

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRILANKA

Warnakulasuriya Hubert Fernando,
Kolinjadiya,
Wennappuwa.

Plaintiff

C A 1178 / 2000 (F)
D.C. Marawila 807 / L

Vs.

1. W. Sebastian Fernando,
Pahala Katunariya, Katuneriya.
2. W. Fatima Merlin Fernando,
Galmalpandura Road,
Pahala Katunariya, Katuneriya.
3. Noel Medit Fernando Kolambage,
'lakmali', Kolinjadiya,
Wennappuwa.

Defendants

NOW BETWEEN

Warnakulasuriya Hubert Fernando,
Kolinjadiya,
Wennappuwa.

Plaintiff Appellant

Vs.

1. W. Sebastian Fernando,
Pahala Katunariya, Katuneriya.
2. W. Fatima Merlin Fernando,
Galmalpandura Road,
Pahala Katunariya, Katuneriya.

3. Noel Medit Fernando Kolambage,
'lakmali', Kolinjadiya,
Wennappuwa.

Defendant Respondents

BEFORE : UPALY ABEYRATHNE, J.

COUNSEL : Dr. Sunil F.A. Cooray with M.U. Rajapaksa
for the Plaintiff Appellant

Athula Perera with Chathurani De Silva for
the 3rd Defendant Respondent
1st and 2nd Defendant Respondents are
absent and unrepresented

ARGUED ON : 21.11.2012

DECIDED ON : 29.05.2013

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) instituted an action against the 1st 2nd and 3rd Defendant Respondents (hereinafter referred to as the Respondents) 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 Respondents in trust for the benefit of the Appellant and the said property be retransferred in the name of the Appellant. The 1st and 2nd Respondents have filed a joint answer praying for a dismissal of the Appellant's action on the basis that they have bought the land in dispute upon a deed of transfer. The 3rd Respondent by his

answer has prayed for a dismissal of the Appellant's action and for a declaration of title to the land in suit.

The case proceeded to trial upon 16 issues. On 28.07.1998 the Appellant's evidence in chief has been led and the trial has been adjourned for further cross examination. When the case was taken up for further trial on 15.09.1998 the 1st 2nd and 3rd Respondents were absent and unrepresented. Thereafter on an application made under Section 144 of the Civil Procedure Code the learned District Judge has proceeded to deliver a judgment and by the said judgment dated 02.11.1998 has dismissed the Appellant's action.

Although the learned District Judge in her judgment at page 122 of the brief has stated that the Appellant's evidence was not adequate to prove the case, at page 118 of the brief she has stated that "Accordingly it is apparent from the evidence of the plaintiff that alleged loan has been obtained from one Alexander and in lieu of the said loan a deed of transfer and a lease agreement have been executed in the name of 1st and 2nd Defendants".

It is apparent from the evidence of the Appellant that in respect of the land in suit a deed of transfer bearing No 3757 dated 07.03.1982 (P 1) and also a lease agreement bearing No 3758 dated 07.03.1982 (P 2) had been executed in favour of the 1st and 2nd Respondents by the appellant. Therefore it is an important matter for the consideration of Court that why the Appellant executed a lease agreement for the same land in addition to the deed of transfer. The Appellant in his evidence has given a detailed description about the attendant circumstances he compelled to execute the said conveyance and the lease agreement on the same date. It seems that the learned District Judge has failed to consider the said parole evidence in regard to a trust under Section 83 of the Trust Ordinance.

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 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 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 1st defendant did not intend to dispose of the beneficial interest.”

In the aforesaid circumstances I set aside the judgment of the learned District Judge dated 02.11.2000 and allow the prayer ‘a’ of the petition of appeal of the Appellant with cost. I accordingly order a re-trial. The learned District Judge is directed to hear and conclude the case expeditiously.

Re-trial ordered.

Judge of the Court of Appeal