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

In the matter of an appeal from the Judgment of Their Lordships of the Civil Appellate High Court of the Western Province holden in Colombo dated 24.07.2014 made in Case No. WP/HCCA/COL/63/2009(F), under and in terms of Article 127 of the Constitution read together with Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006.

SC Appeal No. 169/15

WP/HCCA/COL/63/2009(F)

DC Colombo Case No. 7371/SPL

Malagodage Iranganie
No. 15/1,
Sri Sangabodhi Mawatha
Wellampitiya

PLAINTIFF

Vs.

1. Malagodage Thilakeratne
   No. 15/1,
   Sri Sangabodhi Mawatha,
   Wellampitiya

2. Secretary,

Ceylon Electricity Board EPF

Head Office,

Sir Chittampalam A Gardiner Mawatha

Colombo 2.

DEFENDANTS

AND BETWEEN

Malagodage Iranganie

No. 15/1,

Sri Sangabodhi Mawatha

Wellampitiya

PLAINTIFF-APPELLANT

Vs.

1. Malagodage Thilakeratne

   No. 15/1,

   Sri Sangabodhi Mawatha

   Wellampitiya.

2. Secretary,

   Ceylon Electricity Board EPF,

   Head Office,

   Sir Chittampalam A Gardiner Mawatha,

   Colombo 2.

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

Malagodage Thilakeratne

No. 15/1, Sri Sangabodhi Mawatha

Wellampitiya.

1ST DEFENDANT-RESPONDENT-PETITIONER-APPELLANT

Vs.

Malagodage Iranganie,

No. 151/1,

Sri Sangabodhi Mawatha,

Wellampitiya

PLAINTIFF-APPELLANT-RESPONDENT

Secretary,

Ceylon Electricity Board EPF,

Head Office,

Sir Chittampalam A Gardiner Mawatha,

Colombo 2

2ND DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: **S. THURAIRAJA, PC, J.**

A.H.M.D. NAWAZ, J. AND

KUMUDINI WICKREMASINGHE, J

COUNSEL: Mrs. Saumya Amarasekara, PC with Shehan Gunawardane for the 1st Defendant-Respondent-Petitioner-Appellant

Ranjan Suwandaratne, PC with Anil Rajakaruna and Ms. Dulna De Alwis for the Plaintiff-Appellant-Respondent

WRITTEN SUBMISSIONS: 1st Defendant-Respondent-Petitioner-Appellant on 16th November 2015
Plaintiff-Appellant-Respondent on 18th January 2016
Plaintiff-Appellant-Respondent on 27th February 2020

ARGUED ON: 03rd November 2023

DECIDED ON: 28th February 2025

THURAIRAJA, PC, J.

1. The instant case relates to an action instituted on or about 22nd August 2005 by the Plaintiff-Appellant-Respondent (hereinafter referred to as 'Plaintiff' or 'Respondent') before the District Court of Colombo against her brother, the 1st Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as '1st Defendant' or 'Appellant'), seeking a *inter alia* a declaration that the 1st Defendant is holding the property described in the scheduled to the Plaint on constructing trust in favour of the Plaintiff and for a direction to the Appellant to reconvey the said property to the Plaintiff.

BACKGROUND OF THE CASE

2. The Plaintiff had transferred the property in question to the 1st Defendant by Deed of Transfer No. 1527 dated 02nd May 1990 attested by Nalini Peiris, Notary Public, and contended that the said transfer done upon the 1st Defendant's request to temporarily transfer the said property to his name, in order to enable his application for a loan from the Employees Provident Fund of the Ceylon Electricity Board. The Plaintiff further contended that the 1st Defendant obtained a loan from the Employees Provident Fund providing the property in question as security thereof. The Plaintiff's

position is that she did not receive any consideration for the transfer of this property and argued, therefore, that the transfer formed a contrastive trust.

3. When the Plaintiff wanted the property re-transferred, the 1st Defendant had delayed the same urging that he is unable to do so until the loan obtained from the 2nd Defendant is repaid in full.

4. Following full payment of the loan, the Plaintiff alleges that the 1st Defendant still refused to retransfer the property in accordance with their initial understanding, demanding Rs. 500,000/- from the Plaintiff for such retransfer.

5. The 1st Defendant took up the position that he mortgaged the said property to the 2nd Defendant in order to the purchase the said property for the purpose of building a house, and he contended that all monies from the said loan were paid to the Plaintiff as consideration for the transfer.

6. He vehemently denies ever agreeing to retransfer the property or demanding Rs. 500,000/- in breach of such an agreement to reconvey. According to the 1st Defendant, he had found that the said property cannot be developed after purchasing the same and had intended to sell it. He states that in or around 2005 the Plaintiff's son, his nephew, indicated an interest to purchase the property in suit back from the 1st Defendant for Rs. 500,000/-. According to him, for this reason he had given the Deed of Transfer to the Plaintiff.

7. The District Court of Colombo by its judgment dated 24th April 2009 dismissed the case of the Plaintiff holding in favour of the 1st Defendant. The Plaintiff thereafter preferred an appeal against the said judgment to the Civil Appellate High Court of the Western Province holden in Colombo. The Civil Appellate High Court delivered its judgment on 17th January 2014 ordering a retrial.

8. Aggrieved by the said decision the 1st Defendant-Respondent-Appellant Petitioned to the Supreme Court praying, *inter alia,* for this Court to set aside the aforementioned judgment of the Civil Appellate High Court and affirm the judgment of the District Court of Colombo.

QUESTIONS OF LAW

9. On 01st October 2015 this Court granted leave on the following questions of law submitted by the Appellant:

   i. *Have Their Lordships misdirected themselves in holding that "…the Learned District Judge who finally delivered the judgement but he has not got an opportunity even to hear the evidence of the single witness who has testified at the trial"?*

   ii. *Have their Lordships thus erred in holding that the case must be re-tried in the District Court of Colombo?*

   iii. *Have Their Lordships misdirected themselves in holding "As such we find that the defendant-respondent has not proved by evidence that the said payment has been duly paid to the appellant [Plaintiff-Appellant-Respondent of the instant case]"?*

   iv. *Have Their Lordships thus erred in holding that "… the plaintiff's transaction with her brother in respect of Deed No. 1527 has been duly completed has not proved."?*

ANALYSIS

<u>First and Second Questions of Law</u>

10. I see it convenient to dispense with the first and second questions of law at the very outset as they relate to matters observable on the face of the record.

11. The position of the 1st Defendant-Respondent-Appellant was that the learned Judges of the Civil Appellate High Court had misdirected themselves in concluding that the learned District Judge who delivered the judgment did not have the benefit of hearing the evidence of a single witness at the trial. This finding of the Civil Appellate High Court is based on an erroneous submission to this effect made by the Plaintiff-Appellant-Respondent in their written submissions before the Civil Appellate High Court.[1]

12. As the 1st Defendant contends, it is an error apparent on the face of the record. The learned District Court Judge who gave the judgment has, in fact, the 1st Defendants evidence in its entirety. Moreover, all parties have agreed to adopt the testimonies given before the learned Judge's predecessor on 26th January 2009.[2]

13. Moreover, it is not uncommon for original court judges to give judgments based on evidence led before their predecessors, especially in long draw disputes relating to land such as this. As such, even where a district judge has not had an opportunity to hear any witnesses and bases a judgment on the evidence heard before their predecessors, that, on its own, cannot be considered a reason to set aside such judgment, except under special circumstances.

14. Accordingly, the first question of law is answered in the affirmative.

15. The second question of law is whether "*…their Lordships **thus** erred in holding that the case must be re-tried in the District Court of Colombo?*"[3] This question presupposes

[1] Para II-Z of the Written Submissions of the Plaintiff-Appellant dated 20th June 2013 in Case No. WP/HCCA/COL/63/2009(F) before the Civil Appellate High Court of the Western Province holden in Colombo, appended marked 'X1' to the Petition of Appeal

[2] Proceedings of the District Court of Colombo Case No. 7371/SPL dated 26th January 2009, p. 1

[3] Emphasis added

that Their Lordships have solely based their decision to order a retrial on the finding that the judge who gave the judgment has not had the opportunity to hear any of the witnesses.

16. The judgment of the Civil Appellate High Court indicates that the Court has taken into account the submission of the Plaintiff-Appellant-Respondent that the demeanor of witnesses in the instant case is extremely important to be considered as case depended largely on the factual evidence given by the parties in open court. The Court has also taken into consideration the contention of the Plaintiff-Appellant-Respondent that none of the witness testified before the District Judge who gave the judgment, which is factually inaccurate as already observed.

17. As apparent from the judgment of the Civil Appellate High Court, this appear to be the basis of ordering a retrial as no other reasons are set out therein. As such, the learned Judges have ordered a retrial based on a manifestly erroneous finding.

18. Therefore, the second question of law, too, is answered in the affirmative.

Third Question of Law

19. The last two questions of law relate to the very foundation upon which the Plaintiff's claim before the District Court was based. That is, the purported agreement between the Plaintiff and the 1st Defendant, at the time of the transfer, to reconvey the property in question once the purpose of the transfer (obtaining a loan from the Employees Provident Fund of the Ceylon Electricity Board) is fulfilled. This understanding at the time of transferring the property, if properly established, leads to an inference—albeit an inconclusive one—that the transferor intended not to dispose of the beneficial interest of the property transferred. This would, most certainly lend support to the claim that there is a constructive trust for the benefit of the transferor, the Plaintiff.

20. In this regard the 1st Defendant-Respondent-Petitioner-Appellant invited this Court's attention to the fact that Deed No. 1527 dated 02nd May 1990 attested by Nalini Peiris, Notary Public (marked **'පැ 1'**), by which the transfer in question was made, contains no conditions whatsoever indicating the formation of a trust. In addition, the Appellant further pointed out that the Plaintiff-Appellant-Respondent has expressly admitted the receipt of Rupees 40,000/- in consideration for the transfer as observable on page 1 of the said Deed. With regard to consideration the attestation of the Notary states that "*... withinmentioned consideration will be paid to the Vendor by the Ceylon Electricity Board Provident Fund Society",* indicating that no consideration was paid before the Notary.

21. It was the Appellant's contention that, what the Plaintiff has admitted to have received as consideration on page 1 is that which was to be paid by the Ceylon Electricity Board Provident Fund Society as referred to in the attestation. In light of this, the Appellant contended that there is an outright transfer of the property for consideration of Rupees 40,000/-, the receipt of which the Plaintiff has admitted in the Deed.

22. In this setting, the Appellant sought to argue by virtue of Section 92 of the Evidence Ordinance, while acknowledging the provisos thereto, that the Plaintiff was estopped from contending anything contrary to the contents of the Deed marked **'පැ 1'**.

23. What is alleged here by the Plaintiff is an oral promise to reconvey the property once the 1st Defendant's purpose is fulfilled. Such a promise, however well established, most certainly cannot contradict, vary, add to or subtract from a notarial document such as **'පැ 1'**—for that requires compliance with Section 2 of the Prevention of Frauds Ordinance. In this sense, this promise on its own is of little to no utility, as it would not amount to an enforceable *pactum de retrovendendo.*

24. In spite of this general infirmity associated with informal promises to reconvey, a party may lead evidence of such a promise for the purpose of establishing a trust governed either by Section 5(3) or Chapter IX of the Trust Ordinance.[4] If not, as has been previously observed by this Court, said provisions of the Trust Ordinance effectively becomes nugatory.[5]

25. As **Dr. Abdul Majeed** notes, in **Equity and the Law of Trusts**, it *"…is always available to a party to a suit to lead parol evidence to establish the true nature of the transaction as an exception to the rules contained in sections 92/93 of the Evidence Ordinance, if the land is transferred as security for a loan or the transfer in fact creates a trust as per section 83 of the Trust Ordinance, such an exception would be an instance permitted by law to lead parol evidence to establish the true nature of the transaction."*[6]

26. Section 83 of the *Trust Ordinance* provides that,

> "*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."*

27. Basnayake CJ commented describing the words 'attendant circumstances' in ***Muttammah v. Thiyagaraja*** as follows:

> *"Attendant circumstances are to my mind circumstances which precede or follow the transfer but are not too far removed in point of time to be regarded as*

[4] See the analysis of A.H.M.D. Nawaz J in *Vairamuttu Palagapodi v. Gnanamuttu Kanmani* C.A. Case No. 201/1998(F), CA Minutes of 30th May 2016, pp. 12-15

[5] *Muttammah v. Thiyagarajah* 62 NLR 559; *Bernedette Valangenberg v. Hapuarachchige Anthony* [1990] 1 Sri LR 190

[6] Dr. U.L. Abdul Majeed, *Equity and the Law of Trusts* (Revised 2nd edn 2022) p. 231

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."[7]

28. The jurisprudence of this Court has recognized various circumstances that can be considered as 'attendant circumstances' for the purpose of establishing a constructive trust by virtue of Chapter IX of the Trust Ordinance. Such circumstances include:

I. Whether the transferor continued in possession after the conveyance;

II. If the transferor paid the whole cost of the conveyance;

III. If the consideration expressed on the deed is utterly inadequate to what would be a fair purchase price for the property conveyed [***Ehiya Lebbe v. Majeed (48 NLR 357, 359)***];

IV. The relationship between parties [***Valliyammai Achi v. Abdul Majeed (45 NLR 169, 191)***].[8]

29. An oral promise to reconvey, too, as H.N.G. Fernando J noted in ***Muttammah v. Thiyagarajah***,[9] is undoubtedly an 'attendant circumstance' in cases of this nature, since such a promise supports the proposition that there was no intention on the part of the transferor to part with beneficial interest in the property.

[7] 62 NLR 559, p. 570

[8] See *Liyana Athukoralalage Indrawathie v. Galolu Kankanamalage Dharmasena* SC Appeal No. 190/2016, SC Minutes of 02 October 2023, p. 9

[9] 62 NLR 559

30. His Lordship held therein,

> *"The plaintiff sought to prove the oral promise to reconvey not in order to enforce that promise but only to establish an 'attendant circumstances' from which it could be inferred that the beneficial interest did not pass. Although that promise was of no force or avail in law by reason of Section 2 of the Prevention of Frauds Ordinance, it is nevertheless a fact from which an inference of the nature contemplated in Section 83 of the Trusts Ordinance properly arises. The Prevention of Frauds Ordinance does not prohibit the proof of such an act. If the arguments of counsel for the appellant based on the Prevention of Frauds Ordinance and on Section 92 of the Evidence Ordinance are to be accepted, then it will be found that not only Section 83, but also many of the other provisions in chapter IX of the Trusts Ordinance will be nugatory. If for example 'attendant circumstances' in Section 83 means only matters contained in an instrument of transfer of property, it is difficult to see how a conveyance of property can be held in Trust unless indeed its terms are such as to create an express Trust."*[10]

31. As can be clearly seen, while the Deed of Transfer itself is an important matter which should be considered as one of the attendant circumstances, it is open to a plaintiff to lead parol evidence with regard to other attendant circumstances from which it could be inferred whether a transferor intended to dispose of beneficial interest or not.

Is there sufficient proof of an oral promise to reconvey?

32. As I have already noted, there is no documentary proof of an agreement to reconvey. However, the evidence of the Plaintiff as well as the two witnesses called by the

[10] ibid, p. 571

Plaintiff have given evidence to the effect that the land was transferred to the 1st Defendant to facilitate a loan and that the 1st Defendant agreed to reconvey the land to the Plaintiff once that purpose is fulfilled. They have also given evidence as to the extremely close relationship which existed between the Plaintiff and the 1st Defendant at the time of this transfer.

33. Hettiarachchige Vasantha Sanjeewa, the son of the Plaintiff, is the first witness called by the Plaintiff. He is also a witness to Deed of Transfer No. 1527, and has given evidence with regard to the circumstances under which the said transfer was done. He categorically states that his mother had no intention to sell the land. He further states that it was transferred by his mother to the 1st Defendant in order to obtain a loan and that his uncle, the 1st Defendant, agreed to reconvey the land prior to the Deed of Transfer being executed. Even after strenuous cross-examination this position remain consistent. Moreover, he states that there was an arrangement to recovery at a subsequent time and that it was obstructed due the 1st Defendant requesting Rs. 500,000/- for the same.

34. Thereafter, Hettiarachchige Chandrani Nishanthi, one of the daughters of the Plaintiff, has corroborated this position in her testimony. She states that she heard the discussions between her mother and uncle which related to the transfer in question and that her mother agreed to transfer the property to facilitate the 1st Defendant's attempt to obtain a loan. She has further given evidence with regard to the subsequent arrangement to recovery being frustrated by the 1st Defendant requesting Rs. 500,000/- in corroboration of the testimony given by the earlier witness. The evidence given by the Plaintiff, too, is consistent to this effect.

35. However, the 1st Defendant vehemently denies this, claiming that he intended to buy a land for the purpose of building a house and ended up purchasing the property in

suit, as suggested by his bother-in-law, the husband of the Plaintiff. He further states that he subsequently found the land to be one that cannot be developed and expressed his intention to sell the same, at which point the Plaintiff's son approached him to buy the land for Rs. 500,000/-. He states that a deed of transfer was prepared for this purpose by his nephew and that he even fixed a date to sign the said deed. However, he states that he refused to sign this deed when he realized that his nephew had not brought the money as they previously agreed.

36. The evidence of the Plaintiff-Appellant-Respondent with regard to the agreement to reconvey is probable, consistent and has been corroborated by two witnesses. There is no more than a bare denial by the 1st Defendant-Respondent-Petitioner-Appellant in this regard. As such, I am of the view that the Plaintiff-Appellant-Respondent has proved the existence of an agreement to reconvey on a balance of probability.

37. However, evidence of such an agreement *per se* is not sufficient to establish a constructive trust.[11] There must be other attendant circumstances which indicates the establishment of a constructive trust.

Is there sufficient evidence indicating that the payment has been paid to the Plaintiff?

38. Throughout the trial, parties have placed much emphasis on the question as to whether or not any consideration has moved from the 1st Defendant to the Plaintiff. Indeed, the third question of law before this Court relates entirely to this.

39. The Plaint of the Plaintiff before the District Court of Colombo in paragraph 5 avers that "...පැමිණිලිකාරිය වෙත විදුලිබල මණ්ඩලය විසින් නිකුත් කර ඇති චෙක් පත 1 වන විත්තිකරු විසින් මුදල් කර ගන්නා ලදී [*the cheque issued to the Plaintiff by the Electricity*

[11] *Vairamuttu Palagapodi v. Gnanamuttu Kanmani* C.A. Case No. 201/1998(F), CA Minutes of 30th May 2016, pp. 15-17

Board was encashed by the 1st Defendant]". In her testimony, she states that she never received any money and that she did not even see a cheque. As the learned President's Counsel for the 1st Defendant-Respondent-Petitioner-Appellant contended, this is a somewhat contradictory position.

40. The Plaintiff further states in her evidence that she had never had a current account, that she had never dealt with cheques and that she does not go to the bank except with one her children.

41. The first and second witnesses, son and daughter of the Plaintiff, who gave evidence clearly states that the Plaintiff is not someone who is capable of interacting with banks on her own as she is illiterate and can do little more than signing her name. Both witnesses also state that their mother did not receive cheque and that she could not have encashed one without their assistance.

42. Denying the position of the Plaintiff, the 1st Defendant states that he himself took the Plaintiff to the Electricity Board in order to collect the cheque and that he got to know the Electricity Board that she had collected the cheque which was in her name.

43. The 2nd Defendant, Palitha Kithsiri Samarawickrama, secretary/accountant of Ceylon Electricity Board EPF, giving evidence confirms, having referred to the records, that a cheque had been issued in the Plaintiff name and that it has been encashed. He further confirms that a voucher is available on his record bearing the signature of the Plaintiff acknowledging the receipt of the cheque from his office.

44. However, the 2nd Defendant is unable to give any evidence as to who has encashed it. Furthermore, it is also clear that he has no personal knowledge of this particular transaction in suit as he was not employed at secretary/accountant at the time. It is clear that the evidence of the 2nd Defendant is only relevant insofar as to establish that

the cheque has been issued in the Plaintiff's name and the Plaintiff has signed and collected it from the 2nd Defendant's office. From this alone, we cannot come to a conclusion that the Plaintiff would have encashed the cheque, given the nature of the agreement the Plaintiff claims to have had with the 1st Defendant—which was for the property to be transferred to his name so that he may obtain a loan for its purchase and raise money through his sister.

45. However, no party has adduced any evidence as to who in fact encashed the cheque, and the cheque has not been listed as evidence. As the learned President's Counsel for the 1st Defendant-Respondent-Appellant rightfully submitted, the Plaintiff in paragraph 5 of her Plaint before the District Court has asserted that the 1st Defendant encashed the cheque; and by virtue of Section 101 of the Evidence Ordinance, he who asserts must prove. As such, the burden of proving that 1st Defendant encashed the cheque is clearly in the Plaintiff.

46. Learned Judges of the Civil Appellate High Court, however, have come to a conclusion that the Defendant has had failed to prove by evidence that the payment has been duly paid to the Plaintiff. In coming to this conclusion, the learned Judges have placed the burden of proof on the Defendant, which is clearly bad in law.

47. For the foregoing reasons, the third question of law is answered in the affirmative.

Final Question of Law

48. Although the first three questions of law are answered in the affirmative, before I answer the final question of law, I wish to consider other attendant circumstances of the transfer for the sake of completion.

49. Plaintiff-Appellant-Respondent also contended that, although a survey was done and a plan was prepared, boundaries of the land were not marked and that possession of

the land in suit has never been passed to the 1st Defendant. This is corroborated by the evidence of the first and second witnesses. The two witnesses as well as the Plaintiff also state that the 1st Defendant has not taken any steps to develop the land which he claims to have bought for the purpose of building a house.

50. The 1st Defendant, in his testimony before the District Court, states that he bought the land intending to build a house and every intention of developing the property. He has produced a document marked **'වී 4'** to establish that he sought approval from the Kotikawatte Mulleriyawa Pradeshiya Sabha to develop the land. He states, he was informed that 25 ft from the boundary of the Kolonnawa Canal (කොළොන්නාව ඇළ), which is adjacent to the land in suit, must be set aside for the purpose of conservation. He states that once 25 ft are set aside there was no room to build a house and therefore, he had given up on developing the land and built a house on a different land. He further claims to have erected a fence there and planted several trees, which the other witnesses deny.

51. The document marked **'වී 4'** gives an indication of an intention on the part of the 1st Defendant to develop the land in suit. In addition, as the 1st Defendant himself has admitted in his testimony, the Deed of Transfer marked **'පැ 1'** was in possession of the Plaintiff-Appellant-Respondent at the time of filing action before the District Court. However, the 1st Defendant states that he handed over the Deed of Transfer marked **'පැ 1'** to his nephew in order to prepare a new deed of transfer after his nephew showed interest to buy the land for Rs. 500,000/-.

52. The final question of law before this Court is as follows:

*"Have Their Lordships **thus** erred in holding that "... the plaintiff's transaction with her brother in respect of Deed No. 1527 has been duly completed has not proved."?*[12]

53. This question of law is clearly related to the third question of law. As previously discussed, since the Plaintiff has asserted in her Plaint that the 1st Defendant enchashed the cheque, the burden of proving the same is on the Plaintiff. However, no evidence has been adduced to this effect.

54. The 1st Defendant-Respondent-Respondent in his Written Submissions asserted that the Plaintiff has made no attempt to call a witness from the People's Bank to prove her assertion, despite having all opportunity to do so.[13] The Counsel also invited the Court to consider the presumption set out in Section 114(f) of the Evidence Ordinance in this regard.

55. Considering the aforementioned, I am of the opinion that learned Judges of the Civil Appellate High Court have erred in holding that the transaction between the Plaintiff and her brother had not been duly proven.

56. Accordingly, I answer the final question of law in the affirmative.

Conclusion

57. All questions of law are answered in the affirmative. The judgment of the Civil Appellate High Court is accordingly set aside.

[12] Emphasis added

[13] Written Submission of the 1st Defendant-Respondent-Appellant dated 16th November 2015, p. 13

58. Moreover, despite the finding that the Plaintiff has furnished evidence to tilt the balance of probability towards the existence of an oral promise to reconvey, I am of the view that the totality of the attendant circumstances does not lead to a sufficiently strong inference that the Plaintiff did not intend to dispose of the beneficial interest over the property in suit so as to displace a duly executed notarial instrument.

59. As such, I affirm the findings of the learned District Court of Colombo in judgment dated 24th April 2009, subject to the variation.

60. I make no orders as to costs.

Appeal Allowed.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J.

1. I had the privilege of reading the draft judgment of His Lordship S. Thurairaja, PC, J as well as the draft judgment of His Lordship Nawaz, J. I agree with the opinion of Justice S. Thurairaja, PC.

JUDGE OF THE SUPREME COURT

A.H.M.D. NAWAZ, J.

1. Oftentimes an appeal before this Court raises the quotidian issue of what English law terms a **gratuitous transfer resulting trust**. This typically arises whenever there is a sale of property absolute on the face of it but it is argued in the context of the transfer and attendant circumstances that the vendor never intended to convey the beneficial interest in the property to the purchaser. In such cases, recourse is made to Section 83 of the Trusts Ordinance and I would have thought that the interpretations placed on Section 83 of the Trusts Ordinance and allied legal provisions have been so well settled, and for such a long time, that any contrary construction becomes almost unimaginable. However, the simplistic dismissal of such long-established principles in the judgment of my brother, Justice Thurairaja, compels me to write this dissent. I will therefore proceed to set out my own reasons as to why a constructive trust or resulting trust arises based on the facts inherent in this case.

2. Let me unscramble the bare minimum of the facts. The Plaintiff-Appellant-Respondent (the Plaintiff) seeks to recover her property, which she had transferred to her brother—the 1st Defendant-Respondent-Appellant (the 1st Defendant). Her claim is based on a constructive trust under Section 83 of the Trusts Ordinance, wherein the declaration sought in the plaint states that, although the title to the land was transferred by the Plaintiff sister through a notarial deed of transfer, the deed was executed in the name of the 1st Defendant brother solely as security for a loan to be granted by the Ceylon Electricity Board (CEB). The Plaintiff asserts that her brother never provided consideration for the transfer in his name and, therefore, the "transferee" (the 1st Defendant brother) holds the legal title subject to a constructive trust in favor of the Plaintiff sister.

3. The case of the 1st Defendant brother is that soon after the transfer of the land to him by the sister, he mortgaged the property to the 2nd Defendant (the CEB) for the purpose of obtaining a loan but the proceeds of the loan were all paid to the Plaintiff sister as consideration for the transfer. The assertion is that the consideration was paid to the sister by a cheque issued in her favor by the CEB.

4. So, the quintessential question is whether consideration was paid for the transfer. Whilst the sister's case was one of non-payment of consideration along with other attendant circumstances, the brother asserted payment. The learned District Judge of Colombo by his judgment dated 24 April 2009 dismissed the case of the Plaintiff sister holding *inter alia* that the Plaintiff had failed to establish her contention of non-payment, whilst the appeal preferred by the Plaintiff sister was allowed by the Civil Appellate High Court of the Western Province.

5. The Civil Appellate High Court Judges ruled in favor of a **constructive trust**, holding that the 1st Defendant had failed to provide evidence that the payment in question had been duly made to the Plaintiff. Consequently, the 1st Defendant has appealed this judgment to this Court. However, the Civil Appellate Judges also issued an **inconsistent order** remanding the case for a re-trial—an exercise in futility, as I will demonstrate.

6. When conflicting claims regarding payment or non-payment of consideration arise between the parties, the provisions of the Evidence Ordinance, 1895, determine the allocation of the burden of proof. In this context, Sections 101, 102 and 103, along with other relevant provisions of the Evidence Ordinance, become applicable. Accordingly, the key issue that arises is how the burden of proof should be distributed between the sister and brother in this particular case.

7. Indisputably, Section 83 of the Trusts Ordinance is engaged and it is convenient to posit the provision with the relevant illustration at this stage.

> *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 property for the benefit of the owner or his legal representative.*
>
> *Illustration*
>
> *(a) A conveys land to B without consideration and declares no trust of any part.*
>
> *It cannot, consistently with the circumstances under which the transfer is made, reasonably be inferred that A intended to transfer the beneficial interest in the land. B holds the land for the benefit of A.*

8. Section 83 is found in Chapter IX of the Trusts Ordinance and the first provision in this chapter (Section 82) states,

> "*An obligation in the nature of trust (hereinafter referred to as a 'constructive trust') is created in the following cases.*"

9. Sections 82 and 97 make clear that Sections 83 to 96 each raise a trust, though the sections themselves do not specifically mention the word trust, but refer to "*….hold...for the benefit…..*". However, it has never been doubted that these sections give rise to trusts - ***Fernando v Coomaraswamy.***[1] A comparison between the Indian

[1] (1940) 41 N.L.R. 466

Trusts Act, 1882 and Sri Lankan Trusts Ordinance No. 9 of 1917 reveals that Section 82 of our legislation is *pari materia* with Section 81 of the Indian Trusts Act, 1882. However, while our Chapter IX is expressly titled 'Constructive Trusts', the corresponding chapter in the Indian legislation does not bear the same caption. *En passant*, I must remark that Section 81 of the Indian Trusts Act is no longer in force in India, having been repealed by *Section 7 of the Benami Transactions (Prohibition) Act,* 1988.[2]

10. The omission of any reference to "constructive trusts" in the Indian Trusts Act is intentional and understandable. Both the Indian legislation and the Sri Lanka Trusts Ordinance recognize the concepts of resulting and constructive trusts as understood in English law. However, the Trusts Ordinance, somewhat infelicitously, refers only to "Constructive Trusts" in Chapter IX, whereas the Indian Trusts Act omits explicit mention of either resulting or constructive trusts in its corresponding Chapter IX. Due to this discrepancy, the distinguished jurist L.J.M. Cooray, in his treatise, suggested that the phrase "*obligations in the nature of trusts*" might have been a more appropriate heading for Chapter IX than "*constructive trusts.*"[3]

11. The reason is discernible. Both Sections 83 and 84 of the Trusts Ordinance embody the English law concept of resulting trusts rather than constructive trusts. It cannot be gainsaid that the Trusts Ordinance is an almost verbatim reproduction of the Indian Trusts Act of 1882, but the amendments suggested by L.J.M.Cooray have gone a-begging.

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[2] See *Mukherjee Indian Trusts Act*, 1882, Sixth Edition (2021) at p 1032.

[3] See *The Reception in Ceylon of the English Trust -An Analysis of the Case Law and Statutory Principles Relating to Trusts and Trustees in Ceylon in the light of the Relevant Foreign Cases and Authorities* (1971) at p124.

Resulting Trusts in Sections 83 and 84

12. Lord Upjohn explained resulting trusts in ***Vandervell v IRC***[4]

> *Where A **transfers**, or directs a trustee for him to **transfer**, the legal estate in property to B otherwise than for valuable consideration it is a question of the intention of A in making the **transfer** whether B was to take beneficially or on **trust** and, if the latter, on what **trusts**. If, as a matter of construction of the document **transferring** the legal estate, it is possible to discern A's intentions, that is an end of the matter, and no extraneous evidence is admissible to correct and qualify his intentions so ascertained. But if, as in this case … the document is silent, then there is said to arise a **resulting trust** in favour of A. But this is only a presumption and is easily rebutted. All relevant facts and circumstances can be considered in order to ascertain A's intentions with a view to rebutting this presumption.*

13. David Hayton, in editing the 13th edition of Sir Underhill's *Law of Trusts and Trustees* and relying on ***Re Vandervell's Trusts (No. 2)***[5] described the trust that arose in that case as an *'automatic resulting trust'* to distinguish it from the '*presumed resulting trust'* contemplated in Sections 83 and 84 of the Sri Lankan Trusts Ordinance. In the instant appeal, we are not concerned with an automatic resulting trust as encountered in ***Re Vandervell's Trusts (No. 2)*****,** but rather with a presumed resulting trust as provided for in Section 83 of the Trusts Ordinance.

[4] (1967) 2 AC 291; (1967) 1 All ER 1 (House of Lords).

[5] (1974) Ch 269; (1974) All ER 205

14. According to the 20th Edition of this leading textbook on Trusts which now carries the title ***Underhill and Hayton: Law of Trusts and Trustees*,**[6] resulting trusts of property may be imposed in the following circumstances:

> *(a) when property is transferred to a trustee, on trusts which do not wholly dispose of the beneficial interest.*
>
> *(b) when property is gratuitously transferred to another or purchased in the name of another, and there is no evidence that the transferor or purchaser declared a valid express trust in his own favour, or that he intended to make a gift or loan or to abandon the property, in which case a presumption is made that the transferor or purchaser did not intend the transferee to acquire beneficial enjoyment of the property for himself, failure to rebut such presumption by the transferee leading to the imposition of a resulting trust; or*
>
> *(c) when money is lent on the basis that it will not become part of the borrower's general assets, but must be applied for a specified purpose, a resulting trust arising in the lender's favour from the moment of receipt that is defeasible by the exercise of a power vested in the borrower to use the money for the purpose*

Presumed Resulting Trusts in Sections 83 and 84

15. Paragraph (b) above outlines the principles reflected in Sections 83 and 84 of the Sri Lankan Trusts Ordinance. Regarding the requirements of Section 83, where a resulting trust arises, ***Underhill and Hayton*** provide the following interpretation:

> *When real or personal property is conveyed to a purchaser jointly with others, or to one or more persons other than the purchaser, and he does not provide the*

[6] 20th Edition (2022) at Articles 25 and 26 edited by Paul Matthews, Charles Mitchell, Jonathan Harris and Sinead Agnew.

> *purchase money as lender, and* ***he receives no consideration from the grantees, and there is no evidence to show that he intended them to take beneficially, the law presumes that he did not, and a failure by them to rebut this presumption leads to a resulting trust.***[7]

16. The crucial question then is whether evidence in this case shows that the transferor did or did not intend to transfer the beneficial interest in the property, real or personal. Undoubtedly, non-payment of consideration for the transfer will point to the intention of the transferor but evidence that the transferor did not intend to make a gift of the property to the transferee will also strengthen the presumption that the transferor did intend to keep the beneficial interest in himself or herself.

Rebuttal of Presumed Intention by the Transferee

17. The presumed intention of a resulting trust that arises on evidence has to be rebutted by the transferee in order to claim an absolute transfer. Otherwise, a presumption of trust would continue to prevail in favor of the transferor. Sections 83 and 84 do not lay down the relevant principles with specific reference to the presumption but leave it to the Court to decide whether or not, in the attendant circumstances of the case the transferee has received the beneficial interest.

18. Thus, there is a duty to inquire into the attendant circumstances to ascertain the parties' intention. However, judges have not hesitated to rely on the presumption to determine the nature and extent of the evidential burden placed on the parties. I will address the burden of proof, but only after first examining the evidence. As previously noted, Sections 102 and 103 of the Evidence Ordinance are instrumental in

[7] (20th Edition, 2022) Division Three> Trusts Imposed by Law> Chapter 8>Resulting Trusts>Article 26.1

determining the allocation of the burden of proof between the parties. Upon a synoptic consideration of all the facts in the case, it will become evident that even the presumption expressed in Section 114 of the Evidence Ordinance could be invoked to ascertain the parties' intention. By "parties' intention," I refer to the common intention shared between the sister and brother in this case. If their common intention was that the transfer served solely to facilitate a loan for the brother, a resulting trust would arise. However, if their common intention was a genuine sale, the sister would have intended to transfer not only the legal title but also the beneficial interest.

When is a resulting trust under Section 83 imposed?

19. In ***Westdeutsche Landesbank Girozentrale v Islington*** BC[8] Lord Browne-Wilkinson rejected the notion that the resulting trust is designed to reverse unjust enrichment and declared that this type of trust gives effect to the common intention of the parties. The transferor does not intend to part with the equitable interest and the recipient of the property is also aware that he is not the intended beneficial owner. The trust is imposed on the basis of the conscience of the recipient of the property.

20. It is these principles, which have not been fully grappled with in relation to the facts of the case, that form the basis of my dissent.

Sections 83 and 84 embody English Law

21. On the applicability of English law to Sections 83 and 84 of the Trusts Ordinance, Gratiaen J said the following in the context of a case that arose under Section 84.

> ***Sections 83 and 84 of our Trusts Ordinance have introduced the English law on this subject...*** *Where a man purchases property in the name of (or transfers*

[8] (1996) AC 669.

> *property to) a stranger, a resulting trust is presumed in favour of the purchaser (or transferor); on the other hand, if the transfer is in the name of a child or one to whom the purchaser or transferor then stood in loco parentis, there is no such resulting trust but a presumption of advancement. The presumption may, however, be rebutted, but it should not give way to slight circumstances.*[9]

22. The reference to a "stranger" does not exclude a brother, as is the case with the transferee in the instant appeal. The reasoning of Gratiaen J applies equally to any transferee, including the 1st Defendant in this case. English law does not impose a restriction limiting the transferee to a stranger except in the counter presumption of advancement under Section 84.

23. To summarize the foregoing, Section 83 explicitly states that a transfer of property by a transferor will be subject to a constructive trust only if, considering the attendant circumstances, it cannot reasonably be inferred that the transferor intended to dispose of the beneficial interest in the property**.**

24. The question then arises: what are the attendant circumstances in this case that indicate whether the sister, as the transferor, did or did not intend to dispose of the beneficial interest in her land?

25. If it is established on a balance of probability that the brother (the transferee) did not provide consideration, this fact will serve **as one of the attendant circumstances** pointing to the sister's true intention at the time she executed the deed of transfer. Non-payment of consideration for the transfer is only one circumstance and there may be other circumstances that may throw light on the intention of the transferor as to whether she did or did not intend to pass the beneficial interest to the transferee.

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[9] ***DA Perera v Scholastica Perera*** (1935) 57 NLR 265.

26. Before I proceed to examine the evidence to ascertain the parties' intention, let me make a fleeting reference to the bifurcation of proprietary interests into those silos of equity-legal and equitable interests.

Legal and Equitable Ownership

27. Historically, the separation of equitable ownership from legal ownership is at the core of the English concept of trusts law. When the Charter of Justice 1801 declared the Supreme Court to be a court of law and equity, the way was paved for the reception of concepts of equity, including the distinction between legal and equitable proprietary interests. The influence of equity became more pronounced when courts of original civil jurisdiction also came to be regarded as courts of law and equity.[10] Indian and Sri Lankan judges have repeatedly said that the distinction between equitable and legal ownership forms no part of their legal system, because (unlike in England) there have been no separate courts of law and equity in India or Sri Lanka.[11]

[10] As Lord Haldane observed in ***Dodwell v John:*** under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system (1918) **20 NLR 206**, 211 (PC). See also ***Gavin v Hadden*** (Ceylon) [1871] UKPC 48.

[11] As the Privy Council explained in the Indian case of ***A Krishna v Kumara K Deb*** (1869) 4 Bombay LR Oudh Cases 270, trusts law could operate without relying on the distinction between legal and equitable ownership of property because the Supreme Court of India was a court of law and equity. For instance, in a series of cases the Supreme Court of Sri Lanka has recognised that an equitable lease would prevail over a forfeiture clause in a legal lease. See, for instance, ***Perera v Thalif*** (1904) 8 NLR 118***; Perera v Perera*** (1907)10 NLR 230; and ***Sanoon v Theyvendera-Rajah*** (1963) 65 NLR 574.

28. In an absolute transfer of property that is later declared as a resulting or a constructive trust, the legal interest vests in the transferee (the trustee), while the equitable or beneficial interest remains with the transferor (the beneficiary).

29. In the instant case before us, the legal interest has already vested in the brother (the transferee) but the question is whether the equitable interest continues to reside in the sister (the transferor)? If the attendant circumstances lead to the inference that the sister did not intend to transfer the equitable or beneficial interest to the brother, that interest remains with her. Consequently, a cause of action arises, allowing her to demand that the transferee brother reconvey the land, thereby divesting himself of legal title.

30. Before applying the established facts to the law, it is essential to identify the **pivotal questions** that will determine the outcome of this case: **Did the brother provide consideration to the sister?** Are there other **attendant circumstances** that negate an intention to transfer the **beneficial interest** in the property?

31. These questions must be answered in light of the evidence offered by both the **Plaintiff** and the **1st Defendant**. I now turn to an analysis of that evidence.

The first witness for the Plaintiff

32. The first witness for the Plaintiff was her son who was quite acquainted with the attendant circumstances surrounding the transfer of the Plaintiff's land in favor of the 1st Defendant. The son alluded to the purpose of the transfer - i.e the 1st Defendant wanted the transfer in order to obtain a loan from his employers - the Ceylon Electricity Board (CEB). The CEB wanted a mortgage of a land as a security for the loan, as the evolving evidence would reveal, and as the 1st Defendant did not have title to a land that could be furnished as security, he approached his elder sister (the Plaintiff

in the case) and she voluntarily transferred the land to the younger brother (the 1st Defendant).

33. The Plaintiff's son began by explaining the purpose of the transaction. A key item of evidence that emerges from his testimony is his emphatic assertion that his uncle, the 1st Defendant, never provided consideration to his mother, the Plaintiff, for the transfer of the property. In summary, this issue arises as payment for the land was the core defence of the 1st Defendant.

34. He further testified that his mother (the Plaintiff) never intended to sell the land to her brother-the 1st Defendant.

35. The evidence of non-payment for the transfer, along with the absence of any intention to transfer the land in favor of the 1st Defendant, remained unchallenged during cross-examination. Furthermore, the witness testified that the 1st Defendant exhibited a willingness to re-transfer the land both at the time of transfer and thereafter—an assertion that also went unchallenged. This further reinforces the Plaintiff's account of non-payment as more probable than not.

36. Does the absence of cross-examination on the emphatic assertion of non-payment not establish a *prima facie* case of non-payment in terms of Section 102 of the Evidence Ordinance?

37. This raises the question of burden of proof and its allocation between the sister and the brother. I have already alluded to the presumption of a resulting trust arising under Section 83 upon evidence of a gratuitous transfer of property and the necessity on the part of the 1st Defendant to rebut this presumption (para 17). The question whether the sister transferred the property without receiving any consideration from the

brother has to be determined upon evidence led and for this purpose I now turn to the evidence of the 2nd witness for the Plaintiff namely her daughter.

Second Witness for the Plaintiff.

38. The second witness for the Plaintiff is her daughter, who was shown the deed dated 2 May 1990. At the time of its execution, she was 17 years of age. She claimed to be well acquainted with the background of the transaction, asserting that the transfer was made to facilitate a loan for the 1st Defendant, with the understanding that the property would be reconveyed to her mother once the loan installments had been repaid to the CEB.

39. Like the first witness, she emphasized that no consideration was paid for the transfer. She further supported this assertion by referring to the attestation clause in the deed, which forecasts a prospective payment to be made by the CEB to her mother. The relevant attestation clause states as follows:

> *"I further certify and attest that the within mentioned consideration will be paid to the vendor by the Ceylon Electricity Board Provident Fund Society"*.

40. The Plaintiff's evidence also asserts that the aforesaid promise in the attestation clause - referring to a future payment after the execution of the deed - was never fulfilled. However, at this stage, I must also observe that the 1st Defendant claimed that the Plaintiff was paid by a cheque issued by the CEB, as stipulated in the attestation clause. To support this assertion, he summoned a witness from the CEB to establish proof of payment. In contrast, the Plaintiff and her witnesses unequivocally stated from the witness box that no such payment was ever made to her.

41. These conflicting versions must be assessed for their testimonial credibility, and I will apply evaluative tools commonly used in the assessment of evidence to determine their reliability.

42. The overall tenor of the examination-in-chief of the Plaintiff's second witness was that her uncle, the 1st Defendant, repeatedly declared his intention to retransfer the land to her mother. In furtherance of this, they even visited a lawyer's office to effect the retransfer. However, the 1st Defendant ultimately thwarted these attempts by demanding a sum of Rs. 5 lakhs as a condition for executing the retransfer.

43. The witness also referred to the episode in which the 1st Defendant handed over a copy of the deed of transfer in his name to her mother after repeated pleas from her mother to retransfer the land. At this stage, I would classify this as subsequent conduct under Section 8(2) of the Evidence Ordinance, influenced by the fact in issue—namely, whether the sister ever intended to transfer the beneficial interest of the property to the brother. The subsequent act of handing back a copy of the deed is inconsistent with the behavior of a person who possessed a beneficial interest in the property. An individual who claims to hold both the legal title and beneficial interest in a property would not have relinquished the deed to the sister, whose assertion of non-transfer of the beneficial interest is corroborated by the very act of the 1st Defendant brother.

44. This very same evidence is also given by the Plaintiff in her testimony, albeit with a key distinction. According to the Plaintiff, the 1st Defendant returned **the original deed** to her after its execution. This assertion further reinforces the Plaintiff's position that she never intended to transfer the beneficial interest to her brother. The fundamental question that arises is this: *Why would the 1st Defendant return his own title deed to his sister if he truly held both legal title and beneficial interest in the property?* His conduct is at odds with such a claim.

45. When confronted with this inconsistency, the 1st Defendant attempted to provide an explanation rather belatedly in his evidence-in-chief. At this juncture, I must interpose to note that his evidence— which I will address shortly— is replete with new versions that were never put to the Plaintiff's witnesses.

46. In his examination-in-chief, the 1st Defendant explained that the Plaintiff's first witness—her son—had badgered him into selling the land to them and that the agreed consideration for the reconveyance was a sum of Rs. 5 lakhs. However, I must observe that this appears to be an entirely new case introduced by the 1st Defendant in his evidence, as this stance was never suggested to the Plaintiff or her witnesses, least of all to her son, who was allegedly pressuring his uncle.

47. Therefore, the evidence given by the Plaintiff's witnesses—that he returned the original deed of sale out of a sense of compunction, seeking to dispel any suspicion that he was attempting to wrongfully appropriate the property from his sister—remains unchallenged. His newly introduced claim that he was engaged in discussions regarding a possible sale must be regarded with the incredulity it warrants.

48. The Privy Council has stated that the real tests for either accepting or rejecting evidence are how consistent is the story with itself, how it stands the test of cross-examination, how far it fits in with the rest of the evidence and the circumstances of the case - ***Bhoj Raj vs. Sita Ram***.[12] In deciding on the credibility of witnesses, it is also necessary to ascertain whether they agree in their testimony-consistency *inter se*. If one examines the cross-examination of the Plaintiff's witnesses, it becomes evident that none of the positions later adopted by the 1st Defendant in his evidence-in-chief were ever put to them. This omission casts serious doubt on the testimonial credibility

[12] A.I.R. 1936 P C 60

of the 1st Defendant's belated assertions. Accordingly, I reject this defense, introduced for the first time during his examination-in-chief.

49. With due respect to my learned brother, he does not appear to assess the 1st Defendant's belated defense through the forensic and evaluative tools available to this Court—namely, the inherent inconsistency, improbability and belatedness that undermine the 1st Defendant's case. The belated versions put forward by the 1st Defendant undermine his case and in ***Evidence & Advocacy***[13] Peter Murphy & David Barnard point out that cross-examination has two purposes: to challenge the evidence in chief insofar as it conflicts with your instructions; and to elicit facts favorable to your case which have not emerged, or which were insufficiently emphasized in chief. The cross examiner in the case was innocent of the two purposes as I proceed to dissect the evidence.

50. It is axiomatic that the words or conduct of a transferee carry greater evidential weight when they are explicitly brought to their attention, yet they fail to protest or challenge them at the time. Such a failure to repudiate the words or conduct attributed to the transferee casts a serious doubt over the credibility of any contrary versions they later put forth.

51. Having thus examined the subsequent conduct of the 1st Defendant and its impact on his testimonial credibility, I now turn to the testimony of the Plaintiff.

Plaintiff's Testimony

52. Having pleaded and placed a denial of actual payment of consideration at the forefront of her case, the Plaintiff reiterated this assertion multiple times during both her examination-in-chief and cross-examination. At the time of giving evidence, she

[13] Fifth Edition (1998) at p 182.

was residing at her daughter's house, which is situated adjacent to the land in question—property over which the 1st Defendant claims absolute title. The Plaintiff testified that the transfer of land to the 1st Defendant was not intended to be an outright sale but a temporary arrangement to facilitate his loan application with his employer, the CEB. She emphasized that the transfer was made at her brother's request, without any financial consideration, and based on his promise to reconvey the land upon settling his liability to the CEB.

53. Despite the land being part of a larger parcel, it was never fenced or otherwise demarcated to grant exclusive possession to the 1st Defendant. This claim was reinforced by the testimony of her son and daughter, who confirmed that possession was never intended to be relinquished. The Plaintiff remained unequivocal in her stance that she never intended to transfer ownership permanently.

54. Next, she spoke of the misgivings she harbored due to the 1st Defendant's reluctance to reconvey the land. As a consequence of these concerns, she went so far as to register a caveat, which was duly marked in evidence.

55. She also visited the office of a lawyer for the purpose of having the land reconveyed to her but her brother demanded money for the retransfer and stymied that attempt. She also stated that the 1st Defendant did not come into possession of the lot which had been transferred to him

56. As for the alleged payment of a cheque in her favor by the CEB, the Plaintiff firmly denied receiving any such cheque. She stated that she had never engaged in cheque transactions, as she maintained only a savings account. Moreover, she emphasized that whenever she visited the bank, she was always accompanied by either her son or daughter. She classified the story of payment by cheque as a falsehood.

57. As previously highlighted by me, she also mentioned in her evidence the delivery of the original title deeds by her brother. I pointed this out as subsequent conduct of the 1st Defendant, which I further classify as an implicit admission that she never relinquished her beneficial beneficial interest in the property. His explanation that it was as a result of an ongoing negotiation to sell the land is unworthy of credit as this was not suggested to any of the witnesses including the Plaintiff.

Observations on the evidence of the Plaintiff

58. It must be borne in mind that neither the Plaintiff nor her daughter was ever challenged on their assertions regarding the subsequent conduct of the 1st Defendant in delivering the original deed of sale—a conduct indicative of his recognition of the Plaintiff's beneficial interest in the property. The unchallenged evidence remains that he visited the office of a lawyer to sign a deed intended to reconvey the land to the Plaintiff. His claim that this visit was necessitated by ongoing negotiations to sell the land lacks credibility, as this position was never put to the Plaintiff's witnesses.

59. The Plaintiff further testified that the 1st Defendant was never admitted into possession of the land, which measured 10 perches, and her firm deposition to this effect remained unchallenged in cross-examination. This uncontradicted evidence strongly indicates that the Plaintiff continued to possess the land, whether constructively or otherwise. Both the Plaintiff and her daughter consistently testified that they had planted trees on the land, and this claim, too, was left unchallenged in cross-examination. Having failed to challenge these two witnesses—who remained steadfast in their assertions that the 1st Defendant never took possession of the land despite the sale—the 1st Defendant, in his testimony, belatedly attempted to claim that he had planted the trees. Significantly, his evidence in chief contained no assertion of

exclusive possession of the land. This serves as a strong indication that the beneficial interest in the property remained with the Plaintiff.

60. Moreover, the oral promise to reconvey the land was the overriding tenor of the Plaintiff's evidence, and this crucial aspect of her testimony was not seriously impugned during cross-examination.

61. All this uncontradicted evidence brings to mind a long line of cases affirming the distilled wisdom articulated by H.N.G. Fernando C.J. in ***Edrick de Silva v Chandradasa de Silva,***[14] later followed in cases such as ***Cinemas Ltd v Sounderarajan.***[15] His observations underscore that when a Plaintiff leads evidence that remains uncontradicted by the Defendant in the case, such evidence becomes an additional "*matter before the Court*" as contemplated by the definition in Section 3 of the Evidence Ordinance. In other words, proof under Section 3 is not confined solely to oral, documentary, or real evidence. Sir James Fitzjames Stephen, the author of both the Indian Evidence Act and our own, deliberately employs the term *"matters"* in defining proof of a fact under Section 3—thereby encompassing even uncontradicted evidence.

62. Unchallenged and unimpugned evidence assumes the character of proved evidence as to the fact spoken to by witnesses, and any belated attempt to contradict such evidence in one's own testimony—without having put forward and made known one's position earlier—lacks credibility. This fundamental rule must be borne in mind by all cross-examining counsel, and the counsel for the 1st Defendant, having disregarded it, failed to establish proof of the 1st Defendant's case, if his version were true. This

[14] 70 N.L.R 169 at 174.

[15] (1998) 2 Sri LR 16.

principle, commonly referred to as the rule in ***Browne v Dunn*****,** derives its name from the 19th - century case.

63. Denning J. in ***Miller v. Minister of Pensions***[16] stated :-

> *If the evidence is such that the tribunal can say: 'we think it more probable than not,' the burden is discharged, but, if the probabilities are equal, it is not.*

64. In civil cases the test is not whether one party's version is more probable than the other party's for it may be that neither version of events is credible-*see* ***Rhesa Shipping v. Edmunds***[17]**.**

> *The party bearing the burden will discharge it only if the tribunal of fact is satisfied that his version of events is more probable than any alternative version*.

65. However, the phrase *'balance of probabilities'* is often employed as a convenient phrase to express the basis upon which civil issues are decided but the test says nothing about how far above 50 per cent the probability should be that his version of events is correct.

66. One theory holds that anything over 50 per cent suffices, no matter what the nature of the allegation *(**the so-called '51 per cent test'**-see **Davies v. Taylor***[18]*)*.

67. The only matter on which the Plaintiff was cross-examined concerned the payment purportedly made by the CEB to the Plaintiff. It is worthy of note that the Plaintiff consistently denied receiving such payment, and even her witnesses testified that their mother had not been paid. Counsel for the 1st Defendant attempted to cross-examine

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[16] (1947) 2 All ER 372 at p374 (KBD)

[17] (1985) 1 WLR 948 (House of Lords).

[18] [1972] 3 WLR 801 (HL) p.810.

the Plaintiff on the contents of an answer filed by the 2nd Defendant (CEB), who had by then been discharged from the proceedings. In these circumstances, the material contained in the answer would amount to hearsay and could not serve as proof of the alleged payment by the CEB.

68. The renowned dicta of Honorable L.M. De Silva J, delivered in ***Subramaniam v the Public Prosecutor***[19] while sitting in the Privy Council, established that an out-of-court statement cannot serve as proof of its contents unless supported by direct evidence or falling within an exception to the hearsay rule. Merely because the answer filed by the CEB indicated that a cheque had been drawn in favour of one Iranganie, it does not prove the truth of the implied assertion sought to be made that the proceeds of the cheque reached the account of the Plaintiff. Unless a copy of the cheque and voucher were put to the Plaintiff in cross examination, the Plaintiff's evidence that no payment by way of a cheque was made to her has to be accepted on the foundational principle given in paragraph 61 of this judgement.

69. Even the witness from the CEB who had nothing to do with the drawing of the cheque or its purported delivery to the Plaintiff could not say with certainty that the proceeds of the cheque had reached the Plaintiff. Then who was the recipient of this money? The 1st Defendant could not have left this issue in a state of uncertainty and doubt. If he had personal knowledge of the person to whom the proceeds of the cheque went, it was his bounden duty to bring it to the fore in court.

70. Thus, there is a serious doubt that arises in the case presented by the 1st Defendant. The only line of cross examination undertaken of the Plaintiff focused on the alleged payment of consideration for the transfer which was denied by the Plaintiff, whereas the core of the Plaintiff's case appears to be focused on a purposeful conveyance that

[19] (1956) 1 WLR 965

did not seek to vest beneficial interest in the 1st Defendant. If at all, the testimony as spoken to by the Plaintiff and her witnesses is that a conveyance in the name of the 1st Defendant was effected only for the purpose of facilitating a loan for him upon his oral promise to retransfer.

71. When the Plaintiff alluded to the oral promise on the part of the brother to retransfer the land, she was not seriously challenged on that attendant circumstance that goes to prove that the 1st Defendant did make an oral promise to retransfer the land.

72. Having made these preliminary observations I would now turn to the evidence for the Defendant and briefly touch upon how he fared in the witness box.

Evidence led on behalf of the 1st Defendant.

73. I have already highlighted some items of evidence proffered by the 1st Defendant and I have said that the testimony of the 1st Defendant is replete with new material that was not put to the Plaintiff and her witnesses. For instance, the 1st Defendant speaks of taking the Plaintiff to the CEB in order to secure the cheque for her. He also stated that he was not however present at the time when the cheque was allegedly handed over to her. This visit to the CEB was never put to the Plaintiff or her witnesses. Thus, serious misgivings arise in regard to the testimonial trustworthiness of the story of payment allegedly made by the CEB to the Plaintiff.

74. It is important to observe that the Plaintiff unequivocally denied receiving any cheque from the CEB when giving evidence. She maintained that she only had a savings account implying that she could not have engaged in cheque transactions. She further stated that she did not hold a current account, suggesting that she lacked the means to receive the cheque proceeds. Moreover, during cross-examination, it was never

suggested that her savings account had received the proceeds of the alleged cheque, nor was a copy of the cheque shown to her.

75. As regards the **burden of proof,** which I will address shortly in this judgment, I am of the view that it rests on the 1st Defendant to establish payment. It is critical to his case to prove that payment was made, thereby resulting in a valid sale to him. The burden of proving the payment of consideration, if any, lies with the 1st Defendant, and the circumstances I have highlighted raise serious doubt as to whether such payment occurred. The Plaintiff testified that she did not have a current account, and if a cheque had indeed been credited to her savings account, the 1st Defendant failed to call any officer from either the paying or collecting bank to confirm that the cheque proceeds were received by the Plaintiff through her bank account. It is not difficult for the CEB to establish to whom its money had been dispatched by its bank - the People's Bank.

76. If the attestation clause of the transfer deed states that the consideration of the transfer would be paid by the CEB to the Plaintiff, it is the burden of the vendee to prove that the consideration was paid to her. The only witness summoned by the 1st Defendant to establish the payment of a cheque was the secretary / accountant who served in the EPF department of the CEB. Admittedly, this witness was nowhere there when the CEB allegedly made this payment to the Plaintiff. The witness was giving evidence from a file which was maintained in relation to the loan of the 1st Defendant.

77. The witness from the CEB who was summoned by the 1st Defendant referred to a voucher which had been allegedly signed by one Iranganie - a name that the Plaintiff bears. However, this voucher was not put to the Plaintiff when the Plaintiff was giving evidence. Certified copies of the documents in the files were available to the 1st Defendant but he chose not to confront the Plaintiff with the actual documents. This omission is grievous and does not identify with unerring accuracy the identity of the

person who had allegedly received the payment. This omission to elicit and establish the true identity of the real payee becomes more pronounced in light of the fact that the Plaintiff had vehemently rejected all suggestions of payment and moreover, there was a culpable omission to suggest to her that she went with the brother to the CEB to receive the proceeds of the loan obtained by the 1st Defendant.

78. Did Iranganie (the Plaintiff) personally receive the payment, or was it collected on his behalf by someone else? This is the brooding question as there is uncontradicted evidence that the Plaintiff did not go to the CEB to receive the cheque? If Iranganie (the Plaintiff) had not gone to receive the alleged cheque and there is no evidence that her account received the funds of CEB, who pocketed the funds of the CEB? This looms large in the case and the person who asserted the payment was bound to have established this fact. If this evidence was withheld from Court, the corollary follows i.e the presumption of fact embodied in Section 114(f) of the Evidence Ordinance may be drawn against the 1st Defendant.

79. The witness from the CEB could not establish that the cheque was paid in the account of the Plaintiff. He stated that he could not state with certainty as to who had been paid.

80. If a cheque had been credited to the account of the Plaintiff, it would not have been impossible for the CEB to obtain the details of the person who had encashed the cheque.

81. Thus, there is no proof that the Plaintiff was handed over a cheque. Though the voucher contained a signature bearing the name Iranganie, it was never shown to the Plaintiff and the identity of the recipient of the cheque was never established on a balance of probability.

82. In the teeth of the denials made by the Plaintiff that she was ever paid by a cheque, it was imperative on the part of the 1st Defendant to have conclusively established that the proceeds of the cheque were received by the Plaintiff. The officer from the CEB refreshed his memory from a file maintained at the CEB and he was not the author or had any personal knowledge of the recipient of the cheque.

83. If the 1st Defendant claims to have taken his sister to the CEB to procure the payment for her, it is contrary to human nature that he was not around at the crucial moment when she allegedly collected the cheque.

84. The 1st Defendant had personal knowledge of the path of payment but he failed grievously to establish that it was his sister who received the payment. The paying bank - the People's Bank could have been noticed to supply the deficiency.

85. In the light of this overwhelming evidence against the 1st Defendant, Section 114 (f) of the Evidence Ordinance should be invoked against him and it is fatuous to invite this Court to draw this presumption against the Plaintiff. In light of the items of evidence I have highlighted and the serious omission on the part of the 1st Defendant to prove by cogent evidence that his employer CEB paid consideration to the Plaintiff, my brother could not have used Section 114 (f) of the Evidence Ordinance to draw adverse inferences against the Plaintiff because it was not the burden of the Plaintiff to establish the proof of payment and it was indeed the burden of the 1st Defendant to establish the proof of payment. He sought to do so but failed to lead material evidence resulting in the consequence of the presumption being drawn against the 1st Defendant himself.

86. Now that I have demonstrated that on a balance of probability the case of the Plaintiff outweighs that of the 1st Defendant and it becomes necessary to rationalize my

reasoning on the evidence having regard to the provisions dealing with burden of proof and the law thereon.

Burden of Proof

87. A Defendant who claims to have purchased the Plaintiff's land with a loan from his employer and produces the relevant monthly statement from the paying bank at trial could have easily established that the cheque payment by his employer was credited to the Plaintiff's account. Just as the 1st Defendant in this case presented a witness from the CEB who stated that, based on the monthly statement, he could not confirm to whom the cheque was paid, the Defendant could have procured the necessary information regarding the payee by obtaining it from his employer, CEB—the drawer of the cheque—or by subpoenaing the bank to testify about the destination of the cheque proceeds.

Proving a negative

88. Since it was the 1st Defendant asserting the payment, and the Plaintiff was asserting a negative—namely, non-payment—it is trite law that the Plaintiff cannot be called upon to prove a negative. Based on the rule of Roman Law - ***'ei incumbit probatio, qui dicit, non qui negat***' - the burden of proving a fact rests on party who substantially asserts the affirmative of the issue and not upon the party who denies it, for a negative does not admit of direct and simple proof. see the Indian case of ***Ranutrol Industries Limited v. Mr. Nauched Singh and*** **Anr.**[20]

89. In the aforesaid case, there was a dispute between a company and its employee, regarding his dismissal. The learned counsel appearing for the company stated that

[20] Writ petition (civil) No 1478/2008

the "Labour Court has not addressed the issue that proper enquiry has not been held". According to him, in the light of this issue, the onus of proving the lack of proper enquiry lay upon the workman and that there is nothing in the impugned award to show that this aspect of the matter has been considered by the Labour Court.

90. Justice Sudershan Kumar Misra observed that:

> "*A reading of the impugned award clearly shows that the workman had made a categoric statement that his service had been terminated without any enquiry and in violation of the provisions of the Industrial Disputes Act and that no notice or notice pay or retrenchment compensation had been given to him. As stated in the Latin maxim* ***Ei incumbit probatio qui dicit, non qui negat*** *i.e.,* ***onus of proof lies upon him who affirms, and not upon him who denies the existence of any fact.*** *It is the management who averred that the requisite enquiry had, in fact, been held. Therefore, it was for the management to prove that fact. In this context, the Labour Court has duly noted the fact that despite a number of opportunities being granted to the management, it has failed to produce any evidence of a fair and valid inquiry."*

91. Identical views were expressed in other Indian cases-see ***New Indian Assurance Company Ltd v. Nusli Neville Wadiya***[21] where the Supreme Court of India alluded to the pervasive principle behind Section 101 of the Evidence Ordinance that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for a negative is usually incapable of proof.[22]

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[21] (2008) 3 Supreme Court Cases 279: (2008) 1 Supreme Court Cases (Civ) 850: 2007 SCCC OnLine SC 1540

[22] *Ei qui affirmat non ei qui negat incumbit probatio*

92. In such circumstances, where a *prima facie* case of non-payment has emerged before the court, the relevant evidence—such as the identity of the recipient of the cheque and its proceeds—must come from the proponent of the assertion of payment, namely the 1st Defendant. A culpable failure to discharge this burden arises if the 1st Defendant withholds such evidence. In that event, Section 114 enables the court to draw a presumption that, if produced, the said payment particulars would have been unfavorable to the 1st Defendant. This is why the failure to prove the recipient's identity becomes relevant. As I said before, there is only evidence that a cheque had been drawn in the name of one Irangainie. There is not a scintilla of acceptable evidence that the cheque was handed over to the Plaintiff or credited to her savings account.

93. When the Plaintiff denied receiving payment and this evidence was corroborated by the son and daughter, the Plaintiff furnished a *prima facie* case of non-payment. Then the burden shifted to the 1st Defendant to adduce evidence of payment as he asserted payment. As the date and amount paid were within his exclusive knowledge, he must plead and prove the same in terms of S. 106 of the Evidence Ordinance. The entries in the books should have been put to the Plaintiff and they have been skillfully hidden from her.

94. All in all. the *prima facie* evidence of non-payment has not been rebutted by the 1st Defendant and it is for this reason that even the onus set out in the provisions dealing with burden of proof has not been discharged by him.

95. There is also another aspect that looms large in this case namely failure to cross examine the Plaintiff on material particulars as well as a grievous omission to put matters to the Plaintiff, which the 1st Defendant spoke to only in his examination in chief.

96. To sum up, Professor Peter Murphy, Professor of Law, South Texas College of Law made a significantly important pronouncement in his book on the necessity to cross examine a witness and suggest to the witness the matters that are in favour of the cross-examining party-the 1st Defendant in this instance.

> *There are two direct consequences of a failure to cross examine a witness. One is purely evidential in that, "failure to cross-examine a witness who has given relevant evidence for the other side is held technically to an acceptance of the witness's evidence in chief." The other is a tactical one but no less important for that. "Where a party's case has not been put to witnesses called for the other side, who might reasonably have been expected to be able to deal with it, that party himself will probably be asked in cross examination why he is giving evidence about matters which were never put in cross examination on his behalf."*[23]

97. Even in his other work, viz. "**A Practical Approach to Evidence**, having considered the effect of omission to cross-examine a witness on a material point Peter Murphy states the same as above.

> *It is, therefore, not open to a party to impugn in a closing speech or otherwise, the unchallenged evidence of a witness called by his opponent or even to seek to explain to the tribunal of fact the reason for the failure to cross-examine.*[24]

Accordingly, it is counsel's duty, in every case:

> *"(a) to challenge every part of a witness's evidence which runs contrary to his own instructions; (b) to put to the witness, in terms, any allegation against him which must be made in the proper conduct of the defence; (c) to put to the witness*

[23] *Peter Murphy on Evidence*, 8th Ed., p. 597-598,

[24] *A Practical Approach to Evidence* at page 444,

counsel's own case, in so far the witness is apparently able to assist with relevant matters or would be so able, given the truth of the counsel's case."

To proceed with the quotation from **Peter Murphy**:

"*The second consequence of failure to cross-examine is a tactical one but no less important for that. Where a party's case*" *had not been put to witnesses called for the other side, who might reasonably have been expected to be able to deal with it that party himself will probably be asked in cross-examination why he is giving evidence about matters which were never put in cross-examination on his behalf. The implication of the question is that the party is fabricating evidence in the witness-box, because if he has ever mentioned the matters in question to his legal advisers, then they would have been put on his behalf at the proper time.*"[25]

98. All this goes to prove that the 1st Defendant grievously failed to prove the payment of consideration.

99. Apart from the above, as I have pointed out, there are other attendant circumstances that unambiguously point to the fact that the sister did not have the intention to transfer the beneficial interest to the brother. The fact that the 1st Defendant did not go into possession of the property coupled with his subsequent conduct of handing back the original deed for retransfer remained uncontradicted and as Peter Murphy

[25] In this connection see **C.A.Case No 20/99** ***Athambawa Uthumanachi v Mohamed Thamby Asiya Umma*** (D.C.Kalmunai No 2079/L) decided on 20.06.2018 ; Also see **CA** ***Kananke Acharige Mithrananda*** **(5th Defendant-Appellant) v** ***Manage Sardajeewa and Others*** **CA C.A. Case No. 722/1999 (F)** D.C. Tangalle Case No. P/3194 delivered on 06.05.2019.

sounded the caveat, a number of new versions were taken up by the 1st Defendant only in his examination in chief.

100. I must pinpoint a stark reality and a sad consequence the Plaintiff faces if justice is not meted out in her favor. She never intended to transfer the beneficial ownership of the property to her brother, and, moreover, no payment was made by him for the property. The Plaintiff faces the bleak future of losing not only her land but also the money which should have been paid if it was a genuine sale. I do not think that this Court exercising good conscience and equity can permit such injustice to be perpetrated against the Plaintiff. As Lord Browne-Wilkinson stated in ***Westdeutsche Landesbank Girozentrale v Islington*** (supra), a resulting trust is imposed on the basis of the unconscionable conduct of the recipient of the property and I feel compelled to observe that the owner of the property-the Plaintiff believed and had legitimate expectations that her property would be returned.

101. On the facts of the case a resulting trust arises on the basis of the common intention of the parties and there is no doubt that the brother was well aware that the property must be returned to the sister. In the circumstances, I hold quite compellingly that a declaration of trust must be made in favour of the Plaintiff and the 1st Defendant must be ordered to return the property back to the sister, as it is inequitable for the 1st Defendant to appropriate and convert it illegally as his own.

102. I have already pointed out that it is quite stultifying to remit the case back, as the Civil Appellate High Court Judges erroneously decided to remand it to the District Court for the taking of further evidence. The record contains substantial evidence demonstrating the attendant circumstances, which clearly indicate that the beneficial interest in the property was not transferred to the brother. Accordingly, I set aside the

order to remand the case to the District Court but the judgement of the Civil Appellate High Court declaring a constructive trust in favor of the Plaintiff is hereby affirmed.

103. The decision of the District Court is set aside and all questions of law are answered in favour of the Plaintiff. Thus, I proceed to dismiss the appeal of the 1st Defendant-Respondent-Appellant.

JUDGE OF THE SUPREME COURT