

**KARUNAWATHIE**  
**v.**  
**ROBO SINGHO**

COURT OF APPEAL  
ATUKORALE, J. P/CA AND  
MOONEMALLE, J.  
S. C. 832/75  
D. C. GALLE 7766/L  
29, 30 JUNE 1983.

*Property — Trust to re-transfer land — Section 83 of Trusts Ordinance — Oral agreement to re-transfer — Section 2 of Frauds Ordinance—Section 92 of the Evidence Ordinance.*

**Held —**

The oral agreement by the defendant appellant to reconvey the lands to the plaintiff-respondent on payment of Rs. 3000/- does not give rise to a trust. Further facts, clearly indicative of a trust must be proved before a trust can arise. The facts that adequate consideration did not pass, that plaintiff-respondent remained in possession after execution of the conveyance and that an oral promise was made to re-transfer are insufficient.

Further this oral agreement relied on by the plaintiff-respondent amounts to a contract for the transfer of immovable property which is invalid and cannot be enforced as it contravenes section 2 of the Prevention of Frauds Ordinance. Though parol evidence of this oral agreement was admitted at the trial without objections it would still be prohibited by section 92 of the Evidence Ordinance.

**Cases referred to :**

1. *Saverimuttu v. Thangavelainathan* 55 NLR 486
2. *Perera v. Fernando* 17 NLR 486
3. *Valliamma Atchchi v. Abdul Majeed* 48 NLR 289
4. *Adicappa Chetty v. Caruppan Chetty* 22 NLR 169

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

*H. W. Jayewardene, Q.C.* with *N. R. M. Daluwatte* and *Lakshman Perera* for defendant-appellant.

*N. Devendra* for substituted plaintiff-respondent.

August 4, 1983.

**MOONEMALLE, J.**

The Plaintiff-Respondent instituted this action against the Defendant-Appellant for a declaration that Deed of transfer No. 3443 dated 20th October 1957 (P3) was executed in trust for the Plaintiff-Respondent, and that the Defendant-Appellant be ordered to retransfer to him the six allotments of land described in the schedule to the amended plaint.

The Defendant-Appellant in her amended answer prayed that she be declared entitled to these lands free of any trust, and for ejectment of the plaintiff-respondent, and for damages and costs.

After trial, the learned District Judge entered Judgment for the plaintiff-respondent holding that the deed P3 was executed in trust for the plaintiff-respondent, but that he was not entitled to a reconveyance of the lands mentioned in the deed P3 until he paid the full sum of Rs. 3000/- to the defendant appellant. He dismissed the defendant-appellant's claim to a declaration of title to these lands, for ejectment and damages. The Plaintiff-Respondent was entitled to costs.

This appeal by the Defendant-appellant is from this judgment. The Plaintiff-Respondent is now dead. The Plaintiff-Respondent and the Defendant-Appellant were brother and sister. The Plaintiff-Respondent was a bachelor, while the Defendant-Appellant was married to one D. H. Senanayake, a police constable.

The Plaintiff-Respondent had been in financial difficulties and was sued in D.C. Galle in M. B. Case No. 1162, and Judgment had been entered against him. The decree in that case dated 11th January 1957 is P2.

This decree was for the recovery of Rs. 2032/- and interest at 5% and costs. The Plaintiff-Respondent had decided to sell the lands which are the subject-matter of this action in order to obtain the money to satisfy the decree P2. Sometime in

September 1957 the Defendant-Appellant had come to the Plaintiff-Respondent's house and learnt that he was going to sell the ancestral lands including the ancestral house. She had asked him not to sell the lands to outsiders and had told him that she would give him the money he needed. The Defendant-Appellant had paid the Plaintiff-Respondent the sum of Rs. 3000/- and he had transferred the lands to her by deed P3. The Plaintiff-Respondent's position was that the Rs. 3000/- paid to him was an advance given to him to liquidate his debt and that the lands were transferred to the Defendant-Appellant to be held by her in trust for him, and that she had agreed to retransfer the lands to him on his repaying to her the Rs. 3000/-.

According to the Defendant-Appellant, after the execution of P3, she had allowed her father to look after these lands as she was living away from the village with her husband who was stationed in far off places. She said that her father used to send to her, her share of coconuts and paddy from these lands. It was admitted by the Plaintiff-Respondent that the Defendant-Appellant and her husband were not living in the village after the execution of P3 till they returned to the village in 1969-70.

After the death of the father in 1960, the Defendant-Appellant stated that she had asked the Plaintiff-Respondent to look after the lands. According to her, the Plaintiff-Respondent used to come and see her and bring her share of the income from these lands. Even after the execution of P3, the Plaintiff-Respondent had borrowed money on certain occasions from the Defendant-Appellant and her husband. By Letter of 20th August 1963 (P4), the Defendant-Appellant's husband had written to the Plaintiff-Respondent that the Plaintiff-Respondent had received from him up to that date a sum of Rs. 4600/- inclusive of the Rs. 3000/- that passed on the deed. The Plaintiff-Respondent stated that by June 1969 he had paid the Defendant-Appellant the last instalment of Rs. 475/- due by him and had asked her to reconvey the lands to him, but she had failed to do so.

However, according to the Defendant-Appellant she returned to the village in August 1969 after her husband retired. She had

met the Plaintiff-Respondent and wanted back the possession of her lands which he was looking after for her. The Plaintiff-Respondent had refused to do so and had disputed the Defendant-Appellant's rights to these lands.

The main question for decision in this case is whether the transaction relating to Deed P3 is a pure contract for the purchase and sale of the six allotments of land mentioned in P3 or whether it gives rise to a trust in favour of the Plaintiff-Respondent, whereby the Defendant-Appellant is required to retransfer the said lands to him on his paying her the sum of Rs. 3000/-.

Learned Counsel for the Plaintiff-Respondent contended that a trust in terms of Section 83 of the Trust Ordinance arose in the circumstances of the present case. Section 83 of the Trusts Ordinance reads as follows: "Where the owner of property transfers or bequeaths it, and 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."

Learned Queen's Counsel appearing for the Defendant-Appellant submitted that a trust does not arise in this Case, and that the word 'Trust' is used only as a label which the Plaintiff-Respondent attaches to this transaction. He submitted that if the word 'Trust' is left out, then what remains is the oral agreement to retransfer the lands, which is a non-notarial document, and therefore oral evidence cannot be led to prove that oral agreement, as it contravenes Section 2 of the Prevention of Frauds Ordinance.

Such an oral agreement is unenforceable in law. However, in the present case, the Plaintiff-Respondent sought to prove the oral promise not in order to have it enforced, but only to use it as an attendant circumstance in order to prove the trust. It is for this reason that the oral evidence of this oral promise was admitted in evidence. The learned trial Judge had come to a finding that the Defendant-Appellant had given the

Plaintiff-Respondent the undertaking to reconvey the lands to him on his paying her the sum of Rs. 3000/-. The learned Trial Judge accepted the evidence of the Valuer's valuation of these lands as being Rs. 13,168/- at the time of the execution of P3, which is about four times the amount of the consideration that passed on this deed.

It is common ground that the Plaintiff-Respondent remained in possession of these lands even after the execution of P3.

Thus, the attendant circumstances on which the Plaintiff Respondent relies on to establish a Trust in terms of Section 83 of the Trust Ordinance are,

(a) That adequate consideration did not pass on Deed P3.

(b) That the Plaintiff-Respondent remained in possession of the lands after execution of P3 and therefore did not intend to part with the beneficial interest in the property.

(c) That the Defendant-Appellant made an oral promise at the time of the execution of P3 to retransfer the lands to the Plaintiff-Respondent on the payment of Rs. 3000/-.

Deed P3, on the face of it purports to be an unqualified transfer of immovable property for consideration; whatever label is given to this transaction, it is necessary to scrutinize the evidence carefully and ascertain its true nature.

There is no doubt that the consideration of Rs. 3000/- that passed on P3 is considerably less than the real value of the lands, which is Rs. 13,168/-. In this connection, it is important to note that the relationship of the Plaintiff-Respondent and that of the Defendant-Appellant was not that of debtor and creditor, but that of brother and sister. Evidently, the two of them had been friendly at the time because otherwise, P3 would not have been executed in favour of the Defendant-Appellant. The Defendant-Appellant had stated in her evidence that she had asked the Plaintiff-Respondent not to sell the lands

to outsiders, and that if the lands were sold to outsiders there would be no purpose in their living in the village. It is also of note that the Plaintiff-Respondent was a bachelor who lived in the ancestral house with the father and the mother.

The ancestral house is in land No. 2 in P3, called Bubulewatte. Had the Plaintiff-Respondent sold these lands to an outsider, he and his parents would have had to find accommodation elsewhere. In these circumstances, it is quite natural that the lands were sold to the Defendant-Appellant for Rs. 3000/- in order to preserve them within the family. I do not think that the Defendant-Appellant wanted to take advantage of the Plaintiff-Respondent's financial position and get the transfer of the lands in her name for a low consideration.

It is common ground that the Defendant-Appellant was living away from the village even after the execution of P3. This is quite understandable as her husband who was a police constable was in a transferable service. According to the Defendant-Appellant her husband served in distant places such as Welipenna, Matugama and Amparai, and so it would have been well nigh impossible for the Defendant-Appellant to have remained in physical possession of these lands after the execution of P3. In these circumstances, her version that during her absence from the village, her father looked after her lands till his death, and thereafter her brother, the Plaintiff-Respondent, did so is quite plausible. The feelings between the Plaintiff-Respondent and the Defendant-Appellant became strained only after the Defendant-Appellant returned to the village in August 1969 after her husband had retired.

When the Defendant-Appellant wanted her lands back, the Plaintiff-Respondent was not willing to return them. Then on 18.1.70, when the Defendant-Appellant went to take possession of Land No. 5 in P3, there had been an incident between the Plaintiff-Respondent and the Defendant-Appellant's husband which resulted in the Plaintiff-Respondent being

charged in M. C. Galle case No. 64867/B for attempting to stab the Defendant Appellant's husband. It is clear from the circumstances under which Rs. 3000/- passed as consideration on P3, and from the circumstances under which the Plaintiff-Respondent remained in possession of the lands after the execution of P3, that it was never intended that the beneficial interest in the lands should remain with the Plaintiff-Respondent.

The remaining attendant circumstance the Plaintiff-Respondent relied on is the oral promise to reconvey the Lands in (P3).

The general rule is that a transaction relating to immovable property is invalid unless the terms of the transaction are embodied in a notarially attested document. However, this rule is relaxed in the case of fraud on the ground that the Statute of Frauds should not be made an instrument of fraud — *Saverimuttu v. Thangavelainathan* (1).

Learned Counsel for the Plaintiff-Respondent submitted that fraud need not be present at the inception of the execution of a notarial deed for the transfer of immovable property, and that a breach subsequent to the execution of the deed, of an oral promise to reconvey the property would amount to a fraud.

Learned Counsel for the Plaintiff-Respondent relied on an observation of Dr. L. T. M. Cooray in his book on the Reception in Ceylon of the English Trust, and also on an English Case *Bannister v. Bannister* referred to in that book, in support of his submission. At the outset, I might state that the question of fraud is totally irrelevant to this appeal, as the question of fraud was raised for the first time in appeal. There was no issue on fraud raised at the trial, and learned trial Judge was not invited at any stage of the trial to decide on the question of fraud.

It is settled law that where there is an outright sale of immovable property, by a notarial deed, oral evidence could be

led to prove that the property in the hands of the transferee was held in trust for the transferor.

Learned Queen's Counsel appearing for the Defendant-Appellant in submitting that no trust arose in this case relied on the case of *Saverimuttu v. Thangavelainathan* (1), and contended that case was on all fours with the present case. In the reported case, the appellant and his wife transferred to one *Aiyadorai* by Deed, 3, three allotments of land which were the subject-matter of a Mortgage decree on which at the relevant date, a balance amount of Rs. 2000/- was payable by the appellant and his wife to *Aiyadorai*. It was stated in Deed No. 3 that the consideration for the transfer was this balance amount due on the mortgage decree. Satisfaction of the decree was duly certified of record. On the face of the deed, it was an unqualified transfer for consideration. Immediately after the execution of the deed, on the same day, *Aiyadorai* leased the lands to the Appellant and his wife for a period of six years. The relationship of *Aiyadorai* and the appellant had been converted from that of creditor and debtor to that of lessor and lessee. After the lease expired, a re-indicatio action was instituted by *Aiyadorai's* successors in title against the appellants. The appellants sought to assert by evidence of an informal agreement that the transfer to *Aiyadorai* was subject to a condition that *Aiyadorai* was to hold the lands in trust for the appellants and reconvey the lands to the appellants on payment to *Aiyadorai* of a sum of Rs. 2000/-with interest. It was held in that case that the informal agreement relied on by the appellants amounted not to a trust but to a contract for the transfer of immovable property and was therefore invalid as it contravened the provisions of Section 2 of the Prevention of Frauds Ordinance. Counsel for the appellant in that case argued that if B transfers land to A for a consideration by an effective notarial document and A as part of the same transaction agrees orally or by a non-notarial agreement to retransfer the land to B for the same or another consideration, a Trust in favour of B arises. Their Lordships of the Privy Council did not agree. Their Lordships thought that further facts clearly indicative of a Trust must be proved before a Trust can be said to arise. "

In the Judgment delivered by Mr. L. M. D. de Silva in that case, the Privy Council has referred to the case of *Perera v. Fernando* (2) where it was held that where a person transferred a land to another by a notarial deed purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage and that the transferee agreed to reconvey the property on payment of the money advanced. It was further held in that case that the agreement relied on amounted not to a trust but to " a pure contract for the purchase and sale of immovable property. " Their Lordships were of opinion that *Perera v. Fernando* (2) set out correctly the law of Ceylon.

In the case of *Valliamma Achchi v. Abdul Majeed* (3) there was an unconditional transfer by notarial deed of immovable property by A to B. In pursuance of a verbal agreement B was to hold the property in trust for A. B was to remain in possession of the property and to pay out of the income of the property debts of A due to himself and to others, and thereafter B was to reconvey the property to A.

Their Lordships of the Privy Council stated that they " have been referred to the relevant evidence and they are satisfied that there was ample evidence, if admissible, to justify the finding that the trust was established.

In that case on the facts established by oral evidence it was held that B held on Trust the land conveyed to him by A though the deed of transfer made no reference to the trust.

Their Lordships observed that " The decision does not in terms or otherwise detract from the force of the view expressed by the Board in the case *Adicappa Chetty v. Caruppan Chetty* (4). In that case it was sought to establish by oral evidence that a person who held a land under a notarially attested document held it in trust for another. It was held that parol evidence was inadmissible. It was further held that the agreement in respect of which parol evidence was led sought to " create something

much more resembling a mortgage or a pledge than a trust " and was of no force or avail in law if it contravened section 2 of the Prevention of Frauds Ordinance.

The case of *Valliamma Achchie v. Abdul Majeed* (3) could be distinguished from the case of *Saverimuttu v. Thangavelainathan* (1) in that in the former case " Chief among the purposes of that trust was that the transferee should enter into possession, collect the income and therewith pay off the debt due to himself and debts due to certain other persons. It was thereafter that the transferor was to reconvey the property to the transferee. "

Their Lordships in the course of their Judgment in *Saverimuttu v. Thangavelainathan* (1) referred to the existence of common elements with the case of *Valiamma Achchi v. Abdul Majeed*, (3) namely, that in each case that there was an alleged agreement by a transferee of land to reconvey to the transferor and the transferor in each case was indebted to the transferee at the time of the transfer. But their Lordships were of the view that those elements themselves did not establish a trust and that they established only an agreement to convey. Their Lordships also pointed out that the Judgment in *Valliamma Atchchi v. Abdul Majeed* (3) did not indicate that these common elements are in all cases sufficient to give rise to a trust.

Thus, it is clear that in the present case in appeal the oral agreement by the Defendant-Appellant to reconvey the lands to the Plaintiff-Respondent on the payment of Rs. 3000/- does not give rise to a trust. Further facts, clearly indicative of a trust must be proved before a trust can be said to arise. Further, this oral agreement relied on by the Plaintiff-Respondent amounts to a contract for the transfer of immovable property which is invalid and cannot be enforced as it contravenes Section 2 of the Prevention of Frauds Ordinance. Though parol evidence of this oral agreement was admitted at the trial without objections it would still be prohibited by Section 92 of the Evidence Ordinance — *William Fernando v. Roselyn Cooray* (5).

I hold that there isn't sufficient evidence to uphold the Plaintiff-Respondent's proposition that a trust has been established. I therefore allow the appeal and set aside the judgment of the learned District Judge and enter judgment for the Defendant-Appellant as prayed for by her in her amended answer. She will be entitled to costs of appeal and costs of the court below.

**ATUKORALE, J.** — I agree

*Appeal allowed.*