PREMAWATHI
v.
GNANAWATHI

SUPREME COURT.
G. P. S. DE SILVA, C.J.
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 51/93.
C.A. NO. 623/82 (F).
D.C. GAMPAHA 22263/L.
NOVEMBER 8 AND 22, 1993.

Constructive Trust – Section 83 of Trusts Ordinance – Claim for retransfer of land – Agreement to retransfer on informal writing – Prevention of Frauds Ordinance, Section 2.

An undertaking to reconvey the property sold was by way of a non-notarial document which is of no force or avail in law under section 2 of the Prevention of Frauds Ordinance. However the attendant circumstances must be looked into as the plaintiff had been willing to transfer the property on receipt of Rs. 6000/- within six months but could not do so despite the tender of Rs. 6000/- within the six months as she was in hospital, and the possession of the land had remained with the 1st defendant and the land itself was worth Rs. 15,000/-, the attendant circumstances point to a constructive trust within the meaning of section 83 of the Trusts Ordinance. The "attendant circumstances" show that the 1st defendant did not intend to dispose of the beneficial interest.

Case referred to:

Muttammah v. Thiyagarajah 62 NLR 559, 571.

APPEAL from judgment of the Court of Appeal.

N. R. M. Daluwatte P.C. with *Mrs. Dhammika Dharmadasa* for defendant-appellant.

P. A. D. Samarasekera P.C. with *Hemasiri Withanatchi* for plaintiff-respondent.

Cur. adv. vult.

December 2,1993.
G. P. S. DE SILVA C. J.

The Plaintiff instituted these proceedings for a declaration of title to the land described in the schedule to the plaint, for the ejectment of

the defendants and for damages. Admittedly the 1st defendant was the owner of the land in suit and she by deed No. 5755 dated 4.2.76(P1) transferred it to the plaintiff for a sum of Rs. 6000/-. P1 was *ex-facie* an out and out transfer. Using her claim of title on P1, it was the plaintiff's a case that the defendants acting in concert had wrongfully prevented her from possessing the land since 4.8.76.

The 1st defendant in her answer, in the issues, and in her evidence clearly and specifically took up the position that by P1 she did not intend to dispose of the beneficial interest in the land to the plaintiff. In paragraph 5 of the answer she pleaded a constructive trust in terms of section 83 of the Trusts Ordinance. Issues Nos. 3 and 4 read thus:

3 Did the 1st defendant transfer the beneficial interest in the land in suit to the plaintiff on deed No. 57557?

4. In any event, was the said land worth more than twice the sum of Rs. 6000/- at the time of the execution of the deed as averred in the answer?

After trial, the District Judge answered the above issues as "Not proved" and entered judgment for the plaintiff. The 1st defendant appealed against the judgment to the Court of Appeal, but without success. Hence the present appeal to this Court.

The plaintiff in her evidence admitted that by an informal writing (which bears the same date as P1) she undertook to reconvey the property to the defendant upon the payment of the sum of Rs. 6000/- within a period of 6 months from 4.2.76. She further stated, (i) that she was in hospital for about 2 months from August 1976; (ii) that while in hospital the defendant came to see her and discussed with her the question of the retransfer of the property; (iii) that the hospital authorities did not permit the notary to come to the hospital and the deed of retransfer could not be executed; (iv) that she was willing to retransfer the property within the stipulated period of 6 months; (v) in answer to court, that the value of the property was about Rs. 15000/- in 1976.

The 1st defendant testified to the circumstances in which she came to transfer her property to the plaintiff on P1. She was urgently in need of money and the plaintiff required a transfer of the property in order to lend her the money. By a non-notarial document the plaintiff agreed to retransfer the property upon payment of the sum of Rs. 6000/- within a period of 6 months. In cross-examination she stated that she met the plaintiff with the sum of Rs. 6000/- before the expiry of the period of 6 months but the deed of retransfer could not be executed because the plaintiff was in hospital.

Special leave to appeal to this Court was allowed on two questions:- (1) Can it be reasonably inferred consistently with the attendant circumstances that the 1st defendant intended to dispose of the beneficial interest in the property to the plaintiff? (2) If not, was the District Judge justified in rejecting the claim of a constructive trust in terms of section 83 of the Trusts Ordinance?

Section 83 of the Trusts Ordinance reads as follows:- "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." As stated by Dr. L. J. M. Cooray in his book on Trusts (p. 129)) the "pivotal words" in the section are "intended to dispose of the beneficial interest" in the property.

Mr. Samarasekera for the plaintiff-respondent submitted that the question which arises for decision is, what was the true "arrangement" between the parties in regard to the disputed transaction? It was Counsel's contention that the real "arrangement" was for the defendant to sell the property to the plaintiff and the plaintiff to convey the property back to the defendant upon the payment of a sum of Rs. 6000/- within a period of 6 months. Delivery of possession was postponed only for a period of 6 months. The 1st Defendant failed to tender to the plaintiff the sum of Rs. 6000/- within the stipulated period of 6 months, and hence it was the 1st defendant who was in breach of the agreement arrived at between the parties. In these circumstances. Mr. Samarasekera argued, that no question

of a constructive trust arises at all in this case, and that the plaintiff must succeed in her action.

There are two matters which militate against these submissions. The first is that the undertaking to reconvey the property to the defendant was by way of a non-notarial document which is of no "force or avail in law." (Section 2 of the Prevention of Frauds Ordinance). The "true arrangement" (to use Counsel's own words) between the parties cannot be based on an agreement which is invalid in law. Secondly, as rightly pointed out by Mr. Daluwatte, for the 1st defendant-appellant, there is clear evidence to show that the 1st defendant in fact tendered the money to the plaintiff within the period of 6 months. The deed of retransfer could not be executed because the plaintiff was in hospital.

On the other hand, upon a consideration of the totality of the evidence on record, I am of the opinion that, the following facts have been established:-

(1) 1st Defendant was in urgent need of money at the time she sold her land to the plaintiff on P1 for a sum of Rs. 6000/-.

(2) The plaintiff by a non-notarial document agreed to retransfer the land to the defendant upon payment of the said sum of Rs. 6000/- within a period of 6 months. (The non-notarial document is relevant not to enforce the promise but only to establish an "attendant circumstance" within the meaning of section 83 of the Trusts Ordinance - *Muttammah v. Thiyagarajah*.[1]

(3) The plaintiff entered hospital and the retransfer of the land could not be effected within the period of 6 months; the defendant however, tendered the money to the plaintiff within the stipulated period.

(4) The consideration on P1 was Rs. 6000/-. The Plaintiff admitted that the value of the land was about Rs. 15,000/-.

(5) The plaintiff's evidence was that she was ready and willing to re-transfer the land to the 1st defendant within the period of 6 months. This is indicative of the fact that the plaintiff realised that there was an obligation attached to her ownership of the land.

(6) The possession of the land remained with the 1st defendant.

In my view, the above facts and circumstances point to a "constructive trust" within the meaning of section 83 of the Trusts Ordinance, as rightly contended for by Mr. Daluwatta. In other words, "the attendant circumstances" show that the 1st defendant did not intend "to dispose of the beneficial interest" in the land by P1.

Both the District Court and the Court of Appeal failed to evaluate the evidence having regard to the 1st defendant's plea of a "constructive trust" within the meaning of section 83 of the Trusts Ordinance. Accordingly, the judgment of the Court of Appeal and the District Court are set aside and the appeal is allowed with costs in this Court, Court of Appeal and the District Court.

I accordingly direct –

(i) the 1st defendant to deposit a sum of Rs. 6000/- with legal interest from date of action to the credit of this case on or before 28th February 1994;

(ii) if the said sum of money is paid as aforesaid, the plaintiff to transfer the land in suit in favour of the 1st defendant, on or before 15th April, 1994;

(iii) if the said sum of money is paid as set out in (1) above and if the plaintiff fails to effect a transfer as set out in (ii) above, the Registrar of the District Court to effect the transfer on or before 31st May, 1994;

(iv) the plaintiff is entitled to withdraw the said sum of money set out in (i) above only after the execution of the conveyance by her or by the Registrar of the District Court.

(v) the 1st defendant to bear all expenses of the conveyance in her favour;

The Registrar of this court is directed to return the record forthwith to the District Court so that the parties could comply with the aforesaid directions.

KULATUNGA, J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.
Directions given.