

PIYADASA
v
SUDU BANDA

COURT OF APPEAL
AMERATUNGA, J. AND
BALAPATABENDI, J.
CALA NO. 294/01
D.C.WELIMADA NO.197/SP1
OCTOBER 1, 2002

Trusts Ordinance, sections 84, 112 (1) (ii), 112(2) and 112(5) – Vesting order – Relief under section 112(1) (ii) – Is it by regular procedure or summary procedure? – Action – Cause of action – Order – Decree of court and order of court – Civil Procedure Code, sections 5, 6, 8, 217, 387 and 595.

The question to be determined was whether an action filed in seeking reliefs under section 112(1) (ii) could be maintained under regular procedure.

The District Court held it was by way of regular procedure.

Held :

- (i) Where a person seeks a vesting order under section 112 of the Trusts Ordinance, the procedure must be by way of summary procedure and not by way of regular action. Section 595 of the Civil Procedure Code gives an indication of what the proper procedure should be.
- (ii) A regular action ends always in a decree. An action where an order /order nisi could be obtained is by way of summary procedure. A decree may command the person against whom it operates to do certain acts or it may declare a right or status. It is difficult to see how a vesting order could be incorporated in a decree entered at the end of a regular action.

APPLICATION for leave to appeal from an order of the District Court of Welimada.

Cases referred to:

1. *Marikkar v Lebbe* - 52 NLR 193.
2. *Hunter v Sri Chandrasekera* - 52 NLR 54
3. *Balasunderam v Raman* - 76 NLR 259 at 262

Hemasiri Withanachchi for defendant-petitioner.

Gamini Jayasinghe with *Jayantha de Silva* for plaintiff-respondent.

Cur. adv. vult

November 08, 2002

BALAPATABENDI, J.

The plaintiff-respondent instituted an action in the District Court on 23.11.2000, praying for the following reliefs, in the plaint. 01

a) a “vesting order” under section 112(1) ii of the Trusts Ordinance directing the defendant-petitioner to transfer the properties morefully described in the schedule to the plaint, in favour of the plaintiff-respondent.

b) to nominate a suitable fit and proper person or the Registrar of the District Court under section 112(5) of the Trusts Ordinance to transfer and effect the vesting order.

c) costs and such other reliefs as the Court thinks fit.

The plaintiff-respondent in his written submissions admits the fact that the procedure adopted by him was regular procedure although an affidavit had been filed with the plaint.

The plaintiff-respondent averred in his plaint, that he has paid the consideration to purchase of undivided shares of the property mentioned in the deed No.13501 dated 07.07.1982 although the deed was executed in favour of his brother the defendant-petitioner. And the defendant-petitioner is holding the said property in trust. The defendant-petitioner has been served with summons, directing him to file answer. The defendant-petitioner in his answer dated 02.5.2001 took up the preliminary objection as to the procedure adopted by the plaintiff-respondent to wit "That an application for vesting order under section 112(i) (ii) of the Trusts ordinance, without seeking any other reliefs should be made by way of summary procedure and not by way of regular-procedure, therefore the plaint is liable to be dismissed in *limine*".

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The learned District Judge made an order on written submissions filed by both parties on 27.07.2001 and rejected the preliminary objection raised, and permitted the plaintiff-respondent to proceed with the action under regular procedure.

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This appeal was preferred against that order.

Section 112(1) ii of the Trusts Ordinance states that "In any of the following cases, namely,

1) Where it is uncertain in whom the title to any trust property is vested; or

ii) Where a trustee or any other person in whom the title to trust property is vested has been required in writing to transfer, the property by or on behalf of a person entitled to require such transfer, and has willfully refused or neglected to transfer the property for twenty eight days after the date of the requirement.

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The Court may make an order (in this Ordinance called a "vesting order") vesting the property in any such person in any such manner or to any such person in any such manner or to any such extent as the Court may direct".

Also section 112(5) states that "In all cases in which a vesting order can be made under this section the Court may, if it is more

convenient, appoint a person to transfer the property, and a transfer by that person in conformity with the order shall have the same effect as an order under this section, and every person so appointed for the purposes of all transactions, proceedings, and formalities incidental to the said transfer shall have all the powers and capacities of the trustee or other person in whom the trust property was vested, and shall be deemed to be the duly authorized attorney of such trustee or other person for the purposes aforesaid.” 50

The question to be decided in this case, is whether an action filed in seeking reliefs under section 112(1) ii could be maintained under the regular procedure.

The contention of the defendant-petitioner, was that the action of the plaintiff-respondent as averred in the plaint, was misconceived in law, and the procedure adopted (regular procedure) was irregular and bad in law. 60

The contention of the plaintiff-respondent was that the plaint filed by him in this action, based on a cause of action, instituted under regular procedure to which an application for relief by way of a ‘vesting order’ under section 112(1)ii of the Trusts Ordinance has been tacked on. Section 84 of the Trusts Ordinance states that:

“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”. 70

On a perusal of the plaint filed by the plaintiff-respondent it is apparent that the facts averred in the plaint elicit a transaction that comes within the provisions of section 84 of the Trusts Ordinance. In those circumstances the plaintiff-respondent could have claimed reliefs under section 84 of the Trusts Ordinance, for declaration under regular procedure.

In *Marikkar v Lebbe* ⁽¹⁾ It has been held that “Under section 84 of the Trusts Ordinance, the plaintiff is entitled to a *declaration*, that the defendant held the property as a trustee for the plaintiff and to a conveyance of the premises by the defendant to the plaintiff”. 80

The para (9) of the plaint states that 'the cause of action accrued to the plaintiff (respondent) was under section 112(1)ii of the Trusts Ordinance, and had prayed for an *Order of Court* against the defendant (petitioner) to transfer the said property to the plaintiff (respondent), by way of a 'vesting order.'

The plaintiff-respondent has cited in his written submissions the case, *Hunter v Sri Chandrasekara*⁽²⁾. In *Hunter v Sri Chandrasekera (supra)*, It has been held that "Where a person asks for a vesting order under section 112 of the Trusts Ordinance, without asking for further remedy on a cause of action, the procedure must be by way of summary procedure and not by way of regular action." In the same case, Dias, J said that: "In my opinion where a person asks for a vesting order under section 112 of the Trusts Ordinance, without asking for any further remedy, the procedure is by way of summary procedure and not by way of regular action. By proceeding by way of regular action the petitioner who moves for a vesting order under section 112 would lose the vital and fundamental benefits of section 112(2). The class of cases for which section 112 was designed are those in which the court would act summarily and speedily, and not by means of a protracted regular action. Section 595 of the Civil Procedure Code gives an indication of what the proper procedure in a case like this should be. If in regard to the appointment and removal of trustees summary procedure is necessary, it would appear to be equally necessary when it becomes the duty of the Court to vest a person with the status of trustee. The relief indicated in section 112(5) appears to be appropriate to summary procedure than to regular procedure."

In *Balasundaram v Raman*⁽³⁾, Wimalaratne, J. observed that "A 'vesting order' is one that could more appropriately be incorporated in a *final order* made at the conclusion of summary procedure, under section 387 of the Civil Procedure Code, which read thus "The Court, after the evidence has been duly taken, and the petitioner and the respondent have been heard shall pronounce its final order in the matter of petition." A regular action, on the other hand ends, always in a *decree*. A decree may command the person against whom it operates to do certain acts or it may declare a right or status - section 217 of the Civil Procedure Code. It is difficult to see how a vesting order could be incorporat-

ed in a decree entered at the end of a regular action. I am therefore 120
of the view that when a person asks for a 'vesting order' under section 112, without asking for any further relief, the appropriate procedure is by way of summary procedure under chapter xxiv of the Civil Procedure Code."

In *Balasundaram v Raman (supra)* in the Court of Appeal (then the apex Court) a bench of three judges held that "the petitioner was *prima-facie* entitled to initiate proceedings for a 'vesting order' under section 112 of the Trusts Ordinance. When a vesting order is prayed for, summary proceedings are more appropriate, for such proceedings end in an *order* and not in a *decree* as in a regular 130
action. An application under section 112 is not an action under section 5 of the Civil Procedure Code."

Therefore, I am of the view that it is a settled principle of law that when the plaintiff- respondent instituted his case under the Trusts Ordinance and solely asked for relief under section 112(1)ii of the Trusts Ordinance, and has not asked for any further remedy or relief, he should have instituted proceedings under summary procedure.

The learned District Judge in his order has misconceived section 8 of the Civil Procedure Code (Amendment, No.53 of 1980). 140
Section 8 of the Civil Procedure Code states that "Save and except actions in which it is by this Ordinance or any other law specially provided that proceedings may be taken by way of summary procedure *every action* shall commence and proceed by a course of regular procedure, as hereinafter prescribed."

Section 5 of the Civil Procedure Code defines 'an action' as, 'action' is a proceeding for the prevention or redress of a wrong.

Section 6, states:- "Action" is, every application to Court for relief or remedy obtainable through the exercise of Court's power or authority, or otherwise to invite its interference, constitutes an 150
action.

Every action is based on a 'cause' of action - which ends in a 'decree' or an 'order'.

'Order' - means the formal expression of any decision of a civil court, *which is not a decree*. (but there is an exception- An

order rejecting a plaint is a decree within the definition of a decree).

A person who instituted an action under section 112 of the Trusts Ordinance, moves Court for a vesting 'order' though there is no specific procedure prescribed in section 112 of the Trusts Ordinance. It is implied that, an action where a 'decree' could be obtained is by way of regular-procedure (in a regular-action) 160

An action where an 'order' or 'nisi order' could be obtained is by way of summary procedure.

Therefore, It is obvious that a plaintiff who asks for only a 'vesting order' under section 112 of the Trusts Ordinance - at the end he should get an 'order' of court, but not a 'decree' of Court- And to get an 'order' or (order nisi) of Court the procedure should be summary proceedings.

For the reasons set out in my judgment, I set aside the order made on 27.7.2001 by the learned District Judge as he has erred in law, by upholding that the plaintiff-respondent could proceed with the action under regular procedure. Plaint filed under regular-procedure is rejected. Appeal is allowed without costs. 170

AMARATUNGA, J. – I agree

Application allowed.