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

CA Case No. 502/1999 (F)

DC Matale Case No. 5056/L

Seiyadu Abdul Carim *alias* **Abdul Carim Seiyadu,**
No. 18, Nikaloya Road,
Raththota.
PLAINTIFF

-Vs-

Alfred Madugalla,
No. 98, Palle,
Weragama.
DEFENDANT

AND NOW BETWEEN

Alfred Madugalla,
No. 98, Palle,
Weragama.
DEFENDANT-APPELLANT

-Vs-

Seiyadu Abdul Carim *alias* **Abdul Carim Seiyadu,**
No. 18, Nikaloya Road,
Raththota.
PLAINTIFF-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Manohara de Silva, PC with Hirosha Munasighe for the Defendant-Appellant Shabry Haleemdeen with Srimal Seneviratne for the Plaintiff-Respondent
Decided on	:	02.07.2018

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

The Plaintiff-Respondent (hereinafter sometimes referred to as "the Plaintiff") filed this action seeking the relief that the Defendant-Appellant (hereinafter sometimes referred to as "the Defendant") be ordered to retransfer the property described in the schedule to the plaint upon a payment of a sum of Rs.50,000/-. The plaint dated June 1996 was premised on the ground that the Defendant was holding the property in question on trust for the Plaintiff and a transfer of this property by the Plaintiff on 31.03.1995 was not an outright sale but a security for a loan of Rs.50,000/- given by the Defendant to the Plaintiff.

The Plaintiff further averred that he was a distribution manager under the Defendant's business known as "New Mahaweli Confectionaries" and since he needed a sum of Rs.50,000/- for a loan, his employer-the Defendant agreed to advance it provided the Plaintiff transferred the land in an extent of 2.52 perches to the Defendant and the Plaintiff did so by a Deed bearing No.10015 and dated 31.03.1995. Further he alleged that the transfer of the land was effected on an oral promise of the Defendant to retransfer it provided the Plaintiff repaid the sum of Rs.50,000/-.

As opposed to this version of the Plaintiff, the Defendant filed answer dated 16.01.1997 admitting the said transfer on 31.03.1995 but denying that the said Deed of Transfer was executed for a consideration of Rs.50,000/-. The Defendant further asserted that the Plaintiff parted title to the property only after having obtained a consideration of a sum of

Rs.750,000/-. The Defendant also averred in the answer that a consideration of Rs.50,000/0 was inserted on the deed as the purchase price, at the request of the Plaintiff.

The Defendant further stated in his answer that subsequently he obtained a loan from Seylan Bank upon the security of the land and later he sold the property, subject to the security of Seylan Bank, to one Ranjith Weerawardene on 30.08.1996 for a consideration of Rs.750,000/-. Thus the Defendant asserted that the said Ranjith Weerawardene became the owner of the property.

The case presented to Court by way of Plaintiff's issues on 10.06.1997 raised constructive trust inasmuch as Issues No.5 and 8 engaged that question. Issue No.5, more particularly goes as follows:-

"*Did not the Plaintiff intend to transfer the beneficial interest of the property to the Defendant*". This issue was answered in the affirmative by Court, In other words the learned District Judge held that there was no intention on part of the Plaintiff to transfer the beneficial interest to the Defendant.

Issue No.8 posed the question-*Was the Defendant holding the property in trust, in terms of the Trust Ordinance, on behalf of the Plaintiff*? The learned District Judge has answered this issue in the affirmative holding that there was a trust.

The learned District Judge of *Matale* has found for the Plaintiff holding that there was a constructive trust and by his judgment dated 19.03.1999 he has allowed the reliefs prayed for by the Plaintiff-namely the Defendant must retransfer the property to the Plaintiff upon a payment of Rs.50,000/- and if there was a failure on the part of the Defendant to make the retransfer upon the repayment of Rs.50,000/-, there must be a fiscal conveyance through the Registrar of Court.

The appeal by the Defendant-Appellant is against the judgment of the learned District Judge of *Matale* dated 19.03.1999 and the principal argument that the learned President's Counsel for the Appellant put forward before Court is that Ranjith Weerawardene who became a vendee of this land after the case was instituted is the current owner of the land who should have been added by the Plaintiff to the case as he was a necessary party. For

purposes of clarity let me sequentially refer to the transactions that have taken place in the case.

1. The Plaintiff transfers the land to the Defendant on 31.03.1995-the Deed No.10015 bears a consideration of Rs.50,000/-.
2. The Defendant mortgages the property to Seylan Bank on 24.05.1995 and obtains a loan of Rs.750,000/-.
3. The Plaintiff institutes action against the Defendant for a constructive trust in June 1996.
4. Just two months after the case was filed, the Defendant transfers the property to his brother in law and business partner Ranjith Weerawardene for Rs.250,000/- on 03.08.1996.

As I stated previously, Issue No.5 and 8 raised by the Plaintiff asserted a constructive trust. Issue No.5 is to the effect that the Plaintiff did not intend to transfer the beneficial interest to the Defendant, whilst Issue No.8 engaged the question "*whether the defendant was holding the land and property thereon in trust for the Defendant?*". Both issues have been answered in favour of the Plaintiff and the question before this Court is whether the learned District Judge answered the issues right having regard to the evidence led in the case. Has constructive trust been established as found by the learned District Judge? The question before this Court is whether a constructive trust in respect of the land has been established on a preponderance of evidence was found by the learned District Judge.

Issues No.12 and 13 raised by the Defendant runs as follows:-

12. Has the Defendant transferred and alienated the land to one Ranjith Weerawardene by way of a Deed bearing No.2903 and executed by M.A.C. Adikaram Notary Public?
13. If Issues No.10 to 12 are answered in the affirmative, should the plaint be dismissed?

The pith and substantive of Issues No.12 and 13 is that if the sale to Ranjith Weerawardene is proved, the plaint must be dismissed. In other words, according to the Defendant, the Plaintiff cannot have and maintain this action for constructive trust because the Defendant

has sold this property to his brother in law and business partner Ranjith Weerawardene. So the transfer and alienation to Ranjith Weerawardene is put forward as a defence to the action of the Plaintiff which is based on constructive trust. On the one hand, this is an action filed by the Plaintiff for a constructive trust. On the other hand, there is a Defendant who states that the action must be dismissed because he has sold the property to a third party. If the Court holds that there is a constructive trust between the Plaintiff and Defendant, how else could this finding of trust be defeated? Is it sufficient for the Defendant to plead his brother in law's title which has allegedly supervened after the case was instituted and rest the matter at that? Should Weerawardene to whom the Defendant transferred the property have been added? Whose duty is it to add him?

Upon the foregoing recital of what the Defendant stated in his answer and Issue No.5, it is clear that the Defendant pleaded "*jus tertii*" in defence of the Plaintiff's action for a constructive trust. Before I go on to delve into this defence of the Defendant and ascertain whether this defence defeats an action based on constructive trust, I proceed to consider the question whether the Plaintiff has made out his case of constructive trust. As I have morefully dealt with the question of constructive trust in ***Vairamuttu Palagapodi v. Gnanamuttu Kanmani*** *et al* (CA 201/1998 (F) decided on 30.05.2016), it would be apparent that upon an analysis of cases such as ***Valliammai Atchi v. Abdul Majeed*** (1947) 48 N.L.R 289 (P.C); (1944) 45 N.L.R 169 (S.C), I decided that if there is a parol agreement to retransfer the property, there is no bar to use the parol agreement to establish a trust under chapter IX of the Trust Ordinance. The parol evidence need not be in writing. It can be an oral agreement.

So the issues arising in this case are as follows?

1. Is there a constructive trust in favour of the Plaintiff?
2. Should Ranjith Weerawardene (the 3rd party) to whom the Defendant sold the property be added?
3. If so, whose duty is it to add?
4. What is the status of Ranjith Weerawardene?

Evidence before the District Court

The Plaintiff rejected an outright sale to the Defendant. The transfer to the Defendant has been effected by a Deed bearing No.10015 on 31.03.1995. This deed has been attested by a Notary Public called A.P. Keppetipola, who specifically states in his attestation that the consideration of Rs.50,000/- was acknowledged to have been received. The Defendant testified that because the Plaintiff had owed the Defendant a sum of Rs.250,000/- which was a loss because of the misappropriation of money committed by the Plaintiff as an agent for New Mahaweli Confectionery owned by the Defendant, this money was set off in the purchase price and only the balance sum was paid to the Plaintiff. In the evidence of the Plaintiff though, this was a loan transaction.

Plaintiff's Case

The Defendant granted a loan of Rs.50,000/- and as a security for the loan, the Plaintiff granted an outright transfer. There was an oral promise to reconvey the property. Despite this outright transfer it has to be noted that the Plaintiff continued to be in possession of the land and yet does so. It would appear that until the case was instituted by the Plaintiff in June 1996, the Defendant had not taken any steps to secure vacant possession of the land, even though there is a warranty of affording vacant possession in the deed.

Mortgage to Seylan Bank

The disputed transfer, so to speak in the testimony of the Plaintiff, took place on 31.03.1995. There is evidence that 7 weeks after this transfer, the Defendant, by virtue of his title, mortgaged the land which was in an extent of 2.52 perches to Seylan Bank. The mortgage bond bears the value of Rs.750,000/-. It is axiomatic that no institutional lender would advance a loan to a borrower before a valuation of the land had been fully done and on 24.05.1995-the date of the mortgage to Seylan Bank, it could be assumed that the property was worth Rs.750,000/-. The value of the land was inserted in the mortgage bond as Rs 750,000, just 7 weeks after the disputed transfer of the land to the Plaintiff **(P2)** for a paltry sum of Rs.50,000/-. Then it is clear that the actual value of the land is 15 times more than the value shown in **P2**. It has to be remembered that the Defendant stated in

evidence that the lower amount (Rs.50,000/-) was inserted in the deed, because the Plaintiff owed him the misappropriated money. But the answer of the Defendant dated 11.01.1997 does not speak a word about any misappropriation committed by the Plaintiff.

Nary an issue was raised on misappropriation at the trial, and the allegation of misappropriation came about only in the course of the testimony of the Defendant and this belatedness raises misgivings about the testimonial trustworthiness of the explanation that was offered as to why a lower sum was inserted in the deed of sale-**P2.**

The Plaintiff was cross-examined on some instances of alteration of cheques. The Defendant testified that the Plaintiff diddled him out of a sum of Rs.250,000/-and this sum was deducted out of the purchase price of Rs.750,000/-. But this testimony about misappropriation came too belatedly only later on in the course of the trial and it does not ring true having regard to the evidence. The answer filed by the Defendant does not speak at all about these set-offs. The answer only speaks of one thing. The Defendant had paid the sale price of Rs.750,000/- to the Plaintiff before he executed the outright sale. According to the answer, a consideration of Rs.750,000/- had been paid before the deed was executed. This story was changed when the trial came about.

As to when the sum of Rs.750,000/- was paid to the Plaintiff, there is an inconsistency *per se* and *inter se* in the evidence that emerged at the trial. The deed declares that the consideration was only a sum of Rs.50,000/-. The attestation clause certifies that the consideration was acknowledged to have been paid previously. The answer of the Defendant states that the sale took place only after the Plaintiff had accepted Rs.750,000/-. If that was the case, the attestation clause should have stated that the consideration was Rs 750,000/- and after deducting the sums owed by the Plaintiff, the Plaintiff was paid the balance before he executed the deed. The notary must have been told of this so that the story of the Defendant could gain credence. It would have looked credible if the story had been consistent.

The notary has stated in the attestation that only a sum of Rs.50,000/- was acknowledged to have been paid before. When the Notary referred to a consideration in the attestation

clause, it was certainly a reference to Rs.50,000/- because the consideration put on the deed was a sum of Rs.50,000/-. As I have just observed, this cuts across the assertion in the answer that a sum of Rs.750,000/- had been paid before the deed was executed.

Apart from the inconsistency on the figure, be it Rs.50,000/- as the deed declared or Rs.750,000/- as the answer and testimony attempted to make out, there arose another inconsistency in the evidence of the Defendant. It was for the first time he began to speak of some acts of misappropriation committed by the Plaintiff in his capacity as his agent. The Defendant tried to give a breakdown of the sum of Rs.750,000/- for the first time in the trial.

The evidence of the Defendant at the trial goes contrary to the stances found in the answer and the deed which spoke of Rs.50,000/- alone. He states in evidence that he set off a sum of Rs.250,000/- against the purchase price of Rs.750,000/- as it was the amount misappropriated by the Plaintiff and the balance sum of Rs.500,000/- being due to the Plaintiff, he paid it to the Plaintiff 3 days after the execution of the deed. In other words, if the allegedly misappropriated amount of Rs.250,000/- was set off from the purchase price of Rs.750,000/-, the balance sum of Rs.500,000/- was paid 3 days after the execution of the deed. But at another place in the course of the evidence, the Defendant took up a materially different position-namely only after he got the loan from Seylan Bank, he paid the balance to the Plaintiff. This loan was virtually 2 months after the execution of the deed. Having taken up a clear position in paragraph 9 of the answer that the deed of transfer was executed only after he had paid the full amount of Rs.750,000/-, it cannot now lie in the mouth of the Defendant to make two contradictory positions in his own evidence namely;

1. he paid Rs.500,000/- within 3 days after the execution;
2. he paid Rs.500,000/- after he got the loan from Seylan Bank on 24.05.1995, which was a little more than 7 weeks after the Deed of Transfer on 31.03.1995.

Thus there is a material inconsistency *per se* in the positions taken up by the Defendant at various stages of this litigation. This is in the teeth of what the teed of transfer, which the

Defendant relies upon for legal title, declares that only a sum of Rs.50,000/- had been acknowledged to have been paid to the Plaintiff. This is an inconsistency with reference to external indicia (the deed being documentary evidence vis-à-vis the oral evidence) and thus the credibility of the story proffered by the Defendant has suffered. This discrepancy goes to his testimonial trustworthiness.

Section 92 of the Evidence Ordinance would prohibit the Defendant from taking up these contradictory positions to vary the terms of the deed of transfer and none of the provisos (the exceptions to Section 92 of the Evidence Ordinance) could apply to this situation, as no evidence has been led to bring the case of the Defendant within the exceptions. As is trite, Section 92 lays down the cardinal rule: *the terms of an attested document cannot be contradicted, added to or varied by other evidence, except as provided in the provisos to the section and in section 99.*

A civil case is decided on a balance of probabilities and the probabilities favour the reception of the story of the Plaintiff as true-namely the transfer took place for a consideration of Rs.50,000/- which was a loan advanced by the Defendant, with a promise to re-transfer the property. I proceed to accept the version of the Plaintiff as has the learned District Judge of *Matale.* I bear in mind what Denning, J. said of the normal standard of proof in civil cases which is proof on the balance of probabilities or the preponderance of probabilities or evidence. In ***Miller v. Minister of Pensions*** (1947) 2 All E.R. 372 at 374 (KBD), Denning, J. contrasted the civil and criminal standards. After explaining the criminal standard, he continued:

> *"The.....degree of cogency....required to discharge a burden in a civil case....is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'"*

In the circumstances the assertion of the Plaintiff that he received only a sum of Rs.50,000/- from the Defendant sounds more probable and it is also consistent with the

figure given in the Deed bearing No.10015 and dated 31st March 1995. Apart from the above there are other attendant circumstances that call for comment.

The plea of a Constructive Trust under Section 83 of the Trust Ordinance

If it is established that the transfer deed was executed only to provide security for a loan, that is an instance of attendant circumstances that may negative an intention to part with the beneficial interest in the land.

A constructive trust will arise if the transfer deed was executed only to provide security for a loan of money and that therefore the person to whom it was transferred (namely the lender), called the "transferee", holds the legal title to the land subject to a constructive trust in favour of the person who transferred it (namely the borrower who offered the "security"), called the "transferor". The applicable provision is Section 83 of the Trust Ordinance, which 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 properly for the benefit of the owner or his legal representative."*

Section 83 makes it patently clear that a transfer of property by a transferor will be subject to a constructive trust only if it cannot be reasonably be inferred consistently with the attendant circumstances that he (transferor) intended to dispose of the beneficial interest therein.

So the relevant question to pose is, in a case where constructive trust is pleaded, what are the attendant circumstances which will go to show whether the transferor of a land did or did not intend to dispose of the beneficial interest in the land? It is not possible to encapsulate them in a closed list of attendant circumstances, but the words "attendant circumstances" mentioned in Section 83 are described in several cases to mean that "circumstances which precede or follow the transfer but are not too far removed in point of time to be regarded as attendant"-see Basnayake, C.J in ***Muttammah v. Thiyagarajah*** (1960) 62 N.L.R 559 at 564. What then are the attendant circumstances in the case?

a) Here was a Plaintiff who alleged that he effected the transfer on a promise given by the Defendant. In ***Palagapodi Balasundaram v. Gnanamuttu Kunmani and others*** (CA 201/1998(F) decided on 30.05.2016), this Court held that the promise to transfer may be oral or might even be contained in a non-notarial instrument which is null and void in terms of Section 2 of the Prevention of Frauds Ordinance but if such a promise is available as in this case, it is an attendant circumstance but it will not give rise to a trust without more-*see* the PC decision of ***Saverimuttu v. Thangavelautham*** (1954) 55 N.L.R. 529.

In this case, there are other circumstances that add to the oral promise.

b) Here we have a situation where the transferor continued in possession of the land even after the execution of the Deed of Transfer and such continued possession is an attendant circumstance. It shows that the transferor did not intend to dispose of the beneficial interest, although he signed the Deed of Transfer.

In the case of ***Thisa Nona v. Premadasa*** (1997) 1 Sri L.R. 119, the question that came up in appeal was whether the deed **P16** created a constructive trust or a loan transaction. By **P16** the 1st Defendant had transferred an undivided 1/3rd share of the land to the Plaintiff. Whilst the Plaintiff's Counsel argued that it was an outright transaction, the 1st Defendant's Counsel argued that it was a loan transaction. The District Court held with the Plaintiff.

Wigneswaran, J. at page 175, held that, "the fact that 1st Defendant-Appellant paid the stamps 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 1st Defendant-Appellant, *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. The attendant circumstances show that the 1st Defendant-Appellant did not intend to dispose of the beneficial interest in the property transferred. Law therefore declares under such circumstances (Section 92 of the Trust

Ordinance) that the Plaintiff-Respondent (transferee) would hold such property for the benefit of the 1st Defendant-Appellant (transferor)".

c) Another factor to be taken cognizance of is that the market value of the land transferred was significantly higher than the "consideration" actually paid for it by the transferee to the transfer. This would no doubt constitute an attendant circumstance, which would show that the transferor did not intend to dispose of the beneficial interests in the land.

The exact market value may be proved by means of the evidence of a valuer (whose evidence would qualify to be expert evidence under Section 45 of the Evidence Ordinance). The value can also be proved by producing proof of computation by recognized banks or institutional lenders who are required to have their accounts audited by Banking Act. In this case when the Plaintiff allegedly sold this land, the deed bore the value Rs.50,000/-, but just a little more than 7 weeks later Seylan Bank granted a loan to the Defendant in a sum of Rs.750,000/- which is reflected in the mortgage bond. This shows that the Plaintiff did not intend to dispose of the beneficial interest in the land by executing the Deed of Transfer; Who is the owner of a land who would be willing to be paid less for his land, unless he was executing a transfer of the land as a security for a loan?

The Trust Ordinance provides that in relation to immovable property a trust is not valid unless it is in writing and materially executed-Section 5(1). Trusts of movable property are not valid unless they are in writing, or the property has been transferred to the trustee by delivering-Section 5(2). There is however an important exception to these formalities. Section 5(3) of the Ordinance declares that the rules stated above do not apply "where they would operate so as to effectuate a "fraud"". The acceptance of *parol* evidence to establish a trust then is expressly recognized-***Ranasinghe v. Fernando*** (1922) 24 N.L.R. 17 at p.172.

The underlying rationale for the exception is that equity will not allow a statute to be used as an instrument of fraud. It is on this maxim of equity that the Courts have declared trusts even though the requirement of writing and material execution to expressly create a

trust were not followed by parties. In other words Section 5(3) which reflects the maxim of equity namely *Equity will not allow a statute to be an instrument of fraud* has been used by Court when a person obtains possession of another's property free from such a trust-*see* ***Gould v. Innasitamby*** (1906) 9 N.L.R. 117; ***Ohmus v. Oblmus*** (1906) 9 N.L.R. 183; ***Valliyammai v. Majeed*** (1944) 45 N.L.R. 169, (1947) 48 N.L.R. 289 (P.C).

The above two decisions were followed in the case of ***Perera v. Fernando*** 2011 (2) Sri L.R. 192 and the Supreme Court held that 'When the owner of a property transfers it without intention to dispose of the beneficial interest therein, then a constructive trust is created and the transferee must hold such property in trust for the benefit of the transferor according to the principles laid down in Section 83 of the Trusts Ordinance. However, such *parol* evidence must be substantiated with attendant circumstances as allowed for under Section 83 of the Trusts Ordinance.

In ***Hewaga Don ArunaNishantha v. Hathurusinghe*** SC Appeal No. 41/13 reported in Athula Bandara Herath's Supreme Court Law Reports, 2014, Vol. II, p. 113, the original Plaintiff filed this action praying that the property described in the schedule to the plaint be transferred back to him on payment of Rs.40,000/- as the Defendant is legally bound to do so. The basis of the plaint was that the Deed No.3344 created only a trust and it was not meant to be an outright transfer. The District Court held that the said Deed created a trust and held with the Plaintiff, but the Civil Appellate High Court reversed it. When the matter went up in appeal, the Supreme Court held that-

> *"Sections 91 and 92 of the Evidence Ordinance prevent leading evidence to prove or disprove a written document. But section 83 of the Trusts Ordinance provides that if one can prove that in the attendant circumstances if the donor did not intend to transfer the beneficial interest, even though the written document appears to speak otherwise, a constructive trust will be formed"*-ibid at page 118.

At this stage it is apposite to recall that in my view it is the case of ***Rochefoucauld v. Boustead*** (1897) 1 Ch 196 that can be said to be the precursor to Section 83 of the Trust Ordinance of Sri Lanka. Lindley L.J authoritatively said this: "Notwithstanding the statue,

it is competent for a person claiming land conveyed to another to prove by *parol* evidence that it was so conveyed upon trust for the claimant, and the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself-*ibid* at 206 (1987) 1 Ch 196 (CA).

In fact an example of the application of the maxim of equity I have referred to above arose in the case of ***Rochefoucauld v. Boustead*** (1897) 1 Ch 196, where the court upheld a claim to land in spite of the lack of written evidence required by statute to establish a trust. In this case the Plaintiff had been the owner of mortgaged land in Ceylon. On her default under the mortgage her mortgagee proposed to sell the land. It was arranged with the Defendant (so the court held) that he could purchase land on trust for the Plaintiff but subject to a charge in his favour for the purchase price and other expenses incurred by him. The land was purchased by the Defendant but on proceedings being brought against him by the Plaintiff he relied, among other things, on the absence of writing-see for some interesting aspects of this case an insightful article-"*Formalities for trusts of land and the Doctrine in* ***Rochefoucauld v. Boustead***", T.G. Youdan (1994) 43(2) Cambridge Law Journal 1 pp 306-336.

Just as much as an oral declaration of trust in land was later denied by the trustee who declared that no trust existed, here too I take the view that one can gather from the attendant circumstances an intention not to transfer beneficial interest to the Defendant and that the property had been transferred subject to his beneficial interest and it would be inequitable for those rights to be denied in spite of the lack of written evidence necessary under the statute.

Bona fide purchaser for value-Equity's Darling

Having held that there arises on the facts a constructive trust, let me deal with another issue that came up in the course of the argument. It is axiomatic that just after this case was filed in June 1996, the Defendant transferred the subject-matter of the action to his brother in law and business partner one Ranjith Weerawardene. This conveyance took place on 3rd August 1986 by a deed marked as **V3.** In equity the felicitous phrase 'Equity's

Darling' is a term the courts have coined to refer to the one person whose rights will trump prior equitable interests-the *bona fide* purchaser who acquires property for value and without notice of the equitable rights. Does Ranjith Weerawardene qualify to be Equity's darling? The burden of proof is on the bona fide purchaser to establish (a) he did not have notice of the prior equity and (b) he paid consideration.

Section 66 (1) enacts: Nothing in Section 65 entitles the beneficiary to any right in respect of property in the hands of –

(a) A transferee in good faith for consideration without having notice of the trust, either when the purchase money was paid, or when the conveyance was executed; or

(b) A transferee for consideration from such a transferee.

What is relevant here is whether the purchaser constitutes a *bona fide* purchaser for value: if so, the premises in suit cannot be restored to the transferor. In order to take property free of the trust, the transferee under Section 66(1)(a) must prove that (i) he did not have notice, and (ii) he paid consideration-*see* ***Attorney-General v. Biphosphated Guano Co*** (1878) LR 11 Ch 327; GL,

If the burden of proof is placed on a bona fide purchaser for value, he must become a party to the case himself and establish his case. I am not inclined to accept the argument of the Defendant that the Plaintiff must have made Ranjith Weerawardene a party to the case. In fact it is the Defendant who raised the issue-whether he has transferred the land in question to Ranjith Weerawardene. In my view this is not an issue that will save the Defendant from a claim of constructive trust. This is only a plea of *jus tertii*-the right of a third party. A plea of *jus tertii* does not approximate to a defence of a bona fide purchaser for value. The mere proof that the transferor has passed title of the property to a third party is no answer to an equitable claim. If at all, the prior equitable claim can be trumped and defeated by a third party only if he is a *bona fide* purchaser for value without notice. No such issue has been raised and no evidence has been led on that aspect. It is not for the Plaintiff to make Ranjith Weerawardene a party; it is up to the Defendant to make him a

party and establish through evidence that rights of a *bona fide* purchaser for value without notice have intervened.

The usual rule is that the doctrine relating to a *bona fide* purchaser for value without notice is a defence which must be pleaded and proved by the person who wishes to rely on that defence :*Daniell's Chancery Practice* (7th ed) pp 429-439 ; ***T & H Greenwood Teale v. William Williams Brown & Co*** (1894) 11 TLR 56. I would also make reference to ***Clark v. Ulster Bank Ltd*** (1950) NI 132, ***Nestle Oy v. Lloyds Bank plc (The Tiiskeri)*** [1983] 2 Lloy's Rep 658 and ***Re Goldcorp Exchange Ltd; Kensington v. Liggett*** (1995) 1 AC 74.

In the circumstances the existence of a third party buyer of the trust property would not have an impact on the equitable claim of constructive trust that has been established on evidence. The equitable claim of constructive trust would trump all other claims except a better title possessed by a *bona fide* purchaser for value without notice. There is no such *bona fide* purchaser for value without notice in this case.

Accordingly I affirm the judgment of the District Court of *Matale* dated 19th March 1999 and dismiss the appeal of the Defendant-Appellant with costs.

JUDGE OF THE COURT OF APPEAL