

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

C. A. 1280/99 (F)

D. C. Matale Case No. 4499/L

Welhena Rajapaksha
Appuhamilage Don Podi
Ralahamy Rajapaksha,

No. 15, Viduhal Pedesa,
Matala.

PLAINTIFF-APPELLANT

VS.

1. Rajaguru Rajakaruna Gane
Bandaralage Manel
Padmakanthi
Hulangamuwa,
Weragama, Kaikawala,
Matala.

2. A. Somasunderam,
Thotagamuwa,
Matala (*Deceased*)

2A. Anjalideri Thangavel,
Thotagamuwa,
Matale.

DEFENDANT-RESPONDENTS

Before : **M. M. A. Gaffoor, J.**

Counsel : Parakrama Agalawatte for the Plaintiff-Appellant
Dr. Sunil Cooray with A. W. Diana S. Rodrigo for the
2nd Substituted Defendant Respondent

**Written Submission
tendered on** : 17.01.2019 (by the Plaintiff-Appellant)
01.04.2019 (by the 2nd Defendant-Respondent)

Argued on : 03.12.2018

Decided on : **04.04.2019**

M. M. A. Gaffoor, J.

The Plaintiff-Appellant (hereinafter referred to as the Appellant) instituted the above styled action in the District Court of Matale seeking *inter alia* a Declaration of Title in respect of the property described in the schedule to the plaint and ejectment therefrom of the 1st and 2nd Defendants-Respondent (hereinafter referred to as the Respondents) and all those who are holding under them from the property and also damages and costs.

The Appellant, in his plaint pleaded that one A. O. Lechchiman Chettiar was the original owner of the property in suit, that he transferred to K. A. Somasunderam by Deed No. 1389 dated 10.09.1951 attested by J. L. Thambiraja Notary Public. He further pleaded a series of transactions and finally stated that, the 1st Defendant-Respondent transferred the property in suit to the Plaintiff by Deed No. 9632 (P11) dated 06.04.1991 attested by S. B. Wijeratne Notary Public.

It is also revealed from the plaint that the Appellant paid Rs. 50, 000/- out of the agreed consideration at the time of execution of the Deed while undertaking to pay the balance consideration when possession is handed over on or before 31.05.1991. Therefore, it was the position of the Appellant that the said possession was not handed over as promised and that the 2nd Defendant-Respondent was in possession of the building situated on the property.

The 2nd Defendant-Respondent had filed an answer and two amended answers (vide: page 52 of the appeal brief). In the said second amended answer the 2nd Defendant-Respondent pleaded that he executed a Deed No. 3275 dated 23.12.1987 in favour of one Odayan Kureishan as a trust to secure a loan which he got taken from the said Odayan Kureish. He further stated that the husband of the 2nd Defendant-Respondent paid to Odayan Kureishan the money which the 2nd Defendant-Respondent owed to Odayan Kureishan and that Odayan Kureishan transferred to the 1st Defendant-Respondent. Therefore, the 2nd Defendant-Respondent had taken a position that the 2nd Defendant-Respondent held the property in trust for the benefit of the 2nd Defendant-Respondent. Thus, he prayed *inter alia* dismissal of the Appellant's action and a Declaration that the Appellant holds the property in trust for the 2nd Defendant-Respondent.

In the above factual matrix, the learned District Judge fixed the case for trial on 25 issues (vide: 56 to 61 of the appeal brief). Accordingly, after conclusion of trial, the learned District Judge delivered the judgement on 25.06.1999 dismissing the action of the Appellant and granting reliefs as prayed for in the answer of the 2nd Defendant-Respondent.

Being aggrieved by the said judgment, this appeal is preferred by the Appellant to set aside the judgment and asking reliefs sought in the plaint.

Having heard both parties, the main question which arises for adjudication in this Appeal is whether the 2nd Defendant-Respondent is entitled to claim that the Plaintiff is holding the property on Deed P11 in a Constructive Trust in favour of the 2nd Defendant without first having established that Odayan Kureishan held title by virtue Deed No. 3275 (P6) subjective to a Constructive Trust in favour of the 2nd Defendant-Respondent.

To ascertain whether the Respondents were successful in establishing the necessary ingredients to prove a constructive trust, a careful attention on Section 83 of the Trusts Ordinance, No. 17 of 1917 as amended subsequently is important.

Section 83 of the Trusts 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.”

It is the burden of the person who claims or tries to prove the cover under the above Section 83 to establish that he/she did not intend to dispose of the beneficial interest of the property transferred by the

deed, put in suit. Section 83 referred to above, permits Court to infer such decision upon considering the **attendant circumstances** that led to the execution of the deed. This accustomed position in law had been discussed in many cases in the apex Courts. (See: **Muttammah Vs. Thiyagarajah** [(1960) 62 NLR 559], **Piyasena Vs. Vansue** [(1997) 2 SLR 311], and **Thisa Nona And Three Others Vs. Premedasa** [(1997) 2 SLR 169]

In **Muttammah Vs. Thiyagarajah** (*supra*), it was held that,

“Attendant Circumstances are to my mind circumstances which precede or follow the transfer but are not too far removed in point' of time to be regarded as attendant which expression in this context may be understood as accompanying" or "connected with". Whether a circumstance is attendant or not would depend on the facts of-each case...” (Page at 564)

Accordingly, Section 83 of the Trusts Ordinance allows taking attendant circumstances into account, which, if credible, may establish the existence of a constructive trust.

Further, an important view was taken by the Supreme Court in the case of **Dayawathie And Other Vs. Sgunasekera & Another** [(1991) 1SLR 115], where it was held that Section 92 of the Evidence Ordinance, No. 14 of 1895 as amended does not bar parole evidence to prove a constructive trust and that the transferor did not intend to pass the beneficial interest in property.

In this appeal, it was the position of the 2nd Defendant-Respondent that the said Odayan Kureishan held title to the property in suit on Deed P6 on trust for the 2nd Defendant-Respondent. Therefore, in order to establish that position the 2nd Defendant-Respondent had, necessarily to lead evidence regarding attendant circumstances in respect of the said deed. However, this Court observed that the said deed P6 had been executed way back in 1987, the 2nd Defendant-Respondent never made any attempt to challenge the said deed during the entire period of (more than) 9 years which elapsed up to the institution of the instant action by the Appellant.

In addition to the above backdrop, the Appellant brought an important fact that the 2nd Defendant-Respondent did not so much as call either Odayan Kuresihan or the Notary or any of the attesting witness to give evidence regarding the said transaction. Therefore, the Appellant strenuously has taken up an argument that the 2nd Defendant had failed to establish that the said Odayan Kureishan held the property in trust for him.

It is further observed that the learned District Judge had laid much emphasis in arriving at his conclusion wide disparity between the values of the consideration for Deed P6 by which the 2nd Defendant-Respondent conveyed to Odayan Kureishan and the valuation given by the Court Commissioner. However, after careful perusal of the evidence on the valuation suggested there was no strong evidential since the statements are mere opinions in *per se*.

Furthermore, it is important to note that the entire claim of the 2nd Defendant-Respondent is based on the premise that Deed P6 by which he conveyed the land and premises to Odayan Kureishan was subject to an oral agreement to re-convey upon repayment of the consideration which was purported to be a loan. However, this Court is in a view that the 2nd Defendant-Respondent was not intensely entitled to lead parole evidence to establish the purported oral agreements with Odayan Kureishan to re-convey the property.

Therefore, I am of the view that the learned District Judge had failed to concentrate on the fact that the 2nd Defendant has failed miserably to establish on the parole evidence led, the existence of any such oral agreement with Odayan Kureishan.

In the aforesaid reasons, I proceed to set aside the District Court judgment dated 25.06.1999, and grant the reliefs to the Appellant sought in the Plaint.

I make no order as to costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL