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

C.A.No.930/98 F
C.A.No.939/98 F

01. Ruby Jayasinghe

02. Mala Priyadarshini De Silva
No. 42A, 1st Cross Street,
Borupane Road,
Ratmalana.

DEFENDANT APPELLANTS

Vs.

J.N. Jayamanna
No. 42A, 1st Cross Street,
Borupana Road,
Rathmalana.

And presently residing

C/O Suraweera Jayamanna,
Mahyala Junction,
Malwala,
Via Ratnapura.

PLAINTIFF - RESPONDENT

C.A.No.930/98 F **D.C.Mt.Lavinia Case No.444/95L**

C.A.No.939/98 F **D.C.Mt.Lavinia Case No.446/95L**

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

COUNSEL : Laksiri Hewage for the Defendant-Appellants in both appeals [C.A.No.930/98 (F) and C.A.939/98 (F)]

Vijaya Neranjan Perera with Jeevani Perera for the Plaintiff-Respondent in both the appeals

DECIDED ON : 11th December, 2013

K. T. CHITRASIRI, J.

These two appeals have been filed seeking to set aside the judgment of the learned District Judge of Mt.Lavinia delivered on 3rd March 1998. It is a judgment pertaining to both the cases bearing Nos.444/95 L and 446/95 L filed in the District Court of Mt.Lavinia. Therefore, these two appeals have been filed in respect of those two cases though only one judgment had been delivered in both the cases. The reason to have one judgment for both cases is reflected at pages 49 and 50 of the appeal brief.

When the two appeals were taken up today, the learned Counsel for the appellants referring to the motion dated 06.12.2013 moved to have the argument re-fixed for another date. Learned Counsel for the respondent vehemently

objected for a date being given and then he submitted that no acceptable reason has been mentioned for a postponement in the motion filed by the appellants. The reason to have another date is that the date of argument already been fixed is not suitable for the Counsel. Counsel for the respondent further submitted that merely because the date is not suitable, it should not be regarded as a ground to have a postponement since this date was given to suit the Counsel when the matter was mentioned on the last occasion. Against this background, I will consider whether it is appropriate to grant another date as moved by the learned Counsel for the appellants.

Having perused the journal entries recorded on the previous occasions, it is found that number of dates of argument had been postponed on applications of the Counsel who appeared for the appellants. Even on 2.9.2013, when the matter was taken up, once again it has been postponed on an application made by the registered attorney of the appellants enabling him to revoke his proxy. On that date the argument was re-fixed for 22.11.2013. On this particular day, no one appeared for the appellants neither were they present in Court personally. Accordingly, the Court could have taken up the argument on 22.11.2013 itself. However, since no one was present in Court on that date on behalf of the appellants, Court made order to issue notice on the appellants as well as to their registered attorney and the matter was then re-fixed for argument. The aforesaid circumstances also may amount to have evaded the date of argument by the appellants. It has caused inconvenience and

unnecessary expenses as well to the Respondent. Under those circumstances, I am not inclined to grant a date for a postponement.

Accordingly, Counsel for the appellants is directed to make submissions in support of these two appeals. He then submitted that he has only limited instructions to move for a date. He therefore is not making any submissions in support of the two appeals. Accordingly, the Counsel for the respondent was heard in this regard.

This is an appeal seeking to set aside the judgment dated 3rd July 1998. By that judgment both the cases bearing Nos.444/95L and 446/95 L filed in the District Court of Mount Lavinia were decided in favour of the plaintiff-respondent. As a result the relief prayed for in the prayer to the two plaints was granted in favour of the plaintiff-respondents.

The plaintiff basically sought to have a declaration declaring that the premises referred to in the two schedules found in the two cases are being held in trust for him by the two defendants. Admittedly, the two premises are in the names of the two defendants. Having considered the evidence learned District Judge decided that the defendants are holding the property in trust for the plaintiff.

Then the issue is to ascertain whether the learned District Judge was correct when he decided that the properties in suit are being held by the appellants in trust for the plaintiff-respondent.

Section 83 of the Trust Ordinance stipulates the manner in which a constructive trust is determined. Basically it is on the basis of the attendant circumstances of each and every case, it is being decided. In this instance, clear evidence is found to show that the money that was used to purchase the properties in suit in both cases have been given by the respondent making use of the money that he has earned from his employment abroad. This fact had been admitted by the two appellants as well while they were giving evidence. This issue had been carefully considered by the learned District Judge. The relevant portion in the judgment in this connection is as follows:-

> "ඒ අනුව පැමිණිලිකරු විසින් දී ඇති සාක්ෂිය වන මුදල් 1 වන විත්තිකාරියට එවා තිබුන බවත්, එම මුදල් එවා තිබුනේ 1 වන විත්තිකාරියගේ යැපීම සඳහා පමණක් නොව පැමිණිලිකරු වෙනුවෙන් ආයෝජනය කිරීම සඳහා බවටත් එසේ ආයෝජනය කිරීමෙන් මෙම නඩු තුනටම අදාල ඉඩම් මිලයට ගෙන ඇති බවත්, එම ඉඩම් මිලයට ගැනීමේදී වෙනත් කිසිම කෙනෙකුගේ මුදලක් යොදවා තිබුන බවත්, ඒ අනුව එම ඉඩම් පැමිණිලිකරු වෙනුවෙන් භාරයක් වශයෙන් විත්තිකරුවන් තබාගෙන ඇති බවත්, නොඑසේනම් විත්තිකරුවන් පැමිණිලිකරුගෙන් අයුතු ලෙස ධනවත් වී ඇති බවටත්, ඔප්පු වී ඇති බවට තීරණය කරමි."

(vide proceedings at page 250 of the appeal brief.)

In the circumstances, it is my considered view that the learned District Judge has evaluated the attendant circumstances involved in this case in the proper manner and has come to the correct decision.

Moreover, the best person to determine the issues in relation to the facts of the case is the trial judge who hears and sees the witnesses. This proposition in law was upheld in the cases including that of:

- ***De Silva and others v. Seneviratne and another [1981 (2) SLR 8]***
- ***Fradd v. Brown & Co.Ltd. [20 NLR at page 282]***
- ***D.S.Mahawithana v. Commissioner of Inland Revenue [64 NLR 217]***
- ***S.D.M.Farook v. L.B.Finance [C.A.44/98, C.A.Minutes of 15.3.2013]***
- ***W.M.Gunatillake vs. M.M.S.Puspakumara [C.A.151/98 C.A.Minutes of 9.5.2013]***

In Alwis v. Piyasena Fernando [1993 (1) SLR at page 119], His Lordship G.P.S.de Silva, J held thus:

> *"It is well established that findings of primary facts by a trial Judge who hears and sees the witnesses are not to be lightly disturbed on appeal".*

In keeping with the authorities referred to above, I do not wish to interfere with the decision of the learned District Judge since the issue in this instance involves a pure question of fact.

In the petition of appeal the appellants have also taken up the position that the cause of action of the respondent has been prescribed. Learned District Judge has answered this issue of prescription in favour

of the respondent. In this regard I wish to refer to the matters contained in Section 14 of the Trust Ordinance.

Section 14 of the Trust Ordinance stipulates that:

> *"the Trustee must not for himself or another set up or aid any title to the trust property adverse to the interests of the beneficiary".*

This particular Section gives the protection for the beneficiaries to protect their rights to the trust property against the claims made by the trustees to that trust property. Therefore, the rights given to the respondent in terms of the aforesaid Section 14 should be decided despite the defence of prescription raised by the appellants. Even under Section 111(1), it specifically precludes taking up the cover of prescription when a claim to recover a trust property is made against the trustees.

Furthermore, In the case of **Daniel Appuhamy v. Arnolis Appu, [30 N.L.R. at 247]** it was held thus:

> *"As regards the question of prescription, I think that a cause of action in a case like the present does not arise until the person in the position of the defendant, definitely declines to do what is requested of him, when so requested, or, until it comes to the knowledge of the plaintiff that the defendant has taken a definite step which can only indicate that he regards himself as the absolute owner".*

The law referred to above would preclude a defendant taking up the defence of prescription in the cases where the beneficiaries making claims against the trustees in respect of trust properties. Therefore, the prescriptive claim of the appellants made in this instance also fails.

For the aforesaid reasons both the appeals are dismissed with costs fixed at Rs.75,000/=.

Appeals dismissed

JUDGE OF THE COURT OF APPEAL

Kwk/=