1951 *Present:* **Gratiaen J. and Gunasekara J.**

THANGAVELAUTHAN, Appellant, *and* SAVERIMUTTU *et al.*, Respondents

S. C. 174—D. C. Point Pedro, 2,761

Trust—Sale of land by notarial deed—Parol evidence of trust or mortgage—Prevention of Frauds Ordinance, s. 2—Trusts Ordinance, s. 5 (3).

Where a person transferred for consideration a land to another by a notarial deed, and, thereafter, on the same day, the purchaser executed an independent notarial lease of the land to the vendor for a certain period—

Held, that it was not open to the vendor to prove by parol evidence that either a trust or something resembling a mortgage or pledge was created.

APPEAL from a judgment of the District Court, Point Pedro.

N. E. Weerasooria, K.C., with *H. W. Tambiah*, for the plaintiff appellant.

H. W. Jayewardene, for the defendant respondent.

Cur. adv. vult.

[1] *(1936) 1 Ch. Div. 365.*

July 26, 1951. GRATIAEN J.—

The first defendant and his wife Annamah were admittedly the owners until 12th November, 1937, of the land which is the subject-matter of this action. Annamah died before these proceedings commenced, and the second to the eighth defendants are her legal heirs.

By a deed of conveyance P1 of 12th November, 1937, attested by S. Sivagnanam, Notary Public, the first defendant and Annamah purported to sell the land in dispute, as well as two other properties, to K. Iyadurai for a consideration of Rs. 2,000 which was stated to be the full balance amount due by the vendors to the vendee under the mortgage decree in favour of the latter in D. C., Jaffna, No. 265. Satisfaction of the decree was duly certified of record. On the face of it, the deed is an out and out transfer.

Iyadurai was apparently arranging to leave for Malaya at this time, and immediately after the execution of P1 he leased the property to the vendors for a period of six years at an agreed rental by D3 of the same date. Here again, the terms of the lease afforded intrinsic evidence that the legal title as well as the beneficial interest was acknowledged to be in Iyadurai. The deed contains the usual covenants such as the covenant to keep the property in good repair. On the face of the documents P1 and D3, and by reason of the satisfaction of the decree in D. C., Jaffna, No. 265, the relationship of Iyadurai and the first defendant had been converted from that of creditor and debtor to that of lessor and lessee.

Some years after the expiry of the lease Iyadurai sold the land in dispute to the plaintiff by the deed of conveyance P4 dated 24th June, 1946. The plaintiff then instituted this action complaining that the defendants were in wrongful possession of the property. He asked for a declaration that he was the lawful owner, and for ejectment and damages.

The defence is that, notwithstanding the unequivocal terms of the deed of conveyance P1, the first defendant and Annamah had retained the beneficial interest in the property. Their position is that they had merely conveyed the property to Iyadurai " in trust ", and subject to the terms of an *informal agreement* whereby Iyadurai had undertaken to re-convey the land to them within eight years on payment by them of Rs. 2,000 with interest calculated at the rate of 12 per cent. from the date of P1. This defence was upheld by the learned District Judge, who dismissed the plaintiff's action with costs.

There can be no doubt that, if one considers the claim of the defendants apart from the alleged trust, the informal agreement relied on is by itself of no avail to them. It is obnoxious to the clear provisions of section 2 of The Prevention of Frauds Ordinance, and besides, the period of 8 years within which a reconveyance could have been demanded, on payment of the stipulated consideration, had long since elapsed. The only question which therefore remains for consideration is whether the creation of the alleged " trust " has been substantiated. I shall assume, although I do not hold, that the evidence of the informal agreement is admissible for the purpose of establishing such a trust.

The case for the defendants is that before P1 was executed Iyadurai had for some time been pressing the first defendant and Annamah for repayment of the balance sum due to him under the mortgage decree in his favour. Finally, according to the first defendant's version, he induced them to convey the properties, which were bound and executable under the decree, to him " in trust " and on a promise that if they at any time within 8 years paid him the same consideration, *i.e.*, Rs. 2,000 with interest, he would re-convey the property to them. No explanation has been forthcoming either in the pleadings or in the evidence of the first defendant as to what precisely the parties intended or understood to be the object or the purpose of this vague and nebulous " trust " which is alleged to have been created. If there was any trust at all, it was, presumably, an *express trust*, and I concede that section 5 (3) permits parol evidence to be led if its exclusion would otherwise operate so as to effectuate a fraud—*Valliammai Atchi v. Abdul Majeed* [1]. Certainly the transaction as it has been explained by the first defendant does not introduce the notion of any resulting or constructive trust such as I understand these terms. This is not a case, for instance, where A conveys property to B for a consideration provided by C in circumstances which indicate that the beneficial interest was to vest in C. Nor is it a case where A purports to convey his property to B for a non-existent or fictitious consideration with a clear intention that only the legal estate but not the beneficial interest should pass to the transferee. On the contrary, the facts here establish that the first defendant and his wife sold the property to Iyadurai for *valuable consideration* which he himself provided—namely, the full satisfaction of the decree which he held and was entitled to execute against his vendors. The first defendant suggests that the consideration was in fact inadequate. Even if that were true, it must be remembered that he was at the time in no position to strike an advantageous bargain, and his remedy, if at all, would have been to claim relief under some other legal principle unconnected with the law of trusts. But in truth there is to my mind little substance in his suggestion that the consideration was inadequate. In his plaint in D. C., Jaffna, No. 2,625 instituted on 11th March, 1946, he valued all the properties conveyed in 1937 by P1 at Rs. 7,000 (*vide* P18). He admitted in evidence that the value of immovable property in this locality had since 1942 gone up " even by 10 or 12 times ". It cannot therefore be said that the consideration of Rs. 2,000 paid in November, 1937, was too low.

It seems to me that in recent years many litigants have, through a misunderstanding of the judgment of the Privy Council in *Valliammai Atchi's case*, been encouraged to import some vague element of a " trust " into perfectly normal transactions of purchase and sale. That case dealt with a conveyance to a transferee for the purpose, *inter alia*, of applying the income of the property in settlement of the transferor's creditors including the transferee himself. This transaction, said Sir John Beaumont, created an express trust, and parol evidence could be led to establish it so as to meet a fraudulent attempt on the part of the transferee to repudiate the trust and claim the property as his own. The present case is entirely different.

[1] *(1947) 48 N. L. R. 289 P. C.*

I pointed out to Mr. Jayawardene that, if the defendant's contention could be sustained, Iyadurai's position seemed, after accepting the position of a trustee with nebulous obligations imposed on him, to be very much worse than it had previously been. He had, upon the execution of P1, discharged the debt due to him under the mortgage decree. Had Iyadurai, I asked, any remedy to claim either his money or the beneficial interest in the property after the 8 years period covered by the agreement to recovery had elapsed ? I understood Mr. Jayawardene to reply that some kind of mortgage was in truth created by P1, and that it would have been open to Iyadurai to enforce this so-called mortgage if the transferors did not claim a reconveyance within the stipulated time. This seems to me an impossible contention. I am not aware of any principle of interpretation by which an instrument which is in terms a *sale* can be construed as a *hypothecation* of immovable property. In *Perera v. Fernando* [1], Ennis J. and Sampayo J. held that " where a person transferred 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 ". Their Lordships decided in the same context that the alleged agreement, if enforceable, to reconvey the property was " not a trust but a mere contract for the purchase and sale of immovable property ". The decision of the Privy Council in *Saminathan Chetty v. Vanderpoorten* [2] is another authority of the Judicial Committee which litigants should not misunderstand. That case was concerned with the interpretation of two contemporaneous *notarial* instruments the effect of which, *read together*, was to create " a security for moneys advanced which, *in certain events*, imposed upon the creditor duties and obligations in the nature of trusts ".

There is one further ruling of the Privy Council to which I desire to refer, because it distinguishes, in clear and unambiguous terms, the facts of the present case from the type of case where a transaction creates either a trust or " something resembling a mortgage or pledge ". This authority is *Adicappa Chetty v. Caruppen Chetty* [3]. Stated shortly, it was alleged that A had arranged for the purchase of a land from B with money provided by C. The transfer from B was however executed in the name of the money lender C as the ostensible purchaser, but in *fact* (so A alleged) as security for the repayment by him of the consideration, upon which repayment C was to transfer the property to A. Their Lordships held that parol evidence was inadmissible to prove an agreement of this kind. " Such an agreement ", said Lord Atkinson, " created something much more resembling a mortgage or a pledge than a trust ", and was of no force or avail in law if it contravened the provisions of The Prevention of Frauds Ordinance. In this context Lord Atkinson, in connection with a contemporaneous transaction, made certain observations which seem to be very appropriate to the present case. " It is certainly a novel application of the equitable doctrine of resulting trusts ", he remarked, " that where an owner of property . . . . sells and conveys it to a *purchaser who pays him the purchase*

[1] *(1914) 17 N. L. R. 486.* [2] *(1932) 34 N. L. R. 287.*
[3] *(1921) 22 N. L. R. 417.*

price, all which the deeds recite in the case to have been done or to be done, the purchaser is converted into a trustee for the vendor whom he has paid ". This observation perfectly fits the present transaction whereby, under P1, Iyadurai paid the consideration for the conveyance in his favour by releasing his vendors from their pressing obligation to pay the judgment debt in D. C. Jaffna, No. 265.

I need not refer specifically to the many decisions of this Court in which a trust has been held to be established by parol evidence. The facts with which they were concerned are readily distinguishable. Indeed, even if full effect were to be given to the parol evidence tendered by the first defendant, no trust of any kind could in my opinion have been proved. This case is on all fours with *Carthelis Appuhamy v. Saiya Nona* [1] and I would respectfully follow the opinion there expressed by Keuneman J. with whom Soertsz J. agreed.

I would set aside the judgment appealed from, and enter a decree in favour of the plaintiff in terms of paragraphs (1) and (2) of the prayer of the plaint. Unfortunately, the learned Judge has not answered the issue as to damages. The case must therefore be remitted to the Court below so that the present District Judge of Point Pedro may, after hearing evidence, award damages to the plaintiff against the defendants for their wrongful possession of the property from 4th September, 1946, until date of ejectment. The writ of ejectment should, however, be issued forthwith.

The plaintiff is entitled to the costs of this appeal and of the trial in the Court below. The other questions which were argued before us do not arise for consideration.

GUNASEKARA J.—I agree.

Judgment set aside.