Mar. 8, 1911

Present : Lascelles C.J. and Middleton J.

AMERASEKERA *v.* RAJAPAKSE.

42—*D. C. Chilaw*, 4,285.

Oral agreement to purchase land at a Fiscal's sale and transfer to plaintiff—Plaintiff cannot compel purchaser to transfer land—Trust.

The plaintiff and defendant entered into a non-notarial agreement that the defendant should bid for and purchase land at a Fiscal's sale, and that plaintiff should abstain from bidding in opposition to the defendant at such sale, and that the defendant should subsequently convey 12 acres of the land to the plaintiff.

In an action by plaintiff against defendant (who purchased the land at the Fiscal's sale) to compel him to transfer the 12 acres,—

Held, that plaintiff could not maintain the action in the absence of a notarially executed agreement between the parties.

THE facts appear in the judgment of the Chief Justice.

A. St. V. Jayewardene, for the plaintiff, appellant.—The learned District Judge had not inquired into the facts of this case ; he has held on an issue of law that the action could not be maintained as the agreement was not attested by a notary. This Court held in *Ohlmus v. Ohlmus*[1] and in *Gould v. Innasitamby*[2] that parol evidence is admissible to establish a resulting or constructive trust where a

[1] *(1906) 9 N. L. R. 183.*

[2] *(1904) 9 N. L. R. 177.*

transaction is intended to effect a fraud. The Judge should have recorded evidence and then decided the question of law.

Sampayo, K.C., for defendant, respondent.—The appellant cannot complain that no evidence has been recorded in this case, as both parties desired the Court to decide the question of law before entering into the facts.

In the cases referred to by the appellant there was a trust ; the plaintiff had given the defendant money to buy the land. The present is a pure contract to sell ; and there is no trust or fiduciary relation between the parties.

The question of fraud was not raised in the lower Court.

A. St. V. Jayewardene, in reply.—In *Ohlmus v. Ohlmus* there was no issue as to fraud, yet the plea of fraud was upheld when it was clear from the facts that there was fraud. [Lascelles C.J.—What fraud do you allege ?]. The plaintiff was prevented from bidding and purchasing the land by defendant's promise. [Lascelles C.J.—In a sense there is some fraud in almost every case of breach of contract ; but that is not enough to justify the application of the principle enunciated in *Gould v. Innasitamby*. The defendant is not a trustee of the plaintiff in any sense.] The defendant becomes plaintiff's trustee when he asked him not to bid, and purchased the land himself with a promise to re-convey. In *Ohlmus v. Ohlmus* the plaintiff paid the defendant money because the amount was ascertained at the time of the agreement ; but here it was not ascertainable at the time. Plaintiff is now prepared to pay value. The payment of money by plaintiff to defendant at the time of the agreement is not the test of the trust—suppose the defendant was given credit at the sale !

Cur. adv. vult.

March 8, 1911. LASCELLES A.C.J.—

In this case the plaintiff sues for a specific performance of a certain agreement entered into between himself and the defendant, and also for damages. In paragraph 3 of the plaint it is averred that on or about August 27, 1908, an agreement was entered into between the plaintiff and the defendant above named, that the defendant should bid for and purchase at the Fiscal's sale, which was to be held on August 28, 1908, sixteen allotments of high land aggregating about 36 acres in extent, and that the plaintiff should abstain from bidding at the said sale in opposition to the defendant ; and that the defendant should, in the event of his becoming the purchaser, convey to the plaintiff an extent of 12 acres thereout immediately adjoining Danpitiya estate on the south, the plaintiff paying for it the actual amount paid by the defendant at the said sale plus a proportionate share of the expenses incident to the said sale. The plaint then goes on to aver that the plaintiff accordingly abstained from bidding at the sale, and that the defendant became the

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purchaser of the allotments and obtained a Fiscal's transfer therefor. The plaintiff also avers that he has been always ready and willing to pay for the said 12 acres of land, together with a proportionate share of the expenses of the sale. He then alleges that, relying on the agreement, he cleared and planted a portion of the land when the defendant falsely and maliciously and without reasonable and probable cause caused the plaintiff to be criminally prosecuted in the Police Court. The defendant in his answer denies all the averments in the plaint, and he gives a version of the transaction entirely different from that of the plaintiff. Issues were then settled, the first of which was : " Can the plaintiff maintain this action in the absence of a notarially executed agreement between the parties ? " This issue was argued before the District Judge, who held that the parol agreement between the plaintiff and the defendant was of no force or avail in law, and dismissed the action with costs. The plaintiff now appeals from the judgment of the District Judge. In his argument Mr. Jayewardene has relied largely on the cases of *Gould v. Innasitamby*[1] and *Ohlmus v. Ohlmus*[2]. Now, in both these cases the facts are widely different from the facts of the present case. In the former case the plaintiff employed the defendant to purchase the property for him, and it was understood between the plaintiff and the defendant that the plaintiff should pay the purchase money and that the defendant should get a conveyance in his own name and subsequently re-convey the property to the plaintiff ; in other words, the defendant was a trustee for the plaintiff, and the Court held that the plaintiff was entitled to maintain the action on that ground. In *Ohlmus v. Ohlmus* the facts are similar. There the testator of the plaintiff bought a land and obtained a grant in the name of the defendant, who was to hold the property in trust for the plaintiff-testator, and was to convey it at his request. There, again, it was a question of a trust, and the Court enforced the trust, although there was no notarial agreement. Here it is impossible to contend that the defendant was a trustee of the land which he purchased. He had received no advance of money from the plaintiff, The only benefit that he received from the plaintiff under the agreement was that the plaintiff should not compete with him and so enhance the price at the auction. No authority has been cited, and I have been unable to find any, in which a benefit of this kind has been held sufficient to charge the defendant with a trust, and the agreement, I think, must be construed in its plain and natural meaning. It is simply an agreement that the defendant, after having bought the land, must re-convey to the plaintiff. It is an agreement for an interest in land, and in order to be valid it should have been embodied in a notarial document. I am of opinion that the judgment of the District Judge is correct and should be affirmed and that the appeal should be dismissed with costs.

[1] *(1906) 9 N. L. R. 183.*

[2] *(1906) 9 N. L. R. 177.*

MIDDLETON J.—

I entirely agree with what has fallen from the Chief Justice, and have only to add that there seems to have been an averment in the plaint of a false and malicious prosecution by the plaintiff of the defendant. There is, however, in the prayer of the plaint no claim for damages on that ground. The claim for damages which appears is evidently in respect of what is alleged to have been an injury done to the plaintiff by the defendant's action in respect to the agreement between them before the auction. It is not possible, therefore, to send this case back, I think, for trial of what would otherwise be an action for malicious prosecution.

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Appeal dismissed.