

08/99(F)

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

Don Richard Munasinghe,
No.11/2, Leslie Perera Mawatha,
Kalutara North.

Plaintiff

C.A. Case No:-08/99(F)

D.C.Kalutara Case No:-3792/L

V.

Vincy Edward Von Hagt Pathirana
No.610, Jawatta, Kalutara North.

Defendant

AND BETWEEN

Vincy Edward Von Hagt Pathirana
No.610. Jawatta, Kalutara North.

Defendant-Appellant

V.

Don Richard Munasinghe
No.11/2, Leslie Perera Mawatha,
Kalutara North.

Plaintiff-Respondent

Before:-H.N.J.Perera, J.

Counsel:-Asthika Devendra for the Defendant-Appellant

Buddika Gamage for the Plaintiff-Respondent

Argued On:-18.09.2013

Written Submissions:-26.02.2014/06.03.2014

Decided On:-05.02.2016

H.N.J.Perera, J.

The plaintiff-respondent instituted this action against the defendant-appellant seeking a declaration holding that the property described in the schedule to the plaint is held by the defendant-appellant upon constructive trust on behalf of the plaintiff-respondent and order directing that once money due to the defendant-appellant from the plaintiff-respondent as per Deed No. 15 dated 20.11.1987 is paid to the defendant-appellant that a suitable Deed conveying the legal title of this land to the plaintiff-respondent be executed by the defendant-appellant.

The defendant has filed answer refuting the averments of the plaint and prayed for dismissal of the plaintiff's action.

After trial the learned Additional District Judge delivered his judgment on 02.12.1998 in favour of the plaintiff-respondent. Aggrieved by the said judgment of the learned Additional District Judge the defendant-appellant has preferred this appeal to this court.

The plaintiff is seeking for a declaration that the defendant-appellant is holding land described in the schedule to the plaint on the basis of a constructive trust in favour of the plaintiff-respondent.

The position of the defendant is that he became the owner of the subject matter of this action by Deed No.15 dated 20.11.1987 attested by

D.P.Ravi Domingo on payment of Rs.22,000/-. It is the position of the defendant-appellant that he became the absolute owner in respect of the said premises and prayed for the dismissal of the plaintiff's action.

The plaintiff has instituted this action upon a right that the plaintiff has as envisaged under the provisions of section 83 of the Trust Ordinance. Therefore it is clear that the essence of the case of the plaintiff was that whether there was and is a constructive trust that was created upon the execution of deed of transfer bearing No 15 marked P4 at the trial or not.

Provisions of section 83 of the Trust Ordinance reads as follows:-

“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.”

The learned trial Judge had come to a clear conclusion that there were circumstances that existed for the determination that a trust in the nature of a constructive trust as envisaged in terms of provisions of section 83 of the Trust Ordinance in favour of the plaintiff in the particular transaction that occurred between the plaintiff and the defendant upon the execution of the deed of transfer marked P4 at the trial, has been evident.

It was contended on behalf of the defendant-appellant that the plaintiff has not placed sufficient evidence to prove the existence of a trust. It was argued that the plaintiff had failed to place by way of parol evidence any attendant circumstances sufficient to demonstrate that the beneficial interest of the property was not parted to the defendant-appellant.

It was further contended on behalf of the defendant-appellant that the plaintiff has failed to discharge the burden of proving that the defendant-appellant is holding the said property on trust in favour of the plaintiff and the learned trial Judge by entering judgment in favour of the plaintiff as prayed for, has misdirected himself by not considering the documents tendered by both parties in their correct perspective.

The following attendant circumstances contemplated in terms of section 83 of the Trust Ordinance existed in the facts of the case.

(1)The said property was worth much more than the purchase price that was paid by the defendant-appellant to the plaintiff-respondent at the time deed marked P4 was executed.

(2)That the plaintiff continued to possess the said premises even after the said transaction.

(3)The defendant-appellant agreed to sell the said premises back to the plaintiff-respondent.

(4)In fact a Deed of transfer was prepared and the defendant refused to sign the same before the Notary and demanded more money from the plaintiff to transfer the property in the plaintiff's name.

In dealing with the question of trust the attendant circumstances are considered very material. In the case of *Elieya Lebbe V. Majeed* 48 N.L.R 357, at page 359 Dias, J. stated thus:-

“There are certain tests for ascertaining into which category a case falls. Thus, if the transferor continued to remain in possession after the conveyance or if the transferor paid the whole cost of the conveyance or if the consideration expressed on the deed be utterly inadequate to what would be the fair purchase money for the property conveyed- all these are circumstances which would show whether the transaction was a genuine sale for valuable consideration or something else.”

In the case of *Thisa Nona & three others V. Premadasa* [1997] 1 Sri.L.R 169, it was held that the following circumstances which transpired in that case were relevant on the question whether the transaction was a loan transaction or an outright transfer.

(a) the fact that a non-notarial document was admitted to have been signed by the transferee.

(b) the payment of the stamp duty and the Notary's charges by the transferor

(c) the fact that the transfer deed came into existence in the course of a series of transactions, and

(d) the continued possession of the premises in suit by the transferor just the way she did before the transfer deed was executed.

The learned trial Judge has come to a very clear conclusion that the transaction that occurred upon the execution of deed No.15 marked P4 is a money lending and borrowing transaction. The learned trial Judge has clearly disbelieved the evidence given by the defendant in this case and has proceeded to give cogent reasons for his decision.

The learned trial Judge has held that as the plaintiff did not have money to purchase this land the said money was lent by the defendant in this case. The evidence led in this case clearly establish the fact that the defendant agreed to re-transfer the said property to the plaintiff but declined to do so at the last moment. It was the plaintiff's position that the defendant agreed to accept Rs. 38,000/- and re-transfer the said property in the plaintiff's name but demanded additional Rs.5000/- and refused to sign the said deed of transfer before the Notary.

The defendant in his evidence stated that he paid Rs.35,000/- to buy the land, to the plaintiff and the plaintiff transferred 20 perches for the said sum to him. Although he went with a Surveyor to survey the land, he was

prevented by the plaintiff. The defendant's evidence clearly establish the fact although the deed of transfer was written in defendant's name the defendant did not have possession of the said land and the plaintiff continued to possess it. It is very clearly seen from the evidence of the defendant-appellant that the plaintiff-respondent even after the said transaction continued to possess the said premises just the way he did before the transfer deed was executed. The evidence led in this case clearly demonstrate that the beneficial interest of the property was not parted to the defendant-appellant by the plaintiff-respondent.

Though the defendant has stated as the plaintiff prevented him from taking possession, he agreed to sell his portion to the plaintiff for Rs.42,000/- this clearly indicate that the plaintiff did not intend this to be an outright transfer but intended to pay the sum she has borrowed from the defendant with interest and get the land re-transferred in her name.

The defendant has also admitted that he went before the Notary to transfer the said land to plaintiff but refused to sign the deed as the plaintiff only paid him Rs38,000/-.

The plaintiff in his evidence has said that there was a promise to re-transfer the said property to the plaintiff. Although there was no Notarial or non-notarial document signed by the parties the conduct of the defendant and the other attendant circumstances clearly establish that there was such an understanding between the parties.

It is contended on behalf of the plaintiff-respondent that the learned trial Judge has correctly come to his finding and that there is no need for this court to interfere with the said judgment of the learned trial Judge and to dismiss the same as there is no merit in the appeal filed by the defendant-appellant.

This court finds that the learned Additional District Judge has evaluated and considered all the evidence that has been led by parties in arriving at the conclusion he did in this case. The learned trial Judge has dealt with all points in issue in the case and pronounced definite findings on the issues. I have read the entire judgment and see no reason to interfere and the Judge has given cogent reasons. Primary facts have been considered and this court has no reason to interfere with primary facts.

In M.P.Munasinghe V. C.P Vidanage 69 N.L.R 97 it was held that:-

“If there is no evidence to support a particular conclusion (and this is really a question of law) the Appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the Appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight.”

Further in Gunawardene V. Cabral and others (1980) 2 Sri.L.R 220 it was held that the Appellate Court will set aside inferences drawn by the trial Judge only if they amount to findings of facts based on:-

- (a) Inadmissible evidence; or
- (b) After rejecting admissible and relevant evidence ; or
- (c) If the inferences are unsupported by evidence; or
- (d) If the inferences or conclusions are not rationally possible or Perverse.

In the case before me I do not see that the findings of the learned Additional District Judge and the inferences drawn by him are vitiated by any of these considerations. In my view there is no justification for

interfering with the conclusions reached by the learned Additional District Judge which I perceive are warranted by the evidence that was before him.

For the above reasons I see no reason to disturb the judgment of the learned Additional District Judge. Accordingly the appeal of the defendant-appellant is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL