

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

Don Peiris Sriwardena,  
of Dambahena,  
Omara,  
Walasmulla.

PLAINTIFF-APPELLANT

C.A. Case No. 908/2000 (F)

D.C. Walasmulla Case No.  
L/357/1994

-Vs-

Rajapaksha Pathirage Rathnapala,  
of Muruthawela,  
Walasmulla.

DEFENDANT-RESPONDENT

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

COUNSEL : Rasika Dissanayake for the Plaintiff Appellant  
Shantha Jayawardene with Dinesh De Silva  
and Chamara Nanayakkarawasam for the  
Defendant Respondent.

Decided on : 26.07.2018

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

The Plaintiff Appellant (hereinafter sometimes referred to as the Plaintiff) instituted this action by a Plaint dated 8.12.1994 against the Defendant

Respondent (hereinafter sometimes referred to as the Respondent) praying for a declaration of title and recovery of possession of the land described in the Plaint. The following salient points were averred *inter alia* in the plaint.

- a) He had purchased 3 contiguous allotments of a land containing in extent of 18 Acres 1 Rood and 25 Perches from its original owner namely one Wilfred De Silva by a deed bearing No. 554 attested by W.G. Dharmadasa Notary Public for a sum of Rupees 5000/-.
- b) The said land was thereafter divided into two lots namely Lot 1 and Lot 2 by Plan No. 1374 dated 1993 made by G. Warnakulasuriya Licensed Surveyor,
- c) Thereafter Lot No. 02 of the said land was sold to the Defendant by deed bearing No. 72 and dated 8.11.1993 attested by one Champa Punchihewa Notary Public.
- d) The Defendant commenced to interrupt the peaceful possession of the Plaintiff of the remaining portion namely Lot 1 of the said land. Lot 1 is the subject matter of the law suit.

The Defendant filed his amended answer on 3.4.1997 and admitted the corpus and the title of the Plaintiff to the subject matter. While controverting the other averments in the plaint, he sought a dismissal of the action and a declaration that the Plaintiff was holding Lot No.01 in trust for the benefit of the Defendant under Section 09 of the Trust Ordinance.

The Defendant by his amended answer raised the following positions *inter alia*;

- a) he entered into possession of the entire land in 1982, adversely in opposition to the rights of the Plaintiff's predecessor in title namely Wilfred De Silva,
- b) owing to the close friendship that existed between the Plaintiff and the Defendant they had both agreed verbally to purchase the said land in the name of the Plaintiff but the purchase would be for the benefit of the Defendant and accordingly a half (1/2) share (Rs.250,000/-) of the purchase price was paid by the Defendant to the Plaintiff,

- c) the Defendant had further agreed to reimburse the balance by authorizing the Plaintiff to cut down and sell timber in the said land and once it is fully reimbursed, the Plaintiff agreed to transfer the title of the entire land to the Defendant,
- d) though the Defendant made repeated requests of the Plaintiff to transfer the entire property, the Plaintiff transferred only ½ share of the property by executing the deed bearing No. 72 in favour of the Defendant,
- e) despite many a request, there had been persistent refusal and therefore the Plaintiff was unjustly enriched,

As the above narrative shows the Plaintiff had bought the entire property in 1992 for Rs. 500,000/-. It would appear on the assertion of the Defendant that half the consideration namely Rs. 250,000/- was paid by the Defendant. The Plaintiff transferred Lot No. 02 in 1993 to the Defendant in satisfaction of half the consideration. The Defendant Respondent seeks a declaration of trust to the other half of the property alleging an oral agreement between him and the Plaintiff Appellant whereby the Plaintiff has allegedly agreed to transfer the other half as well to the Defendant Respondent. In other words having got approximately 9 acres of the 18 acre land, the Defendant now seeks beneficial ownership of the other 9 acre portion.

The Additional District Judge of *Walasmulla* has by his judgment dated 18.10.2000 rejected the plaint on the basis that the Plaintiff has not established his case for a declaration of title to Lot 01 on a balance of probability. In other words the learned Additional District Judge concluded that the Plaintiff was a constructive trustee of the Defendant and was holding this property in trust for the Defendant. It is against this judgment that the Plaintiff Appellant has preferred this appeal.

The question arises whether a constructive trust can be declared in favour of the Defendant Respondent in relation to Lot 01 which is the subject matter of this action. The Defendant himself admitted giving only Rs. 250,000/- for the total consideration of Rs. 500,000/-. Having paid only half of the consideration, can the Defendant now stake a legal title to the other half of the land? Needless to say, it is only Section 84 of the

Trust Ordinance that would permit him to claim the other half namely Lot 01 provided the Defendant Respondent satisfies the ingredients of Section 84 of the Trust Ordinance. Section 84 of the Trust Ordinance goes as follows;

“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.”

If the Defendant Respondent alleges that the Plaintiff Appellant is holding Lot 01 for the benefit of the Defendant Respondent, the Defendant Respondent must prove that Wilfred Silva transferred Lot 01 or half of the entire property for a consideration paid by the Defendant Respondent. There is no proof that the Defendant Respondent provided the entire consideration to Wilfred De Silva in 1992 to enable the Defendant Respondent to claim the entire land. For his alleged consideration of Rs 250, 000, the Defendant had already got lot 2 in 1993. Then how would trust exist for lot 2 in his favor? He must establish the property was transferred in the name of the Plaintiff for a consideration provided by him. There is no proof that his consideration, if at all it was for purchase, was sufficient for lot 2 as well. Obviously there is no such proof and it is well nigh impossible for the Defendant to allege a constructive trust in respect of lot 1, as the Defendant Respondent conceded at the trial that he had provided only Rs. 250,000/- to the Plaintiff Appellant in 1992.

There is indeed conflicting evidence as to the purpose for which this sum of Rs 250, 000 was given. Whether this sum of money was for the purpose of contributing to the purchase price of the entire land or it was just a loan for the Plaintiff figures as two conflicting versions. Whilst the Defendant alleged that it was a part of the purchase price, the Plaintiff claimed that the purchase price itself was his own money. In other words according to the Plaintiff, the sum of Rs. 250,000 was only a loan from the Defendant Respondent to the Plaintiff Appellant. If it is a loan, the borrower of

immediately becomes the owner of the lent money and the only obligation on the part of the borrower is to return the money to the lender upon demand.

In a relationship of creditor and debtor which, as the assertion of the Plaintiff Appellant goes as between him and the Defendant Respondent, there cannot be a trust relationship. In other words on the relationship that the Plaintiff Appellant alleged namely that he only borrowed Rs. 250,000/- from the Defendant Respondent, a trust cannot arise. It is only a relationship of creditor and debtor- see the cases of Foley vs. Hill (1848) 2HLC 28, 9ER 1002; Joachimson vs. Swiss Banking Corporation (1921) 3 KB 110 . Both these cases are to the effect that once a loan is given, the lent money becomes the property of the debtor. So, when the Plaintiff Appellant stated that he bought the 18 acre land from Wilfred De Silva with his own money, he was disavowing any suggestion that the Defendant contributed Rs 250,000 for the purchase price.

On 8.11.1993 the Plaintiff Appellant transferred Lot 02 in an extent of 9 acres to the Defendant Respondent for the sum of Rs. 250,000/- which he had borrowed from the Defendant. In other words the Defendant got his share of the property for the money that he had expended on the Plaintiff Appellant. Notwithstanding this legal position, the Defendant Respondent seeks Lot 1 as well on an alleged *parol* agreement that he had with the Plaintiff. This *parol* agreement was to the effect that the Plaintiff had to transfer Lot 01 as well and he could reimburse himself by cutting teak and satin wood. This oral agreement was never spoken to by any of the witnesses summoned by the Defendant.

The witnesses called by the Defendant said that they were unaware of such an agreement between the Plaintiff and the Defendant. It is improbable and implausible for the Defendant to state that the Plaintiff was holding the other half in trust for him. If at all the constructive trust has to be pleaded under Section 84 and the Defendant Respondent has failed to establish the ingredients of Section 84.

The Plaintiff had already divested himself of one half of the land to the Defendant and naturally the other half must belong to the Plaintiff. But when the Plaintiff filed *re*

*vindicatio* action to Lot 1, the Defendant was seeking to defeat it, by pleading a constructive trust. On the evidence the Defendant has not established constructive trust and therefore his claim for a declaration that Lot 1 belongs to him must fail. No doubt *parol* evidence can be proved to establish a trust and there is no proof of a *parol* evidence that Lot 01 too would also be transferred.

The Defendant did not provide consideration for the purchase of the other half of the property and therefore, the constructive trust set up under Section 84 would fail. In my view if at all this unproved *parol* evidence was to be understood, the Defendant must be taken to have pleaded this *parol* agreement to enforce the alleged promise of the Plaintiff that he would transfer lot 1 too provided he had recouped his balance sum of Rs 250,000 by cutting teak and satin wood. Where did these tree stand? were they on lot 1 or lot 2? If they were on Lot 1, how can the Defendant claim ownership of trees on a land which does not belong to him? In any event was there any recoupment to the benefit of Plaintiff by the process of chopping trees? was there a quantification as to how much the Plaintiff made by cutting trees? It was not proved at all.

If at all, this *parol* agreement cannot lay the foundation for a trust but at the most if it is to be believed, it would amount to an oral promise to a transfer a land to the Defendant and an oral promise to transfer land would be invalid in view of Section 2 of the Prevention of Frauds Ordinance. The learned District Judge has adverted to the attestation clause of the deed bearing No. 72 in favour of the Defendant and this attestation clause refers to a date of execution of the previous deed by which the Plaintiff obtained a conveyance of the entire land. This attestation clause speaks about payment of Rs. 250,000/- to the Plaintiff Appellant by the Defendant, but it does not say this payment was for the purpose of contributing part of the purchase money of the entire land. Thus, a reference to Rs. 250,000/- in the attestation clause as having been given by the Defendant Respondent in favour of the Plaintiff Appellant on 15<sup>th</sup> of December 1992 is quite equivocal and could equally corroborate the assertion of the Plaintiff that the Defendant gave him a loan of Rs. 250,000/- on 15<sup>th</sup> of December 1992.

On an overall consideration of the evidence led in this case I take the view that the Plaintiff obtained title to the entirety of the property in 1992 and in 1993 he transferred a divided half portion namely Lot 2 to the Defendant for the sum of Rs. 250,000/-. There is no evidence at all that the Plaintiff was holding Lot 1 for the benefit of the Defendant on a constructive trust.

Therefore, the unlawful entry into Lot 1 has not been explained by the Defendant when the title of the Plaintiff to Lot 1 has been admitted. In a *rei vindicatio* action when the title resides in the Plaintiff, the burden shifts to the Defendant to show as to how lawful his possession is in regard to Lot 1. In the absence of such an explanation and owing to any absence of a constructive trust in favour of the Defendant Respondent, the Plaintiff could not have been dismissed by the learned Additional District Judge of *Walasmulla*. In the circumstances I set aside the judgment of the learned Additional District Judge of *Walasmulla* dated 18.10.2000 and allow the Appeal of the Plaintiff Appellant.

**JUDGE OF THE COURT OF APPEAL**