1944 *Present:* **Hearne, Keuneman and Jayetileke JJ.**

JONGA *et al.*, Appellants, *and* NANDUWA *et al.*, Respondents.

9—C. R. Gampaha, 1,385.

Sale—Reservation of right to repurchase—Condition binding on the vendee—Trusts Ordinance (Cap. 72), ss. 88 and 96.

Where a deed of sale reserves a right of repurchase to the vendor, within a certain period, the condition with regard to repurchase is binding on the vendee, although he has not signed the deed.

THIS case was referred to a Bench of three Judges by Soertsz J.

The facts appear from the argument.

H. V. Perera, K.C. (with him *H. A. Koattegoda* and *C. C. Rasa Ratnam*), for the defendants, appellants.—The first plaintiff transferred, by P 2 of July 15, 1935, a land to the defendants with the right reserved to repurchase " (or redeem) " the property within 8 years on payment of a certain sum of money. Thereafter the first plaintiff purported, by P 1 of July 11, 1942, to assign to the second plaintiff the right which was reserved to him. The first and second plaintiffs now come to Court within the 8 years and ask for the reconveyance of the property. The question is whether, having regard to the fact that P 2 was signed by the plaintiff alone and not by the defendants, the reservation of the right to repurchase can be enforced in law, in view of the provisions of section 2 of the Prevention of Frauds Ordinance (Cap. 57).

In P 2 the entire dominium over the land was transferred to the defendants, and no real right was retained. The first plaintiff reserved only a personal right and not any real right. For the difference between a real right and a personal right see Wille's *Principles of S. African Law (1937 ed.). p. 47.* In order to sue the defendants for a personal right relating to immovable property it is necessary that P 2 should have been signed by them. English principles of equity cannot help the plaintiff in view of the drastic nature of our section 2 of Cap. 57—*Arsecularatne v. Perera*[1], a case which was taken to the Privy Council[2]. English principles were not correctly applied in *Sardiya v. Ranasinghe Hamine*[3] and *Babun Singho v. Semaneris Singho*[4].

[KEUNEMAN J. referred to section 96, illustration (*c*) of the Trusts Ordinance (Cap. 72)].

This is not a case where the transferee can be regarded as a trustee. Section 3 (*a*) of the Trusts Ordinance defines the term " trust ". No questions of beneficial ownership and equitable rights arise in the present case.

[KEUNEMAN J.—Can you not read a mortgage into deed P 2 ?]

The language of the document negatives the existence of a mortgage. It cannot be said that there was any security furnished, because security presupposes the continuing existence of a debt. Further, the dominium in the property passed to the defendants.

[1] *(1926) 28 N. L. R. 1 at 13.*
[2] *(1927) 29 N. L. R. 342 at 345*
[3] *(1939) 41 N. L. R. 233.*
[4] *(1940) 16 C. L. W. 83.*

N. Nadarajah, K.C. (with him *K. Herat*), for the plaintiffs, respondents.—Where property is sold subject to a condition the condition can be enforced. The condition cannot be separated from the grant. Prevention of Frauds Ordinance cannot be used to cover what would amount to a fraud. The plaintiffs are entitled to claim a reconveyance of their property. See *Gould v. Innasitamby*[1]; *Issan Appu v. Gura*[2]; *Guruhamy v. Subaseris et al.*[3]; *Nanayakkara et al. v. Andris et al.*[4]; *In re Duke of Marlborough*[5]; *Babun Singho v. Semaneris Singho* (*supra*); *Sardiya v. Ranasinghe Hamine* (*supra*).

In P 2 full ownership was not granted. There was a diminution imposed by the condition. The transaction imposed upon the defendants duties and obligations in the nature of a trust—*Saminathan Chetty v. Vander Poorten*[6]. Sections 92 and 96 of the Trusts Ordinance are applicable. It is the substance of the transaction which is material—*De Silva v. De Silva*[7]; *Rajah v. Nadarajah et al.*[8]; *A. I. R. (1916) P. C. 27 at 30, 31.*

H. A. Koattegoda replied.

Cur. adv. vult.

February 22, 1944. HEARNE J.—

The first plaintiff and the second plaintiff, who claimed under the former, sued the defendants to obtain a reconveyance of a parcel of land which the first plaintiff had transferred to them by a notarially executed deed (P 2) reserving to himself " the right to pay to the vendees or their heirs within eight years ——— the sum of ——— to redeem this transfer ". The defendants did not sign the document.

When a Court is confronted with a document similar to P 2 the true intention of the parties is sometimes a matter of obscurity. For instance, although the right to repurchase is reserved (this implies a sale), if the vendor with no collateral agreement remains in possession, without the payment of rent, and enjoys all the fruits of possession or, in other words, retains the beneficial interest in a very wide sense of that expression (these were the features of a case that once came to my notice) does the transaction amount to a contract of *sale*, with a *pactum de retrovendendo* attached to it, or was a transaction of a very different nature contemplated by the parties ?

In the present case no difficulty arises. The vendees went into possession. On the face of it, P 2 is an outright deed of sale subject to the reservation of a right of repurchase within eight years. The question is whether the defendants, notwithstanding the tender of the sum and within the time mentioned in the deed, are entitled to resist a demand for resale by them. Is it enough for them to say that the reservation of a right of repurchase involves, as it does, an obligation on their part to sell at a future time, and that that obligation or contract is of no avail in law by reason of the provisions of section 2 of Ordinance No. 7 of 1840 ?

[1] *(1904) 9 N. L. R. 177.*
[2] *(1910) 13 N. L. R. 104.*
[3] *(1910) 13 N. L. R. 112.*
[4] *(1921) 23 N. L. R. 193.*
[5] *L. R. (1894) 2 Ch. 133.*
[6] *(1932) 34 N. L. R. 287 at 294 et seq.*
[7] *(1937) 39 N. L. R. 169.*
[8] *(1943) 44 N. L. R. 470.*

I do not propose to discuss the cases decided in England in which absolute transfers were expressly stated to have been made and in which oral promises to reconvey were enforced and the statutory rule similar to but not identical with section 2 of Ordinance No. 7 of 1840 was evaded. Our own statutory rule would also be evaded if, for instance, the transaction between the first plaintiff and the defendants, viewed as a whole, can be said to fall within one or more sections of the Trusts Ordinance.

In *Wijewardene v. Pejris*[1], Soertsz J. had occasion to refer to the case of *Saminathan Chetty v. Vander Poorten*[2] the facts of which are very different from the facts in this case. In that case, however, as in this certain property had passed absolutely to the respondent. At pages 184 and 185 the learned Judge, after quoting certain sections of the Trusts Ordinance including section 96, referred to the fact that the respondent, who was in receipt, it must be remembered, of an absolute transfer, could not " sell below a certain price without the consent of the Syndicate " by whom the transfer had been made, and if he did sell he had to deal with the proceeds in a certain manner. " In these circumstances " the learned Judge said " their Lordships held, without hesitation, that an absolute interest in the land did not vest in the respondent. The matters relied upon for this finding are just those matters which find a place in the sections of the Trusts Ordinance I have referred to."

I have said that the facts in *Saminathan Chetty v. Vander Poorten* (*supra*) are very different from the facts in this case. But does not the learned Judge's analysis of the judgment delivered by Lord Tomlin provide the clue to the problem we are considering ?

According to the terms of the bargain set out in P 2 the defendants were shut out from selling the property conveyed to them for eight years and were bound, on demand, to reconvey it to the first plaintiff at any time within that period for a consideration stipulated by him in advance.

Is it not correct to say that the defendants although in possession had not the full beneficial interest therein and that they must hold and not part with the property for eight years for the benefit of the first plaintiff who alone, during those eight years, could have sold to a third party at any price he chose to accept after obtaining a reconveyance ? Does not the defendants' inability to sell at any time, to anybody and at any price, connote an absence of the full beneficial interest under our law ? Was there not some residue of the beneficial interest in the first plaintiff ? Were there not just demands within the contemplation of section 96 of the Trusts Ordinance to be satisfied by the defendants on the occasion arising to satisfy them ? The beneficial interest of a beneficiary is " his right against the trustee as owner of the trust property ". In *Saminathan Chetty v. Vander Poorten* (*supra*) the right of the Syndicate was in part at least to say to the respondent " You cannot sell below a certain price without my permission ". Here the first plaintiff had the right to say " You cannot sell *at all* for eight years except to *me* and the sale will be *at my price* ".

[1] *(1935) 37 N. L. R. 179.*

[2] *34 N. L. R. 287.*

Section 96 is taken from India and there it has been held that " beneficial interest " appearing in the section must not be given a restricted meaning. In my opinion the section is wide enough to cover the facts of this case.

To sum up: it may be that in certain cases what is alleged to be a contract of sale with a *pactum de retrovendendo* annexed to it is capable of being regarded as a transaction of a very different nature. As Wille says at pages 75 and 76 " No matter what name or designation the parties give to a contract or transaction, the Court will enquire into the substance of the transaction and give effect to what it finds its true substance or nature to be . . . . Each case must depend upon its own facts, no general rule can be propounded which can meet them all ". Where, however, what is alleged to be a contract of sale with a *pactum de retrovendendo* annexed to it is found to be what on the face of a deed it appears to be, viz., a sale with a contract for repurchase, the vendees who are sued on their obligations cannot evade them by merely pointing to section 2 of Ordinance No. 7 of 1840.

In my opinion the appeal should be dismissed with costs.

KEUNEMAN J.—

This case has been referred to a Divisional Bench by Soertsz J. The facts are as follows:—The first plaintiff by deed No. 980 dated July 15, 1935 (P 2), transferred the premises in question to the second and third defendants. The deed stated that the transfer was " subject to the following conditions, to wit: that I reserve to myself the right to pay to the vendees or their heirs within eight years from the date hereof the sum of Rs. 177.50 in case the said mortgage bond " (*i.e.*, a subsisting mortgage bond D 2 for Rs. 62.50) " is not paid off and settled, or in the event of the said mortgage bond having been settled to redeem this transfer by paying the sum of Rs. 240 within the said period ". Another translation of the material words is as follows: " that there should be the right for me the said vendor at any time desired to repurchase the said property within the period of eight years by paying . . . .".

The first plaintiff thereafter by deed 47, dated July 11, 1942 (P 1), transferred to the second plaintiff " the right to repurchase the premises ", contained in deed P 2.

The second plaintiff on July 27, 1942, gave notice to the defendants calling upon them to receive the sum of Rs. 240 and execute a retransfer. The plaintiffs have also brought the sum of Rs. 240 into Court in this case.

The defence of the defendants is that they are not liable on the contract to repurchase, on the ground that they have " not signed the deed P 2 ". They claim the benefit of section 2 of the Ordinance for the Prevention of Frauds, Cap. 57.

If the condition in deed P 2 is to be treated merely as a contract to repurchase, then it is clear that the deed is not " of force or avail in law " against the defendants, because they have not signed the deed.

It is, however, contended that the condition in P 2 creates an obligation in the nature of a trust, which is binding on the defendants. Our Trusts

Ordinance, Cap. 72, recognizes obligations in the nature of trusts, *i.e.*, constructive trusts (see Chapter IX.). A large number of constructive trusts are defined.

In *Nanayakkara v. Andris*[1], Bertram C.J. discussed the limits of the rule that " Courts of Equity will not permit the Statute (of Frauds) to be made an instrument of fraud ". He set out two classes of cases:—

" (*a*) Cases where the defendant has obtained possession of the plaintiff's property, subject to a trust or condition, and claims to to hold it free from such trust or condition;

(*b*) Cases within the equitable doctrine of ' part performance ' ".

As regards class (*b*) the judgment of Bertram C.J. is undoubtedly no longer binding, in view of our own later decision in *Arsecularatne v. Perera*[2]. This case went up in appeal to the Privy Council, and their Lordships held that in Ceylon the operation of the Ordinance of Frauds could not be avoided under the equitable doctrine of part performance, and that section 2 of our Ordinance is " more stringent " than section 4 of the English Statute of Frauds (see *29 N. L. R. 342.*). To that extent the authority of *Nanayakkara v. Andris* (*supra*) is weakened. On the other hand our Courts have consistently permitted the proof of certain forms of constructive trusts, although the requirements of section 2 of the Ordinance of Frauds were not observed. Section 98 of our Trusts Ordinance runs as follows:—

" Nothing contained in this Chapter " (*i.e.*, Chapter IX. relating to constructive trusts) " shall . . . . create an obligation *in evasion* of any law for the time being in force ".

I think the word " evasion " implies an intentional attempt to circumvent the existing law, and does not touch a case which may merely happen to conflict with the strict law. Otherwise it would not be possible to support the well-established decisions relating to certain recognized forms of constructive trusts.

I am of opinion that where a constructive trust can be held to exist under our law, then the operation of section 2 of the Ordinance of Frauds has no application. In other words, we are no longer dealing with a mere contract for the sale and purchase of land, but with a trust properly constituted.

I think it is necessary for us to consider whether there is a constructive trust created under our law. In this connection I shall first consider the effect of section 96 of our Trusts Ordinance, which is as follows:—

" In any case not coming within the scope of any of the preceding sections where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands ".

The first point of interest is that " the preceding sections " set out certain well-recognized forms of constructive trusts, one or two of which perhaps go beyond the English law of trusts. Section 96 is intended to

[1] *23 N. L. R. 193.* [2] *28 N. L. R. 1.*

catch up something which does not amount to a constructive trust under the earlier sections. Emphasis should also be placed on the words "*where there is no trust.*" Section 96 is intended to cover a case where no trust as previously recognized exists. The next point is that the person in possession of the property has an obligation in the nature of a trust imposed upon him, *i.e.*, "to hold the property for the benefit of" certain persons "to the extent necessary to satisfy their just demands" And lastly, the obligation in the nature of a trust arises—

(1) where the person having possession of property has not the *whole beneficial interest* therein; and

(2) some other person has such interest, or the residue thereof.

As regards the nature of (2), illustration (*c*) is of interest. This is the case where a person parts by way of gift with the whole of his interest, reserving the right to revoke a part of the gift at a later date, and thereafter exercises that right.

I think it is clear that a person cannot be held to be a constructive trustee, unless his possession is such that he owes some duty to the other persons interested—see *Re Biss, Biss v. Biss*[1]. Can it be said in the circumstances of the present case that the defendant owed a duty to the 1st plaintiff ?

The very terms of the grant here set out the condition, and the defendant must be regarded as having taken possession under the grant coupled with the condition. I think the defendant, who entered into possession under these circumstances, owed this duty to the first plaintiff, viz., to have the property available for the condition to be carried into effect. I do not regard this as a mere personal right vested in the first plaintiff, In fact the defendant did not receive the "whole beneficial interest" but only the beneficial interest burdened with the condition, and this fractional portion deducted enured to the benefit of the first plaintiff. Although, in strict law, if this was treated merely as a contract, the condition could be defeated under the Ordinance of Frauds, yet in equity the obligation in the nature of a trust can be enforced. I hold that the present case comes within the scope of section 96 of our Trusts Ordinance which is a section of wide application.

I may add that, on the wording of this document, I think that section 88 of the Trusts Ordinance can also be held to apply. The material portion of section 88 is as follows:—

> "Where property is transferred in pursuance of a contract which is liable to rescission . . . . the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid, and subject to any compensation or other relief to which the transferee may be by law entitled".

In the translation put in by the plaintiffs, there was an express reservation of the right "to redeem the transfer by paying". I am inclined to think that this is equivalent to the reservation of the right of rescission of the contract on the performance of the condition. Even if the actual

[1] *(1903) 2 Ch. 40.*

language employed was " to repurchase the premises by paying ", the substance of the transaction was the reservation of the right of rescission by payment, and I do not think we should give too technical a meaning to the word " repurchase ".

In the course of the argument we were referred to the cases of *Sardiya v. Ranasinghe Hamine*[1] and *Babun Singho v. Semaneris Singho*[2]. Soertsz J. was not in agreement with these decisions.

For the reasons I have given, I am of opinion that in the present case an obligation in the nature of a trust has been established.

The appeal is accordingly dismissed with costs.

JAYETILEKE J.—

I have had the advantage of reading the judgments prepared by my brothers Hearne and Keuneman with which I agree.

Appeal dismissed.