

1932

*Present : Garvin S.P.J. and Drieberg J.*FERNANDO *v.* FERNANDO186—*D. C. Kalutara, 14,184.*

Trust—Transfer of property to acquire qualification for U. D. C. election—Beneficial interest—Sale in execution against transferee—Claim by transferor.

Where property was transferred to X, who was seeking election as member of an Urban District Council, in order to satisfy a statutory requirement of ownership and the object was fully carried out,—

Held, that the property was liable to be sold in execution of a decree against the legal representative of X.

A PPEAL from a judgment of the District Judge of Kalutara.

Rajapakse (with him *R. C. Fonseka* and *Alles*), for first defendant, appellant.

Soertsz, for plaintiff, respondent.

August 1, 1932. DRIEBERG J.—

The appellant held an assignment of a money decree entered against the second respondent as the legal representative of the late Mr. P. C. F. Goonewardene. The appellant took out execution and seized 18/64 shares

¹ (1877) *L. R. 2 A. C. 284* on page 293.

of delgahawatta and 6/16 of the house on it ; this was claimed unsuccessfully by the first respondent who brought this action under the provisions of section 247 of the Civil Procedure Code for a declaration that the property was not liable for seizure and sale under the writ against the second respondent and judgment was entered in his favour. The appeal is from this judgment.

Mr. Goonewardene, who was a proctor, became entitled to this property on a conveyance (P 1) of June 7, 1922, from the first respondent who was his trusted clerk for many years. The first respondent says that he conveyed the property under these circumstances. Mr. Goonewardene wished to represent the Walana ward in the Panadura Urban District Council. The Local Government Ordinance, No. 11 of 1920, requires in certain circumstances a property qualification for membership ; Mr. Goonewardene lacked this qualification and for this purpose the first respondent transferred this property to him. Mr. Goonewardene in November was returned as member for the Walana ward after a contest. He says there was no consideration for the transfer, but the deed recites the consideration for the sale as Rs. 2,000 and the notary certified that the consideration was acknowledged to have been received previously. Mr. Goonewardene died in February, 1923, having a few days before his death made a will leaving all his property to his wife, the second respondent. The appellant was an attesting witness to the will: the will gave no directions regarding this property. The tax receipts show Mr. Goonewardene as owner, his name apparently having been so entered after the conveyance to him. These receipts however are produced by the first respondent and there is evidence that he paid the taxes and possessed the land. In this plaint the first respondent alleged that he transferred the land to Mr. Goonewardene in trust to enable him to qualify as a member for this ward and that the second respondent fraudulently refused to retransfer the land to him. In addition to the usual prayer of an action under section 247 he prayed that the deed of transfer be "declared to have been executed in trust and therefore null and void".

The issues tried were (1) Was the deed of transfer No. 105 of June 7, 1922, executed without consideration and in circumstances which made Mr. Goonewardene a trustee for the plaintiff? (2) Did Mr. Goonewardene hold the property in trust for the plaintiff? The first respondent appears to rely on a constructive trust arising from the circumstances under which the transfer was made—the absence of consideration, his remaining in possession and paying the taxes, and his acquiring after P 1 other shares in this land (these shares were bought in his wife's name in 1926). It is not his case that there was a declared trust. He does not say that Mr. Goonewardene undertook to reconvey the land to him. He seeks apparently to bring the transaction within the scope of section 83 of the Trusts Ordinance.

The learned District Judge found that there was no consideration for the transfer, that the first respondent remained in possession of the property and that this showed that the deed was executed in trust and that the beneficial interest remained with the first respondent. He said this would be so unless it could be shown that the first respondent

at the time of the transfer was in fact holding the property for Mr. Goonewardene. This refers to the case put forward against the first respondent that he bought the shares in this land not for himself, but as agent of and in trust for Mr. Goonewardene; but the Judge has found that the first respondent acquired the shares for himself. He found in favour of the first respondent and decree was entered declaring the first respondent entitled to these shares of the land, that they were not liable to sale under the appellant's writ, and declaring the deed of transfer No. 105, P 1, null and void. The appellant appeals from this judgment.

The mere circumstance that the first respondent continued in possession and paid the taxes does not mean that he had the beneficial interest in it and that he was the beneficiary under the alleged trust.

Section 27 of the Local Government Ordinance, where it provides a property qualification for membership of an Urban District Council requires that the person "is possessed in his own right or the right of his wife" of immovable property of a certain value. These words imply rights of ownership and possession, and the transfer to Mr. Goonewardene must be regarded as made with the object of conferring this on him. It was necessarily a conveyance to him of the beneficial interest, for anything less than this would not have satisfied the requirements of the Ordinance. It is not easy to see in this transaction Mr. Goonewardene as the trustee and the first respondent as the beneficiary; going no further than the definition of a trust in the Ordinance itself, can it be said that this transfer was accepted by Mr. Goonewardene for the benefit of the first respondent or that the ownership was nominally vested in the first respondent? It is sufficient to say that the very object of the transfer was that Mr. Goonewardene should exercise the rights of ownership and he, in fact, did so, for as owner he had himself entered on the list of those qualified for membership.

The transaction was nothing more than a collusive conveyance by which Mr. Goonewardene was to be vested with title in order that he might qualify for membership of the Council as a person possessed of this property in his own right with an implied understanding that it should some day be reconveyed.

From the evidence led it would appear that it is thought in Panadura that there is nothing improper in such a transaction, that the transferor remains the owner for all purposes except one, viz., that of electoral qualification and that the ownership for that one purpose only is vested in the transferee. A specific instance of this was given by one of the parties to such a transaction and the learned Judge apparently considers that the trust underlying such a transaction can be recognized by law. I need only say that this view is wrong and that the law on the point is clear.

This action is primarily under section 247 of the Code and the question is, even if the land was conveyed to Mr. Goonewardene under these circumstances, is it for that reason free from liability to the appellant's claim as a creditor?

In the case of the *Great Berlin Steamboat Co.*¹ the appellant who was interested in the company placed to its credit at its bankers a sum of

¹ 26 Ch. Div. 616.

£1,000. It was done in order that, if certain Berlin bankers inquired of the company's bankers with the object of placing certain shares, they should be influenced by the fact that the company had a creditable balance. It was agreed between the appellant and the company that the latter should not use the money for their general purposes but should hold it as trustees for him. The appellant was paid back some of the money but when the company was wound up there was some of the £1,000 at the company's bankers. It was held that such a purpose was fraudulent, its object being to give a fictitious credit to the company and that this object having been attained the appellant was not entitled to claim the money.

The circumstances of this case are stronger, the transfer was made to satisfy a statutory requirement of ownership and its object was fully carried out, for Mr. Goonewardene on the qualification of ownership of this property was able to secure membership of the Council. Whether as between themselves the first respondent is entitled to reconveyance of the property from the legal representative of Mr. Goonewardene is not a question which I need deal with, the decisive question in this action being whether the property is liable to sale on execution issued against his legal representative, and this it clearly is. In these circumstances it is not necessary to deal with the question of the interest of the other vendor who joined in the deed P 1 or with the question whether the property was acquired and held by the first respondent in trust for Mr. Goonewardene.

The appeal is allowed. Decree will be entered dismissing the action. The plaintiff-respondent will pay the first defendant-appellant his costs in the District Court and the costs of this appeal.

GARLIN J.—I agree.

Appeal allowed.

