

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

In the matter of an Application under Special
Leave to Appeal from the judgment in C.A.
Appeal No. 604/93(F) in terms of Article 128 of
the Constitution

1. Krishanthy Balasubramaniam
Appearing by her next friend the 2nd
Plaintiff

2. Logeswary Balasubramaniam both of
15, Bailey Lane, Koddaimunai,
Batticaloa
Plaintiffs

Vs.

1. Vellayar Krishnapillai and wife,

2. Arunasalam Pooranammah, both of
Lake Road, No. 2, Sallipiti,
Batticaloa.

Defendants

AND

1 Krishanthy Balasubramaniam
Appearing by her next friend the 2nd Plaintiff

2 Logeswary Balasubramaniam both of
151, Bailey Lane, Koddaimunai,
Batticaloa
Plaintiffs-Appellants

Vs.

1 Vellayar Krishnapillai and wife,
2 Arunasalam Pooranammah, both of
Lake Road, No. 2, Sallipiti,
Batticaloa (deceased).

Defendants-Respondents

Krishnapillai Narenthiranthan of
No. 26A Waidiya Road
Dehiwala

*Substituted-2nd Defendant-
Respondent*

AND NOW BETWEEN

- 1 Krishanthy Balasubramaniam
Appearing by her Attorney the 2nd
Plaintiff
2. Logeswary Balasubramaniam both of
151, Bailey Lane, Koddaimunai,
Batticaloa
Plaintiffs-Appellants-Petitioners

Vs.

S.C. Appeal 28/2008
S.C.(Spl.) L.A. 245/07
C.A. Appeal No. 604/93(F)
D.C.Batticaloa Case No. 4167/L

1. Vellayar Krishnapillai and wife,
2. Arunasalam Pooranammah, both of
Lake Road, No. 2, Sallipiti,
Batticaloa (deceased).

*Defendants-Respondents-
Respondents*

- 2 (a). Krishnapillai Narenthiranthan of
No. 26A Waidiya Road
Dehiwala

*Substituted-2nd Defendant
Respondent-Respondent*

Before Marsoof, PC, J.

K.Sripavan, J.

S.I. Imam, J.

Counsel : S. Mandaleswaran with Ms. Thavani Gnaneshanthan for Plaintiffs-Appellants-Petitioners.

M. Nizam Kariapper with M.C.M. Navas and M.I.M. Iynullah instructed by Mrs. S.Gangulharan for 1st and substituted 2(a) Defendants-Respondents-Respondents.

Argued on : 17.11.2011

Written Submissions

Filed : By the 2(a) Defendant-Respondent-Respondent.
on – 05.12.2011

Decided on : 24.05.2012

SRIPAVAN. J.

The 1st Plaintiff-Appellant-Petitioner represented by the 2nd Plaintiff-Appellant –Petitioner(hereinafter referred to as the “Appellants”) as next friend instituted this action against the Defendants-Respondents-Respondents (hereinafter referred to as the Respondents) praying for a declaration of title to the land morefully described in the Schedule “C “ to the plaint, for ejectment of the Respondents thereupon, damages and costs. The Respondents in their answer sought a declaration against the Appellants on the basis that the property which is the subject matter of this action is held by the Appellants in trust and that the Appellants be ordered to execute a conveyance in their favour on payment of a sum of Rs. 4200/- (Rs. 2100/- being the loan installment and Rs. 2100/- being the interest) referred to in Deed Nos. 14542 and 15702.

The learned trial judge dismissed the Appellants action on 21.09.1993 with costs and made order that the Respondents to pay a sum of Rs. 4200/- within two months from the date of the judgment and if the sum is so paid, the Appellants to reconvey the land which is the subject matter of this action to the Respondents: In the event the Appellants failed to execute the deed of reconveyance, the Registrar was authorized to execute the necessary conveyance thereof.

The appeal preferred by the Appellants against the order of the learned trial judge was dismissed by the Court of Appeal on 24th July 2007, thereby affirming the judgment of the District Court. On an appeal made to this Court against the judgment of the Court of Appeal, Special Leave was granted on 05.03.2008 only the following question:-

“Did the Court of Appeal err in confirming the decision of the District Court, that there was a trust, without evaluating all the evidence led in that Court?”

Thus, the only issue to be decided by this Court is, based on the evidence whether the land which is the subject matter of this action is held by the Appellants in trust. It was not in dispute that the Respondents were the original owners of the property in question. It is observed that when the appeal was pending before the Court of Appeal the 2nd Defendant-Respondent-Respondent died and Krishanapillai Narenthiranathan was substituted in the room and place of the 2nd Defendant-Respondent-Respondent.

Briefly the facts are as follows:

1. The Respondents by Deed No. 18848 dated 4.9.58 (P4) became co-owners of the land morefully described in Schedule A of the plaint.

Thereafter, the Respondents joined owners of two other adjacent lands and by Deed No. 5461 dated 5.3.73 (**P3**) effected an amicable partition of the said land among themselves and became owners of a divided portion of the land morefully describe+ed in Schedule B of the plaint.

2. In 1975, the first Defendant-Respondent-Respondent by Deed No. 14542 dated 5.10.75 (**P5**) transferred his undivided half share in the said land to Murugaiah Jagatheswary, whilst the second Defendant-Respondent-Respondent too by Deed No. 15102 (**P6**) transferred her undivided half share in the said land to Murugaiah Jegatheswary. Thus, Murugaiah Jagatheswary became the owner of the entirety of the land described in Schedule B.
3. The said Murugaiah Jagatheswary by Deed No. 15445 dated 22.9,1976 (**P7**) sold and conveyed the land described in Schedule B to Logeswary Balasubramaniam, who is the 2nd Appellant. Almost ten years thereafter the 2nd Appellant by Deed No. 9172 dated 2.3.1986 (**P8**) donated a divided western portion of the land described in Schedule B to the 1st Plaintiff-Appellant-Petitioner.

The Respondents claim that the land referred to in the two Deeds, **P5 and P6** were transferred on trust on the understanding that the said property would be retransferred to Respondents on payment of a total sum of Rs. 4200/-.

A careful and precise examination of the oral and documentary evidence reveal the following;-

1. Both Deeds **P5** and **P6** are on the face of it an out and out transfer with no conditions attached to them with regard to retransfer of the property to the Respondents.
2. The sales effected by both Deeds **P5** and **P6** were for valuable consideration of Rs. 2100/- each, and the consideration passed in the presence of the Notary to the transferor in each Deed.
3. No Witnesses were called to show that considerations paid on **P5** and **P6** were inadequate. Further, no issue was raised in the District Court to determine the true value of the land as at the date of the Deeds **P5** and **P6**. The answer filed by the Respondents indicated that the market value of the land described in Schedule "C" of the plaint as at 25th August 1992 (the date of filing answer) was Rs. 100,000/- .If the evidence of the 1st Defendant-Respondent-Respondent were to be accepted that Murugaiah Jagathesewary agreed to reconvey the said land on payment of a sum of Rs. 4,200/- (which is the total consideration referred to on both Deeds) together with legal interest, it should have been stated in the said Deeds. If there was an oral agreement between the transferor and the transferee such an agreement becomes invalid as it contravenes Section 2 of the Prevention of Frauds Ordinance. In fact, under cross-examination , the First Defendant-Respondent-Respondent admitted that both his wife and he sold a particular lot of land to Murugaiah (Vide

proceeding of 27.5.93) by Deed marked **P2**. The First Defendant-Respondent-Respondent further admitted that the same lot was mortgaged to Rathnam by Deed No. 2458 executed in 1961 (**P19**) prior to the sale. That Deed P19 had a condition that if the capital sum was repaid within a period of three years, the land would be re-transferred to the 1st Defendant-Respondent- Respondent. Thus, the Court draws an inference that the 1st Defendant-Respondent-Respondent knew the difference between a mortgage and an outright sale.

4. The 1st Defendant- Respondent-Respondent conceded in his evidence that he did not pay any municipal taxes to the property in question after 1976. He further conceded that all taxes were paid by Logeswary Balasubramaniam who is the 2nd Appellant
5. When Murugaiah Jagatheswary sold and conveyed the land (she obtained by **P5 and P6**) to the 2nd Plaintiff-Appellant-Petitioner by Deed No. 15445 dated 22.9.76 (**P7**) , the 1st Defendant-Respondent-Respondent signed as a witness to the said deed of transfer. Thus, the 1st Defendant-Respondent-Respondent was aware that the two lots of land sold by his wife and he by **P5 and P6** have been sold to another person.
6. After ten years of the execution of **P7**, the 2nd Plaintiff-Appellant-Petitioner donated a divided portion of the land referred to in Schedule B to the First Plaintiff-Appellant-Petitioner by Deed No.

9172 dated 1.3.86 (P8). It was only during that period the First Defendant-Respondent-Respondent requested Murugaiah to

retransfer the said land to him. This is abundantly clear from the re-examination of the 1st Defendant- Respondent-Respondent as shown in the proceedings of 27.5.93. The relevant portion of the said proceedings is reproduced below :

“After the land was transferred to the daughter I told them to give back my land. I asked in the year 1986.... Murugaiah told me to give Rs. 50,000/- to retransfer the land. I did not agree to it. In 1986 only I asked him to retransfer the land.”

7. The following answers given by the 1st Defendant-Respondent-Respondent when he was subjected to cross-examination, are relevant. (Vide proceedings of 1.6.93)

“Q. Where is your permanent residence situated?

A. The permanent residence is situated in Sallipitty near the hospital.

Q. According to the Voters’ Register, your family reside in Sallipitty close to Puliyanthivu in Batticaloa?

A. Yes.

Q. A case has been filed in the Magistrate’s Court of Batticaloa that you have forcibly encroached the said land on the 20th day of April, 1989. The Certified copy of the said case is filed of record marked D1 ?

A. Yes.

Q. In that case your address is given as Sallipity?

A. Yes.”

It is probable that the 1st Defendant-Respondent-Respondent forcibly entered the land after the dispute arose in 1986.

It is to be further observed with regard to the facts, that Notary Vinayagamoorthy in his evidence stated that though the Deeds – **P5 and P6** were executed as transfer Deeds, there was an understanding between the parties to retransfer the properties after one year of transfer. If the evidence of the Notary is to be accepted, the Respondents should have taken steps to repay the principal amounts due on the said Deeds soon after the lapse of one year. However, no positive steps were taken by the Respondents to repay the said sum until a request was made to re-possess the lands in the year 1986. Even as at that date, the Respondents had not paid the said sum, nor deposited it in Court. Thus, the conduct of the Respondents show that their intention to re-possess the land was an afterthought.

Section 83 of the Trusts Ordinance reads thus :-

“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.”

The only question before Court is whether the Respondents intended to dispose of the beneficial interests in the property or not. “Attendant circumstances” in Section 83 have been described as those “which follow or precede the transfer”... but are not too far removed in point of time to be regarded as attendant...”. Whether a circumstance is attendant or not would depend on the facts and circumstances of each case. (Vide *Muttammah vs. Thiyagaraja*, 62 N.L.R. 559 at 564). In *Dayawathie and Others v. Gunasekera and Another* (1991) 1 S.L.R. 115, this Court 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.

Considering the attendant circumstances referred to above, I am unable to reasonably infer that the Respondents intended to keep the beneficial interest in the property in question. It appears that the District Court and the Court of Appeal failed to consider the abovementioned attendant circumstances and fell into error by treating the transaction between the parties as a security for a loan. I therefore set aside the judgments of the District Court and the Court of Appeal dated 21.09.1993 and 24.07.2007 respectively.

The question on which Special Leave was granted is answered in the affirmative. I hold that the Appellants are entitled to the relief as prayed for in paragraph (a) of the Plaint dated 22nd June 1992, namely, that the 1st Plaintiff is declared entitled to the land morefully described in Schedule “C” to the Plaint. I further direct that peaceful and vacant possession of the said

land be given to the 1st Plaintiff-Appellant-Petitioner within two months from today. The Registrar is directed to return the record of the case forthwith to the District Court of Batticaloa so that parties could comply with the aforesaid directives. There will be no costs.

Judge of the Supreme Court.

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Marsoof,P.C., J.

I agree

Judge of the Supreme Court.

Imam, J.

I agree.

Judge of the Supreme Court.

Amaratunge, J.,

I agree.