

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

Chitra Buddhimathi De Tissera,

Janawasama Directors Quarters,

Palagaswetawatta,

Rajakadaluwa.

Plaintiff

CA Case No. 1160 / 2000 F

DC Panadura Case No. 554 / L

-Vs-

1. Hewannahennadige Sunanda Kumara
Fernando,

2. Hewannahennadige Suresh Kumara
Fernando,

3. Hewannahennadige Anushka Fernando

All of No. 14/1,

St. Joseph Street, Uyana,

Moratuwa.

Defendants

AND

**Hewannahennadige Sunanda Kumara
Fernando,**

No. 14/1,

St. Joseph Street, Uyana,

Moratuwa.

Defendant - Appellant

-Vs-

Chitra Buddhimathi De Tissera,

Janawasama Directors Quarters,

Palagaswetawatta,

Rajakadaluwa.

Plaintiff - Respondent

**2. Hewannahennadige Suresh Kumara
Fernando,**

3. Hewannahennadige Anushka Fernando

All of No. 14/1,

St. Joseph Street, Uyana,

Moratuwa.

2nd and 3rd Defendants - Respondents

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : C.J. Fernando for the Defendant-Appellant.
M.C. Jayaratne with M.D.J. Bandara for the
Plaintiffs-Respondents.

Argued on : 02.09.2015

Decided on : 11.11.2015

A.H.M.D. NAWAZ, J,

This is a case where an aunt (the Plaintiff-Respondent) instituted an action in the District Court, for a declaration of title and ejectment of her nephews (1st Defendant-Appellant, 2nd Defendant and 3rd Defendant). By a plaint dated 24th August 1990 the Plaintiff-Respondent sets out the devolution as to how she became the owner of the promises in question. Emaly Engeltina – the grandmother of the Plaintiff-Respondent had gifted the property to her 3 children which included the father of the Plaintiff-Respondent – Tidman Fernando. In the end, by an intra-family transfer, the Plaintiff-Respondent's father became the owner of the promises in question in its entirety and on 22nd September 1985 the Plaintiff-Respondent's father Tidman Fernando had gifted the entire property to the Plaintiff-Respondent, reserving a life-interest to himself and his wife. By P8 a deed bearing No.106 and executed on 13th September 1989, that Plaintiff-Respondent's father who happens to be a grandfather of the three Defendants divested himself of the life – interest, whereupon the Plaintiff-Respondent became the absolute owner of the property

without any encumbrances. All these transactions had taken place, whilst the three Defendants had been living in the house on the land since their childhood. The version of the Defendants is narrated by their answers but it is the 1st Defendant-Appellant who testified in support of the claim. It has to be stated that whilst the 1st and 2nd Defendants filed a joint answer, the 3rd Defendant filed a solitary answer.

The version of the Defendant is that since their mother had abandoned them during their infancy, it was the great-grandmother-Emaly Engeltina who brought them up and fended for them. These matters are not in contention, except the issues on which the dispute went to trial. The necessity to eject the three Defendants (nephews of the Plaintiff-Respondent) who had been living in the house possibly arose when the Plaintiff-Respondent who was a sister of the Defendants' father became the absolute owner of the property on 13th September 1989 when her father divested himself of his life – interest which he had reserved for himself in the deed of gift dated 22nd September 1985. Two things need to be stated at this stage. Certain positions that had been taken in the respective pleadings were abandoned by the parties when it came to the question of raising issues. Whilst the Plaintiff stated in her plaint that she gave leave and license to the Defendants to stay in the premises, her issues at the trial were premised as to whether the Defendants became the licensees of her predecessor in title namely her father. In other words Plaintiff's issues raised the question of her predecessor granting leave and license to the Defendants. In the same way, though the 1st Defendant pleaded prescription, he abandoned it at the trial.

The 1st and 2nd Defendants who filed a joint answer on 26th August 1993, pleaded contractive trust in that they both averred that since they were far too tender, Engeltina who tendered for them thought that the land - the subject matter of the

dispute should be transferred to Tidman (father of the Plaintiff-Respondent) and so the transfer was on the basis that Tidman must hold the property in trust for the three Defendants. Tidman Fernando who was the father of both the Plaintiff and the father of the Defendants was holding the property in trust for them but he breached the trust by transferring the property to his daughter. The 1st to 3rd Defendants averred that contractive trust would not pose title to the Plaintiff-Respondent.

When this case was taken up for trial finally on 15th September 1998, two admissions were recorded, namely (1) the original owner of the land described in the schedule to the plaint was W. Emelina Engeltina and (2) She transferred the land to (a) Tidman Richard Fernando, (b) Cyril Wilfred Fernando and (c) Buddhi Nissanka Fernando. Thereafter, issues 1 to 5 on behalf of the Plaintiff, and issues 6 to 13 on behalf of the Defendants were raised. The Plaintiff's case was for a declaration of title to the said land, ejectment of the Defendants there from and for damages. The Plaintiff produced documents marked P1 to P14, which were admitted without any objection from the Defendants. Neither at the time of production nor at the closure of the case was any objection forthcoming. Therefore the title of the Plaintiff has been proved without any doubt or objection.

It is common ground that in a *rei vindicatio* action when the Plaintiff's title is admitted, the burden of proof shifts to the Defendants to establish that their possession is lawful. Since the Plaintiff in this case has proved her title satisfactorily, the Defendants have to prove their possession in terms of the law.

Whilst the trial was pending two objections were taken by the Defendants, namely, (i) that at the time of serving of summons, the 3rd Defendant was a minor, and (ii) that the said Engeltina transferred this land to Richard Fernando subject to a

constructive trust in favour of the Defendants, and therefore the Plaintiff cannot maintain this action. These two objections were raised in the form of issues No.6-10. Answering the issues raised by the Defendants in the negative, the learned District Judge delivered the judgment on 01st October 2000 in favour of the Plaintiff. The 1st Defendant has only preferred this appeal against this judgment.

The contention that the Plaintiff could not maintain this action on the ground that at the time of filing the plaint, the 3rd Defendant, was a minor could not hold water because the 3rd Defendant was born on 05th May 1973 (vide his birth certificate V1) and he reached 18 years on 05th May 1991. (vide Age of Majority Act No.17 of 1989 which makes a person of 18 years is a major). This action was filed by the Plaintiff on 24th August 1990. Though the action was filed at a time when the 3rd Defendant was a minor, but on the day summons was served on him, i.e., on 01st July 1991, he had attained majority, i.e., he became 18 years of age. In view of the decision in ***Siebert vs. New Asia Trading Co. Ltd. 66 N.L.R. 460***, the 3rd Defendant, since soon after filing of the plaint, had attained majority and filed his answer on 29th July 1991, the action was not void *ab initio* and it could be maintained against him.

Since the 3rd Defendant, soon after the filing of the action, became a major and filed his answer, the action could validly continue without the appointment of a guardian *ad litem*. Thus the main issue of the Defendants that the 3rd Defendant was a minor at the time of the institution of the action and therefore the action could not be maintained cannot succeed and therefore should be rejected.

Issue No.9 has been raised on the basis that the said Engelina did not donate the property directly to the Defendants because they were minors. This issue has no legal bearing because there is no law in this country which precludes donations

being made to minors by any one. If the donees are minors, and donation is to be accepted by them, then the law requires that some elder relation does accept the donation. Other than this requirement, there is no law preventing donations to minors. Therefore, this issue has been correctly answered by the learned Judge.

The other matter of contest was that the Defendants were occupying the land in dispute subject to a constructive trust in their favour, and therefore they were in lawful possession and their possession was not as licencees of the Plaintiff.

The Plaintiff states that her father Tidman Richard Fernando, who donated this land earlier by Deed No.45 reserved his life interest to himself and later by Deed No.1061 donated his life interest also to her and thereby the Plaintiff became the absolute owner of the land in dispute and since 13th September 1989, her parents had been living there with her permission and after getting her permission they allowed the defendant to live there temporarily.

The Plaintiff further states that her father by his letter dated 24th April 1990, and she by her letter dated 22nd May 1990 terminated the leave and licence granted to the Defendants and since they failed to leave the said land she filed this action for their ejectment.

The Defendants rejected this position and stated that their grandmother Engeltina, who was the original owner of the land, brought them there and she donated the land to Tidmund creating a constructive trust in the hope that this land would be given to them when they became adults. But this position has not been proved. The original deed and the deeds of donation No.45 (P7) and 1061 (P8) in favour of the Plaintiff do not have any such conditions.

It is to be noted that in civil actions, the burden of proof of a fact lies on the party who asserts the existence of that fact. Section 102 of the Evidence Ordinance enacts that *“the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”*.

Issues 9, 10 and 11 relate to the ‘constructive trust’ in favour of the Defendants but the learned District Judge has answered these issues “9-no, 10-no, not proved, and 11- no”. As such, the Defendants have failed to prove that the land was donated by Engeltina to the donees subject to the constructive trust in favour of the Defendants. Consequently, the issues 12 and 13 are correctly answered by the Judge as there was no constructive trust established through the deeds of donation or cogent testimony.

The question of constructive trust is a matter that has been created by the Defendants themselves, but they have not led any evidence to prove that the land was given to the donees by Engeltina subject to a constructive trust they assert.

The next point that the Defendants brought to the fore was that they were possessing the land in dispute not as the licencees of the Plaintiff or her father but independently as beneficiaries of a constructive trust created by the deceased Engeltina. But the question now arises before this Court is that why they did not reply the letters (P12) and (P13) sent by the Plaintiff’s father and Plaintiff respectively to them. Both of these letters asserted that their possession was by virtue of leave and licence. It is an accepted principle of law that if a person, in the ordinary circumstances, sends a letter to another requesting him to do certain act and the receiver of the letter must answer the letter, either to agree or disagree to do such act. If he fails to do so, the presumption is against him. (vide Section 114

Illustration (g) of the Evidence Ordinance). See *The Colombo Electric Tramway and Lighting Co. Ltd. vs. Pereira* 25 N.L.R. 193; *Weidemen vs. Walpola* (1891) 2 Q.B. 534.

Apart from the silence exhibited by the Defendants in the teeth of these two letters, their registered receipts had been tendered by the Plaintiff when she gave evidence on 15th September 1998. No objection was ever raised against these documents by the Defendants. Hence, the Defendants had admitted the contents of these documents. This clearly shows that the Defendants have been occupying the land and premises as the licencees of the Plaintiff and therefore the Plaintiff has a right to eject them. There was affirmation of leave and licence by conduct.

The Defendants took up the question of prescription but did not pursue it. If the Defendants are taking up the position that they are occupying the land not as Plaintiff's licencees but as the beneficiaries of a constructive trust created by Engeltina, then their possession is adverse, but they have not led any evidence to establish either a prescriptive title or constructive trust in their favour. Consequently, the learned District Judge has reached the conclusion that the Plaintiff is entitled to the judgment as prayed for.

Considering the totality of the evidence led in this case I am satisfied that the learned trial judge has come to a correct finding in this case and I see no reason to disturb a finding which is unassailable having regard to the evidence led in the case. Thus I proceed to dismiss the appeal with costs.

JUDGE OF THE COURT OF APPEAL