1930

Present : Garvin A.C.J. and Lyall Grant J.

FERNANDO *et al.* v. PEIRIS.

24—*D. C. Colombo,* 28,660.

Specific performance—Oral agreement to reconvey land—Payment of money—Action for recovery.

Specific performance of an oral agreement to reconvey land cannot be enforced even where money has been paid in pursuance of the agreement.

THIS was an action for specific performance of an oral agreement to reconvey a half share of a land or in the alternative for declaration of title on the ground of prescriptive possession. The defendant was the widow and successor in title of one Daniel Mendis, to whom the plaintiff transferred the land in question by a notarial instrument dated November 30, 1914. It was alleged that there was a verbal agreement by which Mendis undertook to reconvey the land to the plaintiff on payment of a sum of Rs. 600. The plaintiff repaid by instalments a sum of Rs. 553, which was accepted by the defendant. When the balance was tendered the defendant refused to accept the same. The learned District Judge held that the property was a transfer in trust on an agreement for reconveyance, and gave judgment for the plaintiff.

Rajapakse (with him *Weerasooria*), for defendant, appellant.—The trial Judge has given judgment on the footing of a trust. The facts do not disclose a trust, nor is any evidence of a trust admissible. This is a simple case of an out-and-out conveyance with a verbal agreement to reconvey on payment of a certain sum of money. The latter cannot be proved in view of section 2 of Ordinance No. 7 of 1840 (*Perera v. Fernando*[1] and *Adaicappa Chetty v. Caruppen Chetty*[2]).

Hayley, K.C. (with *Peri Sundcram*), for plaintiff, respondent.—Money has been paid and accepted in pursuance of the informal agreement. To deny the right of the plaintiff to specific performance would be to enable the defendant to perpetrate a fraud. In such a case oral evidence is admissible, see section 5 of Ordinance No. 9 of 1917. In any event the plaintiff must succeed on the ground of prescription.

June 26, 1930. LYALL GRANT J.—

This is an action for specific performance of an alleged agreement to reconvey a half share of a land called Millagahawatta or in the alternative for a declaration of title on the ground of prescription by uninterrupted possession.

The facts are fully set out in the judgment of the learned District Judge and he has decided in favour of the plaintiffs on the first ground.

The essential facts which the District Judge has held to be proved are—

(1) The plaintiffs executed in due form a notarial instrument dated November 30, 1914, transferring their rights absolutely to one B. Daniel Mendis, and the defendant is the widow and successor in title to B. Daniel Mendis.

(2) There was a verbal agreement between B. Daniel Mendis and the plaintiffs by which he undertook to reconvey the land to them on payment of a sum of Rs. 600.

(3) The plaintiffs repaid by instalments a sum of Rs. 553, and this sum has been accepted on behalf of the defendant, and have tendered the balance which the defendant refuses to accept.

(4) The defendant personally agreed verbally to retransfer the property.

(5) The assessment register from 1914 to 1929 shows the second plaintiff's name as owner of this property up to the time that the defendant received the letter of demand for the reconveyance.

(6) The plaintiffs have had possession of the property in dispute with the exception of one-half which has remained in the possession of one M. Inasiya Aponsu in virtue of her life-interest.

The learned District Judge has rested his decision on the alleged oral agreement between the plaintiffs and B. Daniel Mendis. He says that to exclude the oral testimony would have enabled B. Daniel Mendis to have perpetrated a fraud, and that to do so now would enable the defendant to do likewise.

The learned District Judge decided the case on the issues that the property was a

[1] 17 *N. L. R.* 486. [2] 22 *N. L. R.* 417.

transfer in trust on an agreement for reconveyance in payment of Rs. 600, and that a sum of Rs. 553 has been paid.

He has not specifically answered the issue dealing with prescriptive title.

I cannot assent to the proposition that the circumstances proved disclose a trust and I consider that the facts set out as (2), (3), and (4) above ought not to have been admitted to probation.

As pointed out by the learned District Judge, the judgment is contrary to the principles applied by this Court in *Perera v. Fernando*,[1] where it is laid down that where a person transfers a land to another by a notarial deed purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage and that the transferee agreed to reconvey the property on payment of the money advanced.

It was further held that the admission of oral evidence to vary the deed of sale contravenes section 92 of the Evidence Ordinance : also that the agreement to resell is not a trust, but is a pure contract for the purchase and sale of immovable property, which Ordinance No. 7 of 1840 declares to be void in the absence of a notarial agreement.

On this point previous cases are referred to by De Sampayo J.

The learned District Judge thinks that this case is differentiated by the fact that money had actually been paid, whereas in the former case it was merely tendered.

I find, however, that in *Perera v. Fernando* (*supra*) a substantial part of the consideration had already been given, and as in the present case the plaintiff merely tendered the balance.

The learned District Judge further says that the law has been altered by the Trust Ordinance, No. 9 of 1917. He refers to section 83 of the Ordinance. Section 83 deals with the case of a transferee holding property for the benefit of the owner.

I do not see how this section can be applied to meet the case of a mortgage.

A mortgage is essentially different from a trust. The mortgagee exercises his rights on his own behalf and not on behalf of the owner.

On this point I would refer to Lord Atkinson's judgment in *Adaicappa Chetty v. Caruppen Chetty*,[1] where this point was considered and elaborated. The judgment proceeds on the same footing as in *Perera v. Fernando* (*supra*).

I do not think the present case is substantially different from the cases to which I have referred.

In none of the cases does the position contemplated by section 83 of the Trust Ordinance arise, viz., that of a person who has bought land with the money of another and gets the conveyance made in his own name.

The principle therefore on which one must fall back is that an agreement to reconvey must be proved by a document notarially executed by section 2 of Ordinance No. 7 of 1840. The fact that payment was made is immaterial. Such payment cannot be referred to an agreement which cannot be proved. There may perhaps be an action for recovery of the money paid but not for specific performance of an oral agreement to transfer land.

On the question of prescriptive possession, however, I think the plaintiffs are entitled to succeed to the extent of half their claim.

With the view of the evidence taken by the learned District Judge in regard to possession, I see no reason to disagree.

Since the date of the transfer and for more than the necessary period to establish title by prescription, the plaintiffs have had exclusive possession of the property in dispute. The other half has remained in possession of M. Inasia Aponsu under her life-interest.

The learned District Judge has held that the defendant has only asserted possessory rights recently, after the prescriptive period had elapsed.

[1] 17 *N. L. R.* 486.

[1] 22 *N. L. R.* 417.

I have not found anything in the evidence to displace the presumption that the plaintiffs possessed as owners, and on this ground I would hold that they have established their title to half the property in dispute.

The decree must be set aside and the plaintiffs declared entitled to a quarter share of the land known as Millagahawatta.

As both parties have been partially and neither completely successful, I think the most satisfactory way to deal with the question of costs is to leave each party to bear his own costs both in this Court and in the Court below.

GARVIN A.C.J.—I agree.

Decree varied.