

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

1. A.M.Nawaratne Amarakoon
No.4, Templers Road,
Mount Lavinia

1st Defendant-Appellant
In 396A/98

2. P.K.Bernard Dias
No.55, 5th Lane,
Nawala

Deceased 2nd Defendant-Appellant
in 396B/98

2A Mrs.W. Purangani Devika Dias
No.520/8, High Level Road, Navinna,
Maharagama

Substituted 2A Defendant-Appellant
In 396B/98

Vs.

C.A.NO.396A/98 (F) &
C.A.NO.396B/98 (F)
D.C.MT.LAVINIA CASE NO.137/L

Sita Hapuarachchi
No.116, Poorwarama Road,
Colombo 06

Plaintiff-Respondent in both appeals

BEFORE : **K.T.CHITRASIRI, J.**

COUNSEL : Samantha Vithana with Ravi Jayawardane for the
1st Defendant-Appellant in 396A/98

Ranjan Suwandarathne for the Substituted 2A
Defendant- Appellant in 396B/98

Harsha Soza, P.C. for the Plaintiff-Respondent in
both appeals

WRITTEN SUBMISSIONS FILED ON : 28.04.2014 by the 1st Defendant-Appellant
: 30.04.2014 by the Substituted 2A Defendant-Appellant
30.04.2014 by the Plaintiff- Respondent
ARGUED ON : 20TH MARCH 2014
DECIDED ON : 06TH JUNE 2014

CHITRASIRI, J.

Plaintiff-Respondent (hereinafter referred to as the plaintiff) filed this action in the District Court of Mt. Lavinia seeking among other things, to have a judgment declaring that:

- ✓ the plaintiff is the beneficial owner of Lots 7B, 15, 19 and 9 which are morefully described in the second schedule to the plaint;
- ✓ the 1st defendant-appellant (hereinafter referred to as the 1st defendant) is holding the said Lots 7B, 15, 19 and 9 in trust for the plaintiff at all material times;
- ✓ the deed bearing No.174 attested by S.N.Fernando, Notary Public is of no force or effect in law and does not convey title to the 2nd defendant-Respondent; (hereinafter referred to as the 2nd defendant)
- ✓ the legal ownership of the aforesaid Lots 7B, 15, 19 and 9 is with the plaintiff and accordingly to have the 1st defendant and/or the 2nd defendant evicted therefrom.

Upon perusal of the reliefs prayed for by the plaintiff and the averments contained in the plaint, it is seen that the case of the plaintiff depends on the

question as to whether the 1st defendant is holding the aforesaid lands referred to in the second schedule to the plaint, in trust for the benefit of the plaintiff. The said claim of the plaintiff had been advanced, basically because the consideration mentioned in the deed bearing No.35 by which the 2nd defendant became the owner of the aforesaid lots described in the 2nd schedule to the plaint, was paid or provided by the deceased father of the plaintiff namely Leon Appuhamy. Learned District Judge relying upon Section 84 of the Trust Ordinance *inter alia* decided that the property in suit is being held by the 1st defendant in trust for the plaintiff on the basis that:

- the consideration for the purchase of the property referred to in the second schedule to the plaint had been provided by the father of the plaintiff; and
- the father had not intended to give the beneficial interest of the said property to the 1st defendant though it was purchased in his name.

Plaintiff in her evidence stated that she married 1st defendant in the year 1968 and it was dissolved by the decree absolute, entered on 12.08.1983 in the case bearing No.11507/D filed in the District Court. During the existence of their marriage, 1/14th share of the property referred to in the first schedule to the plaint had been purchased in the name of the 1st defendant by executing the deed No.35 dated 27.06.1969. The plaintiff alleged that the sale price for the aforesaid transaction was paid by her father. Accordingly, the action of the plaintiff is on the basis that 1/14th share of the property referred to in the first schedule to the

plaint which is in the name of the 1st defendant was purchased for the advancement of their marriage. She therefore took up the position that her father did not intend to give its beneficial interest to the 1st defendant though it was bought in his name. Accordingly, she sought to have a judgment declaring that the 1st defendant is holding the land referred to in the second schedule to the plaint in trust for her.

The 1st defendant denied the payment having been made by the father of the plaintiff. His position is that he paid the consideration amounting to Rs.20,000/- for the purchase of 1/14th share of the land described in the 1st schedule to the plaint. Accordingly, he sought to have the plaint dismissed.

The 2nd defendant has alleged that he purchased lots 7B and 9 from the 1st defendant by executing the deed No.1406 dated 1.10.1985. His position is that he is a *bona fide* purchaser of the said two lots having paid the full consideration to the 1st defendant.

However, the learned District Judge having accepted the position that it was the father of the plaintiff who paid the consideration for the purchase of the property referred to in the second schedule to the plaint has held that the plaintiff is entitled to the benefit of Section 84 of the Trust ordinance. Accordingly, he has held that the property in suit is being held in trust for the plaintiff by the 1st defendant and granted the reliefs as prayed for in the amended plaint dated 30.05.1994.

At this stage, it must be noted that this Court being an appellate Court is generally reluctant to interfere with a decision that had been arrived at, by a trial judge upon considering the facts of the case unless it is perverse and/or irrational. [**Frad Vs. Brown & Co. 28 NLR 282, Mahawithana Vs. Commissioner of Inland Revenue 64 N L R 217, De Silva Vs. Seneviratne 1981 (2) SLR 8, Alwis Vs. Piyasena Fernando 1993 (1) S L R 119**] Hence, I am not inclined to interfere with the decision of the learned trial judge as to the person who paid or provided the consideration when executing the deed 35 by which the 1st defendant became the owner of 1/14th share of the land described in the 1st schedule to the amended plaint. However, it must be noted that the purpose for which the money was provided has not been properly adverted to by the learned trial judge in this instance. I will be looking at it, at a later stage in this judgment.

I must also state that the learned District Judge has correctly relied upon Section 84 of the Trusts Ordinance as the law applicable to the issue at hand. Therefore, it is now necessary to consider whether the plaintiff was successful in establishing a constructive trust over the property referred to in the second schedule to the plaint having proved the ingredients contained in that Section 84 of the Trusts Ordinance. The said Section 84 in the Trusts Ordinance stipulates thus:

84. *Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the*

property for the benefit of the person paying or providing the consideration.

In order to establish a constructive trust in terms of the above Section 84 of the Trusts Ordinance, law requires to prove that the consideration mentioned in the deed in question had been paid or provided by a person other than the vendee to a deed of transfer and also that other person who paid the consideration did not intend to give the beneficial interest to the transferee of the property subjected to in that deed. When such circumstances are established then it is **that other person who paid or provided the consideration has the right to claim** that the transferee to the deed is holding the property in trust for the benefit of that person who provided the money.

In this instance, plaintiff alleged that the **payment was made by the plaintiff's father and not by the plaintiff** though it had been denied by the 1st defendant. **As mentioned above, the said provision of law namely Section 84 of the Trusts Ordinance allows only the person who paid the consideration to claim a constructive trust under that Section and not by another on his/her behalf.** Admittedly, the plaintiff in this case has not paid the consideration to the vendor of the property in question. Admittedly, it was by her father who had made the payment. Under those circumstances, it is seen that the aforesaid section does not provide for the plaintiff to claim a constructive trust, she not being the person who paid the price for the purchase of the property that she claims as a constructive trust.

However, the plaintiff has contended that the money that her father had paid was on her behalf. Therefore, it is necessary to consider whether such circumstances also could be taken into consideration to create a constructive trust in terms of Section 84 of the Trusts Ordinance, in favour of the plaintiff she being the daughter of the person who provided the money. Accordingly, I will now refer to the following authorities which could be of some assistance in finding an answer to the said issue.

I will first look at the provisions in the Trusts Ordinance to find a solution to the issue mentioned in the preceding paragraph. Totality of the provisions contained in Chapter IX of the Trusts Ordinance where the law provides for the instances by which a constructive trust could be created, permit only the person who paid or provided the consideration for the respective transaction, to claim a constructive trust. The very first Section namely **Section 83** in Chapter IX of the Trusts Ordinance, **allows the person who transferred his/her property** without intending to dispose of the beneficial interest of that property, to claim a constructive trust. As stated hereinbefore, the next Section namely Section 84, permits the person who provided the consideration for the transfer of property in the name of another party, to create a constructive trust. Even the rest of the Sections in Chapter IX do not refer to any other person, than the person who provided the consideration, to claim a constructive trust even though evidence is forthcoming to show that the party who paid the consideration did not intend to give the beneficial interest to the transferee of the property in question. Therefore, it is seen that the provisions by which creation of a constructive trust is permitted

under the Trusts Ordinance do not allow another person than the person who paid or provided the money for the purchase of the property even though the evidence is available to show that he has not intended to give up the beneficial interest of the same, to apply for a constructive trust in respect of that property. Accordingly, it is clear that the Parliament has not intended to allow any person other than the person who provided the consideration to claim a constructive trust in terms of Section 84 of the Trusts Ordinance when it was enacted.

In **the book on "Trusts" by Dr.L.J.M.Cooray**, it is mentioned that Section 84 of the Trust Ordinance has effected a change, because a person who relies on it must prove that -

- (1) He provided the consideration,
- (2) It was not for the benefit of the transferee (even if he was a stranger)

(At page 131)

In the case of **Daniel v. Arnolis [30 N.L.R. at 247]**, it was held that the plaintiff must prove that he paid the consideration and he paid so not for the benefit of the defendant when claiming a constructive trust in terms of Section 84 of the Trust Ordinance.

I could not find any authority even in India where the law referred to in Section 84 in our Ordinance is identical to Section 82 in the Indian Trusts Act, allowing a person other than the person who provided the consideration to claim a constructive trust. Therefore, it is clear that only the person who paid or provided the consideration could make an application in terms of Section 84 of the Trusts

Ordinance to claim a constructive trust. In the circumstances, it is my opinion that the protection of Section 84 in the Trusts Ordinance does not extend to the heirs of the person who paid or provided the money for the transaction in issue. It is more so, since our law as well as the law in India in this regard is governed by the statutory provisions enacted by the Parliament though the principles governing a creation of constructive trusts is founded on equity.

I will now turn to consider the purpose for which the money was provided as alleged by the plaintiff in this case. Plaintiff has come to Court on the basis that the money that was paid by her father was for the advancement of her marriage with the 1st defendant who is the transferee to the property referred to in the 2nd schedule to the plaint. Hence, it is the burden of the plaintiff to prove that her father did pay the money for that purpose without intending to give the beneficial interest of the property to the 1st defendant.

In the book titled **“THE INDIAN TRUSTS ACT”** by **P.Ramanatha Aiyar and P.Raghava Aiyar** (2nd Edition) at page 566, it is stated that under the English law, the doctrine of “advancement” will not be presumed in favour of more remote relation, and a fortiori not of a stranger, though the real purchaser may have placed himself in *loco parentis*. Furthermore, at page 567 in that book, it is also stated thus:

“In India the doctrine of advancement in favour of a wife or a son has no application but the test to find out whether a transaction is benami or not is

the source from which the purchase money is got, but even this test becomes relevant only in the absence of all other explanatory circumstances.” (Mt. Raj Kunwari V. Mt. Ram Maharaja Kunwari 82 I C 832)

In Mendis and others Vs. Paramaswami [62 N L R 302] Basnayake C J

held thus:

“It would appear from the language of section 84 of the Trusts Ordinance that the state of mind that is relevant for the purposes of that section is the state of mind the person paying the consideration had at the time he paid it. That state of mind must be established by contemporaneous statements or declarations. Statements made long after the transaction are not relevant. Under our Evidence Ordinance evidence may be given in any suit of the existence or non-existence of every fact in issue, and of such other facts as are declared to be relevant by that Ordinance and of no others.”

Having examined the authorities mentioned above, it is clear that the proof of advancement of marriage or any other purpose similar to that of a marriage depends, not solely on the basis of the relationship the transferee had with the person who provided the consideration but it is basically on the attendant circumstances of each case. Also, it is not only the manner in which the parties are related to each other that is to be considered in deciding the purpose for which the consideration was provided.

In the case at hand, admittedly the plaintiff has not paid the consideration. She claims that her deceased father H. Don Leon Appuhamy paid the consideration. The person who provided money was not available to give evidence to establish the fact that the money was provided for the purpose of advancement of the marriage of the plaintiff. Plaintiff is the only witness who gave evidence on her behalf to establish the intention of the father who paid the consideration even though there are nine vendees to the deed No. 35 marked P2 by which the 1st defendant acquired title to the land in dispute along with eight others. Some of them are the brothers and sisters of the plaintiff herself. None of them gave evidence to support that the father Leon Appuhamy provided the consideration for the advancement of the marriage of their sister. More importantly, it is strange on the part of the plaintiff to have delayed enormously, in making the claim for a constructive trust under Section 84 of the Trust ordinance. This action had been filed in the year 1992 having waited for a very long period which counts over 23 years from the date of the alleged transaction which took place in the year 1969. Furthermore, the court cannot disregard the fact that the plaintiff has not objected the 1st defendant obtaining compensation for the land acquired by the State though she has said it was due to the reason of getting the divorce without delay.

Hence, it is clear that the plaintiff has failed to establish that her father paid the consideration referred to in the deed was paid, for the advancement of her marriage with the 1st defendant. Her oral testimony is not sufficient to establish

such a fact. My view is that the purpose for which the money was provided can only be established with cogent evidence when claiming a constructive trust.

In the circumstances, it is clear that the plaintiff, not being the person who provided money cannot claim the benefit in terms of Section 84 of the Trust Ordinance. Neither has she established with cogent evidence that her father paid the consideration for the advancement of her marriage. The learned District Judge has not addressed his mind to those aspects concerning law. Therefore, it is my opinion that the plaintiff has failed to establish a constructive in terms of Section 84 of the Trusts Ordinance.

Learned President's Counsel for the plaintiff-respondent also submitted that if this Court is of the opinion that there is no trust within the meaning of Section 84 of the Trusts Ordinance, the plaintiff could claim a constructive trust under Section 96 of the Trusts Ordinance which is the residuary section to cover the areas that are not referred to in the Sections found in Chapter IX of the Trusts Ordinance. In support of his contention, he has referred to the case of **Jonga v. Nanduwa. [45 N.L.R. at 128]** The issue in that case had been a situation where a deed of sale was executed reserving a right to re-purchase the land subjected to in that case by the transferor within a certain period of time. The issue in this case is whether the person, who provided the consideration, intended the advancement of the marriage between the plaintiff and the 1st defendant though the plaintiff has failed to establish such circumstances. Hence, I am unable to apply the decision in *Jonga V. Nanduwa (supra)* to the case at hand.

For the aforesaid reasons, it is my opinion that the plaintiff in this case has failed to establish a constructive trust in terms of Section 84 or even under Section 96 of the Trusts Ordinance. Accordingly, the judgment dated 27.02.1998 of the learned District Judge of Mt.Lavinia is set aside. The amended plaint dated 30.05.1994 of the plaintiff is also dismissed. Considering the circumstances of this case, I make no order as to the costs of this appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL