

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

In the matter of an Appeal against the judgment of the Provincial High Court of the Western Province (Civil Appeal) Holden in Gampaha.

Balasuriya Lekamlage Somawathie,
No: 225, Makewita, Ja-ela

Plaintiff

-Vs-

- 1) Severinus Dilano Ranjith Alles,
Central Mail Exchange,
Parcels Division, Sri Chittampalam
Gardiner Mawatha, Colombo 01.
- 2) Jayakody Arachchige Noyel
Jayakody,
226A, Makewita, Ja-ela.

S.C. Appeal 144/2011
SC/HCCA/LA NO: 351/2010
High Court of (Civil Appeal)
WP/HCCA/GPH/22/2003(F)
DC Gampaha Case No. 42902/L

Defendants

AND BETWEEN

Balasuriya Lekamlage Somawathie,
No: 225, Makewita, Ja-ela
Presently at: No.219/A, Makewita,
Ja-ela.

Plaintiff-Appellant

-Vs-

- 1) Severinus Dilano Ranjith Alles,
Central Mail Exchange,
Parcels Division, Sri Chittampalam
Gardiner Mawatha, Colombo 01.

- 2) Jayakody Arachchige Noyel
Jayakody,
226A, Makewita, Ja-ela.

Defendants-Respondents

AND NOW BETWEEN

Balasuriya Lekamlage Somawathie,
No: 225, Makewita, Ja-ela
Presently at: No.219/A, Makewita,
Ja-ela.

Plaintiff-Appellant-Appellant

-Vs-

- 1) Severinus Dilano Ranjith Alles,
Central Mail Exchange,
Parcels Division, Sri Chittampalam
Gardiner Mawatha, Colombo 01.
- 2) Jayakody Arachchige Noyel
Jayakody,
226A, Makewita, Ja-ela.

Defendants-Respondents-Respondents

Before: Sisira J de Abrew, J.,
L.T.B. Dehideniya, J. and
Murdu N.B.Fernando, PC J.

Counsel: Manohara de Silva PC with H. Munasighe for Plaintiff-Appellant-Appellant
S.N. Vijithsingh for 1st and 2nd Defendants-Respondents-Respondents

Argued on: 14.05.2018

Decided on: 05.12.2019

Murdu N.B. Fernando, PC J.

The Plaintiff-Appellant-Appellant came before this Court being aggrieved by the judgment of the Civil Appellate High Court of the Western Province holden at Gampaha (“High Court”) dated 17-09-2010. The High Court by the said judgment upheld the decision of the District Court of Gampaha dated 28-03-2003.

This Court on 26-08-2011 granted Leave to Appeal on four Questions of Law. The 1st and 2nd Questions of Law were raised on behalf of the Plaintiff-Appellant-Appellant (“The Plaintiff/Appellant”), whereas the 3rd and 4th Questions of Law were raised on behalf of the Defendants-Respondents-Respondents (“The Defendants”). The said Questions of Law (in verbatim) are as follows: -

- 1) Was the 2nd Defendant-Respondent-Respondent a *bona fidae* purchaser for valuable consideration for the purpose of Section 98 of the Trust Ordinance?
- 2) Did the learned Judge of the High Court of Civil Appeal err in holding that on all the circumstances of this case, there was no trust arising under Section 83 of the Trust Ordinance with respect to the deed P5?
- 3) Did the 2nd Defendant- Respondent-Respondent have any notice of the alleged trust at the time the transaction embodied in P 13 was entered into the purpose of Section 98 of the Trust Ordinance?
- 4) In any event, in the absence of a prayer for a relief directly against the 2nd Defendant-Respondent and without making a person called Lionel as a party, could the Petitioner have succeeded in the action filed in the District Court?

The Plaintiff instituted action against the Defendants in the District Court of Gampaha and prayed among other relief, for a Declaration,

- (i) that the 1st Defendant was holding the subject matter of this application (“the land”) as a trust on behalf of the Plaintiff; and
- (ii) that the 2nd Defendant is holding “the land” as a trust on behalf of the Plaintiff and the 2nd Defendant obtained the title to the land from the 1st Defendant, subject to the trust on behalf of the Plaintiff.

If I may refer to the facts in brief, the Plaintiff became the owner of the land in issue, in the year 1987 and transferred the land to one B.A. Lionel upon Deed No 2273 dated 23-03-1991. The Plaintiff's position before this Court was that the land was transferred by the Plaintiff to B.A. Lionel as security for a loan obtained by the Plaintiff, reserving the beneficial right to herself. In 1994, B.A. Lionel requested re-payment of the loan and the Plaintiff was not in a position to pay back the loan.

Thereafter, the 1st Defendant paid the sum due to B.A. Lionel and B.A. Lionel transferred the land to the 1st Defendant by Deed No 146 dated 03-03-1994 ("P5"). The Plaintiff's contention before this Court was that the 1st Defendant held the land in trust for the Plaintiff and the beneficial rights were with the Plaintiff and the Plaintiff continued to live in the land in suit bearing No 225, Makewita, Ja-Ela until she was dispossessed by the 2nd Defendant.

The position of the 2nd Defendant before the trial court was that he was a *bona fidae* purchaser. He purchased the land from the 1st Defendant upon Deed No 4599 dated 03-09-1996 ("P13") for valuable consideration and took possession of the land on the said date without any encumbrances and in November 1996, built a parapet wall.

The Plaintiff went before the Magistrate Court of Gampaha in January 1997, and filed a private plaint under Section 66 the Primary Court Act against the 2nd Defendant seeking an order to restrain the 2nd Defendant from disturbing the Plaintiff's peaceful possession of the land in suit. Whilst this application was pending, on 19-02-1997 the Plaintiff alleged, she was dispossessed from the land and the Magistrate Court by an Order dated 02-06-1997 restored the possession.

The 2nd Defendant went before the High Court of Gampaha being aggrieved by the said Order and on 20-02-1998, the High Court set aside the said Order of the Magistrate Court on the basis that a breach of the peace had not occurred for the Plaintiff to go before the Magistrate Court. The Plaintiff appealed to the Court of Appeal against the said Order and on 28-02-2000, the Court of Appeal dismissed the appeal and affirmed the Order of the High Court and held that the Court of Appeal was unable to accept on the material submitted that the land in suit was subjected to a mortgage or that the Plaintiff was in possession of the land in suit at the time the private plaint was filed. No appeal was lodged against the said Order.

On 25-06-1998, whilst the above stated appeal to the Court of Appeal was pending the Plaintiff filed the District Court case from which the instant appeal lies and moved for a declaration that the beneficial interest in the land in issue was with the Plaintiff.

On 28-03-2003, the learned District Judge dismissed the plaint and made Order that the 2nd Defendant is entitled to the land in suit and to evict whosoever is in the land and obtain vacant possession of the land. This Order was upheld by the Civil Appellate High Court of Gampaha on 17-09-2010. Being aggrieved by the said Order the Plaintiff is now before this Court.

We have heard the Counsel for the Appellant and the Respondents and on the arguments presented to this Court, the question that requires our determination is whether the evidence adduced at the trial is sufficient to establish a 'Constructive Trust' in favour of the Plaintiff by the Respondents, (the 1st Defendant and/or the 2nd Defendants) in terms of the provisions of the Trusts Ordinance.

Chapter 1X of the Trusts Ordinance refers to 'Constructive Trusts' and covers many categories of Constructive Trusts. A transfer without disposal of the beneficial interest is envisaged in Section 83 of the Trusts Ordinance.

The sections 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.”

Thus, for a transferee to establish a Constructive Trust, evidence should be furnished to satisfy a Court that it can be reasonably inferred from the 'attendant circumstances' that the transferee did not intend to part with the beneficial interest.

Section 83 of the Trusts Ordinance and the term 'attendant circumstance' has been extensively analysed by our Courts and categorically held that leading of parole evidence pertaining to attendant circumstances, to prove a Constructive Trust does not offend the principles laid down in the Evidence Ordinance and the Prevention of Fraud's Ordinance.

Thus, in **Muttammah Vs Thiyagaraja (1960) 62 NLR 559 at Page 564**, Basnayake CJ stated as follows:-

“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 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.” (emphasis is added)

In the same judgment at page 571 H.N.G. Fernando J., (as he then was) observed as follows:-

“The Plaintiff sought to prove the oral promise to re-convey 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”.

The above dicta was followed by Dheeraratne J, in **Dayawathie and others Vs Gunasekara and another [1991] 1 SLR 115** when he held that extrinsic evidence to prove ‘attendant circumstances’ has been properly received in evidence at the trial.

Similarly, GPS de Silva CJ in **Premawathie Vs Gnanawathie [1994]2 SLR 171** and Sripavan J (as he then was) in **Balasubramaniam and another Vs Krishnapillai and another S.C. Appeal 28/2008 decided on 24-05-2012** and Thilakawardane J in **Kulasuriya Vs Gunathilake S.C. Appeal 157/2011 decided on 04-04-2014** and more recently by Sisira J. de Abrew J in **Fernando Vs Fernando S.C. Appeal 175/2010 decided on 17-01-2017** and Prasanna Jayawardena, PC J in **Sudarshani Vs Somawathie S.C. Appeal 173/2011 decided on 06-04-2017** held that attendant circumstances would depend on the facts of each case and the burden of proof lies on the person who claims a Constructive Trust to prove that it cannot be reasonably inferred from the attendant circumstances that the said party intended to part with the beneficial interest in the land.

Thus, in the instant appeal, for the Plaintiff to succeed in appeal, the Plaintiff should have placed relevant evidence before the trial court for the court to reasonably infer from the attendant circumstances, that the beneficial interest was still with her.

The Plaintiff placed evidence before the trial court that the property was transferred in 1991 to B.A. Lionel by way of a notoriously executed deed. The property thereafter changed hands twice. From B.A. Lionel to the 1st Defendant and from the 1st Defendant to the 2nd Defendant, by P5 and P13 in 1994 and 1996. Thus, the Plaintiff should have led evidence

pertaining to attendant circumstances, in order for the trial judge to reasonably infer that the beneficial interest was still with her when the District Court action was filed in the year 1998.

The conveyance by which the plaintiff transferred the property to B.A. Lionel in 1991, and P5 & P13 by which the 1st Defendant obtained title from B.A. Lionel and transferred the property to the 2nd Defendant respectively, were absolute transfers without any conditions attached. No evidence was led with regard to re-conveyance of the property to the Plaintiff or that it was subjected to a mortgage. Notaries who executed the deeds did not give evidence. No evidence was led to suggest that the beneficial interest was with the Plaintiff and there was an understanding verbally or in writing between the parties to re-convey the land after a certain event or on a given date to the Plaintiff.

The Plaintiff's only assertion was that she continued to live in the land in suit even after she conveyed title in 1991 to B.A. Lionel until she was dispossessed by the 2nd Defendant. In her evidence before the trial court she stated that she obtained a sum of money from B.A. Lionel and the land in suit was kept as a security and therefore B.A. Lionel held the land in trust and in favour of the Plaintiff; that she could not re-pay the loan and the 1st Defendant redeemed it at her request, knowing her financial situation whilst living in the premises as a boarder under the Plaintiff; the 1st Defendant paid the consideration on her behalf and therefore the 1st Defendant held the land in trust and in favour of the Plaintiff; that the said trust continued even when the property was transferred to the 2nd Defendant and though she is not a party to P5 and P13, she continued to have the beneficial interest in the land in suit.

The Plaintiff marked in evidence the electoral registers and assessment registers but did not lead evidence nor call witnesses to substantiate that she physically possessed and lived in the land in suit during the relevant period, i.e. consequent to relinquishing her title to the land in 1991, the transfer of the property to the 1st Defendant in 1994 and thereafter to the 2nd Defendant in 1996. Her evidence that she became aware of the construction of the parapet wall and the fact that the 2nd Defendant had installed a family at the land in suit from neighbours, contradicted her position that she lived in the land in suit.

The 1st Defendant in his evidence categorically denied that the Plaintiff had any interest in the land in suit. His case was that he purchased the land from B.A. Lionel and not from the Plaintiff and at the time of purchase, the Plaintiff was not living in the premises nor had possession of the land. He went onto explain that there were two lands bearing No 219 A and 225 Makewita, 300 yards apart and the Plaintiff lived and conducted her Cadju business at No 219 A, whereas he lived at No 225 when he was employed in Colombo. He purchased the property bearing No 225 without any encumbrances, and upon his transfer he sold the land

bearing No 225 to the 2nd Defendant and the said transfer (P13) was an outright transfer and therefore denied that the Plaintiff had any beneficial interest in the land in suit.

The contention of the 2nd Defendant before Court was that he was a *bona fidae* purchaser of the land in suit and went into immediate occupation of the property and denied that the Plaintiff had any beneficial interest in the land in suit. At the time the 2nd Defendant gave evidence before the trial court the appellate process of the Section 66 application had been concluded. The 2nd Defendant in his evidence produced cheques and payment receipts to substantiate that the land was purchased for valuable consideration and in good faith, since it neighboured a property belonging to his father wherein a furniture venture had been set up.

Having analyzed the evidence led at the trial, the learned District Judge came to the finding that the 1st Defendant by P5, purchased the property from B.A. Lionel as an outright sale; that the evidence led does not suggest that the 1st Defendant held the land in trust for the Plaintiff as it was not purchased from the Plaintiff; the Plaintiff did not have a beneficial interest in the land in suit; the 1st Defendant did not convey the land to the 2nd Defendant subject to a trust as suggested by the Plaintiff; a trust was not created by either the 1st and/or the 2nd Defendant nor existed in favour of the Plaintiff and came to the conclusion that the 2nd Defendant was a *bona fidae* purchaser. It is observed that the judgment did not refer to Section 83 of the Trusts Ordinance or to the term attendant circumstances *per se* but discussed the facts which preceded and followed the transfer and the change of hands of the property from one to another.

The High Court considered the provisions of Section 83 and 98 of the Trusts Ordinance and upheld the said judgment. The High Court observed that the 2nd Defendant was a *bona fidae* purchaser and held that from the attendant circumstances led in evidence by the Plaintiff, that the Court cannot infer that the Plaintiff had a beneficial interest in the land in suit.

Having carefully considered the attendant circumstances pertaining to the transfer of the property in the instant appeal, which preceded and followed the transfer of the land in suit which are not too removed in point of time, I am in agreement with the judgment of the District Court and the High Court, that it cannot be reasonably inferred that the Plaintiff intended to retain the beneficial interest in the property in question, when she transferred the property to B.A. Lionel as security for a loan obtained way back in 1991.

In coming to the said conclusion, I have considered especially the fact that the transferor of P5 was not the Plaintiff but B.A. Lionel and in view of the provisions of Section 83 of the Trusts Ordinance, if a Constructive Trust was created, the transferee, i.e. the 1st Defendant must hold the property for the benefit of the owner B.A. Lionel and not for the benefit of the Plaintiff. In view of the evidence led it clearly manifests that the 2nd Defendant is a *bona fidae*

purchaser who purchased the property in good faith and for valuable consideration. Therefore, I hold that the attendant circumstances relied on by the Plaintiff is inadequate to justify her claim, that she has a beneficial interest in the land in suit. Thus, the trial court was not in error in its findings and the High Court correctly upheld the said judgment.

In the above circumstances, I answer the 2nd Question of Law, namely,

“Did the learned Judge of the High Court of Civil Appeal err in holding that on all the circumstances of this case, there was no trust arising under Section 83 of the Trust Ordinance with respect to the deed P5?”

in the negative and in favour of the Respondents.

Let me now, move onto the 1st Question of Law raised before this Court, which is as follows: -

“Was the 2nd Defendant-Respondent-Respondent a *bona fidae* purchaser for valuable consideration for the purpose of Section 98 of the Trust Ordinance?”

Section 98 of the Trusts Ordinance reads as follows: -

“Nothing contained in this Chapter shall impair the rights of transferees in good faith for valuable consideration, or create an obligation in evasion of any law for the time being in force.”

This provision clearly lays down that the rights of the transferee shall not be impaired if the purchaser has purchased the property in good faith and for valuable consideration.

The 2nd Defendant, as stated earlier gave evidence and relied on documents to establish his *bona fidae*s in purchasing the land in suit and substantiated that the land was purchased for valuable consideration and in good faith.

This evidence was accepted by the trial Judge and upheld in appeal by the High Court. I see no reason to reject the said evidence. The property passed on to the hands of two others, before the 2nd Defendant became the owner of the property. Thus, the contention that the Plaintiff still has a beneficial interest in the land purchased by the 2nd Defendant as a *bona fidae* purchaser, has no merit and for the aforesaid reason, I answer the 1st Question of Law raised before this Court in the affirmative, in favour of the Respondents.

The 3rd Question of Law raised by the Respondents before this Court is as follows: -

“Did the 2nd Defendant- Respondent-Respondent have any notice of the alleged trust at the time the transaction embodied in P 13 was entered into the purpose of Section 98 of the Trust Ordinance?”

In view of the answers given to the 1st and the 2nd Questions of Law, that the 2nd Defendant is a *bona fidae* purchaser and a Constructive Trust was not created in favour of the Plaintiff, this question does not merit an answer from this Court.

However, for completeness let me go back to Section 98 of the Trusts Ordinance, which refers to the rights of a *bona fidae* purchaser not been impaired if the transaction was in good faith and for valuable consideration. The Counsel for the Appellant in his written submissions emphasised the fact that the sale between the 1st Defendant and the 2nd Defendant cannot fall into the realms of a *bona fidae* transaction as the 2nd Defendant ought to have had ‘notice’ of the Trust and relied on the definition of ‘notice’ as found in section 3(k) of the Trusts Ordinance.

This Court at this juncture does not wish to go on a voyage of discovery to ascertain whether the 2nd Defendant had notice and whether it was sufficient, especially since it is a disputed fact. The trial Judge has analyzed the evidence led before him and had come to a conclusion that the 2nd Defendant is a *bona fidae* purchaser. The said finding was upheld by the High Court. I do not wish to disturb the said finding. Hence, I answer the 3rd Question of Law in the negative in favour of the Respondents.

The 4th Question of Law which is as follows, raised by the Respondents is a consequential question.

“In any event, in the absence of a prayer for a relief directly against the 2nd Defendant- Respondent and without making a person called Lionel as a party, could the Petitioner have succeeded in the action filed in the District Court?”

This Court has already held that a Constructive Trust was not created and hence in my view an answer to this question is not required.

However, I wish to refer to Sections 65 and 66 of the Trusts Ordinance which provide for a beneficiary of a trust to follow the trust property into the hands of even a stranger and obtain a declaration pertaining to the trust property. This Court has upheld the said principle and made orders accordingly. **Dayaratne Vs Gunasekara** (supra) and **Balasubramaniam Vs Krishnapillai** (supra) are two instances in which such orders had been made by our Courts.

With regard to the instant appeal, this Court had already come to a finding that the attendant circumstances in this case do not amount to creation of a trust in favour of the Plaintiff and that the Plaintiff has no beneficial interest in the land in suit. Hence, I do not wish to go on an academic exercise to answer the 4th Question of Law raised before this Court, other than simply say, that in view of the findings of this Court, the question does not merit an answer.

For the aforesaid reasons, I uphold the Order of the Provincial High Court of the Western Province holden at Gampaha dated 17-09-2010 and the Judgment of the District Court of Gamapaha dated 28-03-2003.

Appeal is dismissed with costs fixed at Rs. 25,000/=

Judge of the Supreme Court

Sisira J de Abrew, J.
I agree

Judge of the Supreme Court

L.T.B. Dehideniya, J.
I agree

Judge of the Supreme Court