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

Vairamuttu Palagapodi,

Mahiloormunai,

Kaluwanchikudi.

PLAINTIFF

C.A. Case No. 201/1998 (F)

D.C. Batticaloa Case No. 4228/L/1993

-Vs-

1. **Gnanamuttu Kanmani,**
2. **Palagapodi Alagaiah,**
3. **Samithamby Perinpapushpawathy,**
4. **Palipodi Ratnasingham**

All of Mahilloor, Kaluwanchikudi.

DEFENDANTS

AND NOW BETWEEN

Vairamuttu Palagapodi (Deceased)

of Mahiloormunai,

Kaluwanchikudi.

PLAINTIFF - APPELLANT

Palagapodi Balasundaram

Mahiloormunai,

Kaluwanchikudi.

SUBSTITUTED - PLAINTIFF - APPELLANT

-Vs-

1. **Gnanamuttu Kanmani,**
2. **Palagapodi Alagaiah,**
3. **Samithamby Perinpapushpawathy,**
4. **Palipodi Ratnasingham**

All of Mahilloor, Kaluwanchikudi.

RESPONDENTS

BEFORE	:	**A.H.M.D. NAWAZ, J.**
COUNSEL	:	V. Puvitharan with Subhani Kalugamage for the Plaintiff-Appellant. Mano Thevasagayam for the Defendant-Respondents.
Argued on	:	11.05.2015 and 2.07.2015
Decided on	:	30.05.2016

A.H.M.D. NAWAZ, J.

The Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") instituted this action against the 1st to 4th Defendant-Respondents (hereinafter sometimes referred to as "the Defendants") for a declaration of title to the land bearing Lot No.3453 situated at Mahiloor in Eruvil Pattu in the Batticaloa District which is morefully described in the schedule to the plaint, for ejectment of the Defendants, their agents and all those who claimed under them, for an order to set aside Deed No.14 dated 05.10.1987 on the ground of *laesio enormis*; and the deeds executed thereafter be declared null and void as having been executed to defraud and disentitle the Plaintiff to the said land and for costs.

The plaintiff's position was that the land in dispute originally belonged to his mother, one Kanthapodi Valliammai and the said Kanthapodi Valliammai died intestate and inadministrable estate leaving behind the Plaintiff as the sole heir and thus the Plaintiff became the owner of the said land. This position is not disputed by the Defendants.

The Plaintiff stated that he borrowed a sum of Rs.5,000/- from the 1st Defendant on 05.10.1987 and for securing of the repayment of the said sum of money he executed a purported transfer deed bearing No.14 dated 05.10.1987 and attested by S. Arulanantham, Notary Public, to be re-transferred on the repayment of the said sum of Rs.5,000/- and thus the 1st Defendant was holding the said land in trust for the benefit of the Plaintiff. The Plaintiff also takes up the position that the property was more than double the sale price but was sold at half the real value and therefore he is entitled to rescind the sale on the ground of *laesio enormis.*

The Defendants filed their joint answer and traversed that Deed No.14 was an outright transfer. Quite inappropriately as would be clear from my analysis of the facts later in the judgment, the Defendants also stated in their answer that Deed No.14 was a conditional transfer. Admittedly on the same day as Deed No.14 was executed, the 1st Defendant gave the Plaintiff a document marked as **D1**. This is an informal document by which the 1st Defendant undertook to effect a retransfer of the land in question within a period of two years if the Plaintiff paid him Rs.5,000/- with interest at 72% per annum. This writing was not notarially executed.

The Defendants further averred that since it was a *conditional transfer* it could not be construed as a trust and the claim of the plaintiff that the conveyance must be cancelled on the ground of *laesio enormis* cannot hold good because the claim of *laesi oenormis* is prescribed in one year.

Before going into the questions whether the transfer from the Plaintiff to the 1st Defendant is an outright transfer or a trust or a conditional transfer, I wish to first consider the claim of the plaintiff based on the ground of *laesio enormis*.

Knowledge of the Real Value of the Land

The principle of *laesio enormis* will not apply to a situation, where the seller was aware of the true value of the property at the time of the sale and execution of the deed and notwithstanding such knowledge, the seller proceeded to sell the property at a lesser price. The Plaintiff stated in his evidence that his mother became entitled to the land in dispute by a decree entered in Case No.502 of the

District Court of Batticaloa, and "since it was worth Rs.20,000/- and there was no other heir, I became the owner of the said land". From this evidence it is clear that the Plaintiff knew of the value of the land. He himself assessed the value at Rs.20,000/-. But his evidence is not clear whether this value was earlier to the sale or at the time of the sale. But the fact remains that the Plaintiff was aware that the land in question was worth more than Rs.5,000/- which he borrowed from the Defendants.

It is important for a person seeking a remedy on the principle of *laesio enormis* to establish that at the time he sold the property he did not know the actual value of the property in the open market. But a seller who knows the real value of the land is not entitled to rescission of the sale on the ground of *laesio enormis.* It is axiomatic that the burden is on the person claiming the benefit of the doctrine to prove the true value of the property in question. This may be done by expert evidence or by proving the market value at the time and place of sale. None of these has been satisfied by the Plaintiff in the case.

In other words it is not the law that where a proprietor, who is in a position to know the value of his property, sells it for less than half of what is afterwards held to be its true value, he is entitled to come into Court and claim rescission. It is clearly laid down in ***Voet***;

> *"A proprietor who knows the value of his property is not entitled to rescission merely by reason of the fact that the price at which he has sold the property is less than half its true value. The proprietor, in such a case, has only himself to thank for any loss he may have suffered. The case is otherwise where the property is sold at a price grossly disproportionate to its value. In that case the law is on the side of the party who stands to lose by the transaction, and not on the side of the party who stands to make an unconscionable profit".*[1]

It was held by this Court that it is incumbent on the Plaintiff to have established that she was not aware of the true value of the property for her to succeed on the plea of *laesio enormis* - ***See*** **Court of Appeal 216/76 (F) D.C. Kalmunai 875/L.**

This plea of *laesio enormis* will not be entertained when a party, knowing the true value of his property, sells it for less than half of such value. The principle of *laesio enormis* applies where the vendor was unaware of the true value of the land sold-

[1] *See* Voet III 18.05.17 *The Selective Voet Being the Commentary on the Pandects* (trans Gane) (1956)

see ***Sobana vs. Meera Lebbe and Another***[2] where the aggrieved party was aware, or ought to have been aware of the true value at the time of making the contract, the plea of *laesio enormis* would not lie.[3]

With regard to the value of the land in question, the evidence of the retired Grama Sevaka, Nallathambipody Thambirasa who testified at the trial must be adverted to. He said that the value of half an acre of land (vacant land) was about Rs.2,400/-, and the incumbent Grama Sevaka Chelliah Rasanayagam also said that the value of one acre was Rs.10,000/-. The evidence of these two witnesses was not contradicted by the Plaintiff. The land in dispute is 2 Roods and 20 perches, that is about half an acre and therefore, in view of the evidence of the above two witnesses, the fact that the land (half an acre) at the time of sale was worth Rs.5,000/- can be accepted. The Plaintiff has therefore failed to adduce any evidence to show that the value of the land was Rs. 10,000/- or more and that he was damnified to the extent of getting only half the price of the land. There is no evidence to show that he has been inadequately paid. I therefore reject the contention of the Plaintiff on this ground.

Before I next move on to the other issues in the appeal, let me set down some observations gleaned on *laesio enormis*.

Laesio enormis in South African Law

It is worth mentioning that the doctrine of *laesio enormis* constituted part of South African Common law but was soon abrogated in the Cape Colony by the General Law Amendment Act of 1879 and thereafter in the Free State by the General Law Amendment Ordinance of 1902. In the Union of South Africa *laesio enormis* was abolished by statute in 1952.[4] Morice states that the remedy was out of harmony with modern legal views: Although they are in favour of increasing the protection of the law against acts in bad faith, they are not in favour of interference with contracts entered into voluntarily and with the eye open.[5] But yet the doctrine obtains in full force and vigor in Sri Lanka-one of those rarest of jurisdictions where Roman-Dutch law prevails.[6]

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[2] 5 Ceylon Law Journal Reports 46

[3] See *Jayawardene v Amerasekera* (1912) 15 N.L.R 280; *Roff & Co., Ltd v Mosely* (1925) T.P.D 101; *Hoffman v Prinsloo and Hoffman* (1928) T.P.D 621.

[4] See Act 32 of 1952 s 25.

[5] See *Moriceon Sale in Roman-Dutch law with Reference to English, French and German Law* (1919) p.198.

[6] See *Bodiga v Nagoor* (1943) 45 N.L.R 1 at 4.

The expression "*laesio enormis*" used in the above passages refers to ***"laesio ultra dimidium vel enormis"*** which in Roman Law meant the injury sustained by one of the parties to an onerous contract when he had been overreached by the other to the extent of more than one half of the value of the subject-matter, as for example, when a vendor had not received half the value of property sold, or the purchaser had paid more than double value.

Pacta sunt servanda (contracts are to be kept)

On the basis of my finding that the Plaintiff has not established that he received less than half the value of the property, the maxim "*pacta sunt servanda*" which means "contracts are to be kept" would hold sway in this instance. It has to be observed in passing that when the plea of ***laesio enormis*** fails, the maxim "*pacta sunt servanda*" would apply and the Plaintiff would be bound by the contract of sale, subject of course to any other vitiating factors or restitutionary relief that might be pleaded by the Plaintiff to impugn the transaction. In fact ***laesio enormis*** also finds its place in English law under the umbrella rubric of uncoscionability.

Laesio enormis in the English Law of unconscionability

The English Law position has been best summed up by John R. Peden in "The Law of Unjust Contracts" published by Butterworths in 1982 at pages 28-29;

> *". . . . . Unconscionability represents the end of a cycle commencing with the Aristotelian concept of justice and the Roman law laesio ennuis which in turn formed the basis for the medieval church's concept of a just price and condemnation of usury. These philosophics permeated the exercise, during the seventeenth and eighteenth centuries of the Chancery Court's discretionary powers under which it upset all kinds of unfair transactions. Subsequently the movement towards economic individualism in the nineteenth century hardened the exercise of these powers by emphasizing the freedom of the parties to make their own contract. While the principle of pacta sunt servanda held dominance, the consensual theory still recognised exceptions where one party was overborne by a fiduciary or entered a contract under duress or as the result of fraud.* ***However, these exceptions were limited and had to be strictly proved.*** *It is suggested that the judicial and legislative trend during the last 30 years in both civil and common law jurisdictions has almost brought the wheel full circle. Both courts and Parliaments have provided greater protection for weaker parties from harsh*

contracts. In several jurisdictions this included a general power to grant relief from unconscionable contracts, thereby providing a launching point from which the courts have the opportunity to develop a modem doctrine of unconscionability..... "

The above passage shows how ***pacta sunt servanda*** (agreements must be kept) must be given effect to in law subject to the power of courts to vitiate a contract or transaction on the grounds of exemptions such as *laesio enormis*, fraud, duress, undue influence, illegality and existence of fiduciary obligations such as a trust. Unconscionability would lie at the root of a suit to vitiate a transaction and an unconscionable bargain brought about between the parties would be liable to avoidance owing to the umbrella doctrine of unconscionability.

Does such an unconscionable element exist between the parties? I have already disposed of the unconscionability alleged on the ground of ***laesio enormis***. Another ground smacking of unconscionability which was alleged in the plaint to invalidate Deed No.14 is the existence of a constructive trust. Issue No.3 framed in the case puts in issue the existence of a trust, though Deed No.14 dated 05.10.1987 (**P1**) is an out and out sale on the face of it.

Outright Transfer or a Constructive Trust

I would proceed to examine whether the Deed bearing No.14 is an outright transfer as alleged by the Defendant or whether it amounts to a constructive trust as alleged by the Plaintiff. In the process I would also discuss the question of conditional transfers that was raised by Counsel before the learned District Judge.

On the face of the deed there is no doubt that Deed No.14 (**P1**) is an outright transfer. The notary in his attestation has stated that the consideration was paid in his presence and that the 1st witness to the deed Nallathambipody Thambirasa also states in his evidence that the amount mentioned in the deed was paid by the Defendant and it was thereafter that the Plaintiff set his signature on the deed. The said deed was executed and read as an outright transfer.

Non notarial agreement (D1) – *parol a*greement

On the same day as the deed was executed i.e. 05.10.1987, an agreement was written stipulating a condition that if the plaintiff (vendor on the deed) returned the money with 72% interest per annum within two years, the 1st Defendant (the vendee on the deed) should retransfer the land. This non-notarial writing (*parol* agreement) was marked as **D1**. In fact the 1st Defendant has signed this non-notarial

document promising to retransfer the land if the Plaintiff returned the purchase price of Rs.5,000/- with 72% interest per annum. This document does not speak of a loan. Rather it is quite consistent with the deed of transfer which unequivocally evidences an outright sale. What is the effect of this *parol* agreement? Can this be used to contend that what took place between the parties was a conditional transfer? Or as the Plaintiff claimed in the trial, should this non-notarial document signed by the vendee (1st Defendant) lead to creation of a constructive contract within Section 83 of the Trust Ordinance?

Evidence has been led on both sides to show whether the repayment of Rs.5,000/- took place or not within two years. As I conclude presently, there is no satisfactory evidence that the Plaintiff paid back the sum of Rs.5,000/- with interest. Even assuming that the Plaintiff paid back but the 1st Defendant refused to re-convey the land, that breach of **D1** (breach of *parol* agreement) would not have been actionable as **D1** was not a valid *pactum de retrovendendo*[7] or a contract with a condition to re-convey.

Pactum de Retrovendendo (agreement to resell or reconvey)

I must straightaway dispose of the argument for a conditional transfer. No doubt the condition is that if the Plaintiff paid back Rs.5,000/- with 72% interest within two years from 1987, the 1st Defendant would retransfer the land. Unfortunately for the Plaintiff, this promise on the part of the vendee was embodied in a non notarial document (**D1**) which would not be binding on the parties. If the agreement to re-convey the land were to be binding, that agreement would have to be executed by way of a notarial conveyance. It is laid down in Section 2 of the Prevention of Frauds Ordinance that such a non-notarial document in respect of an immovable property is of no force or avail in law. Lascelles C.J elucidated the principle in the following passage of ***Amarasekera vs. Rajapakse***[8]***;***

> *"It is simply an agreement that the defendant, after having bought the land, must reconvey to the plaintiff. It is an agreement for an interest in land, and in order to be valid, it should have been embodied in a notarial document."*[9]

If there was a notarial agreement to re-transfer the land, E.F.N. Gratiaen J. declared in the case of ***Thambipillai vs. Muthucumarasamy:***

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[7] A conveyance with a condition that the property should be retransferred, if the purchase price is tendered within a certain period. This is what is popularly known as the "Moratuwa Mortgage". The Roman and Roman Dutch Law- Voet 18.3.7.

[8] (1911) 14 N.L.R 110

[9] Ibid at p.112

"Time is the essence of the contract in a pactum de retrovendendo. In such a contract it is not open to the Court to take the view that the transaction was in reality a mortgage and not a sale.[10]*"*

Gratiaen J. commented thus because in a *pactum de retrovendendo* there is a conditional sale and in order to recover back the land, the vendor in the sale must tender the money on time. He must comply with the condition which is precise as to time and the amount payable. If the vendee does not keep his promise to retransfer the land despite the timely payment, there is a suit that would lie at the instance of the vendor. This is the essence of a *pactum de retrovendendo.*

But in this case before me there is no *pactum de retrovendendo.* There is only an informal agreement on the part of the 1st Defendant to reconvey. Notwithstanding the absence of an actionable contract to reconvey, evidence was led by the Plaintiff to show a timeous payment but the Defendant led evidence to the contrary.

Evidence of Repayment of Rs.5,000/-

I would at this stage summarize the evidence on repayment and subsequent acts undertakes by the 1st Defendant. The Plaintiff stated in evidence that he had paid the money in April 1989 within 2 years of the sale and requested the 1st Defendant to retransfer the land, but the Defendant failed to do so. This action based on constructive trust was instituted only on 28.09.1993, after a lapse of 4 years from this alleged date of payment. I would not state that delay would defeat equitable remedies such as a declaration of a constructive trust. In any event the evidence of performance by the Plaintiff of repayment of the sum of Rs.5,000/- is not borne out by satisfactory evidence for the following reasons.

The informal agreement to reconvey the land (**D1**) is not denied by the 1st Defendant. The 1st defendant's position is that she asked the Plaintiff to repay the money but he had said he did not have money and she waited for 4 years, and since the Plaintiff failed to pay back, she made a complaint to the Grama Sevaka, which is marked as **D4**.

Subsequent acts undertaken by the 1st Defendant in relation to the land

Since the Plaintiff had failed to pay back the money, the 1st Defendant divided the land into four parcels, keeping one piece for her, and sold three parcels to the 2nd, 3rd and 4th Defendants and the evidence is that they are in possession thereof. That

[10] 58 N.L.R 387

the sale price of the said three parcels in 1990 was Rs.6,000/- per piece is not material, because as the time passes, the value of the land must have gone up in price. The three deeds were not produced in evidence though.

The evidence of the Plaintiff and his wife Kanapathipillai Alagamma was that they paid back the said amount in April 1989 on two occasions and got receipts for the payment from the 1st Defendant but subsequently, the 1st defendant's son came up to them and retrieved the receipt by force at gun point and as a result they could not produce the receipts to establish payment. The Plaintiff stated in evidence, *"I did not make any complaint in this regard as the defendant was a relation of mine. Police was not functioning, but I told the Grama Sevaka verbally and not in writing"*. If the 1st Defendant refused to retransfer after she received the money, it would be natural for a person like the Plaintiff to seek the assistance of the Grama Sevaka particularly at a time when the police was non-functional. If he could make a verbal complaint against the 1st Defendant, despite the fact that the 1st Defendant was his relation, what prevented him from making a written complaint? If he had made a written complaint to the Grama Sevaka, it would have been decisive on the question of repayment. No explanation was given by the Plaintiff as to why he did not make a complaint in writing. On the other hand the 1st Defendant states that she went to the Plaintiff and demanded payment of the money in order to retransfer the land but as he was non-responsive, she sought the Grama Sevaka's assistance to get the money back. She subsequently made a complaint to the Grama Sevaka on 03.05.1990. This complaint was marked as **D4**. Grama Sevaka Chelliah Rasanayagam states in his testimony that he went to question the Plaintiff on the complaint of the 1st Defendant and the plaintiff's response was entered in **D5.** I have to state that though this document is missing from the record, the Grama Sevaka's testimony remains uncontradicted.

Nonpayment of interest

As against the complaint of the 1st Defendant to the Grama Sevaka (**D4**) which is dated 03.05.1990, the evidence of the Plaintiff that he repaid the money in April 1989 on two occasions cannot be accepted, because, when **D1** (the *parol* agreement to reconvey the land) speaks of repayment of Rs.5,000/- with 72% interest, how could the 1st Defendant accept a mere sum of Rs.5,000/- without any interest? The Plaintiff and his wife did not mention any additional payment they paid as interest. They said they paid Rs.2,500/- on 04.04.1989 and the balance sum of Rs.2,500/- before the end of the same month. The evidence on these purported

payments shows that no interest was added. Therefore, the evidence of the Plaintiff and his wife about the repayment is unsatisfactory and cannot be accepted without any independent evidence.

I therefore hold that the Plaintiff has failed to establish the payment of Rs.5,000/- with interest as stipulated in **D1**-the *parol* agreement to pay back Rs.5,000/- with interest which might have resulted in the retransfer of the land. Though the agreement **D1** was informal, the assertion that the plaintiff discharged his obligations under the *parol* agreement has not been established.

There was another opportunity that arose in the case to test the credibility of the story of repayment in the form of a decisory oath but it does not seem to have been pursued.

Decisory Oath

In the course of the plaintiff's evidence he has suggested that if the 1st Defendant could take an oath that she did not receive money from him, he would pay the money in Court. In the same breath he also said that he was prepared to take an oath in the Kovil (temple) to the effect that he paid the money. But these oaths had not been pursued and no oath has been taken by either party. The pursuit of decisory oath would have thrown some light on the veracity of some of the rival positions taken by the parties and it is noteworthy to observe that the celebrated jurist C.G. Weeramantry in volume II of his tome *The Law of Contracts* states the following on decisory oaths:

> *"Disputes are often settled in Ceylon on the basis of a challenge thrown by one party to the other to take an oath at some recognized place of worship, in which event the challenger agrees to give up his claim or to settle on agreed terms. Such agreement, when there is a pending action, will be one in accordance with Section 408 of the Civil Procedure Code, and would receive the sanction of court, so long as it is not illegal or contra bonos mores.*[11]

Be that as it may, though the *parol* agreement (**D1**) is unenforceable because of the lack of formalities as prescribed by Section 2 of the Prevention of Frauds Ordinance, I deemed it appropriate to indulge in the above discussion on the rival versions of repayment as the informal agreement (**D1**) would however form the basis for my

[11] See pages 704-705 of Volume II which cite *William v Nagoor Adumai* (1945) 46 N.L.R 375, *Sinnapody v Mannikkan* (1949) 53 N.L.R 9 at 12; *Tirugnasambanthapillai v Namasivyampillai* (1925) 26 N.L.R 344: Also see *P.V. Suppiah v Brampy and Another* 6 C.L.J 62.

next consideration of the issue of constructive trust on which the Plaintiff has pivoted his case for a declaration of title. The above discussion will also show the distinction between a notarial agreement to re-convey which is called *pactum de retrovendendo* and a non-notarial agreement to re-convey such as **D1**. Whilst the *pactum de retrovendendo* gives rise to a cause of action provided there is a timely tender of money, a non-notarial agreement to reconvey such as **D1** may not afford a basis to ground a cause of action for specific performance of the promise to re-convey the land, as a promise to convey interests in a land has to be notarially executed.

But a non-notarial document such as **D1** is often relied upon by a vendor to support a case of constructive trust against the vendee and it is exactly what the Plaintiff sought to do in the court *a quo*–the District Court of Batticaloa.

Constructive Trust-Is it made out on the facts?

It is often said that in regard to deeds it is more correct to speak of an executant's "manifestation of intention" rather than his intention. What is manifested in the deed is the intention of effecting an out and out transfer for a consideration of Rs.5,000/-.

> *"In construing the terms of a deed, the question is not what the parties may have intended, but what is the meaning of the words which they used"*[12]

In this case, the terms of Deed No.14 are quite clear in that it declares itself to be a deed of outright transfer. One cannot get behind the words used in the deed namely it is a sale upon which legal title to the land passed to the 1st Defendant. It smacks of nothing but a sale. After having sold the land as an outright transfer, is it open to the Plaintiff to claim that there exists a trust between him and the 1st Defendant giving rise to a fiduciary relationship between the duo? In other words does the 1st Defendant hold the property in trust for the Plaintiff? Does the beneficial interest or title yet inheres in the plaintiff though he passed the legal title to the 1st Defendant? This is not the first time that our courts have been confronted with this legal conundrum.

Equity will not allow a statute to be an instrument of fraud.

It is a recognized maxim of equity that equity will not allow a statue to be used as an instrument of fraud. In other words a plaintiff may rely on the lack of formalities

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[12] *See Fernando v Jossie (1956) 58 N.L.R 114 at 115 citing Lord Parmoor in Maharaja Manindra Chandra Nandi v Raja Durga Prashad Singh* (1917) A.I.R 23 P.C

in the transfer of rights as a way of re-claiming property. Section 5(1) of the Trust Ordinance states that a trust in relation to immovable property is valid only if it is created by a last will or by a non-testamentary instrument such as a deed in writing signed by the author of the trust or the trustee, and notarially executed. Thus the Provisions of the Prevention of Frauds Ordinance are reflected in Sections 5(1) and 5(2) of the Trust Ordinance. Despite these provisions which impose formalities for creation of an express trust, if the transferor can prove that the transfer was upon trust and not a sale, the Court would declare the transferor entitled to a conveyance of the property. This is by virtue of Section 5(3) of the Trust Ordinance, by which the Provisions of the Trust Ordinance will not be applied if the insistence of formalities would have the effect of a fraud upon the transferor. The maxim of equity I cited above is mirrored in Section 5(3) of the Trust Ordinance. In other words Sub-Section (3) of Section 5 of the Trust Ordinance allows exceptions to Sections 5(1) and 5(2) of the Trust Ordinance.

So if the 1st Defendant promised to retransfer the land in **D1** but refused to do so upon payment, would that be considered a fraud on the Plaintiff? Drieberg J. answered this question in the negative. In ***Don vs. Don,***[13] there was a *parol* promise to execute a written contract. The Respondents (the purchasers of property from the appellants) in the case refused to sign the written contract. The refusal to execute the written contract was held not to be fraud on the Appellants. In other words the principle that equity does not allow the Statute of Frauds to be used as an instrument of fraud does not apply to cases where the fraud alleged is merely a refusal, after a *parol* agreement to sign a written one. In this instant case there was a *parol* promise to execute a re-conveyance upon repayment. So a refusal to perform the *parol* promise to reconvey the land, even after repayment, would be no fraud of which this Court can take cognizance. Since I have concluded that the Plaintiff has not proved payment and even if there was payment after which the 1st Defendant refused to carry out his *parol* promise, the Plaintiff would not be able to establish fraud and make out a trust in terms of Section 5(3) of the Trust Ordinance. But Section 5(3) has been applied to establish trusts in other circumstances-*see* ***Valliammai Atchi vs. Abdul Majeed***[14] wherein there was an unconditional transfer by notarial deed of immovable property by **A** to **B**. In pursuance of a verbal agreement **B** was to hold the property in trust for **A**. **B** was to remain in possession of the property and to pay out of the income of the property certain specified debts

[13] 31 N.L.R 73

[14] (1947) 48 N.L.R 289 (P.C); (1944) 45 N.L.R 169 (S.C).

and interests to himself and to others, and to reconvey the property to **A**. **B** died and his widow claimed to hold the property free of the trust. **A** brought an action for a declaration of trust and for consequential relief. The Privy Council held, affirming the judgment of the Supreme Court, that oral evidence was admissible to establish the trust; that the formalities for trust were laid down by Section 5 of the Trust Ordinance and not by Section 2 of the Prevention of Frauds Ordinance, and the act of the widow in seeking to ignore the trust and to retain the property for the estate was to effectuate a fraud; and that under Section 5(3) of the Trust Ordinance, even a writing was unnecessary and Sections 91 and 92 of the Evidence Ordinance, therefore, had no application. It has to be noted that this case establishes an important fact. Sections 91 and 92 of the Evidence Ordinance have no application in a case governed by Section 5(3) of the Trust Ordinance, which, after laying down the formalities for a trust, declares that the rules would not apply where they would operate so as to effectuate a fraud.

Other than Section 5(3) of the Trust Ordinance which has no application to this case, there is another gateway through which vendors have in the past sought to establish trusts through *parol* evidence. This is of course with recourse to Chapter IX of the Trust Ordinance.

In other words even though the Plaintiff is incapable of using the refusal of the *parol* promise in **D1** to establish fraud on the part of the 1st Defendant, the *parol* is certainly admissible to establish a trust through another gateway in the Trust Ordinance namely Section 83 of the Trust Ordinance.

In fact the celebrated jurist L.J. Mark Cooray who authored the seminal work ***on the Reception in Ceylon of the English Trust*** (1971)[15] declared thus in relation to the chapter on constructive trust;[16]

> *"Chapter IX has effected a fundamental change in that fraud (discussed in article 33) which as we have seen before 1918 was a prerequisite for the admission of the parol to resulting trust is after 1980 not relevant. The claimant has to make out a case falling within sections 83 to 96.....The change in the post-1918 law has not always been appreciated, and there are a minority of cases after 1918 which continue to follow the pre-1918 cases in*

[15] This was a revised and expanded version of a dissertation for which the learned author was awarded the Degree of Doctor of Philosophy by the University of Cambridge.
[16] *Ibid* at p 111

the construction of sections 83 and 84, and in which fraud was considered relevant." (Sic)

Does Section 83 of the Trust Ordinance include an Agreement to Reconvey?

I have shown that an agreement to reconvey can be notarially executed or may be embodied in a *parol* agreement such as **D1** in this case. If it is the former, the Plaintiff must establish a timely payment and can sue on the enforceable instrument as it is a *pactum de retrovendendo*. If it is the latter, there is no bar to the Plaintiff to use the *parol* agreement to establish a constructive trust under the chapter on constructive trusts. Upon a careful reading of a slew of cases, I deduce one principle. *The parol agreement alone would not be sufficient to establish a constructive trust. The parol agreement is only one of the attendant circumstances referred to in Section 83 of the Trust Ordinance*. It would not establish trust on its own. It must be supplemented by other *"attendant circumstances"* which lead irresistibly to the construction of a constructive trust. This seems to be the pivotal prescription of Section 83 of the Trust Ordinance.

Section 83 of the Trusts Ordinance states 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 retention of the beneficial interest in the transferor has to be established by attendant circumstances which include the *parol* evidence. But the *parol* evidence alone is not conclusive of a constructive trust. The *parol* must be supplemented and substantiated by other *attendant circumstances*. What constitutes attendant circumstances was clarified in ***Muttammah vs. Thiyagaraja***[17]***;***

> *".....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."*

Notable precedents bring out the necessity to establish attendant circumstances along with a non-notarial writing.

[17] (1960) 62 N.L.R 559

A precedent which established that a non-notarial agreement to retransfer property is not trust is ***Saverimuttu vs. Thangavelautham***[18]. The Privy Council held that *the informal agreement relied on by the Appellant in the case amounted not to a trust but to a contract for the transfer of immovable property and was therefore invalid* as it contravened the Provisions of Section 2 of the Prevention of Frauds Ordinance. In other words an informal writing to re-transfer property is neither a trust nor does it create a valid contract to re-transfer property. Counsel for the Appellant in that case argued that if **B** transfers land to **A** for a consideration by an effective notarial document and **A** as part of the same transaction agrees orally or by a non-notarial agreement to transfer the land to **B** for the same or another consideration, a trust in favour of **B** arises. Their Lordships of the Privy Council did not agree. Their Lordships thought that ***further facts*** clearly indicative of a trust must be proved before a trust can be said to arise. These further facts are the other attendant circumstances as contemplated in Section 83 of the Trust Ordinance.

In the judgment delivered by Mr. L.M.D. de Silva[19] (the Sri Lankan Puisne Justice who had the privilege to sit in the Privy Council), the Privy Council referred to the case of ***Perera vs. Fernando***[20] where it was held that where a person transferred a land to another by a notarial deed purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage and that the transferee agreed to reconvey the property on payment of the money advanced. It was further held in that case that *"the agreement relied on amounted not to a trust but to a pure contract for the purchase and sale of immovable property"*. I must add here that though the three distinguished members of the Privy Council called it a pure contract for the purchase and sale of immovable property, it was an unenforceable contract as it contravened Section 2 of the Prevention of Frauds Ordinance. Their Lordships of the Privy Council were of opinion that ***Perera vs. Fernando***[21] set out correctly the law of Ceylon.

There is another reason why the informal agreement will not per se give rise to a trust apart from its invalidity as a contract to retransfer land. Dean J's statement in

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[18] (1954) 55 N.L.R 529: See (1951) 54 N.L.R 28 (S.C).

[19] Puisne Justice of the Supreme Court in 1933 and again so between 1952 and 1953. The judgment of the PC was delivered on July 13, 1954.

[20] 17 N.L.R 486

[21] *Ibid*

the High Court of Australia in ***Muschinski v. Dodd***[22] strikes me as pertinent.

> *"A claim for the imposition of a constructive trust in order to provide a remedy for a disappointed expectation engendered by a representation made in the context of incomplete contractual negotiations is, in my opinion, misconceived and cannot be sustained by reliance on unconscionable behavior on the part of the representor"*

There is vagueness and incompleteness in the informal promise such as **D1** which cannot convert the absolute transfer into a trust, merely because it engenders an expectation in the transferor that the transferee will keep his promise upon payment of the principal and interest. **D1** is so incompletely negotiated that it results in an infructuous document conferring no automatic conversion of the original deed of sale into a trust. But as recognized by precedents of this country, *it has a utilitarian value. It can be treated as one of the attendant circumstances within Section 83 of the Trust Ordinance and it has to be supplemented with further facts or attendant circumstances for the deed of transfer to be construed as a constructive trust.*

Their Lordships of the Privy Council in ***Saverimuttu vs. Thangavelautham***[23] had occasion to allude to another precedent ***Valliammai Atchi vs. Abdul Majeed***[24] and observed:

> *"The decision does not in terms or otherwise detract from the force of the view expressed by the Board in the case* ***Adicappa Chetty vs. Caruppan Chetty***[25]*. In that case it was sought to establish by oral evidence that a person who held a land under a notarially attested document held it in trust for another. It was held that parol evidence was inadmissible. It was further held that the agreement in respect of which parol evidence was led sought to "create something much more resembling a mortgage or a pledge than a trust" and was of no force or avail in law if it contravened Section 2 of the Prevention of Frauds Ordinance."*

There are distinguishing features between ***Valliammai Atchi vs. Abdul Majeed*** and ***Saverimuttu vs. Thangavelautham*** in that in the former case "Chief among the purposes of that trust was that the transferee should enter into possession, collect

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[22] (1985) 160 CLR 583 at 615
[23] *Supra*
[24] *Supra*
[25] 22 N.L.R 169

the income and therewith pay off the debt due to himself and debts due to certain other persons. It was thereafter that the transferor was to reconvey the property to the transferee."

Their Lordships of the Privy Council in the course of their Judgment in ***Saverimuttu vs. Thangavelautham*** also referred to the existence of common elements with the case of ***Valliammai Atchi vs. Abdul Majeed*** namely, that in each case *there was an alleged agreement by a transferee of land to reconvey to the transferor and the transferor in each case was indebted to the transferee at the time of the transfer.* But their Lordships were of the view that those elements themselves did not establish a trust and that they established only an agreement to convey. Their Lordships also pointed out that the judgment in ***Valliammai Atchi vs. Abdul Majeed*** did not indicate that these common elements are in all cases sufficient to give rise to a trust.

Thus, it is clear that in the instant appeal before me the *parol* agreement by the 1st Defendant to reconvey the land to the Plaintiff on the payment of Rs.5,000/- with interest does not give rise to a trust. *Further facts*, clearly indicative of a trust must be established before a trust can be said to arise. Further, the *parol* agreement relied on by the Plaintiff amounts to a contract for the transfer of immovable property which is invalid and cannot be enforced as it contravenes Section 2 of the Prevention of Frauds Ordinance. I would get on to the next question of whether the plaintiff proved *further facts or attendant circumstances* and my conclusion is in the negative for the reasons which become apparent shortly.

Attendant Circumstances

It is certainly not possible to itemize a comprehensive list of such ***attendant circumstances*** as will come within the meaning of those words within Section 83. Let me cite some indicia that have been laid down by courts as attendant circumstances or further facts that are required to establish a constructive trust in terms of Section 83 of the Trust Ordinance. These circumstances will go to show whether the transferor of a land did or did not intend to dispose of the beneficial interest in such land. These guidelines are not exhaustive though. I will only set out the attendant circumstances that are relevant to the deed of transfer in question.

Parol promise to retransfer

As I have shown this promise may be an oral promise 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 vs. Thangavelautham***[26] and the rationale behind it. On the utility of a non-notarial instrument to operate as an attendant circumstance – *see* ***Premawathi vs. Gnanawathi***[27] and ***Thisa Nona and Three Others vs. Premadasa***[28].

Where an adequate purchase price has not been paid

If the transferor of property did not receive adequate purchase price it is certainly an important attendant circumstance. The transferor can bring in the *parol* agreement and show by the further fact of inadequate consideration that he reserved the right to buy back the property within a specific period and therefore did not intend to part with the beneficial interest. In such a situation the *parol* agreement would become quite relevant to raise the probability of the absolute transfer becoming a constructive trust.

I have concluded that the plea of *laesio enormis* raised by the Plaintiff must fail for the reasons stated in the anterior part of this judgment. The Plaintiff could not establish by evidence that the 1st Defendant paid him less than the true value of the land. In the circumstance this attendant circumstance was not established.

Was interest paid by the transferor to the transferee?

If interest is payable to the transferee by the transferor and it is paid as promised, that may be an attendant circumstance. The payment of interest may show that the transferor did not intend to dispose of the beneficial interest even though he signed the deed of transfer. In this case the *parol* agreement specified an interest component but the Plaintiff never adduced proof of payment of interest. I have also concluded that there is no satisfactory evidence that the Plaintiff paid the principal at all within the specified period. So this attendant circumstance too was not established.

Did the transferor continue in possession?

By remaining in possession, it could not be said that a person who retained possession has parted with the beneficial interest. The fact that after the execution of the deed of transfer, the transferor remained in possession of the land would be

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[26] *Supra*
[27] (1994) 2 Sri.LR 171
[28] (1997) 1 Sri.LR 169

an attendant circumstance. It would show that the transferor did not intend to dispose of the beneficial interest, although he signed the deed of transfer. If the transferor has improved the land at his own expense after having executed the deed of transfer, that will make it more probable that the transferor has retained the beneficial or equitable title. But I must state that continual possession by the transferor may not be an attendant circumstance if the transferor becomes a lessee of the transferee after the deed of transfer and proceeds to possess the land. We are not unaware of contemporaneous leases that are executed by transferees in favour of transferors immediately after the deed of transfer and in such a situation the continual possession of the transferor cannot be taken into account as an attendant circumstance, unless the transferor-lessee can show that such a lease is spurious as no consideration passed between the parties. For a combined operation of a non-notarial instrument and continued possession of the transferor to establish a constructive trust-*see* ***Thisa Nona and Three Others vs. Premadasa***[29] and observations thereon by Dissanayake J. in ***Carthelis vs. Ranasinghe.***[30]

As I have observed before, there is no continued possession of this land by the plaintiff. The evidence is that immediately upon transfer, the 1st Defendant entered into possession and he subsequently parted with his legal title of some portions of the land to the 2nd, 3rd and 4th Defendants. These items of evidence go to negative any kind of beneficial title being retained by the Plaintiff.

So my decision flows from the foregoing. It is axiomatic that such attendant circumstances or further facts as are required by Section 83 of the Trust Ordinance do not exist in this case or co-exist with the non-notarial agreement. I have found that there was adequate price paid by the 1st Defendant for the purchase. Immediately upon transfer, the transferee (the 1st defendant) entered into possession and continued until she parted her own title, as was alleged, to the other defendants.

In the circumstances the original deed of transfer remains an out and out sale. Now that the *parol* agreement stands alone without any attendant circumstances, a curious upshot emerges. The *parol* agreement would be prohibited by Section 92 of the Evidence Ordinance because a constructive trust does not arise on the facts without *further facts or attendant circumstances* and if the original deed remains an outright sale without a constructive trust arising on the facts, Section 92 of the

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[29] *Supra*
[30] (2002) 2 Sri.LR 359

Evidence Ordinance would place an embargo on the *parol* evidence to vary the terms of the deed of sale-*see* the 5-bench decision of the Supreme Court ***William Fernando vs. Roselyn Cooray***.[31] Section 92 does not bar *parol* evidence only to establish a trust by showing that the transferor did not intend to pass the beneficial interest in the property.[32] But it has to be supplemented by other attendant circumstances. If other attendant circumstances have not been established, the *parol* agreement would have lost its utility. So one simply disregards the *parol* agreement in the end, though it remains on the record.

If the deed of transfer remains a deed of sale to all intents and purposes, the Plaintiff cannot follow the property into the hands of 2nd, 3rd and 4th Defendants just as much he cannot do so against the 1st Defendant.[33]

I therefore hold that there is no sufficient evidence to uphold the Plaintiff-Appellant's proposition that a constructive trust has been established. I proceed to disallow the appeal and affirm the conclusion reached by the learned District Judge of Batticaloa. The judgment would be entered for the Defendant-Respondents as prayed for in their joint answer.

JUDGE OF THE COURT OF APPEAL

Appeal dismissed.

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[31] (1957) 59 N.L.R 182-see a discussion on Section 92 of the Evidence Ordinance in *Dayawathie v Gunasekara* (1991) 1 Sri.LR 115 (Dheeraratne J) and *Karunawathie v RoboSingho* (1983) (2) Sri.LR 407 at 416.

[32] See Dheeraratne J in *Dayawathie v Gunasekara* (1991) 1 Sri.LR 115.

[33] See Section 65(1) of the Trust Ordinance on this aspect of the matter and *Warnakulasuriyage Charlert v Don Wimal Harischandra Gunathilaka* (SC Appeal No 157/2011) decided on 4.4.2014 for a discussion on trust property coming into the hands of third parties-see 2014 Supreme Court Law Reports (1) 537 at 551 compiled by Athula Bandara Herath.