

BERNEDETTE VALANGENBERG
v.
HAPUARACHCHIGE ANTHONY

SUPREME COURT,

H. A. G. de SILVA, J., BANDARANAYAKE, J., KULATUNGA, J.

S. C. APPEAL No. 47/88.

DECEMBER 05, 06, 07, 13, 14 and 15, 1989.

JANUARY 22, 23 and 24, 1990.

Trusts - Purchase of property for mistress - Consideration - Constructive Trusts - Parole evidence to vary terms of deed - Prevention of Frauds Ordinance s. 2, - Evidence Ordinance ss. 91 and 92 - Trusts Ordinance ss. 2, 5, 83 and 84 - Doctrine of advancement - Application of English Law to extend doctrine of advancement to the case of a mistress.

The plaintiff, H. Anthony a middle grade hotel employee lived with the defendant - appellant Bernedette Vanlangenberg a hairdresser and mother of four children as man and mistress. Both worked in the same hotel. Thereafter the plaintiff proceeded to Sweden where he learned the language and received an income of about Rs. 9,000/= a month. The defendant went over to Sweden for a short spell and she too found employment receiving about Rs. 2,000/= a month. The plaintiff purchased a house property in 1976 for Rs. 8,40,000/= paying the consideration out of his earnings. On 12 5 77 as he had to go to Sweden again he conveyed the said house property to the defendant appellant his mistress by a deed of transfer in the attestation to which the consideration of Rs. 40,000/= was acknowledged to have been received earlier. Parties fell out in November, 1979. The plaintiff then sued the defendant for a return of the house pleading a trust. The defendant claimed absolute title and that she paid the consideration of Rs. 40,000/= on the deed in her favour.

Held:

(1) Section 2 of the Frauds Ordinance is not meant to govern trusts arising under chapter IX of the Trusts Ordinance i. e. constructive or implied trusts. A person has therefore to make out a case falling within the provisions of ss. 83 to 96 of the Trusts Ordinance

(2) The plaintiff initiated the moves to buy the house whilst still in Sweden; he had paid the purchase price. The defendant's resources were insufficient to enable her to pay the consideration on the transfer to her. She had written to the plaintiff that she would transfer the house to him if he returns her gold chain and money amounting to Rs. 4,000/=

(3) The trial judge rejected the claim of the defendant that she paid the consideration after considering the financial resources of the parties as being highly improbable. The defendant's claim was very probably false and her denial of the existence of a constructive case amounts to fraud. In the result s. 2 of the Trusts Ordinance and s. 92 of the Evidence Ordinance do not apply and plaintiff can lead parole evidence of the existence of a constructive trust in his favour on the basis that he retained the beneficial interest in the property at the time he transferred it to the defendant.

(4) The presumption of advancement in favour of mistress though available in England is not part of Sri Lankan Law. Section 2 of the Trusts Ordinance cannot be utilised to bring in English Law.

Cases referred to :

- (1) *Perera v. Fernando* 17 NLR 486, 488
- (2) *Adaicappa Chetty v. Karuppan Chetty* 22 NLR 417.
- (3) *Mohamadu v. Pathumah et al* (1930) IX Ceylon Law Recorder 48.
- (4) *Saverimuttu v. Thangavelauthem* 55 NLR 529, 535, 536 (PC)
- (5) *Sethuwa v. Ukkua* 56 NLR 337, 340, 342
- (6) *Fernando v. Cooray* 59 NLR 164, 174
- (7) *Siriwardena v. Don Saranelis* 59 NLR 182
- (8) *Muthamma v. Thiagarajah* 62 NLR 559
- (9) *Saminathan Chetty v. Vanderpoorten* 34 NLR 287, 294 (PC)
- (10) *Valliamma Achchi v. Abdul Majid* 45 NLR 169 (SC)
- (11) *Valliamma Achchi v. Abdul Majid* 48 NLR 289 (PC)
- (12) *Muthalibu v. Hameed* 52 NLR 97, 100, 101
- (13) *Fernando v Fernando* (1918) 20 NLR 244
- (14) *Ammal v Kangany* (1910) 13 NLR 65
- (15) *Gissing v Gissing* 1970 2 All ER 780 (HL)
- (16) *Cooks v Head* 1972 2 All ER 38
- (17) *Ewes v Ewes* 1975 3 All ER 768
- (18) *Bernard v Joseph* 1982 3 All ER 162
- (19) *Narayan Chetty v James Finlay Ltd* (1927) 29 NLR 65, 70
- (20) *Jonga v Nanduwa* 45 NLR 128, 130, 132
- (21) *Davis Singho v Herath* 64 NLR 492
- (22) *Moonesinghe v Vithanage* 69 NLR 97 (PC)
- (23) *Nadarajah v Ramalingam* 21 NLR 39

APPEAL from Judgment of the Court of Appeal.

Dr. H. W. Jayewardene Q.C. with *B. Rajapaksa, H. Amerasekera, and H. Cabraal* for defendant - appellant.

J. W. Subasinghe P.C. with *D. J. C. Wilanduwa and K. S. Tillakeratne* for plaintiff - respondent.

Cur. adv. vult.

April 4, 1990

BANDARANAYAKE, J.

The plaintiff- respondent filed action in the District Court against the defendant -appellant claiming, that the defendant-appellant had lived with him as his mistress for some years; that he had purchased a house property to wit; 32, Temple Road, Negombo belonging to Garwin de Silva,

Attorney-at-Law on 17.11.76 by Deed No. 3871 - marked P2 - for a total consideration of Rs. 45,000/= of which Rs. 5,000/= was paid on 12.11.76 - P1 out of monies saved by him whilst employed abroad; and that on Deed No. 3974 dated 12.5.77 marked P3 he conveyed the legal interest in the said house property to his mistress the defendant -appellant retaining the beneficial interest in himself; and prayed that the said property be declared subject to a trust in favour of himself (the plaintiff) and for an order that the defendant transfer the said property to the plaintiff and for other incidental reliefs.

The defendant-appellant contended that the property was purchased on Deed P2 on monies provided by her although she was not a party to that transaction on the face of the deed; that upon discovery later that the conveyance on P2 was in the name of the plaintiff which was wrongful and unwarranted she prevailed upon the plaintiff to convey the property to her (the defendant) which he did by P3 aforesaid; and that thereby the defendant-appellant had become the sole and absolute owner of the property and that P3 was not subject to any trust in favour of the plaintiff-respondent and was never intended to be so.

After trial, the District Judge held with the plaintiff. Upon appeal, the Court of Appeal upheld the judgment of the District Court and dismissed the appeal. Learned Counsel for the defendant-appellant has raised several matters of law and fact before us at the hearing of this appeal and submits that the plaintiff's action be dismissed.

The relationship between the parties is germane to the issues in this case; the plaintiff, a married man was receptionist at the Blue Lagoon Hotel, Negombo from 1971 - 1974. The defendant a married woman with 4 children was a hairdresser also working at that hotel. An association developed between them and they became intimate friends - they lived together. In 1974 the plaintiff moved to the Sunflower Hotel in Negombo frequented by Swedish tourists. Plaintiff went to Sweden on a prepaid ticket to learn that language. Whilst there he attended language classes and worked in a home for elders. He was paid a salary. Board and lodging was free. In October 1975 plaintiff returned to Sri Lanka to the Sunflower Hotel bringing with him 4500 Swedish Croners. In May 1976 the plaintiff returned to Sweden and resumed language classes and also worked as before. He took with him on this occasion, the defendant's daughter. She was also found work and paid a honorarium. The defendant joined him in

Sweden three months later, the airfare having been paid by the plaintiff. The defendant was also found work and paid a honorarium. They returned to Sri Lanka in November 1976. On 17.11.76 P2 was executed. The plaintiff had resumed work at the Sunflower Hotel. In May 1977 the plaintiff again went to Sweden. Three days before his departure he executed P3 transferring the said house property to the defendant. The defendant followed him to Sweden and both returned to Sri Lanka in October, 1977. On deed No. 4598 of 17.8.79 - P4 - the defendant leased the aforesaid premises for a period of two years to Ibrahim, an Arab working for Air Lanka. Ibrahim paid a sum of Rs. 60,000/= as an advance so that the house could be refurbished for new furniture, fittings, air conditioning, etc. to be installed. The plaintiff and defendant went to Singapore for a short trip to make the purchases for the house. Sometime thereafter the plaintiff and defendant fell out. Plaint was filed on 23.1.80 wherein plaintiff claimed a trust and demanded a transfer back of the property.

Counsel for appellant contended the plaintiff cannot now contradict the terms of the deed P3. He cannot say it is a deed of trust and not what it purports to be to wit: a deed of outright transfer as he is not entitled in law to contradict the terms of his own deed. Sections 91 and 92 of the Evidence Ordinance prohibits such a course as does s.2 of the Prevention of Frauds Ordinance which is a stringent provision different to the English Law. For purposes of comparison he cited the English Statute of Frauds enacted in 1676 and made effective in 1677 and the English Law of Property Act, 1925 (Appellant's Counsel also criticized the amended plaint filed. He complained that by several new averments and amendments made to paragraph 4, so called "attendant circumstances" were enumerated seeking thereby to set up a trust. Counsel submitted that these new averments were trumped up for the purpose of bringing it within the ambit of s.83 of the Trusts Ordinance).

Reliance was placed on a series of decisions *Perera v. Fernando* (1) and *Adaicappa Chetty v. Karuppan Chetty* (2) which held that parole evidence was not permissible to explain or vary terms of a deed. It was also a contravention of the Prevention of Frauds Ordinance -

Mohamadu v. Pathumah et al (3) and *Saverimuttu v. Thangavelautham* (4). Counsel stressed in his argument that this case had been correctly decided and should be applied to the instant case.

Sethuwa v. Ukkuwa (5) *Fernando v. Cooray* (6) and *Siriwardena v. Don Saranelis* (7); Counsel also cited "Law of Trusts" by A. W. Scott, Vol I, p. 38.

Appellant's Counsel examining the contents of deed P3 highlighted that:

- (a) P3 is not a deed of gift.
- (b) it is an outright transfer " for the absolute sale and assignment to her of the said premisesfor consideration....."
- (c) Plaintiff acknowledged receipt of consideration in a sum of Rs. 45,000/= "well and truly paid to the said Vendor by the said Vendee (the receipt) whereof the said Vendor do hereby admit and acknowledge....." - not for love and affection.
- (d) The Notary Mr. Karunaratne who testified that the consideration was not paid in his presence has in the attestation clause stated that ".....the full consideration hereinmentioned was acknowledged to have been received....."

Submission :

In the circumstances there is no room to admit parole evidence to explain P3 was different. The provisions of s. 2 of the Prevention of Frauds Ordinance, the provisions of ss. 91 and 92 of the Evidence Ordinance and the provisions of s. 5 of the Trusts Ordinance all militate against the admission of any parole evidence to alter, explain or change the ordinary meaning of the clear language of P3. The Court was invited to follow the dicta of the cases cited (supra) and dismiss the plaintiff's action and declare the defendant to be the owner of the said property.

Dealing with the plaintiff's contention that upon the attendant facts and circumstances a constructive trust had arisen in favour of the plaintiff, it was the appellant's position that there were no attendant contemporaneous circumstances which could be proved in law in this case favouring a finding of a constructive trust. Counsel submitted the treatment of the facts by the District Judge was erroneous as the proved facts did not warrant the inferences drawn by the Court; the Court had failed to consider the fact that the defendant and her daughter too had earned foreign currency in Sweden and would have contributed substantially to

the joint savings; that the Court of Appeal failed to consider and critically examine the facts but merely relied upon the findings of the lower Court and that therefore it could not be said that there were concurrent findings of fact in favour of the plaintiff which should not be interfered with. Pointing to the plaint filed appellant's Counsel commented that it contained no concise statement of the facts and circumstances relied on as constituting an inferred trust. The amended plaint brought in several averments to its paragraph 4, which then for the first time made reference to s. 83 of the Trusts Ordinance and declared that the plaintiff was enjoying the beneficial interest in the property at the time. It was submitted that nevertheless, s. 83 of the Trusts Ordinance covered several areas of property both immovable and movable and that s. 83 was governed by s. 5 of the Trusts Ordinance and s. 92 of the Evidence Ordinance. This being so, *Adaicappa Chetty's* case and *Saverimuttu's* case (supra) contained correct statements of the law.

Thus, the judgments cited (supra) settled the law, and if the terms of a document were clear and unambiguous one cannot admit parole evidence to show that it meant something else. Counsel confined this submission to situations involving transactions of immovable property such as land. His arguments did not extend to situations such as financial investments like monies deposited in Financial Institutions or the transfer of shares in respect of which trusts may be created without a notarial document. Counsel contended that a problem arose because of the decisions in *Muthamma v. Thiagaraja* (8) which he submitted was wrongly decided; wrongly because the Court admitted an oral promise to return the property as an attendant circumstance ignoring thereby the provisions of s. 92 of the Evidence Ordinance and s. 5 of the Trusts Ordinance. Counsel submitted that such a promise should have been by a notarially executed document. The Court had held that the father held the property in trust for the son but the Court did not examine the question whether the son intended to convey the beneficial interest in the property to his father. There was also no reference to *Thangavelautham's* case or to *Fernando v. Cooray* (supra). In any event Counsel submitted this case was not relevant for a proper consideration of the instant case. Counsel also submitted that the cases of *Saminathanchetty v. Vanderpoorten* (9) and of *ValliammAchchy v. Abdul Majid* reported in 45 NLR 169 (S.C.) (10)

and 48 NLR (P. C) (11) were concerned with exceptional situations and had been decided on their special facts. Oral evidence went in upon the language of the deeds themselves which indicated that the land was to be returned. In these two cases vast complicated transactions were involved with creditor-debtor relationships and hence these cases should not be applied willy-nilly.

To summarise the submissions made on behalf of the appellant on this aspect of the case, it was argued that :

- (a) on the basis of the pleadings and on the facts, the deed P3 was an absolute transfer in favour of the defendant for a consideration acknowledged to have been received ;
- (b) it was not open to the plaintiff to controvert or contradict the plain meaning of the language of P3 by parole evidence seeking to prove that P3 created a constructive trust recognised by s. 83 of the Trusts Ordinance ;
- (c) no plea under s. 83 of the Trusts Ordinance of a trust is available because of the stringency of the provisions of the Prevention of Frauds Ordinance and of s. 5 of the Trusts Ordinance ;
- (d) S. 92 of the Evidence Ordinance precludes the plaintiff from controverting the terms of P3 and proving a trust as alleged in the pleadings ;
- (e) further, the evidence in the case does not prove a trust and that the fact of the marking in evidence of paragraph 4 of the amended pleadings does not make it evidence or establish the alleged trust ;
- (f) the rest of the evidence does not prove a trust.

Further,

- (g) the evidence discloses the circumstances in which the plaintiff came to purchase the property on P2 ; that it was held by the plaintiff on his own behalf and on behalf of the defendant and on P3 when he transferred to the defendant, it must be presumed he was transferring for a consideration he had received and which has not been rebutted.

Next, learned Counsel for the appellant contended that the doctrine of advancement should be applied to the instant facts ; that doctrine was known to our law even before the enactment of the Trusts Ordinance ; that the facts warranted a strong initial presumption that the plaintiff transferred the property to the defendant on P3 as she had admittedly been his mistress for a number of years, they had lived together as husband and wife openly both in Sri Lanka and abroad and that presumption cannot be rebutted by the application of s. 83 or s. 84 of the Trusts Ordinance. Counsel strongly relied on the case of *Mutalibu v. Hameed* (12) which held that where a father or person in loco parentis purchases property in the name of his wife or child there is a strong initial presumption that such transfer was intended for the advancement of such wife or child and the provisions of s. 84 of the Trusts Ordinance do not apply to such transaction. The onus in such cases is on the party seeking to establish a trust to prove that fact. *Fernando v. Fernando* (13) and *Ammal v. Kangany* (14) were approved and applied by the Court in *Mutalibu v. Hameed* (ante). Counsel sought to extend this doctrine to the case of a mistress. To do so he pointed to s. 2 of the Trusts Ordinance which he submitted provided for recourse to the English Law in the absence of provision covering the subject in the Trusts Ordinance or in any other law. Seeking to use this means Counsel cited a number of decisions of the English Courts which he claimed had recently contributed to the development of the law of trusts in England vis-a-vis man and mistress. The matrix upon which the law of trusts developed in this regard in England was, it was submitted, the case of *Gissing v. Gissing* (15) per Lord Diplock where a new line was taken for the first time in the area of the law of trusts. Where a lady had contributed to the running of the matrimonial house then she had rights to a beneficial interest.

"Any claim to a beneficial interest in land whether spouse or stranger in whom the legal interest in the land is vested must be on the proposition that the person in whom the legal interest is vested holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust."

This was extended to a mistress by Lord Denning in the case of *Cooks v. Head* (16) followed by *Ewes v. Ewes* (17) — an unmarried couple-a joint acquisition of property-transfer of property into name of one party-inference of agreement-mistress entitled to beneficial interest-appropriate share-house to be held in trust by man-3/4 to himself-1/4 to mistress.

Bernard v. Joseph (18). Reference was also made to Halsbury's Laws of England, Vol 48, 4th Ed. para. 610, p. 341 under title "unmarried cohabiters". It was submitted that these developments should be adopted and absorbed into the law of Sri Lanka through s. 2 of the Trusts Ordinance and that therefore, the presumption that the plaintiff transferred property on P3 for her advancement has not been rebutted and no question of trust in his favour arises.

On behalf of the plaintiff-respondent learned Counsel first referred to the relationship between the parties which he submitted must be at the forefront of this case. Intimacy between the parties commenced in 1971 when they were at the Blue Lagoon Hotel. In 1974 October when plaintiff moved to the Sunflower Hotel he rented a house in Sea Street, Negombo, repaired it and paid the rent, purchased furniture and moved in with the defendant who came with her children. At that time the defendant was earning Rs. 750/- per month. Plaintiff left for Sweden in June 1975 - he went alone for 5 months, acquired proficiency in the Swedish language obtaining a Diploma - P5. He was also employed as an attendant in a home for elders earning Rs. 9,000/- to Rs. 10,000/- per month. He saved as he was given free board and lodging. He opened a Bank account - P6 - and remitted part earnings to Sri Lanka to help maintain the defendant and her children. He returned to Sri Lanka.

Plaintiff made a second trip to Sweden in May 1976 going there on a student visa and was again employed on the same salary with free board and lodging. He took defendant's daughter with him. Defendant joined him three months later on a prepaid ticket for which the plaintiff had paid having given up the house in Sea Street and moving the furniture to her sister's house at Asarappa Road. Defendant stayed only for 3 months and returned home before the plaintiff. The plaintiff had got the defendant to assist him in his work as the defendant did not know Swedish and could not have got a job. Daughter also worked in a similar way. Defendant was paid only an honorarium but with free board and lodging. So also her daughter. It was the plaintiff's evidence that the defendant was paid sums amounting to about Rs. 1,500/- to Rs. 2,000/- per month. (which would be about 1/4th of what he earned). It was also the plaintiff's evidence that when the defendant returned to Sri Lanka she had no money. Plaintiff wrote to one Beverly Jansz in 1976 asking him to look out for a house for purchase. Jansz says he contacted Garwin de Silva. Jansz wrote to the plaintiff about the availability of Garwin de Silva's house. Defendant also

met Garwin de Silva who testified that she told him that Hapuarachchi (plaintiff) will buy the house. After the plaintiff returned home in November 1976 he met Garwin de Silva, made an advance payment of Rs. 5,000/ – vide P1, and on 17.11.76 when P2 was executed he paid the balance Rs. 40,000/–. The Notary says that this amount of Rs. 40,000/– was paid in his presence at the time of execution but he cannot remember by whom. The defendant too was present at the time. She did not protest about anything. Garwin de Silva says that the money was paid to him by the plaintiff. The defendant did not say anything about the money. In this respect therefore he corroborates the plaintiff and flatly contradicts the defendant who has said that she paid the money. The Notary also says that the plaintiff paid his fees and paid the stamp duty as well. As regards P3 however, as stated earlier, the Notary says that no money was paid in his presence on that transaction but the plaintiff paid his fees as well as the stamp duty and it was the plaintiff who gave him instructions for the preparation of P3.

As regards the subsequent lease on deed No. 4598 of 17.08.79 by the lessor the defendant to the lessee Ibrahim, the same Notary says that he attested it. Instructions concerning the lease were given to him by the plaintiff. Both parties i.e. Ibrahim and the plaintiff paid his fees as was the custom in the case of a lease. It was the plaintiff-respondent's case that he had wanted to lease the house he bought. In order to expedite matters and as he was due to return to Sweden almost immediately, he executed P3 so that in his absence, leasing this property would be facilitated if the property was in the name of the defendant who was to remain in Sri Lanka. He left for Sweden 3 days after the execution of P3. He was in a hurry. It was submitted that as a layman he was not familiar with giving a power of attorney to someone to act on his behalf.

The parties finally separated with the plaintiff making a complaint to the Police on 22.11.79 –P8. In that statement the plaintiff has stated in third person –

“that he was living with the defendant as man and mistress and that because of the confidence he had in her he had transferred his house property in her name ... Today when he visited the house he found she had left- He learnt she had gone to her sister's house in Asarappa Road, He does not know what she has removed from the house-He made this statement in order that a settlement be effected ...”

Counsel points out that the reason why he executed P3 is given in P8. In consequence of P8 the defendant had made a statement to the Police on 24.11.79 P10. In F10 the defendant has stated "... this house is in my name" – P10B. Again, it says "... if my passport and my sovereign chain and Rs. 4,000/- that I had obtained from my sister are returned, I shall retransfer the land and the house".

Thus, it was the contention of respondent's Counsel that:

(a) the evidence relating to the foreign earnings of the plaintiff as supported by P6 showed that he would have had sufficient savings to have purchased this property on P2;

(b) that the earning capacity of the defendant (and her daughter) was low and that the District Judge was right in holding that she had insufficient funds to have paid Rs. 40,000/- on P2 as asserted by her;

(c) that the plaintiff had played a dominant role as regards P2, P3, and even P4;

(d) that all of the above matters were attendant circumstances within the meaning of s.83 of the Trusts Ordinance and could have been properly considered as proved facts in construing a constructive trust;

(e) the contents of P10 were admissions made by the defendant against her interests.

(f) that the contradictions between the evidence of the defendant and that of Garwin de Silva as regards the payment of consideration in P2 cast the defendant's evidence in grave doubt;

(g) that if the plaintiff wanted to gift the premises to the defendant there was nothing to prevent him from doing so. Thus the probabilities from all the surrounding circumstances were that the plaintiff was speaking the truth.

With regard to the propositions of law taken on behalf of the appellant and referred to earlier in this judgment, the respondent argued that:

(a) Section 2 of the Prevention of Frauds Ordinance does not prohibit or prevent the plaintiff from proving by parole evidence attendant circumstances as envisaged in s.83 of the Trusts Ordinance. It has

no application to Chapter IX of the Trusts Ordinance. *Saminathan Chetty v. Vanderpoortan* (9), *Valliamma Achchi v. Abdul Majid* (10) – 48 NLR 289 (PC) (11). *Muthuamma v. Thiagarajah* (19). It was submitted that s.2 provided only for legal interests and not equitable interests in immovables. Equitable interests may be proved by parole evidence. Reliance was placed on the decision in *Narayan Chetty v. James Finlay Ltd.* (20) where it had been argued that s.2 provided only for the legal estate and not for an equitable interest. Reference was made to the comment by Garvin, J. “Our Statute of Frauds left out those portions of the English statute – to wit: ss. 7,8,9 and 10 that provided for equitable interests”. As those sections have not been incorporated in our statute, it was submitted they had been deliberately left out and supported the submission that s.2 does not apply to equitable interest.

- (b) The denial of a trust is a fraud - vide s. 5 of the Trusts Ordinance. Counsel referred to *Valliamma Achchi's* case as the first where the principle of fraud was considered. Counsel also referred to “Equity and the law of trusts” by Philip H. Pettit - p.19: 80. Counsel submitted that, in the instant case, the denial by the defendant of a constructive trust vis-a-vis P3 was a fraud, and therefore, neither s.2 of the Prevention of Frauds Ordinance or s.92 of the Evidence Ordinance were applicable - vide s.92(1).
- (c) that the cases relied on by the appellant (supra) which applied s.2 of the Prevention of Frauds Ordinance and s.92 of the Evidence Ordinance and declared those transactions void or held that there was no trust could all be distinguished, as those transactions did not relate to the creation of constructive or express trusts but related to other dispositions of land such as mortgages and were therefore irrelevant for present purposes. Trusts had failed on the facts in those cases. Chapter IX of the Trusts Ordinance was in the scheme of the written laws of Sri Lanka and had to be given effect to.
- (d) that the doctrine of advancement was not pleaded by the defendant, no issue was raised on it and no reference was made to it in the evidence and not adjudicated upon in the District Court. It was raised for the first time in appeal. The defendant's evidence has in

fact the effect of denying it. Furthermore the evidence adduced does not warrant such a conclusion.

- (e) that modern trends in the development of the English Law of Trusts as detailed by the case law cited (ante) in regard to unmarried cohabiters have no place in the law of Sri Lanka. Section 2 of the Trusts Ordinance does not permit the introduction of these trends into Sri Lanka Law and should never be regarded as a vehicle which was intended to admit new species of constructive or resulting trusts as and when they are evolved by application of English equitable principles to changing English society. What situations could be regarded as creating constructive trusts are set out in Chapter IX of the statute. One cannot add more categories to the statute by judicial decision.

Conclusions :

Mindful of the case law that has been cited (ante) it is my view that a trust may be said to arise where a person proves a case which falls within the language of one of the provisions in Chapter IX of the Trusts Ordinance; therefore s.2 of the Frauds Ordinance would not be relevant. Section 5(1) of the Trusts Ordinance specially enacts that a trust created under Chapter II of that Ordinance must be notarially executed in the manner prescribed by s.2 of the Frauds Ordinance. In the absence of a similar provision which makes s.2 of the Frauds Ordinance applicable to trusts arising under Chapter IX it is a safe approach to say that s.2 of the Frauds Ordinance is not meant to govern trusts arising under Chapter IX i.e. constructive or implied trusts. A person has therefore to make out a case falling within the provisions of ss.83 to 96 of the Trusts Ordinance - vide - *Jonga v. Nanduwa* (21). In the instant case the plaintiff has sought to make out that he did not intend to dispose of his beneficial interest and that the instant situation is one governed by s.83 of the Trusts Ordinance. The plaintiff also asserts that the defendant's denial that she was holding the property in trust for the plaintiff is fraudulent. If he succeeds in proving this, then certainly s.2 of the Frauds Ordinance and ss.91 and 92 of the Evidence Ordinance would not be applicable and would not be a bar to his proving a constructive trust upon parole evidence.

The plaintiff relies on a chain of facts and circumstances in support of his claim. Each case has to be viewed on its particular facts. In this case,

the parties claim to have been man and mistress. Both depended on their employment incomes, the plaintiff being a middle grade hotel employee and the defendant a hairdresser with four dependent children, who, before she lived with the plaintiff, lived in her sister's house. The contest revolves around the purchase of a house. With their employment incomes in Sri Lanka, neither could have had sufficient funds to purchase a house and garden. There is no evidence of their savings in Sri Lanka. Thus we see the plaintiff in 1975 seeking to improve himself - he proceeds abroad, learns a foreign language and earns and saves money and that is the starting point of the circumstances which ultimately led to the purchase of the house. What both earned during their spells abroad in Sweden has been placed before the trial Court through P6 the plaintiff's Swedish Bank Book. We have the evidence that the plaintiff spent a longer time in Sweden in 1975 and 1976 and plaintiff says he earned much more than the defendant who spent only a few months. The defendant claims she earned as much as him. According to the plaintiff's evidence he earned about Rs. 9,000 per month (converted from Swedish Croners) whereas the defendant earned about Rs. 2,000 per month and her daughter a 15 year old girl earned something for a period of 4 months in 1976. The defendant who knew no Swedish does not claim she worked as a hairdresser in Sweden. She has said her duty was to assist in attending to the meals and personal needs of the inmates of a home for elders. The trial Judge has considered the evidence regarding the earnings of the parties in Sweden. He has concluded that the plaintiff was more qualified than the defendant in that he had gained in the Swedish language and therefore was better placed to secure a better paid job than the defendant who was there only for 3 months, had visa problems and knew no Swedish. In the result the trial Judge has accepted the plaintiff's evidence as more probable and concluded the defendant could not have had sufficient money to have purchased the house. I see no reason to interfere with those findings. No other source of income or wealth concerning the parties has been adduced in evidence. In this background one has to examine the claim of the defendant-appellant that she paid the money on the occasion of the purchase of the house on P2 - i.e. Rs. 40,000 cash. The seller Garwin de Silva, Attorney-at-Law, specifically alluding to this testified that it was the plaintiff who paid him first Rs. 5,000 advance and then Rs. 40,000 on the date of the execution of the deed. He therefore flatly contradicts the defendant. He has to be regarded as a disinterested witness and he supports the plaintiff. There are the further facts that the plaintiff paid the Notary's fees and stamp fees for both P2

and P3 according to the Notary. There is also the evidence that no money in fact passed at the time of execution of P3 - vide evidence of the Notary. His mere attestation on P3 that consideration was paid is therefore of little value and has been rebutted by his testimony. The attestation on P3 is therefore not conclusive. - vide - *Davis Singho v. Herath* (12), *Moonesinghe v. Vithanage* (23), *Nadarajah v. Ramalingam* (24).

The trial Judge has in the light of the foregoing, rejected the claim of the defendant that she paid the consideration on P2. He has come to a firm conclusion that the plaintiff paid Rs. 45,000 out of his money on P2. It is also probable that no consideration was paid at the time of the execution of P3. There is no reason to interfere with these findings. We now have the situation that the defendant's claim to have paid the consideration on P2 has been rejected as highly improbable. These circumstances could be regarded as showing that the defendant very probably made a false claim. Such conduct on her part is highly relevant to the question whether the defendant's denial of the existence of a constructive trust in this case amounts to fraud. There is also the letter P9 and the defendant's statement to the Police - P10. The trial Judge having considered all relevant facts has concluded that P9 was written by the defendant. I cannot disagree. By P9 it is stated that "Now Hapu the house is in my name I am willing to write the house in your name you took every cent I saved....." The trial Judge points to the language of P9 and concludes it suggests an admission by the defendant that the house was merely written in her name on P3. That is a finding that Court could have come to on the evidence. Appellant's Counsel submitted that P10 is long after the events of 1976 and should not be regarded as attendant circumstances. But no objection has been taken to the admission of P10 at the trial. The Civil Procedure Code permits a document to go in if not objected to. Furthermore, its contents to wit: that she will transfer the house back to the plaintiff if he returns her gold chain and money amounting to Rs. 4,000 could be regarded as an admission against her interests and therefore relevant and admissible. This conduct too is relevant to the question of fraud. The findings of fact that the defendant had insufficient savings or capital to buy the property at the time P2 was executed coupled with the high probability upon the circumstances set out earlier that the defendant had falsely said that she paid the money as consideration for P2 together with her admissions in P9 and P10 makes it probable that her denial of the plaintiff's assertion of the existence of a constructive trust is fraudulent. It is my view that the plaintiff has

succeeded in showing fraud on the part of the defendant in denying the claim of the plaintiff. In the result s.2 of the Frauds Ordinance and s.92 of the Evidence Ordinance have no application to this case and the plaintiff can lead oral evidence of the existence of a constructive trust in his favour on the basis that he retained the beneficial interest in the property at the time P3 was executed.

The unreliability of her evidence that she paid the money for P2 also affects her evidence that she later discovered that the property had been transferred in the plaintiff's name and she persuaded him to execute P3. Her evidence as to the circumstances in which P3 came to be executed in her name has therefore to be rejected as probably untrue. The trial Judge has correctly answered issue 3(c) in the affirmative. This leaves one with only the plaintiff's version that he executed P3 in defendant's name to facilitate the leasing of the property to generate further income for him whilst he was abroad and the trial Judge has believed him. P4 has therefore to be viewed in this light despite the fact that the defendant was the lessor. I see nothing intrinsically improbable about the plaintiff's explanation for transferring the premises to the defendant on P3. The plaintiff initiated the moves to buy the house whilst still in Sweden; he has paid the purchase price; the trial Judge holds that in all the circumstances he retained a beneficial interest in the property. The Court was entitled to come to this conclusion on the facts and circumstances of this case.

I now turn to the question of a presumption of advancement in favour of the defendant-appellant who admittedly was the mistress of the plaintiff and not the wife. Learned Counsel for appellant sought to extend the rationale in *Mutalibu v. Hameed* (ante) to the case of a man and mistress relationship. As no such presumption can arise in such a relationship in the law of Sri Lanka, Counsel sought to introduce modern trends in the law of England through s.2 of the Trusts Ordinance. I do not think this can be done. The decisions of the English Courts have given rise to qualified trusts based on property concepts and rules of English property law which is not the law of Sri Lanka. Furthermore, the Courts of this country have been disinclined to introduce categories of English constructive and resulting trusts not mentioned in Chapter IX of the Trusts Ordinance. As I said earlier this case has been fought on the basis that the defendant was the sole owner of the property in question. I am unable to say that an initial presumption of advancement arises on the facts.

The trial Judge has held that the plaintiff has proved that he conveyed only a legal interest in the property to the defendant on P3 and retained a beneficial interest in the property and that there was a constructive trust operating in his favour. I agree with the decision and uphold it. I accordingly affirm the judgment of the Court of Appeal and dismiss this appeal with costs.

H.A.G. DE SILVA, J. - I agree.

KULATUNGA, J. - I agree.

Appeal dismissed.