

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

A.L.Mary Nursila Jayawardene
No.5, Unnaruwa, Minduwangoda.

Plaintiff-Appellant

Vs

C.A.178/97 (F)

D.C.NEGOMBO CASE NO.3227/L

P.Gamini Silva
Gamangedera, Minuwangoda.

Defendant-Respondent

COUNSEL : P.Nanayakkara with T.Alahakoon
for the Plaintiff- Appellant

Rohan Sahabandu P C with
S.Kumarawadu for the Defendant-
Respondent

ARGUED ON : 04.09.2013

**WRITTEN
SUBMISSIONS
FILED ON** : 04th September 2013 by the Plaintiff-
Appellant
10th September 2013 by the Defendant-
Respondent

DECIDED ON : **31.10.2013**

K.T.CHITRASIRI,J.

This is an appeal seeking to set aside the judgment dated 6th March 1997 of the learned District Judge of Negombo. By that judgment, learned

District Judge dismissed the plaint with costs. The said amended plaint dated 8th July 1998 of the plaintiff contains two causes of action. The first cause of action is on the basis of *lesio enormis* whilst the other is on the basis of Sections 5(3) and 83 of the Trust Ordinance. The plaintiff by the second cause of action sought to have a declaration to the effect that the land in question being held by the defendant in trust for the plaintiff. Even though the original action had proceeded on those two causes of action, the plaintiff-appellant in the submissions dated 4th September 2013 filed in this Court has submitted that the principle of *lesio enormis* is not applicable in this instance and the plaintiff is not pursuing the reliefs claimed on the basis of *lesio enormis*. Accordingly, this appeal is basically to canvass the decision arrived at upon considering the evidence relating to the second cause of action pleaded in terms of Section 83 of the Trust Ordinance.

Section 83 of the Trust Ordinance reads thus:-

“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”..

Since the plaintiff has relied upon Section 83 of the Trust Ordinance, it is her burden to establish that she did not intend to dispose the beneficial interest of the property transferred by the deed, put in suit. This phenomenon contained in Section 83 of the Trust Ordinance should be decided upon considering the attendant circumstances of the issue at hand.

This position in law had been discussed in the cases of **Thisa Nona and three others vs. Premadasa (1997) 1 S.L.R at 169** and **Piyasena vs. Don Vansue (1997) 2 S.L.R. at 311**

In **Thisa Nona and three others vs. Premadasa** (supra), it was held as follows:

“The fact that document 1V2 was admitted by the plaintiff-respondent, the fact that the 1st defendant-appellant paid the stamp and Notary’s charges, the fact that P16 was a document which came into existence in the course of a series of transactions between the plaintiff-respondent and the fact that the 1st defendant-appellant continued to possess the premises in suit just the way she did before P16 was executed all go to show that the transaction was a loan transaction and not an outright transfer”.

In **Piyasena vs. Don Vansue** (supra), it was held thus:

“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 real transaction was either –

- (i) *money lending, where the land is transferred as a security as in this case or;*
- (ii) *a transfer in trust-in such cases section 83 would apply;*
- (iii) *A trust is inferred from attendant circumstances. The trust is an obligation imposed by law on those who try to camouflage the actual nature of a transaction. When the attendant circumstances point to a loan transaction and not a genuine sale transaction the provisions of section 83 of the Trust Ordinance apply.”*

Per Wigneswaran, J

“The behavior of the plaintiff-appellant with Samagi Mudalali in the background and the defendant-appellant just before and after the signing of P2 and P3 and even after the end of the

period of lease, show them to be that of rapacious investor/s and persecuted borrower respectively rather than a genuine purchaser and a over holding tenant.

(iii) It cannot be reasonably be inferred consistently with the attendant circumstances that the defendant-appellant intended to dispose of the beneficial interest to the property in question.”

In the circumstances, it is necessary to consider whether the learned District Judge, in this instance had correctly looked at the evidence particularly the evidence in relation to the given attendant circumstances, in accordance with the law referred to above when she dismissed the claim made on the basis of constructive trust.

Admittedly, the deed bearing No.58401 dated 20.12.1982 had been executed transferring the two blocks of land referred to in the schedule thereto to the defendant-respondent (hereinafter referred to as the defendant) by the plaintiff-appellant. (hereinafter referred to as the plaintiff). However, the plaintiff has taken up the position that even though the said deed marked P1 is a deed of transfer, transferring the lands to the defendant, in fact it was executed with the intention of re-transferring the same to her upon paying back the consideration mentioned in the deed to the defendant. However, the position of the defendant was that there was no such agreement between the parties and it was in fact an outright transfer made in favour of the defendant.

This issue can be decided by looking at the evidence adduced in relation to the attendant circumstances of the case. Admittedly, the consideration

passed at the time of executing the deed was Rupees Three Thousand (Rs.3,000/-) though the amount mentioned in the deed as the purchase price is Rupees Five Thousand (Rs.5,000/-). According to the defendant, the balance Rupees Two Thousand (Rs.2,000/-) had been paid exactly one month before the date of execution of the deed. It is the evidence of the Notary concerned as well. However, no evidence is available to show the way in which Rupees Two Thousand (Rs.2,000/-) was paid by the defendant prior to the execution of the deed. The Notary cannot vouch for the money supposed to have given by the defendant to the plaintiff prior to the execution of the deed as it was a matter that had taken place in his absence. The Notary has merely stated what the parties have informed him of the payment made before. The plaintiff has stated that it was on account for the interest that she had to pay the plaintiff for the rice she bought from him. Version of the plaintiff is acceptable than the version of the defendant since there is undisputed evidence as to selling of rice to the plaintiff by the defendant. In the circumstances, credibility of the defendant is seriously affected when evaluating his evidence in respect of the manner in which the aforesaid Rs.2000/- advanced by him to the plaintiff prior to the execution of the deed.

Be that as it may, it is necessary to consider whether Rupees Five Thousand (Rs.5,000/-) referred to in the deed as consideration could have been the real value of the property subjected to the action. Witness W.P.C.Perera has stated that he prepared a Valuation Report in respect of the two lands in issue. The said report has been marked as F4. In that report, it

is mentioned that the value of the property in the month of May 1985 was Rupees Fifty Five Thousand (Rs.55,000/-). It is further stated that the value of the property as at 20.12.1982, it being the date of execution of the deed, had been Rupees Thirty Seven Thousand Five Hundred. (Rs.37,500/-) Therefore, according to the evidence of W.P.C.Perera, the value of the property is more than seven times of the value referred to in the deed marked P1, at the time the transaction took place. This witness was subjected to lengthy cross-examination. In that cross-examination, he has admitted that he did not have any academic qualifications to undertake preparing valuations of properties. However, he has stated that he was functioning as the valuer for the State Mortgage Bank, Bank of Ceylon and Commercial Bank and his valuations so made had been accepted by those banks. He has further stated that he has issued 700 to 800 Valuation Reports to Courts as well. He had been a Valuer and Court Commissioner for about 25 years.

In view of the above experience, the learned District Judge should not have completely disregarded the Valuation Report marked P4. Therefore, it is seen that the learned District Judge has not properly evaluated the evidence as to the value of the property when she decided to reject the claim of the plaintiff. However, upon considering the evidence of the case, particularly the evidence of the said W.P.C.Perera, it is clear that correct market value of the property has not been received by the plaintiff for the sale of the two blocks of land subjected to this action.

Moreover, it is necessary to consider the circumstances under which the deed of transfer was executed. Plaintiff in her evidence has stated that she was in need of Rupees Three Thousand (Rs.3,000/-) to be given to her sister-in-law who wanted to go abroad for employment. The said sister-in-law has also given evidence to that effect. Both the plaintiff and her sister-in-law have stated that they needed money to seek employment abroad for the sister-in-law though she could not succeed in finding such an employment. The evidence so adduced by the plaintiff and her sister-in-law should not have been rejected by the learned trial judge. Moreover, the document marked P2 (Vide at page 287 in the appeal brief) indicates that the defendant has agreed to re-transfer the two lands back to the plaintiff. Learned District Judge has rejected the contents of the said document P2 merely because the defendant has rejected signing the document (Vide at page 239 in the appeal brief). She has failed to properly evaluate the evidence in that connection too.

The other important fact is the question of physical possession of the two lands concerned. Plaintiff has clearly stated that the possession of the two lands had been with her up to date. She lives in the close proximity to the place where the lands in dispute are situated. Her evidence as to her longstanding possession seems to be accurate and without any ambiguity. On the other hand, the defendant has stated that he, on several occasions had plucked coconuts from the trees found on one of the two lands in dispute. The person who plucked the coconuts also has given evidence. He is a person

who has disabilities and therefore his evidence has not been considered even by the learned District Judge. Father of that person who supposed to have plucked coconuts also has given evidence in support of the position taken up by the defendant.

In this regard the plaintiff admitting plucking coconuts by the defendant has stated that the defendant once came to the land and plucked coconuts. Then she, while explaining the incident, has said that the plucking of coconuts by the witness who gave evidence took place only after this action was instituted. (Vide at page 121 in the appeal brief). She has made a complaint to this effect and it has been marked as P5. In that complaint, it is clearly stated that the defendant came to the land only after the filing of this action. The learned District Judge should have considered this aspect carefully. In this connection, the learned District Judge has stated that the plaintiff should have obtained an order of Court preventing the defendant in such a situation. She has failed to look at this document marked P5 addressing her mind particularly to the date of plucking coconuts. However, no clear evidence is found to establish that the defendant was in physical or actual possession of the two lands since the date of execution of the deed up to the date of filing of this action.

In the circumstances, it is clear that the learned District Judge has not properly evaluated the attendant circumstances when she decided to dismiss the claim of the plaintiff made relying upon Section 83 of the Trust Ordinance.

As mentioned hereinbefore, it is my opinion that the attendant circumstances in this case show that the defendant is holding the two lands referred to in the schedule to the deed marked F1 in trust for the plaintiff and therefore I decide that it is a fit case to apply the law referred to in Section 83 of the Trust Ordinance to the issue at hand.

At this stage, it is necessary to consider whether or not the consideration referred to in the deed that was received by the plaintiff should be returned to the defendant. In paragraph 12 of the amended plaint, it is stated that the said Rupees Five Thousand (Rs.5,000/-) had already been deposited in Court by the plaintiff. This position has not been disputed by the defendant. Therefore, the defendant is entitled only to move the District Court of Negombo to obtain the said amount of Rupees Five Thousand (Rs.5,000/-) with interest if such an interest has been accrued to the deposit.

For the aforesaid reasons, the judgment dated 06.03.1997 is set aside. Accordingly, this appeal is allowed. The plaintiff-appellant is entitled to the reliefs prayed for in her amended plaint dated 08.07.1998. Learned District Judge is directed to enter decree accordingly. Having considered the circumstances, I make no order as to the costs of this appeal. Parties are to bear their own expenses.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL