

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

In the matter of an application for  
Leave to appeal under article 128 of  
the constitution read along with  
section 5 (1) (C) of the High Court  
Special Provisions Act No.1990  
Amended by Act 54 of 2006

SC APPEAL/185/15  
SC HCCA LA 669/14  
CP/HCCA/Kandy 88/2012 FA  
D.C. Kandy Case No.21558/05

Watagodagedara Mallika Chandralatha  
88A, Ihagama, Madawala  
Harispattuwa

**Plaintiff**

Vs.

1. Hearath Mudiyanse Lage Punchi  
Banda  
Doranegama Road,  
Medawela  
Harispattuwa
2. Watagode Gedara Dhammika  
Ranjith Watagodage  
26, Ihagama  
Medawela,  
Harispattuwa

**Defendants**

**And**

Watagodagedara Mallika  
Chandralatha  
88A, Ihagama,  
Medawela  
Harispattuwa

**Plaintiff-Appellant**

Vs

1. Hearath Mudiyansele Punchedi Banda  
Doranegama Road,  
Medawela  
Harispattuwa
2. Watagodagedara Dhammika  
Ranjith Watagodage  
26, Ihagama  
Medawela,

**Defendants-Respondents**

**And now between**

Watagodagedara Mallika  
Chandralatha  
88A, Ihagama, Medawala  
Harispattuwa

**Plaintiff-Appellant-Petitioner**

Vs.

1. Hearath Mudiyansele Punchedi Banda  
Doranegama Road, Medawela,  
Harispattuwa

2. Watagode Gedara Dhammika  
Ranjith Watagodage  
26, Ihagama  
Medawela,  
Harispattuwa

**Defendants-Respondents-Respondents**

**BEFORE:**            B.P.ALUWIHARE, PC. J,  
                             ANIL GOONERATNE, J &  
                             K.T.CHITRASIRI, J.

**COUNSEL:**            S.N..Vijithsingh with Abindra Perera for the Appellant.  
                             Respondents are absent and unrepresented

**ARGUED ON:**            15<sup>th</sup> July, 2016.

**DECIDED ON:**        04 December 2017

ALUWIHARE, PC, J:

The Plaintiff-Appellant-Appellant (hereinafter referred to as the Plaintiff) filed action in the District Court against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant-Respondents-Respondents (hereinafter referred to as 1<sup>st</sup> and 2<sup>nd</sup> Defendants, respectively) and sought a declaration against the 1<sup>st</sup> Defendant that the property which is the subject matter of this case is held by the 1<sup>st</sup> Defendant in trust for her, and to declare the deed of transfer executed by the 1<sup>st</sup> Defendant in favour of the 2<sup>nd</sup> Defendant, null and void.

The learned District Judge gave judgment in favour of the defendants and dismissed the action of the Plaintiff on the basis that the Plaintiff had failed to prove her case on a balance of probability.

The High Court of Civil Appeals by its judgment dated 11th November, 2014, dismissed the appeal of the Plaintiff and affirmed the judgment of the learned District Judge which judgment the Plaintiff is challenging before this court.

This court granted leave to appeal on the following questions of law:

- i. Did the Honourable Judges of the High Court of Civil Appeal err in law by coming to the conclusion that there was no proof of a constructive trust as the Honourable Judges of the High Court of Civil Appeals failed to consider the evidence in relation to the attendant circumstances which are sufficient to prove a constructive trust, in that the Petitioner remained in possession of the property for nearly 10 years after executing the Deed of Transfer marked 'P5'.
- ii. Whether the Honourable Judges of The High Court of Civil Appeals erred in law by not considering the questions that the Petitioner never intended to part with the beneficial interests (of the property) in the circumstances of the case.
- iii. Whether the Honourable Judges of the High Court of Civil Appeals err in law by holding that no constructive trust exists in the circumstances of this case.

The facts relating to this action are as follows:

The Plaintiff became the owner of the property in suit through inheritance and the transfer to her of their shares by some of her relatives. She, along with her husband lived in the house that was standing thereon, approximately 27 perches in extent. In addition, there is one other building standing there on that was used by the plaintiff and her husband who were engaged in the business of running a bakery.

There had been two distinct transactions germane to this action where the Plaintiff was involved.

According to the Plaintiff, in the year 1999, she borrowed a sum of Rs. 20,000/- from the 1<sup>st</sup> Defendant whom the plaintiff claimed, is a money lender. This assertion remains un-assailed. In furtherance of this transaction the plaintiff executed a deed P5, which is dated 5<sup>th</sup> July, 1999. The deed P5, is ex facie, a deed of transfer for a consideration of Rs.20, 000. Plaintiff in her evidence had said that the value of the property is approximately Rupees five hundred thousand (Rs.500, 000).

The Plaintiff, however entered into a second transaction in December of that year with the 2<sup>nd</sup> Defendant, who happened to be her own cousin, the 2<sup>nd</sup> Defendant being the son of the Plaintiff's mother's brother.

Whereby the Plaintiff leased an undivided portion of the property in suit, an extent, 30 feet by 20 feet to the 2<sup>nd</sup> Defendant for a sum of Rs.15, 000, for a period of 15 years in 1999. The lease which had been notarially executed, was produced at the trial (P6). The said indenture (P6) permits the lessee (2<sup>nd</sup> Defendant), at his expense, to put up a structure with a concrete roof on the portion of the land leased out to him. Further the indenture estops the 2<sup>nd</sup> Defendant from demanding any payment in respect of the expenses incurred for the construction of the building.

It appears that, as per the lease agreement, the 2<sup>nd</sup> Defendant has put up a structure and has been carrying on his business activities from that location since then.

In the year 2005, a dispute had arisen between the 2<sup>nd</sup> Defendant and the Plaintiff when the 2<sup>nd</sup> Defendant made an attempt to prepare a building site on the property in suit and the 2<sup>nd</sup> Defendant had disclosed that he had purchased the property from the 1<sup>st</sup> Defendant. Plaintiff had promptly lodged a complaint to that effect with the Galagedara Police which had been produced at the trial marked P8.

In the said statement the Plaintiff had taken up the position that she borrowed Rs.20, 000 from the 1<sup>st</sup> Defendant and that she continued to pay the interest and when she approached the 1<sup>st</sup> defendant to settle the amount borrowed and to have the property redeemed, the 1<sup>st</sup> Defendant had informed that he had sold the property in question to the 2<sup>nd</sup> Defendant.

It was then that the Plaintiff had taken the initiative to file an action in the District Court against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

The 1<sup>st</sup> Defendant after filing answer had not participated in the trial. The trial against the 1<sup>st</sup> Defendant had proceeded *ex parte* while the 2<sup>nd</sup> Defendant had contested the case, claiming the land and had taken part in the proceedings.

Both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not respond to the notices issued by this court when this matter was supported for leave to appeal and also at the hearing. Both were throughout absent and unrepresented. That had been the case before the High Court of Civil Appeals as well

At the hearing of this case, the learned counsel for the Plaintiff-Appellant, strenuously argued that both the District Court and the High Court of Civil Appeals, had totally misdirected themselves with regard to the requirement of attendant circumstances which are vital to bring a transfer of property within the meaning of Section 83 of the Trust Ordinance.

It was pointed out by the learned counsel that there had been a total failure on the part of the learned District Judge to evaluate the evidence in the correct perspective and on the other hand had failed to consider vital items of evidence in arriving at his conclusions. The learned counsel submitted that the misdirections on the part of the District Judge and the same lapses, had permeated the judgment of the High Court of Civil Appeals and they too failed to appreciate evidence placed before the court by the Plaintiff which had gone largely unchallenged.

The learned counsel drew the attention of the court to a passage of the judgment of the High Court wherein the learned judges of the High Court of Civil Appeals had referred to the position taken up by the Plaintiff which is reproduced below:

*“The second contention of the appellant is that the 1<sup>st</sup> respondent (1<sup>st</sup> Defendant) had not appeared in the trial court, therefore, since his (her) evidence was unchallenged, the learned District Judge could have acted on his (her) evidence. But what the appellant (Plaintiff) has forgotten is that the same evidence had been challenged by the 2<sup>nd</sup> respondent (2<sup>nd</sup> defendant) as he had totally denied of the existence of a trust between the parties. (The emphasis is mine)*

I am of the view that the High Court of Civil Appeals fell into the same error made by the learned District Judge, when they too made the same observation, and if the learned District Judge had decided the non-existence of a trust, based on the denial by 2<sup>nd</sup> Defendant of the existence of the same, as claimed by the judges of the High Court of Civil Appeals, their finding cannot be correct, for the reason that the 2<sup>nd</sup> Defendant was not privy to any of the transactions that took place between the Plaintiff and the 1<sup>st</sup> Defendant which were solely between two of them.

The 2<sup>nd</sup> Defendant came into the picture only seven months after the transaction between the Plaintiff and the 1<sup>st</sup> Defendant and seven months after the deed P5 was executed as well. He came to the land only as a lessee and that transaction was also confined to the plaintiff and the 2<sup>nd</sup> Defendant as the 1<sup>st</sup> Defendant was not even in the picture as far as the transaction relating to the lease. Similarly that transaction was confined to the plaintiff and the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant was never privy to the lease in question.

Then, what knowledge did the 2<sup>nd</sup> Defendant had to speak with regard to the existence of a trust? If at all, it would have been necessarily based on knowledge gained from third parties and would tantamount to hearsay and cannot be acted upon in the absence of any other person who had first-hand knowledge giving evidence on the issue.

The main issue that this court is called upon to decide is whether the facts adduced in this case are sufficient to establish a constructive trust and whether the High Court of Civil Appeals gave its mind to the said issue in the correct perspective.

Before I consider the issue referred to above, I wish to refer to the evidence of the 2<sup>nd</sup> Defendant, albeit briefly.

2<sup>nd</sup> Defendant admitted that the Plaintiff is in possession of the impugned property and she was living there even on the date he testified in court. He also admitted that a portion of the land was given to him on a lease by the Plaintiff for a period of 15 years and as per the Indenture of lease, he put up a structure. It is significant that the 2<sup>nd</sup> Defendant had said, that after the lease was executed, he came to know that the Plaintiff has transferred the property in favour of the 1<sup>st</sup>

Defendant. In the year 2004, the 2<sup>nd</sup> Defendant says he bought the property from the 1<sup>st</sup> Defendant, but did not request the Plaintiff to vacate the same, nor did he take any steps to cancel the lease, even after he bought the property. In his evidence, the 2<sup>nd</sup> Defendant had stated that he requested the Plaintiff to have the property redeemed, but he was told by the Plaintiff that she is not in a position to do so and it was thereafter that he got the property transferred in his name. What is also significant is, upon coming into occupation of the land consequent to the lease and before he bought the property from the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant had put up a building on the land and had carried on business for about three years, but the 1<sup>st</sup> Defendant neither raised any objection nor took any action to evict him from the property.

With regard to the inaction on the part of the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant had said that the 1<sup>st</sup> Defendant complained to him and he in turn requested the Plaintiff to get the property redeemed, but the Plaintiff did not do so. The 2<sup>nd</sup> Defendant had said that after a lapse of about 2 to 3 years he (the 2<sup>nd</sup> Defendant) bought the property from the 1<sup>st</sup> Defendant.

The applicable law:-

Section 83 of the Trust Ordinance states that:

*“Where the owner of a property transfers or bequeaths it, and it cannot reasonably be inferred consistently with 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”*

One needs to bear in mind that where a constructive trust within the meaning of Section 83 of the Trust Ordinance is asserted, it is incumbent on the court to meticulously examine the evidence placed before the court, the reason being, on the face value the evidence placed may give the appearance of a straight forward transaction of a sale but the real intention of the parties can only be gleaned from a close scrutiny of the circumstances under which the transaction was effected. And the intention of the parties is of paramount importance.

It is in this context that our courts have consistently held that the provisions of the Prevention of Fraud Ordinance and Section 92 of the Evidence Ordinance do not bar parole evidence to be led to establish the attendant circumstances

contemplated in Section 83 of the Trust Ordinance, when a court is called upon to decide on the intention of the parties, in relation to transfer of property.

This aspect was considered in the case of *Dayawathie and others Vs. Gunesekera and another* 1991 1SLR 115 as well as in the case of *Muttamma Vs. Thiagaraja* 62 NLR 559. In the case of Thiagaraja (supra) Fernando J (as he then was) in reference to Section 2 of the Prevention of Fraud Ordinance and Section 92 of the Evidence Ordinance stated that;

*"The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise, but only to establish an "attendant circumstances" from which it could be inferred that the beneficial interest did not pass. Although that promise was of no force or avail in law by reason of section 2 of the Prevention of Frauds Ordinance, it is nevertheless a fact from which an inference of the nature contemplated in section 83 of the Trusts Ordinance properly arises. The Prevention of Frauds Ordinance does not prohibit the proof of such an act. If the arguments of counsel for the appellant based on the Prevention of Frauds Ordinance and on section 92 of the Evidence Ordinance are to be accepted, then it will be found that not only section 83, but also many of the other provisions in chapter IX of the Trusts Ordinance will be nugatory. If for example "attendant circumstances" in section 83 means only matters contained in an instrument of transfer of property, it is difficult to see how a conveyance of property can be held in trust unless indeed its terms are such as to create an express trust".*

As referred to earlier in a case of this nature a court cannot ignore the attendant circumstances adduced and is required to give its mind to circumstances established and decide, as to whether it can be reasonably inferred that the parties concerned did not intend to part with the beneficial interest of the property.

At this point I wish to refer to the views expressed by L.J.M Cooray with approval, in his book "**The reception in Ceylon of the English Trust 1971**"

*"No doubt as held in the case of Sinna Lebbe v. Pathumma 3. C.L R 98 and Fernando v. Fernando 35 N.L.R 154, where a person has a notarial conveyance in his favour, courts have placed a burden on the transferor to prove facts bringing himself within Section 83 of the Trust Ordinance. Once a party adduces facts (circumstances) in that respect, the court, however,*

*has a duty to consider the cumulative effect of circumstances so placed before arriving at a finding on the issue. Although our courts have in several judgements referred to several facts that a court ought to consider in deciding this issue, one must bear in mind it is not an exhaustive list of attendant circumstances, as, a circumstance is attendant or not would depend on the facts of each case.*

*Thus, the court cannot move away from its responsibility of scrutinising these facts in the backdrop of the peculiarities of the case before it. In most of these transactions, the transferor or the borrower if it's a case of loan, is motivated by the need to overcome a dire financial circumstance and a money lender on the other hand will endeavour to secure the collateral with minimum of conditions. It is in that context that we see, even in a case of lending money, the transfer is one that is straightforward, bereft of any conditions.” (Emphasis added)*

Scrutiny of the judgment of the learned District Judge reveals that, apart from a sweeping statement holding that the Plaintiff had failed to establish a constructive trust, the learned District judge had failed to give his mind to numerous “circumstances” that the court ought to have given its mind to, in order to draw inferences as to the intention of the parties.

The High Court of Civil Appeals in its albeit brief judgment had also not referred to any of the attendant circumstances adduced on behalf of the Plaintiff.

On the face value of the impugned deed P5, the land in extent of 27 perches, with two buildings standing thereon had been sold for Rs.20,000/-. The Plaintiff had stated that its true value is around Rs.500,000/-.The 2<sup>nd</sup> Defendant in his evidence, presumably giving evidence with an intention to safeguard his rights had said that, the value of the property is between Rs.50,000 or Rs.100, 000. Even going by the conservative estimate of the 2<sup>nd</sup> Defendant, the value of the property is five times more than what is stated in the deed of transfer P5.

Furthermore, the Plaintiff had leased out a portion of 30 feet by 20 feet out of the land 27 perches in extent to the 2<sup>nd</sup> Defendant for a period of 15 years for a sum of Rs.15, 000. If that be the case, the actual value of the land necessarily has to be far in excess of Rs.20, 000.

On the other hand, the Plaintiff by leasing out a portion of the land to the 2<sup>nd</sup> Defendant even after the execution of the deed of transfer in favour of the 1<sup>st</sup> Defendant (P5) demonstrates that the Plaintiff had acted as the owner of the impugned property.

Even when one considers the conditions of the lease, which says the lessee (2<sup>nd</sup> Defendant) is required to leave the improvement made to the leased-out portion of the land and the lessee is not entitled to claim any payment for such improvements from the Plaintiff. This condition of the lease is another factor that demonstrate again, that the Plaintiff intended to enjoy the property, after the expiry of the lease. The 1<sup>st</sup> Defendant, the purported owner, on the other hand did not raise a whimper of protest when the 2<sup>nd</sup> Defendant put up a structure on the property in suit and carried on business, which could hardly considered as the natural and a probable conduct of an owner of a property.

The impugned deed P5 was executed in 1999. Neither the 1<sup>st</sup> Defendant nor the 2<sup>nd</sup> Defendant who claims he purchased the property in suit from the 1<sup>st</sup> Defendant, had taken any step to evict the Plaintiff from the property.

It was the Plaintiff who lodged a complaint in 2005 (P7) with the Police, when the 2<sup>nd</sup> Defendant made an attempt to clear a portion of the land and sought the intervention of the Police in preventing the 2<sup>nd</sup> Defendant effecting any changes to the property.

Plaintiff in her evidence has said that the 1<sup>st</sup> Defendant is a moneylender, which has not been controverted. It is the position of the Plaintiff that they continued to pay the interest as agreed and when they approached the 1<sup>st</sup> Defendant to have the property re-transferred upon accepting the capital which was Rs.20, 000/-, the 1<sup>st</sup> Defendant avoided them. There appears to be some credence to this assertion of the Plaintiff. The Defendant after filing an answer, did not take part in the trial before the District Court nor did he appear before the High Court of Civil Appeals.

The 2<sup>nd</sup> Defendant (the lessee) who happened to be a cousin of the Plaintiff admitted in his testimony that he did not keep the Plaintiff informed from whom he leased the property that he is planning to buy the land from the 1<sup>st</sup> Defendant.

The suppressing of this transaction exposes the sinister motives on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Neither the learned District Judge nor the judges of the High Court of Civil Appeals, had discredited the evidence of the Plaintiff. The only reason both courts held in favour of the Defendants was that the plaintiff had not adduced attendant circumstances from which could be drawn the inference that the Plaintiff had not intended to dispose of the beneficial interest of the property.

It appears that both the District Court and the High Court of Civil Appeal ignored all the circumstances referred to above, and fell into error, treating the transaction between the Plaintiff and the 1<sup>st</sup> Defendant as a straight forward sale.

I have mentioned earlier in this judgement that the 1<sup>st</sup> Defendant did not challenge the evidence adduced by the Plaintiff which evidence High Court of Civil Appeals have ignored. To reiterate, the High Court of Civil Appeals fell in to the same error when it concluded that there was no trust on the basis of the 2<sup>nd</sup> Defendant's evidence, whereas the evidence clearly showed, that the 2<sup>nd</sup> Defendant was not privy to the transaction between the Plaintiff and the 1<sup>st</sup> Defendant.

It was only the 1<sup>st</sup> Defendant who was capable of shedding a different light on the transaction between the parties and the failure of the 1<sup>st</sup> Defendant to do so strongly militate against any argument that deed of transfer (P5) was an out and out transfer between the Plaintiff and the 1<sup>st</sup> Defendant.

Considering the attendant circumstances, I am of the view that the transaction was only a nominal transfer and the Plaintiff had only pledged her property to obtain a loan. Accordingly, I answer the questions of law on which leave was granted as follows:

- (i) The High Court of Civil Appeal erred in law by arriving at the conclusion that there was no proof of a constructive trust.
- (ii) The High Court of Civil Appeal erred in law by not considering the question that the Plaintiff never intended disposal of the beneficial interest of the impugned property.

(iii) The High Court of Civil Appeal erred by holding that there was no constructive trust exists in the circumstances of this case.

Accordingly, both the judgment of the High Court of Civil Appeals dated 11<sup>th</sup> November, 2014 and the judgment of the learned District Judge dated 29<sup>th</sup> July, 2011 are hereby set aside.

I further hold that Plaintiff is entitled to relief prayed in prayers (අ) and (ආ) of the plaint of the plaintiff dated 10<sup>th</sup> February, 2005. The learned District Judge of Kandy is directed to enter decree accordingly.

The Plaintiff is entitled to the cost of this court and the courts below.

**JUDGE OF THE SUPREME COURT**

**JUSTICE ANIL GOONARATNE**

I agree.

**JUDGE OF THE SUPREME COURT**

**JUSTICE K.T.CHITRASIRI**

I agree.

**JUDGE OF THE SUPREME COURT**