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

In the matter of an Appeal.

S.C. Appeal No.173/2011
SC/HCCA/LA No: 105/2010
WP/HCCA/GPH No.32/02(F)
D.C.Gampaha Case No. 41975/L

SENADHEERAGE CHANDRIKA SUDARSHANI,
No.497/A/1,Ranmuthugala,
Kadawatha.

PLAINTIFF

VS.

MUTHUKUDA HERATH MUDIYANSELAGE GEDARA SOMAWATHI
No.406/2/A, Welipillawa,
Ganemulla.

DEFENDANT

AND

MUTHUKUDA HERATH MUDIYANSELAGE GEDARA SOMAWATHI
No.406/2/A, Welipillawa,
Ganemulla.

DEFENDANT-APPELLANT

VS.

SENADHEERAGE CHANDRIKA SUDARSHANI
No.497/A/1,Ranmuthugala,
Kadawatha.

PLAINTIFF- RESPONDENT

AND NOW BETWEEN

SENADHEERAGE CHANDRIKA SUDARSHANI
No.497/A/1,Ranmuthugala,
Kadawatha.

PLAINTIFF- RESPONDENT -PETITIONER/APPELLANT

VS.

MUTHUKUDA HERATH MUDIYANSELAGE GEDARA SOMAWATHI
No.406/2/A, Welipillawa,
Ganemulla.

DEFENDANT-APPELLANT -RESPONDENT

BEFORE: B.P. Aluwihare, PC, J.
Upaly Abeyrathne J.
Prasanna Jayawardena, PC,J.

COUNSEL: Ms.Sudarshani Cooray for the Plaintiff-Respondent-Petitioner/Appellant.
Rohan Sahabandu, PC for the Defendant-Appellant-Respondent.

WRITTEN SUBMISSIONS FILED: By the Plaintiff-Respondent-Petitioner/Appellant on 01st November 2016.
By the Defendant-Appellant- Respondent on 28th November 2016.

ARGUED ON: 06th September 2016.

DECIDED ON: 06th April 2017.

Prasanna Jayawardena, PC J.

This appeal is about the rights to a 20 perch land in Ranmuthugala in the Gampaha District ["the land"]. The land was gifted to the Plaintiff-Respondent-Petitioner/ Appellant ["the plaintiff"] by her father, on 23rd October 1996.

About four months later, the plaintiff executed a notarially attested deed no. 14133 dated 20th February 1997 attested by D.C.Gunawathie, Notary Public. On the face of this deed, the plaintiff has transferred the land to the Defendant-Appellant-Respondent ["the defendant"] in consideration of the payment of a sale price of Rs.100,000/-. The attestation by the Notary Public before whom this Deed was

executed, states that, the Notary Public explained the nature of the deed to the plaintiff before the plaintiff executed this deed, and that the aforesaid consideration of Rs.100,000/- was paid by the defendant to the plaintiff, in the presence of the Notary Public.

About 15 months later, on 22nd May 1998, the plaintiff filed this action against the defendant in the District Court of Gampaha pleading: that, her father had title to the land described in the First Schedule to the plaint which is A:2 R:0 P:21.7 in extent; that, on 23rd October 1996, her father had gifted to her the allotment of land described in the Second Schedule to the plaint, which is a divided lot of 20 perches in extent out of the larger land described in the First Schedule to the plaint; that, in December 1996, the plaintiff needed money urgently and obtained a loan of Rs.100,000/- from the defendant which was repayable together with interest thereon at the rate of Rs.3,000/- per month; that, upon the defendant's request that the plaintiff transfers the land to the defendant as security for the repayment of this loan ["එම මුදලට ඇපයක් ලෙස "], the plaintiff executed the aforesaid deed no.14133; that, thereafter, the plaintiff paid interest on the loan to the defendant for four months; that, in or about 12th December 1997, the plaintiff sought to repay the entire loan and all accrued interest to the defendant but the defendant refused to accept repayment.

In paragraph [8] of the plaint, the plaintiff pleaded that, at the time deed no.14133 was executed, it was agreed by the plaintiff and the defendant that the defendant will transfer the land back to the plaintiff when the loan and interest thereon was repaid ["සම්පූර්ණ එකඟතාවය වූයේ ඉහත කී ණය මුදල සහ ඊට අදාළ පොලිය ගෙවා නිම කල පසුව එකී දේපල ආපසු පැමිණිලිකාරියට පවරා දීමටය"]. Thus, **the plaintiff has claimed that, there was an Agreement to Reconvey**.

In the same paragraph [8] of the plaint, the plaintiff has gone on to plead that, any right, title or interest that the defendant may have in the land is subject to a Trust in favour of the plaintiff and subject to the plaintiff's beneficial interest in the land. [විත්තිකාරියට ඉහත කී දේපල සඳහා යම් හිමිකමක් ඇත්තේ නම්, එසේ වනුයේ එම දේපල සඳහා පැමිණිලිකාරියට ඇති විශ්වාසය මත පදනම් කරගත් පලදායී හිමිකම් වලට යටත්ව බව පැමිණිලිකාරිය ප්‍රකාශ කර සිටී]. Thus, **the plaintiff claimed that, the defendant holds the land in Trust for the plaintiff**.

The plaintiff pleaded that she remained in possession of the land.

On the basis of these averments, the plaintiff pleaded her alleged First Cause of Action in paragraph [11] of the plaint, as follows: ඉහත වගන්තිවල අන්තර්ගත කරුණු අනුව මෙම පැමිණිලිකාරිය ප්‍රකාශ කර සිටිනුයේ මෙහි පහත දෙවන උපලේඛනයේ දක්වා ඇති දේපල සඳහා විත්තිකාරියට යම් කිසි ලේඛනගත හිමිකමක් ඇත්නම් එසේ වනුයේ එම දේපල සඳහා පැමිණිලිකාරියට ඇති විශ්වාසය මත පදනම් කරගත් පලදායී හිමිකම් වලට යටත්ව බවට නියෝග ලබා ගැනීමටත්, ඉහත කී රුපියල් ලක්ෂයක (රු. 100,000 /=) ක මුදල සහ ඊට අදාළ පොලිය ගෙවා නිම කල පසු අදාළ දේපල පැමිණිලිකාරිය නමට පවරා දෙන ලෙසට නියෝගයක් ලබා ගැනීමටත් පැමිණිලිකාරිය හට විත්තිකාරියට එරෙහිව නඩු නිමිත්තක් උද්ගතව ඇත.

Thus, when the plaintiff averred her First Cause of Action in paragraph [11] of the plaint, the plaintiff has *first* pleaded that, a Trust exists in her favour *and* has pleaded that, the land should be transferred back to the plaintiff upon payment of Rs.100,000/-.

On this basis, the plaintiff has prayed for the following reliefs by prayers ("ඈ") and ("ඉ") of the plaint, upon her First Cause of Action:

(i) An Order declaring that, any right, title or interest that the defendant may have in the land is subject to a Trust in favour of the plaintiff with the plaintiff having a beneficial interest in the land;

(ii) An Order that, upon the plaintiff repaying the loan of Rs.100,000/- with accrued interest thereon, the defendant was obliged to transfer the land to the plaintiff.

The plaintiff also pleaded an *Alternative* Cause of Action that, the true value of the land was about Rs.400,000/- at the time deed no. 14133 was executed and, therefore, this deed should be set aside on the ground of *laesio enormis*.

In her answer, the defendant denied the claims of the plaintiff and prayed that the action be dismissed. The defendant pleaded: that, she had duly and *bona* fide purchased the land from the plaintiff for the value of the land at the time of the transfer; that, the defendant had obtained good title to the land by deed of transfer No. 14133 executed for valuable consideration; and that, the plaintiff had placed the defendant in possession of the land after the deed was executed.

When the trial commenced, no admissions were made and the parties framed issues which were closely based on the averments in their pleadings.

The issues framed by the plaintiff included the following issues no.s [5] and [6] based on the aforementioned paragraph [11] of the plaint:

Issue No.[5] - එසේ නම් ඉහත කී ඔප්පුව අත්සන් කරන අවස්ථාවේදී පැමිණිලිකාරිය විත්තිකරියගේ සම්පූර්ණ එකඟත්වය වශයෙන් ඉහත කී ණය මුදල හා අදාළ පොලිය ගෙවා නිම කල පසු එම දේපළ පැමිණිලිකාරියට ආපසු පවරා දීමට ද ?

Issue No.[6] - එසේ නම් එම ඔප්පුවේ සඳහන් දේපළ සඳහා විත්තිකාරියට යම්කිසි හිමිකමක් ඇත්නම් එසේ වනුයේ එම දේපළ සඳහා පැමිණිලිකාරිය සතු විශ්වාසය මත පදනම් කළ පැමිණිල්ල පලදායි හිමිකම් වලට යටත්ව ද ?

It appears from the averments in paragraph [11] of the plaint, prayer ("ඈ") of the plaint, and issue no. [6] that, the plaintiff seeks to rely on the well known principle of law enacted in Section 83 of the Trust Ordinance No. 9 of 1917. Section 83

stipulates that, where the owner of property transfers the property and it cannot be reasonably inferred from the attendant circumstances that he intended to dispose of the beneficial interest in that property, the transferee must hold the property for the benefit of the owner – *ie:* that, a Constructive Trust is deemed to exist in terms of which the transferee holds the property for the benefit of the owner. However, somewhat strangely, the plaint does not refer to Section 83 of the Trust Ordinance or any other provision of the Trusts Ordinance. None of the plaintiff's issues have done so, either. That should have been done, both in the plaint and in the issues. The plaintiff would have been better served if the plaint had been drafted and the issues had been framed more precisely and with a better understanding of the applicable law.

To get back to the facts relevant to this appeal, the plaintiff, her father, her father-in-law and her husband testified in support of the plaintiff's case. The plaintiff also led the evidence of Mr.T.M.S.Pieris who had valued the land on 14th July 1998, at the request of the plaintiff. The plaintiff produced in evidence the deed of gift no. 2099 dated 23rd October 1996 by which her father gifted the land to her marked **"පැ 1"**, the aforesaid deed no. 14133 marked **"පැ 2"** and the valuation report prepared by a Mr. T.M.S.Pieris marked**"පැ 3"**, which valued the land at Rs.600,000/-.

The case presented to the Court by the plaintiff and her witnesses was that: the plaintiff's father gifted the land to her; the land remained unfenced and was part of the larger land described in the First Schedule to the plaint which was in the possession of the plaintiff's father; after the plaintiff married, she lived in her husband's home; shortly after the plaintiff's marriage, her father-in-law was in urgent need of money to repay a loan taken by him earlier from one Nagahalanda; but, at the same time, the plaintiff's father-in-law denied that he needed any money and claimed that it was his son – *ie:* the plaintiff's husband – who had needed money; in any event, in order to raise the money which was required, the plaintiff's father-in-law obtained another loan of Rs.100,000/- from the defendant; at the request of her father-in law and as security for the repayment of this loan given to him by the defendant, the plaintiff, her father-in-law , her husband and another person went to the office of the Notary Public; the plaintiff executed deed no. 14133 marked **"පැ 2"** after the Notary Public explained the nature of the deed to her [*"ඔප්පුව ලිව්වාට පසුව කියවා තේරුම් කර දුන්නා ඊට පසුව අත්සන් කළා "*]; this deed had been witnessed by the plaintiff's husband and the other person who accompanied them; the plaintiff claimed that this deed marked **"පැ 2"**was a "Mortgage Bond" [*"උකස් ඔප්පුවක් "*]; the defendant agreed that she would transfer the land back to the plaintiff upon repayment of the loan with interest at the rate of Rs.3,000/- per month; the plaintiff's father-in-law had paid four monthly interest payments of Rs.3,000/- each to the defendant; but when, in December 1997, the plaintiff's father tried to pay the defendant a sum of Rs.124,000/- being the loan of Rs.100,000/- with accrued interest for eight months amounting to Rs.24,000/-, the defendant had refused to accept repayment and refused to transfer the land; the defendant holds the land subject to a Constructive Trust in the plaintiff's favour [*"අනුමිත භාරයකට තියාගෙන "*];

and, in any event, the land had a value of Rs.500,000/- which is very much higher than the sum of Rs.100,000/-, which is the amount stated in the deed marked **"පැ 2"**.

The defendant stated in her evidence that: she wished to purchase a land and had been informed that the plaintiff wished to sell the land; accordingly, she had first inspected the land and then purchased it as set out in the deed marked **"පැ 2"**; in addition to the sum of Rs.100,000/- stated in the deed marked **"පැ 2"**, she had paid further sum of Rs.100,000/- to the plaintiff; when she purchased the land, the boundaries were demarcated by a fence; she had paid a fair price for the land; she had been in possession of the land and had then heard that, the fence had been broken; when she went to the land to repair the fence, the plaintiff's family had prevented her from entering the land; thereupon, the defendant made the Complaint marked **"වි1"** to the Police; the plaintiff had filed this action a few days after that.

The evidence of the plaintiff, her father and her father-in-law was heard by one District Judge. Thereafter, the proceedings were adopted before his successor, who heard the evidence of the plaintiff's husband, Mr.T.M.S.Pieris and the defendant and delivered the judgment of the District Court.

In her judgment, the learned District Judge observed that, there were several discrepancies in the evidence of the witnesses in the plaintiff's case and also that, the plaintiff had been unable to adduce any documentary evidence to support her claim that the transaction was not an outright sale but was a loan against the security of the land.

Nevertheless, the learned District Judge held that, the deed marked **"පැ 2"** was executed as `Security' for a loan of Rs.100,000/- which the plaintiff's father-in-law had obtained from the defendant. [**"පැ 2"** ඔප්පුව මගින් දේපල පවරා දීමක් සිදුවී විත්තිකාරියට පැමිණිලිකාරියගේ මාමා විසින් ලබාගත් රුපියල් ලක්ෂයක මුදලට **ඇපයක් වශයෙන් බවත් ය**"] [emphasis added].

Although, as set out above, the plaintiff's first Cause of Action was based on the claim that the defendant held the land in Trust for the Plaintiff, the learned District Judge did *not* consider whether a Trust had arisen and did not arrive at a specific finding as to whether there was a Trust. The learned District Judge did not consider any of the statutory provisions or other provisions of the law which define the circumstances in which a Court can hold that a Trust has arisen. The learned District Judge did not consider the decisions of the superior courts which have dealt with these matters.
However, despite not making any specific determination with regard to a Trust and or with regard to who held the beneficial interest in the land, the learned District Judge has answered, in the affirmative, the aforesaid Issue No [6] which asks whether there was a Trust. Further, despite not making a specific determination with regard to a Trust, the learned District Judge has, in her judgment, granted the declaration prayed for in prayer ("ඇ") of the plaint declaring that, any right, title or interest that the defendant may have in the land is subject to a Trust in favour of the plaintiff.

With regard to the alternative Cause of Action based on the ground of *laesio enormis*, the learned District Judge accepted the accuracy of the valuation report marked **"පැ 3"**. Having done so, the learned District Judge held that, the deed marked **"පැ 2"** was null and void on the ground of *laesio enormis*.

The defendant appealed to the High Court [Civil Appeal] of the Western Province holden at Gampaha.

In appeal, the learned High Court judges held that, the evidence did not establish a Trust and, further, that the plaintiff had failed to raise any issue with regard to a Trust. The High Court held that, instead, the evidence established there had been an Agreement to reconvey the land upon repayment of the loan but that such agreement was null and void since it was not notarially attested. The learned High Court judges also held that, the plaintiff has not proved *laesio enormis*. On the aforesaid basis, the High Court set aside the judgment of the District Court.

I have previously mentioned that, the plaintiff had, in fact, raised issue No [6] with regard to the whether a Trust exists. The learned High Court judges erred, to that extent, when they overlooked that issue. But, the other determinations by the High Court judges with regard to whether the evidence established a Trust and on the other matters which were in contention, have not been considered by this Court, as yet.

The plaintiff made an application to this Court seeking leave to appeal from the judgment of the High Court. This Court gave the plaintiff leave to appeal on the following two questions of law:

(i) Have the Honourable Judges of the Provincial High Court erred in failing to appreciate that the evidence given on behalf of the Plaintiff-Respondent-Petitioner would clearly establish a Trust in favour of the Plaintiff-Respondent-Petitioner ?

(ii) Have the Honourable Judges of the Provincial High Court erred in failing to appreciate that the attendant circumstances in this case would clearly establish that, the Plaintiff-Respondent-Petitioner did not intend to part with the beneficial interest to the land by executing the deed in favour of the Defendant- Appellant-Respondent ?

The defendant framed the following third question of law too:

(iii) If the Trial Court had come to the conclusion that there is a Trust, could the Court apply the principle of *laesio enormis* to set aside the impugned Deed ?

It is convenient to deal now with the **third question of law** raised by the defendant. This question asks whether a prayer for a declaration that any rights the defendant may have under and in terms of the deed marked **"පැ 2"** are subject to a Trust in the plaintiff's favour, can coexist with a prayer for a declaration that the very same deed, is null and void on the ground of *laesio enormis*.

In this connection, it is established law that, where a plaintiff who has executed a deed transferring a land to a defendant, prays for a declaration that the defendant holds the land in Trust for the benefit of the plaintiff, that plaintiff cannot, at the same time, also ask for a declaration that the same deed is null and void on the ground of *laesio enormis*. Thus, in FERNANDO vs. FERNANDO [19 NLR 210], Woodrenton CJ observed that, a plaintiff, who has executed a deed transferring a land to the defendant but claims that the defendant holds the land in Trust for him, cannot seek to also rely on the ground of *laesio enormis*. The learned Chief Justice stated [at p.211], *"There is, therefore, no room for the application of the doctrine of enormis laesio,1[Voet 18, 5, 16, and Juta's Digest, vol. II. , col. 2583.] as the transaction was not a sale at all."*.

This is because the first relief of a declaration of Trust can be granted only if the Court finds that title was *not* transferred absolutely and that the parties always intended that the beneficial interest in the property will remain with the transferor. In other words, Court has to determine that there was *no* true sale and that, therefore, the deed of transfer is of *no* force or effect - *ie:* that the deed of transfer is *void*. However, the second relief of setting aside the deed on the ground of *laesio enormis* can be granted only if the Court reaches the entirely different conclusion that, the deed of transfer was valid but that, nevertheless, the contract of sale should be set aside because of the gross disparity or inequality between the price paid and the true value of the property - *ie:* that the deed of transfer is *voidable*. It is this disparity or inequality between the true value of the property and the price paid for it, which is termed *laesio enormis.* As Weeramantry [Law of Contract at p.327-328] observes, this disparity *"implies something in the nature of fraud or undue influence"* and allows the vendor to have an otherwise valid contract of sale rescinded on the ground that the price he was paid is grossly inadequate and unfair.

Thus, the foundation upon which a declaration of Trust can be granted (which is that the deed of transfer is of no force or effect – *ie:* that it is *void*), contradicts and cuts across the basis of granting relief on the ground of *laesio enormis* (which is that the deed of transfer is valid but should be set aside – *ie:* that it is only *voidable*).

Therefore, the learned District Judge erred when she answered the aforesaid issue no. [6] in the plaintiff's favour and, thereby, concluded that the deed of transfer marked **"පැ 2"** is void and that the defendant held the land in Trust for the plaintiff *and*, at the same time contradicted herself by holding that, the deed marked **"පැ 2"** is valid but should be set aside on the ground of *laesio enormis*. The High Court has not considered this error of law but has held that, the plaintiff did not prove the constituent elements required to establish *laesio enormis*.

In this appeal, learned Counsel for the plaintiff concedes the aforesaid error of law on the part of the District Court but draws attention to the fact that, the plaintiff has first pleaded the Cause of Action based on Trust and, thereafter, pleaded the Cause of Action based on *laesio enormis*, *in the alternative*. Learned Counsel for the plaintiff submits that, the Cause of Action based on Trust can be decided and the Cause of Action based on *laesio enormis* can be ignored. On the other hand, it has been submitted on behalf of the defendant that, the District Judge's error of law in granting both reliefs renders the entire judgment of the District Court *"per se void*" and *"illegal"*.

In this regard, I am of the view that, the determination by the District Court that the plaintiff had established a Trust can stand independent of the `contradictory' determination that the deed marked **"පැ 2"** should *also* be set aside on the ground of *laesio enormis*. The fact that, the plaintiff has pleaded the two Causes of Action *in the alternative* supports this conclusion. I do not think that, the error of law committed by the learned District Judge when she granted *both* reliefs, vitiates the judgment of the District Court *in toto*. Therefore, I cannot accept the defendant's submission that the District Judge's error of law in granting both reliefs renders the *entire* judgment of the District Court void. It would appear that, in this instance, the proverbial caution that 'one should not throw out the baby with the bath water', is apt.

Accordingly, I answer the third question of law as follows: The District Court erred when, after answering issue No. [6] in the affirmative and, thereby, concluding that, the land was subject to a Trust in the plaintiff's favour and the deed marked **"පැ 2"** was void, *also* proceeded to *set aside* the same deed on the ground of *laesio enormis*. However, this mistake on the part of the learned District Judge does not render the judgment of the District Court with regard to the issue of whether the plaintiff had established a Trust, *"per se void" or "illegal"* as contended on behalf of the defendant.

The **first two questions of law** remain to be now considered. They both ask the same question. That is, whether the learned High Court judges erred when they held that, the evidence placed before the Court did not establish the existence of a Trust in favour of the plaintiff.

As observed earlier, the plaintiff's First Cause of Action averred in the plaint
refers to *both* a claim that, a claim that the defendant holds the land in **Trust** for the plaintiff and a claim that there was an **Agreement to Reconvey**. Thereafter, when the plaintiff gave evidence, she suggested that, the deed marked **"පැ 2"** is a "Mortgage" ["උකස් ඔප්පුවක් "]. Learned President's Counsel for the defendant has submitted that, the plaintiff's position is that there was a Mortgage and that parol evidence cannot be led to prove that the deed marked **"පැ 2"** is a Mortgage. Thus, the pleadings and the issues and evidence require examination, to ascertain what exactly the plaintiff's First Cause of Action is.

Although, at first glance, there are the aforesaid contradictions and some confusion in the pleadings, issues and evidence, a closer look makes it clear that, the plaintiff's First Cause of Action is that a Constructive Trust exists in her favour. That is because, as set out above, paragraph [11] of the plaint, prayer ("ඊ") of the plaint and issue no. [6] make it evident that, the plaintiff has claimed the existence of a Constructive Trust arising from the type of circumstances contemplated in Section 83 of the Trust Ordinance and has prayed for an Order declaring that, any right, title or interest that the defendant may have in the land is subject to a Trust in favour of the plaintiff, with the plaintiff having the beneficial interest in the land. Further, I am not inclined to place too much weight on the fact that, in the course of her evidence, the plaintiff referred to a "Mortgage". The plaintiff cannot be expected to have knowledge of legal terminology. This Court must place more reliance on the pleadings and issues and also the effect of the entirety of evidence led by the plaintiff.

When that is done, it is evident that, the plaintiff's substantive claim is that a Trust exists in her favour and that, the subsequent claim to have the property transferred back to her, is consequential to the substantative claim that a Trust exists. In the same way, prayer (ඉ) for a declaration of Trust is the `main relief ' which has been prayed for upon the First Cause of Action and prayer (ඌ) for an Order to Retransfer, is a `consequential relief'.

The plaintiff would have been better served if the plaint had been drafted and the issues had been framed more precisely and with a better understanding of the applicable law. However, these defects should not prevent the plaintiff from having her true Cause of Action adjudicated, since the Court can see that a Cause of Action based on Trust has been made out in the plaint and placed in issue and the appropriate relief has been prayed for.

Next, in view of the submission made by learned President's Counsel for the defendant that, parol evidence cannot be led by the plaintiff, it is necessary to consider whether the plaintiff was entitled to lead parol evidence which seeks to vary the terms of the notarially attested deed marked **"එ 2".**

It may be mentioned here that, if the plaintiff's Cause of Action had been that, there was an **Agreement to Reconvey** [or a Mortgage, as submitted by learned President's Counsel], the plaintiff would not have been entitled to lead parol evidence. That is because, it is established law that, the plaintiff cannot lead parol evidence in an attempt to satisfy the Court that the outright transfer set out in the notarially attested deed marked **"එ 2"** should be treated as an Agreement to Reconvey or a Mortgage. This prohibition arises since Sections 91 and 92 of the Evidence Ordinance bar the reception of parol evidence which seeks to prove that a notarially attested deed of transfer should be treated as an Agreement to Reconvey [or as a Mortgage] unless the circumstances fall within one of the provisos to Section 92. In this connection, it is to be noted that, the plaintiff does not claim the existence of fraud, intimidation, illegality, want of capacity, want of due execution or any other grounds which would bring this case within one of the provisos to Section 92. Thus,

as Jameel J stated in GUNASEKERA vs. UYANGODAGE [1987 1 SLR 242 at p.245], *"…..sections 91 and 92 of the Evidence will not permit the receipt of evidence to vary the terms of a notarially executed deed which on the face of it (as in P1) is a simple straightforward transfer and more particularly will prevent parole evidence being led to superimpose on a simple transfer deed characteristics such as mortgages or agreements to retransfer - even when those agreements between those parties are contained in contemporaneous non-notarially executed documents."*. This same rule has been enunciated in several other decisions such as MOHAMADU vs. PATHUMAH [11 C.L.R. 48], SOMASUNDERAM CHETTY vs. TODD [13 NLR 361], PERERA vs. FERNANDO [17 NLR 486], ADAICAPPA CHETTY vs. CARUPPEN CHETTY [22 NLR 417], DON vs. DON [31 NLR 73], SOMASUNDERAM CHETTY vs. VANDER POOTEN [31 NLR 270], APPUHAMY vs. UKKU BANDA [41 CLW 43], SAVERIMUTTU vs. THANGAVELAUTHAM [55 NLR 529], SETUWA vs. UKKU [56 NLR 337] and FERNANDO vs. COORAY [59 NLR 169].

But, the position is *different* with regard to the plaintiff's First Cause of Action which is that, the defendant holds the land **in Trust** for the plaintiff. That is because, it is also a well-established rule that, parol evidence can be led to prove the existence of a **Trust** over a land which is the subject matter of what appears, on the face of it, to be a deed of transfer by which the land has been transferred. As Jameel J stated in the aforesaid case of GUNASEKERA vs. UYANGODAGE [at p.245], *"….. parole evidence is always available to prove a **trust** (vide the Privy Council decisions in Saminathan Chetty v. Vendor Poorten , Vallyammai Atchi v. Majeed and Saverimuttu v. Thangavelautham."*. [emphasis added].

His Lordship, Justice Jameel, was referring to the well known principle that, although Sections 91 and 92 of the Evidence Ordinance enact the general prohibition placed by English Common Law on the admission of parol evidence aimed at contradicting or varying the terms of a written agreement, an exception is made to the reception of parol evidence required to prove the existence of a Constructive Trust over property which, on the face of it, has been unconditionally transferred by a deed of transfer or other written instrument. In such a situation, the prohibition on parol evidence stipulated by Sections 91 and 92 of the Evidence Ordinance, does not apply.

This exception is made on the following twofold basis: Firstly, the Courts recognize that, the provisions of Chapter IX of the Trusts Ordinance which, *inter alia*, set out the circumstances in which a Constructive Trust arises, require that parol evidence be admitted to prove a Constructive Trust. A moment's thought will show that, if parol evidence which seeks to prove a Constructive Trust is barred, it will be impossible to prove that a Constructive Trust had arisen. Thus, unless a person who wishes to prove a Constructive Trust is permitted to lead parol evidence, the provisions of Chapter IX of the Trusts Ordinance will be rendered nugatory. Secondly, the Courts have been disposed towards treating the circumstances which give rise to a claim that a Constructive Trust has arisen, as falling within the ambit of one of the Provisos to Section 92 of the Evidence Ordinance.

Thus, in several decisions, it has been held that, parol evidence may be admitted to prove a **Constructive Trust**. In VALLIYAMMAI ATCHI vs. ABDUL MAJEED [48 NLR 289], the Privy Council held that, oral evidence may be admitted to prove the existence of a Constructive Trust. In MUTTAMMAHH vs. THIYAGARAJAH [62 NLR 559 at p.571], H.N.G.Fernando J, as he then was, stated, *"The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise but only to establish an 'attendant circumstances' from which it could be inferred that the beneficial interest did not pass. Although that promise was of no force or avail in law by reason of Section 2 of the Prevention of Frauds Ordinance, it is nevertheless a fact from which an inference of the nature contemplated in Section 83 of the Trusts Ordinance properly arises. The Prevention of Frauds Ordinance does not prohibit the proof of such an act. If the arguments of counsel for the appellant based on the Prevention of Frauds Ordinance and on Section 92 of the Evidence Ordinance are to be accepted, then it will be found that not only Section 83, but also many of the other provisions in chapter IX of the Trusts Ordinance will be nugatory. If for example 'attendant circumstances' in Section 83 means only matters contained in an instrument of transfer of property, it is difficult to see how a conveyance of property can be held in Trust unless indeed its terms are such as to create an express Trust".* In DAYAWATHIE vs. GUNASEKERA [1991 1 SLR 115 p.118], it was held that, *"….. one has to bear in mind that the Trusts Ordinance is a later enactment, and it deals expressly with trusts. Naturally in any conflict of the provisions of the Evidence Ordinance with the provisions of the Trusts Ordinance the later must undoubtedly prevail."* Recently, in FERNANDO vs. FERNANDO [SC Appeal 175/2010 decided on 17.01.2017], Sisira De Abrew J explained [at p. 7] *"In order to prove the legal principle discussed in Section 83 of the Trust Ordinance, it is necessary to lead oral evidence between the vendor and the vendee at the time of the Deed of Transfer was executed. If evidence relating to attendant circumstances that the vendor did not intend to transfer the beneficial interest is shut out, then the purpose of Section 83 of the Trust 8 Ordinance will be rendered nugatory."* His Lordship went on to hold [at p.10] *"Section 2 of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not operate as a bar to lead parol evidence to prove a constructive trust and to prove that the transferor did not intend to dispose of beneficial interest in the property."* Other cases where parol evidence has been admitted to prove a Constructive Trust, include CARTHELIS vs. PERERA [32 NLR 19], FERNANDO vs. THAMEL [47 NLR 297], PREMAWATHI vs. GNANAWATHI [1994 2 SLR 171], VAN LANGENBERG vs. ANTHONY [1990 1 SLR 190], THISA NONA vs. PREMADASA [1997 1 SLR 169], PIYASENA vs. DON VANSUE [1997 2 SLR 311], FERNANDO vs. FERNANDO [CA Appeal 373/2000F decided on 08th October 2008] and PERERA vs. FERNANDO [2011 BLR 263].

It may be mentioned here that, a third reason has been adduced in cases such as VALLIYAMMAI ATCHI vs. ABDUL MAJEED and MARIKAR vs. LEBBE [52 NLR 193], as being a ground to admit parol evidence to prove a Constructive Trust. That is, the effect of Section 5 (3) of the Trusts Ordinance which states that, the usual requirement of a notarially attested written instrument in order to create a valid *inter*

vivos express Trust over immovable property, does not apply in circumstances where insisting on that requirement, will result in effectuating a fraud. However, it seems to me that, Section 5 (3) applies to Express Trusts created under Chapter II of the Trusts Ordinance while, in contrast, there is no requirement of notarial attestation in the case of Constructive Trusts arising under Chapter IX of the Trusts Ordinance. That is because the requirements of Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840 apply only to the creation of legal interests over immovable property and, therefore, do not apply to the equitable interests created by a Constructive Trust arising in terms of Chapter IX of the Trusts Ordinance. Thus, in JONGA vs. NANDUWA [45 NLR 128 at p.132], Keuneman J stated *"I am of opinion that where a constructive trust can be held to exist under our law, then the operation of section 2 of the Ordinance of Frauds has no application"*. Similarly, in NARAYANAN CHETTY vs. JAMES FINLAY & CO [29 NLR 65 at p.69], Garvin J observed, *"….. the local Statute of Frauds - section 2 of Ordinance 7 of 1840 - is concerned with interests in land created by the acts of parties, and not with obligations in the nature of trusts raised by operation of law.'*. As Weeramantry explains [Law of Contracts at p.635-636], the Prevention of Frauds Ordinance *"…. deals only with legal and not with equitable interests. Consequently there is nothing in section 2 repugnant to the proof by parol evidence of the transfer of equitable interests in land arising out of a Trust created by operation of law."*

Next, it also should be considered whether the fact that the plaintiff had also claimed that there was an Agreement to Reconvey, cuts across or excludes her claim that there was a Trust. It has to be kept in mind that, the facts and circumstances which give rise to a claim that there was an Agreement to Reconvey and the facts and circumstances which give rise to a claim that there is a Constructive Trust, can often be similar. This could cause some difficulty in distinguishing which is which. As Keuneman J has observed [Notes on the Law of Trust at p.17], *"It is a fine but sharp line that divides cases where there is a mere Agreement to Reconvey and those where there is a Trust."* However, drawing the distinction is important since, as set out above, the success of a case may depend on which side of the line the facts fall. Thus, as set out above: if the facts point to an Agreement to Reconvey *per se* (or a Mortgage *per se*), the case will fail by operation of Section 2 of the Prevention of Frauds Ordinance and Sections 91 and 92 of the Evidence Ordinance; On the other hand, if the facts establish that there was a Constructive Trust under Chapter IX of the Trust Ordinance, neither Section 2 of the Prevention of Frauds Ordinance nor Sections 91 and 92 of the Evidence Ordinance will apply and the claim of a Constructive Trust will succeed provided it has been proved. Each case will have to be decided upon its own facts.

However, the requirement to make the aforesaid decision does not arise here since, in the present case, as stated earlier, the Plaintiff's substantive Cause of Action is that a **Trust** exists for the benefit of the plaintiff and the claim that there was an Agreement to Reconvey has been made only as a fact in support of or as an `attendant circumstance' which helps to prove the Cause of Action based on Trust. This is a situation similar to the one which arose in MUTTAMMAH vs.

THIYAGARAJAH where H.N.G.Fernando J, as he then was, observed [at p. 571], *"The plaintiffs ought 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."*

Thus, the aforesaid examination establishes that, the Plaintiff's First Cause of Action is nothing other than a claim that, any rights which the defendant has over the land are subject to a Constructive Trust in favour of the plaintiff. Further, it is clear that the plaintiff was entitled to lead parol evidence in her efforts to establish the existence of a Constructive Trust.

To get back to the first two questions of law to be determined in this Appeal: when considering whether the plaintiff has led the required evidence to establish that, there was a Constructive Trust in her favour, one has to look to Chapter IX of the Trusts Ordinance which sets out the circumstances in which a Constructive Trust would arise. The statutory provision in that Chapter which is relevant to the circumstances of this case is, as mentioned earlier, Section 83.

Section 83 states:

"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."

In THISA NONA vs. PREMADASA, Wigneswaran J observed [at p.172], *"What this Court has to decide is whether the 1st defendant appellant `intended to dispose of the beneficial interests in the property' or not."*. It has to be added that, in terms of the words used in Section 83, this decision must be based on the only inference which can be reasonably drawn from the attendant circumstances. Therefore, the more complete question to be asked when determining whether a Constructive Trust exists under Section 83 would be: whether the only inference that can be reasonably drawn from the attendant circumstances is that, the owner of the property did not intend to part with his beneficial interest in the property.

The words `attendant circumstances' can be broadly described as meaning the facts surrounding the transaction. In Black's Law Dictionary (9th 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."* In MUTTAMMAH vs. THIYAGARAJAH [at p.564], Basnayake CJ, describing the words `attendant circumstances', stated, "*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."*

It is clear that, the use of the words *"it cannot reasonably be inferred consistently with the attendant circumstances"* in Section 83, impose a requirement on the Court to satisfy itself that, the attendant circumstances clearly point to the conclusion that the owner did not intend to dispose of his beneficial interest. If the attendant circumstances unequivocally point to that conclusion, a Constructive Trust would have arisen. However, if the attendant circumstances fail to unequivocally establish that the owner did not intend to dispose of his beneficial interest or, in other words, there is a doubt as to the conclusion which can be drawn from the attendant circumstances, a Court should, usually, reject the claim that, a Constructive Trust exists.

Further, 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. In this case, that is the plaintiff.

Thus, if the plaintiff is to succeed in this appeal, she should have furnished evidence which satisfies the Court that, it cannot be reasonably inferred from the attendant circumstances that she intended to part with her beneficial interest in the land.

As stated earlier, the Court has to apply an objective test when determining this question. Accordingly, the Court has to place more reliance on facts that can be ascertained from the evidence rather than unsubstantiated claims made from the witness box. 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. PATHUMMAH [at p.49] " *It is becoming not uncommon by the mere allegation of a trust to seek to evade the very salutary provisions of (Evidence) Ordinance to which I have referred.*", continues to remain a salutary caution.

The plaintiff started her case by testifying. However, when she did so, plaintiff did not claim that she had any discussions with the defendant with regard to the plaintiff retaining the beneficial interest in the land or with regard to a Trust or an Agreement to Reconvey. In fact, the plaintiff stated *"වචනයක් හරි හුවමාරු වුණේ නැහැ"*. The plaintiff did not stop at that, she went on to give the following evidence which appears to cut across her case:

Q: *"වචනයක් හෝ කතා කරගත්තාද විත්තිකාරිය ආපසු දෙනවද කියලා?",*
A: "නැහැ"

and

Q: *"තමා සහ විත්තිකාරිය අතර විශ්වාසයක් තිබ්බාද?",*
A: "එහෙම එකක් තිබුණේ නැහැ"

Further, the deed marked **"පැ 2"** is, plainly, an unconditional deed of transfer. It is in Sinhala and the plaintiff, who had studied up to Grade 11, could have easily read the deed and understood its nature. In fact, the plaintiff specifically stated that, she read the deed and that the Notary Public explained the nature of the deed to her before the plaintiff executed it. *''ඔප්පුව ලිව්වාට පසුව කියවා තේරුම් කර දුන්නා ඊට පසුව අත්සන් කළා ".* In these circumstances, the plaintiff cannot claim that she did not fully understand that she was unconditionally transferring the land to the defendant when she signed the deed marked **"පැ 2".**

Next, when the 'attendant circumstances' are examined, it is glaringly obvious that, the plaintiff has been unable to produce any documentary evidence such as an informal written agreement or a promissory note or an exchange of letters which substantiate her claim that, a loan was obtained from the defendant against the `Security' of the land or that there was an Agreement to Reconvey. The many decisions of the Courts which have dealt with transactions of the nature claimed by the plaintiff reveal that, when such a transaction occurs, the parties often enter into an informal written agreement which reflects the agreement of a loan granted against the security of the land or which set out a promise by the lender to convey the land back to the borrower upon payment of the loan. Often, there is a promissory note or other writing signed by the borrower promising to repay the loan. Payments of loan installments or interest are usually proved by receipts issued by the lender or are sometimes proved by cheques issued by the borrower. Letters are written by the parties referring to the loan and the lender's agreement to re-transfer the land when the loan is repaid. The plaintiff was unable to produce any such document.

Further, it has to be noted that, the witnesses who testified in support of the plaintiff's case with regard to the transaction, were the plaintiff, her father, her father-in-law and her husband. They were all persons who would have, naturally, desired the plaintiff to succeed. They cannot be regard as disinterested or independent witnesses. The plaintiff was unable to lead the evidence of any non-related witness who could support her claim that a loan had been obtained from the defendant

against the `Security' of the deed marked **"පැ 2"** or that, the plaintiff did not intend to dispose of her beneficial interest in the land.

As the learned District Judge observed, the plaintiff also failed to lead the evidence of the person named Nagahalanda who is said to have given the earlier loan (which had to be repaid) to the plaintiff's father-in-law. Further, the plaintiff failed to lead the evidence of the Notary Public who had attested the deed marked **"පැ 2"** or the evidence of the other witness to this deed, both of whom could have given independent and disinterested testimony with regard to any discussions had at the time the deed was executed.

There were also conflicting claims with regard to the person who needed the alleged loan that had to be repaid. In the plaint, the plaintiff avers that she needed the money. When she gave evidence, the plaintiff claimed that her father-in-law needed the money. When the father-in-law gave evidence, he claimed that the plaintiff and her husband took the alleged loan. Next, in the plaint, the plaintiff stated that she paid interest to the defendant and that she tried to repay the loan but, in evidence, it was claimed that her father-in-law paid interest to the defendant and that her father tried to repay the loan.

The circumstances and the conflicting evidence I have enumerated in the preceding paragraphs, cast substantial doubt on the truth of the plaintiff's claim of a Trust.

Next, in the aforesaid case of FERNANDO vs. FERNANDO, Salam J identified some of the other factors which would, usually, be relevant when determining whether a Constructive Trust has arisen. His Lordship, Justice Salam, citing the earlier decision of EHIYA LEBBE vs. MAJEED [48 NLR 357] stated [at p.6], *"….. the continued possession of the transferor after the conveyance, or if the transferor paid the whole cost of the conveyance or if the consideration expressed on the deed is utterly inadequate to what would be the fair purchase money for the property conveyed are circumstances which would show whether the transaction was a genuine sale for valuable consideration or something else."*.

With regard to the possession of the land, the plaintiff and her father claimed that the land was unfenced and that the plaintiff's father possessed the land which had a few coconut trees and cashew nut trees. The plaintiff's father-in-law contradicted this position and stated that, he was in possession of the land and that he had planted it with manioc. On the other hand, the defendant claimed that she had been in possession of the land which was fenced but that, the plaintiff's family had damaged the fences and prevented her from entering the land and filed this action. What remains undisputed is that this is a bare land. If the plaintiff had wished to prove that her father continued to possess the land after the deed marked **"පැ 2"** was executed, she could have summoned the Grama Seva Niladhari or a neighbor who could have given independent and disinterested evidence with regard to who had possession of the land. The plaintiff could have produced documentary evidence that her father continued to pay Rates and Taxes relating to the land. However, the plaintiff has not

done any of this, even though the burden of proof in this case rested on her. In these circumstances, it is not possible to come to any reliable conclusion that the plaintiff's father remained in possession of the land after the deed marked **"පැ 2"** was executed.

With regard to the value of the land, the deed of gift marked **"පැ 1"** by which the plaintiff's father gifted the land to the plaintiff and which was executed on 23rd October 1996, has valued the land at Rs.50,000/-. The impugned deed of transfer marked **"පැ 2"** has been executed four months later, on 20th February 1997, and the sale price stated therein is Rs.100,000/-. Thus, the sale price stated in the impugned deed of transfer marked **"පැ 2"** is not obviously disparate with the value of the land stated in the earlier deed of gift marked **"පැ 1"**. The land is a 20 perch bare land to which access is from a road that is only five feet wide. There are only a few trees on the land and the evidence establishes that no crops of any particular value were obtained from the land. In fact, the plaintiff stated *"භුක්ති විඳින්න තරම් දේපලක් තිබුණේ නැහැ"* . It should also be mentioned that, little weight can be placed on the valuation set out in the report marked **"පැ 3"** which was obtained by the plaintiff in 1998, over a year after the case was filed. The author of the report did not possess any professional qualification in the field of valuation. He did not produce any documentary evidence to demonstrate that he had a professional practice as a Valuer. He admitted that he had not ascertained the value of other properties which were near the land. In addition, as mentioned earlier, three *different* values were ascribed to the land - *ie:* in the plaint, when the plaintiff testified and in the valuation report. Thus, there is no reliable evidence to establish that, the sale price stated in the deed of transfer marked **"පැ 2"** was much less than the real value of the land at the time **"පැ 2"** was executed.

With regard to the payment of consideration, the attestation to the deed of transfer marked **"පැ 2"** states that, the entire consideration of Rs.100,000/- was paid in the presence of the Notary Public. When the defendant gave evidence, she did say that she had paid a further Rs.100,000/-. However, that could have been payment of a further amount in addition to the amount stated on the deed since, regrettably, the undervaluing of deeds in order to evade payment of Stamp Duties is not unknown. I do not think the above evidence helps the plaintiff in her claim that there was Trust.

In FERNANDO vs. FERNANDO, His Lordship, Justice Salam also cited the earlier decision of CARTHELIS vs. RANASINGHE [2002 2 SLR 359] and stated [at p.8], *"The failure on the part of the defendants to produce the title deeds also should have been considered as favourable circumstances to infer the existence of a constructive trust …."*. However, in the present case, the question of whether or not the defendant had the title deeds, was not raised in the course of the trial or in the High Court and, therefore, cannot be considered at this stage.

Further, the defendant's evidence indicates that she knew of the land she was to purchase by the deed of transfer marked **"පැ 2"** and that the plaintiff had title to the land. There is no reliable evidence with regard to who paid the Stamp Duty.

For the reasons set out above, it is clear that, the plaintiff has failed to prove that the defendant held the land subject to a Constructive Trust in the plaintiff's favour. Therefore, the first two questions of law are answered in the negative.

It should be mentioned here that, a perusal of the many decisions which have examined whether a Constructive Trust has arisen will demonstrate that there are many types of `attendant circumstances' which could arise for consideration when a Court determines whether a Constructive Trust has arisen. In this judgment, I have only referred to the `attendant circumstances' which arose for consideration in the present case. Other cases will give rise to other `attendant circumstances' which may have to be considered in terms of Section 83 of the Trusts Ordinance.

This appeal has to be dismissed. In the circumstances of the case, each party will bear their own costs.

Judge of the Supreme Court

B.P.Aluwihare PC J

Judge of the Supreme Court

Upaly Abeyrathne J

Judge of the Supreme Court