THISA NONA AND THREE OTHERS
v.
PREMADASA

COURT OF APPEAL.
WIGNESWARAN J.
C.A. 689/83 (F)
D. C. NEGOMBO 1584/P
DECEMBER 4, 1996.

Trusts Ordinance, Sections 5 and 63 - Constructive trust – Beneficial interests - Attendant circumstances - Section 2 of the Prevention of Frauds Ordinance 7 of 1840.

The District Court refused the claim of the 1st defendant-appellant that P16 created a constructive trust.

On appeal, -

Held:

(1) The fact that document 1V2 was admitted by the plaintiff-respondent, the fact that the 1st defendant-appellant paid the stamp and Notary's charges, the fact that P16 was a document which came into existence in the course of a series of transactions between the plaintiff respondent and the fact that the 1st defendant-appellant continued to possess the premises in suit just the way she did before P16 was executed all go to show that the transaction was a loan transaction and not an outright transfer.

(2) The attendant circumstances show that the 1st defendant-appellant did not intend to dispose of the beneficial interest in the property transferred.

Law therefore declares under such circumstances that the plaintiff-respondent would hold such property for the benefit of the 1st defendant-appellant.

APPEAL from the District Court of Negombo.

Cases referred to:

1. *Valliammi Achi v. Abdul Majeed* 48 NLR 289 at 292.
2. *Ehiya Lebbe v. Majeed* 48 NLR 357 at 359.
3. *Premawathie v. Gnanawathie Perera* 1994 – 2 SLR 171.

P. Kenneth E. Perera for 1st defendant-appellant.
Bimal Rajapakse for plaintiff-respondent

Cur. adv. vult.

December 4, 1996.

WIGNESWARAN, J.

This is an appeal against the order dated 25.08.83 of the District Judge, Negombo refusing the claim of the 1st defendant-appellant that P16 created a constructive trust. By deed No. 7973 dated 09.01.1975 attested by S. M. Wijewickrama Notary Public, Negombo (P16) Balasooriya Kankanamalage Thisa Nona the 1st defendant-appellant transferred an undivided extent of one rood from her undivided 1/3rd share out of the land called Ambagahawatte in Wankapumulla in extent 1 Acre 0 Roods 20 Perches to the plaintiff-respondent Adikari Appuhamilage Premadasa for a sum of Rs. 1500/.

On P16 she claimed her title by Deed No. 7972 dated the same day (09.01.1975) and attested by the same Notary. This was a transfer by the above said plaintiff-respondent to the 1st defendant-appellant. (P15)

On P15 the plaintiff-respondent claimed title by Deed No. 17082 dated 06.12.1971 attested by D. A. S. Wijesinghe Notary Public (P14) which was again a transfer by the above said 1st defendant-appellant to him. The previous deed by which 1st defendant-appellant got title was deed of gift No. 1652 dated 24.09.1968 attested by S. M. Wijewickrama, Notary Public Public. (P13)

While P13, P14 and P15 referred to undivided 1/3rd share as the share transferred, P16 referred to undivided one rood from and out of the undivided 1/3rd share. Thus out of about undivided 60 perches [1/3rd of (1 Acre 0 Roods 20 Perches =) 180=60 perches] only an undivided 40 perches were transferred on P16.

Further Deed of gift P13 referred to the value of the land in 1968 as Rs. 500/-. P14 by which the 1st defendant-appellant first transferred the entirety of the undivided 1/3rd share referred to the consideration as Rs. 450/- in 1971. P15, which was a retransfer on 09.01.1975 referred to the consideration as Rs. 450/-

P16 on the other hand was a transaction between the same parties but for a lesser share (undivided 1 Rood out of undivided 1/3rd of the entire land in extent 1 Acre 0 Rood 20 Perches). The purchase price was Rs. 1500/- in 1975. In other words P15 which was a retransfer in favour of the 1st defendant-appellant referred to the purchase price

in respect of undivided 60 perches as Rs. 450/- while an undivided share of 40 perches from and out of the undivided 60 perches on the deed written on the same date as P15 referred to the purchase price as Rs. 1500/-. This may give the impression that adequate consideration was paid. But, out of the consideration of Rs. 1500/- on P16 only Rs. 125/- was paid in the presence of the Notary and the balance was acknowledged to have been received earlier. On P15 no consideration passed in the presence of the Notary. It was acknowledged to have been received earlier. On P14 Rs. 300/- was paid in the presence of the Notary and the balance was acknowledged to have been received earlier. Whether the consideration payable on P15 was deducted from the consideration payable on P16 is a moot point. But at pages 123-134 of the Brief the manner in which money was borrowed by 1st defendant-appellant is set out. In this background the question to be decided in this case is whether P16 created a trust in favour of the 1st defendant-appellant in terms of the provisions of section 83 of the Trusts Ordinance.

The learned Counsel for the appellant has referred to a number of attendant circumstances to suggest that there was a trust. Briefly they are as follows:

(1) The transaction was a loan transaction.

(2) The transfer was a security for the loan.

(3) The notarial fees and stamps were paid by the 1st defendant-appellant.

(4) The plaintiff-respondent refused to accept Rs. 1500/- and property even **before** the 6 years mentioned in 1V2 – a contemporaneous non-notarial; document.

(5) Possession not handed over. Appellant continued to reside even after the transaction.

The learned Counsel for the 1st defendant-appellant therefore argued that the order of the District Judge, Negombo dated 25.08.83 should be set aside and the case decided in favour of the 1st defendant-appellant.

The learned counsel for the plaintiff-respondent has said that the provisions of Section 83 of the Trusts Ordinance has no bearing to the facts of this case since

(i) There was no evidence led to show that consideration paid on P16 was inadequate.

(ii) There was evidence that the plaintiff-respondent was in possession of another portion of the same land owned by a brother of the 1st defendant-appellant.

(iii) There were no effective steps taken to pay Rs. 1500/- within the six years assuming 1 1/2 is admissible despite Section 2 of the Prevention of Frauds Ordinance.

(iv) Even up to date Rs. 1500/- had not been paid nor deposited in Court.

(v) P16 is an outright sale with no conditions attached to it and for valuable consideration.

(vi) All authorities cited by the Counsel for the 1st defendant-appellant smacked of trust being created. Whereas there was no such parallel in this case since the 1st defendant-appellant had effectively disposed both her legal and beneficial interests to the plaintiff-respondent.

All these submissions would presently be examined

Section 83 of the Trusts Ordinance states 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".

What this Court has to decide is whether the 1st defendant-appellant "intended to dispose of the beneficial interests in the property"or not. In this connection the following matters need consideration.

(i) Plaintiff-respondent admitted signing 1 V 2 a contemporaneous non-notarial document at the time P16 was executed. If P16 was

an out right transfer and Rs. 1500/- was an adequate consideration for the undivided 40 perches why should he has given such a document? This document gives an insight into the state of mind of the parties to the transaction. Formalities required to constitute a valid trust relating to immovable properties are to be found in Section 5 of the Trusts Ordinance rather than in Section 2 of the Prevention of Frauds Ordinance. (Vide *Valliammai Achi v. Abdul Majeed*) [1].

(ii) The 1st defendant-appellant paid the Notary's fees and stamp fees. If it was an outright transfer the purchaser would have had to pay the charges. Why did 1st defendant-appellant willingly come forward to pay same if the transaction was not beneficial to her in that she was receiving a loan or had received a loan for which a security was given in the form of an outright transfer? In fact according to the attestation clause most of the consideration had been received by the transferor prior to the signing of P16. In *Ehiya Lebbe v. A. Majeed*[2], it was held that if the transferor paid the whole costs of the conveyance it would be a test to find out the nature of the transaction. It therefore appears that having taken the bulk of the loan earlier the 1st defendant-appellant was forced to consent to the terms of the plaintiff-respondent. By allowing the cost of the conveyance to be paid by the 1st defendant-appellant the plaintiff-respondent exposed the nature of the transaction.

(iii) Possession of the premises was not handed over on execution of P16. The plaintiff-respondent being a possessor of another portion of the land is not relevant. The 1st defendant-appellant's rights were undivided. The undivided portion in extent one Rood from and out of the 1st defendant-appellant's undivided 1/3rd share could at least have been given possession constructively. On the contrary the 1st defendant-appellant continued to stay where she stayed before the transaction even after the transaction. Does it not show that the 1st defendant-appellant had **not intended** to part with the beneficial interest in the land to the plaintiff-respondent? In *Ehiya Lebbe v. A. Majeed* (*Supra*) it was held that if the transferor continued to remain in possession after the conveyance that would also be a test to find out the nature of the transaction.

(iv) The Notary's attestation with regard to P16, P15 and P14 show that there had been money transactions between the parties for a considerable length of time. On P14 out of the consideration of Rs. 450/-, Rs. 350/- was paid in the presence of the Notary. The balance had been paid to the 1st defendant-appellant prior to the execution of the deed (Vide page 301 of the Brief). On P15 no consideration was paid in the presence of the Notary. The full amount was acknowledged to have been received previously (Vide page 310 of the Brief). The fact that there had been various financial transaction between the parties is brought out at page 304 of the Brief where the transferor and the transferee on Deed No. 7972 (P15) refers to a transfer free of the right of retransfer, mortgage and security for loan. The Notary has specially inserted in a printed transfer Deed form the following words:-

"එකී මිස්පුව පිට ඉතිරි කරගෙන සිංහල අපපු ගැනීම් අයිතිවාසිකමට යතුව"

This refers to the conditions set out in P14 where the 1st defendant-appellant on payment of an agreed interest and principal was entitled to a re-transfer. P15 and P16 were executed on the same date one after the other before the same Notary. Thus the 1st defendant-appellant had been called upon to execute P16 under more stringent conditions presumably because the loan was now Rs. 1500/- unlike earlier in that no right of re-transfer was preserved on the face of the Deed P16. But such a preservation is found in 1V2 which reads as follows:-

"1975-01-09.
මිනුවන්ගොඩදීය.

දෙවලපොල-වත්තැපුමුල්ලේ පදිංචි අධිකාර අප්පුහාමිලාගේ ලජ්මදාස වන මට ඇස්. ඇම්. විජයවික්‍රම නොතාරිස් මහතා සහතික කල අද දින සහ අංක 7973 දරණ මිස්පුව පිට අපේ වූ ලදල මෙදින සිව අවුරුදු සයක් තුළදී එම මිස්පුවේ විකුණුම්කාරිය වූ එකී වත්තැපුමුල්ලේ පදිංචි බාලසූරිය සංඛානමලාගේ තිසා සෝනා විසින් රුපියල් එක දහස් පන්සියක් (රු. 1500/-) ක මා වෙත ගෙවා සින්නක්කරයේ ලියවා දෙන ලෙස ඉල්ලා සිටියොත් එලෙස මුදල් හාරගෙන එම ඇේපල සින්නක්කර කරන බවට පොරොන්දු වී මෙය ලියවා අත්සන් කර දුනිමි."

Within the period of years mentioned in 1V2 the 1st defendant-appellant requests the acceptance of Rs. 1500/- but the plaintiff-respondent refused to accept payment. (Vide page 131 of the Brief).

Thus it is in the light of the sequence of events and the nature of attendant circumstances that a Court should come to its conclusion as to whether Section 83 of the Trust Ordinance should apply to a particular case or not. The fact that 1V2 was admitted by the plaintiff-respondent, the fact that 1st defendant-appellant paid the stamps and Notary's charges, the fact that P16 was a document which came into existence in the course of a series of transactions between the plaintiff-respondent and the 1st defendant-appellant, the fact that the 1st defendant-appellant continued to possess the premises in suit just the way she did before P16 was executed – all go to show that the transaction was a loan transaction and not an outright transfer. The attendant circumstances show that the 1st defendant-appellant did not intend to dispose of the beneficial interest in the property transferred. Law therefore declares under such circumstances (Section 83 of the Trusts Ordinance) that the plaintiff-respondent would hold such property for the benefit of the 1st defendant-appellant. [Vide case similar – *Premawathie v. Gnanawathie Perera*][3].

Thus the learned District Judge has failed to evaluate the evidence in the light of the 1st defendant-appellant's plea of a constructive trust within the meaning of Section 83 of the Trusts Ordinance. The judgment dated 19.08.83 is thus misconceived. The said judgment is therefore hereby set aside and the appeal is allowed with incurred costs payable in this Court.

The 1st defendant is hereby directed to deposit a sum of Rs. 1500/- with legal interest from 08.01.81 up to date of payment to the credit of D.C. Negombo Case No. 1584/P on or before 31.03.1997. If the said sum of money is paid as aforesaid the plaintiff-respondent must transfer the land and premises in suit in favour of the 1st defendant-appellant on or before 31.05.1997. If the said sum of money is paid as set out above and if the plaintiff-respondent fails to effect a transfer as set out above, the Registrar of the District Court of Negombo is hereby directed to effect the transfer on or before 30.06.1997. It is hereby directed that the plaintiff-respondent is entitled to withdraw the said sum of money above referred to only after the execution of the conveyance by him or by Registrar of the District Court of Negombo. It is further directed that the 1st defendant-appellant shall bear all expenses of the conveyance in her favour.

Subject to abovesaid directions the plaintiff's case in the District Court is dismissed with costs incurred by the 1st defendant-appellant payable by the plaintiff-respondent to her.

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

Appeal allowed.