

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

Manawaduge Ebert,  
Agatuduwa,  
Dodandugoda, Dodanduwa.

**Plaintiff**

**Vs.**

C.A. No. 721 / 2000 F  
D.C. Galle No. 12261 / L

Walpitagamage Darmadasa alias Berti de  
Silva alias Berti Silva,  
Modara,  
Patuwatha, Dodanduwa.

**Defendant**

**AND NOW BETWEEN**

Walpitagamage Dharmadasa alias Berti  
de Silva alias Berti Silva,  
Modara,  
Patuwatha, Dodanduwa.

**Defendant Appellant**

**Vs.**

Manawaduge Ebert,  
Agatuduwa,  
Dodandugoda, Dodanduwa.

**Plaintiff Respondent**

**BEFORE** : UPALY ABEYRATHNE, J.

**COUNSEL** : Widura Ranawake With Chinthaka  
Kohomban for the Defendant Appellant.  
D.M.G. Dissanayake with Ms K.K. Farook  
for the Plaintiff Respondent.

**ARGUED ON** : 28.10.2011

**DECIDED ON** : 24.11.2011

**UPALY ABEYRATHNE, J.**

This is an appeal by the Defendant Appellant (hereinafter referred to as the Appellant) from the order of the learned Additional District Judge of Galle dated 14.06.2000. The facts relevant to this appeal are briefly as follows;

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted the said action against the Appellant in the District Court of Galle seeking inter alia a declaration of title to the land described in the schedule to the plaint. According to the Respondent the Appellant who was the owner of the said land had transferred it to the Respondent by deed bearing number 6261 dated 26.02.1990. After the said conveyance the Respondent had allowed the Appellant to stay in the house situated on the said land for a period of one year commencing from the date of execution of the said deed No 6261. Since the Appellant had continued to be in the possession of the said property the Respondent had terminated the said leave and licence and had instituted the said action in the District Court.

The Appellant's position was that he had borrowed a sum of Rs. 80,000/ from the Respondent and the said deed was executed as a security for the said sum and for a further sum of Rs. 30,000/ as interest thereon. On the said basis it was contended that the Appellant did not intend to dispose of the beneficial interest of the said property to the Respondent and therefore the Respondent must hold the said property for the benefit of the Appellant.

At the hearing of this appeal both Counsels admitted that the only question which arises in this appeal for determination is that whether the said deed of transfer No 6261 was an outright transfer or the Respondent should hold the said property for the benefit of the Appellant. Hence I now consider the claim of a constructive trust in terms of Section 83 of the Trust Ordinance.

Section 83 of the Trusts Ordinance 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."

It is important to note that the "crucial words" in the section are "intended to dispose of the beneficial interest" in the property. It is therefore necessary to consider the true nature of the transaction between the parties.

It is in evidence that after the deed No 6261 was executed, on the same day the parties had entered in to an agreement giving an undertaking by the Respondent that the said property would be re-transferred to the Appellant upon the payment of Rs. 110,000/- within a period of one year from 26.02.1990. On the other hand it is also in evidence that the Appellant did not make the said payment of Rs. 110,000/- within the said period of one year. After the said period of one

year the Appellant had made an application to the Debt Conciliation Board and the said application had been dismissed by the Board. The learned Counsel for Appellant contended that the Appellant had acted on the basis that the deed 6261 was a security furnished in respect of a loan transaction.

If the deed No 6261 was a security furnished in respect of a loan transaction then it will become necessary to consider the nature of the transaction between them. It is common ground that the parties had entered in to an agreement to retransfer the land on payment of Rs. 110,000/- within one year from 26.02.1990 and the Appellant had failed to fulfil the said condition as agreed by them. Both Counsels did not challenge the validity of V 1. Hence it is clear that after the expiry of one year period there was no existing contract between the parties.

In the above context can it be reasonably inferred consistently with the attendant circumstances that the Appellant did not intend to dispose of the beneficial interest in the property to the Respondent?

In the case of Sanmugam and Another Vs. Thambaiyah (1989) 2 SLR 157 it was observed that "We have on "P1" a legal obligation on the purchaser to retransfer upon fulfilment of the contract within 2 years. The terms of the deed show it is an outright sale or transfer of interests in land subject to a condition to re-convey if the sum of Rs. 5000/- owned by the vendor is paid in full within the time stipulated. No question of trust arises in such a context. Time is explicit. On the expiry of two years the purchaser is relieved of the undertaking to retransfer the property. The true construction of Deed "P1 is that property has been offered as security for the payment of a sum of money within 2 years. It is not a pledge or mortgage. It is well to remember the evidence of Sanmugam that the bridegroom's

parents wanted tangible security. The two years for obtaining a retransfer lapsed on 4.1.66.”

The Supreme Court in the case of Maggie Silva Vs. Sai Nona 78 N.L.R. 313 held that "when the condition underlying the conditional transfer is not fulfilled the transferee becomes absolute owner in terms of the agreement of parties free from any obligation to retransfer".

The learned Counsel for the Appellant relied upon the decision in Premawathi Vs. Gnanawathi (1994) 2 SLR 171. In this case, the plaintiff in her evidence admitted that by an informal writing (which bears the same date as P1) she undertook to re-convey the property to the defendant upon the payment of the sum of Rs. 6000/- within a period of 6 months from 4.2.76. She further stated, (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.

On the said evidence G.P.S. de Silva CJ observed that “An undertaking to re-convey 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."

When I consider the present case before me there is no such evidence before this court as in the case of Premawathi Vs. Gnanawathi. In the present case before me the agreement between the parties had come to an end. In terms of the agreement V 1, on 27.02.1991 the Respondent became absolute owner of the property. After the one year lapsed the Appellant remaining in possession of the property without fulfilling the condition rendered himself liable to be ejected.

Hence it is my considered view that the above facts and circumstances do not point to a "constructive trust" within the meaning of section 83 of the Trusts Ordinance. In the said premise the learned District Judge was correct in entering judgment and decree for the Respondent as prayed for with costs. Therefore I dismiss the appeal of the Appellant with costs.

*Appeal dismissed.*

Judge of the Court of Appeal