

1930

*Present : Fisher C.J. and Akbar J.*CARTHELIS *et. al.* v. PERERA *et al.*414—*D. C. Colombo, 22,207.**Trust—Notarial transfer of land—Contemporaneous agreement to retransfer—Equitable estate—Evidence Ordinance, s. 92 (3).*

A non-notarial writing is admissible to prove that the equitable estate under a notarial transfer was intended to pass upon the non-fulfilment of a certain condition.

THIS was a partition action in which the plaintiffs, the daughter and son-in-law of the first and second defendants, claimed three-fifths of a property absolutely and another one-fifth subject to the life-interest of the defendants, upon a deed of gift, No. 130, dated April 29, 1912, by the first, second, fourth, and fifth defendants. The defendants pleaded that deed No. 130 was not a gift but a transfer of the legal estate for the fulfillment of a promise to pay Rs. 5,000 in cash as dowry on the marriage of the first and second plaintiffs and that the plaintiffs undertook to retransfer the property on the payment of the said sum of Rs. 5,000. It was further pleaded that the sum was fully paid in 1913, and that the defendants have been in possession of the property. In proof of the promise to re-convey the defendants led in evidence a non-notarial document (1D2) signed by the plaintiffs and the second defendant. The learned District Judge dismissed the plaintiff's action.

B. F. de Silva (with P. Sunderam), for plaintiffs, appellants.

F. A. Hayley, K.C. (with *F. A. Tisserasinghe*), for first to third defendants, respondents.

F. de Zoysa, K.C. (with *Abeysekera, C. V. Ranawake, and F. C. Perera*), for fourth and fifth defendants, respondents.

April 10, 1930. AKBAR J.—

In this partition case the two plaintiffs, who are the daughter and son-in-law of the first and second defendants, claimed three-fifths of a property bearing No. 8, Flower road, Colombo, absolutely and another one-fifth subject to a life-interest in favour of the first and second defendants. The main contest was as regards the claim to the three-fifths share absolutely, which was conveyed by deed No. 130 dated April 29, 1912 (P4), by the first, second, fourth, and fifth defendants to the two plaintiffs. By deed No. 2,347 dated March 23, 1899, the first defendant gifted this property to her five children, viz., the second plaintiff, third, fourth, and fifth defendants, and one Romanis, but reserving to the first and second defendants a life-interest. This child Romanis died intestate leaving his father and mother as his sole heirs. By deed No. 130 the defendants, excepting the third, who was a minor, and the sixth, who does not figure in this appeal, conveyed three-fifths of the property to the two plaintiffs, who were then about to marry. I agree with the District Judge that by deed P4 not only the three-fifths but also the whole life-interest of the first and second defendants was transferred to the plaintiffs. The evidence clearly proves that the first and second defendants have been in possession of the property all along, and that the plaintiffs never had any possession, and the District Judge has also come to the same conclusion. This means that the first and second defendants have prescribed against the plaintiffs in respect of their life-interest (*Selohamy v. Goonewardene*¹), and on this one ground alone the plaintiffs are bound to fail in their

¹ 30 N. L. R. 112.

claim for partition, for a reversioner, remainderman, or fideicommissary cannot bring a partition case when the life-interest is outstanding in the tenant for life or fiduciary. But the main ground on which the decision has gone against the plaintiffs is the plea raised by the defendants that deed No. 130 was in effect not the gift it purported to be, but that it was a transfer of the legal estate only, for the due fulfilment of a promise to pay Rs. 5,000 as cash dowry on the marriage of the first and second plaintiffs and on the express understanding that the legal title conveyed thereby was to be retransferred on the payment of the Rs. 5,000. It was further pleaded in the defendants' answer that the sum of Rs. 5,000 was fully paid in 1913 and that P4 conveyed no beneficial interest to the plaintiffs. Notice of marriage was given on April 29, 1912, the date of P4, and the marriage took place on May 27, 1912. To prove the constructive trust the defendants put in two very important documents, namely, 1D2 and 1D1. 1D2 is a non-notarial document and is signed by the third defendant and the two plaintiffs. It purports to be instructions given to Mr. W. H. W. Perera, proctor, who has given evidence, "regarding the deed of agreement to be drawn respecting retransfer of No. 8, Flower road". It will be remembered that deed No. 130 was not signed by the third defendant, who was then a minor, and 1D2 provided for the transfer of one-fifth belonging to George Molligode as soon as he attained majority in May, 1914, and on failure first defendant promised to pay Rs. 500 damage. The document proceeded to state as follows:—"On the other hand Mr. Alfred William Karthelis and Miss Ellen Molligode promise to retransfer all the interest they may have to the property now and hereafter on payment of Rs. 5,000 by Mr. Paul Molligode within one year from this date, and they further relinquish their right, and claim to obtain the outstanding one-fifth share now vested in George Molligode, a

minor. In failure of their part to re-transfer they hold themselves liable in Rs. 500 in addition to other legal liability.

“ Read over and signed by us—

M. G. MOLLIGODE.

A. W. CARTHELIS.

M. E. MOLLIGODE.”

“ Colombo, April 29, 1912.”

1D1 is a receipt signed by the first plaintiff on April 29, 1913, and is as follows :—

“ No. 36, Dam street,
Colombo, April 29, 1913.

“ I do hereby acknowledge that I received to-day from Mr. M. P. Molligode the sum of Rs. 4,000, being part payment of the dowry of Rs. 5,000 promised to me in the event of the marriage of Mr. Molligode's daughter to me in the year 1913. I do hereby further promise to cancel the deed transferred to me on payment of the balance Rs. 1,000 with reasonable interest.

“ Received payment with thanks.

“ April 30, 1913. A. W. CARTHELIS.”

I agree with the District Judge that the reference to 1913 in the body of 1D1 is a mistake for 1912. These two documents, if admissible, are conclusive that the defendants' plea regarding the constructive trust is true and the District Judge has so found. The District Judge has in my opinion quite rightly rejected the plaintiff's evasive and disingenuous explanation to account for these two documents. These two documents are, in my opinion, admissible. If they had been embodied in P4, the constructive trust would have been evident enough, and by the plaintiffs' seeking to avoid giving full effect to 1D2 they are trying not only to keep the Rs. 5,000 which the District Judge has found to have been fully paid, but also the interest conveyed by P4. This, in my opinion, amounts to

fraud, and this case will come within the last line of section 5 and section 83 of the Trusts Ordinance, No. 9 of 1917. I do not think that section 92 of the Evidence Ordinance, No. 14 of 1895, will apply for two reasons. 1D1 and 1D2 are documentary evidence and not oral evidence. Moreover, these documents could be put in under proviso (3) of section 92 to prove that the equitable interest was only to pass on P4 on the non-payment of the Rs. 5,000 at the end of the year. Nor do I think that section 2 of Ordinance No. 7 of 1840 and the Privy Council judgment of *Adicappa Chetty v. Caruppen Chetty*¹ apply. 1D2 is not a document embodying an agreement entered into subsequent to P4, but contemporaneously with it and explaining the whole transaction. Nor is 1D2 put in evidence to prove such an agreement, but to prove the real nature of the transaction referred to partly in P4. This case is not on all fours with the case of *Don v. Don*,² because in the latter case both the legal and the equitable estates passed on the sale, and an agreement to retransfer them was held to be invalid for want of a notarial document. In this case the surrounding and attendant circumstances prove that only the legal estate was conveyed and that the equitable estate was withheld. The fact that the original of P4 was produced by the defendants (1D3); that the plaintiffs never had possession; that plaintiffs made no attempt to claim the penalty provided by 1D2 for the non-transfer of the third defendant's one-fifth nor took any steps to bring matters to a head from the time that the third defendant attained majority in May, 1914, till this action was filed on December 20, 1926, and that the interests conveyed by P4 are valued at Rs. 5,000 when they are clearly worth much more; all show to my mind that the District Judge was right in holding against the plaintiffs. Even as regards the one-fifth which the second plaintiff claims on

¹ 22 N. L. R. 417.

² 31 N. L. R. 73.

deed No. 2,347, the action for partition cannot succeed as the life-interest on it is outstanding. The appeal must be dismissed with costs.

FISHER C.J.— I agree.

Appeal dismissed.
