

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

Jayanthi Chandrika Perera
No.132/2, Kolonnawa Road,
Dematagoda, Colombo
Presently at
No.161, Hospital Road,
Kalubowila, Dehiwala

Defendant-Petitioner-Appellant

S.C.Appeal No.83/2014
SC/HCCA/LA No. 210/13
WP/HCCA/MT/No. 48/2011/F
D.C.Mt. Lavinia No. 1788/03/L

Vs.

D. Don Chandrakumara
No. 161, Hospital Road,
Kalubowila, Dehiwala
Presently at
No.167/6 Hospital Road,
Kalubowila, Dehiwala

Plaintiff-Respondent-Respondent

BEFORE : **B.P. ALUVIHARE, PC, J.**
PRIYANTHA JAYAWARDENA, PC, J.
K.T.CHITRASIRI, J.

COUNSEL : W. Dayaratne, PC with R.Jayawardane for the
Defendant-Petitioner-Appellant

M.U.M.Ali Sabry, PC with Nuwan Bopage and
Samhan Munzir for the
Plaintiff-Respondent-Respondent

ARGUED ON : 17.11.2016

WRITTEN SUBMISSION ON : 19.11.2016 by the Defendant-Petitioner-Appellant.
15.12.2016 by the Plaintiff-Respondent-Respondent

DECIDED ON : 24.03.2017

CHITRASIRI, J.

This is an action filed in the District Court of Mt. Lavinia by the plaintiff-respondent-respondent (hereinafter referred to as the plaintiff) seeking inter alia for a declaration that the plaintiff is the owner of the premises described in the schedule to the plaint dated 17th September 2003. He has also sought for a declaration that the defendant-petitioner-appellant (hereinafter referred as the defendant) is holding the said property as a trust in his favour. He has further prayed for an order to have the aforesaid property, transferred in his name upon payment of a sum of Rs.2,100,000/= (Two million one hundred thousand) to the defendant and also to recover Rs.100,000/= per month as damages.

The defendant filed her answer denying most of the averments in the plaint and has pleaded that she is the absolute owner of the premises in suit in view of the deed bearing No. 9222 attested by D.W.Pathinayake, Notary Public that was marked as P9 in evidence. Accordingly, she has prayed that the action of the plaintiff be dismissed. The case proceeded to trial on 25 issues and the learned District Judge

by his judgment dated 08th March 2011 held with the plaintiff having determined that the defendant is holding the property subject to a constructive trust in favour of the plaintiff.

The defendant filed an appeal in the Civil Appellate High Court, challenging the aforesaid judgment of the learned District Judge and in that appeal he sought to have the judgment in the District Court set aside. Learned Judges in the Civil Appellate High Court dismissed the appeal and affirmed the judgment of the learned District Judge. Being aggrieved by the aforesaid decision, defendant filed this appeal in the Supreme Court. This Court, granted leave to proceed with the appeal, on the questions of law referred to in paragraph 14 of the petition of appeal dated 04th June 2013.

Basically the question of law that is to be answered in this appeal revolves round the issue i e; whether the defendant is holding the property referred to in the schedule to the plaint as a constructive trust in favour of the plaintiff. Therefore, it is clear that the plaintiff is relying upon Section 83 of the Trust Ordinance to have his reliefs obtained in his favour. Section 83 of the Trust Ordinance reads thus:

“Where the owner of a property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the

beneficial interests therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.”

I shall now turn to consider the merits of this appeal. It is the burden of the plaintiff to establish that he did not intend disposing the beneficial interest when he parted with his rights in the property in question. A heap of authorities is found to determine the manner in which Section 83 of the Trust Ordinance had been applied when a claim is made relying upon the same. Before referring to those decisions, I will briefly refer to the facts of this case.

Admittedly, the plaintiff became the owner of the premises in suit by executing the deed of gift bearing No.163 dated 5th January 1992 which was marked P1, in evidence. Thereafter, he has transferred this property to Vajira Samarawickrama by the deed bearing No.3303 dated 12th January 2000, marked P2. The plaintiff in his evidence has stated that the aforesaid deed 3303 was executed in order to obtain a loan from “The Finance Company” for the benefit of the plaintiff and purpose of which was to construct a building on the land in question. Aforesaid Samarawickrama gave evidence in this case and he has clearly stated that he only helped the plaintiff to raise a loan and the money obtained from the Finance Company was given to the plaintiff to construct a

building on the land. He also has stated that the loan was serviced by the plaintiff having paid the due installments by the plaintiff himself.

Evidence of Samarawickrama in this regard is as follows:

ප්‍ර. දැන් ද පිනැන්ස් එකෙන් ණයක් ගත්තද?

උ. මගේ ඥාති සහෝදරයා වන පැමිණිලිකරුට නුගේගොඩ ද පිනැන්ස් ආයතනයෙන් ණය ගත්තා. ණය ගැනීම සඳහා ඔක්කොම කටයුතු කලේ පැමිණිලිකරු.

ණය ලාබා දුන්නේ මගේ නමට. නමුත් ටෙක් එක ගත්තේ පැමිණිලිකරු.

එයා ණය ගන්න පෙර අයියාගේ දේපලක් මට පවරා තිබුණා. එම ලේඛණය පැ.2 ලෙස ලකුණු කරනවා. ලක්ෂ 20 ක මුදලක් ගත්තේ.

එම මුදල ගන්නකොට ද පිනැන්ස් ආයතනයට යම් දේපලක් සුරක්ෂිතයක් ලෙස තබන්න කිව්වා. ඒ සඳහා කලබෝවල ඒ නිවස තිබ්බා. ඒ ඉඩම ණය මුදල සඳහා උගසට තියෙනකොට අයිතිවෙලා තිබුණේ පැමිණිලිකාර අයියට අයිතිව තිබුණේ. මගේ නමට ඒ ඉඩම උගස් කලා.

ප්‍ර. ද පිනැන්ස් සමාගම අයියගේ නම තිබුණ ඉඩම බාර ගන්න කැමති වුණාද? මිලියන දෙකක් දෙන්න?

උ. ඔව්.

ප්‍ර. ඒ වෙලාවේ උකස් තබන්න බලාපොරොත්තුවන දේපලේ අයිතිය තිබුණේ ඥාති සහෝදරයා වන පැමිණිලිකාර චන්ද්‍රකුමාරටයි කියා කිව්වා?

උ. ඔව්.

ප්‍ර. ද පිනැන්ස් සමාගම කැමති වුනාද ටන්ද්‍රකුමාර නමින් එය ලාබාගෙන ණය දෙන්න?

උ. නැහැ. මගේ නමට දෙන්න කැමතිවුනේ.

ඊට පසුව මගේ නමට විකුණුම්කරයක් හැඳුවා. ඒක තමයි පැ.2 ලෙස ලකුණු කලේ. මේ නඩුවට අදාල දේපල පැමිණිලිකාර ටන්ද්‍රකුමාර විසින් මගේ නමට හැරවීවේ ඒ පැ 2 ඔප්පුවෙන්. මෙම දේපල සම්බන්ධයෙන් ඇත්ත වශයෙන්ම විකිණීමක ආකාරයෙන් කිසිම ගනුදෙනුවක් සිදුවුනේ නැහැ. ඒ සඳහා මම ටන්ද්‍රකුමාරගෙන් සත පහක්වත් අරන් නැහැ. පැමිණිලිකරුගේ උපදෙස් පිට මම මේක කලේ.

ප්‍ර. දැන් පැ.2 ඔප්පුව ප්‍රකාරව පැමිණිලිකරු කිව්ව ආකාරයට මේ දේපල තමන්ගේ නමට පැවරුවානේ. ඊට පස්සේ එම දේපල නැවත වතාවක් ද පිනැන්ස් ආයතනයට උකස් කළාද?

උ. ඔව්.

උකස් තබා ලක්ෂ 20 ක් ගත්තා.

ප්‍ර. ලක්ෂ 20 ක් ලබා ගැනීම සඳහා සකස් කරන ලද උකස් ඔප්පුව තමයි මේ පැ. 3 ලෙස ලකුණුකර තිබෙන්නේ?

උ. ඔව්.

(vide at page 244 in the appeal brief)

Accordingly, it is clear that the transfer effected in favour of Vajira Samarawickrama was merely to obtain a loan for the benefit of the plaintiff. Hence, it is seen that the plaintiff had no intention to transfer

the beneficial interest of the property to Vajira Samarawickrama when the deed 3303 marked P2 was executed. Samarawickrama has also stated that he never paid any loan installment to the Finance Company to settle the loan. Admittedly, all the loan installments had been paid by the plaintiff.

Thereafter, aforesaid Vajira Samarawickrama has transferred the property by deed No.9222 marked P9 which was attested by D.W.Pathinayake, Notary Public on 09th April 2003 in the name of the defendant namely, Jayanthi Chandrika Perera. It is this deed that is being challenged by the plaintiff stating that it is not an outright transfer but it was executed with the intention of him retaining the beneficial interest of the property.

Following are some of the decisions that show the manner in which the issues similar to the question in hand are to be considered, having regard to Section 83 of the Trust Ordinance. In the case of **Piyasena Vs. Don Vansue [1997 2SLR at page 311]**, it was held thus:-

“Even though a transfer is in the form of an outright sale it is possible to lead parole evidence to show that facts exist from which it could be inferred that the real transaction was either.

(i) money lending, where the land is transferred as a security as in this case or,

(ii) *a transfer in trust-in such cases section 83 would apply;*

(iii) ***A trust is inferred from attendant circumstances.***

The trust is an obligation imposed by law on those who try to camouflage the actual nature of a 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”

(emphasis added)

In the case of **Carthelis Vs. Ranasinghe, [2002 (2) SLR 359]** importance of looking at the intention of the parties when parting with the beneficial interest of a particular property had been considered as a material fact when looking at the attendant circumstances. In **Perera Vs. Fernando and Another [2011 (2) SLR 192 / 2011 BLR at 263]** Suresh Chandra J held as follows:

“...It would be necessary to conclude that both transfers did not convey absolute title to the transferees and that they held the property in trust for the transferor as the transferor in both instances had not intended to convey the beneficial interest in respect of he property. This is in line with the principle laid down in Section 83 of the Trust Ordinance.”

In the circumstances, it is now necessary to consider the attendant circumstances in relation to the execution of the deed P9 in order to determine the intention of the plaintiff on the issue of transferring the beneficial interest of the property in question. In fact, it is the requirement that is to be considered under Section 83 of the Trust ordinance.

Transferor of the deed marked P9 namely, Vajira Samarawickrama has clearly stated that he held the property not for his benefit but it was held by him for and on behalf of the plaintiff. It is also in evidence that the plaintiff at one stage has failed to service the loan obtained from the Finance Company. Under those circumstances, the plaintiff has requested his brother-in-law Gamini Vithanage to help him servicing the loan. Plaintiff's evidence is that he requested said Gamini Vithanage to help him by giving him a loan amounting to Rs.2100,000/= in order to pay the Finance Company. The evidence to that effect adduced by plaintiff is found at page 166 in the appeal brief and it reads as follows:

“මේ කාලය තුළ මම ද පිනූන්ස් සමාගමට බදු මුදල් ගෙවීම් අමාරුවෙන්. ද පිනූන්ස් සමාගමෙන් ආවා. මට ගෙවන්න පුළුවන්කමක් තිබුණේ නැහැ. විත්තිකාර ජයන්ති ටන්ද්‍රිකා පෙරේරා මගේ නෝනාගේ අයිසාගේ භාර්යාව. මෙම නඩුවේ විත්තිකරු මගේ නෝනාගේ අයිසාගේ භාර්යාව. මට බදුමුදල් ගෙවන්න අපහසු වුනාම අයිසා අපේ ගෙදර එන නිසා, ඔහු කිව්වා උදව්වක්

ලෙස මුදල් ගෙවන්නම්, කැමති දවසක ගෙවන්න කියලා. විත්තිකාරියගේ ස්වාමිපුරුෂයාගේ නම ගාමිණි විතානගේ. ඒ මහත්මා මගේ භාර්යාවගේ එක කුස උපන් සහෝදරයා. මගේ භාර්යාවට මේ ප්‍රශ්නය පිළිබඳව මම කිව්වා. අපි අතර එකඟත්වයක් ඇතිවුනා. ඔහු කිව්වා කැමති දිනයක ගෙවන්න කියලා. එයා උදව්වක් ලෙස ගෙවන්නම්, නංගිගේ නමට ලියන්න කියලා සුරකුමක් ලෙස. ලක්ෂ 21ක් ද පිනැන්ස් සමාගමට ගෙවන්න තිබුන මුදල. ඒ මුදල ගෙව්වා.”

(vide at page 166 in the appeal brief)

Admittedly, the plaintiff's wife and the defendant's husband are siblings. The plaintiff in his evidence has stated that his brother-in-law agreed to give Rs.2,100,000/= provided the plaintiff keeping the property in dispute as a security for the said loan. The position of the defendant is that the deed P9 was executed as a full pledged transfer and there was no intention to have the property kept as a security. This is the very question that is to be determined in this case.

The authorities referred to above show that the circumstances of each case has to be considered independently to ascertain the intention of the parties and then only the Court could decide whether such circumstances fall within the ambit of Section 83 of the Trust Ordinance. Admittedly, Vajira Samarawickrama being a close relative of the plaintiff has helped his cousin brother to raise a loan in order to

construct a building on the premises in suit. Accordingly, the property was transferred in the name of Smarawickrama and the loan had been raised on behalf of the plaintiff through Samarawickrama. Loan installments were paid by the plaintiff himself. It is not in dispute, that the plaintiff had failed to settle the loan obtained from the Finance Company.

Under such circumstances, the plaintiff has requested his brother-in-law to give money as a loan to settle the moneys due to the Finance Company. Evidence is forthcoming to establish that the loan obtained from the Finance Company had been settled after receiving the said sum of money by the plaintiff. It is the background for the transfer of the property by executing the deed P9, in the name of the defendant.

It is also necessary to ascertain whether the plaintiff did receive the exact value of the property when the deed P9 was executed. The person who valued the property has given evidence. There is no dispute as to the qualifications of the valuer who issued the valuation certificate in respect of the property in question. He has valued the property in a sum Rs. 09 million which was the market value of the property at the time the deed P9 was executed and the said valuation has not been disputed.

The Notary who executed the deed P9 also has given evidence. In his evidence he has stated that Rs.5.1 million was given by the defendant to the plaintiff at the time the deed was executed. This evidence had been rejected by the trial judge who heard the witnesses and saw them giving evidence. He also has given enough reasons for not believing the Notary.

Surprisingly, the Notary Pathinayake, in his attestation clause which is found in the deed P9, has mentioned that the amount transacted in his presence when he executed the deed P9 was only Rupees three million. Such a contradiction is sufficient to conclude that the Notary is not coming out with the truth as to the amount that was paid by the defendant when executing the deed marked P9. On the other hand, the plaintiff in his evidence has categorically stated that he received only Rs.2,100,000/= and it was to settle the loan that Vajira Samarawickrama had obtained on his behalf from the Finance Company. Even if the aforesaid evidence as to the alleged payment of Rs.5.1 million is accepted as correct, obviously it is not the full value of the property the defendant should have paid to the plaintiff when executing the deed P9. Therefore, it can safely be concluded that the correct value of the property had not been received by the plaintiff when executing the deed marked P9.

Having considered all those materials, the learned District Judge as well as the learned Judges in the Civil Appellate High Court had inclined to accept the evidence of the plaintiff. The Original Court Judges being the best Judges of facts, I am not inclined to interfere with those findings of the learned District Judge on issues of facts.

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Defendant in support of her position has also argued that she came into possession of this premises soon after the execution of the deed P9. Therefore, she has claimed that such possession should be looked at when the attendant circumstances are being considered. However, the manner in which the defendant came into possession had been explained by the plaintiff in his evidence. He has stated that the defendant came into possession forcibly, soon after the lessee who was in occupation left the premises. In support of this position, the plaintiff has submitted two complaints that he had made to the police and those were marked as P10 and P12. The plaintiff by making those complaints to the police has explained that the defendant entered the premises in dispute forcibly soon after P9 was executed. Those matters also had been carefully considered by the learned trial Judge. To my mind, facts in relation to receiving the correct value by the plaintiff as the consideration

for the transfer of the property should prevail over the evidence in relation to its possession when considering the attendant circumstances referred to in Section 83 of the Trust Ordinance.

Accordingly, the attendant circumstances of this case show that the plaintiff did not intend transferring the beneficial interests in the property in question when the deed P9 was executed. Therefore, the plaintiff is entitled to have the benefit of Section 83 of the Trust Ordinance

For the aforesaid reasons, this appeal is dismissed with costs. Decisions of the Civil Appellate High Court and the District Court shall remain intact.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

B.P.ALUVIHARE, PC,J.

I agree.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT