HEMAWATHIE SAHABANDU
VS.
GUNASEKERA

COURT OF APPEAL.
MS. EKANAYAKE, J.,
W. L. R. SILVA, J.
CA 476/95 (F).
DC MT. LAVINIA 1954/L.
MAY 18, 2005.
JUNE 1, 2005.
NOVEMBER 8, 2005.
JANUARY 23, 2006.

Reivi Vindicatio action, section 84- Defence of Trust and Prescription - Trust Ordinance, No. 9 of 1917, section 111(1) - Prescription Ordinance, section 3 - Are the two defences contradictory?–Rent Act, No. 7 of 1972 - Can the tenant claim the benefit of the Rent Act whilst denying that he is a tenant?–Evidence Ordinance, sections 114(f), section 116 - Approbate and Reprobate?

The plaintiff–respondent instituted action seeking a declaration of title to the land in suit and the ejectment of the defendant–appellant. The defendant appellant pleaded a constructive trust and prescription.

The trial judge held in favour of the plaintiff-respondent.

HELD:

(1) There is no express trust and the burden of establishing a constructive trust lies on the defendant–appellant. The appellant herself admits that she paid only a fraction of the consideration and that the major portion of the money was provided by the mother and the respondent. There is no trust.

(2) There was adequate evidence to arrive at a finding that the defendant-appellant acknowledged the ownership of the respondent in respect of the premises. The conduct of the appellant and her husband is wholly inconsistent with the appellant's position that they became the owners of the said property by prescriptive title.

(3) It is clear that the appellant and her family occupied the said premises with the leave and licence of the respondent. There is no evidence pointing to the fact that the appellant started at some point of time, to possess the property in a manner adverse and independent to the interests of the respondent.

Held further–

(4) The whole purpose of section III (I) of the Trust Ordinance is to protect the trust property and beneficiaries and not to protect the trustee. This section has not stipulated that the beneficiary cannot prescribe against the trustee.

Per W. L. Ranjith Silva, J. :

"I am constrained to disagree with the view expressed by the Counsel for the respondent that the two defences *viz.* trust and prescriptive title cannot exist side by side in a fit case if the circumstances of that case warrant such strategy".

APPEAL from the District Court of Mt. Lavinia.

Cases referred to :

1. *Sirijudeen vs. Abbas* 1994 Sri LR 365
2. *Maduwanwela vs. Ekneligoda* 3 NLR 213
3. *Kandasamy vs. Gnanasekeram* 1983 2 SPLR 01 (SC)
4. *Ranasinghe vs. Premawardena* 1985 1 Sri LR 63 (SC)
5. *Lucia Perera vs. Martin Perera* 53 NLR 347
6. *Mohamed vs Abdul Gaffoor* - 57 NLR 228
7. *Bahar vs Burah* - 55 NLR 1
8. *Vaidhiarathan and Another vs Idroos Mohideen* and 1988 - 2Sri. L.R. 55

Maureen Seneviratne, P. C. With Tilak Gunawardena and Nalinda Premaratne for appellant.

L. C. Seneviratne, P.C. with U. H. K. Ahangama and Anuraddha Dharmaratne for respondent.

Cur.adv.vult

March 3, 2006.

RANJITH SILVA, J.

This Appeal has arisen from the judgment of the learned Additional District Judge of Mt. Lavinia dated 04.09.1995 delivered in case No. 1954/ L. The Plaintiff Sumithra Rani Gunasekara, the elder sister of the Plaintiff instituted this action against the Defendant (hereinafter referred to as the Appellant) for a declaration of title to the land and the house thereon referred to in the schedule to the plaint (hereinafter referred to as the premises), for the ejectment of the Appellant and all those in occupation of the land and house under the appellant and for compensation and damages resulting from the unlawful occupation of the said premises and the house by the Appellant. After trial the learned Additional District Judge in his judgment held *inter alia* that the Plaintiff was the owner of the said premises and that the appellant was in unlawful occupation of it. This appeal is taken against the said judgment. Whilst this appeal was pending the plaintiff died on 13.01.2001 and is his stead the present Substituted–Plaintiff–Respondent (hereinafter referred to as the Respondent was substituted for the purpose of prosecuting this Appeal. Both parties made their oral submissions followed by written submission and subsequently the matter was fixed for judgment of this court.

The facts

The Appellant who lived in Colombo prior to and subsequent to her marriage continued to live in rented premises. Her mother who lived at Anuradhapura frequently stayed with the Appellant whenever she happened to be in Colombo.

The plaintiff purchased the said house and property in suit on deed 1595 dated 01.04.1965 attested by M. U. Mohammed Saleem Notary Public which is filed of record in the main case marked as P1. According to this deed the consideration of Rs.28,500 was paid to the vendor by the Vendee Sumithra Rani, the original plaintiff in this case to whom the property was sold and delivered by the vendor. The appellant herself was one of the witnesses to the said deed. Both the appellant and the husband have stated in evidence that they paid the assessment rates in respect of the

premises until 1984 (although on some occasions in the course of their evidence they have given the year as 1981 or 1982) and that thereafter the plaintiff herself paid the assessment rates to the said premises.

The appellant's husband has stated in his evidence that his wife the appellant paid the assessment rates and the said payments were made in the name of the Plaintiff. He has also stated that his wife ceased to make the said payments after the Plaintiff commenced making payments, that they did not make any payments after 1984 and that they did not care to ascertain as to why the Respondent started to make the necessary payments from 1984. (*Vide* pages 99, 105, and 107) The Appellant too in examination has stated that the assessment rates in respect of the premises were paid by the Appellant in the name of the Plaintiff up to 1982 and that the assessment rates, in respect of the premises, thereafter, were paid by the Plaintiff herself.

It was the case for the appellant, that having realized the hardship of the appellant her mother asked her to look for a house in Colombo that they could buy for themselves to live in, that the Appellant together with her husband searched for a house, that they found the premises which is the subject matter of this action and that after consultation with her mother and her sister who is the Respondent in this case decided to buy the same. Admittedly the appellant's own evidence is to the effect that out of the total consideration for the purchase of these premises Rs.16000 was contributed by the appellant's mother and a sum of Rs.10000 was contributed by the Respondent. The Appellant contends that the Respondent saw the premises only once prior to its puchase, that the Respondent made no inquiries about the premises and thus showed no interest in respect of the premises from whom the property was purchased and that all the spade work was done by the appellant and her husband whilst the Respondent conducted herself in a lackadai sical manner. What is more, the Appellant argued that the Respondent later wanted the money she contributed for the purchase of the property to be regarded as a gift from her to the appellant's daughter Dharshini. (*vide* pages 76-77 of the brief) but there is no corroboration of this fact and it was only the Appellants word against the Respondent's. The Respondent has categorically denied this position. Explaining why the deed of transfer was written in favour of the Respondent, the possession of which as all times remained with the Appellant, the Appellant has stated that it was because the Respondent contributed money for the purchase of the said property and in view of the

fact that the Appellant believed that disputes with her husband were likely to ensue in the future, in case some mishap befell on her.

This argument sounds rather preposterous because if they contemplated a situation of that sort they could have circumvented such a situation by the simple expedient of writing the deed in favour of Dharshini the daughter of the Appellant to whom the Appellant alleged that the Respondent intended to gift the money. It is not unusual for the Respondent to have relied on her sister's discretion and to depend on her assistance in purchasing the said property especially so, as the Respondent was living at Anuradhapura, a place far away from Colombo and the appellant was living with her husband and the family, in Colombo. The relevant deed is an out right grant and there is no ambiguity. Therefore the deed cannot be contradicted by oral evidence unless it is attacked on the ground of fraud or in order to prove a constructive trust. The Appellant has alleged that the Respondent is holding the said property in trust for her and it has to be examined very carefully whether the Respondent is holding the said property in that capacity for the benefit of the appellant.

Trust

When a person obtains a title to a property for the consideration paid by another person, he is aware that the person who furnished the consideration becomes the true owner of the property. There are instances where conveyances are executed in another's name without the knowledge of the purchaser. Some times the conveyances are executed in another's name with the understanding that the property is to be conveyed to the true owner at a particlar time agreed upon or at request. If such conditions are not fulfilled the true owner can bring an action on the ground of constructive or implied trust. In such cases the parties are entitled to lead parol evidence up to a particular extent without violating the provisions of the Prevention of Frauds Ordinance. In the instant case before us none of the aforesaid conditions exist. Nearly half the consideration for the purchase of the property was paid by the Respondent is the version of the appellant herself. The Respondent categorically denied this position and maintained that she provided the entire consideration for the purchase of the said property, a fact born out by the statement of the notary found in the attestation clause to the deed P1. Also there was never an agreement between the parties that the property should be transferred to the Appellant by the Respondent on the happening of an event or on a future date fixed or otherwise. what is more the whole transaction took place in the presence

of the Appellant and with her full knowledge. The Appellant states in paragraph 10 of her answer that the Respondent held the premises in trust for the Appellant for the reason that the parties had by their act and deed accepted that the premises belonged to the Appellant and the deed was written in the name of the Respondent as security for the Rs.10,000 the Respondent contributed towards the payment of the consideration due on the contract of sale.

Issue No. 9, reads, thus;

"Has it been accepted at all times by the parties that by the act and deed of the parties the premises which is the subject matter of this action is property held by the Respondent in trust for the appellant."

There is no express trust in this case and the burden of establishing a constructive trust lies fairly and squarely on the Appellant. Chapter XI of the Trust Ordinance give various instances that give rise to a constructive Trust. The Appellant relies on section 84 of the Trust Ordinance. Under this section where property is transferred to one person for a consideration paid by another and it appears that the person who paid or provided the consideration did not intend that such payments was made for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. But in this case the appellant herself admits that she paid only a fraction of the consideration and that the major portion of the money was provided by the mother and Respondent. It is not the case for the Appellant that the Respondent holds the property in trust for her mother who is alleged to have contributed Rs.16,000 for the purchase of the property.

If, as the Appellant has stated in evidence the Respondent had no interest in retaining the beneficial interest or the ownership of the premises there was no need to go to the extent of executing the deed P1 in the Respondent's name for the purpose of certifying the payment of Rs.10,000. All that the Appellant need have done to certify the payment of the said Rs.10,000 was to issue a receipt or a promissory note to the Respondent for the payment of the said sum of Rs. 10,000.

Furthermore there is no corroboration supporting the version of the Appellant that out of the consideration of 28,500 their mother paid Rs.16,000, the Respondent paid Rs.10,000 and that the appellant paid Rs.3,000. The attestation clause in P1 does not mention the names of the

monther or the appellant as having paid any part of the consideration and what is more the deed contains a statement that the entire amount was paid by the vendee to the vendor. The Appellant whose burden it was to prove her assertions did not even care to summon Mr. Saleem, the notary as a witness to explain how and by whom the payments were made or did not explain as to why she did not propose to summon him and thus it would not be unfair to draw the presumption arising out of section 114 (f) of the Evidence Ordinance. Therefore in the circumstances of this case the presumption arising out of section 114(f), that is, if such evidence was led, that evidence would have been adverse to the appellant, could be relied on. What is more in the instant case the Appellant well knowing what was passing, was not only content to stand by and see what was passing but also has placed her signature as an attesting witness to the deed P 1 according to which the entire consideration was paid by the Respondent. For these reasons among others I am of the view that this court should not disturb the findings reached by the Learned Additional District Judge with regard to the claim of a constructive trust relied on by the Appellant.

Prescription

The appellant relied on the defence of prescription and endeavoured to establish prescriptive title to the said property by reason of the fact that the appellant possessed the property from the time it was purchased by the Respondent, that is from 1965. The appellant in support of her claim has stated in her evidence that the original of the deed P1 was always in her possession and that her husband effected repairs to the said house from time to time without any objection from the Respondent. This conduct of the appellant is not inconsistant with the Appellant and her family being in possession of the said property with the leave and licence of the Respondent, further this conduct certainly does not amount to adverse possession as far as the Respondent is concerned. In *Sirajudeen v Abbas*[1] it was held that as regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiffs possessed the land is dispute for a number of years exceeding the prescriptive period are not evidence of uninterrupted and adverse possession, necessary to support a title by prescription. It was further held that it was necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court.

There is ample evidence lead in this case to indicate that the respondent and some times even her mother stayed in the said premises for long spells at a time, when they came to Colombo occasionally.

There was adequate evidence placed before the learned District Judge, for him to have arrived at the finding that the appellant acknowledged the ownership of the respondent in respect of the premises. For instance the fact that the appellant and her husband had admitted in evidence that up to 1984 (some times referred to as 1982 or 1981) they paid the assessment rates for the premises in the name of the respondent is itself, in my view, sufficient proof of this fact. The appellant has also admitted that the respondent paid the assessment rates for the said premises thereafter. This conduct of the appellant and her husband is wholly inconsistent with the appellants position that they became the owners of the said property by prescriptive title. If they had prescribed to the said property they would not have allowed any other person including the respondent to pay taxes in respect of the said property, especially so after having paid the relevant taxes by the appellants up to the year 1984 in the name of the respondent.

The above facts are totally inconsistent, with the fact that the appellant was the owner of the property and is a clear indication of the fact that the appellant and her family occupied the said premises with the leave and licence of the respondent. As it is provided in section 116 of the Evidence Ordinance No. 14 of 1895 tenants and licensees have been debarred from claiming title to the premises which they commenced to occupy in their capacity as tenants or licensees. Section 116 of the Evidence Ordinance reads thus;

"No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy a title to such immovable property; and

No person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when licence was given."

In *Maduwanwala vs Ekneligoda*[2] at 213 Bonser C. J. held ; That a person who was let into occupation of property as a tenant or licensee, must be deemed to continue to occupy on the footing on which he was admitted, until by some overt act he manifests his intention of occupying in another capacity. No secret act will avail to change the nature of his occupation. It was further held in that case I quote; "..... the possession, as I understand it, is occupation either in person or by agent, with the intention of holding the land as owner." (*ut dominus*)

A person, who enters into possession of a land as a licensee, who fails to prove that the character of his initial possession had changed to adverse and independent possession, at a particular point of time, against the interest of the land lord who let him into possession, in my view, is certainly not entitled to claim the benefit of section 3 of the Prescription Ordinance. In the instant case too I find that there in not an iota of evidence pointing to the fact that the Appellant started at some point of time, to possess the property in a manner adverse and independent to the interests of the Respondent.

For these reasons I find that the learned judge cannot be faulted for his decision that the appellant has not proved prescriptive title to the property. The learned Additional District Judge has correctly answered issue No.12 in the negative.

Approbate and Reprobate

In view of the findings of facts and the law reached by the Learned judge and the conclusions drawn by him based on such facts resulting in the rejection of both the defences put forward by the Defence namely the defence of trust and the defence of prescription, it is my opinion that it would be frivolous or redundant for me to deal with this aspect of the law raised by the Respondent, in their submissions that the two defences are conflicting and therefore the appellant cannot maintain the two defences at one and the same time. Even if this court were to hold that the two defences are not contradictory that will not help the appellant as I find that the Learned Additional District Judge was quite correct when he held that the appellant failed to prove both the defences taken by them. Although it is not necessary to deal with this matter yet in view of the fact that the Respondent has vigorously argued on this subject I thought I should express briefly, my views on this matter.

The Appellant based her case mainly on two defences. The first of the two is that the property in suit is trust property held by the Respondent in trust for the appellant and the second defence is that the appellant acquired a prescriptive title to the said property. In the written submissions filed on behalf of the Respondent, the Respondent contends that the two claims/ defences taken by the appellant, cannot be maintained as they are wholly inconsistent and in conflict with each other. In other words the Respondents argument is that if the property is held in trust on behalf of the appellant then the defence of prescriptive title of the apellant cannot stand ; by the same token if the appellant maintains that she had acquired a prescriptive title to the said property then the claim/defence that the said property is held in trust by the Respondent on her behalf cannot exist ; that is to say that the Appellant cannot be allowed to Approbate and Reprobate one and

the same time (blow hot and cold, to affirm at one time and deny at another). In support of this the Respondent relies on two decision namely *Kandasamy Vs Gnanasekaram*[3] *and Ranasinghe Vs Premawardena.*[4] Both those cases are Rent and Ejectment cases of which the facts are completely different from the instant case. In *Kandasamy vs Gunasekaram* the premises were subject to Rent Act No.7 of 1972 and the Plaintiff sought to eject the tenant on the ground that the premises were reasonably required for his use and occupation. A year's notice of the termination of the tenancy has been given by him to the defendant in terms of section 22 (6) of the Rent Act. The Defendant in his answer denied that he was a tenant of the premises. The trial judge held on the evidence that the Defendant was the tenant of the premises under the Plaintiff, that the premises were reasonably required for his use and occupation and ordered the ejectment of the defendant. The Court of Appeal affirmed this finding of reasonable requirement which was challenged in appeal. The Supreme Court set aside the finding of reasonable requirement, but held that the District judge came to a correct finding that the Plaintiff was entitled to the order of ejectment of the defendant on the basis that he was never a tenant of the premises as the defendant himself had denied in his answer that he was a tenant. The basis of this judgment is that one cannot claim the benefit of the provisions of the Rent Act whilst denying that he is a tenant. (Approbate and Reprobate)

In *Ranasinghe Vs. Premawardana and Others (Supra)* too it was held that the tenant was not entitled to notice because he had repudiated his tenancy. In such a case the land lord need not establish any one or more of the grounds of ejectment stipulated in section 22 of the Rent Act No.7 of 1972 for success in his suit for ejectment.

I fully agree with this statement of law expressed in the two cases mentioned above. But I am constrained to disagree with the view expressed by the counsel for the Respondent that the two defences mentioned above cannot exist side by side in a fit case if the circumstances of that case warrant such strategy.

Section III (1) of the Trust Ordinance No.9 of 1917 makes provision to exclude the defence of prescription in respect of actions for trust. Section III (1)–

(a) In the case of any claim by any beneficiary against a trustee founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy;

(b) In the case of any claim to recover trust property or the proceeds thereof still retained by a trustee, or previously received by the trustee and converted to his use; and

(c) In the case of any claim in the interest of any charitable trust, for the recovery of any property comprised in the trust, or for the assertion of title to such property,

the claim shall not be held to be barred or prejudiced by any provision of the Prescription Ordinance.

The whole purpose of section III (1) is to protect the trust property and the beneficiaries and not to protect the trustee. This section does not stipulate that the beneficiary cannot prescribe against the trustee.

Lucia Perera Vs Martin Perera was a case where A, bought an undivided 1/4 share in a land at the request of his daughter B who had paid the purchase price, but, contrary to his mandate he obtained from the vender a conveyance in which A, not B, was named as purchaser. Shortly thereafter B, under the belief that she was the absolute owner, went into occupation of a divided allotment which represented the undivided share and remained in occupation of it for over 19 years on the basis that she was entitled to possession in her own right. During that period, A, whenever he was requested by B, to execute a fresh conveyance in her favour, promised to do so. Subsequently, however, A, without the knowledge of B conveyed the 1/4 share to C, who was in fact a *bona fide* purchaser for value without notice of the trust. It was held that B, had acquired prescriptive title to the land before the date on which the share was conveyed to C, and therefore, her rights were completely protected. The request of B, that A, should execute a conveyance of the property did not constitute an acknowledgement of As rights so as to interrupt B' s possession *ut dominus. Mohamed vs Abdul Gaffor*[6], *Bahar vs Bural*[7] *Vaidhianathan and Another vs Indoor Mohideen and Another*[8] From this it is clear that under certain circumstances a beneficiary can prescribe against a trustee but not *vice versa*. In the instant case, no matter whether the appellant was successful or not in proving that he prescribed to the land, quite independently of that, the appellant was not precluded in law from taking both the defences together at the trial.

For the reasons adumbrated above I find no justification in interfering with the judgment of the Additional District Judge of Mt. Lavinia dated 04.09.1995 delivered in case No. 1954/L. Accordingly this appeal is dismissed with costs fixed at Rs.5,000, to be paid to the Respondent by the Appellant.

EKANAYAKE, J. - *I agree.*

Appeal dismissed.