

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

S.C.Appeal 8A/09

WP/HCCA/Kal/132/2001(F)

D.C.Panadura: 845/L

G.C.Karunaratne Perera

Hidwatte, Panapitiya,

Waskaduwa.

Plaintiff

Vs

1. P.U.Sanath Fernando

2. P.U.Navaratne Fernando

Both of No.113, Galle Road,

Panadura.

Defendants

And

1. P.U.Sanath Fernando

2. P.U.Navaratne Fernando

Both of No,113,Galle Road,

Panadura.

Defendants-Appellants

Vs

G.C.Karunaratne Perera

Hidwatte, Panapitiya,

Waskaduwa.

Plaintiff-Respondent

AND NOW

G.C.Karunaratne Perera.
Hidwatte, Panapitiya,
Waskaduwa.

**Plaintiff-Respondent-
Appellant**

Vs

1.P.U.Sanath Fernando

2. P.U.Navaratne Fernando

Both of No.113, Galle Road,

Panadura.

**Defendants-Appellants-
Respondents**

Before: J.A.N.de Silva CJ.,
N.G.Amaratunga J,
R.K.S.Suresh Chandra J.

Counsel: H.Withanachchi for Plaintiff-Respondent-Appellant
Ranjan Suwandarathne for Defendants-Appellants-Respondents

Argued on: 21st January 2011

Decided on: 9th May 2011

R.K.S.Suresh Chandra J,

This is an appeal from the judgment of the Provincial High Court of the Western Province holden at Kalutara.

The Plaintiff instituted action seeking a declaration that the 1st Defendant was holding under a constructive trust in favour of the Plaintiff the property which was the subject matter of the case, for a direction on the Registrar of the court to execute such deed in the event of the 1st Respondent refusing to execute such deed and for a declaration that Deed No. 3742 dated 31.05.1993 was null and void.

The Plaintiff in this Plaint had averred that

- (i) That the original owner of the subject matter namely P.H.Rodrigo had caused an amalgamation and a subdivision of the property and that after his death Lot No.1 in the subdivided plan devolved on his widow Bathilda Rodrigo and daughter Swarna Kumari Seneviratna respectively
- (ii) That the said two persons by Deed No. 14046 conveyed the said Lot No.1 to the Plaintiff.
- (iii) That in May 1987 the Plaintiff when in need of a sum of Rs. 50,000 had obtained a loan from Weda Malini Dharmalatha but on condition that an outright transfer be made to her which the Plaintiff had agreed had executed Deed No. 147 dated 05.05.1987.
- (iv) That by the said transaction the Plaintiff did not convey the beneficial interest and that the transferee held the property in trust till the sum of Rs. 50,000 was repaid with interest at 24%.
- (v) In December 1987 Dharmalatha had wanted her money back and the Plaintiff too needed more money he had negotiated with the 2nd Defendant who had agreed to advance the sum of RS. 75,000 at an interest of 36% on condition that a transfer was effected in favour of his son the 1st Defendant.

- (vi) The Plaintiff had thereafter executed Deed No. 581 as agreed on 16.12.1987 with Dharmalatha signing as the transferor and the Plaintiff signing as a witness to signify the subsistent constructive trust.
- (vii) The possession of the said property had remained with the Plaintiff throughout.
- (viii) After the said transaction the Plaintiff had constructed a house thereon worth Rs. 600,000 and the value of the land alone was estimated at Rs. 400,000 as at 1987.
- (ix) In order to negate the said constructive trust the 1st Defendant had by Deed No. 3742 dated 31.05.1993 purporting to convey once 1/6th share to the 2nd Defendant.

The Defendants filed their answer and stated that the Plaintiff had by Deed No. 147 had transferred the property to Weda Malini Dharmalatha who in turn had by Deed No. 581 conveyed the same to the 1st Defendant for valuable consideration, that the Plaintiff was permitted to occupy the land and the said deeds been outright transfers there was no constructive trust.

The pivotal issue in the case was whether the deeds 147 and 581 were subjected to a constructive trust or whether they were absolute transfers. The Learned District Judge held in favour of the Plaintiff and held that the said deeds were not absolute transfers. On appeal to the Civil Appellate High Court the Judgment of the District Court was set aside and judgment was entered in favour of the Defendants.

On an application by the Plaintiff seeking leave this Court had granted leave on the following questions :

- (i) Did the Civil Appellate High Court misdirect itself by concluding that there was no evidence to establish a constructive trust from Weda Malini or the Defendants?
- (ii) Did the High Court err in law by failing to take into consideration that the District Court was satisfied with regard to the attendant circumstances surrounding the transaction between the parties?
- (iii) Has the said High Court misdirected itself in law by drawing an inference from the alleged failure to deposit the money in Court to establish the bona fides of the Appellant?

The facts relating to this case as per the evidence led by the parties needs consideration in answering the above questions of law in which leave was granted.

It is not in dispute that prior to 1987 that the Plaintiff was the owner of the said land the Plaintiff by Deed No.147 dated 1987 had conveyed the said property which on the face of it appears as an absolute transfer however the evidence before the District Court was to the effect that it was not an absolute transfer as it had been executed for the granting of a loan of Rs. 50,000 with interest at 24%. The Plaintiff in his evidence before Court stated that since Dharmalatha the transferee on Deed No. 147 had wanted her money back and he too had wanted more money had made arrangements with the 2nd Defendant to obtain a sum of Rs. 75,000 at 36% interest on the basis of a transfer of the property being effected in favour of the 2nd Defendants son the 1st Defendant. It is in that light that Deed No 581 had been executed on 16.12.1987 by the said Dharmalatha with the Plaintiff signing as a witness to the said deed. The said Deed No. 581 on the face of it appears to be an absolute transfer. Right throughout these transactions the Plaintiff had not parted with possession of the property nor had the transferees on the said deeds 147 and 581 obtained possession he had in fact constructed a house on the said land obtained a subsidy for coconut cultivation on the land and had even taken an electricity supply to the house. The Plaintiff had produced a letter dated 15.07.1992 (P9) purported to have been sent by the 2nd Defendant asking the Plaintiff to see him and finalise the matter. The Plaintiff had also been charged in the Magistrates Court on a complaint made by the 2nd Defendant regarding a cheque for Rs. 50,000 given by the Plaintiff in which case the Plaintiff had been discharged. The Plaintiff had also got to know that the 1st Defendant had also transferred an undivided 1/6th share of the land to the 2nd Defendant by Deed no 3742 dated 31.05.1993. The Plaintiff had also sated in evidence that he had allowed his sister in law to occupy in the house constructed in the said land regarding in the said land which there was no objection by the Defendants. There was also evidence that the 2nd Defendant had visited the Plaintiff from time to time to collect interest in respect of the loan given by him. It is in these circumstances that the Learned District Judge had come to the conclusion that there had been no absolute transfer of the property in question by the Plaintiff.

In the present case there are two Transfer Deeds which have to be considered as to whether they have been absolute transfers or conveyances creating constructive trusts. It would be apparent from the evidence that the first transaction was not an absolute transfer as seen from the evidence but the question arises as to what was conveyed by the transferee on the first transaction to the transferee on the second transaction since the first transferee that is Dharmalatha did not have absolute title to the property what she could convey to the 2nd defendant was only the right she had in respect of the said property which was not absolute title. In these circumstances it would be necessary to conclude that both transfers did not convey absolute title to the transferees and that they held the property in trust for the transferor as the transferor in both instances had not intended to convey the beneficial interest in respect of the property. This is in line with the principle laid down in s.83 of the Trusts Ordinance which states that –

“Where the owner of property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.”

In *Muttamma v Thiagaraja* (1961) 62 N.L.R 559 Basnayake C.J held referring to s.83 of the Trusts Ordinance that, “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.”

The above principle has been illustrated in the case of *Dayawathie v Gunasekera* (1991) 1 Sri LR 115 where similar circumstances were dealt with by the Court and where

Dheeraratne J held that if the relevant “attendant circumstances” were sufficient to demonstrate that the Plaintiff hardly intended to dispose of his beneficial interest then it would be logical to elucidate that the beneficial interest of the property was not parted with by the Plaintiff. Most of the attendant circumstances referred to in the Dayawathie case are very similar to the present case which the Learned District Judge had adequately considered.

The Civil Appellate High Court was in error in concluding that the Plaintiff had failed to establish that he reserved the beneficial interest when effecting the conveyances, where as the Learned District Judge had arrived at the conclusion on the abundance of evidence placed before Court that the transactions effected by the Plaintiff had been loan transactions.

The Civil Appellate High Court in the course of its judgment had stated that the Defendant had inspected the title relating to the land prior to the transaction and that was the correct procedure to be followed prior to the transfer of a property and that thereafter the deed had been executed and registered in the Land Registry inclined that following such a procedure would tantamount to a transfer which would confer absolute title to the transferee. This by itself would not confer title to a transferee as it would be prudent to check the title by inspecting the Land Registry before entering in to a loan transaction. Therefore the above conclusion of the Civil Appellate High Court does not appear to be sound.

The Civil Appellate High Court went on to state further that the Plaintiff should have deposited the money that he claimed to have borrowed with the interest due thereon when instituting his action in order to show his bona fides. The case that was filed by the Plaintiff was on the basis of creation of a constructive trust although there was a transfer of the property on the face of the deed that was executed in favour of the 1st Defendant. It is usual to deposit in a matter relating to specific performance of a sales

agreement it is necessary to deposit the money agreed upon for the purchase by the buyer in Court when instituting action. It would appear that the High Court was drawing a parallel to such a transaction in stating that the Plaintiff should have deposited the money in Court as aforesaid. The mere fact that the Plaintiff has sought in his prayer in his Plaint for execution of a deed in favour of the Plaintiff after cancelling the Deeds that are in favour of the Defendants does not necessitate the depositing of such monies when he initiated the action. The High Court has therefore erred in that respect.

In the above circumstances the judgment of the Civil Appellate High Court is set aside and the questions of law set out above are answered in favour of the Plaintiff.

It is a matter of general observation that this case is yet another demonstration of a practice prevalent in many parts of the country where unofficial money lenders lend money to persons who seek the assistance when in need of money and the borrowers have very often no option but to agree to very high rates of interest for which no document is given and further they are compelled to effect transfers of the property in order to obtain such loans. In addition they resort to obtaining signed blank cheques from the borrower, post dated cheques, promissory notes, powers of attorney and sometimes rental agreements or lease agreements to give the impression that the borrower is permitted to be in possession regarding such properties. Very often such borrowers have no choice in the matter but to agree to such terms and sign documents which are detrimental to them. However in most of these instances the borrower remains in possession of the property throughout. When the borrower is unable to settle the loan and the interest during the agreed period of time (which is generally not specified in any document) disputes arise between them as the lenders thereupon seek to claim title to the property which is really kept as security on the strength of the Deed of Conveyance which on the face of it would appear to be an outright transfer. Such lenders dislike the execution of mortgage bonds or entering into agreements to reconvey as they would have to resort to litigation to recover their monies and also they would not be in a position to put down in writing the exorbitant rate of interest that

they would charge. This trend appears to have evolved over the years as it is not easy to obtain loans from recognised financial institutions and banks. Banks generally impose stringent conditions for borrowers and also require satisfactory credit worthiness of the borrowers, a regulated income, the requirement of being tax payers, and the capacity to repay etc in addition to the formal procedures that have to be followed which is not sometimes affordable and also the delay in going through such processes. If such institutions adopt much more flexible measures in respect of granting loans it would have the impact of preventing the occurrence of the type of transactions which take place which benefit unofficial money lenders. Further if such financial institutions and banks carry out awareness measures among specially the rural folk about the facilities that can be made available to them by reaching out to them it would help such persons of being victims at the hands of unofficial money lenders.

The Plaintiff in the prayer to his Plaint which was filed on 22nd June 1993 prayed that he be allowed to deposit the sum of Rs. 75,000 that he borrowed together with the interest at 36% per annum to the Defendants and obtain a conveyance in his favour. The Deed in favour of the 1st Defendant No. 581 had been executed on 16.12.1987 and the action had been filed in 1993 in the District Court of Panadura. The District Court proceedings were concluded with the entering of the judgment dated 07.07.2001 in favour of the Plaintiff. The Appellate procedure has taken a further 10 years and now reached the culmination point in 2011. 24 years have lapsed since the execution of Deed No. 581 inflation rates have varied and are very much on the rise in the present era. The District Court had given judgment in favour of the Plaintiff as prayed for in his Plaint this would mean that he would have to pay Rs. 75,000 together with interest at 36%. It would not appear to be reasonable in these circumstances of this case to subject the Plaintiff to pay the interest of 36% to cover the entire period that the matter was under litigation which would come to a period of 18 years. It would be reasonable to subject him to pay the said sum of Rs. 75,000 together with interest at 36% per annum for a period of 10 years in order to get the Deed executed in his favour.

The appeal of the Plaintiff Appellants is allowed and the judgment of the District Court of Panadura is affirmed subject to the aforesaid variation.

JUDGE OF THE SUPREME COURT

JA.N.DE SILVA CJ,

I agree.

CHIEF JUSTICE OF THE SUPREME COURT

N.G.AMARATUNGA J.

I agree.

JUDGE OF THE SUPREME COURT