

1948

Present : Howard C.J. and Nagalingam J.

NADARAJAH *et al.*, Appellants, and KANAPATHY *et al.*,
Respondents,

S. C. 298—D. C. Jaffna, 66.

Trust—Notarial conveyance of land—Transferee to pay off mortgage debt on land—Oral agreement to hold land in trust till debt was repaid—Is agreement enforceable?—Statute of Frauds—Trusts Ordinance, section 5 (3).

By deed P 1, notarially attested, plaintiff's mother since dead and the co-plaintiffs transferred certain lands to the first defendant. These lands were subject to mortgage decrees in favour of the second and third defendants. The consideration for the transfer was the amount due on the decrees. There was an oral agreement between the parties that the first defendant was to re-transfer the lands on payment to him within a reasonable time of the amount due on the mortgage decrees which he had undertaken to settle and that he should hold the land in trust till then.

Held, that the agreement was enforceable at law although it was not notarially attested. To hold otherwise would allow the Statute of Frauds to be used as a protection or vehicle for frauds.

Valliyammai Atchi v. Abdul Majeed (1947) 48 N. L. R. 289, followed

APPEAL from a judgment of the District Judge, Jaffna.

C. Thiagalasingam with V. Arulambalam and C. Chellappah, for plaintiffs, appellants.

F. A. Hayley, K.C., with *T. B. Dissanayake*, for first, second and third defendants, respondents.

S. J. V. Chelwanayakam, K.C., with *P. Navaratnarajah*, for fourth defendant, respondent.

Cur. adv. vult.

January 29, 1948. HOWARD C. J.—

This is an appeal by the plaintiff and co-plaintiffs from a decision of the District Court of Jaffna dismissing their action with costs. The action was instituted by the plaintiff against the defendants praying that the defendants should on the plaintiff depositing Rs. 650 in Court reconvey a certain plot of land called Veeramanpalaiyamuttan on the ground that his mother Nagamma, since dead, had transferred this land and two other lands to the first defendant on trust with an undertaking by him to retransfer the lands to her or her heirs on the payment of Rs. 850 and interest. The plaint further alleged that the first defendant had thereafter transferred the said lands to his daughter the third defendant and

the first and third defendants had in turn fraudulently and collusively and for no consideration transferred them to the fourth defendant in order to deprive the plaintiff of his right to obtain a retransfer. In the alternative the plaintiff asked for judgment against the defendants in the sum of Rs. 1,750 being the difference between the value of the land and the amount due to the first defendant, that being the amount by which the first defendant is alleged to have enriched himself by his fraudulent conduct with the connivance of the second, third and fourth defendants. The second defendant is the husband of the third defendant. The first, second and third defendants by their answer denied that the land was conveyed to the first defendant in trust. They further stated that a half share of the land belonged to one S. Arulampalam and his wife Maheswari and that Arulampalam, Maheswari and Nagamma (who owned the other half) had transferred the land in suit and another land to the first defendant in consideration of the latter undertaking to settle two mortgage decrees which had been entered against Arulampalam and Maheswari. Nagamma joined in the transfer as the first defendant refused to purchase the lands unless Nagamma's half share was also conveyed to him. The fourth defendant filed a separate answer denying all knowledge of any trust or agreement to retransfer. The fourth defendant further maintained that he was a *bona fide* purchaser for value having purchased the land on July 18, 1942, from the first, second and third defendants for Rs. 1,300 paid in the presence of the Notary, that being the sum that the land was reasonably worth. On February 4, 1943, the plaintiff with the consent of the defendants moved to add S. Arulampalam and his daughter as parties (Maheswari having died) as they were entitled to a half share of this property. S. Arulampalam consented to be added as co-plaintiff and was also appointed guardian *ad litem* of his minor daughter Saraswathy. An amended plaint was filed on March 11, 1943, in which S. Arulampalam and Saraswathy are described as the first and second co-plaintiff.

The District Judge in coming to a conclusion in favour of the defendants has decided the issues material for the purpose of this appeal as follows :—

- (1) The deed No. 380 of April 16, 1936, P 1, was not executed in trust, but there was an informal agreement between the parties for a reconveyance in the terms specified by Notary Ragunathan in his evidence.
- (2) The land referred to in the plaint was conveyed to the first defendant in consideration of the first defendant paying a sum of Rs. 1,397.25 in full satisfaction of the decrees referred to in paragraph 4 of his answer.
- (3) The first defendant had not paid the said amounts.
- (4) The agreement referred to in paragraph 3 of the plaint is not enforceable at law inasmuch as the sum is not notari ally attested.
- (5) The plaint does not disclose a trust valid in law in favour of Nagamma or the plaintiffs inasmuch as the alleged trust has not been declared in a notari ally attested instrument of trust.

- (6) The fourth defendant was a *bona fide* purchaser for value of the land described in the schedule to the plaint.
- (7) The fourth defendant was not aware of the trust as alleged in paragraph 3 of the plaint at the time of the execution of the transfer in his favour.

The learned District Judge in arriving at these findings states that he sees no reason for not accepting the facts as stated by Notary Ragnathan, a witness called by the plaintiffs. By the deed P 1 attested by Ragnathan Nagamma, S. Arulampalam and his wife Maheswari transferred to the first defendant two lands, the first of which is the subject matter of this action. The two lands were subject to mortgage decrees. The decree holders were the second and third defendants, one Visuvalingam and his wife Rasammah. The consideration for P 1 was Rs. 850, the amount due on both the decrees. According to Ragnathan's evidence there was an oral agreement between the parties to P 1 that on the payment to the first defendant of the money paid by him to the mortgage creditors within a reasonably short period Arulampalam, Maheswari and Nagamma were to be entitled to a reconveyance of the two lands within a reasonably short period, that is to say, within a period of one or two years. The first defendant was to hold the lands until the debt was settled. The parties to P 1 were aware that the lands transferred by P 1 were worth much more than Rs. 850. With regard to subsequent events Ragnathan states for a period of about 3 months prior to July, 1942, the first defendant and Arulampalam (the 1st co-plaintiff) had seen him from time to time with regard to the amount to be paid on account of the mortgage debts which the first defendant had undertaken to settle so that a reconveyance in favour of Nagamma and the first co-plaintiff could be executed. A dispute arose as to the amount each had paid towards the liquidation of those debts and as costs in the cases. They were unable to agree on the amount and on a date between July 11 and 18, 1942, the discussion in his office became so heated that the parties were about to exchange blows. The first co-plaintiff and the second defendant had prior to that day given Ragnathan instructions to draft a transfer of the land in dispute to one Nallathamby, a nominee of the first co-plaintiff for a sum of Rs. 1,000. The first co-plaintiff had deposited Rs. 750 with him on the day the instructions were given, the balance to be paid when the deed was signed. The negotiations for the reconveyance of the land to Nagamma and the first co-plaintiff having fallen through Ragnathan proceeded to find another purchaser. On July 18, 1942, the four defendants came to his office and the first, second and third told him that they wanted to transfer the land in dispute, a portion of which had been dowered by the first defendant to the third defendant, his daughter, by deed (4D7) dated June 5, 1938, to the fourth defendant. Ragnathan told them that the money had been deposited by the first co-plaintiff and that if they did not want to transfer the land to him but to someone else, he had no objection. The fourth defendant was willing to pay Rs. 1,300 for the land. The full amount was paid in the presence of Ragnathan and the deed (4D5) was executed. Ragnathan explains the advice he gave in regard to the execution of this

deed by the fact that a long time had elapsed since the execution of P 1 and by the failure of the first co-plaintiff to come to an agreement with the first defendant as to the amount to be paid to the latter.

The first question that requires consideration is whether the learned Judge was right in holding that the deed P 1 was not executed in trust. At an early stage in the trial applying the decision in the case of *Valliyammai Atchi v. Abdul Majeed*¹ the learned Judge allowed the plaintiff to lead oral evidence in order to establish that the lands were being held in trust by the first defendant pending the settlement of the mortgage debts. When allowing this evidence to be led, the learned Judge said that the question whether the plaintiff has succeeded in establishing a trust or not will have to be decided later after the evidence has been led. As I have already stated the learned Judge has accepted the evidence of Ragunathan the Notary. I see no reason to canvas this decision. There is nothing in the case to suggest that Ragunathan was anything but an honest and impartial witness acting as a notary in the interests of all the parties. No one was better qualified to testify as to the real agreement between the parties to P1. Having regard to the evidence of Ragunathan was the learned Judge right in law on the principles formulated in *Valliyammai Atchi v. Abdul Majeed* in holding that P1 was not executed in trust? The decision of this Court in *Valliyammai Atchi v. Abdul Majeed* was affirmed by the Privy Council (*vide* 48 N. L. R. 289).

The facts in the case were as follows :—

“ M who was entitled *inter alia* to certain immovable property of the value of over Rs. 460,000 executed an unconditional notarial transfer of these properties to N for a consideration of Rs. 203,256. It was alleged by M that this transfer was in pursuance of a verbal agreement that N was *inter alia* to hold the properties in trust for him ; to pay out of the income certain specified debts and interest to himself at 12 per cent. on the said sum of Rs. 203,256 and to reconvey the properties to M on the liquidation of the said sum of Rs. 203,256 and interest. N died and his widow claimed to hold the properties free of the trust. In an action by M for a declaration of trust and consequential relief—

Held, that oral evidence was admissible to establish the trust.

Held, further, that the formalities required to constitute a valid trust relating to land are to be found in section 5 of the Trusts Ordinance and not in section 2 of the Prevention of Frauds Ordinance ; that the act of the widow in seeking to ignore the trust and to retain the property for the estate was to effectuate a fraud ; that, therefore, under section 5 (3) of the Trusts Ordinance even a writing was unnecessary and sections 91 and 92 of the Evidence Ordinance had no application.”

Is it possible that having regard to the evidence of Ragunathan to distinguish the facts of the present case from those in *Valliyammai Atchi v. Abdul Majeed* ? In the latter case the transfer was in pursuance of a notarial agreement to hold the properties in trust, to pay out of the income specified debts and interest to the transferee at 12 per cent. and

¹ (1944) 45 N. L. R. 169.

to reconvey the properties on the liquidation of the said sum and interest. In the present case Ragnathan states that the first defendant was to hold the lands in trust till the mortgage debts were liquidated and that a reconveyance should be executed within a reasonable time. Ragnathan also states that both parties were aware that the lands transferred by P 1 were worth much more than Rs. 850. As in *Valliyammai Atchi v. Abdul Majeed* the transferors remained in possession. The learned Judge whilst holding that there was an informal agreement between the parties in the terms stated by Ragnathan then states that no attempt was made either by the plaintiff or co-plaintiff thereafter to pay the first defendant the balance due to him. The first defendant was therefore morally free to sell the two lands. He sold the second land first and when after negotiations for obtaining a reconveyance of the first in favour of the first co-plaintiff's nominee had broken down he cannot be blamed for selling the land in dispute too, quite apart from the legal position regarding the oral agreement. I find it difficult to understand how the learned Judge has arrived at this conclusion after satisfying himself that the oral agreement between the parties in the terms stated by the Notary existed. Moreover in the deed dated September 16, 1936, P 7 Nagamma, the first co-plaintiff and his wife Maheswari of the first part and the first defendant of the second part leased to one Kandiah the land in dispute. In this lease to which the first defendant was a party P 1 was recited as a deed by which Nagamma, and Maheswari transferred the lands in dispute in trust to the first defendant. The latter agreed to set off the rent paid by the lessee in part liquidation of the amount due on the mortgage decrees. The first defendant has given to the lessee a receipt for rent P 8 for a sum of Rs. 125. This receipt is also dated September 16, 1936. There is also a receipt P 9 dated September 16, 1936, from the first defendant acknowledging a sum of Rs. 35.40 as interest on the principal sum of Rs. 850 due to him by Nagamma, the first co-plaintiff and his wife. In regard to the liquidation of the mortgage decrees by the first defendant it would appear from 4D2 and 4D3 that he paid Rs. 346 and liquidated the amount due in respect of action No. 3142/A of Court of Requests, Kayts, on July 18, 1942. From 4D4 it seems that the first defendant paid on the same day, that is to say, July 18, 1942, the sum of Rs. 851.25 in liquidation of the decree in case No. 7,796 of the District Court of Jaffna. So it would appear that the mortgage decrees were liquidated by the first defendant only on the day when the transfer 4D5 was made to the fourth defendant. Moreover the transfer was made when negotiations were still proceeding between the first co-plaintiff and the first defendant for a reconveyance to the nominee of the former and when Ragnathan was holding a sum of Rs. 750 from the first co-plaintiff as part consideration for such reconveyance. In these circumstances I do not understand how the learned Judge could hold that the first defendant could not be blamed for selling the land in dispute to a person other than the plaintiff.

In my opinion the learned Judge in view of his acceptance of the testimony of Ragnathan should have found that P 1 was executed in trust. The agreement referred to in paragraph 3 of the plaint was having regard to the decision in *Valliyammai Atchi v. Abdul Majeed* enforceable

at law even though it was notarially attested. To hold otherwise would allow the Statute of Frauds to be used as a protection or vehicle for frauds. In this connection I would refer to *Lincoln v. Wright*¹.

The only remaining question for consideration relates to the position of the fourth defendant and whether the learned Judge was right in holding (a) that he was a *bona fide* purchaser for value and (b) that he was not aware of the trust at the time of the execution of the transfer in his favour. In regard to (a) there is no doubt if Ragnathan's evidence is accepted that the fourth defendant purchased the land for Rs. 1,300. I agree with the learned Judge that there was no reliable evidence to establish the fact that this figure did not represent the approximate value. The learned Judge in holding that the fourth defendant had no knowledge of the trust makes the point that he is not related to the first defendant and is of a different caste. He is satisfied that it was Ramalingam who arranged the sale to him and that even if the evidence of the first co-plaintiff and Notary Vinasithamby as to what they say they told the fourth defendant is accepted in its entirety, it is insufficient to fix him with notice of a trust valid in law as the trust that they referred to was the informal agreement to reconvey which failed to materialise. Notary Vinasithamby's evidence is explicit. He states that the first co-plaintiff and the first defendant came to him to settle their differences. To his knowledge the first co-plaintiff had the money to pay the first defendant in order that the first defendant might reconvey the lands and offered to give the money to Notary Ragnathan. The first defendant refused to reconvey the lands. Vinasithamby then goes on to say that he knew the fourth defendant who lived close to his house. The fourth defendant questioned him as to whether it was proper for outsiders to purchase the land in suit. He also says that he told the fourth defendant that the first co-plaintiff had transferred the lands to the first defendant for a sum of Rs. 850 in trust and also that the lands were worth Rs. 4,000 to Rs. 5,000 and it was not proper for others to get into that transaction. The evidence of Vinasithamby who has not been in any way discredited proves that the fourth defendant had notice of the trust. It is not inconsistent with the testimony of Ragnathan. In fact from the history of the negotiations that led up to the execution of 4D5 it is difficult from the latter's evidence to resist the inference that the fourth defendant was fully aware of the trust. In this connection according to Ragnathan he told the first, second, third and fourth defendants about the transaction between the first co-plaintiff and the first, second and third defendants collapsing. Surely this must have put the fourth defendant on his guard. In my opinion the fourth defendant had notice of the trust.

For the reasons I have given the judgment of the District Court is set aside and judgment is entered in favour of the plaintiffs as prayed in paragraph 9 of the plaint together with costs in this court and the Court below.

NAGALINGAM J.—I agree.

Appeal allowed.

¹ (1859) 45 E. R. 6.