

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

Panambarage Jude Fernando  
No.154, Chilaw Road  
Manaweriya  
Kochchikade.

**Plaintiff**

**S.C. Appeal No.175/2010**

**Vs.**

**WP/HCCA/GPH 177/03**

**D.C. Negombo Case No.5312/L**

1. Hetti Thanthirige Anesta Malani  
Fernando
2. Jayakodige Jerrad Fernando  
Both of No.46  
Owitiyawatte  
Kochchikade.

**Defendants**

**And Between**

Panambarage Jude Fernando  
No.154, Chilaw Road  
Manaweriya  
Kochchikade.

**Plaintiff-Appellant**

**Vs.**

1. Hetti Thanthirige Anesta Malani  
Fernando
2. Jayakodige Jerrad Fernando  
Both of No.46  
Owitiyawatte  
Kochchikade.

**Defendants-Respondents**

**And Now**

In the matter of an appeal in terms of Section 5(c) of the High Court of the Provinces (Special Provinces) (amendment) Act No.54 of 2006.

Panambarage Jude Fernando  
No.154, Chilaw Road  
Manaweriya  
Kochchikade.

**Plaintiff-Appellant-Petitioner**

**Vs.**

1. Hetti Thanthirige Anesta Malani  
Fernando
2. Jayakodige Jerrad Fernando  
Both of No.46  
Owitiyawatte  
Kochchikade.

**Defendants-Respondents-  
Respondents**

Before : Sisira J.De Abrew, J.  
Upaly Abeyrathne, J.  
Anil Gooneratne, J.

Counsel : Kuvera de Zoysa PC for the Plaintiff-Appellant.  
Athula Perera for the Defendant-Respondents.

Written submission  
filed on : 6.4.2011 by the Plaintiff-Appellant  
25.7.2011 by the Defendant-Respondent

Argued On : 27.07.2016, 28.07.2016 and 04.08.2016

Decided on : 17.1.2017

**Sisira J. De Abrew, J.**

This is an appeal by the plaintiff-appellant-petitioner (hereinafter referred to as the plaintiff-appellant) against the judgment of the Civil Appellate High Court dated 29.10.2009 wherein the Judges of the Civil Appellate High Court affirmed the judgment of the learned District Judge. The learned District Judge by his judgment dated 25.04.2012, held in favour of the 1<sup>st</sup> defendant-respondent-respondent (hereinafter referred to as the 1<sup>st</sup> defendant). Being aggrieved by the judgment of the Civil Appellate High Court, the plaintiff-appellant has appealed to this Court. This Court by its order dated 8.12.2010 granted leave to appeal on the questions of law set out in paragraphs 9(b), (c) and (d) of the petition dated 23.03.2010 which are set out below –

- b) Have the learned District Judge and the learned High Court Judge erred in deciding that the deed P2 is one which is executed as a mere trust and that it is not a legally valid document which transfers beneficial interest of property unto the Petitioner thus wrongfully analysing the law of trust as opposed to the law of ownership of property?
- c) Based on 8 (b) above have the learned Judges of the District Court and the High Court wrongly analysed and misinterpreted section 83 of the Trust Ordinance and section 2 of the Prevention of Frauds Ordinance.
- d) Have the learned judges failed to analyse the evidence which leads to the conclusion that all ingredients constituting the concept of the law on ownership of property has been established by the Petitioner in his evidence thus entitling him to the reliefs prayed for in the plaint?

The facts of this case may be briefly summarised as follows:-

The original owner of the property in suit was Maria Fernando and after her death, the 1<sup>st</sup> defendant Anesta Malani Fernando became the owner. The 1<sup>st</sup> defendant by Deed No.18580 dated 12.09.1995, transferred the property to Harold Appuhamy on a consideration of Rs.50,000/-. Thereafter, Harold Appuhamy and the 1<sup>st</sup> defendant on 10.10.1995, by Deed No.626 dated 10.10.1995 attested by Dilrukshi Fernando, Notary Public (P2), transferred the property in suit to the plaintiff-appellant. On the same day (10.10.1995) the plaintiff-appellant by Deed No.627 dated 10.10.1995

attested by Dilrukshi Fernando, Notary Public leased the property in suit to the 1<sup>st</sup> defendant for a period of one year. The 2<sup>nd</sup> defendant-respondent-respondent (hereinafter referred to as the 2<sup>nd</sup> defendant) is the husband of the 1<sup>st</sup> defendant. Since the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant failed to handover the vacant possession of the property in suit, the plaintiff-appellant filed this action in the District Court seeking inter alia, a declaration of title; ejectment of the 1<sup>st</sup> and the 2<sup>nd</sup> defendants; and vacant possession of the property in suit.

The 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant filed answer denying the claims of the plaintiff-appellant. The position of the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant was that the 1<sup>st</sup> defendant did not, by Deed No.18580, transferred the beneficial interests to Harold Appuhamy; that it was only a monetary transaction; that she (the 1<sup>st</sup> defendant) obtained Rs.50,000/- from Harold Appuhamy with an oral agreement that Harold Appuhamy would retransfer the property once the amount of Rs.50,000/- is repaid; that it was not an outright transfer; that Harold Appuhamy wanted back Rs.50,000/-; that 1<sup>st</sup> defendant had to seek Rs.50,000/- in order to repay the loan obtained from Harold Appuhamy; that the property in suit was transferred to the plaintiff-appellant by Deed No.626 and obtained Rs.50,000/- from the plaintiff-appellant; that the amount of Rs.50,000/- was paid back to Harold Appuhamy; that the property in suit was kept on security; that she (the 1<sup>st</sup> defendant) never transferred the beneficial interests of the property to the plaintiff-appellant.

Learned President's Counsel for the plaintiff-appellant referring to the issue No.12 submitted that the answer given by the learned District Judge to the said issue was wrong. Issue No.12 was to the effect that the agreement at the time of execution of Deed No.18580 between the 1<sup>st</sup> defendant and Harold Appuhamy was that Harold Appuhamy would be retransfer the property in suit to the 1<sup>st</sup> defendant once the amount of Rs.50,000/- with interest is paid back. The learned District Judge has answered the issue in the following language: "There has been an agreement to retransfer the property". Learned President's Counsel for the plaintiff-appellant submitted that the said agreement was contrary to Section 2 of the Prevention of Frauds Ordinance and invalid. Learned President's Counsel for the plaintiff-appellant relying on Section 91 and 92 of the Evidence Ordinance contended that no oral evidence could be led to contravene what is stated on the face of Deed No.626. He has taken up this contention in paragraph 34 of his written submissions. I now advert to this contention. He relied on the judicial decision in the case of **Perera vs. Fernando** 17 NLR 486 where it was held that -

"where a person transferred a land to another by a Notarial deed purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage and that the transferee agreed to re-convey the property on payment of money advanced."

Learned President's Counsel for the plaintiff-appellant also relied on the judgment in the case of **Serimuttu vs. Thangavelanthan** 55 NLR 529 where the Privy Council held that in formal agreement relied on by A amounted not

to a trust but to a contract for the transfer of immovable property and was therefore invalid as it contravened the provisions of Section 2 of the Prevention of Frauds Ordinance.

In considering the contention of the learned President's Counsel, it is necessary to consider Section 83 of the Trust Ordinance which reads 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."*

As stated by Dr. L.T.M. Cooray in his book on Trust (page 129) the pivotal words in the Section are "intended to dispose of the beneficial interest in the property".

If the principle set out in the above legal literature is to be followed how can an owner of the property in a case under Section 83 of the Trust Ordinance prove that he did not intend to dispose of the beneficial interest in the property?

In order to prove the legal principle discussed in Section 83 of the Trust Ordinance, it is necessary to lead oral evidence between the vendor and the vendee at the time of the Deed of Transfer was executed. If evidence relating to attendant circumstances that the vendor did not intend to transfer the beneficial interest is shut out, then the purpose of Section 83 of the Trust

Ordinance will be rendered nugatory. In this connection I would like to consider the judicial decision in **Muttammah vs. Thyagarajah** 62 NLR 559.

The facts as set out in the headnote of the said judgment are as follows:-

*In September 1941, P. who was entitled to the entirety of a land, donated to T. his son, an undivided half-share of the property. In October 1954, T donated the same half-share back to his father P to enable him, the more easily, to raise a loan of Rs. 20,000 on a mortgage of the entire land. No reservation was made: in favour in the deed of gift of 19-54, but by parolevidence T proved interalia that he continued to remain in possession of his share of the land and 'that: it was expressly understood between the parties that the share should be reconvened to after payment of the mortgage debt. The loan of Rs. 20,000 was never raised, and P died in March 1956. In the present action instituted by T against the executrix de son tort of F's estate, T claimed that the defendant held the half-share in trust for him.*

*It was held that the plaintiff was entitled under section 83 of the Trusts Ordinance to lead parolevidence of " attendant circumstances" at or about the time of the execution of the deed showing that although T transferred his half-share to P in 1954 by what was in form an absolute conveyance it was the intention of the parties that T should retain the beneficial interest in the property and that what was conveyed was only the nominal ownership to P.*

G.P.S. de Silva CJ in the case of **Premawathi vs. Gnanawathi** [1994] 2 SLR 171 following the judicial decision in **Muttammah vs. Thyagarajah** (Supra) held as follows:-

*“An undertaking to reconvey the property sold was by way of a non-notarial document which is of no force or avail in law under section 2 of the Prevention of Frauds Ordinance. However the attendant circumstances must be looked into as the plaintiff had been willing to transfer the property on receipt of Rs. 6000/- within six months but could not do so despite the tender of Rs. 6000/- within the six months as she was in hospital, and the possession of the land had remained with the 1st defendant and the land itself was worth Rs. 15,000/-, the attendant circumstances point to a constructive trust within the meaning of section 83 of the Trusts Ordinance. The "attendant circumstances" show that the 1<sup>st</sup> defendant did not intend to dispose of the beneficial interest.”*

**In Dayawathi and Others vs. Gunaskera and Another** [1991] 1SLR 115

the facts set out in the headnote are as follows:-

*The Plaintiff bought the property in suit in 1955. He started construction work in 1959 and completed in 1961. The Plaintiff, a building contractor, needed finances in 1966 and sought the assistance of the 2nd defendant with whom he had transactions earlier. This culminated in a Deed of Transfer in favour of the 1st Defendant, who is the mother of the 2nd Defendant and the 2nd Defendant being a witness to the Deed. The property was to be re-transferred within 3 years if Rs. 17,000/- was paid. The Plaintiff defaulted, in his action to*

*recover the property, the Plaintiff succeeded in the trial Court in establishing a constructive trust. The Court of Appeal reversed the judgment on the sole ground that the agreement was a pure and simple agreement to re-transfer.”*

His lordship Justice Dheeraratne in the above case held as follows:

*“(i) The Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not bar parole evidence to prove a constructive trust and that the transferor did not intend to pass the beneficial interest in the property.*

*(ii) Extrinsic evidence to prove attendant circumstances can properly be received in evidence to prove a resulting trust.”*

I am in respectful agreement with a view expressed by His Lordship Justice Dheeraratne. After considering the above legal literature, I would like to follow the principle laid down in the case of **Dayawathi and Others Vs. Gunasekera and Another** (Supra) and I hold that Section 2 of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not operate as a bar to lead parole evidence to prove a constructive trust and to prove that the transferor did not intend to dispose of beneficial interest in the property.

For the above reasons I reject the above contention of learned President's Counsel for the plaintiff-appellant.

It was the contention of the plaintiff-appellant before us that Deed No.626 dated 10.10.1995 was an outright transfer and the plaintiff-appellant by virtue of the said deed has become the rightful owner of the property in suit.

It was the contention of the defendant-respondents that the 1<sup>st</sup> defendant by Deed No.626 did not transfer the beneficial interest of the property in suit to the plaintiff-appellant and that the plaintiff-appellant held the paper title of the property subject to a constructive trust in favour of the 1<sup>st</sup> defendant. Therefore the most important question that must be decided in this case is whether the 1<sup>st</sup> defendant by Deed No.626 has transferred beneficial interest of the property in suit to the plaintiff-appellant.

In order to prove the contention of the plaintiff-appellant, he, among other things, relied on the evidence that is to say that prior to the execution of Deed No.626, he made an advance payment of Rs.100,000/- to the 1<sup>st</sup> defendant. He specifically states that on 20.01.1995 he paid an advance of Rs.50,000/- to the 1<sup>st</sup> defendant for the purpose of purchasing this property. The date of Deed No. 626 is 10.10.1995. Although, he takes

up the above position, the Notary Public in her attestation in Deed No.626 does not state this fact. The Notary Public Dilrukshi Fernando in her attestation states that an amount of Rs.50,000/-which was the consideration of the deed was paid in her presence. The plaintiff-appellant was specifically questioned as to why he did not tell the Notary Public that he had paid Rs.100,000/- to the 1<sup>st</sup> defendant. He failed to give an answer to this question (vide 78 of the brief). When the above evidence is considered, his evidence that he paid Rs.100,000/- as an advance payment to the 1<sup>st</sup> defendant prior to the execution of Deed No.626 cannot be accepted and no reliance can be placed on his evidence.

The Deed No.626 was executed on 10.10.1995. The plaintiff-appellant, in his evidence at page 69 of the brief, states that even after the execution of Deed No.626 on 11.10.1995, he paid Rs.100,000/- to the 1<sup>st</sup> defendant. If the Deed No.626 was an outright transfer, there is no obligation on the part of the plaintiff-appellant to pay further sum of money. Thus it can be contended that the plaintiff-appellant has not received the beneficial interest of the property in suit by Deed No.626. During the cross examination of the 1<sup>st</sup> defendant the plaintiff-appellant produced promissory notes marked P9 to P12 (vide page 158 of the brief). The details of P9 to P11 are as follows:--

<b>Promissory Note</b>	<b>Date</b>	<b>Amount</b>
P9	16.10.1995	Rs.100,000

P10	26.12.1995	Rs.52,000
P11	25.03.1996	Rs.40,000

The above details demonstrate that the plaintiff-appellant had made payments to the 1<sup>st</sup> defendant after the execution of Deed No.626 (P2) dated 10.10.1995. The position of the plaintiff-appellant is that by Deed No.626 (P2) he has received the beneficial interest of the property in suit and the 1<sup>st</sup> defendant had transferred the same to him (plaintiff-appellant). If he has got the full title of the property in suit by Deed No.626 and the 1<sup>st</sup> defendant has transferred the beneficial interest to him, why did he make the above payments to the 1<sup>st</sup> defendant after the execution of the deed?

The above evidence demonstrates that the plaintiff-appellant indirectly has admitted that he had not received the beneficial interest of the property in suit. Thus, from the evidence of the plaintiff-appellant itself conclusion can be reached that the plaintiff-appellant had not received the beneficial interest of the property in suit.

On the other hand what does the 1<sup>st</sup> defendant say on the promissory notes? She says that the plaintiff-appellant obtained her signature on empty pro notes as she could not pay the interest on the loan of Rs.50,000/- that she obtained from the plaintiff-appellant. The above evidence establishes that the 1<sup>st</sup> defendant had only obtained a loan and beneficial interest had not been transferred when the Deed No.626 (P2) was executed.

According to Deed No.626 (P2) Harold Appuhamy transferred the property to the plaintiff-appellant. For Harold Appuhamy to transfer the property he should be the owner of the property. But, what does Harold Appuhamy, in his evidence say on this point? He says that the 1<sup>st</sup> defendant requested a loan from him and he granted the loan of Rs.50,000/- keeping the deed of transfer (Deed No.18580) as a security (vide pages 185-190 of the brief). Harold Appuhamy, at page 186 of the brief, specifically states that he did not purchase the property in suit. He further states, in his evidence, that it was a transaction between the 1<sup>st</sup> defendant and him. This evidence clearly shows that Harold Appuhamy has not become the owner of the property and the 1<sup>st</sup> defendant had not passed the beneficial interest of the property in suit to Harold Appuhamy and that he (Harold Appuhamy) was only holding the property in suit on a constructive trust on behalf of the 1<sup>st</sup> defendant. If Harold Appuhamy was not the owner of the property in suit and he was holding a property on a constructive trust on behalf of the 1<sup>st</sup> defendant, the plaintiff-appellant cannot claim that he became the owner of the property in suit and the beneficial interest was transferred to him by Deed No.626 (P2). Therefore, the contention of the plaintiff-appellant that by Deed No.626 (P2) he became the owner of the property in suit fails. If the plaintiff-appellant did not become the owner of the property in suit, Deed No.627 (P3) whereby he is alleged to have leased the property in suit to the 1<sup>st</sup> defendant becomes an invalid deed.

The plaintiff-appellant claims that on 19.12.1996 the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant both left the property in suit and they re-entered the property on 21.12.1996. The plaintiff-appellant has led the evidence of Grama Sevaka to prove that the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant handed over the keys of the house on 19.12.1996 in his presence. The 1<sup>st</sup> defendant in his evidence admitted that she handed over the keys of the house to the Grama Sevaka but came back to the house on the same date. She vehemently rejected the suggestion that she left the premises. Her statement made to the police to prove that she had left the house on 19.12.1996 was produced marked P5. She admits that she made a statement P5 to the police but denies having made the particular statement that she left the house on 19.12.1996. I have carefully gone through her evidence and in my view it is difficult to consider that she (1<sup>st</sup> defendant) had left the house on 19.12.1996. She says in her evidence that the plaintiff-appellant on several occasions threatened her to leave the house but she did not leave.

There is also evidence that she (the 1<sup>st</sup> defendant) paid assessment tax to the relevant local authority even after the execution of Deed No.626; that she continued to occupy the house after the execution of Deed No.626 (P2); that she paid notary's fees when Deed No.626 was executed; that she attempted to get a loan from the State Mortgage Bank to repay the money obtained from the plaintiff-appellant.

Upon a consideration of the totality of evidence led at the trial I observe the following facts.

- 1) Harold Appuhamy says in his evidence that he only granted a loan of Rs.50,000/- to the 1<sup>st</sup> defendant and he did not purchase the land. From his evidence it is clear that he only kept the Deed No.18580 as a security; that the 1<sup>st</sup> defendant did not pass the beneficial interest of the land in suit to Harold Appuhamy; and that Harold Appuhamy held the property in suit on a constructive trust on behalf of the 1<sup>st</sup> defendant. Therefore, Harold Appuhamy by Deed No.626 could not have transferred the beneficial interest of the property in suit to the plaintiff-appellant.
- 2) The 1<sup>st</sup> defendant continued to occupy the property in suit after the execution of Deed No.626 dated 10.10.1995.
- 3) The plaintiff-appellant gave money even after the Deed No.626 (P2) was executed to the 1<sup>st</sup> defendant.
- 4) The plaintiff-appellant got the signature of the 1<sup>st</sup> defendant on empty promissory notes when the 1<sup>st</sup> defendant could not pay the interest on the money given by the plaintiff-appellant. This shows that the plaintiff-appellant had granted a loan to the 1<sup>st</sup> defendant keeping the property in suit as a security.
- 5) The plaintiff-appellant admitted in evidence that the value of the property in suit in January 1995 was Rs.340,000/-. Valuation report submitted by Joseph indicates that the value of the property in March

1996 was Rs.750,000/- (vide Joseph's evidence at pages 191-197)  
The consideration of the Deed No.626 dated 10.10.1995 was only  
Rs.50,000/-.

- 6) Valentine Appuhamy on the request of the 1<sup>st</sup> defendant made an application to the State Mortgage Bank with the consent of the plaintiff-appellant to get a loan in respect of the property in suit to repay the loan obtained from the plaintiff-appellant. The plaintiff-appellant in fact gave a copy of the relevant deed to Valentine Appuhamy. The bank approved a loan of Rs.350,000/-. But later the plaintiff-appellant withdrew his consent that he gave to obtain the loan. Therefore, the loan of Rs.350,000/- could not be obtained from the bank.

When I consider the entire evidence led at the trial and submissions of both parties, I am of the opinion that the 1<sup>st</sup> defendant by Deed No.18580 and/or Deed No.626 have not transferred the beneficial interest of the property in suit to the plaintiff-appellant and that the plaintiff-appellant is holding the property in suit on a constructive trust on behalf of the 1<sup>st</sup> defendant and that the plaintiff-appellant cannot be granted the relief asked for in his plaint and that more reliance can be placed on the case of the 1<sup>st</sup> and the 2<sup>nd</sup> defendants. I therefore hold that there are no reasons to disturb the judgments of the District Court and the Civil Appellate High Court. In view of the conclusion reached above, I answer the questions of law raised by the plaintiff-appellant in the negative.

For the aforementioned reasons, I hold that there is no merit in the appeal of the plaintiff-appellant, I affirm the judgments of the District Court and the Civil Appellate High Court and dismiss this appeal with costs.

The Learned District Judge in his judgment had granted 8 weeks' time from the date of his judgment to the 1<sup>st</sup> defendant to pay Rs.80,000/- and its interest to the plaintiff-appellant. This date should be read as the date that the learned District Judge pronounces the judgment of this Court in the District Court. However, the learned District Judge has a discretion to extend the above time period.

*Appeal dismissed.*

Judge of the Supreme Court

**Upaly Abeyrathne, J.**

I agree.

Judge of the Supreme Court

**Anil Gooneratne, J.**

I agree.

Judge of the Supreme Court

