

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

In the matter of an appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5C(1) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, as amended

**SC Appeal No: 84/2015**

SC/HC/CALA No: 103/2012

HC Civil No. WP/HCCA/MT/37/06(F)

DC Mount Lavinia No: 10/97 Trust

Adikarige Emalin Perera,  
No. 110/24, Jubilee Mawatha,  
Mirihana, Nugegoda.

**PLAINTIFF**

- Vs -

Bope Arachchige Don Ananda Thilakasiri,  
No. 1571/86, Horana Road,  
Pannipitiya, Kottawa.

**DEFENDANT**

And between

Bope Arachchige Don Ananda Thilakasiri,  
No. 1571/86, Horana Road,  
Pannipitiya, Kottawa.

**DEFENDANT – APPELLANT**

- Vs -

Adikarige Emalin Perera,  
No. 110/24, Jubilee Mawatha,  
Mirihana, Nugegoda.

**PLAINTIFF – RESPONDENT**

1. Bope Arachchige Don Senadheera,  
No. 110/24, Jubilee Mawatha,  
Mirihana, Nugegoda.
2. Bope Arachchige Don Dilantha,  
No. 110/24, Jubilee Mawatha,  
Mirihana, Nugegoda.
3. Bope Arachchige Nimal Shantha,  
325/6, Sirimangala Watta,  
Mampe North, Piliyandala.

**SUBSTITUTED PLAINTIFF – RESPONDENTS**

**And now between**

Bope Arachchige Don Ananda Thilakasiri,  
No. 1571/86, Horana Road,  
Pannipitiya, Kottawa.

**DEFENDANT – APPELLANT**

- Vs -

1. Bope Arachchige Don Senadheera,  
No. 110/24, Jubilee Mawatha,  
Mirihana, Nugegoda.
2. Bope Arachchige Don Dilantha,  
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Mirihana, Nugegoda.
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325/6, Sirimangala Watta,  
Mampe North, Piliyandala.

**SUBSTITUTED PLAINTIFF – RESPONDENTS –  
RESPONDENTS**

**Before:** P. Padman Surasena, CJ  
Janak De Silva, J  
Arjuna Obeyesekere, J

**Counsel:** Rohan Sahabandu, PC with Chathurika Elvitigala, Sachini Senanayake and Pubudu Weerasuriya for the Defendant – Appellant – Appellant

Kamal Dissanayake with Dulna De Alwis for the Substituted Plaintiff – Respondents – Respondents

**Argued on:** 8<sup>th</sup> November 2024

**Written Submissions:** Tendered on behalf of the Defendant – Appellant – Appellant on 16<sup>th</sup> December 2025

Tendered on behalf of the Substituted Plaintiff – Respondents – Respondents on 17<sup>th</sup> January 2025

**Decided on:** 5<sup>th</sup> June 2026

**Obeyesekere, J**

- (1) The Plaintiff – Respondent – Respondent [the Plaintiff] filed action in the District Court of Mount Lavinia [the District Court] on 13<sup>th</sup> November 1997 claiming that although she transferred the property referred to in the Schedule to the plaint to **her son**, the Defendant – Appellant – Appellant [the Defendant] by Deed of Transfer No. 98 dated 1<sup>st</sup> October 1987 [**P2**], that was done only to enable the Defendant to raise a loan from the bank and that she had no intention of transferring the beneficial interest in the said property to the Defendant. The Plaintiff had claimed further that the Defendant had agreed to re-transfer the property to the Plaintiff once all instalments had been paid to the Bank. The Plaintiff had accordingly sought a declaration that the Defendant is holding the said property in trust for the Plaintiff and for an order directing the Defendant to transfer the property to the Plaintiff.
- (2) In his answer, the Defendant claimed that (a) the Plaintiff had issues with some of her other children and had subsequently fallen out with them in 1986, resulting in the Plaintiff threatening to sell the said property and move out, and (b) in order to

avoid his brothers and sisters being stranded without a place to live, he had purchased the said property at the price of Rs. 125,000 quoted by the Plaintiff, as reflected in P2. The Defendant thus denied the claim of the Plaintiff that he does not have the beneficial interest to the said property.

- (3) By its judgment delivered on 17<sup>th</sup> April 2006, the District Court upheld the position of the Plaintiff and granted the Plaintiff the aforementioned relief. The appeal filed by the Defendant in the High Court of the Western Province holden in Mount Lavinia exercising Civil Appellate jurisdiction [the High Court] was dismissed by the High Court by its judgment delivered on 10<sup>th</sup> February 2012.
- (4) Aggrieved, the Defendant sought and obtained leave to appeal from this Court on 12<sup>th</sup> January 2015 on the following two questions of law:
  - (a) Did the High Court misdirect itself with regard to the burden of proof?
  - (b) Did the High Court fail to properly consider the attendant circumstances and err in the evaluation of same?
- (5) The principal question that needs to be determined in this appeal is whether the Plaintiff has conveyed to the Defendant by P2, the beneficial interest in the property referred to in the said Deed. The answer to this question would then determine whether the said property is being held by the Defendant in trust for the Plaintiff, as provided for by Section 83 of the Trusts Ordinance.

#### Reception of oral evidence

- (6) Bearing in mind that the Plaintiff is seeking to contradict the terms of P2 which on the face of it is an outright transfer, and in order to give context to the submissions of the learned Counsel, I shall at the outset refer to the provisions of the Prevention of Frauds Ordinance and the Evidence Ordinance.
- (7) Section 2 of the Prevention of Frauds Ordinance (prior to its amendment by the Prevention of Frauds (Amendment) Act, No. 30 of 2022) provided as follows:

*“No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not*

*exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, and no notice, given under the provisions of the Thesawalamai Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be in force or avail in law **unless the same shall be in writing** and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses.” [emphasis added]*

- (8) Sections 91 and 92 of the Evidence Ordinance reads as follows:

Section 91

*“When the terms of a contract, or of a grant, or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and **in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself**, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained. ...”*  
[emphasis added]

Section 92

*“When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, **no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms.** ...”* [emphasis added]

- (9) None of (a) the exceptions to Section 91, and (b) the provisos to Section 92, as indicated in the respective provisions, arise for consideration in this appeal.

- (10) The cumulative effect of Section 2 of the Prevention of Frauds Ordinance and Section 91 of the Evidence Ordinance is that while the disposition of any immovable property must be reduced to writing, proving the terms of a deed by which any immovable property has been transferred can only be done by producing the deed itself or, where permissible, by way of secondary evidence and in the manner provided therefor. It is important to note that to this, Section 92 of the Evidence Ordinance adds that no oral evidence that seeks to contradict, vary, add to or subtract from the terms contained in any instrument relating to land can be received by a Court.

### Section 83 of the Trusts Ordinance

- (11) However, Section 83 of the Trusts Ordinance, reproduced below, acts as an exception to the rule laid down in Section 92:

*“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.”* [emphasis added]

- (12) Referring to Section 2 of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance, H.N.G. Fernando, J (as he then was) stated in **Muttammah v Thiyagarajah** [62 NLR 559; at page 571] that:

*“The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise, but only to establish an ‘attendant circumstance’ 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.” [emphasis added]*

- (13) A similar view was expressed in **Balasubramaniam and another v Vellayar Krishnapillai and another** [(2012) 1 Sri LR 261] where Sripavan, J (as he then was) referring to the judgment in **Dayawathie and Others v Gunasekera and another** [(1991) 1 Sri LR 115] stated [at page 267] that this Court has “*held that the provisions of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not bar parole evidence to prove a constructive trust and that the transferor did not intend to pass the beneficial interest in the property. In such a case, extrinsic evidence to prove attendant circumstances can be properly received in evidence to prove a resulting trust.*”

#### Application of Section 83 – caution and scrutiny

- (14) With Section 83 thus being a significantly generous exception, it has been held that in applying Section 83, Courts must exercise great caution. In **Senadheerage Chandrika Sudarshani v Muthukuda Herath Mudiyansele Gedara Somawathi** [SC Appeal No. 173/2011; SC minutes of 6<sup>th</sup> April 2017], Prasanna Jayawardena, PC, J stated that:

*“The Court has to keep in mind that, a notarially attested deed of transfer should not be lightly declared to be a nullity. The Court must also guard against allowing a false or belated claim of ‘Trust’ made by a transferor who has transferred his property and then had second thoughts or seeks to profit from changed circumstances. Dalton J’s observations made close to 90 years ago in Mohamadu vs. Pathuamma [11 CLR 48 at page 49], (that) ‘It is becoming not uncommon by the mere allegation of a trust to seek to evade the very salutary provisions of (the Evidence) Ordinance to which I have referred,’ continues to remain a salutary caution.” [emphasis added]*

- (15) In Watagodagedara Mallika Chandralatha v Herath Mudiyanseleage Punchi Banda and Another [SC Appeal No. 185/2015; SC minutes of 4<sup>th</sup> December 2017] Aluwihare, PC, J emphasised as follows the need for Court to carefully scrutinise the evidence before it when Section 83 is sought to be applied:

*“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 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.**”* [at page 8; emphasis added]

Section 83 - what is an attendant circumstance?

- (16) The application of the test laid down in Section 83 would enable the Court to decide whether the owner of the property intended to dispose his or her beneficial interest in the said property when he or she executed the relevant deed. Accordingly, the intention of the owner must both be **reasonably inferred from** and **consistent with** the attendant circumstances surrounding the transfer.
- (17) This brings me to the question as to what is an ‘attendant circumstance’? In Muttammah v Thiyagarajah [supra; at page 564], referring to Section 83, Chief Justice Basnayake rightly stated as follows:

*“The section is designed to prevent transfers of property which on the face of the instrument appear to be genuine transfers, but where an intention to dispose of the beneficial interest cannot reasonably be inferred consistently with the attendant circumstances. **Neither the declaration of the transferor at the time of the execution of the instrument nor his secret intentions are attendant circumstances. Attendant circumstances are to my mind circumstances which precede or follow the transfer but are not too far removed in point of time to be regarded as attendant which expression in this context may be understood as “accompanying” or “connected with”.** Whether a circumstance is attendant or not would depend on the facts of each case.”* [emphasis added]

- (18) In Senadheerage Chandrika Sudarshani v Muthukuda Herath Mudiyansele Gedara Somawathi [supra], it was stated that, “*The words ‘attendant circumstances’ can be broadly described as meaning **the facts surrounding the transaction**. In Black’s Law Dictionary (9<sup>th</sup> Edition) the words ‘attendant circumstance’, as used in the American Law, have been defined as ‘A fact that is situationally relevant to a particular event or occurrence.’” [emphasis added].*
- (19) Our Courts have identified over the years different circumstances as being ‘attendant circumstances’ within the meaning of Section 83, and emphasised that, what an attendant circumstance is and the weight that must be attached to such circumstances in reasonably inferring the intention of the owner, would depend on the facts and circumstances of each case. It would therefore mean that a circumstance which is attendant in one case may not be so in another.
- (20) Accordingly, I am of the view that it is in light of the sequence of events and the nature of the attendant circumstances peculiar to a particular case, that a Court must arrive at its conclusion on whether Section 83 of the Trusts Ordinance applies to that particular case.

#### The burden of proof

- (21) The burden of proof in establishing the applicability of Section 83 lies on the person who claims that he or she did not intend to transfer the beneficial interest in the property to the transferee. In Watagodagedara Mallika Chandralatha v Herath Mudiyansele Punchi Banda and another [supra] Aluwihare, PC, J cited with approval the following passage from ‘**The Reception in Ceylon of the English Trust**’ (1971) by L.J.M. Cooray: “*Where a person has a notarial conveyance in his favour, **courts have placed a heavy burden on the transferor to prove facts bringing himself within Section 83.***” [emphasis added]
- (22) In Senadheerage Chandrika Sudarshani v Muthukuda Herath Mudiyansele Gedara Somawathi [supra; at page 15], it was held that:

*“... the use of the aforesaid words in Section 83 require that, the Court applies an objective test when determining the intention of the owner from the attendant circumstances. Therefore, **if the claim of a Constructive Trust is to succeed, the***

***attendant circumstances must make it plainly clear to the 'reasonable man' that, the owner did not intend to part with his beneficial interest in the property. A secret or hidden intention to retain the beneficial interest will not do. The attendant circumstances must be such that they would have demonstrated to the transferee that the owner intended to retain the beneficial interest in the property. The transferee is judged here as standing in the shoes of the 'reasonable man'. If a 'reasonable man' must have known from the 'attendant circumstances' that the owner intended to retain his beneficial interest in the property, the transferee is deemed to hold the property upon a Constructive Trust in favour of the owner. However, if a 'reasonable man' may not have drawn such an inference from the attendant circumstances, the transferee holds the property absolutely, since no Constructive Trust can be deemed to have arisen. Further, the burden of proof lies firmly on the person who claims a Constructive Trust to prove it."***  
[emphasis added]

- (23) The fundamental premise on which Section 83 applies is whether the owner intended to transfer the beneficial interest in the property in question, which intention must be reasonably inferred from, and be consistent with the attendant circumstances surrounding the transfer.

#### Applicability of Section 83

- (24) I shall now consider the several attendant circumstances that were relied upon by the District Court as demonstrative of the intention of the Plaintiff in arriving at its conclusion that the Plaintiff had established the existence of a constructive trust, and which findings were affirmed by the High Court.
- (25) The first and perhaps the most important attendant circumstance relied upon by the Plaintiff is the purpose for which she required the money since the purpose would clearly demonstrate whether she had the intention to pass the beneficial interest in the said property to the Defendant.
- (26) In order to better appreciate the purpose and thereby the intention of the Plaintiff, I must perhaps go back in time to 1980 when the Plaintiff purchased the property which is the subject matter of this appeal, in extent of 15.75P of land, by Deed No. 2832 dated 14<sup>th</sup> January 1980 for a sum of Rs. 8025. The attestation to this deed

bears out the facts that the purchase consideration was paid by the Plaintiff in three instalments between 1975 and 1980, thus making it clear that the Plaintiff had laboured over a long period of time to purchase this property.

- (27) The Plaintiff states that she thereafter constructed a house consisting of three rooms in 1981 and that she resided at the said house with her husband and her eight children, including the Defendant. The Plaintiff states further that in 1987 she wanted to add another section to the house. It must be noted that by this time all her eight children including the Defendant were grown up men and women but were continuing to live with their mother in a house consisting of three rooms. Hence, the need for additional space.
- (28) The Plaintiff however did not have sufficient money to fund the construction nor was she in a position to raise a loan in view of her age and due to her not having any permanent employment. The Plaintiff states that the Defendant, who was employed by then, had offered to raise a loan from a bank in his name and for the Plaintiff to pay the monthly loan instalments. Such a course of action required the Plaintiff to transfer the property to the Defendant so that he could pledge the property as security for the loan.
- (29) The Plaintiff had accordingly signed P2 in favour of the Defendant. Although she admits to having signed a set of papers, she states that she did so only to facilitate the loan transaction that would have enabled her to expand the house. The Plaintiff has stated very clearly that she did not intend to transfer the beneficial interest in the property to the Defendant and that the Defendant had undertaken to re-transfer the property once all instalments had been paid to the bank.
- (30) According to the said deed, the total consideration had been Rs. 125,000, of which the Bank had given a loan of Rs. 85,000. The Defendant claims that he paid the Plaintiff the balance sum of Rs. 40,000 in two instalments of Rs. 15,000 and Rs. 25,000. The Plaintiff admits that she signed the two receipts but states that she did not receive any money from the Defendant and that the said receipts were signed to satisfy the Bank that the balance sum of the total purchase price had been paid to the vendor. The Plaintiff states further that she utilised the loan proceeds and monies given by some of her children including the Defendant to complete the addition of the new section to the house.

- (31) The learned Counsel for the Plaintiff submitted that the land was purchased and the house was constructed with difficulty and with the meagre resources that the Plaintiff had. It was submitted further that this being the only property that the Plaintiff owned, she had no intention at all of selling the property. It was submitted that had she sold the property as claimed by the Defendant for Rs. 125000, she could not have bought another property in the vicinity for that price and the Plaintiff would have been stranded without a proper place to live during her old age. It was submitted further that most of the other children were still living in the same house with their mother and that they too would have had to look for alternative accommodation had she sold the property. It was submitted that these are all factors that point towards the lack of an intention on the part of the Plaintiff to transfer the beneficial interest in the property to the Defendant.
- (32) The version of the Plaintiff that she utilised the sum of Rs. 85,000 towards the construction of the additional section of the house has not been challenged by the Defendant. This gives rise to the question as to why the Plaintiff should spend on improving a house if she had by then sold to the Defendant the property on which the house was situated. These are the factors that the District Court has relied upon in accepting the version of the Plaintiff that the money was required to finance the expansion of the house, and that the Plaintiff had no intention of transferring the beneficial interest in the property to the Defendant.
- (33) There are two matters that I wish to add. The first is, I have already stated in paragraph 2 of this judgment that in his answer, the Defendant stated that he purchased the property because his mother was quarrelling with his brothers and sisters and was threatening to sell the property and move out. However, in his evidence, the Defendant stated that he wanted to purchase a property in Kadawatha and that when he informed the Plaintiff of this fact, she had told him to purchase her house, instead of buying land in another location. While none of these positions were suggested to the Plaintiff during cross examination, it is clear that the Defendant had taken two contradictory positions with regard to the circumstances in which he purchased the property.

- (34) The second matter that I wish to add is even though the Defendant had contracted a marriage on 22<sup>nd</sup> May 1996, he had continued to reside in the house situated on the said property with his wife. The Defendant states that issues developed between his wife and the Plaintiff and that as a result thereof, he and his wife were compelled to leave the said house soon thereafter. It appears that this was the beginning of the dispute between mother and son that led to the Plaintiff making a complaint at the Mirihana Police Station on 5<sup>th</sup> April 1997, the filing of action in the District Court on 13<sup>th</sup> November 1997 and which has now culminated in this appeal.
- (35) The District Court had also taken into consideration the following attendant circumstances as evidence of a constructive trust:
- (a) That the Plaintiff continued to reside at the said property with her other children including the Defendant;
  - (b) That the building plan seeking to add a section to the house had been submitted to the local council in the name of the Plaintiff;
  - (c) That the annual assessment of the property had been issued in the name of the Plaintiff and that the rates had been paid by the Plaintiff.
- (36) The Plaintiff also stated that she paid the monthly instalments due on the loan to the Bank, a fact which she had stated in her complaint to the Police prior to the filing of action. Although the Defendant has denied this and produced over 100 deposit slips as proof of payment, the Plaintiff had stated that the Defendant had forcibly removed these slips from her cupboard. While the version of the Plaintiff appears to be credible, the District Court had refused to consider the payment of the loan instalments as an attendant circumstance in favour of the Plaintiff.
- (37) The Defendant claimed that the additional section had been built entirely at his cost without any contribution from the Plaintiff. However, he failed to produce any documentary material to establish that he had the financial resources to do so or that he bore the cost of the materials and labour. The Defendant stated further that he had rented out part of the house to a third party and that he received the rent. The Plaintiff however claimed that the rent had been collected by her.

(38) The judgment of the District Court is founded upon the fact that the Plaintiff did not have the intention to transfer the beneficial interest in the said property for the reasons that I have referred to in paragraphs 26 - 32 of this judgment. This finding was affirmed by the High Court. I have carefully examined the evidence and I am satisfied that the findings of the District Court and the High Court are supported by the evidence. The three attendant circumstances that I have referred to in paragraph 35 buttress the position of the Plaintiff that she did not have the intention to transfer the beneficial interest in the said property at the time she signed P2.

(39) I am satisfied that the District Court and the High Court have correctly identified the scope of Section 83 of the Trusts Ordinance and have considered the attendant circumstances in accordance with the judicial reasoning that I have referred to. The analysis of the facts by both Courts also demonstrate that the burden of proving the existence of a constructive trust had been placed fairly and squarely on the Plaintiff.

#### Conclusion

(40) In the above circumstances, I answer the two questions of law in the negative. The judgments of the District Court and the High Court are accordingly affirmed and this appeal is dismissed, without costs.

**JUDGE OF THE SUPREME COURT**

**P. Padman Surasena, CJ**

I agree

**CHIEF JUSTICE**

**Janak De Silva, J**

I agree.

**JUDGE OF THE SUPREME COURT**