

CONSTRUCTIVE TRUST IN LAND ACTIONS

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INTRODUCTION

The reception of trusts in Sri Lanka was not by way of an offensive intrusion into the Roman-Dutch based common law of Sri Lanka, but as a welcome device to resolve disputes which Roman-Dutch law was seen to be ill-equipped to handle.

By the time the British rule came to an end in 1948, the law of trusts had been statutorily entrenched in Sri Lankan law by virtue of the Trusts Ordinance of No. 9 of 1917.

DEFINITION OF TRUST

The word '**trust**' is defined in section 3(a) of the Trusts Ordinance as follows;

“trust’ is an obligation annexed to the ownership of the property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another person, or of another person and the owner, of such a character that, while the ownership is nominally vested in the owner, the right to the beneficial enjoyment of the property is vested or to be vested in such other person, or in such other person concurrently with the owner’

The person who reposes or declares the confidence is called the '**author of the trust**', the person who accepts the confidence is called the '**trustee**', and the person for whose benefit the confidence is accepted is called the '**beneficiary**'.

TRUST CAN BE CREATED ONLY FOR A LAWFUL PURPOSE

Section 4 of the Trusts Ordinance stipulates **no** trust can be created if the purpose of trust comes within any of the following categories;

- a) If it is forbidden by law, or
- b) If it is of such a nature that, if permitted it would defeat the provisions of any law,
or
- c) It is fraudulent, or
- d) It involves or implies injury to the person or property of another or
- e) The Court regards it as immoral or oppose to public policy.

CREATION OF CONSTRUCTIVE TRUSTS

Chapter IX of the Trusts Ordinance titled 'Constructive Trusts' contains 13 sections setting out discrete situations (or 'doctrines') in which a constructive trust will arise. Section 82 provides that '[a]n obligation in the nature of a [Constructive] Trust ... is created in the following cases' and **Sections 83 to 96 lists out the 13 discrete doctrines**.

Out of the said 13 discrete doctrines, Sections 83 and 84 are the two most, common situations in the Sri Lankan society where constructive trusts arise which will be hereinafter more fully dealt with.

SECTION 83 OF TRUSTS ORDINANCE

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.

In *Perera v. Fernando and Others* [2011 BLR 263] it was held that when the owner of a property transfers it without intention to dispose of the beneficial interest therein, then a constructive trust is created and the transferee must hold such property in trust for the benefit of the transferor in line with the principle laid down in Sec. 83 of the Trusts Ordinance.

‘ATTENDANT CIRCUMSTANCES’ UNDER SECTION 83 OF TRUSTS ORDINANCE

In ***Muttamma v. Thiagaraja*** [62 NLR 559], Basnayake CJ referring to Sec. 83 of the Trusts Ordinance held that,

“... the section is designed to prevent transfers of property which on the face of the instrument appear to be genuine transfers, but where an intention to dispose of the beneficial interest cannot reasonably inferred consistently with the attendant circumstances. Neither the declaration of the transferor at the time of execution of the instrument nor his secret intentions are attendant circumstances. Attendant circumstances are to my mind, circumstances which precede or follow the transfer but not too far removed in point of time to be regarded as attendant which expression in this context may be understood as ‘accompanying’ or ‘connected with’. Whether a circumstance is attendant or not would depend on the facts of each case.”

It was held by the Court of Appeal in ***Piyasena v. Don Vansue*** (1977) 2 Sri L.R. 311 that 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 Sec. 83 of the Trusts Ordinance apply.

Justice Wigneswaran had considered along with other reasons in ***Thisa Nona and Three Others v. Premadasa*** (1997) 1 Sri L.R. 167 that the reason of continuation of possession of the premises in suit, just the way the transferor had done prior to execution of the transfer deed, and payment of stamp duties and Notary fees contribute to show that the transaction was a loan transaction and not an outright transfer.

In ***Carthelis v. Ranasinghe*** (2002) 2 Sri L.R. 359 importance of looking at the intention of the parties when parting with the beneficial interest of a particular property had been considered as a material fact when looking at the attendant circumstances.

In ***Fernando v. Fernando*** [S.C. Appeal 175/2010, Decided on 17.01.2017] Salam J. identified some of the other factors which would, usually, be relevant when determining whether a Constructive Trust has arisen. His Lordship, Justice Salam, citing the earlier decision of ***Ehiya Lebbe v. Majeed*** [48 NLR 357] stated,

“The continued possession of the transferor after the conveyance, or if the transferor paid the whole cost of the conveyance or if the consideration expressed on the deed is utterly inadequate to what would be the fair purchase money for the property conveyed are circumstances which would show whether the transaction was a genuine sale for valuable consideration or something else.”

Prasanna Jayawardena J. held in **Sudarshani v. Somawathi** [S.C. Appeal No. 173/2011, Decided on 06.04.2017] as follows;

“... The use of the aforesaid words in Section 83 require that the Court applies an objective test when determining the intention of the owner from the attendant circumstances. Therefore, if the claim of a Constructive Trust is to succeed, the attendant circumstances must make it plainly clear to the ‘reasonable man’ that, the owner did not intend to part with his beneficial interest in the property. A secret or hidden intention to retain the beneficial interests will not do. The attendant circumstances must be such that they would have demonstrated to the transferee that the owner intended to retain the beneficial interest in the property. The transferee is judged here as standing in the shoes of the ‘reasonable man’. If a ‘reasonable man’ must have known from the ‘attendant circumstances’ that the owner intended to retain his beneficial interest in the property, the transferee is deemed to hold the property upon a Constructive Trust in favour of the owner. However, if a ‘reasonable man’ may not have drawn such an inference from the attendant circumstances, the transferee holds the property absolutely, since no Constructive Trust can be deemed to have arisen.” [Emphasis added]

However it was further held that,

*“...The Court has to apply an objective test when determining this question. Accordingly, the Court has to place more reliance on facts that can be ascertained from the evidence rather than unsubstantiated claims made from the witness box. The Court has to keep in mind that, a notarially attested deed of transfer should not be lightly declared to be a nullity. The court must also guard against allowing a false or belated claim of ‘trust’ made by a transferor who has transferred his property and then had second thoughts or seeks to profit from changed circumstances. Dalton J’s observations made close to 90 years ago in **Mohamadu v. Pathummah** [P. 49],*

‘It is becoming not uncommon by the mere allegation of a trust to seek to evade the very salutary provisions of (Evidence) Ordinance to which I have referred.’
continues to remain a salutary caution.” [Emphasis added]

CONSTRUCTIVE TRUST CREATED BY PURCHASING A PROPERTY IN ANOTHER'S NAME

SECTION 84 OF TRUSTS ORDINANCE

Section 84 of the Trusts Ordinance states as follows;

Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

There are instances where the conveyances are executed one person's name but the consideration is totally paid by another. usually the person who has the name on the conveyance as the 'purchaser' would become the owner of the property. Yet under section 84 of the Trust Ordinance, the provisions have been made in certain circumstances for the person who paid the consideration to claim the ownership of the property under the concept of constructive trust.

The most common occurrence in this regard is that the conveyances are executed in another's name with an understanding that the property to be conveyed to the true owner at particular time agreed upon or at request.

If such conditions are not fulfilled the true owner can bring an action on the ground of constructive or implied trust. In such instances, the parties are entitled to lead parole evidence to prove that the person who paid the consideration, though purchased the property under someone else's name, did not intend that person to own the property.

In ***Gould v. Innasitamby*** [9 NLR 177] facts of the case are as follows;

Plaintiff being desirous of buying a particular land did so in the name of his servant Innasitamby, the defendant to the action. The Plaintiff furnished the purchased money, and the defendant promised both before and after the purchase to convey the lands to the plaintiff when called upon. Instead of doing so when called upon the defendant, having had the Fiscal's transfer made out in his own name, claim the lands as his own property. The plaintiff then sued for the delivery of the bills of sale, plans and documents

for a declaration that the defendant held the bills of sale in trust for the plaintiff as his agent. He further sought to transfer the title in his name.

The defendant plead that the plaintiff was debarred in law to maintain the action in terms of section 2 of the Prevention of Frauds Ordinance as the law does not permit to have any valid transaction relating to immovable property unless such conditions of transaction are embodied in a notarial instrument and signed by the parties to transaction or their lawfully authorized agents.

Therefore, District Court dismissed the action upholding the defence raised by the defendants. But Supreme Court set aside the judgement and directed to enter judgment in favour of the plaintiff by holding that notwithstanding the absence of any notarial instrument the plaintiff was entitled to obtain the relief. Middleton J. said that the statute of frauds not be allowed to be used to perpetuate and cover frauds.

In ***Sangarapilla v. Kandiah* [19 NLR 344 A]** agreed to buy a land from B and paid the purchase money, but, fearing some litigation, obtained a conveyance in the name of C without C's knowledge. A informed C subsequently of the execution of the deed in C's favour, and C acquiesced in it, and agreed to transfer the land to A whenever called upon. Show J. held that C held the land in trust for A, and that A could maintain an action for a conveyance for the land from C, or if C had parted with the land, to recover its value.

In ***Muniyandi Natchie v. Kayambo* (1988) 2 CALR 56**, the Defendant who did not challenge the findings of facts by the trial Judge, conceded that the fact established a trust under section 84 of the Trusts Ordinance, since the plaintiffs did not intend to provide the consideration for the benefit of the defendant transferee. The plaintiffs desired to own property that was sold through the Estate Fragmentation Board. They were both persons whose applications for citizenship in Sri Lanka were being finalized by the Registering Authorities of the State. Thus, they were non-citizens at the time of the sale. Under the Finance Act No. 11 of 1963 they were required to pay 100% tax if they purchased the property as non-citizens. In order to overcome this, they paid the purchase price for the land and had the deed written in the name of the defendant who was their sister and a citizen of Sri Lanka. After they became citizens, they filed this action in Court for a declaration that the defendant holds his property in trust and for the transfer of the title to the plaintiffs.

Defendant's claim that she had bought the property out of her money, was totally rejected by the trial Judge, who found that the plaintiffs had provided the consideration

for the purchase. However, counsel for the defendant contended that section 98 of the Trusts Ordinance read with section 4(1) of the same ordinance would prevent the creation of such a Trust in so far as the transfer of property was in evasion of section 58(1) of the Finance Act. Section 4(1) states that, a trust may be created for any lawful purpose. The purpose of a trust is lawful, unless it is (a) forbidden by law, or (b) is of such a nature that, if permitted, it would defeat the provisions of any law, or (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy.

The relevant provisions of the Finance Act do not impose a prohibition on the transfer of land to the class of persons to whom the plaintiff belonged. Section 58(1) read with section 59 of the Finance Act imposed a tax and empowered the Commissioner of Inland Revenue to recover any unpaid tax from anyone from whom it has become due. If the plaintiffs are found to be non-citizens at the time of the re-transfer of the land then the obligation casts on such transferees to pay the hundred percent tax could not be evaded. The breach of a revenue law has not been within contemplation of section 4(1) of the Trusts Ordinance. It is the prohibition by law or the immorality or objectionable nature in regard to public policy that has to be considered in assessing this matter. Palakidner J. held that a constructive trust exists under section 84 of the Trusts Ordinance in favour of the plaintiffs.

CONSTRUCTIVE TRUST CREATED ON THE GROUNDS OF FRAUDS

When a person holds a property with a purpose of defrauding the beneficiary of it, the beneficiary is entitled to bring an action for a declaration that the property is subjected to a constructive trust in his favour and to recover the same. It is necessary to prove that there should have been fraud at the very inception of the transaction; it is sufficient if it arises subsequently.

In *Mohamadu Marikkar v. Ibrahim Naina* [13 NLR 187] the Plaintiff in October 1907, conveyed to the defendant's intestate land, which is the subject property of the case, by a deed of transfer. He impugned that deed on the ground of fraud and want of consideration. He averred that the defendant's intestate, Marikkar Pulle, was his agent in charge of some of his business and lands, and persuaded him by a lie that certain persons were disputing the plaintiff's title to this land, and so induced him convey temporarily to Marikkar Pulle, in order that the task of litigation might be more conveniently carried through by Marikkar Pulle, and that plaintiff might avoid the necessary journeys to Court

from his distant village in Kalpitiya. Defendant denied the alleged misrepresentation *in toto*, and averred that the conveyance was for value received.

Middleton J. said that the plaintiff intending to defraud third parties, by whom he expected that he would be sued in respect of a certain land, executed without consideration a deed of conveyance, by which he purported to transfer the land to one Marikkar Pulle. The contemplated fraud was not effected, as no action was instituted by the third parties. Plaintiff then sued Marikkar Pulle's administration for a declaration for a declaration that the deed of conveyance was null and void. Accordingly, Plaintiff was entitled to succeed.

The Court had cited the judgement of *Groves v. Groves* in which the Court held that the Court would not assist the party in getting back an estate conveyed by him for an illegal purpose, so as to enable the grantee to vote at an election and to sit in Parliament even though it has not been used for the illegal purpose. The same principle had been followed by *Brackenbury v. Brackenbury*.

In ***De Silva v. Silva* [58 NLR 145]**, A executed a conveyance of certain lands in favour of B intending to transfer to B not only the legal title to the lands but also the beneficial interests in them so as to put them beyond the reach of his creditors, fully believing that in due time B, in whom A had complete confidence, would effect a re-transfer of the same lands in favour of A. In the present action A's intestate heirs sued B claiming a re-conveyance of the lands to them.

Weerasuriya J. held that,

1. Although the facts might have constituted a ground for a paulian action at the instance of the creditors of A, no constructive trust within the meaning of section 82 and 83 of Trusts Ordinance was created by the conveyance executed by A.
2. Even if a constructive trust was established, the plaintiffs, as heirs of A, would have to rely on the fraud committed by A. the maxim *in pari delicto potior est condition possidentis* being applicable in the circumstances, the plaintiffs could not maintain the action. It was held further, that, in as much as the execution of the conveyance by A actually resulted in his creditors being defrauded and any unjust enrichment accruing to B was at the expense of the defrauded creditors and not of the plaintiffs, the plaintiffs could not avail themselves of the maxim that no person ought to

be enrich at the expense of another (*nemo cum damno alterius locupletior fieri debet*)

In ***Carthelis Appuhamy v. Saiya Nona* [46 NLR 313]**, by a notarial deed (P3) of April 30, 1941, plaintiffs conveyed certain lands to the defendant. On the same day, in consequence of a prior oral agreement, a non-notarial document (P4) was signed by the defendant by which he agreed to retransfer the said lands on payment by plaintiff, within a certain period, of a sum equal to the consideration paid by the defendant on deed P3. The deed P3 on the face of it conveyed the full interest of the owners, without the reservation of any condition or equitable right, and the defendant was thereafter placed in possession of the lands. There was no evidence of any gross disparity between the value of the lands at the time and the price paid under P3, or of any other circumstance which might tend to show that the transfer was to be in trust.

The Court held that the writing (P4) was of no force or avail at law as it was not contained in a notarial document. It was held further that there were no circumstances which could bring the case within the sections of the Trusts Ordinance relating to Constructive Trusts.

In ***Ehiya Lebbe v. Majeed* [48 NLR 357]**, Plaintiff on P1 of 1943, conveyed a certain land to the defendant. On the same day by P2, a non-notarial document, the defendant agreed to re-convey the land to the plaintiff on payment of the sum of Rs. 250/- within two years. The defendant refused to retransfer on tender of the money within the time. The Commissioner found on the facts that when plaintiff executed P1 it was never in the contemplation of either party that the defendant was to hold the property as absolute owner but only till plaintiff's debt to the defendant of Rs. 250/- was repaid.

Dias J. held that in the circumstances the defendant was a trustee for the plaintiff in terms of section 83 of the Trusts Ordinance. It was held further that, to shut out the non-notarial document P2 would be to enable the defendant to effectuate a fraud and that section 5(3) of the Trusts Ordinance would apply.

In ***De Silva v. Senaratne* [50 NLR 313]**, first to seventh defendants agreed to transfer to the plaintiff the lot allotted to them by the final decree in a partition action. The agreement was registered. It was further stipulated that if the defendants failed to effect the transfer within the one month of the decree, they were to pay to the plaintiff a certain sum of money. The defendants failed to convey the land to the plaintiff but in breach of

the agreement conveyed it to the 8th defendant. The defendants claimed the right to pay the stipulated sum of money in lieu of performance of the agreement.

It was held that the defendant had no right of election, and held further, that in the absence of the evidence that the plaintiff had waived his right to specific performance, the contract was an existing contract and that the 8th defendant having notice of the agreement was in terms of section 73 of the Trusts Ordinance under obligation to convey the land to the plaintiff.

PRESUMPTION OF ADVANCEMENT

Presumption of advancement arises in a situation when A provides the consideration but the conveyance was made to B, wherein a presumption of trust arises, and the burden is on B to rebut this. However, if A is in *Loco Parentis* to B, (i.e., Parent of B), the counter presumption arises that the purchase was for the B's benefit and the burden is on A to rebut.

In order for A to rebut the presumption, A should prove that, he had paid the consideration, and he did not do so for B's benefit.

In ***Ranghamy v. Bastian Vederala* [2 NLR 360]**, when the first plaintiff was a small child her father, the defendant, many years ago bought a piece of land in her name, for which he had paid the consideration. The daughter's position was that he thought he was going to die, and he wanted to provide for his daughter in case he should die. He had no intention of parting with the land during his lifetime.

Withers J. cited Voet and held that the defendant became the owners of the land, because he had no mandate from his daughter to nominate her as the purchaser.

This presumption is rebuttable and the only evidence of the intention of the parties at the time of or contemporaneous with the transaction is admissible. But subsequent acts or expression on the part of the parent will not convert the gift into a trust.

In ***Fernando v. Fernando* [20 NLR 244]**, Bertram J. concluded that when property is bought in the name of one person with money of another, there is a presumption of a resulting trust in favour of the person who provides the money. This presumption does

not arise where property is bought by a father or another person in *loco parentis* in the name of the child. In such a case strong presumption arises that it was intended to be a gift to the child. Such a presumption (of gift) does not necessarily arise in the case of a mother, but only when she has placed herself in *loco parentis* within a special legal sense, i.e., when she has assumed an obligation to provide for the child. Very little evidence is wanted to establish that a mother stands in *loco parentis*. The presumption of gift in favour of the child can be displaced by evidence of the intention of the parties. In order that a person who is out to his election (of his rights under a will) should be concluded by it, two things are necessary;

1. A full knowledge of the inconsistent rights and of the necessity of electing between them;
2. An intention to elect manifested either expressly or by acts which imply choice and acquaintance.

Where property was bought by a mother in the name of her son, it was held, in the circumstances of this case, that the son held it in the trust for the mother, and that, even if it was in the nature of the gift to the son, he had elected under the mother's will to treat it as the mother's property.

Gratiaen J. held in ***Perera v. Perera* [57 NLR 265]** that if a person transfers property to another to whom he stands in *loco parentis* there is a presumption of advancement, so that a resulting trust under section 84 of the Trusts Ordinance does not arise in favour of the transferor. But, under section 83 of the Trusts Ordinance, the presumption of advancement may be rebutted by proof that the transferor did not intend to dispose of the beneficial interest in the property unconditionally to the transferee.

Plaintiffs had deposited a total sum of Rs. 5,000/- in favour of their younger sister, the defendant, in the Post Office, Savings Bank. Although the account in the Post Office, Savings Bank was in the name of the defendant, the Bank pass book was retained by the eldest brother (1st plaintiff). The attendant circumstances showed that the beneficial interest in the money was intended to be 'given as dowry' to the defendant only if and when she would be 'given in marriage' to a bridegroom approved by the family. Defendant, however, soon after she attained her majority, eloped with and married a man of her own selection without the approval of her parents or her brothers.

Gratiaen J. held that when the defendant contracted a marriage without the approval of her family, she became disentitled to receive the sum of Rs. 5,000/-. The money, therefore, belonged to the plaintiffs.

ADMISSIBILITY OF PAROLE EVIDENCE WITH REFERENCE TO SECTION 2 OF THE PREVENTION OF FRAUDS ORDINANCE AND SECTIONS 91 AND 92 OF THE EVIDENCE ORDINANCE

Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840 stipulates the necessary requirements to be complied with, in respect of any sale, purchase, transfer, assignment or mortgage of land or other immovable properties. If any person who enters into such a contract fails to adhere such provisions, such transaction cannot be enforced in law.

Section 91 of the Evidence Ordinance requires that with the terms of a contract, or of a grant, or of any other disposition of property have been reduced through a form of document no evidence shall be given in proof of the terms of such contract.

Section 92 of the Evidence Ordinance further makes provisions for exclusion of evidence of oral agreement for the purpose of contradicting, varying, adding to, or subtracting from its terms.

The facts of the ***Valliyammai Atchi v. Abdul Majeed*** [48 NLR 289] are as follows;

“... M who was entitled *inter alia* to certain immovable property of the value of over Rs. 460,000/- executed an unconditional notarial transfer of these properties to N for a consideration of Rs. 203,256/-. It was alleged by M that this transfer was in pursuance of a verbal agreement that N was *inter alia* to hold the properties in trust for him; to pay out of the income certain specified debts and interest to himself at 12 percent. On the said sum of Rs. 203,256/- and to reconvey the properties to M on the liquidation of the said sum of Rs. 203,256/- and interest. N died and his widow claimed to hold the properties free of the trust.”

In an action by M for a declaration of trust and consequential relief it was held that oral evidence was admissible to establish the trust. The Privy Council held further, that the formalities required to constitute a valid trust relating to land are to be found in Section 5 of the Trusts Ordinance and not in section 2 of the Prevention of Frauds Ordinance; that the act of the widow in seeking to ignore the trust and to retain the property for the

estate was to effectuate a fraud, that, therefore, under section 5(3) of the Trusts Ordinance even a writing was unnecessary and sections 91 and 92 of the Evidence Ordinance had no application.

In ***Muttammah v. Thiyagarajah*** [62 NLR 559], in September 1941, P, who was entitled to the entirety of a land, donated to T, his son, an undivided half-share of the property. In October 1954, T donated the same half-share back to his father P to enable him, the more easily, to raise a loan of Rs. 20,000/- on a mortgage of the entire land. No reservation was made in T's favour in the deed of gift of 1954, but by parole evidence T proved *inter-alia* that he continued to remain in possession of his share of the land and that it was expressly understood between the parties that the share should be re-conveyed to T after payment of the mortgaged debt. The loan of Rs. 20,000/- was never raised, and P died in March 1956. In the present action instituted by T against the executrix *de son tort* of P's estate, T claimed that the defendant held the half share in trust for him.

Sansoni J. and H.N.G. Fernando, J. (Basnayake, C.J. dissenting), held that the plaintiff was entitled under section 83 of the Trusts Ordinance to lead parole evidence of 'attendant circumstances' at or about the time of the execution of the deed showing that although T transferred his half-share to P in 1954 by what was in form an absolute conveyance it was the intention of the parties that T should retain the beneficial interest in the property and that what was conveyed was only the nominal ownership to P.

In ***Bernedette Vanlangenberg v. Hapuarachchige Anthony*** (1990) 1 Sri L.R. 190, the Plaintiff H. Anthony a middle grade hotel employee lived with the defendant Bernedette Vanlangenberg a hairdresser and mother of four children as man and mistress. Both worked in the same hotel. Thereafter the plaintiff proceeded to Sweden where he learned the language and received an income of about Rs.9, 000/- a month. The defendant went over to Sweden for a short spell and she too found employment receiving about Rs. 2,000/- a month. The plaintiff purchased a house property in 1976 for Rs. 840,000/- paying the consideration out of his earnings. On 12.05.77 as he had to go to Sweden again, he conveyed the said house property to the defendant his mistress by a deed of transfer in the attestation to which the consideration of Rs. 40,000/- was acknowledged to have been received earlier. Parties fell out in November 1979. The plaintiff then sued the defendant for a return of the house pleading a trust. The defendant claimed absolute title and that she paid the consideration of Rs. 40,000/- on the deed in her favour.

Bandaranayake J. held as follows;

“... Section 2 of the Frauds Ordinance is not meant to govern trusts arising under chapter IX of the Trusts Ordinance i.e., constructive or implied trusts. A person has therefore to make out a case falling within the provisions of sections 83 to 96 of the Trusts Ordinance. The plaintiff initiated the moves to buy the house whilst still in Sweden; he had paid the purchase price. The defendant’s resources were insufficient to enable her to pay the consideration on the transfer to her. She has written to the plaintiff that he would transfer the house to him if he returns her gold chain and money amounting to Rs. 4,000/-.

The trial Judge rejected the claim of the defendant that she paid the consideration after considering the financial resources of the parties as being highly improbable. The defendant’s claim was very probably false and her denial of the existences of a constructive trust amounts to fraud. In the result, section 2 of the Trusts Ordinance and section 92 of the Evidence Ordinance do not apply and plaintiff can lead parole evidence of the existence of a constructive trust in his favour on the basis that he retained the beneficial interest in the property at the time he transferred it to the defendant. The presumption of advancement in favour of mistress though available in England is not a part of Sri Lankan law. Section 2 of the Trusts Ordinance cannot be utilized to bring in English Law.”

In ***Dayawathie v. Gunasekera (1991) 1 Sri L.R. 115***, the plaintiff bought the property in suit in 1955. He started construction work in 1959 and completed in 1961. The plaintiff, a building contractor, needed finances in 1966 and sought the assistance of the second defendant with whom he had transactions earlier. This culminated in a deed of transfer in favour of the first defendant, who is the mother of the 2nd defendant and the second defendant being a witness to the deed. The property was to be re-transferred within three years if Rs. 17,000/- was paid. The plaintiff defaulted. In his action to recover the property, the plaintiff succeeded in the trial court in establishing a constructive trust. The Court of Appeal reversed the judgement on the sole ground that the agreement was a pure and simple agreement to re-transfer.

Dheeraratne J. held that,

- “..1. The Prevention of Frauds Ordinance and section 92 of the Evidence Ordinance do not bar parole evidence to prove a constructive trust and that the transferor did not intend to pass the beneficial interest in the property.*
- 2. Extrinsic evidence to prove attendant circumstances can be properly be received in evidence to prove a resulting trust.”*

In ***Piyasena v. Don Vansue* (1997) 2 Sri. L.R. 311** it was held that;

“... 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 the case or,

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

(iii) 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 Trusts Ordinance apply.”

Sisira De Abrew J. in ***Jude Fernando v. Malani Fernando and Others* [S.C. Appeal No. 175/2010, Decided on 17.01.2017]** held that as follows;

“...As stated by Dr. L.J.M. Cooray in his book on Trust (page 129) the pivotal words in the Section are ‘intended to dispose of the beneficial interest in the property’.

If the principle set out in the above legal literature is to be followed how can an owner of the property in a case under Section 83 of the Trusts Ordinance prove that he did not intend to dispose of the beneficial interest in the property?

In order to prove the legal principle discussed in Section 83 of the Trusts Ordinance, it is necessary to lead oral evidence between the vendor and the vendee at the time of the Deed of Transfer was executed. If evidence relating to attendant circumstances that the vendor did not intend to transfer the beneficial interest is shut out, then the purpose of section 83 of the Trusts Ordinance will be rendered nugatory.

[...]

Section 2 of the Prevention of Frauds Ordinance and Section 92 of the Evidence Ordinance do not operate as a bar to lead parole evidence to prove a constructive trust and to prove that the transferor did not intend to dispose of beneficial interest in the property.”

EXCLUSION OF PRESCRIPTION

Section 111 (1) of the Trusts Ordinance No. 9 of 1917 makes provisions to exclude the defence of prescription in respect of actions for trusts.

In ***Hemawathie Sahabandu v. Gunasekera* (2006) 2 Sri L.R. 208**, it was held that when there is no express trust, the burden of establishing a constructive trust lies on the defendant-appellant. The appellant herself admits that she paid only a fraction of the consideration and that the major portion of the money was provided by the mother and the respondent. There is no trust.

There was adequate evidence to arrive at a finding that the defendant appellant acknowledged the ownership of the respondent in respect of the premises. The conduct of the appellant and her husband is wholly inconsistent with the appellant's position that they became the owners of the said property by prescriptive title.

It is clear that the appellant and her family occupied the said premises with the leave and license of the respondent. There is no evidence pointing to the fact that the appellant started at some point of time, to possess the property in a manner adverse and independent to the interests of the respondent.

The whole purpose of section III (I) of the Trusts Ordinance is to protect the trust property and beneficiaries and not to protect the trustee. This section has not stipulated that the beneficiary cannot prescribe against the trustee.

Per W.L. Ranjith Silva J.:

I am constrained to disagree with the view expressed by the Counsel for the respondent that the two defences viz. trust and prescriptive title cannot exist side by side in a fit case if the circumstances of that case warrant such strategy.'

BURDEN OF PROOF

Facts in ***Wijesundera v. Neela Wickramasinghe* (2002) 2 Sri L.R. 307** are as follows;

The Plaintiff instituted action seeking a declaration that, the defendant was holding the subject matter of the action in trust for herself and the defendant denied the plaintiff's claim. The plaintiff's position was that the property was purchased in the name of the defendant and on the same day it was mortgaged to the bank and the plaintiff provided the money to the defendant to pay the loan instalments to the bank.

The District Court held that in favour of the plaintiff and the defendant appealed against the judgement.

Weerasuriya J. held that,

“...Under the section 84 of the Trust Ordinance the plaintiff in order to succeed, has to establish,

(i) that the consideration was paid or provided by the plaintiff, though that property was transferred in the name of the defendant.

(ii) that the plaintiff did not intend to pay or provide such consideration for the benefit of the defendant.

The Court further held that, *on the materials produced before the Court it was difficult to reject the position that it was the defendant who had paid the instalments in respect of the loan secured by way of the mortgage to the bank since the plaintiff failed to produce a single receipt relating to the payment of loan instalments from the commencement of payment. All the receipts including the advance payment to the seller had been affected jointly.”*

***Sudarshani v. Somawathi* [S.C. Appeal No. 173/2011, Decided on 06.04.2017]** held that the burden of proof lies firmly on the person who claims a Constructive Trust to prove it... Thus, if the plaintiff is to succeed in this appeal, she should have furnished evidence which satisfies the Court that, it cannot be reasonably inferred from the attendant circumstances that she intended to part with her beneficial interest in the land.

Assisted by:

Ms.Kethmini Hasara Dharmasena