

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

Jayasinghe Arachchige Percy Hubert,
Lihiriyagama.

C.A. No. 644 / 96 (F)

Plaintiff

Vs.

D.C. Marawila No. 367 / L

Kadupitige Jennie Muriel Perera,
Lihiriyagama.

Defendant

And Now Between

Jayasinghe Arachchige Percy Hubert,
Lihiriyagama.

Plaintiff-Appellant

Vs

Kadupitige Jennie Muriel Perera
(deceased)

Defendant -Respondent

1. Naththandige Disna Niroshani
Fernando,
Jayagama, Lihiriyagama.
2. Naththandige Inoka Deepthi Ramya
Fernando,
C/O A.M. Ravindra Abeysinghe,
Welegedara, Hettirippuwa,
Lihiriyagama.

Substituted Defendant Respondents

BEFORE : UPALY ABEYRATHNE J.

COUNSEL : Chandrasiri Wanigapura for the
Plaintiff Appellant
1st and 2nd Defendant Respondents –
Absent and Unrepresented

WRITTEN SUBMISSIONS ON : 15.11.2011

ARGUED ON : 16.03.2012

DECIDED ON : 29.05.2012

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) instituted an action against the Defendant Respondent (hereinafter referred to as the Respondent) in the District Court of Marawila seeking inter alia for a judgment that the property described in the schedule to the plaint was held by the Respondent in trust for the benefit of the Appellant and the said property be retransferred in the name of the Appellant. The Respondent took up the position that she was in possession of the land in dispute upon a deed of transfer No 2001 dated 01.09.1985 which was not subjected to any trust or obligation and the agreement mentioned in paragraph 6 of the plaint was contrary to the provisions

contained in Section 2 of the Prevention of Frauds Ordinance. The case proceeded to trial upon 16 issues. After trial the learned Additional District Judge dismissed the Appellant's action.

At the trial the parties have admitted the deeds of transfer No 1980 dated 03.07.1985 and 2001 dated 01.09.1985. The Appellant relied upon the agreement dated 01.05.1985 wherein the Appellant has agreed;

- a. To sell the said property in dispute to the Respondent for a sum of Rs. 35,000/-,
- b. To deduct a sum of Rs 20,000/- which had already been paid to the Appellant by the Respondent and the balance sum of Rs 15,000/- to be paid to the Appellant by the Respondent within a period of 06 months from the date of the said agreement,
- c. To transfer the title to the Respondent upon the paying of the said sum of Rs 15,000/- to the Appellant,
- d. And in the event the Respondent failed to pay the said amount of Rs 15,000/- to the Appellant within the said period of 06 months to have the said property retransferred in the name of the Appellant upon paying the sum of Rs 20,000/- which had already been paid and the interest at the rate of 5% accrued on a sum of Rs 10,000/- for a period of 12 months.

It is common ground that the Respondent has failed to pay the sum of Rs. 15,000/- within the stipulated period of 06 months. The Respondent's position was that the said agreement did not comply with the provisions of Section 2 of the

Prevention of Frauds Ordinance. I now deal with the said contention of the Respondent.

In the case of Dayawathie and Others Vs. Gunasekera and Others (1991) 1 SLR 115 (SC) it was held that “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. Extrinsic evidence to prove attendant circumstances can be properly be received in evidence to prove a resulting trust.”

In the case of Premawathie Vs. Gnanawathie (1994) 2 SLR 171 G.P.S de Silva CJ observed that “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 1st defendant did not intend to dispose of the beneficial interest.

In the present case the Appellant and the Respondent has entered in to an agreement (P 3) to retransfer the property in dispute. Said agreement has been made on the very same date on which the deed of transfer No 2001 was executed. In the light of the said judicial pronouncements it seems to me that the Prevention of Frauds Ordinance does not bar said documentary evidence to prove a

constructive trust and that the transferor did not intend to pass the beneficial interest in the property.

In the said circumstances I set aside the judgment of the learned Additional District Judge dated 25.07.1996 and allow the appeal of the Appellant. The Appellant should pay a sum of Rs. 20,000/- and also the interest accrued on a sum of Rs. 10,000/- at the rate of 5% for a period of 12 months to the Respondent. I accordingly direct, if the said sum of money is paid by the Appellant and if the Respondent fails to effect a transfer as set out above, the Registrar of the District Court to effect the transfer on an application to that effect. The Appellant is entitled to costs in both Courts.

Appeal allowed.

Judge of the Court of Appeal