

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

SC. (Appeal) No. 8A/2010

Sc. HC. CA. LA. No. 287/2009

CP/HCCA/Kandy/434/2003

D.C. Gampola 2492/L

In the matter of an Application for Leave
to Appeal.

Mohamed Haniffa Sithy Zulfika,
No. 33, Hill Street,
Gampola.

Defendant-Appellant-Petitioner

Vs.

Chandrani Seelavangsha,
No. 63, Nuwara Eliya Road,
Gampola.

And presently of,
No. 156/A, 'Thilaka Nivasa',
Kirinda,
Hodiyadeniya,
Gampola.

Plaintiff-Respondent-Respondent

BEFORE : **TILAKAWARDENA, J**
IMAM, J &
DEP, PC, J

COUNSEL : Faisz Musthapha, PC with Kamran Aziz for
Defendant-Appellant-Petitioner.
Lal Wijenayake for Plaintiff-Respondent-Respondent.

ARGUED ON : **30/05/2012**

DECIDED ON : **07/12/2012**

TILAKAWARDENA, J

The appeal was preferred against the judgement of the High Court of Civil Appeal of the Central Province, holden at Kandy (hereinafter referred to as the Civil Appellate High Court) marked Case No. CP/HC/CA/434/2003 dated 28.09.2009 which dismissed the Appeal of the Appellant. On hearing submissions this Court granted leave on the following questions of law:

1. Do documents D1 (a) - (j) establish that the Plaintiff-Respondent-Respondent (hereinafter referred to as the Respondent) was engaging in money lending transactions?
2. Did the Learned Judges of the Civil Appellate High Court, misdirect themselves, by failing to properly assess and examine the attendant circumstances, which establish that the Defendant-Appellant-Appellant (hereinafter referred to as the Appellant) did not intend to dispose of the beneficial interest in the property, in the correct perspective?
3. Did the Learned Judges of the Civil Appellate High Court, misdirect themselves, by holding that the evidence of the Appellant was contradictory, having regard to the totality of the evidence led?
4. (a) Has the Respondent failed to raise an issue as to whether the tenant, T.P. Assen (hereinafter referred to as Assen), had attorned to her and discharged the burden of establishing this fact?
(b) If not, is the Appellant entitled to Judgement in her favour, on the basis of a Constructive Trust?

The Respondent instituted an action in the District Court of Gampola (hereinafter referred to as the District Court) on the 11th of September 1995, seeking a declaration of title to the property, eviction of the Appellant, who was in unlawful possession of the property, and damages for unlawful occupation. He relied on a Deed of Transfer No. 2572 dated 06.03.1986 attested to by R S K Chandrakanthi, Notary Public (hereinafter referred to as the Deed P1), to prove that there had

been an outright transfer by the Appellant to the Respondent, of the land referred to in the Schedule to the Plaint. The Respondent asserted that his legal right to be in possession of the land had been violated for over 12 years.

This was challenged by the Appellant who alleged that the purported transfer on the Deed P1 was merely to secure the loan of Rs 11,000/- given by the Respondent, and the property was to be held on trust until the loan was repaid. The Appellant therefore states that if found in her favour, the Appellant would repay the loan with interest. It is to be noted that this statement by the Appellant conflicts with the Appellant's assertion that the loan was re-paid to the Respondent. The overall position alleged by the Appellant is that she had no intention to transfer the beneficial interest in the said property.

In the reasoning of the Civil Appellate High Court, it was concluded that the evidence presented at the trial by the Appellant was contradictory, inconsistent and lacked creditworthiness. It is this Court's opinion that the learned High Court Judge in his judgement clearly set out the reasoning for his findings after an incisive evaluation of the facts, which were found to reflect the salient and material inconsistencies in the Appellant's case. The findings were similar to those arrived at in the evaluation of the facts by the learned District Court Judge.

Furthermore the learned Civil Appellate High Court Judge in his reasoning highlighted the fact that the Appellant had contradicted herself even regarding the re-payments of the alleged loan. The High Court referred specifically to the answers given by the Respondent at paragraph 5, 17, 18 and 20, regarding the loan. Further in evidence the Appellant initially stated that the loan and interest had been repaid, however she subsequently stated that she would repay the money due on the loan, with interest, only if the judgement was held in her favour. Due to these contradictions and the attendant circumstances the High Court has correctly held in favour of the Respondent.

The issues in this appeal relate primarily to the question of whether the beneficial interest in the property was transferred by Deed P1, or whether the transfer was intended to be a security for a loan, thereby merely creating a constructive trust.

It was admitted that at the time of the deed of transfer, Assen was in occupation of the said land and had been a tenant of the said land since 1986, for 9 years. Explaining this, the Respondent stated that she did not seek to take immediate possession of the property as she had purchased the property with the explicit intention of residing in it only after her husband had retired from the Railway Department. She had therefore permitted Assen to continue in occupation until February 1995 when the Respondent took possession of the premises. This therefore explains both the reason why the Respondent did not take possession of the property for 9 years as well as why the tenant had made the rent payments to the Urban Council. In addition it explains the delay in making the changes to the Urban Council register, as transfer of the property to the Respondent was made on 07.02.1995.

Two attendant circumstances which this Court needs to consider are the allegations pertaining to the undervaluing of the property in the Deed of transfer, and the Respondent's husband's alleged employment as a moneylender.

As stated above, the Appellant alleges that the value of the property mentioned in the Deed was significantly below the market value at the time, as the amount on the Deed was intended to reflect the sum actually taken as a loan from the Respondent. Therefore, the Appellant argues that there was no intention to sell the property and the sum paid was only a loan given by the Respondent.

The Court notes that the Deed of Transfer No. 2572 dated 06.03.1986 (P1) values the land in question at LKR11,000/= and that the Deed No. 2375 dated 07.09.1985 attested to by R S K Chandrakanthi, Notary Public (P2) values the land at LKR5,600/=. This is contrary to the position that the Appellant sought to take, as rather than being undervalued, it establishes on the contrary; that the sale price was significantly higher than the amount reflected in the previous Deed. The previous Deed was dated earlier to the Deed P1. Therefore the documents P1 and P2 reveal that the property had not been undervalued on the Deed of transfer and due to this the position taken by the Appellant is without basis.

The Appellant also took up the position that the Respondent's husband was a money lender which, she alleged, supported her assertion that the transaction was a loan and not a transfer of property. However no evidence to prove this argument was put forward except for a few receipts to reflect loan re-payments by the Appellant (V1). Further the receipt for LKR 4,000/= is dated (September 1997) after the case against the Appellant was filed. Further, when asked about this receipt the Appellant's answer lacked credibility.

In the case of **Edgelow v. Mac Elwee** [1918] 1 KB 205, McCardie, J deals with the attributes of a moneylender and these attributes are referred to in the Sri Lankan case of **Dias Nagahawatte Vs. Alwis Appuhamy** (1987) 288 SLR at paragraph 291:

"A man does not become a money lender by reason of occasional loans to relations, friends or acquaintances, whether interest be charged or not. Charity and kindness are not the basis of usury. Nor does a man become a moneylender merely because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money lending and the word 'business' imports the notion of system, repetition and continuity. The line of demarcation cannot be defined with closeness or indicated by any specific formula. Each case must depend on its own peculiar features ----"

Money lending businesses constitute a requisite repetition and continuity in the transactions.

This Court on observation of the receipts submitted into evidence as V1, agrees with the findings of the High Court; as payments are inconsistent. Further this Court believes it to be highly unlikely that payment was made to the Respondent by the Appellant in September 1997 after legal proceedings had commenced.

In relation to the issue of attornment by the tenant Assen, the Urban Council Representative stated that the payments were made to the owner and as the ownership had been registered to the Respondent it is the opinion of this Court

that even if Assen was unaware of the identity of the new owner he intended the rent payment to be made to the new landlord .In the case of **Hameed Vs Anamalay (1946) 47 NLR page 558**, it was held by Nagalingam J, that “the position in Ceylon too, would appear to be the same for under our law a purchaser of land which is subject to a lease succeeds to all the rights of the vendor on the lease without a special assignment of them by the latter to the former.

The Court finds that the evidence submitted by the Respondent and the Urban Council representative indicate that Assen had accepted the Respondent to be the owner of the said land. Further it is accepted law that attornment does not have to be expressed and therefore, provided it can be presumed under the cogent and relevant facts, it maybe said to exist. In addition, it is the opinion of this Court that the facts in this case which reveal that that the land was transferred at the time Assen was a tenant of the Appellant; his tenancy would have transferred to the Respondent.

Therefore it is this Court's opinion that the payments were intended to the owner of the land and as there is convincing evidence that Respondent had acquired the land under P1, the fact that Assen may have been unaware of the transfer is irrelevant. For this reason the payments made to the owner is not the relevant issue as in the light of the other facts adverted to in the judgement this matter has little relevance. The other facts dealt in this Judgement establish that beneficial interest had been transferred.

In relation to the creation of a constructive trust, this Court would like to highlight the fact that the deed of transfer did not indicate an intention to create a constructive trust or that any such information was furnished on the Notary. In addition it was not evident from the said Deed, P1, that the money paid by the Respondent was a loan.

The Appellant states that she had repaid the said sum with interest, however when asked why she didn't take steps to get a re-transfer of the property she was unable to provide a justifiable answer. Further the representative from the Urban

Council, when examined, indicated that the Respondent was recorded as the owner of the property. This occurred on the 7th February 1995, which was the same month in which the tenant vacated the premises. Further, the representative states that the owner took the payments of rent made to the Urban Council by Assen. In addition the representative from the Urban Council, when he was examined, indicated that the Respondent was recorded as the owner of the property.

In addition, the Deed of Transfer occurred in the presence of a Notary who would have expressly indicated the conditions of the transfer, if there were any, and in this instance if such transfer was to be temporary. Further, if the intention of the Appellant was not to transfer the beneficial interest of the property, the notarial document would have been a mortgage bond, rather than an outright transfer.

Therefore based on these facts and the circumstances at the time of sale, as well as the events at the time the tenants left the property, this Court finds there to be no attendant circumstances to suggest the existence of a constructive trust.

For the reasons set out, it is the finding of this Court that the Civil Appellate High Court Judge had not erred in his finding and had given due consideration to all factors. Therefore this Court affirms the order of the High Court. No costs.

JUDGE OF THE SUPREME COURT

IMAM, J.

I agree

JUDGE OF THE SUPREME COURT

DEP, PC, J.

I agree

JUDGE OF THE SUPREME COURT