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

C.A. Case No. 1344/2000 (F)

D.C. Pugoda Case No. 53/71 L

(Old D.C. Gampaha Case No. 30171/L)

Edwin Wickramarachchi
No. 24, Middle Class Housing Scheme,
Kirindiwela.
PLAINTIFF

-Vs-

M.K. Nimalasena
Radawana Road, Kirindiwela.
DEFENDANT

AND NOW BETWEEN

M.K. Nimalasena (Deceased)
Radawana Road, Kirindiwela.
DEFENDANT-APPELLANT

1. **Bogodage Chandralatha Perera**
2. **Sudarma Pushpa Kumari**
   both of Radawana Road, Kirindiwela.
3. **Ajith Kumara**
   No. 79/2, Church Road,
   Brandiyamulla,
   Gamapaha.

Substituted DEFENDANT-APPELLANTS

-Vs-

Edwin Wickramarachchi (Deceased)
No. 24, Middle Class Housing Scheme,
Kirindiwela.
PLAINTIFF-RESPONDENT

M.K. Chandrawathie
No. 24, Middle Class Housing Scheme,
Kirindiwela.
Substituted PLAINTIFF-RESPONDENT

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Chula Bandara with Gayathri Kodagoda for the Substituted Defendant-Appellants Romesh Samarakkody for the Substituted Plaintiff-Respondent
Decided on	:	11.02.2019

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

The Plaintiff-Respondent, who is now deceased, (hereinafter sometimes referred to as "the Plaintiff") instituted this action originally in the District Court of *Gampaha* praying *inter alia* for the following remedies:-

a. a declaration that the Defendant-Appellant (hereinafter sometimes referred to as "the Defendant"), is a trustee of the Plaintiff to a 1/3rd share of the land described in the schedule to the plaint;

b. a declaration that the Plaintiff is the owner of the said 1/3rd share of the land described in the schedule to the plaint;

c. an order directing the Defendant to transfer the said 1/3rd share to the Respondent;

d. to eject the Defendant from the said 1/3rd share of the land.

In addition the Plaintiff averred in his plaint the following:-

a. on or around 27.03.1975 he had paid Rs. 3800/- and a further sum of Rs. 200/- as notarial fees to a real estate agent ***House and Property Trades Ltd*** (H.T.P.) with a view to purchasing the land described in the schedule to the plaint;

b. further he accompanied his father-in-law (hereinafter sometimes referred to as Jamis Appuhamy) to the real estate agent (H.T.P) on the date he made the said payment and the receipts acknowledging such payments were issued in his father-in-law's name 'Mirihana Kankanamalage Jamis Appuhamy';

c. on 22.07.1977 the said Mirihana Kankanamalage Jamis Appuhamy-the Plaintiff's father-in-law passed away and his estate along with this land devolved on the Plaintiff's wife and two other children of the said Jamis Appuhamy; one child being Nimalasena-the Defendant in the case;

d. accordingly, the deceased Defendant owned 1/3rd of the land described in the schedule to the plaint;

e. however the deceased Defendant held this 1/3rd share on trust, on behalf of the Plaintiff because the Plaintiff had paid the consideration for the land;

f. since 15.10.1986 the deceased Defendant had been in possession of 1/3rd of the land illegally, which was adverse to the interest of the Plaintiff.

The original Defendant by his answer had traversed the following:-

a. denying the averments contained in the plaint the deceased/original Defendant Nimalasena stated that the land described in the schedule to the plaint was purchased by his father "M.K. Jamis Appuhamy" having paid its market value at the time;

b. the said M.K. Jamis Appuhamy passed away on 22.07.1977 and after his death his estate devolved on the deceased Defendant and his two sisters;

c. thereafter by a Plan bearing No.2708 of L.J. Liyanage, Licensed Surveyor, the said land was divided into 3 Lots and the Defendant and his two sisters began to enjoy their respective lots since then;

d. further, having investigated into the matter after the death of the said Jamis Appuhamy, the owners of the land described in the schedule to the plaint transferred it to the deceased Defendant and his two sisters by a deed of sale bearing No. 946 executed by C.L. Abeygoda, Notary Public on 19.03.1987.

It is noteworthy that the original Plaintiff Edwin Wickramaarachchi who was married to one of the sisters of the original Defendant namely Chandrawathie instituted this action only against his brother-in-law-the original Defendant and the cause of action alleged was one of constructive trust against the brother-in-law only for a 1/3rd portion of the land, though another 1/3rd had devolved on his wife Chandrawathie. The other 1/3rd of the land had devolved on the sister-in-law of the Plaintiff namely Sumanawathie. Interestingly enough the Plaintiff claimed only the 1/3rd held by his brother-in-law as being embodied in the constructive trust. Whilst the case was pending in the District Court, the original Plaintiff Edwin Wickramaarachchi passed away and the case was continued in the District Court of *Pugoda* when the territorial jurisdiction of *Gampaha* changed.

From the forgoing narrative of the case it is apparent that the Plaintiff formulated his claim of constructive trust on the basis that it was him who had paid the consideration for the land which was more fully depicted in Plan No.1305 and dated January 25, 1975. The land which was described in the said plan as Lot 43 of a larger land is in an extent of 8 perches. The agents of the owners known as ***House and Property Trades Ltd*** (H.P.T) were selling the land on behalf of the owners of the land namely P.A.P Deraniyagala, S.U. Deraniyagala and I.R. Deraniyagala. In both the plaint and his testimony, the Plaintiff relied on a document marked **P4** which is a receipt for a payment of Rs. 1000/- as an

advance payment issued by Mrs. P. Deraniyagala. The said document **P4** which is dated 15.03.1975 indicates that this sum of payment had been made to the said Mrs. Deraniyagala by Mirihana Kankanamalage Jamis Appuhuamy-the father-in-law of the Plaintiff, though the name of the purchaser is indicated as A. Wicramarachchi on **P4.**

If one peruses another document marked as **P1** which is styled as a sale book entry, the name of the purchaser is once again M.K. Jamis Appuhamy-the father-in-law. This document declares that a total sum of Rs.3800/- has been paid but it would appear that one A. Wickramarachchi made the payment of Rs. 3800/- for M.K. Jamis Appuhamy.

The document marked **P2** is a receipt from ***House and Properties Trade Ltd*** and this document indicates that a sum of Rs.3800/- had been paid by M.K. Jamis Appuhamy. The Document **P2** does not mention nary a word about the Plaintiff as having made the payment. The report of the Director (legal) of H.P.T Group marked as **V5** and dated 4th of September 1986 is more explicit as to who made the payment for the purchase of this land. This document which draws attention to the dispute as to who has made the payment sets out in detail, from the book entries maintained at the office of HPT, as to who made the payments for the land. For clarity of the narrative it would suffice to set out the contents of the document marked **V5.**

1. In terms of the receipt bearing No. C.055734 Jamis Appuhamy had paid a sum of Rs. 1000/- on March 15, 1975.
2. As borne out by receipt No. C.055858, Mr. Jamis Appuhamy had paid a sum of Rs. 3000/-on 27th March 1975.
3. In terms of a letter dated 25th of March 1975, a sum of Rs. 8200/- and 190/-remained outstanding to be paid for the completion of the purchase. It would appear that this outstanding balance had been subsequently paid as borne out by receipt **V2.** In other words it was a payment made by Jamis Appuhamy-the father-in-law of the Plaintiff.

As I stated above these documents make it patently clear that it was Jamis Appuhamy who had made the payment for the purchase of Lot 43-the subject-matter in question

which was later transferred by the original owners of the land to the son and two daughters of Jamis Appuhamy. The son who got 1/3rd of the land was the original Defendant in the case, whilst the wife of the original Plaintiff obtained another 1/3rd and the remaining 1/3rd devolved on the second daughter of Jamis Appuhamy. The deed of sale was effected by the original owners the Deraniyagalas so to speak only after Jamis Appuhamy had since crossed the great divide. The document marked **V5** of 4th of September 1986 further states that as far back as 27th January 1979 a Surveyor named J. Liyanage had partitioned Lot 43 into three allotments among the three children of the deceased Jamis Appuhamy namely Mirihana Kankanamlage Nimalasena (the Defendant-the brother-in-law of the Plaintiff), Mirihana Kankanamlage Kusumawathie (sister-in-law of the Plaintiff) and Mirihana Kankanamlage Chandrawathie (the wife of the Plaintiff). The deed of sale bearing No.946 was executed on 19th of March 1987 in the name of the aforesaid three children of the deceased Jamis Appuhamy. One cannot resist noticing the chronology of the events.

In 1975, the late father-in-law of the Plaintiff made a payment for the purchase of the land as indicated by the receipts referred to above. In 1979, the three children, one of whom was Chandrawathie-the wife of the Plaintiff, proceeded to block the land into three equal parcels. It is curious that the Plaintiff who stood by as a mute bystander whilst the partitioning was taking place around him possibly woke up only in June 1987-barely two months after the execution of the deed of sale in favor of the three persons who partitioned the land. It also begs the question as to why the Plaintiff filed this action only against Nimalasena his brother-in-law, whilst there were two others as well who had become the legal owners of the land namely his wife and sister-in-law. The plaint seeks a constructive trust only in respect of a 1/3rd of the property.

It is quite clear from the above narrative that the wife of the Plaintiff also became the owner of a 1/3rd share of the land. It is quite strange as to how the Plaintiff could seek the remedy of constructive trust only against his brother-in-law when his own wife became the owner of another 1/3rd share of the land. If the brother-in-law was holding a 1/3rd share as a trustee for the Plaintiff, it passes strange as to how the wife and sister-in-law

who also received 1/3rd share each of the land have not been sued for a similar declaration for constructive trust. Maybe the wife was omitted on account of uxorial bond. Why was not the sister-in-law sued? These are question that go a begging with nary an explanation. For it was the assertion of the Plaintiff that he had paid the consideration not for only 1/3rd but for the entire extent of land. Then there would exist a cause of action to sue not only the brother-in-law (the Defendant) but also his wife Chandrawathie and sister-in-law Sumanawathie. But the Plaintiff elected to sue only the brother-in-law in order to have him held liable as a constructive trustee. The wife and sister-in-law were spared the ordeal of a suit for a constructive trust.

Another important question arises. If the Plaintiff had acquired proprietary right or beneficial interest over the land, why did he maintain a stoic silence when the land was blocked into three equal portions by the surveyor on the 23rd of January 1979? The surveyor was quite emphatic that nobody protested when he went to partition Lot 43 into three equal portions and demarcated the fragmented lots as 43A, 43B and 43C. The evidence of the surveyor that nobody made any protestation or raised a whimper against the partitioning of the land shakes the credibility of the Plaintiff's version that he had acquired the beneficial interest of this land to himself.

The Plaintiff could not plead that he was unaware that not only his wife but also his sister-in-law had become the owners of a 2/3rd share of lot 43. Apart from the fact that he did not plead a constructive trust against his wife and sister-in-law, the fact that he instituted this action only against the brother-in-law raises doubts about the veracity of the Plaintiff's version that he held the beneficial interest only in the 1/3rd share held by the brother-in-law. Moreover, the silence on the part of the Plaintiff at the time of the division of property into three equal parcels would connote estoppel by conduct and it would not lie in the mouth of the Plaintiff now to assert that the beneficial interest of the 1/3rd portion resides in him. In my view, the omission to protest at the time of the partition would estop the Plaintiff from asserting a contrary position at the trial. It has to be recalled that the wife of the Plaintiff herself testified that the Plaintiff facilitated the

partitioning of the land into three blocks. Is this conduct of the Plaintiff consistent with the legal and equitable dominium that he now seeks for only 1/3rd of the land?

Estoppel by Acquiescence or Standing by or Encouragement

Estoppels by standing by or encouragement or acquiescence are equitable causes of action or they may constitute defences to an equitable claim. A declaration for a constructive trust is an equitable claim which may be defeated by a successful plea of estoppel by standing by or acquiescence.

Spencer Bower and Turner state the principle of estoppel by acquiescence as follows:-

> *"Where **A** has a right or title which **B** is in fact infringing under a mistaken belief that his acts are not acts of infringement at all, and A is aware of his own title or right, and also of B's invasion of that title or right, and of his erroneous belief that he is not encroaching thereon, but is lawfully exercising rights of his own, and yet, with that knowledge, **A** so conducts himself or so abstains from objection, protest, warning or action, as to foster and maintain the delusion under which he knows that **B** is labouring, and induces B to act to his prejudice on the faith of the acknowledgment to be implied from such conduct or inaction or, A is not permitted afterwards to assert his own rights against B, or contest B's rights against himself."*[1]

Thus, Thesiger, L.J. stated in ***De Bussche v. Alt***:[2]

> *"If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act."*[3]

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[1] Spencer Bower & Turner in *The law relating to Estoppel by Representation* 3rd Edition (1977), S. 290. pp. 283-284; see also *Plimmer v. Wellington City Corp.* (1884) 9 A.C. 699 P.C. at 713; *Civil Service Musical Instrument Association Ltd., v. Whiteman* (1899) 68 L.J. Ch. 484 at 487; *A.G. to Prince of Wales v. Collom* (1916) 2 K.B. 193 at 203, 204.

[2] (1878) 8 Ch. D. 286; (1874-1880) A.E.R. Rep. 1247; 47 L.J. Ch. 381.

[3] (1878) 8 Ch. D. at 314; see Lord *Cottenham* in *Duke of Leeds v. Earl Amherst* (1846) 2 Ph. 117 at 123; 16 L.J. Ch. 5.

In ***Ramsden v. Dyson,***[4] Lord Cranworth, L.C. stated the necessary conditions of estoppel by standing by or acquiescence or encouragement in the following terms:-

> *"If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wholly impassive on such an occasion, in order afterwards to profit by the mistake which I might have prevented. But.....to raise such an equity, two things are required, first, that the person expending his money supposes himself to be building on his own land; and, secondly, that the real owner.....knows that the land belongs to him and not to the person expending the money.....For if a stranger builds on my land, knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights. It follows*[5] *as a corollary from these rules.....that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me taking possession of the lands and buildings when the tenancy had determined."*

The principle of giving relief in cases where the so called proprietor of land has knowingly acquiesced in another's mistake was followed in ***Willmott v. Barber***,[6] where Sir Edward Fry J. set out his famous 'five probanda':-[7]

i. the *person concerned* must have made a mistake as to his legal rights;

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[4] (1866) LR 1 HL 129, 140-1, and 162, 163, 174; *Michaud v. City of Montreal* (1923) 92 LJPC 161; A-G *to the Prince of Wales v. Collom* [1916] 2 KB 193, 203-4. Lord Cranworth did not describe the owner's conduct as acquiescence but this description was used in *East India Co. v. Vincent* (1740) 2 Atk 83, n 115.

[5] Applied in *Lala Beni Ram v. Kundan Lall* (1899) LR 26 Ind App 58, 64 where the Privy Council rejected a claim by tenants to perpetual leases based on alleged acquiescence by the landlord in their construction of buildings; approved *Canadian Pacific Railway Co. v. The King* [1931] AC 414, 430 *(Canadian Pacific)*; n 66. para 11-015.

[6] (1880) 15 Ch. D. 96; at 105-106; 49 L.J. Ch. 792 – on appeal (1881) 17 Ch. D. 772 – confirmed in *Russelel v. Watts* (1883) 25 Ch. D. 559 at 585-586, followed in *Crabb v. Arun D.C.* (1975) 3 A.E.R. 865 at 876-877 and *Kammins Ballrooms Co. Ltd., v. Zenith Investments (Torquay) Ltd.,* (1970) 2 All E.R 871 at 895 (HL).

[7] What he called the "elements or requisites necessary" for the doctrine to operate (at p.105).

ii. he must have expended some money or must have done some act on the faith of his mistaken belief;

iii. the other party must know of his own right; and

iv. he must also know of the other's mistake,

v. he must have encouraged the claimant's expenditure or other action, actively or by saying nothing.

If one transposes the numbered paragraphs on the facts in this case *the person concerned* would be the Defendant, because if at all the defence of estoppel by standing by or acquiescence or encouragement would be open to him on evidence even though it was not specifically pleaded; An appellate court could raise this issue of estoppel in appeal as it arises on the evidence led. In fact when the partitioning of the land took place in 1979 among the siblings, they had not even become the owners of the land but they did expend expenses in employing a surveyor to block the land into three parcels. There is also evidence that some structure was put up on the land. The Plaintiff facilitated all this though he later claimed that the beneficial title to the land resided in him. The probability of that claim is weakened by the Plaintiff's acquiescence or standing by or encouragement that he provided to the children of Jamis Appuhamy, one among whom was his wife.

There is a catena of cases in Sri Lanka that throw light on estoppel by standing by or acquiescence or encouragement which could support either a cause of action or a defence to an equitable claim like in the instant appeal.

In a banking litigation that arose in ***Collettes Ltd v. Bank of Ceylon***[8] Sharvananda, J. (as His Lordship then was) considered the concept of estoppel by acquiescence. In this case, there was an obligation on the part of the defendant bank to send bank statements by post, but the plaintiff company's employees were aware of and acquiesced in the handing over of monthly statements for four years and weekly statements for the next six years to one **I**, a sales manager and director of a subsidiary company, who committed several

[8] (1984) 2 Sri.LR 253 S.C

frauds on the company in regard to the transactions with the bank. It was held that an acquiescence is not a question of fact but of legal inference from facts found and it must be intentional conduct with knowledge, and the plaintiff was now estopped by twelve years of acquiescence from complaining that the delivery of the bank statements to I was wrongful. It was bound by such performance. By acquiescing in I's acts of collecting the bank statements and permitting him to deal with them, the plaintiff held him out to the bank as having authority to collect the monthly and weekly statements and thereby dispensed with the necessity of sending them by post. The plaintiff by its conduct ratified and adopted the delivery of the statements to I on its behalf and the obligation of the bank to send them to the plaintiff was thereby discharged and there was estoppel by acquiescence.

As in the English cases there are cases in Sri Lanka which impose a requirement of an implied duty to speak when one's rights are being infringed upon. In Sri Lanka as in England, a person, who knowing that a violation of his legal rights is in progress, deliberately stands by and allows another person, who has no knowledge of the existence of such a right, to believe that it does not exist and to spend his own money on the strength of that belief, may be held to be estopped by acquiescence from afterwards setting up as against the person so misled the right which he had concealed-*see* the decision of Wood Renton C.J in ***Abdulla v. Amarasekera***[9]. As concise as the judgment is, the learned Chief Justice pithily uses the expressions such as standing by and acquiescence in the case. As I said before, the court can draw legal inferences of estoppel by acquiescence having regard to the proved facts in a particular case.

It is an essential ingredient that the person who had the legal and beneficial title must have kept silent; If the defence of estoppel by standing by or acquiescence or encouragement were to succeed, there must be evidence that the legal owner knew of his rights but yet chose to remain silent. ***Fernando v. Fernando***[10] reiterates that requirement. The plaintiffs who were entitled to three-fourths share of a land, not

[9] (1914) 2 Balasingham's Notes of Cases 50.
[10] (1911) 14 N.L.R 155.

knowing that they were so entitled, stood by when the 3rd defendant, who was entitled to only 1/4th of the land, executed two successive leases in favour of the first and second defendants, in which he dealt with the whole land. In an action brought by the plaintiffs to vindicate their title against the defendants, it was held that they were not estopped from setting up their title. The defence of estoppel by acquiescence specifically raised by counsel for the defendants in this case failed to the ground for want of the ingredient that is requite to the constitution of the defence-namely the Plaintiffs knew that they were the owners of the three-fourths share of the land but yet they stood by holding the 3rd defendant out as the owner. In this case there was no evidence of any silence or inaction on the part of the Plaintiffs on any occasion when it was their duty to assert their rights.

Lascelles A.C.J said: "It is essential, in order to create an estoppel by acquiescence, to show that the plaintiffs, knowing that a violation of their rights was in progress, stood by and so misled the first and second defendants." Unlike in the case of ***Fernando v. Fernando*** *(supra)* which was a case on an appeal from the District Court of *Negombo*, in the instant appeal before me, the Plaintiff came to court asserting that he was the owner of the entire land. His cause of action was that his brother-in-law (the Defendant) was holding 1/3rd of the land on trust. If it was the case, why did he permit the Defendant to secure that 1/3rd by informally partitioning it and even improve on it? The Plaintiff had a duty to speak but remained speechless.

In ***Saparamadu v. Saparamadu*** (1918) 20 N.L.R. 369, this was an action for declaration title to land and the plaintiff was the purchaser at a Fiscal's sale in execution against the 2nd defendant. The land was seized by the Fiscal on January 15 and sold on February 8. On January 14 the 1st defendant took a conveyance from the 2nd defendant of the land in question and registered the same on January 25. Thereafter, the land was sold in execution against the 2nd defendant. The 1st defendant was present at the sale, but did not inform the bidders at the sale that he had already purchased the land. In an action for declaration of title brought by the purchaser, Ennis and Shaw JJ., held that, the 1st defendant was estopped from setting up title to the said land. The absence of any

circumstance which might have put the purchaser on his guard, and on inquiry into the title, facilitated the imputation of responsibility to the 1st defendant for the belief under which the purchaser bought the land.

Once again the failure to assert one's own title figured in this case. There was estoppel by acquiescence that is discernible on the part of the 1st defendant in the case. The crucial factor that tilted the scales in favor of the plaintiffs in the case was that the 1st defendant, though present at the fiscal's sale, did not intimate to the purchaser (the plaintiff) that he was entitled to this land. He was a mute bystander when the plaintiff bought his land at the fiscal's sale. Though Ennis, J. and Shaw, J. did not use in their separate judgments the phrase "estoppel by standing by or acquiescence or encouragement" in this appeal from the District Court of *Negombo*, the learned Justices were indeed dealing with this species of estoppel. After all, estoppel by standing by or acquiescence or encouragement has been described as 'no more than an instance of the law of estoppel by words or conduct'.[11]

All that these concatenation of cases lay down is that if A holds title to a property which is encroached upon by B under the very nose of A and is improved upon by B with no protest from A, on the supposition that he has proprietary interests therein, A would be estopped from asserting his title afterwards as against B. Estoppel by standing by or acquiescence or encouragement begins to operates against A and the defence is triggered by A's silence. There was a duty to speak which A failed to discharge. The quiescence on the part of A under those circumstances can best be described as acquiescence and assent. It is no more than an instance of the law of estoppel by words or conduct. Silence triggers it and the law prefers to call it estoppel by standing by or acquiescence or encouragement.

Assuming without conceding that the Plaintiff had ownership in the property, one confronts further questions. When did he acquire ownership? I have already held that the evidence led in the case does not support his version that he had paid consideration

[11] See *De Bussche v. Alt* (1878) 8 Ch.D 286, per Thesiger LJ at p.314. See also Halsbury (4th Edn. Reissue, 1992), xvi, para 924.

for the property. His only tenuous argument for assertion of title lay in his claim that he paid the consideration but the receipts were issued in the name of the father-in-law. Assuming without conceding that he had paid for the purchase, then the only way in which he could claim beneficial interest in the property was through the conduit of a constructive trust which he had placed before the District Court.

I have held that such an equitable owner should have protested against his wife, sister-in-law and brother-in-law improving the property in defiance of his proprietary interests. The precedents establish that he should have put them on notice. But was he the equitable owner? Will equity aid him?

In this backdrop I would turn to the Plaintiff's equitable claim of constructive trust.

CONSTRUCTIVE TRUST

If at all, the provisions that could afford relief to the Plaintiff would be Section 83 and 84 of the Trust Ordinance. In my view the case advanced by the Plaintiff before the District Court of *Pugoda* could not fall within Section 83 of the Trust Ordinance which goes as follows:-

> *"Where the owner of the property transfers or bequeaths it, and it cannot reasonably inferred consistently with the attendant circumstances that he intended to dispose the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative."*

Only the owner of a property who held that property before transferring it to another, can claim the benefit of Section 83 of the Trust Ordinance. It is abundantly clear that the Plaintiff was never the owner of the property on paper before it was transferred to Nimalasena (the Defendant), Chandrawathie (the wife of the Plaintiff) and Kusumawathie, the sister-in-law of the Plaintiff. In the circumstances Section 83 of the Trust Ordinance would hardly avail the Plaintiff.

Then the Plaintiff would have to bring his case within Section 84 of the Trust Ordinance as this is the section that could have well advanced the case of the Plaintiff provided the

ingredients of Section 84 were satisfied. In terms of Section 84 of the Trust Ordinance where the property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

The rationale for this provision goes back at least as far back as the late eighteenth century, and its most authoritative basis is the case ***Dyer v. Dyer***[12]. In this case Eyre CB remarked that:-

> *"The trust of a legal estate.....whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase money."*

Thus in English law whoever provides the purchase money for the property will be viewed in equity as having an equitable interest in the property, in the form of a *resulting trust* in their favour. It was Mr. Justice Megarry who defined this type of trust in the leading case of ***Re Vandervell's Trusts (No.2)***[13] as '**presumed resulting trusts**'. So English law takes the view that whenever a person has bought property in another's name, unless there is some indication that he does not intend to keep the beneficial interest, there is a presumption of a resulting trust in his favour-*see* ***Fowkes v. Pascoe***.[14] In English law this is a presumption, not a rule and like some presumptions, it may be rebutted by evidence to the contrary. It is sometimes referred to as a presumption against a gift. To put it in another way, in English law equity will presume that the property is held on presumed resulting trust for the person providing the purchase money. There is no presumption that it is a gift to the transferee who did not give consideration. In order to rebut the presumption, the burden is on the transferee to prove that the transfer was a gift.

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[12] (1788) 2 Cox Eq Cas 92
[13] (1974) Ch 269
[14] (1874-75) LR 10 Ch App 343.

But our Trust Ordinance No. 9 of 1917 as amended incorporates purchase price resulting trust as a species of constructive trusts under Section 84 of Chapter IX.

Section 84 of the Trust Ordinance makes it quite explicit:-

> *"Where property is transferred to one person for a consideration paid or provided by another person, and* ***it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee****, the transferee must hold the property for the benefit of the person paying or providing the consideration."*

For Section 84 to come into play, there must be consideration passing from **A** to a vendor who in turn transfers the property to **B**. If it appears upon evidence that **A** contributed the money towards the purchase price fully intending that **B** must hold the property on trust for **A**, there will be a constructive trust resulting to the benefit of **A**. **A** will have a beneficial interest in the property provided his intention not to make a gift of the property to **B** emerges from evidence. In other words **A** the provider of consideration *qua* a Plaintiff must prove *a)* he contributed to the purchase price and *b)* he did not intend to have the transfer effected for the benefit of **B**. In addition to the proof that he paid the consideration, the Plaintiff must establish in terms of Section 84 that he intended to keep the beneficial interest for himself. There is a burden cast on a Plaintiff pleading a Section 84 trust to establish these ingredients-*1)* provision of money and *2)* no intention to give the beneficial interest to **B**-the transferee.

If **A** in the example is represented by the Plaintiff, the obvious question one would pose is-Did he provide the consideration for the property? Both the oral and documentary evidence in this case point to the fact that it was the father of the original Defendant Nimalasena, Chandrawathie (wife of the Plaintiff) and Kusumawathie (sister-in-law of the Plaintiff) who had paid the consideration for the transfer. The document marked **V5** establishes that it was the father of the Defendant who had paid the consideration. This is a report dated 4th September 1986 which preceded the execution of the deed of sale bearing No. 946. Even the deed of sale in its attestation makes reference to consideration for the purchase as having been made by Jamis Appuhamy the father of the Defendant.

On a preponderance of evidence, it is quite apparent that the payment of consideration by the Plaintiff has not been established and it is improbable that Section 84 of the Trusts Ordinance could come to the rescue of the Plaintiff in those circumstances. The essential and primary requirement of Section 84 which is payment by the Plaintiff towards the purchase price has not been proved on a preponderance of evidence and therefore a constructive trust cannot arise on proved facts in the case.

In ***Wijesundera v. Neela Wickremasinghe*** (2002) 2 Sri.L.R 307, the plaintiff-respondent instituted the action seeking a declaration that the defendant-appellant was holding the property in trust for the plaintiff-respondent. The defendant-appellant denied the said contention and sought a declaration that he is the owner. It was the position of the plaintiff-respondent, that the property was purchased in the name of the defendant-appellant, and on the same day it was mortgaged to the Bank and the plaintiff-respondent provided the money to the defendant-appellant to pay the instalments to the Bank.

The District Court held with the plaintiff-respondent. On appeal it was contended that it was the defendant-appellant who had paid the instalments to the Bank. The Court of Appeal held:-

(1) Under s. 84 the plaintiff-respondent in order to succeed has to establish (i) that the consideration was paid or provided by him, (ii) that the plaintiff-respondent did not intend to pay or provide such consideration for the benefit of the defendant-appellant.

(2) On the material available, it is difficult to reject the position that it was the defendant-appellant who had paid the instalments in respect of the loan secured by way of a mortgage to the Bank.

(3) The plaintiff-respondent failed to produce a single receipt relating to the payment of loan instalments from the commencement of payments. As the receipts were in the defendant-respondent's name, even the advance payments to the seller had been affected jointly.

Upon a conspectus of the foregoing it is crystal clear that the Plaintiff never made out a case of constructive trust at the trial and the learned District Judge of *Pugoda* misdirected herself on the law and facts when she proceeded to hold that the Defendant was holding the 1/3rd of the property on trust for the Plaintiff.

I would observe that once the paterfamilias of the family Jamis Appuhamy passed away the whole arrangement among the three children to secure the transfer in their names had supervened and in my view there is nothing unjust in that equitable arrangement. According to the testimony of Chandrawathie (the wife of the Plaintiff herself), it was the Plaintiff who had facilitated the partitioning of the land which benefitted her. Thus here was a Plaintiff who had acquiesced in the supervening arrangement and in my view this voluntary acquiescence on the part of the Plaintiff also disentitles him to invoke the equitable jurisdiction of this court.

In the circumstances I set aside the judgment of the District Court of *Pugoda* dated 8th December 2000 and allow the appeal of the Defendant-Appellant. The Plaintiff's case would thus stand dismissed.

JUDGE OF THE COURT OF APPEAL