

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

Suppaiah Yogendran alias Suppaiah
 Yohanandan
 Ketpawathy Watte, Mundel

(Deceased-Defendant)
 Meenaloshani Yohanandan
 No.20, Albert Place,
 Dehiwela.

Substituted Defendant-Appellant

C.A. NO. 1308/98(F)
D.C.PUTTALAM CASE NO.10985/L

Vs

Mrs.Selvarani Johnson
 No.05, Railway Quarters,
 Puttalam.

Plaintiff-Respondent

BEFORE : **K. T. CHITRASIRI, J**
W.M.M.MALINIE GUNARATNE,J

COUNSEL : H.Withanachchi with S.Karunadara for the Substituted-
 Defendant- Appellant

Asthika Devendra for the Plaintiff-Respondent

ARGUED ON : **02. 12. 2014**

**WRITTEN
 SUBMISSIONS
 FILED ON** : 27th November 2013 by the Plaintiff-Respondent

2nd December 2014 by the Substituted-Defendant-
 Appellant

DECIDED ON : **10.02.2015**

CHITRASIRI,J.

This is an appeal by which the defendant-appellant (hereinafter referred to as the defendant) sought to set aside the judgment delivered on 11.08.1998. By that judgment learned District Judge of Puttalam decided the case in favour of the plaintiff-respondent (hereinafter referred to as the plaintiff) wherein he granted the reliefs prayed for in the plaint dated 13.11.1987. Basically, the relief sought in that plaint is to have a declaration, declaring that the plaintiff is the owner of the land referred to in the schedule to the plaint and to have the defendant evicted therefrom.

At the commencement of the trial in the District Court, an admission had been recorded admitting the contents found in paragraph 2 in the plaint. As a result, the fact that the defendant had been the owner of the land referred to in the schedule to the plaint before the execution of the deed bearing No.18040 had been accepted, as proved. It is the deed by which the property subjected to in this case had been transferred to the plaintiff. Therefore, the plaintiff has raised an issue to determine whether or not the plaintiff became the owner of the land referred to in the plaint pursuant to the execution of the said deed bearing No.18040 dated 23.07.1986, having purchased the same for a sum of Rs.30,000/.

Execution of the aforesaid deed has not been disputed. However, it had been executed with the condition to re-transfer the land subjected to in that deed to the defendant in the event the vendor (defendant) re-paying the said sum of Rs.30,000/- with interest thereon at 20% per annum, to the transferee (plaintiff)

within a period of one year from the date of execution. It is so mentioned in the said deed 18040 itself. Admittedly, the defendant has not paid Rs.30,000/- as mentioned in the deed 18040. It is on that basis the plaintiff filed this action seeking *inter alia* to have a declaration as to the title and accordingly to obtain possession of the land in question.

However, the defendant in her answer dated 03.08.1989, has taken up the position that the deed 18040 was executed having kept the land subjected to in that deed, as security for a loan amounting to Rs.15,000/-, that she borrowed from the plaintiff. Accordingly, she has pleaded that the plaintiff is holding the said land in trust for the defendant. Therefore, it is seen that the defendant has claimed the benefit of Section 83 of the Trust Ordinance in this instance.

Aforesaid 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 defendant has relied upon Section 83 of the Trust Ordinance in this instance, it is her burden to establish that she did not intend disposing the beneficial interest of the property transferred by the deed bearing No.18040, marked as P1. Furthermore, when such a claim is made under Section 83 of the Trust Ordinance, then that claim will have to be considered by looking at the attendant circumstances of the case. Such a criterion is mentioned in that Section 83 itself. 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]** as well.

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:

“(1) 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;

(2) 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.

(3) *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."*

Having discussed the law applicable to the issue at hand, I will now turn to consider whether the learned District Judge is correct when he decided to disallow the claim of the defendant made in terms of Section 83 of the Trusts ordinance. As mentioned hereinbefore, the plaintiff became the owner of the land referred to in the schedule to the plaint, upon executing the deed 18040 in which a condition is found to re-transfer the property to the defendant upon paying a sum of Rs.30,000/- with the interest due thereon to the plaintiff. Admittedly, the defendant has failed to comply with the aforesaid condition referred to in the deed 18040 marked P1. Therefore, the plaintiff became entitled to have a decree in her favour as prayed for in the plaint since the execution of the deed 18040 has not been challenged. In the circumstances, it is now necessary to ascertain whether the defendant was able to establish that she did not intend transferring the beneficial interest of the property to the plaintiff in order to consider granting relief to the defendant.

As referred to hereinbefore, the defendant has taken up the position that the deed, P1 was executed only as a security for a loan amounting to Rs.15,000/- that she obtained from the plaintiff. However, in the body of that deed it is mentioned that a sum of Rs.15,000/- had been given to the defendant before the execution of the deed P1 and the balance Rs.15,000/- was paid in the presence of the Notary

totaling it to become Rs.30,000/-. The defendant being the seller had placed her signature on that deed having understood the contents of the same. The matters contained in the deed had been explained to her by the notary in the presence of two witnesses, at the time the deed was executed. Furthermore, the evidence forthcoming to support that the plaintiff paid only a sum of Rs.15,000/- is, only the oral evidence of the plaintiff. Therefore, on a balance of probabilities learned District Judge has accepted the evidence contained in the deed P1 having rejected the oral testimony of the defendant. I do not see any error in deciding so. Moreover, he is the trial judge who saw the demeanour of the witnesses becoming the best person to evaluate such evidence. Therefore, it is seen that the defendant has failed to show that she received only Rs.15,000/- and that she did not receive the balance Rs.15,000/- alleged to have been paid before the execution of the deed.

Then the question arises as to the value of the property to ascertain whether the market value had been passed when the deed 18040 was executed. The defendant in her evidence has stated that the value of an acre of land in that area which is the extent of the land in dispute, was Rs.75,000/- to 80,000/- at the time she gave evidence (vide proceedings at page 51 in the appeal brief). She has said so on 24.1.1994. However, the deed in question had been executed on 23.7.1986 making it nearly 09 years before. Therefore, it is not incorrect to argue that the plaintiff has paid the market value for the land when the transaction took place. Hence, it is clear that the defendant has failed to establish that she did not receive the purchase price for the land she has alienated.

Moreover, the plaintiff also has indicated the purpose for which she has purchased this property. In her evidence she has said that it was to commence a business at a place abutting the main road. (vide proceedings at page 49 of the appeal brief) Furthermore, it is necessary to note that even the notary's fees had been paid by the plaintiff in the capacity of the purchaser of the property. (vide proceedings at page 48 of the appeal brief)

In the circumstances, it is clear that the attendant circumstances of the case show that the deed 18040 had been executed having paid the due consideration to the seller namely the defendant. Hence, I do not see any error on the part of the learned District Judge when she disallowed the claim of the defendant that was made relying upon Section 83 of the Trusts Ordinance.

Learned Counsel for the appellant heavily relied upon the decision in the case of ***Dayawathie v. Gunasekera [1991 (1) S.L.R. 115]*** in support of his argument. In that decision ***Dheeraratne, J.*** has held that sufficient material was available in that case to prove, existence of a constructive trust though the deed subjected to in that case was also a conditional transfer becoming it similar to the deed in dispute in this case. However, in coming to the said decision Dheeraratne J has stated thus:

"On the next question as to the adequacy of evidence to prove a resulting trust the following "attendant circumstances" have been accepted by the learned trial

judge as pointing to the fact that beneficial interest of the property was not parted with by the original plaintiff.

- (1) The oral promise to re-convey the property in suit on receipt of Rs. 17,000 comprising of money advanced and the interest thereon.*
- (2) The original plaintiff (transferor) continuing to remain in possession and enjoying the property.*
- (3) The original plaintiff's agreement to pay all instalments that will fall due on account of the loan obtained from the National Housing Department.*
- (4) The gross disparity between the consideration on the face of the deed (Rs. 17,000) and the market value of the property (Rs. 70,000 - 80,000)*
- (5) The first defendant's failure to take any steps to assert her ownership in pursuance of the purchase until she received the letter of demand P10, namely, the failure to get her name registered as the owner in the assessment register of the local authority and non-payment of installments payable to the National Housing Department.*
- (6) The original plaintiff taking steps to obtain a loan from the State Mortgage Bank soon after the transaction to pay off debts due to the defendants and to the National Housing Department.*

These "attendant circumstances" in my view are sufficient to demonstrate that the original plaintiff hardly intended to dispose of his beneficial interest in the property. I find that the facts in the instant case are different from those of Shanmuganathan Pillai v. Unjappa Kone [45 NLR 465]; Carthelis Appuhamy v. Saiya Nona [46 NLR 313] and Savarimuttu v. Thangavelauthan [55 NLR 529] in all of which the attendant circumstances were found to be inadequate".

Aforesaid attendant circumstances referred to in that case are quite different to the facts and circumstances of the case at hand. In the circumstances, it is clear that the decision in Dayawathie V. Gunasekara (supra) is to be distinguished in this instance. Hence, I am not inclined to accept the submissions of the learned Counsel for the appellant that was made relying upon the said decision in Dayawathie V. Gunasekara.

For the aforesaid reasons, I am not inclined to interfere with the findings of the Learned District Judge. Accordingly, this appeal is dismissed. Considering the circumstances of the case, I do not wish to make any order as to the costs of this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL