

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

In the matter of an Appeal from
a judgment of the Civil Appellate
High Court.

Mahadura Chandradasa Thabrew
alias Mahadura Chandradasa
Weerawardena, 'Allan Niwasa',
No. 47, Uposatharama Road,
Panadura.

Plaintiff

SC APPEAL No. 168/14

SC/HCCA/LA/ 160/2013

WP/HCCA/KAL/149/2004(F)

DC PANADURA 1198/L

Vs

1. Mahadura Padmini
Hemalatha Thabrew,
Uposatharama Road,
Pinwatta, Panadura.
2. Seylan Bank PLC,
Head Office,
Sir Baron Jayathilaka
Mawatha, Colombo 2.

Defendants

AND BETWEEN

Mahadura Chandradasa Thabrew
alias Mahadura Chandradasa
Weerawardena, 'Allan Niwasa',
No. 47, Uposatharama Road,
Panadura.

Plaintiff Appellant

Vs

1. Mahadura Padmini
Hemalatha Thabrew,
Uposatharama Road,
Pinwatta, Panadura.
2. Seylan Bank PLC,
Head Office,
Sir Baron Jayathilaka
Mawatha, Colombo 2.

Defendant Respondents

AND NOW BETWEEN

Mahadura Padmini Hemalatha
Thabrew, Uposatharama Road,
Pinwatta, Panadura.

1ST Defendant Respondent Petitioner

Vs

Mahadura Chandradasa Thabrew
alias Mahadura Chandradasa
Weerawardena, 'Allan Niwasa',
No. 47, Uposatharama Road,
Panadura.

Plaintiff Appellant Respondent

Seylan Bank PLC,
Head Office,
Sir Baron Jayathilaka Mawatha,
Colombo 02.

2nd Defendant Respondent Respondent

**BEFORE : S. EVA WANASUNDERA PCJ
ANIL GOONERATNE J &
H.N.J. PERERA J**

**COUNSEL : M. U. M. Ali Sabry PC with Shamith Fernando and
Nalin Alwis for the 1st Defendant Respondent
Appellant.
Saliya Peiris PC with Varuna de Saram for the
Plaintiff Appellant Respondent.**

ARGUED ON : 04.07.2017.

DECIDED ON : 01.08.2017.

S. EVA WANASUNDERA PCJ.

The Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff) filed action in the District Court of Panadura against his own sister, the 1st Defendant Respondent Appellant (hereinafter referred to as the 1st Defendant) and the Seylan Bank PLC named as the 2nd Defendant. The purpose of filing this action is

to get the land in the Schedule to the Plaint which is held by the 1st Defendant under a deed of transfer, retransferred to the Plaintiff, allegedly since the said land has been transferred and held by the 1st Defendant in trust for the Plaintiff. The Plaintiff claims that it was held on a constructive trust within the meaning of Sec. 83 of the Trusts Ordinance.

The Plaintiff's father, Allan Thabrew and mother, Darling Premawathie Thabrew and their nine children lived in "Allan Niwasa" at Uposatharama Road, Pinwatta, Panadura. The father died in 1965 due to a heart problem. He had many blocks of land which he had told his wife to sell and live with the money received from such sales. The Plaintiff had been 16 years old when the father died. The Plaintiff had one elder brother, two younger brothers and five younger sisters. The 1st Defendant is the second younger sister.

In 1974 Chandradasa the Plaintiff received by way of a transfer, only 1/14th share of the land of one and a half acres of the land on which their main house Allan Niwasa was existing including the whole house, from his mother, Darling Premawathie. The said deed was marked as P1. It is in evidence that Chandradasa wanted some money in the year 1978. Mother had told him not to borrow from any others but to get it as a loan from a Bank. For the purpose of getting a loan of Rs. 20000/- from the National Savings Bank, the Insurance Corporation had issued a title insurance to the owner, Darling Premawathie, for the land of one Acre depicted in a new plan No. 3524 dated 26.09.1978 made by R.W.Fernando Licensed Surveyor. The Plaintiff was the person named as purchaser and mother was named as the seller. The receipt of the money by the seller, the mother, is also marked in evidence. On the face of the document, the money was borrowed from the National Savings Bank by the Plaintiff to purchase the land owned by the seller who was his own mother Darling Premawathie. The Plaintiff had however repaid the money to the Bank. In reality, the mother had facilitated the son's need to get money from the National Savings Bank acting as the seller of the land. After the Plaintiff got the land redeemed from the NSB, he had been keeping the whole land for himself even though allegedly the promise to the mother had been to transfer the land to the two sisters after the land is redeemed. In cross examination he had admitted that **he never transferred the land to the mother back again or allegedly even to the sisters as promised by the son to the mother.**

In 1979 again, he received a transfer of other undivided portions of the same land of Delgahawatte Kattiya from his mother. The said deed was marked as P2. In 1981, he bought 30 and 1/3rd Perches from Nimal Jayathilake from and out of the land called Gorakagahawatte, which land was adjacent to Delgahawatte Kattiya. This deed was marked as P3. The whole area covered by **these three deeds** was **in his name as owner** and he got the area surveyed by L.W.L. De Silva on 05.03.1987.

The total extent of Delgahawatte Kattiya and Gorakagahawatte together was 1 Acre 0 Roods 27 Perches. By Plan No. 6904 dated 5.3.1987 done by Licensed Surveyor L.W.L. De Silva, the big land was blocked out into three larger lots and two smaller lots. Lot 1 and 2 were of equal extents, each containing 1 Rood and 21 Perches. Lot 3 with the house thereon was of an extent of 1 Rood and 16 Perches. The road 15 feet wide reserved to reach Lot 1 and Lot 2 was marked as Lot 4 of an extent of 6 Perches. There is a Lot 5 also on the other side of Uposatharamaya Road of an extent of only 3 Perches.

The Plaintiff transferred Lots 1 and 2 to the sisters, Malini Kusumalatha and Padmini Hemalatha with the roadway over Lot 4 on one and the same day, i.e. on 5.6.1987 by deed numbers 15397 and 15398. The Deeds were registered in the Land Registry properly according to the Plaintiff's evidence. He had not even placed a caveat at any time in the Land Registry for over ten years regarding Lot 2. He had registered a caveat in 1997, i. e. right before filing the District Court action against Padmini Hemalatha alleging that the transfer deed No. 15398 was signed and delivered to her on a constructive trust.

The subject matter of this application is the said **Lot 2** which he transferred to the 1st Defendant, Padmini Hemalatha by **Deed No. 15398 attested by Ranjith Weerasekera Notary Public and marked as P5 dated 05.06.1987.**

The 1st Defendant had mortgaged Lot 2 to the Seylan Bank, the 2nd Defendant and obtained a loan in the year, 1996. The Seylan Bank participated at the trial and stated that by Mortgage Bonds Nos. 1316 dated 8.5.1996 and 1466 dated 13.12.1996, the 1st Defendant had mortgaged the said Lot 2 which was registered as her own land and that the 2nd Defendant Seylan Bank had accepted her as the true owner of the land. The Bank took up the position that these Bonds cannot therefore be declared null and void according to law.

The District Judge had heard the case and at the end of the trial given judgement **dismissing the Plaintiff**. The Plaintiff had appealed to the **Civil Appellate High Court** and the judges had over turned the judgment of the District Court and held that the **1st Defendant had held the land as the trustee of the Plaintiff under a constructive trust in terms of Sec. 83 of the Trusts Ordinance**. The High Court Judgment is dated 14.03.2013. Being aggrieved by the said judgment, the 1st Defendant had sought leave to appeal and the same was granted by this Court on the following questions of law contained in paragraph 14 (iii), (iv), (v),(vi) and (vii) of the Petition which read as follows:

1. Did the Judges of the Civil Appellate High Court of Kalutara err in law in failing to consider the material evidence and facts placed before the Court in correct perspective thus misdirected in law?
2. Did the Civil Appellate High Court fail to consider the fact that the Respondent has failed to prove basic requirements and tests related to a constructive trust?
3. Did the Civil Appellate High Court fail to consider the fact that, the Deed of Transfer marked as P5 which was a properly executed deed , cannot be challenged by parole evidence unless there were attendant circumstances?
4. Did the Civil Appellate High Court err in law in their opinion in place of that of the judge of the original court without possible reasons or rhymes?
5. Did the Civil Appellate High Court misdirect itself in law in failing to consider that the Respondent has failed to establish a case which falls within the ambit of Sec. 83 of the Trust Ordinance?

The primary question to be determined by this Court is whether deed No . 15398 dated 95.06.1987 marked as P5 was an outright transfer, or whether it was held on a constructive trust for the Plaintiff.

The trial judge in the District Court heard the Plaintiff giving evidence. He admitted that he received the bigger portion of the land and the ancestral house from the mother of both the Plaintiff and the 1st Defendant, Darling Premawathie for him to obtain a loan from the National Savings Bank in the year 1978. So, the transfer of the land from the mother to the son took place for a need of the son, Plaintiff. Even though he paid the loan to the NSB, he did not re-transfer the land to the mother or to the sisters as promised to the mother, according to the pleadings in the answer of the 1st Defendant. It was only in 1987 that the Plaintiff

transferred part of the land to the two younger sisters as promised to the mother in 1978 by Deeds numbers 15398 and 15399. Sister Malani Kusumalatha had thereafter mortgaged her portion of 1 Rood and 21 Perches to an outsider and finally after the mortgage was redeemed, she had sold the land to one Sirisena Liyanage. Sister Padmini Hemalatha was only 18 years old, according to the Plaintiff's evidence before court, in the year 1987 when the transfer deed 15398 was executed. However, the Plaintiff's contention is that Hemalatha wanted that block of land in her name as part of the future plan to produce to the school Sri Sumangala Vidyalaya, Panadura when she makes an application to send her child to school. The Plaintiff had mentioned so in his Plaint and gave evidence also to that effect. It was admitted that Hemalatha had no children at that time and that Hemalatha at the child bearing age, in 1992 had given birth to a child while living in the main house where even the Plaintiff was living at that time and that the child was not admitted to Sri Sumangala Vidyalaya. It is hard to believe that by getting a deed for a bare land with no house on it, how such a deed would be beneficial to any mother of a child to produce to the school with the application to get a school for the child. That seems to be a baseless reason for having the land transferred to Hemalatha by the Plaintiff. The Plaintiff claims that therefore the transfer deed is a trust and not an outright transfer. The Plaintiff further stated to court that even though the other sister sold her block of land to Sirisena Liyanage through Dimuthu Land Sales Company, the money received was taken by him without any problem from the other sister. Anyway that sister had not given evidence in court to support that stance taken by the Plaintiff.

The Plaintiff states that even though the land was blocked out with a roadway on the Plan 6004 on paper, such blocks were never barb wired or the road was not used. His position is that he held the beneficial interest of the whole land even though the transfer deeds were written to the sisters. He had produced certain deeds of lease where he had leased out some coconut trees on the land to a relation of his but in cross examination, he had admitted that the lands mentioned in the schedules to the said deeds of lease are different from the corpus of the case in hand. I find that in the evidence of the Plaintiff, it is obvious that he had tried hard to prove that he was holding the beneficial interest. The District Judge who heard the case had analyzed the evidence and held that if the transfer was on a constructive trust, the Plaintiff should have called the witnesses and the Notary which he failed to do. The consideration of Rs.7000/- had been nominal due to the fact that it was between family members. Even then, the

Notary states in the attestation that the Plaintiff, the transferor had admitted that the money was paid earlier to him by the transferee, Padmini Hemalatha.

Another stance taken up by the Plaintiff was that he blocked out the land and did the transfer to purify his ownership rights of the whole land. This explanation has no validity or recognition in the law relating to land. The other two witnesses who gave evidence were the surveyor and another Notary Public but their evidence has not touched upon a constructive trust at all.

I find that the Plaintiff who received the whole land owned by his mother at a time of his need to get a loan from NSB as a big favor from the mother to the son, never retransferred the land to the mother or gave any portion of the land to the sisters as promised to the mother in 1978. He had finally blocked it out and transferred two blocks of land to two sisters after about nine years in 1987. Later on, after ten more years, in 1997 he has filed action, not only against one sister who had held the land and who had applied for loans from the 2nd Respondent Bank and had received the loans by mortgaging the said land but also against the 2nd Respondent Bank.

Sec. 83 of the Trusts Ordinance specifically states that where the owner of the 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 benefit for the owner or his legal representative. Accordingly, the transferor is duty bound to adduce evidence to show that he did not intend to dispose of the beneficial interest of the property. He is obliged to adduce evidence to show the attendant circumstances that there was no intention to transfer the beneficial interest.

In the case in hand there was no evidence to show that there was an agreement on the part of the transferee to re transfer the property back to the Plaintiff. The Plaintiff's explanation that the transfer was done to clear the title to his property does not hold water because if one wants to have clear title which he is enjoying with others, all what had to be done was to file a partition action. I hold that the Plaintiff has failed to prove that he did not intend to transfer the beneficial interest.

The High Court of Civil Appeal has held that there was continuous possession by the Plaintiff of the said land but having gone through the evidence, I find that the evidence before court was not sufficient to come to that conclusion. The burden of proof vests in the Plaintiff to show that he was in continuous possession. That fact was not proved. The High Court has erred regarding the proper value of the land not having been placed as consideration in the transfer deed by not having seen the value as of that date and also not having taken into account that these were transactions within the family of the mother, brother and sisters. The District Judge who saw the witness, heard the witness and watched the demeanor of the witness had analyzed the evidence properly but the High Court had presumed many matters without having read the evidence in the proper perspective. In this regard I would like to **quote Somawansa J in Sumanawathie Vs Bandiya and Others 2003, 3 SLR 278 as follows:** “ In deciding these questions of fact the learned District Judge was in a better position than me and had the advantage of seeing, hearing and observing the demeanor of the witnesses who were called to testify to the matter in issue.”

I answer the questions of law in favor of the 1st Defendant Respondent Appellant and the 2nd Defendant Respondent Respondent, the Seylan Bank and against the Plaintiff Appellant Respondent. I do hereby set aside the judgment of the Civil Appellate High Court dated 14.03.2013 and affirm the judgment of the District Court dated 06.12.2004.

The Appeal is allowed with costs of suit.

Judge of the Supreme Court

Anil Gooneratne J.

I agree.

Judge of the Supreme Court

H.N.J. Perera J.

I agree.

Judge of the Supreme Court

