

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an appeal to the Supreme
Court of the Democratic Socialist Republic
of Sri Lanka.

SC. Appeal 41/2013

SC(HC) CALA. Application No. 68/12
WP/HCCA/Kal/84/2002(F)
D.C. Matugama No. 710/Spl.

Hewage Don Piyasena
Owitigala,
Matugama.

Plaintif

Vs.

Karunasena Hathurusinghe,
Rannagala, Naboda,
Matugama.

Defendant

And Between

Karunasena Hathurusinghe,
Rannagala, Naboda,
Matugama.

Defendant-Appellant

Vs.

Hewage Don Piyasena
Owitigala,
Matugama.

**Plaintif-Respondent
(Deceased)**

a. Hewage Don Aruna Nishantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.

- b. Yakdehige Dona Somawathie,
No. 35, Sirikandura Road,
Badugama,
Matugama.
- c. Hewage Don Lalith Susantha,
No. 34, Sirikandura Road,
Badugama,
Matugama.
- d. Hewage Don Sandya Malkanthi,
Owitigala,
Matugama.
- e. Hewage Don Nayana Priyantha
No. 34, Sirikandura Road,
Badugama,
Matugama.
- f. Hewage Don Yamuna Irangani,
No. 34, Near Police Station,
Baduraliya.
- g. Hewage Dona Ganga Priyanthi,
No. 35, Sirikandura Road,
Badugama,
Matugama.
- h. Hewage Don Sanjeeva Prasanna,
No. 35, Sirikandura Road,
Badugama,
Matugama.
- i. Hewage Don Sujeewa Nilantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.

**Substituted-Plaintiff-Respondents
of Deceased Plaintiff-Respondent**

And

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- a. Hewage Don Aruna Nishantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.
- b. Yakdehige Dona Somawathie,
No. 35, Sirikandura Road,
Badugama,
Matugama.
- c. Hewage Don Lalith Susantha,
No. 34, Sirikandura Road,
Badugama,
Matugama.
- d. Hewage Don Sandya Malkanthi,
Owitigala,
Matugama.
- e. Hewage Don Nayana Priyantha
No. 34, Sirikandura Road,
Badugama,
Matugama.
- f. Hewage Don Yamuna Irangani,
No. 34, Near Police Station,
Baduraliya.
- g. Hewage Dona Ganga Priyanthi,
No. 35, Sirikandura Road,
Badugama,
Matugama.
- h. Hewage Don Sanjeeva Prasanna,
No. 35, Sirikandura Road,
Badugama,
Matugama.

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- i. Hewage Don Sujeewa Nilantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.

**Substituted-Plaintiff-Respondents-
Petitioners**

Vs.

Karunasena Hathurusinghe,
Rannagala, Naboda,
Matugama.

**Defendant-Appellant-
Respondent**

And Now Between

- a. Hewage Don Aruna Nishantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.
- b. Yakdehige Dona Somawathie,
No. 35, Sirikandura Road,
Badugama,
Matugama.
- c. Hewage Don Lalith Susantha,
No. 34, Sirikandura Road,
Badugama,
Matugama.
- d. Hewage Don Sandya Malkanthi,
Owitigala,
Matugama.
- e. Hewage Don Nayana Priyantha
No. 34, Sirikandura Road,
Badugama,
Matugama.

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- f. Hewage Don Yamuna Irangani,
No. 34, Near Police Station,
Baduraliya.
- g. Hewage Dona Ganga Priyanthi,
No. 35, Sirikandura Road,
Badugama,
Matugama.
- h. Hewage Don Sanjeeva Prasanna,
No. 35, Sirikandura Road,
Badugama,
Matugama.
- i. Hewage Don Sujeewa Nilantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.

**Substituted-Plaintiff-Respondents-
Petitioners-Appellants**

Vs.

Karunasena Hathurusinghe,
Rannagala, Naboda,
Matugama.

**Defendant-Appellant-
Respondent –Respondent**

* * * * *

SC. Appeal 41/2013

Before : **Eva Wanasundera, PC.J.**
Aluwihare, PC, J. &
Sarath de Abrew, J.

Counsel : Wijedasa Rajapakse, PC. with Sanjeewa Jayawardena, PC., Dasun Nagashena and Rakitha Rajapakse for the Plaintiff-Respondents-Petitioners-Appellants.

Ranjan Gooneratne with Sarath Walgamage for the Defendant-Appellant- Respondent-Respondent.

Argued On : **27-05-2014**

Decided On : **01-09-2014**

* * * *

Eva Wanasundera, PC.J.

In this matter Leave to Appeal was granted on the questions of law set out in paragraphs 56(a) to (k) in the petition dated 22.02.2012 filed by the Petitioner, as follows:-

- (a) Has the High Court erred by misinterpreting the provisions of Section 83 of the Trust Ordinance, read in line with established principles of Law?
- (b) Has the High Court fallen into substantial error by unduly restricting and limiting the scope and application of the provisions of Section 83 of the Trust Ordinance?

- (c) Has the High Court fallen into grave and substantial error by misinterpreting and limiting the scope and application of Section 83 of the Trust Ordinance read in light of Section 91 of the Evidence Ordinance?
- (d) Has the High Court misdirected itself by failing to consider and evaluate the evidence produced at the trial, especially the evidence of the Defendant?
- (e) Has the High Court fallen into substantial error by failing to consider the “attendant circumstances” surrounding this transaction, including the comparison of the prices of the several other lands located within the vicinity?
- (f) Has the High Court fallen into substantial error by failing to appreciate and give due weightage to the fact that the Defendant never enjoyed possession of the said land nor had the original of the Deed bearing No. 3329?
- (g) Has the High Court misdirected itself by failing to consider that the deed marked “V-2” by the Defendant and on which the Defendant relies on to establish that he had obtained the purchase consideration for the land in issue, is numbered 209 when in fact, the Defendant is purporting to rely on deed bearing No. 4347?
- (h) Did the High Court fail to appreciate that the learned District Judge was in the best position to adjudicate upon matters of fact and further, that when overruling the trial Judge’s conclusion, it was incumbent upon their Lordships to evaluate the evidence comprehensively, before varying the same?
- (i) Did the High Court err in law when failing to identify that in the special circumstances of this case, it would be most unreasonable and arbitrary to hold that the purported transaction was an outright sale and not a constructive trust created for the benefit of the Plaintiff?

- (j) Can the judgment and the findings contained in the 2nd judgment of the High Court be reconciled with the previous judgment of the same two Judges who have held that there was indeed a constructive trust?
- (k) In the totality of the foregoing circumstances, did the High Court fall into grave and substantial error by setting aside the judgment of the Learned District Judge and holding that the transaction in issue, was an outright sale and not the creation of a Constructive Trust?

Two more questions of law was raised on behalf of the Defendant-Appellant-Respondent and allowed by Court to read as follows:-

- (1) Had the plaintiff proved the attendant circumstances to establish the trust ?

If it is shown,

- (a) that at the time the conveyance was entered into, the beneficial interest had passed to the Defendant and
- (b) that the Defendant thereafter had been in possession of the property in question,
Can the Plaintiff maintain this action?

Even though the questions of law set out above are formed in different ways, I find that, in summary, the question before this Court is “whether the deed transfer No. 3344 dated 17.11.1987 created a trust or whether it was an outright transfer of property”?

Facts pertinent to this application can be summarily narrated in this way. The original Plaintiff in the District Court case of Mathugama No. 710/Spl. Was Hewage Don Piyasena. He filed this action on 13.11.1997 praying that ‘the property in the schedule to the plaint, [i.e. ½ share of a land in extent of 1A 3R 37P which is equal to ½ share of 317 perches] be transferred back to him on payment of Rs.40,000/- as the Defendant is legally bound to do so’. The basis

of the plaint was that Deed 3344 created only a trust and it was not meant to be an outright sale.

The District Judge, at the end of the trial delivered judgment on 05.11.2002, holding that Deed 3344 created a trust and granted the relief prayed for by the Plaintiff. The Defendant appealed to the Provincial High Court of the Civil Appeals of the Western Province holden at Kalutara against the judgment of the District Court and the appeal was dismissed and the judgment of the District Court was affirmed on 19.10.2010 by 2 Judges, namely Judge A and Judge B. The Defendant appealed again to the Supreme Court being aggrieved by the judgment of the Civil Appeal High Court under case No. SC. HC. CA. LA. No.379/2010. At the commencement of this case in the Supreme Court, it was revealed that the Plaintiff had died when the case was pending in the Civil Appellate High Court and no substitution order had been made even though papers were filed in the High Court for substitution. Then, on 25-04-2011, under Case No. SC. HC. CA. LA. 379/2010, the Supreme Court held that all proceedings after the death of the Plaintiff was void and invalid in law and therefore the judgment dated 19-10-2010 was invalid in law. The Supreme Court sent the case back to the High Court for substitution and directed the High Court to deliver a fresh judgment.

The same Civil Appellate High Court Judges namely Judge A and Judge B who heard the appeal and delivered judgment on 19.10.2010, heard it again for the second time and delivered judgment on 12.10.2012, setting aside the judgment of the District Judge dated 05.11.2002. It is from that second judgment of the Civil Appellate High Court that the Appellants are before the Supreme Court once again.

Incidentally I observe that when the judgment was sent back to the Civil Appellate High Court to correct an oversight on a technical procedural matter such as substitution when the parties are consenting to the substitution, the case should have gone back only for that limited purpose and returned back to the

Supreme Court with the amended caption and the same judgment intact. If it was so done, the prevailing absurd situation of two contradicting judgments on the same matter by the same two Judges A and B would not have arisen. Yet, keeping this controversy aside, I proceed to look into the questions of law on which leave was granted in this case after considering the submissions made by Counsel to this Court representing the substituted Plaintiff-Respondent-Petitioners-Appellants (hereinafter referred to as 'Appellants') as well as submissions made by Counsel representing the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the 'Respondent').

Sections 91 and 92 of the Evidence Ordinance prevents leading evidence to prove or disprove a written document. But Section 83 of the Trusts Ordinance provides that if one can prove that in the attendant circumstances that if the donor did not intend to transfer the beneficial interest, even though the written document appears to speak otherwise, a constructive trust will be formed.

In the instant case I have to look deep into the High Court Judges' analysis of the evidence considered by the District Judge to decide whether any attendant circumstances were present to prove that the transferor did not intend to transfer the beneficial interest to the transferee in Deed 3344 aforementioned.

The evidence of the Plaintiff was that his father was Hewage Ago Singho. The land in question was donated to Piyasena (the Plaintiff) and Sirisena in equal shares. Plaintiff's brother Sirisena was unmarried. Plaintiff had 8 children and the Plaintiff was in possession of the whole land. The brother of the Plaintiff was living when he obtained a loan of Rs.40,000/- from the Defendant in 1987. The brother Sirisena died in 1992. Plaintiff uprooted the rubber cultivation prior to getting a loan from the Defendant as he planned to put in a new plantation. Plaintiff had known the Defendant over 15 years or so. He used to get loans from the Defendant who was a rice-trader. The loans were on interest and trustworthiness. Even prior to this transaction of obtaining Rs.40,000/- on the transfer of the land by Deed 3344 as security for the loan, the Plaintiff had sold

another different land to the Defendant. Even though the transfer deed was executed, possession was not given. The said transfer was just a formality. The Defendant promised to transfer the land back to the Plaintiff when Rs. 40,000/- was returned. The loan was on interest 5% per month. The Plaintiff kept on paying Rs.2500/- per month to the Defendant who used to come to the Plaintiff's shop to collect the interest. After a few years of paying regular interest every month, the Plaintiff requested the Defendant to re-transfer the property on payment of Rs.40,000/-. The Defendant was reluctant to do so. He put it off for future and never did it. So the Plaintiff stopped paying interest. Then he came to know that the Defendant was looking for buyers to sell the land. It is only then that the Plaintiff filed the District Court case to get the land back from the Defendant.

The Defendant's evidence was that he did not know the Plaintiff at all till the deed was executed. He never charged any interest. He demarcated the land and arranged a fence around. He paid rates and taxes. He bought the land to try to get his children into schools in the town. He was not a money lender. He further said that he planned to build a house but could not do so. In cross examination he admitted that his children were already admitted to the schools in town as he had got a house on rent in town prior to buying this land. This land had no house in it to show school authorities regarding residence on the land. In cross examination he further admitted that he bought another land from the Plaintiff 3 months after the disputed transaction. He admitted that he had visited the Plaintiff's shop twice. The District Judge had found his evidence not credible due to his answers when cross examined. He did not have the original deed of his purchase either. He failed to produce his deed of sale of another land which he claimed to have sold to raise funds to buy the land mentioned in deed No. 3344.

The analysis of the deeds produced in evidence by the Defendant and the Plaintiff show that the price for one perch of land in that area at that time was between Rs.595/- and Rs.1000/-. The price Rs.40,000/- for 158 perches sets

down the price for a perch around Rs.260/- which is less than half the minimum price of one perch of land in that area at that time. Furthermore, the evidence in the District Court shows that the Plaintiff had never given up the beneficial interest to the property which is the subject matter of this case.

I am of the view that the attendant circumstances suggest that there was no intention whatsoever of the Plaintiff who is the Appellant in this case to truly transfer the land in question to the Defendant who is the Respondent. In all the circumstances of the case, I am of the view that the High Court Judge has erred in holding that the deed of transfer No. 3344 dated 17-11-1987 did not create a trust.

I allow the appeal and set aside the judgment of the Provincial High Court of Kalutara dated 12-01-2012 and affirm the judgment of the District Judge of Matugama dated 05-11-2002 in case No. 710/Spl. I order Rs.90,000/- as costs to be paid by the Defendant-Appellant-Respondent-Respondent to the Nine Substituted –Plaintiff-Respondents-Petitioners-Appellants.

Judge of the Supreme Court

Aluwihare, PC, J.

I agree.

Judge of the Supreme Court

Sarath de Abrew, J.

I agree.

Judge of the Supreme Court