

**GUNARATNA**  
**v**  
**NANDAWATHIE**

COURT OF APPEAL  
DISSANAYAKE, J.  
SOMAWANSA, J.  
C.A. 958/92(F)  
D.C. KANDY 11093/X  
NOVEMBER 08, 2001  
JANUARY 17, 2002

*Trust Ordinance – S. 83, S.111 – Constructive trust – Attendant Circumstances – Prescription Ordinance - S.10 – When does prescription commence to run? – Cause of action – Demand – Civil Procedure Code - S. 44, S. 187.*

The plaintiff-respondent instituted action in 1984 seeking a declaration that Deed No.397 dated 5.2.1976 is invalid or in the alternative that a constructive trust has accrued to him within the meaning of the Trust Ordinance. The defendant appellant contended that the land was unconditionally transferred to him. The District Court held with the plaintiff-respondent.

**Held :**

- (i) Though Deed No.397 - *ex facie* an outright transfer was executed on 5.2.1976 - prescription commences to run only from the time when the cause of action arose and that was when the defendant-appellant failed

and neglected to reconvey the land as promised though demanded – which was in 1983.

- (ii) As the action was instituted within 3 years there was no necessity to comply with section 44 C.P.C.,
- (iii) Failure to answer a particular issue causes no prejudice to the defendant-appellant.
- (iv) The attendant circumstances show that the plaintiff-respondent never had the intention to effect an outright transfer.

**APPEAL** from the judgment of the District Court of Kandy.

*Dr. Jayantha de Almeida Gunaratne* for defendant-appellant.

*A.A.de Silva P.C.*, with *H.Sarajah* for plaintiff-respondent.

*Cur. adv. vult*

March 15, 2002

### **SOMAWANSA, J.**

The plaintiff-respondent instituted action No.11093/x in the District Court of Kandy seeking a declaration that deed No. 397 is invalid or in the alternative that a constructive trust has accrued to the benefit of the plaintiff-respondent within the meaning of the Trust Ordinance and for a declaration of title to the land described in the Schedule to the plaint. The plaintiff-respondent's pleaded case was that the defendant-appellant fraudulently induced her to transfer the said land to the defendant-appellant to be kept as security to obtain a loan from the Bank in order to purchase a vehicle with a promise to re transfer the land once the loan is settled. The plaintiff-respondent averred that the defendant-appellant after settling the loan failed and neglected to reconvey the land as promised though demanded on several occasions. The position taken up by the defendant-appellant is that the land was unconditionally transferred to him for valuable consideration by the plaintiff-respondent and denied any constructive trust or the allegation of fraud and averred that the transfer was an absolute transfer. Hence the defendant-appellant prayed for a dismissal of the action. The parties went to trial on 11 points of contest and the learned District

Judge by his judgment dated 21.08.92 held in favour of the plaintiff-respondent. It is from this judgment that the defendant-appellant has preferred this appeal. 20 C

At the outset it must be said that although the plaintiff alleged fraud no issue was raised based on fraud and consequently no finding to that effect has been made by the learned District Judge thus the dispute boiled down as to whether the transfer by the plaintiff-respondent to the defendant-appellant was subject to a constructive trust as contemplated in section 83 of the Trust Ordinance.

At the hearing of this appeal one of the matters raised by the counsel for the defendant-appellant was whether the judgment of the learned District Judge can be allowed to stand in as much as the learned District Judge has failed to answer issue No.9(c) crucial to the defendant-appellant's case. Accordingly it was contended that the judgment was not in compliance with section 187 of the Civil Procedure Code. The second matter raised by the counsel for the defendant-appellant was whether in failing to answer the said issue the learned District Judge failed to consider the implications or the impact of section 111 of the Trusts Ordinance. As these two matters raised by the defendant-appellant are interwoven I shall deal with them together. Issue No.09(c) raised on behalf of the defendant-appellant is as follows: 30 40

“On the plaintiff's own averment was she in law entitled to have deed bearing No.397 set aside”.

On an examination of the judgment one has to concede the fact that issue No.9 (c) has not been answered. It is the contention of the counsel for the defendant-appellant that this issue is raised on the impact of the provisions of section 111 of the Trusts Ordinance read with section 10 of the Prescription Ordinance which is demonstrable *ex facie* on the plaint itself. 50

Section 111 of the Trusts Ordinance deals with prescription in relation to trusts. The relevant provision in the said section referred to by the counsel for the defendant-appellant are the following:

“111.(1) In the following cases, that is to say –

(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

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(c) In the case of any claim in the interests 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.

(2) Save as aforesaid, all rights and privileges conferred by the Prescription Ordinance shall be enjoyed by a trustee in all actions and legal proceedings in the like manner and to the like extent as they would have been enjoyed if the trustee had not been a trustee.

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Provided that in the case of any action or other proceeding by a beneficiary to recover money or other property, the period of prescription shall not begin to run against such beneficiary, unless and until the interest of such beneficiary shall be an interest in possession.

(5) This section shall not apply to constructive trusts, except in so far as such trusts are treated as express trusts by the law of England."

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Section 10 of the Prescription Ordinance reads thus:

"10. No action shall be maintainable in respect of any cause of action not herein before expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued".

Applying the provisions contained in Section 111 of the Trusts 90

Ordinance and section 10 of the Prescription Ordinance to the instant case, I am inclined to take the view that this action is not prescribed. In that though the deed No.397 marked P1 was executed on 5th February 1976, prescription commenced to run only from the time when the cause of action accrued and that was according to the pleadings only when the defendant-appellant failed and neglected to re convey the land as promised though demanded by the plaintiff-respondent and according to the evidence of the plaintiff-respondent and his witness Wickramaratna in 1983 and certainly not from the date on which the deed marked P1 was executed as averred by the counsel for the defendant-appellant. The action has been instituted on 23.03.84. In the circumstances, the plea of prescription raised by the defendant-appellant cannot succeed as the action has been instituted well within three years as prescribed by section 10 of the Prescription Ordinance. Hence there was no necessity for the plaintiff-respondent to comply with provision contained in section 44 of the Civil Procedure Code in claiming exemption to any prescription. Furthermore, even if issue No.9 (c) is answered the defendant-appellant could never succeed in this action as his plea of prescription would fail. Hence even if provisions of section 187 of the Civil Procedure Code has not been complied with by the learned District Judge, by his failure to answer issue 9(c) no prejudice would be caused to the defendant-appellant.

I might also mention that the deed marked P1 is *ex facie* an outright transfer, thus conveying title to the property in suit to the defendant-appellant. Also one has to accept that there is no evidence of a promise in writing to re transfer the land once the loan is settled. However when one considers the attendant circumstances in this case as transpired in evidence would show the plaintiff-respondent never had the intention to effect an outright transfer of her title to the property, in that it transpired in evidence led on behalf of the plaintiff-respondent that the property transferred on deed marked P1 was very much more valuable than the consideration of Rs.2000/- said to have passed on the conveyance. There is also the evidence of the needy circumstances of the defendant-appellant and the evidence that having obtained a conveyance on a promise to re transfer defendant-appellant did repudiate the existence of this promise. All in all, I am inclined to take

the view that the learned District Judge having considered and analysed the evidence very carefully has come to a correct finding. <sup>130</sup>

In the light of the above reasoning, I see no reason to disturb the judgment of the learned District Judge. The appeal is dismissed with costs.

**DISSANAYAKE, J.**

- I agree.

*Appeal dismissed.*