

PIYASENA
v.
DON VANSUE

COURT OF APPEAL.
WIGNESWARAN, J.
C.A. 875/91 (F).
D.C.KULIYAPITIYA 9009/L.
JUNE 12, SEPTEMBER 24 AND DECEMBER 2, 1996.

Rei Vindicatio Action – Trust Ordinance, sections 83, 84, 97 – Beneficial interest – Constructive trust – Attendant circumstances – Evidence Ordinance, sections 11 and 43.

The plaintiff-respondent instituted action for a declaration of title, damages and ejectment, on a deed which was a conveyance by the defendant-appellant to him.

The defendant-appellant took up the position that the transaction on the deed was merely a loan transaction and that the beneficial interest in the land was never transferred to the plaintiff-respondent; he sought benefits under section 83 of the Trust Ordinance and claimed a constructive trust. The District Court held in favour of the plaintiff-respondent. On appeal—

Held:

(i) Even though a transfer is in the form of an outright sale it is possible to lead parole evidence to show that facts exist from which it could be inferred that the real transaction was either–

(i) money lending, where the land is transferred as a security as in this case or;

(ii) a transfer in trust-in such cases section 83 would apply.

(ii) A trust is inferred from attendant circumstances. The trust is an obligation imposed by law on those who try to camouflage the actual nature of a transaction. When the attendant circumstances point to a loan transaction and not a genuine sale transaction the provisions of section 83 of the Trust Ordinance apply.

Per Wigneswaran, J.

The behaviour of the plaintiff-appellant with Samagi Mudalali in the background and the defendant-appellant just before and after the signing of P2 and P3 and even after the end of the period of lease, show them to be that of rapacious investor/s and persecuted borrower respectively rather than a genuine purchaser and a overholding tenant.

(iii) It cannot be reasonably be inferred consistently with the attendant circumstances that the defendant-appellant intended to dispose of the beneficial interest to the property in question.

APPEAL from the judgment of the District Court of Kuliapitiya.

Cases referred to:

1. *Premawathie v. Gunawathie Perera* – BASL Journal Vol. V part 1-21.
2. *Adaicappa Chetty v. Caruppan Chetty* – 22 NLR 417, 426 (PC)
3. *Valliyammai Atchi v. Abdul Majeed* – 48 NLR 289 (PC).
4. *Thangavelauthan v. Saverimuttu* – 54 NLR 28.

L. C. Seneviratne, P.C. with *N. D. S. Jayasinghe* for defendant-appellant.

Ranjan Guneratne for plaintiff-respondent.

March 31, 1997.

C. V. WIGNESWARAN, J.

Plaintiff-respondent instituted this action for declaration of title, damages and ejectment. He relied on deed of Transfer No. 424 dated 09.09.1986 (P2) for his title, which was a conveyance by the defendant-appellant himself to the plaintiff-respondent.

The defendant-appellant took up the position that the transaction on the deed was merely a loan transaction and that the beneficial interest in the land was never transferred to the plaintiff-respondent. He sought benefits under section 83 of the Trust Ordinance and claimed a constructive trust.

By judgment dated 04.10.1991 the District Judge of Kuliapitiya held in favour of the plaintiff-respondent. This is an appeal from the said judgment.

Section 83 of the Trust Ordinance is as follows:-

"83. Where the owner of property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative."

Thus to set up a constructive trust the defendant-appellant should have proved that "it cannot reasonably be inferred consistently with the attendant circumstances" that the defendant-appellant "intended to dispose of the beneficial interest" in the property that is the subject matter of this action.

The learned President's Counsel on behalf of the defendant-appellant has pointed out the following favourable attendant circumstances from which he said it could reasonably be inferred that the defendant-appellant never intended to dispose of the beneficial interest to the plaintiff-respondent by Deed No. 424 (P2). These

circumstances were pinpointed from the evidence led by the plaintiff-respondent himself:

1. Consideration on P2 paid not by plaintiff but by plaintiff's brother-in-law Samagi Mudalali who was a pawn broker and a man of means. (Vide page 221 of the Brief).
2. Plaintiff himself was not a man of means (Vide pages 220 and 221 of the Brief).
3. Plaintiff did not go to the land in dispute nor check its boundaries, nor know of the existence of a coir mill on the land except on the date of signing the deed and thereafter (Vide pages 224, 226 and 230 of the Brief).
4. Notary's fees and stamp fees re- P2 and deed of lease No. 425 (P3) were paid by the defendant-appellant. (Vide pages 255 and 256).
5. Plaintiff did not check title prior to the signing of P2 and P3 (Vide page 239 of the Brief).
6. The need for the plaintiff to inform the Grama Sevaka that he had purchased the property in question seems unnatural.
7. Watcher Somaratne's evidence confirms Samagi Mudalali's interest in the property. His evidence contradicts plaintiff's evidence (Vide pages 260 and 282, 292, 296 of the Brief). He referred to plaintiff, intermediary Joseph Fernando and others going to the Grama Sevaka's office from the Notary's office in Samagi Mudalali's van No. 40 Sri 3515.
8. Contradiction re-consideration of Rs. 150,000/- in plaintiff's evidence.
9. The payment of Rs. 10,000/- per month as lease rent was a cover for interest.

10. Continuance of defendant-appellant in possession of the property in question. The order of the Primary Court Judge in a "Section 66 action" confirmed that the defendant never handed over possession.

Countering the argument that attendant circumstances in this case give rise to an inference of a constructive trust the learned Counsel for the plaintiff-respondent said that,

1. Neither the answer nor the issues raised in this case pleaded that Deed No. 424 created a trust. Instead it was said that Deed No. 424 was given as a security for the loan of Rs. 150,000/- (Vide *Premawathie v. Gunawathie Perera*⁽¹⁾ BASL Journal Vol. V part 1 page 21 in this connection).
2. Parole evidence cannot be led to establish that money was given as security for a loan thus varying the terms of P2 (Vide *Weeramantry* Vol II page 641 and *Adaikappa Chetty v. Caruppen Chetty*⁽²⁾).
3. If P2 was security for repayment of loan the intention was that security should be forfeited on failure to repay loan or violate conditions. No attempt made to repay loan nor interest from September 1988. Thus breach forfeited security on the basis of defendant-appellant's own argument and entailed beneficial interests passing to the plaintiff-respondent.
4. Land given as security cannot create a trust.— *Valliyammai Atchi v. Abdul Majeed*⁽³⁾.
5. In any event attendant circumstances negate trust in that,
 - (a) P3 (lease bond) was executed on the same day as P2 and it was a duly executed lease bond—*Thangavelauthan v. Saverimuttu*⁽⁴⁾
 - (b) Rs. 120,000/- as lease money was paid for the period 09.08.86 and 08.09.87;

- (c) The lease was an admission of the nature of transaction and acceptance of the premises by the defendant-appellant after such admission of the beneficial interests passing to the plaintiff-respondent;
- (d) If Rs. 10,000/- was interest paid, it was never paid after 08.09.87. Clearly therefore the sum of Rs. 120,000/- was lease rent;
- (e) Possession was handed over to the plaintiff-respondent on 03.01.88 (Vide page 215 and page 540 of the Brief); and
- (f) Placing of Somaratne as watcher, surveying of land, fencing the premises at a cost of Rs. 35,000/-, making an application to have his name entered as owner (P5 and P6) – **all negate a trust.**
6. Primary Court proceedings irrelevant under section 43 of the Evidence Ordinance.
7. Issue 9(b) is an admission by appellant that respondent was in possession.
8. Respondent never acted as a constructive trustee (Vide section 97 of Trust Ordinance).
9. What took place before signing of P1 is irrelevant.
10. If consideration was paid by Samagi Mudalali the respondent could be held as having acted only as a trustee of Samagi Mudalali and not the appellant. (Vide section 84 of the Trusts Ordinance).
11. Appellant did not give evidence.

All these submissions would now be examined.

Section 83 of the Trust Ordinance has already been incorporated into this judgment. Significantly the learned Counsel for the plaintiff-

respondent has not referred to this section but only to section 84 and 97 of the Trust Ordinance.

As between the plaintiff and Samagi Mudalali the provisions of section 84 might have some relevance. But as between the plaintiff-respondent and the defendant-appellant what is relevant are the provisions of section 83. The simple question at issue therefore is whether the provisions of section 83 applies to the facts of this case.

Let us first consider some of the attendant circumstances, referred to by the learned President's Counsel appearing for the defendant-appellant.

The plaintiff did not go to the land he purchased nor check its boundaries except on the day of the signing of P2 and P3. The title to the property was not checked prior to the signing of these deeds. It was the defendant-appellant who was called upon to pay the Notary's fees and stamp charges on both P2 and P3. When a man purchases a property he would pay the Notary's fees as well as the stamp charges because the deed is written in his favour and to his benefit. The charges in respect of a lease bond since it is beneficial to both sides is shared by both parties. Here, all charges in respect of both transactions were called upon to be paid by the defendant-appellant.

When the plaintiff-respondent did not even know up to the date of signing P2 and P3 of the existence of a coir mill on the land in dispute it is surprising that Rs. 10,000/- per month has been inserted as the lease money. Unless prior discussion with regard to the payment of lease money took place, such a high amount as Rs. 10,000/- per month could not have been fixed. Only basis on which such exorbitant amount such as Rs. 10,000/- a month could have been fixed as lease money with regard to a property purchased for a mere Rs. 150,000/- would have been the income assessed in relation to the coir mill. Yet the plaintiff said as follows in his evidence:-

Q: එ ඉවත් ගෙයිනක්ල විභේදවාද?

A: කොතුවෙළත් විභේදවා

ඒ කොළඹලේ පැ.2 ශියන ඔරුප්‍රව මත ගත්ත අවස්ථාවේද තිබූහා. කොළඹ මොල සිංහල බව පෙමුවති වතාවට දැක්වෙන ඔරුප්‍රව ලිංච ද්‍රව්‍ය. පොලෝලේ වලවල වලට ශියනය මේව වලවල.

උ: එවා ශියන රිඛනවාද?

උ: එකඟ.

වතාව වශයෙන් ඒ අවස්ථාවේද සමඟ තිබූන් තෙය. පොල ගක 16 ක 17 ක තිබූහා.

උ: ඒ ගත්ත ඉඩීමට කුහුරක් ඇතුළත වෙනවාද?

උ: ඔවුන්.

උ: කුහුර සිතරම වැඩ තරුණ පුද්ගලික නොවන බව දැනගතාද?

උ: වැඩි තරුණ පුද්ගලික කුහුරක්.

වතුර සියනක් තෙය. ඉස්සර ඇම පාරවල තිබෙනවා.

උ: ඒ කුහුරත් තොරමින ආදායම් මධ්‍යනවාද?

උ: ශියනත දුන්නේ තෙය.

උ: කොළඹලේ සිංහ ඉඩීමේ වන්නපාරයෙහි කොළඹ ආදායමක් මධ්‍යනවාද තමාට ශියනත පුද්ගලිකද?

උ: මට ශියනත දුන්නේ තෙය.

Thus the lease money at the rate of Rs. 10,000/- per month had been fixed and deeds written without even finding out the income particulars of the coir mill. The plantations hardly brought in any income.

It is significant to note that the transaction took place with the defendant-appellant going over to meet plaintiff-respondent and not vice versa. (Vide bottom of page 231 of the Brief) in a case of purchase the buyer would go over to the property, examine its suitability for purchase, its price etc. and come to a decision. Not necessarily so with regard to a mortgage or raising of a loan. It is the borrower who is dominant in such a transaction trying to persuade the investor to part with his money. Here was a case of the "purchaser" not going to the property but the owner or "seller" going over to Dankotuwa to see the plaintiff-respondent. Presumably the other person who accompanied the owner (defendant-appellant) was an intermediary.

In any case after the deeds P2 and P3 were written the defendant-appellant was left severely alone. Even after the so called lease

period was over the defendant-appellant continued in possession of the property in question.

At page 487 of the Brief the learned Primary Court Judge in his order in Kuliyapitiya M. C. Case No. 12913 states as follows:

තවද සිද්ධිය පමණිතයෙන් 88.03.15 එවති දිනට පලෙවන් පාර්ශවකරු විසින් පත්තු යොමු කළ පැමිණිලුක් කර ඇති වා යොත්. එම පැමිණිලුල් කොත්තකාවන් මෙම දේපල හිතු ආක්‍රී විනිදු බව සඳහන් කර තැක. දේපල ඔහුට අයිති බවත්, දේපල පාර්ශවකරුවෙන් බිඳ කාලය 87.10.9 දිනෙහි අවසන් වාවත් පලෙවන් පාර්ශවකරු එහි සඳහන් කර ඇත. 88.01.03 දින සිටි පලෙවන් පාර්ශවකරු මෙම දේපලවල ආක්‍රීයක සිටින වාවත්, 88.03.15 දින ඔහු ආක්‍රීයකෙරුපු බවත් එම පැමිණිලුල් සඳහන් කර තැක. මෙම පැමිණිලුල් අකුලත් කරයු විනිදු යොත් සංස්කීර්ණ දේපල පාර්ශවකරුවෙන් බිඳ කාලය 87.10.09 දිනෙහි අවසන් වාවත් ඔහු දිගුම ආක්‍රීයක රැදි සිටි බව සිම් පලෙවන් පාර්ශවකරුට අවශ්‍ය වූ බවයි.

At the end of the order the learned Primary Court Judge held that the plaintiff-respondent in this case was never handed over possession of the property by the defendant-appellant in this case.

The learned Counsel for the plaintiff-respondent referred to section 43 of the Evidence Ordinance under which the Primary Court proceedings were irrelevant. This is not so. Read *inter alia* with section 11 of the Evidence Ordinance the provisions of section 43 are relevant to this case. The finding of the learned Primary Court Judge referred to the police statement made by the plaintiff-respondent on 15.03.1988 (V2) where the fact of currently being in possession of the property in question was never referred to. This fact is relevant in that the conduct of the plaintiff-respondent even after the lease period was over is relevant in coming to a conclusion with regard to the attendant circumstances.

Thus the behaviour of the plaintiff-appellant with Samagi Mudalali in the background and the defendant-appellant, just before and after the signing of P2 and P3 and even after the end of the period of lease, show them to be that of rapacious investors and persecuted borrower respectively rather than a genuine purchaser and an overholding lessee.

Rs. 10,000/- per month as lease rent seems to be an interest covertly claimed. All evidence points to Samagi Mudalali as the puppeteer and the plaintiff-respondent a mere marionette. Even informing the Grama Sevaka of a purchase sans possession gives a predatory dimension to the whole episode. (Vide items 1, 2, 6, 7, and 8 above under submissions made by Counsel for defendant-appellant).

Thus when the attendant circumstances point to a loan transaction and not a genuine sale transaction does the provisions of section 83 of the Trust Ordinance apply, seems to be the question to answer.

Most certainly the issues did centre around the nature of the transaction. Issue 7 referred to a loan transaction though Samagi Mudalali was not mentioned. Issue 8 referred to interest at Rs. 10,000/- per month. Issue 9(a) referred to Deed 424 being a security for a loan. Issue 9(b) referred to the behaviour of the plaintiff as a "constructive trustee". No doubt the wording of issue 9(b) in Sinhala may not have been the best way to have put across the idea of a constructive trust. But the transaction was adequately referred to in order to bring it under the provisions of section 83 of the Trust Ordinance. In fact the issue 9(b) raised in Sinhala relating to the behaviour as a "constructive trustee" seems to owe its origin to the wording of section 83 which says "the transferee or legatee must **hold** such property for the benefit of the owner or his legal representative". May be the Sinhala translation of section 83 (or the Original in Law?) would throw more light on this peculiar wording of the issue. Therefore there is no doubt that throughout the case the defendant-appellant put in issue the question of a constructive trust. Thus even though a transfer is in the form of an outright sale, it is possible to lead parole evidence to show that facts exist from which it could be inferred that the real transaction was either, (i) money lending where the land is transferred as a security as in this case, or (ii) a transfer in trust. In such cases section 83 would apply. (Vide 48 NLR 357 and Weeramantry on Contracts Vol. 11 page 647).

The learned Counsel for the plaintiff-respondent seems to confuse a transfer in trust with a transfer as security for a loan. A security for

repayment of a loan does not get forfeited on failure to repay loan or violate conditions. It only gives rights to the investor to put the matter in suit and claim his dues. He cannot indulge in some form of parate execution resorted to by Hire Purchase Companies.

A trust is inferred from attendant circumstances. The trust is an obligation imposed by law on those who try to camouflage the actual nature of a transaction. The facts of this case seem to confirm that P3 (lease bond) was a cover for the loan transaction that took place. Firstly the investor seems to have wanted adequate security for his capital sum not in the form of a mortgage but a transfer. Next he had wanted to ensure a high rate of interest which if it had been inserted in the documents of transaction would have appeared exorbitant and unreasonable. Thus the Lease Bond was innovated. It is apparent that through this transaction Samagi Mudalali with the help of the plaintiff-respondent was also setting his sights on a long term securement. That was why a statement to the Grama Sevaka about a simple "purchase" had been made. Placing of Somaratne as watcher and wanting to get his name registered etc. were steps taken not qua owner but to assert ownership furtively where in fact it did not exist.

The answer to the question raised by the learned Counsel for the plaintiff-respondent as to how the plaintiff-respondent could become a constructive trustee of the defendant-appellant if money was invested by Samagi Mudalali is simple.

If property passed to the plaintiff-respondent and he let down Samagi Mudalali the latter had a cause of action against the plaintiff-respondent. (Vide section 84 Trusts Ordinance). But so long as money was paid ostensibly by the plaintiff-respondent (though most probably helped by Samagi Mudalali) and paper title was shown to be in his favour the cause of action lay for the defendant-appellant against the plaintiff-respondent. Though the action in this instance was by the plaintiff-respondent, it was open to the defendant-appellant at the end of the period of lease to file an action to declare him as the owner on payment of all dues to plaintiff-respondent.

This Court has not the slightest doubt despite the defendant-appellant not giving evidence that the transaction between the plaintiff-respondent and Samagi Mudalali on the one hand and the defendant-appellant on the other was one from which "it cannot reasonably be inferred consistently with the attendant circumstances that he (the defendant-appellant) intended to dispose of the beneficial interest" to the property in question. This Court therefore holds that such property was held for the benefit of the defendant-appellant subject to the payment of plaintiff-respondent's dues.

This Court therefore sets aside the judgment dated 04.10.91 and declares that the plaintiff-respondent holds the property in dispute in trust for the defendant-appellant subject to the payment of Rs. 150,000/- together with legal interest at 18% per annum from 10.09.1987 until date of payment. On payment of this sum of money within 6 months of the record reaching the District Court of Kuliyapitiya by the defendant-appellant, the plaintiff-respondent shall retransfer the property in suit to the defendant-appellant at the expense of the defendant-appellant. If the plaintiff-respondent neglects or refuses to retransfer the property in suit the Registrar of the District Court of Kuliyapitiya is hereby authorised to do so.

If the defendant-appellant fails to pay the sum of money due to the plaintiff-respondent within 6 months as aforesaid the trust hereby declared would come to an end and the plaintiff-respondent would then be entitled to take out writ of possession as if he had been declared owner.

The appeal is allowed with taxed costs payable by the plaintiff-respondent to the defendant-appellant.