

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

In the matter of an application for Special Leave  
to Appeal.

**SC.Appeal No. 117/2012**

SC.Spl. LA.No. 02/2012

Court of Appeal Case No. 721/2000(F)

DC. Galle Case No. 12261/L

Walpita Gamage Dharmadasa alias

Berty de Silva alias Berty Silva,  
Modara.

Patuwatha, Dodanduwa.

**Defendant-Appellant-Petitioner-Appellant**

-Vs-

Manawaduge Ebert,  
Agathuduwa, Dodandugoda,  
Dodanduwa.

**Plaintiff-Respondent-Respondent-Respondent**

Before:                   Sisira J.de Abrew, J  
                              Priyantha Jayawardena, PC, J &  
                              K.T.Chitrasiri, J

Counsel:                Widura Ranawaka with Indunil Bandara for the Defendant-  
                              Appellant-Petitioner-Appellant.  
                              D.M.G.Dissanayake with Ms. L.M.C.D. Bandara and Ms.  
                              Namalee Perera instructed by B.C.Balasuriya for the  
                              Plaintiff-Respondent-Respondent-Respondent.

Argued on             :       06.12.2016

Written submission

Tendered on : 9.10.2013 by the Defendant-Appellant  
10.1.2013 by the Plaintiff-Respondent

Decided on : 1.3.2017

Sisira J. De Abrew J.

This is an appeal against the judgment of the Court of Appeal wherein it affirmed the judgment of the learned District Judge who held in favour of the Plaintiff-Respondent-Respondent. This court by its order dated 6.7.2012, granted leave to appeal on questions of law stated in paragraphs 22(a), (b) and (c) of the Petition of Appeal dated 4.1.2012 which are set out below.

- a. Has the Court of Appeal erred in Law by failing to identify the District Judges failure to evaluate evidence to attendant circumstances of the transaction with a view to establish a constructive trust?
- b. Has the Court of Appeal erred in Law by affirming the judgment of District Court entered on the basis of that the non-notarial agreement V1 could be treated as a supplement to deed P1?
- c. Has the court of Appeal erred in Law by considering document V1 as a supplement to P1 in order to create a conditional transfer between the parties, since V1 was contrary to Section 2 of the Prevention of Frauds Ordinance?

Facts of this case may be briefly summarized as follows.

The Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) by deed No.6261 dated 26.2.1990 attested by SP Gunawardene Notary Public transferred the property in suit to the Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-

Respondent) in a sum of Rs.110,000/- The deed No.6261 was marked as P1 at the trial. On the same day that the deed No.6261 was executed (26.2.1990), the Plaintiff-Respondent, by a letter dated 26.2.1990 marked P1, agreed to retransfer the property that he purchased by deed No.6261 to the Defendant-Appellant if a sum of Rs.110,000/- is paid by Defendant-Appellant to the Plaintiff-Respondent within a period of one year from 26.2.1990. Thus it is clear that if the Defendant-Appellant wants to get the property back, he will have to pay Rs.110,000/- to the Plaintiff-Respondent within one year from 26.2.1990.

Learned counsel for the Defendant-Appellant contended that the Defendant-Appellant had borrowed a sum of Rs.80,000/- from the Plaintiff-Respondent and the deed No.6261 was executed only to provide security for the said amount and the interest. The interest for Rs.80,000/- was calculated to be Rs.30,000/-. He therefore contended that the Defendant-Appellant, by deed No 6261, had not transferred the property to the Plaintiff-Respondent. I now advert to this contention. It is in evidence that the Defendant-Appellant, after the execution of deed No.6261, made an application to the Debt Conciliation Board to get relief regarding this transaction but the Debt Conciliation Board rejected the said application. In deed No. 6261 there is nothing to suggest that it was executed to provide security for a sum of Rs.80,000/- that the Defendant-Appellant had borrowed from the Plaintiff-Respondent. Even in the document marked V1 there is no such indication. There is also no clear evidence by the Defendant-Appellant on this matter. When I consider all the above matters, I am unable to agree with the above contention of learned counsel for the Defendant-Appellant. Learned counsel for the Defendant-Appellant next tried to contend that the learned District Judge should not have considered document marked V1 as it is contrary to Section 2 of the Prevention of Fraud Ordinance. It has to be

noted here that the document marked V1 was produced by the Defendant-Appellant himself at the trial and that the Defendant-Appellant also, on the strength V1, relied on a constructive trust between him and the Plaintiff-Respondent. One of the important questions that must be considered here is that whether the court cannot consider the document marked V1 when the Defendant-Appellant relies on a constructive trust between him and the Plaintiff-Respondent. It is undisputed that the document marked V1 is not a document executed by a Notary Public and it relates to the property in suit. In considering the above contention of learned counsel for the Defendant-Appellant, I must consider the following question. In order to prove a constructive trust, is parole evidence permitted in view of the principles set out in Section 2 of the Prevention of Fraud Ordinance and Section 92 of the Evidence Ordinance? This question was discussed in the case of Dayawathi and Others Vs Gunasekara and Another [1991] 1 SLR 115. Before I discuss the said judicial decision, I would like to consider Section 83 of the Trust Ordinance which reads as follows.

*"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 facts set out in the head note of Dayawathi and Others Vs Gunasekara and Another (supra) is as follows.

*"The Plaintiff bought the property in suit in 1955. He started construction work in 1959 and completed in 1961. The Plaintiff, a building contractor, needed finances in 1966 and sought the assistance of the 2nd defendant*

*with whom he had transactions earlier. This culminated in a Deed of Transfer in favour of the 1st Defendant, who is the mother of the 2nd Defendant and the 2nd Defendant being a witness to the Deed. The property was to be re-transferred within 3 years if Rs. 17,000/- was paid. The Plaintiff defaulted, in his action to recover the property, the Plaintiff succeeded in the trial Court in establishing a constructive trust. The Court of Appeal reversed the judgment on the sole ground that the agreement was a pure and simple agreement to re-transfer.”*

His lordship Justice Dheeraratne in the above case held as follows:

*“(i) 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.*

*(ii) Extrinsic evidence to prove attendant circumstances can properly be received in evidence to prove a resulting trust.”*

In order to establish legal principles discussed in Section 83 of the Trust Ordinance, in my view, it is necessary to lead parole evidence between the parties. If this evidence is shut out, the purpose of Section 83 of the Trust Ordinance would be rendered nugatory. Applying the principles laid down in the above legal literature, I hold that Section 2 of the Prevention of Fraud Ordinance and Section 92 of the Evidence Ordinance do not operate as a bar to lead parole evidence to prove a constructive trust between the parties. Considering all the above matters, I hold that the learned District Judge was correct when he

considered the document marked V1 and that the court should consider the document marked V1. I therefore reject the above contention of learned counsel for the Defendant-Appellant.

The next question that must be considered is whether the Plaintiff-Respondent held the property in suit on behalf of the Defendant-Appellant on a constructive trust. In considering this question the document marked V1 is relevant. I have earlier discussed the contents of the document marked V1. It is important to note that the Defendant-Appellant did not, after the execution of deed No.6261, hand over the possession of the property in suit to the Plaintiff-Respondent. I have earlier held that the learned District Judge was correct when he considered the document marked V1. When I consider the contents of the document marked V1 and the fact that the Defendant-Appellant did not, after the execution of deed No.6261, hand over the possession of the property in suit to the Plaintiff-Respondent, I hold that the Plaintiff-Respondent held the property in suit on behalf of the Defendant-Appellant on a constructive trust for a period of one year from 26.2.1990 to 26.2.1991. The Plaintiff-Respondent, by the document marked V1, has agreed to retransfer the property in suit to the Defendant-Appellant if a sum of Rs.110,000/- is paid to the Plaintiff-Respondent by the Defendant-Appellant within a period of one year from 26.2.1990. But the Defendant-Appellant has failed to pay the said sum of money within the said period. When I consider all the aforementioned matters, I hold that the aforementioned constructive trust has come to an end on 26.2.1991 and was not in operation when the case was filed on 28.5.1992.

Learned counsel for the Defendant-Appellant relied on the judicial decision in the case of Premawathi Vs Gnanawathi [1994] 2SLR 171. In Premawathi's case (supra) the plaintiff, in her evidence, admitted the following

facts. (i) that she was in hospital for about 2 months from August 1976; (ii) that while in hospital the defendant came to see her and discussed with her the question of the retransfer of the property; (iii) that the hospital authorities did not permit the notary to come to the hospital and the deed of retransfer could not be executed; (iv) that she was willing to retransfer the property within the stipulated period of 6 months; (v) in answer to court, that the value of the property was about Rs. 15000/- in 1976. His Lordship GPS de Silva CJ held as follows.

*“An undertaking to reconvey the property sold was by way of a non-notarial document which is of no force or avail in law under section 2 of the Prevention of Frauds Ordinance. However the attendant circumstances must be looked into as the plaintiff had been willing to transfer the property on receipt of Rs. 6000/- within six months but could not do so despite the tender of Rs. 6000/- within the six months as she was in hospital, and the possession of the land had remained with the 1st defendant and the land itself was worth Rs. 15,000/-, the attendant circumstances point to a constructive trust within the meaning of section 83 of the Trusts Ordinance. The "attendant circumstances" show that the 1<sup>st</sup> defendant did not intend to dispose of the beneficial interest.”*

The facts of the said case are different from the facts of the present case. I therefore hold that the decision in Premawathi's case (supra) has no application to the present case.

For the aforementioned reasons, I answer the above questions of law in the negative and hold that the Plaintiff-Respondent is entitled to the relief calmed in

the Plaintiff. I affirm the judgment of the learned District Judge and the Court of Appeal and dismiss this appeal with costs.

*Appeal dismissed.*

Judge of the Supreme Court

Priyantha Jayawardena PC J

I agree.

Judge of the Supreme Court

KT Chitrasiri J

I agree.

Judge of the Supreme Court