

**SOMAWATHI DE ZOYSA ALIAS KUMARASINGHE
V.V.
JAYASENA FERNANDO**

SUPREME COURT
S. N. SILVA, C. J.,
DE SILVA, J.
AND WEERASOORIYA, J.
S. C. APPEAL NO. 19/2000
C. A. 673/1988
D. C. MT. LAVINIA 650/ZL
2ND JUNE AND 4TH AUGUST, 2003

Declaratory Action – Defence of constructive trust – Plaintiff's claims to be a bona fide purchaser without notice of trust – Burden of proof – Trust Ordinance, sections 65, 66 and 84 – Lack of evidence of trust – Plaintiff's right to declaration of title.

The plaintiff-respondent ("the plaintiff") instituted action against the defendant appellant ("the defendant") for a declaration of title to a land consisting of separate portions, namely the northern and the southern portions. The plaintiff had purchased the northern portion of the land on 01.12.1979 from the former husband of the defendant. The defendant had left the husband on 23.02.1979.

The defendant claimed that prior to her separation from her husband the defendant had sold a land for Rs. 5000/- and two days later namely, on 24.10.1978, her former husband had purchased the aforesaid northern portion of the land for Rs. 5000/- paid by her. Hence the said land which the plaintiff purchased was held in trust for her (in terms of section 84 of the Trust Ordinance). Under section 65 (1) of the Ordinance she had a right to follow the said land into the hands of the plaintiff who had purchased it from the trustee. She did not file an action for that purpose. However, in terms of section 66 (1) of the Ordinance, the plaintiff was not liable to suit if he was a *bona-fide* purchaser without notice of the trust.

The District Judge held with the defendant and dismissed the plaintiff's action. On appeal, the Court of Appeal held that the burden of proof under section 66 (1) as to whether the plaintiff purchased the land *bona fide* without notice of the trust was on the beneficiary and not on the transferee (the plaintiff). Nevertheless the court set aside the judgment of the District Judge given in favour of the defendant.

Held :

- (1) The burden of proof under section 66(1) is on the transferee. The Court of Appeal erred in holding that the burden was on the beneficiary.
- (2) However, the findings of the Court of Appeal that on a consideration of the entire evidence the conduct of the defendant was not that of a person who had provided purchase money to her former husband to purchase the Northern portion of the land in dispute and that the plaintiff had no notice of the alleged trust at the time of the impugned purchase were correct.
- (3) The appeal of the defendant – appellant should be dismissed.
- (4) On the question of the burden of proof under section 66(1) of the Trust Ordinance –

Held :

Per Weerasuriya, J.

“The provisions of a statute must be construed with due regard to the object to be achieved and the mischief to be prevented. Where two views are possible an interpretation which would advance the remedy and suppress the mischief to be prevented is to be preferred”

APPEAL from the judgment of the Court of Appeal

Rohan Sahabandu for defendant-appellant

Amarasiri Panditharatne for plaintiff-respondent

Cur. Adv. vult.

June 15, 2004

WEERASURIYA, J.

The defendant-respondent-appellant (“the defendant”) was granted special leave to appeal on the matters set out in paragraph 9 (i), (j) and (k) of the petition. They read as follows :

- (9) (i) that the interpretation placed by the Court of Appeal on Sections 65 and 66 of the Trust Ordinance was erroneous in that it required the defendant to plead and prove the negative.
- (9) (j) that the decision of the Court of Appeal to interfere with the findings of the trial judge was entirely due to the erroneous view taken by the Court of Appeal on the burden of proof and the Court Appeal made no reference to Section 98 of the Trust Ordinance.
- (9) (k) that the findings on facts by the Court of Appeal cannot be supported on an examination of the entirety of the evidence.

Facts in brief

The plaintiff-appellant-respondent (“the plaintiff”) instituted action against the defendant for a declaration of title to the land described in the schedule to the plaint which constituted two separate portions of land being the northern portion and the southern portion, purchased upon two deeds (P2 and P3) and the ejection of the defendant. The plaintiff purchased the

northern portion of the land from the (former) husband of the defendant and the southern portion from T. Dias. The defendant claimed that before she separated from her (former) husband she sold a property belonging to her for Rs. 5000/- and her (former) husband purchased the northern portion of the land, two days later namely, on 24/10/1978 for Rs. 5000/- with her money. The defendant therefore pleaded in her answer that her (former) husband held the subject matter of this action in trust for her and sought a declaration to that effect.

It was common ground :

- (a) that the (former) husband of the defendant purchased the northern portion of the subject matter of this action in extent 12.5 perches for Rs. 5000/- on 24/10/1978 from T. Dias upon deed No. 9166 (P1).
- (b) that the defendant and husband resided on the said land after the purchase of the same till 23/02/1979.
- (c) that the (former) husband of the defendant sold the property to the plaintiff for a sum of Rs. 5000/- on 01/12/1979 upon deed No. 9816 (P2).
- (d) that the plaintiff purchased an equivalent extent of 12.5 perches of the same land which formed the southern portion on 20/11/1979 from T. Dias upon deed No. 9781 (P3).

The learned District Judge upheld the defendant's position and held that the property was subject to a trust in favour of the defendant and dismissed the action. The plaintiff thereafter appealed against the judgment of the District Court, and the Court of Appeal by its judgment dated 26/05/1999 allowed the appeal and entered judgment for the plaintiff as prayed for in the plaint.

Section 65 and Section 66 of the Trust Ordinance :
(Paragraph 9 (i))

There is no controversy that the claim of the defendant that the land in dispute was held by her (former) husband in trust for her was based in

terms of the provisions of Section 84 of the Trust Ordinance, which lays down that where property is transferred to one person for a consideration paid or provided by another one, 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 such consideration.

It is well accepted that a beneficiary under a trust has a personal remedy against a trustee for loss caused by a breach of the trust. Section 65 (1) of the Trust Ordinance provides an additional remedy to a beneficiary to follow the trust property into the hands of a third party where trust property has been disposed of by the trustee. This section enacts that where property comes into the hands of a third party inconsistently with the trust, the beneficiary may institute a suit for a declaration that the property is comprised in the trust. Though the remedy available to the beneficiary is merely a declaration, this would effectively prevent the third party (transferee) from exercising his proprietary rights in respect of the property.

It is significant that Section 66 (1) makes provisions for a third party to obtain the property free of the trust on proof of certain circumstances. This section lays down that nothing in Section 65 (1) entitles the beneficiary to any right in respect of the property in the hands of a transferee who in good faith for consideration purchases the property without notice of the trust either when the purchase money was paid or when the conveyance was executed.

Having regard to the provisions of Section 65 (1), there is no dispute that the burden of establishing a constructive trust in terms of Section 84 of the Trust Ordinance lies with the defendant. The crucial question in this appeal is on whom does the burden of proof lie in terms of Section 66 (1) of the Trust Ordinance.

The provisions of a statute must be construed with reference to their context and with due regard to the object to be achieved and the mischief to be prevented. Where two views are possible an interpretation which would advance the remedy and suppress the mischief it contemplates is to be preferred.

Section 65 (1) of the Trust Ordinance seeks to protect a beneficiary from a breach of the trust, by alienation of the property by making provisions

for a beneficiary to follow the property into the hands of a third party. The provisions of Section 66 (1) of the Trust Ordinance seek to protect a *bona fide* purchaser for value who had no notice of the trust. In the light of the provisions of Section 66 (1), to take the property free of any trust there must be proof that the transferee was a *bona fide* purchaser for consideration and that he had no notice of the trust. To place the burden of proof to come within these provisions on the beneficiary, would be to frustrate the object of obtaining a declaration that the property is comprised in the trust in terms of Section 65(1) of the Trust Ordinance. Therefore to advance the remedy provided by Section 65 (1) to a beneficiary and to suppress the mischief which is sought to be avoided by breach of the trust, the burden of proof should be placed on the transferee. For the above reasons I hold that the burden of proof in terms of Section 66(1) of the Trust Ordinance to prove the existence of circumstances bringing the case within its provisions lies on the transferee. The Court of Appeal has taken the mistaken view that the burden lies with beneficiary (defendant).

The alleged erroneous finding by the Court of Appeal

Paragraph 9 (j) & (k).

These related to two fundamental issues, namely :

- (1) Whether the defendant's (former) husband held the property in trust for the defendant; and
- (2) Whether the plaintiff was a *bona fide* purchaser for consideration without notice of the trust.

Learned District Judge held that the defendant's (former) husband purchased the northern portion of the subject matter upon deed No. 9166 on 24/10/1978 (P1), with the money advanced by the defendant. This conclusion rested on the testimony of the defendant and from the inference drawn from the following circumstances.

- (1) that the defendant sold a property belonging to her on 22/10/1978 for Rs. 5000/- and

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- (2) that the defendant's (former) husband purchased the northern portion of the subject matter just two days later namely, on 24/10/1978 for Rs. 5000/-.

Learned District Judge accepted the testimony of the defendant and rejected the version of the husband that he purchased the land using his money and the money given to him by his father and members of his family.

The Court of Appeal whilst conceding that at first glance it would appear that the defendant provided the money, considered the following material as well in respect of the conduct of the defendant *vis-a-vis* the property, which had been overlooked by the learned District Judge.

- (a) that the defendant left her husband on 23/02/1979.
- (b) that the defendant's (former) husband sold the property in dispute to the plaintiff on 01/12/1979 namely, nine months after their separation.
- (c) that during this period the defendant had not called upon her (former) husband to reconvey the property.
- (d) that the defendant failed to protect her rights in terms of the Registration of Documents Ordinance by entering a caveat.
- (e) that the defendant did not file action against her (former) husband for a declaration that the property is subject to a trust in her favour.
- (f) that the defendant in her answer filed in the divorce action filed by her (former) husband did not aver that this property was subject to a trust in her favour.

The Court of Appeal held having considered all the circumstances that the conduct of the defendant was not the conduct of a person who had provided the consideration for the purchase of the property.

Upon a close examination of all the circumstances I hold that the Court of Appeal was justified in arriving at the above finding.

Learned District Judge had held that the plaintiff was not a *bona fide* purchaser for value and had notice of the trust mainly due to two reasons.

- (1) that the plaintiff having made aware of the dissension between the defendant and her husband took advantage of it and purchased the property for a low price.
- (2) that when the plaintiff informed the defendant's former husband that the defendant had got into possession of the property, he merely told him to file action.

The Court of Appeal had considered the following material on this issue.

- (1) that the plaintiff had purchased the southern portion of this land similar in extent on 20/11/1979 for Rs. 5000/-.
- (2) that the defendant's (former) husband purchased the northern portion of the land nearly one year earlier for Rs. 5000/- and sold it to the plaintiff for the same amount.
- (3) that there was no material to establish that the plaintiff was aware of a trust in favour of the defendant since the property was purchased by the plaintiff nine months after their separation.
- (4) that the alleged possession of the defendant of the land in dispute at the time of purchase by the plaintiff would have alerted him to the risk of entering into litigation and consequently there was no need for him to complain to the defendant's (former) husband of the alleged possession by the defendant.
- (5) that there was no need for the plaintiff to complain to the defendant's (former) husband, in view of her assertion that she was in possession at the time of the purchase of the property.
- (6) that the admission by the defendant (page 283 of the brief) that she left her (former) husband on 23/02/1978 corroborated the testimony of her husband that she left him on 23/02/1978 and established the position of the plaintiff that there was no one in possession of this land at the time of his purchase.

It is not possible to come to the conclusion that the defendant had left the land on 23/02/1978 by solely relying on the answer appearing at page 283 of the brief, in view of the contrary position of the defendant both in her examination in chief and in re-examination.

Section 3 (j) of the Trust Ordinance has to be considered on the question of notice of the trust by the plaintiff.

“3 (j) a person is said to have notice of a fact either (i) when he actually knows that fact, (ii) or when, but for willful abstention from inquiring or gross negligence, he would have known it, (iii) or when information of the fact is given to or obtained by any person whom the Court may determine of having been his agent for the purpose of receiving or obtaining such information”.

On the available material it is not possible to hold that the plaintiff had notice of the trust by applying the criteria spelt out in Section 3 (j).

The Court of Appeal had proceeded to evaluate the evidence led at the trial and had drawn certain inferences from the conduct of the defendant *vis-a vis* the trust property and held that the purchaser had no notice of any interest of the defendant in respect of the property. In the light of the above material the contention of the defendant that the Court of Appeal had failed to consider Section 98 of the Trust Ordinance has no merit. For the above reasons I hold that the Court of Appeal had correctly held that the plaintiff had no notice of the trust at the time of his purchase of the property.

For the foregoing reasons, I dismiss this appeal. However, I make no order as to costs.

S. N. SILVA, C. J. – I agree.

J. A. N. DE SILVA, J. – I agree.

Appeal dismissed