

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

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**S.C. (Appeal) No. 82/2009  
S.C. (H.C.) C.A. L.A. No. 35/2009  
SP/HCCA/Kag/248/2007(F)  
D.C. Mawanella No. 529/L**

Dheerasingha Arachchige Saroja Nisansala,  
"Kumari", Attanagalla,  
Nittambuwa

presently at Vagollahena, D 27, Gonagala,  
Devanagala.

**Defendant-Appellant-Appellant**

Vs.

John Laurence Rose Aberfoyle,  
F K 8, 3 TD, Scotland,  
United Kingdom

Presently of Dubai Cable Company Pvt. Ltd., P.O.  
Box 11529, Dubai, United Arab Emirates.

**Plaintiff-Respondent-Respondent**

**BEFORE** : Dr. Shirani A. Bandaranayake, J.  
K. Sripavan, J. &  
S. I. Imam, J.

**COUNSEL** : Rohan Sahabandu for Defendant-Appellant-Appellant  
P.K.T. Perera for Plaintiff-Respondent-Respondent

**ARGUED ON:** 10.06.2010

**WRITTEN SUBMISSIONS**

**TENDERED ON:** Defendant-Appellant-Appellant : 31.08.2010  
Plaintiff-Respondent-Respondent : 02.09.2010

**DECIDED ON:** 28.06.2011

**Dr. Shirani A. Bandaranayake, CJ.**

This is an appeal from the judgment of the Provincial High Court (Civil Appeal) of the *Sabaragamuwa* Province holden in Kegalle dated 27.01.2009. By that judgment learned Judges of the High Court had dismissed the appeal of the defendant-appellant-appellant (hereinafter referred to as the appellant) and affirmed the judgment of the learned District Judge of Mawanella dated 03.09.2004, which had granted the reliefs prayed for by the plaintiff-respondent-respondent (hereinafter referred to as the plaintiff-respondent). The appellant preferred an application before this Court for which leave to appeal was granted.

At the stage of hearing both learned Counsel agreed that the appeal could be argued on the basis of the following questions:

1. Could the plaintiff-respondent in the circumstances of the case, plead a constructive trust?

2. Is the trust alleged by the plaintiff-respondent contrary to the provisions in sections 4(1) and 98 of the Trusts Ordinance?

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:

The appellant had been in Dubai where she had been working in several houses on an hourly basis and had stayed at the plaintiff-respondent's house. At that place she had not paid any rent, and in lieu of rent she had helped to clean the garden for two hours which belonged to the plaintiff-respondent. The appellant submitted that, during that period the plaintiff-respondent had a close intimacy with the appellant. When the appellant returned to Sri Lanka, the plaintiff-respondent had agreed to purchase a land and a house for the appellant and he had accordingly carried out the said purchase and had gifted it to her. The appellant further submitted that the plaintiff-respondent had purchased the said land for the benefit of the appellant.

The plaintiff-respondent contended that the appellant had worked for him as a domestic-aid and he had given her the money to purchase a property on his behalf. He further contended that he had no intention to grant the beneficial interest of the property in question to the appellant and therefore she holds the land in trust in favour of the plaintiff-respondent. It was also submitted that the plaintiff-respondent had requested the appellant through his nominee to transfer the said land, which had been refused by the appellant and that since 01.06.1998, she had been in possession of the said land.

Having stated the facts of this appeal and the position of the appellant and the plaintiff-respondent, let me now turn to consider the two questions on which leave to appeal was granted by this Court.

The two questions referred to earlier, clearly indicate that the issue in question is as to whether a purchase of a property by a third party for and on behalf of a foreigner, allegedly in order to evade the payment of 100% tax on the sale, could create a constructive trust on the basis of sections 4(1) and 98 of the Trust Ordinance.

It is not disputed that the land in question was brought in the name of the appellant. It is also not disputed that the proceeds for the purchase of the said land was provided by the plaintiff-respondent. The contention of the learned Counsel for the appellant was that at the time the appellant returned to Sri Lanka, the plaintiff-respondent had agreed to purchase a property for her and therefore the said purchase was a gift from the plaintiff-respondent to the appellant. The learned Counsel for the plaintiff-respondent relied on the documents marked as P1 and P2 and contended that the necessary funds for the purchase of the land belonged to the plaintiff-respondent as he had obtained money from a joint account he had with his wife and to show her that it was a different transaction he had obtained the appellant's signature to a letter whereby she had agreed to re-transfer the land to a nominee of the plaintiff-respondent. The appellant submitted that a copy of the said letter was not given to the appellant.

The appellant had stated that she had never promised to transfer the land in the name of the plaintiff-respondent and that she had spent over Rs. 2,000,000/- to renovate the house. She had also cultivated the land in question and she had assessed the improvements made to the house and to the land for Rs. 3,000,000/-.

The plaintiff-respondent stated that the land in dispute was purchased in the name of the appellant by Deed No. 386 dated 12.07.2004 attested by S.L.M. Halish, Notary Public. He had paid the consideration amounting to Rs. 2,760,000/- as referred to in the Deed and also had paid Rs. 170,662.50 as survey fees, Notaries fees and Stamp Duty etc. It was also submitted that he had purchased the said land in the name of the appellant as since he is a foreigner he would have to pay 100% as Tax. His intention was to form a

company in Sri Lanka and thereafter to transfer the said land in the name of the company. He had not been able to form a company with the approval of the Board of Investment of Sri Lanka. However, before the execution of the said Deed he had obtained a letter from the appellant agreeing to re-transfer the property in question either to the plaintiff-respondent or to his nominee.

The document P1 is the Deed of Transfer No. 386, dated 01.06.1998 attested by S.L.M. Halish, Notary Public. The schedule to the said Deed refers to lots 1, 2, 3 and 4 in Plan No. 3851, dated 09.07.1993 made by K.S. Panditharatne of Kegalle, Licensed Surveyor.

The document P2 dated 29.05.1998 is an undertaking by the appellant to transfer the land either in the name of the company to be incorporated in Sri Lanka or in the name of any person nominated by the plaintiff-respondent. The said document is as follows:

“29<sup>th</sup> May 1998

I, **DEERASING ARACHCHIGE SAROJA NISANSALA** of “Kumari”, Attanagalle Road, Nittambuwa, do hereby declare and state that I received a sum of **RUPEES TWO MILLION SEVEN HUNDRED AND SIXTY THOUSAND** (Rs. 2,760,000/-) from **JOHN LAWRENCE ROSE** of Ducab, Dubai Cable Company Limited, Dubai to purchase a land, on behalf of the said **JOHN LAWRENCE ROSE**, at Gonawala and depicted as Lots 1, 2, 3 and 4 in Plan No. 3851 dated 9.7.1993 made by K. S. Panditharatne, Licensed Surveyor.

I further undertake and agree that, on the instructions of the said **JOHN LAWRENCE ROSE**, to transfer the said land in the name of the company to be incorporated in Sri

Lanka or in the name of any persons nominated by the said **JOHN LAWRENCE ROSE.**”

It was on the basis of the aforementioned document that the plaintiff-respondent had pleaded a constructive trust. A trust creates a situation where one person holds property for the benefit of another. Describing the concept of trust, Dr. L.J.M. Cooray refers to the definition given by Keeton, (Trust, 1971, pg. 13), which is as follows:

“The relationship which arises wherever a person called the trustee is compelled in Equity to hold property, whether real or personal, and whether by legal or equitable title for the benefit on some persons (of whom he may be one and who are termed *cestuis que trust*) or for some object permitted by law, in such a way that the real benefit of the property accrues not to the trustee but to the beneficiaries or other objects of the trust.”

Learned Counsel for the appellant contended that, considering the provisions contained in sections 4 and 98 of the Trusts Ordinance, the transaction in this appeal cannot be treated as one, which created a trust. It was also submitted that the District Court of Mawanella as well as the Provincial High Court had erred in law on this issue and that the decision in **Muniyandy Natchie v Kayambo** ([1988] II CALR 56) on which reliance was placed by both Courts, was wrongly decided.

Section 4 of the Trusts Ordinance is contained in Chapter II of the said Ordinance, which deals with the creation of Trusts. Section 4(1), which deals with lawful purpose is as follows:

“A trust may be created for any lawful purpose. The purpose of a trust is lawful, unless it is –

- a) forbidden by law, or
- b) is of such a nature that, if permitted, it would defeat the provisions of any law, or
- c) is fraudulent, or
- d) involves or implies injury to the person or property of another or
- e) the Court regards it as immoral or opposed to public policy.”

Section 98 of the Trusts Ordinance refers to the saving rights of *bona fide* purchasers and reads as follows:

“Nothing contained in this Chapter shall impair the rights of transferees in good faith for valuable consideration, or create an obligation in evasion of any law for the time being in force.”

Section 98 of the Trusts Ordinance, it is to be borne in mind, is contained in Chapter IX of the Trusts Ordinance, which deals with Constructive Trusts.

Learned Counsel for the appellant strenuously contended that, the plaintiff-respondent’s action, clearly indicates that there is a breach of Revenue Law and therefore the respondent cannot seek relief under the Trusts Ordinance. As stated

earlier, section 4(1) of the Trusts Ordinance is specific with regard to the creation of Trusts, which could be for any lawful purpose. The said section has clearly defined the instances, where a trust could be regarded as unlawful. In such circumstances, what is necessary is to examine as to the steps taken by the plaintiff-respondent and whether they would come within the purview of section 4(1) of the Trusts Ordinance.

It is not disputed that the plaintiff-respondent had sent the money for the appellant to purchase the property in her name.

The contention of the plaintiff-respondent was that the reason for the said decision was to avoid the payment of tax imposed under the Finance Act. Learned Counsel for the appellant contented that both the District Court and the High Court had held that the breach of Revenue Law is not within the contemplation of sections 4(1) and 98 of the Trusts Ordinance and as stated earlier that both Courts had erred as they had relied on **Muniyandy's** case, which had been wrongly decided.

In the light of the above, it is necessary to consider whether the transaction in question could be treated as an unlawful transaction.

Dr. L.J.M. Cooray in his work on the subject of Trust (Trust, L.J.M. Cooray, pg. 91) has discussed the nature of an unlawful trust. According to Dr. Cooray, if sections 4 and 98 of the Trusts Ordinance had been omitted, the general law of the land would have prevented the operation of trusts for unlawful purposes. Referring to trusts for unlawful purposes, Dr. Cooray refers to Prof. Weeramantry's Treatise on the Law of Contracts (The Law of Contracts, Vol. I). Prof. Weeramantry, referring to the breach of revenue regulations clearly states that the mere breach of revenue regulations would not itself render illegal a contract in respect of which they are imposed (The Law of Contract, Vol. I, pg. 340). It could also be argued that what the plaintiff-respondent intended by purchasing the property in the name of the appellant was not to breach the

revenue legislation, as in any event, at the stage of a re-transfer and at the stage of registration of the said land, the plaintiff-respondent would have to make the payment of tax in terms of the Finance Act.

An act could not be treated as invalid simply due to illegality. In **Fernando v Ramanathan** ((1913) 16 N.L.R. 337), a Full Bench at that time, had decided that a deed is not invalid on the ground of illegality because it is contrary to what may be termed the policy of an Ordinance. Considering the implied statutory prohibitions, Prof. Weeramantry (supra, pg. 337) has referred to the decision in **Mohideen v Saibo** ((1913) 17 N.L.R. 17), **Georgiades v Klompje** ((1943) T.P.D. 15) and Pollock (13<sup>th</sup> edition, pg 275) and had stated thus:

“Where a statute merely imposes a penalty on the performance of certain acts without declaring such acts to be illegal or void, the question arises whether such acts are void. In such cases we must look to the intention of the legislature to see whether the imposition of the penalty implies such a prohibition as to make the resulting contract void. The imposition by the legislature of a penalty on any specific act or omission is *prima facie* equivalent according to Pollock to an express prohibition. Such provision is however, only *prima facie* evidence and is not enough by itself to make a contract to do that act illegal or void.”

Considering the submissions made by both learned Counsel for the appellant as well as the plaintiff-respondent it is apparent that no arguments were put forward by the appellant that if it was allowed, the transaction which took place between the appellant and the plaintiff-respondent would defeat the provisions of any law. Similarly no

material was put forward to substantiate the fact that the said transaction is not one which is forbidden by law, fraudulent, involves or implies injury to the person or property of another and the Court regards it as immoral or opposed to public policy.

Learned Counsel for the appellant contended that in terms of section 4(1) of the Trusts Ordinance there is no possibility of relying on a Trust, when the purpose is illegal.

Section 4(1) of the Trusts Ordinance as stated earlier clearly refers to the fact that a trust may be created for any lawful purpose. The unlawful purposes, which would forbid a Trust being created, are specifically referred to in section 4(1). Learned Counsel for the appellant took up the position that the intention to avoid the payment of 100% as tax on the land transaction would clearly show the objective of the plaintiff-respondent's action. However, unlawful intention alone cannot make the contract illegal. Referring to unlawful intentions, Prof. G.L. Peiris (Some Aspects of the Law of Unjust Enrichment in South Africa and Ceylon, pp. 72-73) states that,

“A significant development in the modern law is that an unlawful intention, bilaterally entertained, is no longer an absolute bar to restitution. This principle was recognized for South African law in 1939 in **Jajbhay v Cassim** where Stratford, C.J. declared that “the rule expressed in the maxim *in pari delicto potior est conditio defendentis* is not one that can or ought to be applied in all cases . . . . It is subject to exceptions which, in each case, must be found to exist only by regard to the principle of public policy.” Watermeyer, J.A. said: “the principle underlying the general rule is that the Courts will discourage illegal transactions, but the exceptions show that where it is necessary to prevent injustice or to promote public policy,

they will not rightly enforce the rule.” This view has been authoritatively accepted as applicable to the law of Ceylon.”

It is therefore evident that, no material had been adduced before this Court to show that the transaction in question had been for an unlawful purpose in terms of section 4(1) of the Trusts Ordinance.

Learned Counsel for the appellant strenuously contended that **Muniyandy’s** case (supra) was wrongly decided for the reason that the transaction in issue cannot be called a trust in view of sections 4(2) and 98 of the Trusts Ordinance. In **Muniyandy’s** case (supra) the plaintiffs-respondents desired to own property that was sold through the Estate Fragmentation Board. They were both persons whose application for citizenship in Sri Lanka were being finalised by the Registering Authorities of the State. The plaintiffs-respondents were therefore non-citizens at the time of the sale. Under the Finance Act, No. 11 of 1963, they were required to pay 100% tax if they purchased the property as non-citizens. In order to overcome this, the plaintiffs-respondents had paid the purchase price for the land and had the deed written in the name of the defendant-appellant, who was their sister and a citizen of Sri Lanka.

Learned Counsel for the defendant-appellant in that matter had contended that section 98 read with section 4(1) of the Trusts Ordinance would prevent the creation of such a Trust in so far as the transfer of property was an evasion of section 58(1) of the Finance Act. The Court of Appeal, considering the submissions made, had held that the relevant provisions of the Finance Act do not impose a prohibition on the transfer of land to the class of persons to whom the plaintiffs-respondents belonged.

An examination of the provisions of the Finance Act, No. 11 of 1963, referred to in **Muniyandy’s** case (supra), clearly show that appropriate steps could have been taken

to ensure that such person, who had attempted to evade tax, be made to pay the relevant dues to the authorities. As correctly pointed out in **Muniyandy's** case (supra) section 58(1) read with section 59 of the Finance Act had imposed a tax and empowered the Commissioner of Inland Revenue to recover the tax if in default due to the non-payment, from the person/s whom it has become due. Section 58(1) of the Finance Act, No. 11 of 1963, referred to the charge of the tax and stated that,

“Subject to the provisions of sub-section (4), where there is a transfer of ownership of any property in Ceylon to a person who is not a citizen of Ceylon, there shall be charged from the transferee of such property a tax of such amount as is equivalent to the value of that property.”

Section 59 of the Finance Act, which dealt with the effect of the non-payment of the tax, clearly stated that the Commissioner of Inland Revenue, upon notification of such default by the Registrar of Lands or the Company as the case may be, shall take steps for the recovery of the tax deemed to be in default.

The Court of Appeal in **Muniyandy's** case (supra) had considered the said position and the non-payment of the tax above the ordinary stamp duty where the purchase was made in the appellant's name. Consideration was also given to several decisions by the Court of Appeal. Considering the provisions of the Finance Act and the other relevant material referred to above, it would not be correct to state that the **Muniyandy's** case (supra) was wrongly decided by the Court of Appeal. Accordingly, the two questions on which this appeal was argued are answered as follows:

1. the plaintiff-respondent could in the circumstances of the case, plead a constructive trust;

2. the trust alleged by the plaintiff-respondent is not contrary to the provisions in sections 4(1) and 98 of the Trusts Ordinance.

For the reasons aforesaid, the appeal is dismissed and the judgment of the Provincial High Court (Civil Appeal) of the *Sabaragamuwa* Province holden in Kegalle dated 27.01.2009 is affirmed.

I make no order as to costs.

**Chief Justice**

**K. Sripavan, J.**

**I agree.**

**Judge of the Supreme Court**

**S. I. Imam, J.**

**I agree.**

**Judge of the Supreme Court**