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

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka from the Civil Appellate High Court of the Western Province holden at Kalutara in WP/HCCA/KAL/106/2005 dated 16.07.2009.

A.M. Hilda Enid Perera,
No 89/04, Poorwarama Road,
Colombo 05.

PLAINTIFF

S.C. Appeal No. 16/2011
S.C./H.C.C.A./L.A./172/2009
WP/HCCA/KAL/106/2005 (F)
D.C. Panadura Case No. 1041/L

Vs.

Daya Somawathie Lokuge,
No 147, Kotagedara,
Madapatha.

DEFENDANT

Panadura Finance and Enterprises Ltd,
No. 60, Park Street,
Colombo 02.

ADDED DEFENDANT

AND BETWEEN

A.M. Hilda Enid Perera,
No 89/04, Poorwarama Road,
Colombo 05.

PLAINTIFF-APPELLANT

Panadura Finance and Enterprises Ltd,
No. 60, Park Street,
Colombo 02.

ADDED DEFENDANT-APPELLANT

Vs.

Daya Somawathie Lokuge,
No 147, Kotagedara,
Madapatha.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Daya Somawathie Lokuge,
No 147, Kotagedara,
Madapatha.

DEFENDANT - RESPONDENT – APPELLANT

Vs.

A.M. Hilda Enid Perera (Deceased),
No 89/04, Poorwarama Road,
Colombo 05.

PLAINTIFF - APPELLANT – RESPONDENT

1A. Devamullage Gamini Kulapathy Perera,
No. 89/04, Poorwarama Road,
Colombo 05.

1B. Devamullage Maduri Mohara Perera,
No. 07, Keells Houses,
Kalalgoda Road, Thalawathugoda.

1C. Devamullage Ruwani Anushri
Manawaduge,
1, Minnamurra Grove, Dural,
NWS 2158, Australia.

1D. Hemanga Harshana Perera,
Oakville, Ontario,
Canada.

SUBSTITUTED PLAINTIFF-APPELLANT-RESPONDENTS

Panadura Finance and Enterprises Ltd,
No. 60, Park Street,
Colombo 02.

ADDED DEFENDANT-APPELLANT-RESPONDENT

Before: **Hon. P. Padman Surasena, C.J.,**

Hon. Janak De Silva, J.

Hon. Arjuna Obeysekere, J.

Counsel: Manohara De Silva, P.C., with Hirosha Munasinghe for the Defendant-Respondent-Appellant

Ikram Mohomed P.C., with A.T. Shyama Fernando for the 1A and 1B Substituted Plaintiff-Appellant-Respondent

P.L. Gunawardena with A. Jayaratne and D. Tennakoon for 1C and 1D Substituted Plaintiff-Appellant-Respondents

Written Submissions: 16.03.2015 and 02.09.2024 by Defendant-Respondent-Appellant

25.04.2011 and 19.03.2015 by Plaintiff-Appellant-Respondent

26.08.2024 by 1A and 1B Substituted Plaintiff-Appellant-Respondents

Argued on: 17.07.2024

Decided on: 12.06.2026

Janak De Silva, J.

The deceased Plaintiff-Appellant-Respondent (Plaintiff) instituted this *rei vindicatio* action seeking a declaration of title, ejectment of the Defendant-Respondent-Appellant (Defendant) and damages at Rs. 10,000/= per month from 27.07.1995 until recovery of vacant possession of the corpus.

The Defendant prayed for the dismissal of the action, declaration that the Plaintiff is holding the property in trust for the Defendant, declaration that Deed of Transfer No. 420 dated 18.02.1985 in favour of the Added Defendant-Appellant-Respondent (Added Defendant) is void on the ground of *laesio enormis*, declaration that Deed of Transfer No. 1117 dated 20.03.1989 is void on the ground of *laesio enormis* and damages in a sum of Rs. 100,000/=.

The learned trial judge dismissed the action of the Plaintiff and held that the Plaintiff was holding the corpus in favour of the Defendant by way of constructive trust.

Aggrieved, the Plaintiff appealed to the Provincial High Court of Civil Appeal of the Western Province holden in Kaluthara (High Court) which set aside the judgment of the District Court of Panadura and held that the Plaintiff had purchased the corpus for valuable consideration by Deed of Transfer No. 1117 from the Added Defendant. The appeal was allowed.

The Defendant sought leave to appeal which was granted on 14.02.2011. However, the journal entry does not indicate the questions of law on which leave was granted.

Position of the Plaintiff

The Defendant transferred the corpus to the Added Defendant by Deed of Transfer No. 420 dated 18.02.1985 attested by S. Ramani Kularatna, Notary Public. On the same date (18.02.1985) by Deed No. 421 attested by the same S. Ramani Kularatna, Notary Public, the Added Defendant entered into an Agreement to Sell with Lalith Chandrasiri Lokuge, a nephew of the Defendant.

As Lalith Chandrasiri Lokuge did not purchase the corpus, the said Agreement to Sell was cancelled by Deed No. 1116 dated 20.03.1989 attested by S. Ramani Kularatna, Notary Public, and on the same date (20.03.1989) the corpus was transferred to the Plaintiff by Deed No.1117 attested by the same S. Ramani Kularatna, Notary Public.

Position of the Defendant

The Defendant kept the corpus as a security to obtain a loan for her nephew Lalith Chandrasiri Lokuge. However, the Added Defendant got their signatures on blank papers. Later the Defendant got to know that her signature had been obtained to transfer the corpus. She alleged that although she never agreed to transfer the corpus to the Added Defendant, the Added Defendant has executed an Agreement to Sell with her nephew Lalith Chandrasiri Lokuge on the same day. She further asserted that she did not receive any valuable consideration, nor was there any *justa causa* for the transaction.

There are two principal grounds on which the High Court set aside the judgment of the District Court of Panadura. Firstly, it held that the Defendant had failed to establish that there was a constructive trust. Secondly, it was held that the matter is *res judicata.* Let me begin by first examining the latter ground.

Res Judicata

The Defendant had previously instituted action in D.C. Panadura case No. 416/L against the Plaintiff, the Added Defendant and her nephew Lalith Chandrasiri Lokuge. The Defendant claimed that Deed of Transfer No. 420 dated 18.02.1985 attested by S. Ramani Kularatna, Notary Public is a fraud committed on her as her signatures had been obtained on blank forms. The Defendant prayed for the cancellation of Deed of Transfer No. 420 dated 18.02.1985 and a declaration that she is the owner of the corpus. This action was dismissed.

The appeal of the Defendant was dismissed as it was out of time.

The High Court held that this judgement operates as *res judicata* between parties in view of Section 207 of the Civil Procedure Code (CPC).

The doctrine of *res judicata* traces its roots to Roman Law, which was founded upon the two maxims *nemo debet bis vexari pro una et eadem causa*, meaning that no person ought to be harassed twice on the same matter, and *interest rei publicae ut sit finis litium*, meaning that it is in the interest of the State that there should be an end to litigation.

In Roman-Dutch Law, Voet defined *res judicata* as a matter in which an end has been put to disputes in a declaration of a Judge by absolution or adverse judgment [Gane, Vol. 6, p.297].

Even in English Law, this doctrine was adopted by the Courts in their earlier judgments as understood in Roman Law. But, in their later judgments, the English Courts considered the law of *res judicata* as a branch of the law of estoppel. However, it has always been the policy of the law that there should be an end of litigation, as the court is a public institution, and its determination must be respected.

Basnayake, C.J. in ***Herath v. Attorney General*** **[60 N.L.R. 193 at 217]**, explained the historical foundation of the doctrine of *res judicata* as follows:

> *"It has its origin in the Roman Law where it is stated thus:* ***Res Judicata dicitur, quae finem controversiarum pronunciatione - judicis accipit, quod vel condemnatione vel absolutione contingit*** *(Digest XLII, Tit, I, Sec, 1). Scott translates it into English thus : '****By res judicata is meant the termination of a controversy by the judgment of a Court****.* ***This is accomplished either by an adverse decision, or by discharge from liability*** *'."* (emphasis added)

In considering the different perspectives adopted by Courts across various jurisdictions on the doctrine of *res judicata*, it is evident that the doctrine is consistently understood and applied in substantially the same manner.

For instance, in ***Satyadhyan Ghosal and Others v Sm. Deorajin Debi and Another*** **[1960 AIR 941]**, Gupta, J. expounded the Indian perspective on the application of *res judicata*, as follows:

> *"The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation.* ***When a matter-whether on a question of fact or on a question of law-has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again****."* (emphasis added)

This observation by Gupta, J. has been consistently reaffirmed by the Supreme Court of India in several judgments delivered subsequent to the decision in ***Satyadhyan Ghosal*** **(supra). [See *Arjun Singh v. Mohindra Kumar & Others* (1964 AIR 993); *Union of India & Another v. Ashok Kumar Aggarwal* (2013 SC 479, S.C.M. 22.11.2023); *Anil S/O Jagannath Rana & Others v. Rajendra S/O Radhakishan Rana & Others* (Civil Appeal No. 11604/2014, S.C.M. 18.12.2014); *Ebix Singapore Pte Ltd. v. Committee of Creditors of Educomp* (2021 SC 713, S.C.M. 13.09.2021); *Sulthan Said Ibrahim v. Prakasan*, (2025 INSC 764, S.C.M. 23.05.2025)].**

In ***Virgin Atlantic Airways Limited v. Zodiac Seats UK Limited*** **[(2013) UKSC 46 at para. 17]**, Lord Sumption, in outlining the general principles of *res judicata* in English law, expressed a position broadly consistent with the previously discussed understandings of the doctrine as follows:

> *"Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins...****The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be***

challenged by either party in subsequent proceedings…Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages… Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment…Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties*... **Fifth,** there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, **which precludes a party from raising in subsequent proceedings matters which were not but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger**."* (emphasis added)

In ***United States v. Munsingwear*** **[340 U.S. 36 (1950) at 38]**, Douglas, J. also taking a similar view, cited ***Southern Pacific R. Co. v. United States*** **[168 U. S. 1 at 48-49]** as follows:

*"The general principle announced in numerous cases is that a right, **question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies**; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."* (emphasis added)

In the Australian judgment, ***Curran and Perpetual Trustee Co. (Ltd.) v Blair*** **[(1939) 62 CLR 464 at 531]**, Dixon, J. held that:

> *"**A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies.** The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. **The distinction between res judicata and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order**."* (emphasis added)

In considering the application of *res judicata* within the Sri Lankan legal framework, it becomes necessary to examine Sections 34, 207, and 406 of the CPC, which collectively embody the legislative recognition of this doctrine in our jurisdiction.

Section 34 of the Civil Procedure Code stipulates that:

> *"(1) **Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action**; but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any court.*
>
> ***(2) If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with***

the leave of the court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

(3) For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action." (emphasis added)

The Illustration expounds this provision as follows:

"A lets a house to B at a yearly rent of Rs. 1000. The rent for the whole of the two years 1886 and 1887 is due and unpaid. A sues B only for the rent due for one of those years. A shall not afterwards sue B for the rent due for the other year."

Section 207 of the CPC stipulates that:

"All decrees passed by the court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall hereafter be non-suited."

The Explanation elaborates this provision as follows:

"Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue ***between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, becomes, on the passing of the final decree in the action, a res judicata,*** *which cannot afterwards be made the subject of action for the same cause between the same parties."* (emphasis added)

Section 406 of the CPC stipulates that:

"(1) If, at any time after the institution of the action, the court is satisfied on the application of the plaintiff-

(a) that the action must fail by reason of some formal defect, or

(b) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned,

the court may grant such permission on such terms as to costs or otherwise as it thinks fit.

(2) If the plaintiff withdraws from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part.

(3) Nothing in this section shall be deemed to authorize the court to permit one of several plaintiffs to withdraw without the consent of the others." (emphasis added)

Nevertheless, in ***B. H. Jayawardene v. W. A. Arnolishamy*** **[69 N.L.R. 497 at 500]**, Samarawickrame, J. held that,

*"**The dismissal of an action upon its withdrawal by the plaintiff gives rise to the statutory bar provided for in Section 406 (2). It does not, however, provide the basis for a plea of res judicata properly so termed, because there is no adjudication.** Where a partition action was withdrawn and the claims made in that action was set up again in another action brought subsequently, Justice Gratiaen said, " As there had been no formal adjudication in the earlier action regarding these competing claims, the doctrine of res judicata, in the strict sense of the term, does not apply ",-vide 57 N. L. R. page 241, at page 244."* (emphasis added)

Our Courts have expressed divergent views on whether the CPC constitutes an exhaustive statement of the law of *res judicata* within our jurisdiction.

In ***Palaniappa v. Gomes*** **[11 N.L.R. 285 at 286]**, Wendt, J. held that our law as to *res judicata* is to be found in Section 207 of the CPC. But, in ***Dingiri Menika v. Punchi Mahatmaya*** **[13 N.L.R. 59 at 64]**, Wood Renton, J. expressed a different view that, the sections in question should not be held to be exhaustive of the law of *res judicata* in Ceylon. In ***Samichi v. Pieris*** **[16 N.L.R. 257 at 260-261]**, Lascelles, C.J. also held that:

> ***"I see no reason for accepting the contention that the whole of our law of res judicata is to be found in sections 34, 207, and 406 of the Civil Procedure Code. The law of res judicata has its foundation in the civil law and was part of the common law of Ceylon long before Civil Procedure Codes were dreamt of.*** *But even if these sections contain an exhaustive statement of the law on this point, I cannot see that there is anything in them which is inconsistent with the principles which have been followed in the English, Indian, and "American Courts."* (emphasis added)

But, in the same judgment, Pereira, J. taking a different view, held (at page 266) that our law on to *res Judicata* is to be found in Section 207 of the CPC, and that although the provisions of that section may be supplemented by English law, that law cannot be brought in to qualify those provisions, or to supersede any portion of the section, or to restrict or expand its scope or meaning.

In ***Herath*** **[supra]**, Basnayake, C.J. (at page 218) held that the whole of our law of *res judicata* is to be found in Section 34, 207 and 406 of the Civil Procedure Code. As the question whether the application of *res judicata* in Sri Lanka is confined to the provisions of the CPC does not arise for determination in this matter, I need not express any view thereon. Nevertheless, I need to consider the requirements for a successful plea of *res judicata*.

In ***Rev. Moragolle Sumangala v. Rev. Kiribamune Piyadassi*** **[56 N.L.R. 322 at 324],** Gratiaen, J. held that:

> *"Two important tests must be applied whenever a plea of res judicata is raised,*
>
> *(1) whether the judicial decision in the earlier litigation was, or at least involved, a determination of the same question as that sought to be controverted in the later litigation in which the estoppel was raised, and if so*
>
> *(2) whether the parties to the later litigation were the parties or the privies of the parties to the earlier decision."*

However, Tambiah, J. subsequently in ***Karunaratna v. Amarisa*** **[66 N.L.R. 567 at 568]**, proposed a broader test than that enunciated by Gratiaen J. for determining whether *res judicata* may be applied to a given litigation.

Tambiah, J. held as follows:

> *"The doctrine operates when the following essentials are present:-*
>
> *(1) There must be a judgment of a court of competent jurisdiction [Ibrahim Baay v. Abdul Rahim (12 N.L.R 177)].*
>
> *(2) There must be a final judgment [Fernando v. Menika (3 Bal. 115)].*
>
> *(3) The case must have been decided on its merits [Annamalai Chetty v. Thornhill (34 N.L.R 381)].*
>
> *(4) The parties must be identical or be the representatives in interest of the original parties. [Sivakolunthu v. Kamalambal (56 N.L.R 52)].*
>
> *(5) The causes of action must be identical [Dingiri Menika v. Punchi Mahatmaya (13 N.L.R 59)]"*

But, in ***Nandawathie v. Tikiri Bandara Mudalali*** **[(2003) 2 Sri L.R. 347 at 353]**, Dissanayake, J. again outlined a simple three-fold test, which was identical to the test that enunciated by Gratiaen, J. Yet, it is evident that, in this pronouncement, Dissanayake, J. has placed reliance on the classical requisites enunciated by Voet, namely, identity of persons, identity of cause, and identity of subject-matter, rather than on the formulation articulated by Gratiaen, J. The test according to Dissanayake, J. is as follows:

> *"[…] for the principle of res judicata to apply the second action must be:-*
>
> *(a) between the same parties*
>
> *(b) same subject matter*
>
> *(c) same cause of action. "*

Coomaraswamy [Law of Evidence, Vol. I, p. 528] identifies the following list of essential elements that must be established in order to sustain a plea of *res judicata*:

(i) The former action must have been a regular action; [*Arulampalam et al. v. Kandavanam* (41 N.L.R. 304); *Nandawathie v. Tikiri Bandara Mudalali* (supra)]

(ii) The two actions must be between the same parties or their representatives in interest (privies); [*William Singho v. Silva* (50 N.L.R. 510); *Town Council of Madampe v. J.C.W. Munasinghe* (72 N.L.R. 156); *Sathuk v. Layaudeen* (63 N.L.R. 25)]

(iii) The previous decision must be what in law is deemed such;

(iv) The particular judicial decision must have been in fact pronounced as alleged;

(v) The previous decision must have been decided on its merits; [*Annamaly Chetty v. Thornhill* (34 N.L.R. 381); *Annamalay Chetty, S.P.A. v. Thornhill* (33 N.L.R. 41)]

(vi) The same subject matter must have been involved in both actions; [Newington v Levy (6 L.R.C.P. 180)]

(vii) The previous judgment must be a final judgment; [*Nagalingam v. Ledchumipillai* (55 N.L.R. 280); *Palaniappa* (supra); *Dharmadasa v. Piyadasa Perera* (64 N.L.R. 249); *Ranjith v. Piyaseeli* (2006) 2 Sri L.R. 325]

(viii) The same question or identical causes of action must have been involved in both actions; [*Dingiri Menika v. Punchi Mahatmaya* (supra); *Kalu Banda v. David Appuhamy* (66 N.L.R. 162); *Vanderpoorten v. Peiris* (39 N.L.R. 5); *Mohideen v. Pitche* (17 N.L.R. 410) *De Silva et al. v Goonetileke et al.* (32 N.L.R. 217)]

(ix) The judicial tribunal pronouncing the decision must have had competent jurisdiction in that behalf; [*Marjan et al. v. Burah et al.* (51 N.L.R. 34); *Nilabdeen v. Farook* (1984) 1 Sri L.R. 14; *Suppiah Paliah Veeravagu v. Wilson Sameravickrema* (1986) 2 C.A.L.R. 66]

(x) The judgment should not have been obtained by fraud or collusion**;** [*Noris v Charles* (63 N.L.R. 501)]

(xi) If it is a foreign judgment, it should have been passed in accordance with the principles of natural justice; [*Nandawathie v. Tikiri Bandara Mudalali* (supra)]

In my view, although this list contains a large number of requirements, the essence of those requirements, and the burden imposed thereby on a party who pleads *res judicata*, is not materially different from the simpler tests articulated by Gratiaen J. in ***Rev. Moragolle Sumangala*** **[supra]** or Dissanayake, J. in ***Nandawathie*** **[supra].**

I am of the considered view that it is not unreasonable to require all such requirements to be satisfied by a party seeking to invoke the doctrine of *res judicata*. However, it is clear that the burden on a party who seeks to challenge a plea of *res judicata* is merely to demonstrate that at least one of these essential requirements has not been established, and not to prove that all such requirements have failed.

District Court of Panadura Case No. 416/L

Although the Defendant instituted this action in the District Court of Panadura against the Added Defendant, Deceased Plaintiff and her nephew, Lalith Chandrasiri Lokuge on the alleged fraud, it appears that Lalith Chandrasiri Lokuge was subsequently discharged from the proceedings at the request of the Defendant, as he was expected to be produced as her main witness.

The District Court held that the Defendant's position that the Added Defendant had committed a fraud cannot be accepted, as the Deed of Transfer No. 420 refers to the payment of Rs. 36,000/- by way of cheques drawn on the People's Bank in favour of the Defendant, which cheques had not been established to have been dishonoured by the Bank. The District Court further held the Defendant had not repaid the said sum of Rs. 36,000/- with interest as outlined in the said Deed on or before 18.02.1988 in order to obtain a re-transfer of the said property.

The learned trial judge held (at pages 357-359) as follows:

> *"පැමිණිලිකාරියගේ සාක්ෂි සහ අධිකරණයට ඉදිරිපත් කළ ලියවිලි මම සලකා බැලූ අතර, පැමිණිලිකාරිය වෙනුවට මෙම නඩුව විභාගයට ගත් මුල් අවස්ථාවේදී මෙම නඩුවේ 3 වෙනි විත්තිකාර ලලිත් වන්ද්‍රසිරි ලොකුගේ යන අය පැමිණිල්ල වෙනුවට සාක්ෂි වශයෙන් කැඳවන බවට අධිකරණයට දැන්වූ නමුත් ලලිත් වන්ද්‍රසිරි ලොකුගේ යන අයගේ සාක්ෂිය පැමිණිල්ල විසින් කැඳවා නැත. තවද අධිකරණයට ඉදිරිපත් කළ ලියවිලි පරීක්ෂා කිරීමේදී පැ.4 දරණ ඔප්පුව පිට පැමිණිලිකාරිය වන ලොකුගේ දයා සෝමවතී හාමිනේ 1 වෙනි විත්තිකාර සමාගමට රුපියල් 36,000/= කට පවරා ඇති අතර, එම ඔප්පුව පරීක්ෂා කිරීමේදී එම ඔප්පුවේ අවසන් පිටුවේ එම ඔප්පුවට අදාල ප්‍රතිඥාව එම ඔප්පුවේ සඳහන් කරන ලද මහජන බැංකුවේ වෙක්පත් මඟින් පැමිණිලිකාරියට බාරදී ඇති බවට එහි සඳහන් කරන ලදී. මෙම වෙක්පත් කිසිම අවස්ථාවක අදාල බැංකුවෙන් අගරු කළ බවට පැමිණිලිකාරිය විසින් කිසිම සාක්ෂියක් අධිකරණයට ඉදිරිපත් කොට නැත.* ***තවද එම ඔප්පුවේ 2 වෙනි පිටුවේ මීලයට ගන්නා විකුණුම්කරුට 1988 පෙබරවාරි මස 18 වෙනි දින රු. 36,000/= ක් 30%***

*පොලියක් සමඟ **1** වෙනි විත්තිකාර සමාගමට ආපසු ගෙවන කොන්දේසිය මත මෙම නඩුවට අදාල ඉඩම නැවත වරක් විකුණුම්කාරි වන මෙම නඩුවේ පැමිණිලිකාරියට ආපසු ලබාගැනීමට ඉඩ ඇති බවට එම ඔප්පුවේ සඳහන් වී ඇති නමුත් මේ කොන්දේසිය තවමත් ඉටුවී නැති බවට සාක්ෂියක් ඉදිරිපත් කර නැත. මෙම කරුණු සලකා බැලීමේදී පැමිණිලිකාරියගේ සාක්ෂි පිලිගැනීමට නොහැකි වන අතර, මෙම පැමිණිල්ල මම නිෂ්ප්‍රභා කරමි, ගාස්තු රහිතව."* (emphasis added)

Clearly the learned trial judge's refusal to entertain the Defendant's claim based on the alleged fraud constitutes a firm adjudication of the merits of the case.

Characterisation : Is Constructive Trust a Cause of Action or Remedy (Relief)?

Section 34(1) of the CPC requires that every action shall include all the reliefs that can be claimed from one and the same cause of action and not the inclusion of different causes of action in the same action although they arise from the same transaction.

Section 34(2) of the CPC states that if a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

In ***Lowe v. Fernando*** **[16 N.L.R. 398 (F.B.)]**, Court was called upon the identify the cause of action in an action for declaration of title. Wood Renton A.C.J., held (at page 400) that the cause of action was the *denial of the plaintiffs title*. Pereira, J., held (at page 402) that when each of two persons has ousted the plaintiff from a separate and distinct portion of one block of land and holds possession of such portion, the cause of action against each is the wrong done by him, and that is his *unlawful ouster of the plaintiff from the particular portion of land claimed by him and the denial by him to the plaintiff of enjoyment of that portion*.

The cause of action relied on by the Defendant in District Court of Panadura Case No. 416/L is the fraudulent transfer of the title of the Defendant. The Defendant claimed, as she does in this action, that her intention was only to enter into a conditional transfer and not an absolute sale. The relief she claimed in that action is a declaration that Deed of Transfer No. 420 is void as it has been executed fraudulently by suppression of facts and a permanent injunction restraining the Plaintiff from alienating the corpus.

In this action, the Defendant again asserts that she never intended to part with her title but only wanted to provide security for the loan obtained by her nephew Lalith Chandrasiri Lokuge and for this purpose she signed some blank forms. The claim-in-reconvention made by the Defendant is founded upon this assertion. Here again, the cause of action is the fraudulent transfer of her title. In fact, by issue Nos. 3 and 6, the Defendant specifically raised fraud. She sought a declaration that the Plaintiff is holding the corpus in constructive trust for her and a declaration that Deed of Transfer No. 420 is void on the principle of *laesio enormis*.

In this context, it becomes necessary to examine whether constructive trust is an independent *cause of action* or a *remedy or relief* for the purposes of Sections 34(1) and 34(2) of the CPC. If it is an independent cause of action, the claim-in-reconvention of the Defendant cannot be defeated by the plea of *res judicata*. On the contrary, if it is only a remedy or relief, the plea of res judicata will succeed in view of Sections 34(1) and 34(2) read with Section 207 of the CPC.

A comparative examination reveals that constructive trust is characterized both as a remedy (relief) as well as an independent cause of action.

In the US, Florida cases conflict as to whether a constructive trust is a separate cause of action or a remedy. The First and Second Districts have held that a constructive trust is merely an equitable remedy which may only be imposed based upon an established cause of action [*See Accord Wadlington v. Edwards*, 92 So. 2d 629 (Fla. 1957); *Collinson v. Miller*,

903 So. 2d 221 (Fla. 2d DCA 2005); *Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696 (Fla. 1st DCA 2008); *Est. of Kester v. Rocco*, 117 So. 3d 1196, 1201 (Fla. 1st DCA 2013)].

In contrast, the Fourth District and the Southern District of Florida appear to hold that a constructive trust is a separate cause of action [*See Abele v. Sawyer*, 750 So. 2d 70 (Fla. 4th DCA 1999); *Arral Industries, Inc. v. Touch Entertainment, Inc.*, 2000 U.S. Dist. LEXIS 2306 (S.D. Fla. 2000); *Hugo Bernardele & Gelway SA v. Bonorino,* 608 F. Supp. 2d 1313 (S. D. Fla. 2009)].

In England, the inherent jurisdiction of the Court of Chancery to prevent unconscionable conduct led to the evolution of constructive trusts. English law draws a distinction between *institutional constructive trust* and a *remedial constructive trust*.

In ***Westdeutsche Landesbank Girozentrale v. Council of the London Borough of Islington*** **[(1996) 2 WLR 802 at 837]**, Lord Browne-Wilkinson explained the difference between *institutional constructive trust* and *remedial constructive trust* as follows:

> *"Under* ***an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past****. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion.* ***A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.*** *Thus for the law of New York to hold that there is a remedial constructive trust where a payment has been made under a void contract gives rise to different consequences from holding that an institutional constructive trust arises in English law."* (emphasis added)

Two leading English decisions recognising *institutional constructive trust* are ***Keech v. Sandford*** **[(1726) EWHC Ch J76]** and ***Boardman v. Phipps*** **[(1967) 2 AC 46]**.

Lord Browne Wilkinson in ***Westdeutsche*** **(supra)** emphasized that English constructive trusts arise from established principles rather than judicial discretion, thereby reinforcing the institutional approach.

In ***Re Polly Peck International Plc*** **(In Administration) (No. 2) [(1998) 3 All E.R. 812]** the Court of Appeal stated that English law does not recognise a broad remedial constructive trust because it undermines certainty, particularly in insolvency. The dicta of Lord Neuberger PSC in ***FHR European Ventures LLP v Cedar Capital Partners LLC*** **[(2014) UKSC 45]** appears to confirm that view.

Recently, in ***Stevens (Respondent) v. Hotel Portfolio II UK Ltd (In Liquidation) and another (Appellants)*** **[2025] UKSC 28,** the Supreme Court examined whether constructive trust is really just a remedy. It was contended that the constructive trust of the dividend is in substance just equity's remedy for the breach constituted by the making of the profit in the first place. Lord Briggs (at para. 28) held that he would accept that, there are certain respects in which the constructive trust can usefully be seen loosely as equity's *remedy* (or one of equity's remedies) for a breach of trust. However, he went on to hold that:

> *"[…] once established, the constructive trust of the profits is a free-standing "real" trust in its own right, and not merely a way of conferring additional proprietary remedies upon the beneficiary, beyond the personal remedies of account or compensation for loss. Of course the availability of those proprietary remedies may be of critical importance, but they are not the only consequences of the existence of an institutional constructive trust. Other consequences include the usual personal remedies triggered by a breach of it."*

The main difference between the US approach and the English Courts is that US Courts more often use constructive trust as a remedial device where specific restitution is

appropriate on detailed consideration of the facts, whereas English Courts adopt a more institutional approach where some form of a fiduciary or quasi-fiduciary relationship is a pre-requisite instead of just prioritizing the overall equities.

In Canada, a constructive trust is primarily understood as a remedy **[*Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC), [1997] 2 S.C.R. 217; *Moore v. Sweet*, 2018 SCC 52 (CanLII), [2018] 3 SCR 303]**. In ***Moore*** **[supra, para. (33)]**, Côté J., held that:

> *"What is therefore crucial to recognize is that a proper equitable basis must exist before the courts will impress certain property with a remedial constructive trust. The cause of action in unjust enrichment may provide one such basis, so long as the plaintiff can also establish that a monetary award is insufficient and that there is a link between his or her contributions and the disputed property."* (emphasis added)

A constructive trust is in Australia charaterised primarily, but not exclusively, as remedial. In ***Muschinski v. Dodds*** **[1985] HCA 78; (1985) 160 CLR 583 (6 December 1985)** the High Court held that constructive trust is primarily, but not exclusively remedial. They are remedial in the sense that they arise out of the actions of parties and usually involve the distribution or transfer of property.

The approach of other jurisdictions may not necessarily reflect the correct position in Sri Lanka as our legislative framework must determine the characterization issue.

The decision in ***Waduganathan Chettiar v. Sena Abdul Cassim*** **[54 N.L.R. 185]** appears to indicate that Court considered a claim for constructive trust as a cause of action than a remedy. However, in ***Caroline Hewa Abewickrama v. Hettiarachchige Don Sugath*** **[S.C. Appeal No. 18/2021, S.C.M. 17.11.2022]** it was held that constructive trust is largely an *equitable remedy* for the benefit of the rightful owner of the property against the person holding the legal right to the property in an inequitable and unconscionable manner.

However, in my view, the characterization of a constructive trust is not a rigid or inflexible matter. Whether a constructive trust is to be regarded as a cause of action or as a remedy depends upon the manner in which the claim is formulated and pleaded. In appropriate circumstances, a constructive trust may itself constitute the cause of action, whilst in other cases it may operate as the equitable remedy granted in consequence of an established cause of action such as fraud, breach of fiduciary duty, or unjust enrichment. It is therefore possible for a constructive trust to perform both functions, either separately or simultaneously, depending upon the pleadings and the nature of the relief sought.

According to Section 5 of the CPC, the word "*cause of action*" is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury.

It is open to a plaintiff to institute an action founded directly upon a constructive trust by pleading the facts giving rise to the alleged wrongdoing and setting out the basis upon which the property ought, in equity, to be restored. By way of illustration, a plaintiff may aver that, notwithstanding the execution of a Deed of Transfer, there was never any intention to transfer the beneficial interest in the property and that a subsequent demand for its re-transfer or return was wrongfully refused. In such circumstances, the refusal would constitute the denial of the plaintiff's equitable rights and would furnish the cause of action for the purposes of Section 5 of the CPC.

Alternatively, a plaintiff may formulate the cause of action on the basis of fraud, unjust enrichment, or other wrongdoing associated with the transfer of the property, and seek the imposition of a constructive trust as the appropriate equitable remedy. It may, of course, be contended that in such a case there is no necessity to plead a constructive trust

as an independent cause of action, since the more appropriate relief may be a rescission of the transaction or a declaration that the impugned deed of transfer is null and void.

Be that as it may, in both District Court of Panadura Case No. 416/L and the present action, the Defendant elected to proceed on the latter basis by pleading fraud as the principal foundation of her claim. However, whilst in the present action she has sought a declaration of constructive trust, no such relief was claimed in the earlier action. The Defendant thereby failed to seek, in the former action, all the reliefs arising from and available upon the same cause of action.

In these circumstances, the provisions of Sections 34(1), 34(2), and 207 of the CPC are attracted. Having omitted to claim, in the earlier proceedings, a remedy which was available to her upon the same factual and legal foundation, the Defendant is precluded from re-litigating the matter in a subsequent action. Accordingly, the plea of *res judicata* is well-founded and must be upheld.

However, in this action, the learned trial judge refused to apply the doctrine of *res judicata* against the claim-in-reconvention of the Defendant. It was held:

> *"2 වන විත්තිකරුගේ ස්ථාවරය වී ඇත්තේ මෙම නඩුවේ කරුණු විනිශ්චිත කරුණු හෙයින් 1 වන විත්තිකරුට සහනයක් ලබාගත නොහැකි බවය. **මෙම අධිකරණයේ අංක 416/ඉඩම්** නඩුවේ මෙම මූල්‍ය සමාගම **1** වන විත්තිකරු වී සිට ඇති අතර, ඔවුන් මෙම විත්තිවාචකය ඉදිරිපත් නොකිරීම මත නඩුව ඒකපාක්ෂිකව තීන්දුවට නියම වී ඇත. ඒ අනුව නඩුවේ දී එම විත්තිකරු විත්තිවාචකයක් ඉදිරිපත් නොකිරීම මත විත්තිය ඉදිරිපත් කරන ලද කරුණු සම්බන්ධයෙන් සාක්ෂි විශ්ලේසනයක් වී නොමැත. එම නඩුවේ පැමිණිලිකාරිය ඔප්පුවේ කොන්දේසි අනුව ක්‍රියානොකිරීම පදනම් කරගෙන එම පැමිණිල්ල නිෂ්ප්‍රභා වී ඇත. තවද, **12** නව නීති වාර්තා **184** පිටුවේ සඳහන් 'මොහොමඩ් රසීක් එදිරිව සින්න ලෙබ්බේ මරික්කාර්' **17** නව නීති වාර්තා **112, 113** පිටුවල සඳහන් 'පෙරේරා එදිරිව අප්පුහාමී' නඩුවේ කරුණුද සැලකීමේදී **1,2** විත්තිකරුවන් විසින් ඉදිරිපත් කරන 'රෙස්ජුඩිකා' සිද්ධාන්තයට අදාල ස්ථාවරය සනාත නොවන බව නිගමනය කරමි. තවද, එම නඩුවේ නඩු නිමිත්ත හා*

මෙම නඩුවේ නඩු නිමිති ද එකිනෙකට වෙනස් බැවින් ඒ මත ද එම සිද්ධාන්තය අදාල නොවන බවට තීරණය කරමි." (emphasis added)

It appears the learned trial judge concluded that an *ex parte* decree cannot form the basis for a successful plea of *res judicata* relying on the decisions in ***Mohamed Cassim v. Sinne Lebbe Maricar et al*** **[12 N.L.R. 184]** and ***Perera v. Appuhamy*** **[17 N.L.R. 112].**

In ***Mohamed Cassim*** **[supra],** Middleton, J. together with Wendt, J. held that a judgment dismissing an action for declaration of title to land on the ground that the plaint disclosed no valid cause of action does not operate as a bar to a second action for the same relief, when there is a valid cause of action.

In ***Perera*** **[supra]**, Pereira, J. held that the dismissal of a claim in reconvention, made without evidence and where no replication was filed, did not necessarily constitute *res judicata* on the substantive issue of the defendant's right to the produce of the trees, reaffirming that for a prior decision to operate as *res judicata*, it must have necessarily and conclusively decided the very issue sought to be raised in subsequent proceedings.

However, in ***Dharmadasa*** **[supra]** it was held that a decree absolute for default that has been passed against a defendant by a District Court is one to which section 207 of the CPC applies and can, therefore, operate as *res judicata* in a subsequent action between the same parties in respect of the same subject-matter.

Admittedly the judgment in District Court of Panadura Case No. 416/L proceeded *ex parte* against the Added Defendant and Deceased Plaintiff. Nevertheless, the judgment was delivered upon a consideration of the merits.

In my view, a judgment entered *ex parte* following due notice to the parties is capable of giving rise to a plea of *res judicata*, provided that the judgment constitutes a determination on the merits of the case. The mere fact that a party failed to appear and

that the judgment was consequently entered *ex parte* does not, in itself, deprive the judgment of its conclusive character for the purposes of the doctrine.

Accordingly, the learned District Judge erred in law in holding that the doctrine of *res judicata* was inapplicable solely on the basis that the judgment in District Court of Panadura Case No. 416/L had been entered *ex parte*. The correct inquiry was whether the earlier judgment involved a judicial determination of the matters in issue on their merits and not whether the judgment was entered in the absence of one of the parties. If the former requirement is satisfied, the judgment is capable of operating as a bar to subsequent proceedings between the same parties in respect of the same cause of action.

For all the foregoing reasons, the High Court was correct in holding that the claim-in-reconvention of the Defendant is *res judicata*.

Constructive Trust

The principal submission of the Defendant is that the Plaintiff has failed to establish her title to the corpus. Reliance was placed upon the decisions in ***De Silva v. Goonethileke*** **[32 N.L.R. 217]**, ***Wanigaratne v. Juwanis*** **[65 N.L.R. 167]** and ***Dharmadasa v. Jayasena*** **[(1997) 3 Sri.L.R. 327]**.

The Defendant contended that an admission had been erroneously recorded in respect of Deed Nos. 420, 421, 1116, and 1117, notwithstanding the fact that a similar application had previously been refused by another learned Judge. It was submitted that such an order was amenable to challenge at the appellate stage in view of the principle laid down in ***Mudiyanse v. Punchi Banda*** **[77 N.L.R. 501]**, wherein it was held that a party aggrieved by an order made in the course of an action, even where such order goes to the root of the case, is entitled to refrain from challenging the order immediately and instead raise the matter in an appeal against the final judgment.

The Defendant further submitted that the Plaintiff elected not to lead any evidence in support of her case and failed to produce and mark Deed Nos. 420 and 1117 through any witness for the purpose of establishing her title. It was argued that those deeds were placed before Court solely through the Defendant's evidence and were marked only in support of the Defendant's case. Accordingly, the Defendant maintained that the Plaintiff could not rely upon those documents to discharge the burden of proving her title.

I am in agreement with the principle enunciated in ***Mudiyanse*** **[supra]**, as its application may serve the salutary purpose of reducing frivolous interlocutory applications. However, in my view, that principle ought to be applied with a measure of restraint where the matter concerns admissions and issues recorded at the commencement of the trial. Parties embark upon the trial on the basis of the admissions and issues so recorded, and the decisions they make regarding the oral and documentary evidence to be adduced are inextricably linked to those admissions and issues. Consequently, where an admission or issue has been improperly recorded, omitted, or denied, the matter ought to be raised and resolved before the trial proceeds further. To hold otherwise may result in a situation where, after the expenditure of considerable time, costs, and judicial resources in the conduct of a lengthy trial, the resulting judgment is liable to be set aside solely on account of an improperly recorded admission or issue. Such an outcome would be contrary to the interests of the efficient administration of justice.

The admissions now sought to be contested were recorded as far back as 11.01.2000. A perusal of the proceedings of that date (at page 178 of the Appeal Brief) reveals that the learned counsel appearing for the Defendant merely requested that admissions Nos. 5, 6, 7, 8, and 9 be recorded as admissions made in terms of paragraphs 5, 6, 7, 8, and 9 of the Answer. No objection appears to have been taken at that stage to the manner in which the admissions were recorded.

It is also pertinent to note that the Defendant did not prefer a cross-appeal before the High Court when the Plaintiff challenged the judgment of the learned trial judge. Furthermore, in the petition of appeal dated 07.08.2009 filed before this Court, the Defendant did not raise any complaint with regard to the alleged improper recording of admissions by the learned trial Judge.

In these circumstances, the Defendant cannot, at this stage of the proceedings, be permitted to impugn the correctness of the admissions as recorded. Having failed to challenge the recording of the admissions at the appropriate stage, either before the High Court or in the petition of appeal before this Court, the Defendant is precluded from raising such a challenge in this appeal. Accordingly, I hold that the Defendant is not entitled to contest, in these proceedings, the admissions recorded by the learned trial judge on the basis that they were improperly recorded.

In any event, upon a consideration of the pleadings in this action, it cannot be said that the admissions were improperly recorded. They are clearly based upon the averments made in the answer.

It must be borne in mind that evidence adduced by either party at the trial constitutes evidence properly before Court and is available for consideration by the learned trial judge in determining the issues arising in the action. Such evidence cannot be compartmentalised or accorded differing weight merely on the basis of the party by whom it was tendered. In the present case, Deed Nos. 420 and 1117 were produced and marked in evidence and accordingly form part of the evidentiary record in this action. Both the learned trial Judge and the High Court were entitled to consider those documents in arriving at their respective determinations.

The Defendant instituted proceedings under Section 66 of the Primary Courts Procedure Act in relation to the corpus. In her counter affidavit dated 15.06.1995, she has admitted (at page 345) that she transferred the corpus to the Added Defendant by Deed of Transfer

No. 420 dated 18.02.1985. This deed is on printed form. During her cross-examination, the Defendant admitted (at page 210) that she has affirmed to the fact that she had transferred the corpus to the Added Defendant by Deed No. 420 and thereby it became the owner. She also admitted (at pages 211, 212 and 213) that she had not stated in her affidavit that her signatures had been obtained on blank documents or that the corpus had been transferred subject to a trust. She went on to admit in evidence (at pages 222 and 223) that the corpus had been sold by her to the Added Defendant.

In terms of Section 70 of the Evidence Ordinance, the admission of a party to an attested document, of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

The Defendant's contention that the transaction gave rise to a constructive trust, and that her signature had been obtained on blank papers, stands in direct contradiction to her own testimony given under oath. Such assertions are therefore irreconcilable with the evidence emanating from the Defendant herself and cannot be accepted.

I hold that the Plaintiff has fulfilled the burden of proof.

For all the foregoing reasons, I affirm the judgment of the Civil Appellate High Court of the Western Province holden at Kalutara dated 16.07.2009. The appeal is dismissed with costs.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, C.J.

I agree.

CHIEF JUSTICE

Arjuna Obeyesekere, J.

I agree.

JUDGE OF THE SUPREME COURT