
Kegalle.
Defendant-Appellant

Vs.

Hettiarachchige Don Sugath
Nandana,
Meda Arambe,
Nawagamuwa,
Devalegama.

Plaintiff-Respondent

AND NOW BETWEEN

Caroline Hewa Abewickrama,
Pussella,
Devalegama,
Kegalle.

Defendant-Appellant-Appellant

Vs.

Hettiarachchige Don Sugath
Nandana,
Meda Arambe,
Nawagamuwa,
Devalegama.

Plaintiff-Respondent-Respondent

Before: P. Padman Surasena, J.
Kumudini Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Dr. Sunil F.A. Coorey with Sudarshani Coorey for the Defendant-Appellant-Appellant.

Ranjan Suwandarathna, P.C., Shammil Perera, P.C., with Primal Ratwatte and Gimhani Gamage for the Plaintiff-Respondent-Respondent.

Argued on : 01.11.2021

Written submissions:

by the Defendant-Appellant-Appellant on
19.08.2021 and 15.02.2022.

by the Plaintiff-Respondent-Respondent on
27.04.2021 and 18.01.2022.

Decided on: 17.11.2022

Mahinda Samayawardhena, J.

Introduction

The plaintiff filed this action in the District Court of Kegalle seeking a declaration that he is the owner of the immovable property described in the schedule to the plaint by deed No. 6165 marked P2, ejectment of the defendant therefrom and damages. The defendant, who was the transferor of the property by deed P2 to the plaintiff, filed answer seeking dismissal of the plaintiff's action and a declaration that the plaintiff is holding the property by deed P2 in trust for the defendant. In the alternative, the defendant prayed that deed P2 be set aside on the ground of *laesio enormis*. After trial, the District Court entered judgment for the

plaintiff. On appeal, the High Court affirmed the said judgment. Hence this appeal by the defendant to this Court.

This Court granted leave to appeal on the question of law whether the District Court and the High Court erred in deciding that there was no evidence to prove that the defendant did not intend to part with the beneficial interest in the property when deed P2 was executed. On behalf of the plaintiff, a purported consequential question of law was raised to say that the defendant cannot raise trust and *laesio enormis* in the same action. In my view, the latter cannot be a consequential question since this Court did not grant leave to appeal to the defendant on the question of *laesio enormis*.

Constructive trust

The only question for decision in this appeal is whether deed P2 is an outright transfer or a transfer effected subject to a constructive trust.

A constructive trust is largely an equitable remedy for the benefit of the rightful owner of the property against the person holding the legal right to the property in an inequitable and unconscionable manner. Unlike in an express trust, in the case of a constructive trust, the intention of the parties is not apparent. Section 3(p) of the Trusts Ordinance, No. 9 of 1917 defining express trust states “*express trust means a trust that is created by the author of the trust generally in the form of an instrument in writing with certainty indicating the intention of the trust, but does not include a constructive trust or a de facto trust, whether charitable or not*”.

Chapter IX of the Trusts Ordinance (sections 82-98) deals with categories of constructive trusts. What is relevant in the instant

case is the category described under section 83 of the Trusts Ordinance, which runs 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.

If it can be inferred by Court, as stated in section 83, from “the attendant circumstances” (the circumstances which precede or follow the transfer) that the owner did not intend to dispose of the beneficial interest in the property when he transferred the legal interest to the transferee, an obligation in the nature of a constructive trust is considered to have been created. However, there is no general principle to determine “the attendant circumstances” on which a constructive trust can be held to have been established. Whether or not a constructive trust has been created is a question of fact. As the term “constructive trust” denotes, the Court construes that the defendant should be treated as the trustee of the property. In *Carl Zeiss Stiftung v. Herbert Smith (No 2) [1969] 2 Ch 276 (CA)*, Edmund-Davies L.J. stated “*English Law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court by technicalities in deciding what the justice of a particular case might demand.*” The onus of proof of a constructive trust is on the person who claims such a trust. The test is objective as opposed to subjective (*De Silva v. Silva (1956) 58 NLR 145, Wijeyaratne v. Somawathie [2002] 1 Sri LR 93*).

As held in the case of *Piyasena v. Don Vansue* [1997] 2 Sri LR 311:

The trust is an obligation imposed by law on those who try to camouflage the actual nature of the transaction. When the attendant circumstances point to a loan transaction and not a genuine sale transaction the provisions of section 83 of the Trust Ordinance apply.

Section 96 quoted below, which falls within Chapter IX of the Trusts Ordinance, is a residuary section without limitation (*Seelachchi v. Visuvanathan* (1922) 23 NLR 97).

In any case not coming within the scope of any of the preceding sections where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

Acceptance of parol evidence notwithstanding section 2 of the Prevention of Frauds Ordinance and sections 91 and 92 of the Evidence Ordinance

Section 5(1) of the Trusts Ordinance requires that a declaration of trust of immovable property shall be notarially executed:

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.

In addition, section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840, and sections 91 and 92 of the Evidence Ordinance, No. 14 of 1895, mandate that transactions in relation to immovable property be notarially executed and that no oral evidence is permitted to be led to contradict such documents.

Despite the above express provisions, parol evidence is nevertheless admitted to establish a constructive trust. This is justified on different grounds.

The Trusts Ordinance was enacted subsequent to the Prevention of Frauds Ordinance and the Evidence Ordinance and therefore in the event of a conflict, the later Act should prevail. *Maxwell on The Interpretation of Statutes*, 12th Edition, page 193 states “*If, however, the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later.*”

In *Bernedette Vanlangenberg v. Hapuarachchige Anthony* [1990] 1 Sri LR 190 at 202, the Supreme Court took the view that section 2 of the Prevention of Frauds Ordinance is applicable only to the trusts created under Chapter II of the Trusts Ordinance and not to the constructive trusts created under Chapter IX of the Trusts Ordinance.

It is also significant to note that although section 5(1) of the Trusts Ordinance enacts that no trust in relation to immovable property is valid unless notarially executed, section 5(3) further provides “*These rules do not apply where they would operate so as to effectuate a fraud.*” (*Ehiya Lebbe v. Majeed* (1947) 48 NLR 357) This means where fraud is alleged, the formalities are not insisted upon; even an oral agreement is sufficient.

In the Privy Council case of *Valliyammai Atchi v. Abdul Majeed* (1947) 48 NLR 289 it was held:

The formalities required to constitute a valid trust relating to land are to be found in section 5 of the Trusts Ordinance and not in section 2 of the Prevention of Frauds Ordinance; that the act of the widow in seeking to ignore the trust and to retain the property for the estate was to effectuate a fraud; that, therefore, under section 5(3) of the Trusts Ordinance even a writing was unnecessary and sections 91 and 92 of the Evidence Ordinance had no application.

The applicability of section 2 of the Prevention of Frauds Ordinance, which enacts that instruments affecting immovable property shall be of no force or avail in law unless notarially attested, has to be relaxed in the case of constructive trusts, as the Prevention of Frauds Ordinance designed to prevent fraud cannot be allowed to be misused to cover fraud. In some cases of constructive trusts, there is a non-notarial document executed in parallel to the notarially executed one manifesting the true intention of the parties. Such informal writings can be led in evidence notwithstanding section 2 of the Prevention of Frauds Ordinance and sections 91 and 92 of the Evidence Ordinance (*Dissanayakage Malini v. Mohamed Sabur* [1999] 2 Sri LR 4).

In terms of the first proviso to section 92 of the Evidence Ordinance quoted below, sections 91 and 92 of the Evidence Ordinance would not apply if parol evidence is to be led to invalidate an instrument on fraud, mistake etc:

Any fact may be proved which would invalidate any document, or which would entitle any person to any decree

or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law.

The fact that a notarially executed written document is not an indispensable requirement to create a trust is also discernible by section 107 of the Trusts Ordinance, which recognises “*De facto trusts*”. It reads as follows:

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.

Attendant circumstances in favour of a constructive trust

I take the view that the learned District Judge has failed to evaluate the evidence in the proper perspective.

A proper analysis of the evidence led before the District Court demonstrates that the real reason for the execution of deed P2 was to secure a loan from the plaintiff and there was no intention to effect an outright transfer of the property. Let me now justify this finding.

The property in suit is the residential property of the defendant. The defendant had mortgaged the property to the Rural Bank to obtain a loan of Rs. 75,000 on 06.02.1997 at an interest rate of 30% per annum. The plaintiff himself produced this Mortgage Bond marked P4. According to the defendant, she obtained a loan

of Rs. 100,000 from the plaintiff to be repaid with interest at a rate of 20% per annum to redeem the said mortgage offering this property as security, although the impugned deed P2 is *prima facie* an outright transfer. This contention is acceptable, as deed P2 was executed and the mortgage to the Rural Bank was admittedly redeemed on the same day, i.e. 07.03.2000.

There is no dispute that the consideration passed on deed P2 is Rs. 100,000. If deed P2 was a genuine sale, as the plaintiff claims, the defendant would have had to pay more than the selling price of the property to the Rural Bank to redeem the mortgage (Rs. 75,000 with 30% interest from 06.02.1997 to 07.03.2000)! If that were the reality, the defendant could have simply stayed away and allowed the Rural Bank to sell the property to recover its dues. This in itself demonstrates that the defendant by executing P2 intended not to part with the property but to continue to possess the property.

The plaintiff has admitted in evidence that he lends money to others; he is a money lender. The transfer deeds marked D5 of 2005 and D6 of 2001 bear testimony to this. Although they are *prima facie* outright transfers in favour of the plaintiff in relation to different lands by different people, the plaintiff himself in re-examination admitted that deeds D5 and D6 are securities taken by him for loans.

It is significant to note that in deed D5, the attesting witnesses are Somaratne and Piyasena; in deed D6, the attesting witnesses are Somaratne and Herath Banda. In the impugned deed P2, the attesting witnesses are Herath Banda and the plaintiff's wife. In P5, which I will refer to later, the first witness is Somaratne. Apart from the plaintiff's own evidence, the only witnesses called by him

to substantiate his case are Somaratne and Herath Banda. This indicates that they work as a team lending money at high interest rates and retaining immovable properties as securities.

According to the plaintiff's evidence, he does not know the exact boundaries of the land and the layout of the house standing on it where the defendant lives.

The plaintiff has admitted in evidence that he does not have the title deed of the defendant although he purchased the property by P2. The title deed is still with the defendant. In a genuine sale transaction, in the ordinary course of events, the old deeds of the seller are given to the purchaser.

Even after this transaction, up to now, the defendant has continued to live on the property with her family. The continuation of possession of the property even after the alleged transfer is a well-known "attendant circumstance" in favour of a trust.

The document strongly relied upon by the learned District Judge to hold against the defendant on this point is the existence of P5 whereby the defendant, whilst accepting that she sold the property to the plaintiff, has promised to leave the premises within three months from the date of that document, i.e. from 22.06.2002. The parties are at variance on the circumstances in which P5 was given by the defendant. Be that as it may, it is relevant to note that P5 was obtained by the plaintiff not on the same day on which deed P2 was executed but more than two years after the execution of P2: P2 is dated 07.03.2000 and P5 is dated 22.06.2002. P6 is a similar letter issued by the defendant to the Ceylon Electricity Board permitting the monthly electricity bills to

be changed in the name of the plaintiff. By D3, which is referred to in the next paragraph, the defendant promised to get the land released within two years of the execution of deed P2. P5, written two years after P2, is, in my view, consistent with the defendant's version that P2 was not an outright transfer.

Another strong “attendant circumstance” in favour of a trust is the informal agreement marked D3 through the plaintiff. According to the defendant, this non-notarial document was signed contemporaneously with deed P2. It bears the same date as that of deed P2. The plaintiff identifies his wife's signature on D3. By this document the defendant, whilst stating that she sold the property to the plaintiff by P2, further states that she undertakes to get the land released by paying Rs. 100,000 with 20% interest per annum within two years. (“එකී රුපියල් ලක්ෂයේ මුදල හා පොලිය (20%) ගෙවා ඉඩම නිදහස් කර ගන්නා බවටත්, කැගල්ල දේවාලේගම, පුස්සැල්ල පදිංචි ක්ලරැයින් හේවා අබේවික්‍රම වන මම මෙයින් පොරොන්දු වෙමි.”) The signatories to D3 are the defendant and the two attesting witnesses to deed P2, one of whom is the plaintiff's wife. It is clear that if the defendant by P2 transferred both her legal and beneficial interest in the land, D3 is meaningless. D3, in my view, illustrates that P2 is not an out and out transfer.

The argument advanced by learned President's Counsel for the plaintiff that at the most D3 is a contract to repurchase the property by the defendant, in which class of contract time is of the essence, and the defendant failed to pay the money to retransfer the property within two years of the execution of deed P2 and therefore the plaintiff's action shall fail, is unacceptable. Such a conclusion could be arrived at only on the footing that the defendant transferred both her legal and beneficial interest in the property by deed P2 (*Dayawathie v. Gunasekera* [1991] 1 Sri LR

115 at 120-121). L.J.M. Cooray in his masterpiece *The Reception in Ceylon of the English Trust* at page 129, whilst stating that an agreement to reconvey could come within section 96 of the Trusts Ordinance (residuary section in Chapter IX which deals with constructive trusts), further explains at 129-130:

If there is a trust, the contractual rule that time is of the essence of the contract would not 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 section 83 will also arise where a person has transferred property subject to a notarial agreement to reconvey within a specified period, and he cannot enforce the 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 inadequate consideration on the face of the deed and the actual value of the property is another “attendant circumstance” which favours the view that the beneficial interest has not been parted with.

Different interpretations have been given by the parties to the document marked D8. By D8 dated 25.02.2002 (which date falls within the period of two years from the execution of deed P2), the defendant agreed to sell the property to the plaintiff’s daughter for a sum of Rs. 500,000 having already collected Rs. 100,000 from the plaintiff. This indicates that the value of the property was much higher than Rs. 100,000 at the time of the execution of deed P2. If the defendant wanted to part with both the legal and

beneficial interest in the land at the time of the execution of deed P2, she would not have sold the land for a sum of Rs. 100,000. There is no evidence that the defendant was looking for buyers to sell this land or that the land price increased by four times the value within two years.

In the Supreme Court case of *Premawathi v. Gnanawathi* [1994] 2 Sri LR 171 the following facts were established through evidence:

- (a) The defendant was in urgent need of money at the time she sold her land to the plaintiff on P1 for a sum of Rs. 6,000.
- (b) The plaintiff by a non-notarial document agreed to retransfer the land to the defendant upon payment of the said sum of Rs. 6,000 within a period of 6 months and although the defendant tendered the money to the plaintiff within that period the retransfer could not be effected because the plaintiff was in hospital.
- (c) Although the consideration on P1 was Rs. 6,000 the plaintiff admitted that the value of the land was about Rs. 15,000.
- (d) The plaintiff's evidence was that she was ready and willing to re-transfer the land to the defendant within the period of 6 months. This was considered to be indicative of the fact that the plaintiff realised that there was an obligation attached to her ownership of the land.
- (e) The possession of the land remained with the defendant.

On the said findings of fact, G.P.S. de Silva C.J. at page 175 concluded:

In my view, the above facts and circumstances point to a "constructive trust" within the meaning of section 83 of the

Trusts Ordinance. In other words, “the attendant circumstances” show that the 1st defendant did not intend “to dispose of the beneficial interest” in the land by P1.

In the Supreme Court case of *Dayawathie v. Gunasekera [1991] 1 Sri LR 115*, the following “attendant circumstances” were considered sufficient to demonstrate that the original plaintiff (transferor) hardly intended to dispose of his beneficial interest in the property:

- (a) The oral promise to reconvey the property in suit on receipt of Rs. 17,000 comprising the money advanced and the interest thereon.
- (b) The original plaintiff continuing to remain in possession of the property.
- (c) The original plaintiff's agreement to pay all future instalments due on account of the loan obtained from the National Housing Department.
- (d) The gross disparity between the consideration on the face of the deed (Rs. 17,000) and the market value of the property (Rs. 70,000-80,000)
- (e) The first defendant's failure to take steps to assert her ownership pursuant to the purchase until she received the letter of demand, namely, the failure to get her name registered as the owner in the assessment register of the local authority and non-payment of instalments payable to the National Housing Department.
- (f) The original plaintiff taking steps to obtain a loan from the State Mortgage Bank soon after the transaction to pay off debts due to the defendants and to the National Housing Department.

Similarly, continued possession after the alleged transfer by the transferor; inadequate purchase price; failure to cause examination of the title of the property prior to the purchase; failure to produce the old deeds were considered in *Carthelis v. Ranasinghe* [2002] 2 Sri LR 359 to be circumstances in favour of a constructive trust.

(*vide* also *Wijeytilaka v. Ranasinghe* (1931) 32 NLR 306, *Ehiya Lebbe v. Majeed* (1947) 48 NLR 357, *Thisa Nona v. Premadasa* [1997] 1 Sri LR 169, *Perera v. Fernando* [2011] 2 Sri LR 192)

Conclusion

The attendant circumstances in the instant case do not show that the defendant intended to dispose of the beneficial interest in the property to the plaintiff by deed P2 and that the plaintiff is a *bona fide* purchaser of the property. Hence it can be concluded that the plaintiff is holding the property for the benefit of the defendant, creating a constructive trust within the meaning of section 83 of the Trusts Ordinance.

The learned District Judge failed to analyse and evaluate the evidence in the proper perspective. The High Court merely endorsed the conclusion of the District Court.

I answer the question of law raised on behalf of the defendant in the affirmative and set aside the judgments of the District Court and the High Court and allow the appeal with costs. The consequential question of law raised on behalf of the plaintiff does not arise for consideration here.

The plaintiff lent Rs. 100,000 to the defendant with interest at a rate of 20% per annum. This happened on 07.03.2000. Indeed,

the defendant could not pay the money with interest within two years as agreed. After the lapse of two years, the plaintiff took up the position that deed P2 is an outright transfer, thereby preventing the defendant from repaying the money to effect a retransfer of the property.

Taking all the circumstances into account, I direct that the defendant deposit a total sum of Rs. 870,303.35 (calculated at a compound annual interest rate of 10% from 07.03.2000 to 17.11.2022) to the credit of the case within five months from today for the plaintiff to withdraw. If the money is so deposited with notice to the plaintiff, the plaintiff shall retransfer the property in the name of the defendant within one month thereof. If the plaintiff fails to do so, the Registrar of the District Court shall effect the transfer. All expenses of the conveyance of the property shall be borne by the defendant. The Registrar of this Court shall transmit the case record to the District Court forthwith for the parties to comply with these directions.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Kumudini Wickramasinghe, J.

I agree.

Judge of the Supreme Court