

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

C.A. No. 684/98 F
D.C. Kegalle No. 3691/L

K. Gunarath Manike
"Yamuna",
Warahena,
Bentota.

Appellant

Vs.

K.A. Abeyrathne
Mawanella.

Respondent

BEFORE : K.T. Chitrasiri J.

COUNSEL : Nimal Weerakkody for the Substituted Defendant-
Respondents

Substituted Plaintiff-Appellants are absent and
unrepresented

ARGUED &

DECIDED ON : 03.04.2014

K.T. CHITRASIRI J.

Pursuant to the preparation of briefs, the Registrar of this Court had sent notices under registered cover to the Substituted-Plaintiff-Appellants directing them to be present in this Court on 18.06.2014. The Registrar also has sent a notice to their Registered Attorney as well, informing him of this appeal. When the matter was taken up on 18.06.2013, they all were absent and unrepresented. Thereafter the matter was fixed for argument for the 28.08.2013. Even thereafter, notices have been sent to the Substituted-Plaintiff-Appellants and to their Registered Attorney under registered cover, informing them again that this matter would be taken up for argument on 28.08.2013. On that occasion too, they were absent and unrepresented. Accordingly, it is seen that the Appellants are not prosecuting this appeal diligently. Hence this appeal is taken up for argument in their absence.

This is an appeal seeking to set aside the judgment dated 21.04.1998 of the learned District Judge of Kegalle. By that judgment, the action of the Plaintiff was dismissed and then the matter was decided in favour of the

defendant. Being aggrieved by the aforesaid decision of the learned District Judge, the Plaintiff- Appellant filed this appeal.

The Plaintiff -Appellant (hearing after referred to as the Plaintiff) filed this case seeking *inter alia* that he is entitled to the land referred to in the schedule to the plaint, by virtue of the deed bearing No. 1741 dated 15.01.1976 marked P(1) in evidence. The Defendant-Respondent (hearing after referred to as the Defendant) in his answer has taken up the position that the said deed bearing No.1741 marked P(1) upon which the Plaintiff became entitled, had been executed, not as an outright transfer but as a security for a loan of Rs. 20,000/- obtained by him from the plaintiff. Accordingly, the defendant has prayed *inter alia* that the Plaintiff is holding the property referred to in the schedule to the plaint, as a trust in favour of the defendant. He has specifically stated that his claim is on the basis 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 “.

Basically, it is the burden of the person who claims the cover under the above Section 83 to establish that he/she did not intend disposing of the

beneficial interest of the property transferred by the deed put in suit. Section 83 referred to above, permits Court to infer such a decision upon considering the attendant circumstances that led to the execution of the deed. 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.*

Hence, it is the burden of the defendant, he being the person who is relying upon Section 83, to establish that he did not intend transferring the beneficial interest of the property put in suit. In the circumstances, it is necessary to evaluate the evidence in respect of the attendant circumstances that had taken place in this particular instance.

Admittedly, the extent of this land covers an area of 12 lahas of paddy sowing and it is a property situated in Mawanella. There is evidence to show that the value of the property is around Rs. 300,000/-. (Vide proceeding at page 76 in the appeal brief) The house found on the land where the family of the defendant lived at that point of time consisted of four bed rooms. Consideration alleged to have given by the plaintiff to the defendant at the time of the execution of the deed is Rs. 20,000/-. The Defendant in his evidence has categorically stated that he took only Rs. 20,000/- from the Plaintiff. The consideration referred to in the deed is only Rs. 15,000/-. The Notary in his attestation has stated that only Rs. 15,000/- was paid in his presence to the Defendant. The defendant has stated that he paid the plaintiff Rs. 60,000/- subsequently, to have the property re-transferred in his favour. (vide proceeding at page 128 in the appeal brief) The defendant also has said that he did not intend to hand over the possession of the premises though the plaintiff in his plaint has stated so. (vide proceedings at page 117 in the brief)

Accordingly, it is clear that the Defendant had not intended to sell the property to the Plaintiff; but his intention had been to obtain a loan and to keep the property in question as a security for the loan. Therefore, it is seen

that the defendant had not intended to transfer the beneficial interest of the property though the deed in question had been executed as an outright transfer. The above circumstances had been carefully considered by the learned District Judge and she has come to the conclusion that there had been no sale in respect of the property in question. Accordingly, she has dismissed the claim of the Plaintiff having accepted the claim of the defendant.

For the aforesaid reasons, I do not see any reason to interfere with the findings of the learned District Judge. Accordingly this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

CN/-