

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

C. A. No. 1339/99 (F)

D.C., Galle No. 12920/L

Manoj Nuwan Kumara Maitipe
No. 245/7, Liyanagedarawatta, 2nd
Lane, Maitipe, Galle

PLAINTIFF

VS.

- 1. Samaraweera Maitipe**
No. 560, Mosque Road,
Godage Mw,
Anuradhapura
- 2. Mallika Malanie Maitipe**
No. 26/15,
Liyanagedarawatta, 2nd
Lane, Maitipe, Galle
- 3. Heeraluwattege
Somawathie**
No. 245/7, 2nd Lane,
Maitipe, Galle
- 4. Themiya Bandu Maitipe**
No. 26/15,
Liyanagedarawatta,
2nd Lane, Maitipe, Galle
- 5. Padmini Maitipe**
No. 26/15,
Liyanagedarawatta,
2nd Lane, Maitipe, Galle
- 6. Wijaya Gamini Maitipe**
No. 245/7, 2nd Lane,
Maitipe, Galle
- 7. Sumanawathie Maitipe**
Asiri tailors, Heenatige,
Thalpe
- 7A. Melaegoda Gamage Victor**
Upasaka Mahatha Bare,
Samaya Abakolahena,
Thalpalakanda,
Berapanathara, Urubokka.

7B. Mealgoda Gamage thushari**Samanthilaka,**

Upasaka Mahatha Bare,

Samaya Abakolahena,

Thalapalakanda,

Berapanathara, Urubokka

**7C. Melaegoda Gamage Mervin
Victor**

Dehiya Godellawatta,

Hingatigala, Thalpe, Galle

7D. Malaegoda Gamage**Lakmini Sewwandi**

Labuduwa, Sri Vijeyarama

Temple Road, Labuduwa

**7E. Malaegoda Gamage Yuhan
Victor**

Dehiya Godellawatta,

Hingatigala, thalpe, Galle

8. Pugunawathei Maitipe

Wijeyananda Mw,

Thalagaha, Akmeemana

9. Banduwathie Maitipe

Maitipe tailors,

No. 99, Main Street, Galle

10A. Sandara marakkalage**Vinitha Kalyani**

No. 360/1, Mahamodara,

Galle

10B. Gihan Mahiruk Maitipe

No. 360/1, Mahamodara,

Galle

10C. Niyusha Panchani Maitipe

No. 360/1, Mahamodara,

Galle

10D. Mayumi Rangika Maitipe

No. 360/1, Mahamodara,

Galle

11. Asoka Iranganie Maitipe
Wanadura Road, Panawila,
Galle

12. Chandrawathie Maitipe
Koratuwatta, Labuduwa, Galle

DEFENDANTS

AND NOW

Manoj Nuwan Kumara Maitipe
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PLAINTIFF-APPELLANT

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Labuduwa, Sri Vijeyarama
Temple Road, Labuduwa

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 Galle

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 Koratuwatta, Labuduwa,
 Galle

DEFENDANTS-RESPONDENTS

BEFORE : **M. M. A. GAFFOOR, J.**

COUNSEL : Esara Wellala Plaintiff-Appellant

Rohan Sahabandu, P.C. with Surekha Withanage for
 the 2nd Defendant-Respondent

ARGUED ON : 25.06.2018

WRITTEN SUBMISSIONS

TENDERED ON : 28.08.2018 by both Parties

DECIDED ON : **05.02.2019**

M. M. A. GAFFOOR, J.

The Plaintiff-Appellant (hereinafter referred to as the 'Appellant') filed the above styled case bearing No. 12920/L in the District Court of Galle against the Defendants-Respondents seeking *inter alia*,

- a. a declaration that the Deed of transfer No. 3008 dated 15th January 1981 is subject to a constructive trust;
- b. that the properties described in the schedule to the plaint are held on trust by the 1st Defendant-Respondent in this case in favour of the heirs of Hinni Appuhamy Maitipe;
- c. that an order be made for the 1st Defendant-Respondent to accept Rs. 7000/- with interest and transfer the properties mentioned in the said deed to the heirs of Hinni Appuhamy Maitipe, and if he fails to do so, an order be made to the Registrar of the District Court to effect such transfer; and
- d. for a declaration that the Deeds attested after the said Deed No. 3008 dealt in paragraphs 15 and 16 of the plaint be declared null and void.

The Appellant and the Defendant-Respondents are siblings; 3rd Defendant-Respondent is the mother of all the Parties of the case.

Though the case has been filed against the 1st Defendant-Respondent, he was absent and unrepresented and further had not filed any answer in this case since the case fixed *ex parte* against him.

The 2nd, 3rd, and 4th Defendant-Respondents (hereinafter sometimes collectively referred to as the 'Respondents') by their joint answer dated 18th October 1995, have specifically denied that the Deed No. 3008 (**P3**) is subjected to any trust and

sought a dismissal of the Appellant's action. Whilst the 10th Defendant-Respondent by filing his answer on or about 18th October 1995 admitted the plaint of the Appellant.

At the trial, 21 issues were raised on behalf of the Appellant and 3 issues were raised on behalf of the Respondents.

The Appellant commenced giving evidence on 17th February 1998, after the conclusion of his evidence, the mortgagee/vendee of the Deed No. 3008, Nanayakkara Badungodage Samaparapala gave evidence on behalf of the Appellant. Whereas the 2nd Defendant-Respondent gave evidence on behalf of the respondents and she was the only one who gave evidence on behalf the Respondents.

After conclusion of the trial, the learned District Judge of Galle by his judgment dated 07th September 1999 (vide page 171 of the appeal brief) dismissed the Appellant's action.

Being aggrieved by the said judgment, the Appellant has preferred this appeal to set aside the judgment and for the relives set out in the plaint.

According to the Appellant, when he explains the circumstances leading to the filling of this action can briefly as follows:

Due to certain financial difficulties his father Hinni Appuhamy had mortgaged (conveyed) the property which he purchased by Deed No. 893 (P1) more fully described in the schedule to the plaint to one Bandungodage Samaparapala who is a friend of him for only Rs. 3000/- by Deed No. 1118 (P2).

According to the Appellant, in the said Deed there was a condition that the Appellant's father shall repay the value of the Deed with interest within a year in order to reclaim the property. Therefore, the Appellant is in a position that the said Samaparapala held the property on trust until the Appellant's father reclaimed the said property over years.

The Appellant stated that on 15.01.1981, the 1st Defendant-Respondent on the request of the father reclaimed the said property only for Rs. 5000/- on behalf of the family by virtue of Deed No. 3008 dated 15.01.1981, therefore, the appellant further taken up a position that the intention of the parties was to held the property worth of over Rs. 500,000/- on trust for the family and the father who was the original owner of the property.

He further stated that later after the death of the father, the 1st Defendant-Respondent had transferred the said property among the family members in breach of said constructive trust. It's further noted that the 1st Defendant-Respondent conveyed the property to the 2nd Respondent by virtue of Deed No. 648 dated 13.08.1990 who is the eldest sister of the family and she divided and sold the property as per her intentions. The Appellant also stated that even though the market value of the property in 1981 was over Rs. 500,000/- the 1st Defendant-Respondent was able to reclaim said property for such lower price was due to the constructive trust and the consent of the father. Therefore, the Appellant also argued that if the mortgagee Samarapala wanted to sell this property he should have sold it for the market value.

In contrast, the 2nd Defendant-Respondent submitted that the said Samarapala has not been holding the said property as a trust in favour of Hinni Appuhamy due to the fact the time period specified in the said deed which has been exceeded, Hinni Appuhamy had become no longer the owner of the property. They further

submitted that when there was a conditional transfer there would be no constructive trust after the lapse of fixed term as there was no contract to retransfer. Therefore, the 2nd Defendant-Respondent is in a position that there should be an existing contract for Section 93 of the Trusts Ordinance to operate, but in this case, there was no existing contract, as there was no demand or action brought for retransfer this property because, the right to retransfer has lapsed.

Having heard the both parties' submissions, the pivotal issue in this case is whether the said (transactions) Deeds Nos. 1118 (**P2**) and 3008 (**P3**) were subjected to a constructive trust or whether they were absolute transfers.

To ascertain whether the Appellant was successful in establishing the necessary ingredients to prove a constructive trust, a careful attention on Section 83 of the Trusts Ordinance is important.

Section 83 of the Trusts Ordinance reads thus:

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

It is the burden of the person who claims or tries to prove the cover under the above Section 83 to establish that he/she (any person) did not intend to dispose of the beneficial interest of the property transferred by the deed, put in suit. Section 83 referred to above, permits Court to infer such decision upon considering the **attendant circumstances** that led to the execution of the deed. This accustomed

position in law had been discussed in many cases in the apex Courts. (See: *Muttammah Vs. Thiyagarajah* [(1960) 62 NLR 559], *Piyasena Vs. Vansue* [(1997) 2 SLR 311], and *Thisa Nona And Three Others Vs. Premedasa* [(1997) 2 SLR 169]

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

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

In *Piyasena Vs. Vansue* (*supra*), it was held that:

(1) “Even though a transfer is in the form of an outright sale it is possible to lead parole evidence to show that facts exist from which it could be inferred that the real transaction was either-

(i) money lending, where the land is transferred as a security as in this case or;

(ii) a transfer in trust-in such cases section 83 would apply.

(2) A trust is inferred from attendant circumstances. The trust is an obligation imposed by law on those who try to camouflage the actual nature of a transaction. When the attendant circumstances point to a

loan transaction and not a genuine sale transaction the provisions of section 83 of the Trust Ordinance apply.”

(3) “The behaviour of the plaintiff-appellant with Samagi Mudalali in the background and the defendant-appellant just before and after the signing of P2 and P3 and even after the end of the period of lease, show them to be that of rapacious investors and persecuted borrower respectively rather than a genuine purchaser and a over holding tenant.

(iii) It cannot be reasonably be inferred consistently with the attendant circumstances that the defendant-appellant intended to dispose of the beneficial interest to the property in question.”

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

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

However, as regard the issue that consideration for the transfer was paid by the 1st Defendant to Samarapala at the interest of Hinni Appuhamy, when giving reference to Section 84 of the Trusts Ordinance, it was argued by the Defendants-Respondents that the provisions of the Trusts Ordinance are not applicable to a situation of this nature.

Section 84 of the Trusts Ordinance reads thus:

“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.”

Counsel for the 2nd Defendant-Respondent was submitted that, in order to establish a constructive trust in terms of the above section, the law requires to prove that the consideration mentioned in the deed in question had been paid or provided by a person other than the original transfer in a deed of transfer and also that other person who paid the consideration did not intend to give the beneficial interest to the transferee of the property subjected to in that deed. When such circumstances are established then it is that other person who paid or provided the consideration has the right to claim that the person who provided the money and not to the Hinni Appuhamy or his children.

Further, the 2nd Defendant-Respondent brought an interesting fact that in any event the Appellant who was only 4 years old at the time of the conditional transfer was made and he was not able or not in a position to lead evidence, that there were attendant circumstances to the alleged trust.

It was in those circumstances, the learned District Judge has reached a conclusion that the Appellant has failed to indicate the attendant circumstances in his plaint to prove that there is a trust in favour of Hinni Appuhamy and his heirs.

Therefore, the learned District Judge has correctly held that the Samarapala has obtained good title to the land by land by Deed of Transfer No. 1118 executed for

valuable consideration and has transferred the clear title of the said property since he was an absolute owner of the said property. And, he did not hold the property on trust since time period specified in the said deed has been exceeded.

In all the circumstances of this case, this Court in a view that the Appellant has failed to show a proper case to interfere with the judgment of the learned District Judge. Therefore, I do not wish to interfere with the judgment.

Accordingly, the appeal is dismissed without Costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL