

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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 12/2012

SC/ HCCA/LA/ 76/2011

WP/HCCA/GPH/29/2003(F)

DC Gampaha/43145/L

Bridget Premalatha Perera,

No. 520, Ranmuthugala,,

Kadawatha.

Plaintiff

VS.

1. Balasooriyage Anton Nimal Perera,
2. Denipitiya Manikkuge Ramani Kumari,  
Both of No. 115/A,  
Ihalakaragahamuna,  
Kdawatha.

Defendants

AND BETWEEN

1. Balasooriyage Anton Nimal Perera,
2. Denipitiya Manikkuge Ramani Kumari,  
Both of No. 115/A,  
Ihalakaragahamuna,  
Kdawatha.

Defendant Appellants

**Vs.**

Bridget Premalatha Perera,

No. 520, Ranmuthugala,,

Kadawatha.

Plaintiff Respondent

**AND NOW BETWEEN**

Bridget Premalatha Perera,

No. 520, Ranmuthugala,,

Kadawatha.

Plaintiff Respondent Appellant

**Vs.**

1. Balasooriyage Anton Nimal Perera,
2. Denipitiya Manikkuge Ramani Kumari,

Both of No. 115/A,  
Ihalakaragahamuna,  
Kdawatha.

Defendant Appellant Respondents

BEFORE

: S. EVA WANASUNDERA, PC, J.

B. ALUWIHARE, PC, J.

UPALY ABEYRATHNE, J.

<u>COUNSEL</u>	:	Manohara De Silva PC with Vidura Gunaratne and Pubudini Wickramaratne for the Plaintiff Respondent Appellant
		M.U.M. Ali Sabri PC with Nuwan Bopage for the Defendant Appellant Respondents

WRITTEN SUBMISSION ON:	20.06.2012 (Plaintiff Respondent Appellant)
	10.09.2015 (Defendant Appellant Respondents)

ARGUED ON	:	23.09.2015
DECIDED ON	:	02.12.2016

### UPALY ABEYRATHNE, J.

The Plaintiff Respondent Appellant (hereinafter referred to as the Appellant) instituted an action in the District Court of Gampaha against the Defendant Appellant Respondents (hereinafter referred to as the Respondents) seeking a declaration of title to the land described in the schedule to the plaint and to eject the Respondents from the said land and to hand over the vacant possession of the same to the Appellant.

Parties have admitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who became the owners of the land in suit by virtue of the deed of transfer bearing No 4238 dated 10<sup>th</sup> August 1988 had transferred the said land to the Appellant by the deed of transfer bearing No 15613 dated 23<sup>rd</sup> July 1998.

The Respondents filed their answer on the basis that the said property was mortgaged to the Peoples Bank and the Appellant had agreed to lend them a sum of Rs. 475,000/-to redeem the said mortgage on the understanding that the property to be kept as a security with the Appellant. Furthermore, the Respondents have averred that they did not intend to transfer the beneficial interest of the property to the Appellant and therefore the said property is held by the Appellant in trust to the benefit of the Respondents. They further averred that at the time of the sale, value of the said property was over 2.5 million and thus pleaded the benefit of the doctrine of *laesio enormis*.

The case proceeded to trial on 11 issues. The Respondents have raised issues No 06 to 11 on the basis that the Appellant must hold the property in question in trust to the benefit of the Respondents. After trial the learned District Judge delivered the judgment dated 13.05.2013 in favour of the Appellant and upon the appeal, the High Court of Civil Appeal of the Western Province holden at Gampaha, by its judgment dated 28.01.2011, set aside the said judgment of the District Court and enter a judgment in favour of the Respondents.

The Appellant sought leave to appeal from the said judgment of the High Court and this court granted leave on the following questions of law set out in paragraph 12 (b) to ( h) of the petition dated 09<sup>th</sup> of March 2011.

- 12(b) The learned Judges of the Provincial High Court erred in holding that the said transaction was a loan transaction and not an outright transfer when no interest was paid by the Respondents.
- (c) The learned High Court Judges have reached a wrong conclusion that the Respondent borrowed money from the

witness Cabral to settle the existing loan and that they never intended to transfer the beneficial interest in the property to the Petitioner.

- (d) The learned high court Judges have failed to consider the evidence given by the bank officer Ananda to the effect that Cabral on behalf of the Plaintiff had deposited Rs. 575,000/- to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' account and in the light of his evidence the learned High Court Judges erred in disbelieving Cabral's evidence that he had paid Rs; 575,000/- to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- (e) The learned High Court Judges erred in holding that Plaintiff's witness Cabral had contradicted himself when Cabral's evidence is corroborated by Ananda's evidence.
- (f) The learned High Court Judges failed to consider the Defendant's evidence at page 111 where he admits that Cabraaal gave Rs. 575,000/-.
- (g) The learned High Court Judges erred in holding that since the Petitioner was unaware of the boundaries of the property amounts to his intention not to purchase the same.
- (h) The learned High Court Judges erred in holding that attendant circumstances demonstrate that the Respondent did not intend to dispose the beneficial interest in the property.

The Appellant has not sought reliefs from this court under the doctrine of *laesio enormis*. He has set out the said questions of law on the basis that the

money transaction between the parties was not a loan transaction but the Respondents intended to dispose of the beneficial interest in the property to the Appellant.

Section 83 of the Trusts Ordinance stipulates that "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".

I now deal with the fact in issue whether the Respondent "intended to dispose of the beneficial interests in the property in suit or not". In this regard both parties relied upon the evidence of witness Lokuliyangage Jorge Nelson Cabral who was called to give evidence by the Appellant.

Evidence of the 1<sup>st</sup> Respondent at pages 93 to 99 of the brief demonstrate that the Respondents had borrowed a sum of Rs. 475,000/- from the said witness Nelson Cabral to prevent their land from being auctioned at a public auction due to non-payment of a loan granted by the Peoples Bank and said Nelson Cabral had requested them to transfer the property in suit in his name as a security until the said sum of Rs 475,000/- was settled by the Respondents and therefore they had executed the deed in question bearing No 15613 dated 23<sup>rd</sup> July 1998 with the sole intention of repaying the money owed by them to said Nelson Cabral and to get the property transferred back to them.

It is important to note that the transferee of the said deed No 15613 was not said Nelson Cabral. Nelson Cabral had testified that the Respondents informed him that the land in suit was mortgaged to the Bank and the bank had

sent a notice indicating the auction of the property in question (V 1). Since the Respondents were not in position to repay the loan they requested him to redeem the mortgage and thereafter he went with them to the bank and paid a sum of Rs 575,000/- and stopped the sale in public auction. In proof of the payment the witness produced half a copy of bank deposit slip dated 04.07.97 marked P 1 and also the full copy of the said deposit slip marked P 4. It is seen from P 1 that the parties had entered in to an agreement to transfer the mortgaged property to Nelson Cabral. P 1 and P 2 have been admitted as evidence without any objection. The witness Nelson Cabral further testified that since he did not have any money, he obtained the said amount of money from his mother in law (the Appellant) which was kept in her custody by his brother in law for the purpose of purchasing a land and accordingly the transfer of the said land was made in the name of his mother-in law, the Appellant. The witness further stated that the deed of transfer was executed about one year after the money was paid to the Bank and the Appellant or his brother in law was not aware that the land was purchased in the Appellant's name for the occupation of his brother in law.

It is apparent from evidence led at the trial that there had been no money transaction taken place directly or indirectly between the Appellant and the Respondents. There was no iota of evidence to conclude any involvement of the Appellant in the alleged money transaction.

It is apparent from the evidence at page 67 and 68 of the brief that Nelson Cabral has paid the Notary's fees and stamp fees. The Respondents have not contradicted the said evidence. Also, the Respondents have not testified to the effect that they had paid the Notary's fee and stamp fees. On the other hand, if it was not an outright transfer would the purchaser have to pay the charges? Why

Nelson Cabral did willingly come forward to pay the same if the transaction was beneficial to the Respondents in that they were receiving a loan or had received a loan for which a security was given in the form of an outright transfer? On the other hand, if the Respondents being the transferor paid the whole costs of the conveyance it would be a test to find out the nature of the transaction. Therefore it appears that having allowed Nelson Cabral settling the bank loan and also by allowing the cost of the conveyance and stamp fees to be paid by Nelson Cabral, the Respondents have exposed the nature of the transaction.

It is also important to note that the said deed of transfer (P 2) does not contain any clause or condition indicating the existence of a loan agreement or an agreement to re-convey the land in question upon the repayment of the money obtained from Nelson Cabral by the Respondents. There was no time frame set out in the deed in question or in any other document to that effect.

The 1<sup>st</sup> Respondent in his evidence at page 97 of the brief had stated that on 04.07.1997 the said sum of money was obtained from Nelson Cabral on the basis that it would be settled in six months or in one year. The deed of transfer bearing No 15613 (P 2) had been executed on 23<sup>rd</sup> of July 1998, after lapse of one year of the said date of the money transaction. Even assuming that there was a verbal agreement to settle the money obtained from Nelson Cabral and to re-convey the property in question, it was evident from the said evidence of the 1<sup>st</sup> Respondent that they had failed to settle the loan obtained from Nelson Cabral within the agreed period of time and the deed P 2 had been executed after the lapse of the said time period agreed upon to re-convey the property by the parties. The 1<sup>st</sup> Respondent in his evidence had stated that he could not make the repayment of money within the agreed period of time and therefore the deed in question was

executed. That would have been the reason for the parties to refrain from setting out any term or condition in the deed in question with regard to the right to re-convey the property in question after the repayment of the money obtained from Nelson Cabraal.

Thus, it is clear that no right of re-transfer was preserved on the face of the Deed P 2. Also, no such a preservation is found in any other documentation. Also, there was no evidence to show that the Respondents requested to accept the said amount of money but the Appellant refused to accept the same.

Thus, it is in the light of the sequence of events and the nature of attendant circumstances that a Court should come to its conclusion as to whether Section 83 of the Trust Ordinance should apply to a particular case as such or not. The fact that the executing of P 2 without subject to any condition was admitted by the Respondents, the fact that the Respondents did not pay the stamp fees and Notary's charges and Nelson Cabral had paid the Notary's fees and stamp fees, the fact that the deed P 2 was a document which came into existence after one year of the money transactions between the Respondents and Nelson Cabraal, the fact that the transferee of the land in dispute was not the said Nelson Cabraal, the fact that there had been no oral or documentary evidence to establish a repayment scheme of the alleged loan with the interest to be accrued there upon and the fact that the failure of the Respondents to prove that the Appellant had agreed to lend them a sum of Rs. 475,000/-to redeem the said mortgage on the understanding that the property to be kept as a security with the Appellant; all go to show that the transaction was an outright transfer and not a loan transaction. The attendant circumstances show that the Respondents intend to dispose of the beneficial interest in the property transferred. In a such situation, the mere possession of the Respondents in the land in dispute would not construct attendant circumstances

favourable to them. Law therefore does not declare under such circumstances (Section 83 of the Trusts Ordinance) that the Appellant would hold such property for the benefit of the Respondents.

Thus, the learned High Court Judges have erred in law in evaluating the evidence in the light of the Respondents' plea of constructive trust within the meaning of Section 83 of the Trusts Ordinance. The said judgment of the learned High Court Judges is thus misconceived in law. Hence I answer the said questions of law in favour of the Appellant. Accordingly, the said judgment of the High Court of Civil Appeal dated 28.01.2011 is set aside and the appeal of the Appellant is allowed with costs. I uphold the said judgment of the learned District Judge dated 13.05.2003.

*Appeal allowed.*

Judge of the Supreme Court

S. EVA WANASUNDERA, PC, J.

I agree.

Judge of the Supreme Court

B. ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court