

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

Mrs. Thavamanie Rasalingam of
Division 2, Periyakalar.

Plaintiff

C.A. Application No.301/97 (F)

D.C. Batticaloa Case No.4420/L

Vs.

1. Mrs. V. Thangamalar Pakkiyam
2. Nallathamby Krishnapillai, both of
Division 2, Periyakallar

Defendants

AND

1. Mrs. V. Thangamalar Pakkiyam
2. Nallathamby Krishnapillai, both of
Division 2, Periyakallar.

Defendants-Appellants

Vs.

Mrs. Thavamanie Rasalingham of
Division 2, Periyakallar.

Plaintiff-Respondent

BEFORE : S. SRISKANDARAJAH, J (P/CA)

COUNSEL : S.Mandaleswaran with Ms.Tharani Ganeshanandan,
for the Defendant -Appellant

V. Puvitharan with Mrs.S.Kalugamage and Ms.R.Shanthini
for the Respondent.

Argued on : 15.03.2012

Written Submission on : 24.05.2012 (Defendant-Appellant and Respondent)

Decided on : 29.05.2012

S.Sriskandarajah.J

This is an appeal from a judgment of the learned District Judge of Batticaloa, delivered on 20th of May 1997. In the said judgment the learned District Judge has granted the reliefs sought by the Plaintiff, i.e., for a declaration of title to the land described in the schedule to the Plaint and for ejectment of the Defendants, their servants, agents, and all those claiming under them.

The Plaintiff filed an action in the District Court of Batticaloa for a declaration of title on the basis of a Deed of Transfer bearing No.2005 dated 12/02/1994 attested by Gopalapillai, Notary Public. The said Deed of Transfer was entered into between the Plaintiff-Respondent and the 1st and 2nd Defendants-Appellants.

The Appellants submitted that the learned District Judge has erred in granting relief to the Plaintiff on the basis that the aforesaid deed is an outright transfer and has failed to consider that the said deed was executed in trust for the 2nd Defendant for the loan obtained by the 2nd Defendant from the Plaintiff.

The Appellants submitted that the 2nd Defendant who was the owner of the property by deed No.13346 dated 25th April 1973, attested by Kandappan Chelliah,

Notary Public, obtained a sum of Rs.2,000/- as a loan carrying an interest of 24% per annum as he was in financial difficulty and, thereafter, by Deed No.2605 dated 12/02/1994, attested by V. Gopalapillai, Notary Public, raised a loan of Rs.20,000/- carrying an interest of 3% per annum for a period of 3 years as he needed the money to send his nephew abroad for which deed the 1st Defendant, too, signed as a party. In relation to the 1st transaction the money borrowed was settled together with interest, but the property was not re-transferred to the 2nd Defendant-Appellant, but the 2nd Defendant was in possession of the said property and a re-transfer was not legally executed. In view of this, the title of the said property remained with the 1st Defendant-Appellant. In or around February 1994, the 2nd Defendant executed the Deed No.2605 which is an outright transfer, and as the title was vested with the 1st Defendant, the 1st Defendant-Appellant and the 2nd Defendant-Appellant have executed the said Deed of Transfer, but the evidence revealed the consideration for the transfer was handed over to the 2nd Defendant-Appellant.

The position of the Appellants was that the transfer effected by Deed No.2605 in February 1994 was in order to borrow Rs.20,000/- from the Plaintiff-Appellant as the said sum was needed to send the 2nd Defendant-Appellant's nephew abroad, but as the Plaintiff has insisted that the property be transferred without any condition, the said deed was written as an outright transfer. The position of the Appellants was that, even though the said Deed of Transfer was an outright transfer, in fact, it was a conditional transfer and that the Plaintiff-Respondent was holding the said property in trust to the 2nd Defendant.

The Appellant submitted that the trust in this instance is a constructive trust coming under Section 83 of the Trust Ordinance which reads as follows:-

Section 83: "Where the owner of the property transfers or bequeaths it, and it cannot reasonably infer consistently in 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 of his legal representative."

The Appellant submitted that even though a transfer is in the form of an outright sale, it is possible to lead parole evidence to show that facts exist from which it could be inferred that the transaction was either;

- (a) money lent, where the loan is a transfer as security as in this case, or;
- (b) a transfer in trust.

In such case, Section 83 would apply.

The Appellant relying in *Piyasena Vs. Don Vensu* (1997) 2 SLR 311, where it was held, "a transfer is inferred from attendant circumstances, the trust is an obligation imposed by law on those who try to camouflage the actual nature of the transaction. When the attendant circumstances point to a loan transaction, and not a genuine sale transaction, the provision of Section 83 of the Trust Ordinance applies."

In this case the Plaintiff and the 1st and 2nd Defendants have given evidence and it appears, that the 2nd Defendant has, on previous occasions, borrowed money from the 1st Defendant by pledging the same property and in that transaction the 2nd Defendant has made an conditional transfer of the said property to the 1st Defendant. Therefore, it is evident that the 2nd Defendant is well aware of an outright transfer and a conditional transfer and, if the present transaction is also a transaction to borrow money, the 2nd Defendant would have taken sufficient precaution in entering into the transaction but, it appears, that the 2nd Defendant has transferred the said property byway of an outright sale, and the Notary Public who executed the deed in this action has given evidence, and he said, there is no discussion in relation to a conditional transfer or that the property is transferred in lieu of a loan transaction, and the Notary Public has specifically said, that the transfer is an outright transfer, and it is also in evidence that the said deed was read to the parties and, therefore, the parties cannot deny that they are not aware of the contents of the said document.

The learned Judge in his judgment has analysed the evidence, and the learned Judge has observed that the 2nd Defendant in his evidence has said, that he was a classmate of the Notary Public who executed the deed, and that he knew the said Notary Public, but at the same time the Notary Public, when giving evidence has said that the parties are not known to him. Pointing out these contradictions, the learned District Judge has disbelieved the 2nd Defendant's evidence. The learned District Judge has also taken into consideration the evidence given by the Grama Sevaka, and the Grama Sevaka in his evidence has said that he has observed that the Plaintiff's father was clearing the said land on 2 occasions. This also shows that the Plaintiff was in possession of the said land.

From the evidence led the learned Judge has come to the conclusion that the transaction is an outright transfer and not a conditional transfer or a transfer in trust for money lent.

From the attendant circumstances it is clear that the said transaction is an outright transfer and not a transfer of property as security to the money lent. I, therefore, hold that there is no error in the learned District Judge's judgment for this court to interfere and hence this court dismisses this appeal without cost.

President of the Court of Appeal