

1956

Present : Pulle, J., and Weerasooriya, J.

DE SILVA *et al.*, Appellants, and SILVA *et al.*, Respondents

S. C. 159—D. C., Matara, 22,869 L

Trusts—Transfer of property to defraud creditors—Constructive trust—Elements necessary—In pari delicto potior est conditio possidentis—Rule against unjust enrichment—Trusts Ordinance, ss. 82, 83.

A executed a conveyance of certain lands in favour of B intending to transfer to B not only the legal title to the lands but also the beneficial interest in them so as to put them beyond the reach of his creditors, fully believing that in due time B, in whom A had complete confidence, would effect a re-transfer of the same lands in favour of A.

In the present action A's intestate heirs sued B claiming a reconveyance of the lands to them.

Held, (i) that although the facts might have constituted a ground for a Paulian action at the instance of the creditors of A, no constructive trust within the meaning of sections 82 and 83 of the Trusts Ordinance was created by the conveyance executed by A.

(ii) that, even if a constructive trust was established, the plaintiffs, as heirs of A, would have to rely on the fraud committed by A. The maxim *in pari delicto potior est conditio possidentis* being applicable in the circumstances, the plaintiffs could not maintain the action.

Held further, that, inasmuch as the execution of the conveyance by A actually resulted in his creditors being defrauded and any unjust enrichment accruing to B was at the expense of the defrauded creditors and not of the plaintiffs, the plaintiffs could not avail themselves of the maxim that no person ought to be enriched at the expense of another (*nemo cum damno alterius locupletior fieri debet*).

APPEAL from a judgment of the District Court, Matara.

Sir Lalita Rajapakse, Q.C., with *A. C. Gunaratne*, for the plaintiffs-appellants.

D. S. Jayawickreme, Q.C., with *D. R. P. Goonetilleke*, for the 1st defendant-respondent.

N. E. Weerasooria, Q.C., with *D. R. P. Goonetilleke*, for the 2nd defendant-respondent.

Cur. adv. vult.

May 18, 1956. WEERASOORIYA, J.—

In this case the plaintiffs-appellants seek to obtain a decree declaring—

- (a) that Deed No. 688 (P1) dated the 27th November, 1948, executed by one William Ediriweera in favour of the 1st defendant-respondent created a trust and that the 1st defendant-respondent held the several lands transferred thereon in trust for the plaintiffs;
- (b) that Deed No. 34065 dated the 2nd August, 1951, by which the 1st defendant-respondent purported to sell the said lands to the 2nd defendant-respondent “is of no force or avail in law as the 2nd defendant has purchased the said properties with notice of the said trust”; and
- (c) that the 2nd defendant-respondent is liable to re-convey the said lands to the plaintiffs.

The 1st and 2nd defendants in the respective answers filed by them take up the position that Deed P 1 was a transfer for valuable consideration paid by the 1st defendant to William Ediriweera and on the execution thereof the legal title to, as well as the beneficial interest in, the said lands passed to the 1st defendant who subsequently, by Deed No. 34065, conveyed the same to the 2nd defendant, also for valuable consideration, and they accordingly pray for a dismissal of the action.

The 1st plaintiff is the widow and the 2nd to 8th plaintiffs are the minor children of William Ediriweera who died on the 13th May, 1950, and they bring this action as his intestate heirs. The 1st plaintiff also claims to be the duly appointed administratrix of the estate of her husband in D. C., Matara, Case No. 4,472 (Testamentary).

The case went to trial originally on eight issues the first of which is in the following terms: “Was deed No. 688 of November 27, 1948 (P1) attested by Mr. R. Hewagama, Notary Public, executed by the late William Ediriweera in favour of the 1st defendant in trust for the said William Ediriweera?” It is clear that a decision of this issue in the negative would necessarily involve a dismissal of the entire action. Under Sections 82 and 83 of the Trusts Ordinance (Cap. 72) a constructive trust is created whenever the owner of property transfers it and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein. The burden was, therefore, on the plaintiffs to prove the alleged circumstances in which P 1 came to be executed from which it cannot reasonably be inferred that Ediriweera intended to dispose of the beneficial interest in the lands transferred thereon. In order to discharge this burden the 1st plaintiff stated in the evidence given by her at the trial that Ediriweera was very attached to the 1st defendant, who is a son of Ediriweera's mother's brother, and had complete confidence in him. About three years prior to the execution of P 1 the 1st defendant had purchased in his name, on Deed P 3, a certain land for a sum of Rs. 1,400. It has been

established conclusively that the full consideration on P 3 was provided by Ediriweera. The 1st plaintiff also stated that on the 1st defendant's marriage he received as a gift a substantial sum of money from Ediriweera and that on other occasions as well the 1st defendant benefited by Ediriweera's generosity towards him.

There is evidence that on the same date on which P 1 was executed Ediriweera transferred to one Julian Silva, a brother of the 1st plaintiff, by Deed P 2 such divided interests in Ediriweera's residing house and garden and another land as would be allotted to Ediriweera (in lieu of his undivided interests) in two partition actions which were then pending in the District Court of Matara in respect of those lands. P 2 purports to be a deed of sale for a sum of Rs. 1,000 and is attested by the same notary who attested P 1 and he has declared in the attestation clause that the full consideration on P 2 passed in his presence. Both P 1 and P 2 have been duly registered. Although the consideration on P 1 is stated to be Rs. 7,000, the lands dealt with in that deed would appear to be worth much more, as one of them alone had been purchased by Ediriweera in 1947 at a partition sale for Rs. 7,000. The 1st plaintiff also stated that at or about the time of the execution of P 1 and P 2 Ediriweera transferred certain other lands of his in favour of one William Silva, who is another brother of the 1st plaintiff, and that after Ediriweera's death William Silva re-transferred those lands to the 1st plaintiff. Neither the original transfer in favour of William Silva nor the deed of re-transfer have, however, been produced in these proceedings.

At the time when P 1 and P 2, as also the transfer in favour of William Silva, were executed it would appear that Ediriweera was indebted to various creditors to the extent of Rs. 15,000, and that in an action filed by another creditor writ had been taken out against Ediriweera to enforce payment of the comparatively small sum of Rs. 300 for which judgment had been entered in favour of the plaintiff in that case. According to the 1st plaintiff the object of her husband in executing these transfers was to put his properties out of the reach of his creditors. That he achieved this object is shown by the fact that in two subsequent actions filed by certain of his creditors for the recovery of monies due to them the decrees which they obtained against Ediriweera remained unsatisfied. Affidavits were filed by Ediriweera in those actions stating that he was not possessed of any property or income.

The 1st plaintiff stated, further, that even after P 1 had been executed, her husband continued to be in possession of the properties which had been transferred on that deed and took the income from them. In support of this assertion she produced the documents P 5A, P 6A, P 7, P 8 and P 9. P 5A and P 6A are dated respectively the 1st December, 1948, and the 31st December, 1949, and they purport to be receipts for rent for premises described as No. 157, Bogahalange, Pinwatta. P 7 is a receipt for irrigation contribution in respect of the land Muhandirange Ammai. Apart from the evidence of the 1st plaintiff there is nothing, however, to show that the lands to which these documents refer are any of the lands transferred on P 1. P 8 is a certified copy of a plaint filed by Ediriweera in the

year 1945 suing a certain party in respect of an alleged encroachment of one of the lands transferred on P 1. P 9 is a certified copy of the decree entered in the case and it shows that a few months after the execution of P 1 the dispute was compromised by the payment of a sum of Rs. 550 to Ediriweera by the defendant in the case. The fact that Ediriweera agreed to this compromise does not appear in any way to bear out the evidence of the 1st plaintiff that the land which was the subject matter of that action was possessed by Ediriweera even after P 1 had been executed.

In regard to the consideration of Rs. 7,000 on deed P 1, the 1st plaintiff tried to make out that it was provided by Ediriweera. She does not claim, however, to have been present when P 1 was executed, and in order to substantiate this allegation she had to rely on the evidence of the notary who attested P 1 and his clerk. The evidence of both these witnesses was unsatisfactory and was completely discredited by the trial Judge.

After the 1st plaintiff had given her evidence-in-chief on the first date of trial, two further issues of law were raised by counsel for the 2nd defendant and allowed by the trial Judge without any objection being taken to them. These issues (as subsequently amended) read as follows:—

- “ 9. Did William Ediriweera purport to transfer to the 1st defendant with the intention of defrauding his creditors or with the intention of perpetrating a fraud ?
10. If so, are the present plaintiffs entitled to maintain this action for the re-transfer of the land from the 2nd defendant ? ”

The 1st plaintiff was recalled and further examined-in-chief and also cross-examined, and then counsel for all the parties invited the Court to decide these issues as preliminary issues. Although counsel for the 1st defendant reserved further cross-examination of the 1st plaintiff on certain unspecified points, it would appear that at this stage all the evidence available to the plaintiffs in proof of their case had been adduced by them. The learned trial Judge thereupon gave judgment answering issue No. 9 in the affirmative and issue No. 10 in the negative and dismissing the plaintiff's action with costs. In so answering these issues the trial Judge held—

- (a) that P 1 was executed for valuable consideration paid by the vendee to the vendor ;
- (b) that neither William Ediriweera nor the plaintiffs had possession of the lands in suit since the execution of P 1 ; and
- (c) that the purpose of the execution of P 1 was to delay payment of the debts due from Ediriweera to his creditors and to put the transferred lands beyond their reach and that both of these illegal objects had been achieved.

He held on the authority of *Saurmma et al. v. Mohamadu Lebbe*¹ that as the plaintiffs, in order to establish a constructive trust as alleged by them, would have to rely on the fraud committed by Ediriweera in executing P 1, the maxim *in pari delicto potior est conditio possidentis* applies and they cannot, therefore, maintain this action.

In regard to the findings at (a), (b) and (c) above, there is sufficient evidence on record to justify them and I see no reason to disturb them. On these findings the position that emerges is that Ediriweera in executing P 1 intended to transfer to the 1st defendant not only the legal title to the lands in question *but also the beneficial interest in them* so as to put them beyond the reach of his creditors, fully believing that in due time the 1st defendant, in whom (as the 1st plaintiff herself stated) Ediriweera had complete confidence, would effect a re-transfer of the same lands in Ediriweera's favour. Assuming that the 1st defendant was aware of the purpose of the transfer (on which matter there is no definite finding by the trial Judge) the facts may have constituted a ground for a Paulian action at the instance of the creditors of Ediriweera who were defrauded by the execution of P 1, but it is apparent that no constructive trust was created on that deed, and if the occasion had arisen for the trial Judge to decide on the other issues as well, issue No. 1 would have had to be answered in the negative and the plaintiffs' action dismissed.

In regard to the actual ground on which the plaintiffs' action was dismissed, learned counsel representing them at the hearing of the appeal sought to distinguish the present case from that of *Saurmma et al. v. Mohamadu Lebbe* (*supra*) on the submission that even if the 1st plaintiff became aware of Ediriweera's fraud it was after P 1 had been executed and that as she was no party to it neither she nor, in any event, the other plaintiffs could be regarded as *in pari delicto* so as to justify the application of the maxim relied on by the trial Judge. Learned counsel had to concede, however, that had Ediriweera himself sued the 1st defendant for a declaration that P 1 had been executed in trust the maxim would undoubtedly have been applicable and his action dismissed. I do not see how the plaintiffs can claim to be in a better position since they too have to set up Ediriweera's own fraud as the ground on which they ask for the declaration that P 1 created a constructive trust.

Learned counsel for the plaintiffs also relied on the case of *Andris v. Punchihamy*². The report of this case has the misleading head-note that the point decided was that where A transferred his property to B without consideration and with the object of defrauding his creditors, it was open to the heirs of A to sue B for the same. The facts of that case are that the plaintiff sued for a declaration of title and ejectment of the defendant who was the widow of the vendor on a deed by which the latter purported to sell to the plaintiff for valuable consideration the land in dispute. The defendant while admitting the transfer stated that her husband (the vendor) received no consideration, that the deed was executed in trust and with the object of defrauding his creditors, that notwithstanding its execution the vendor remained in possession of the

¹ (1943) 44 N. L. R. 397.

² (1922) 24 N. L. R. 203.

land and that after his death she, as his widow, continued in possession. This evidence of the defendant was accepted by the trial Judge who, however, gave judgment for the plaintiff. But the judgment was reversed in appeal by Ennis J., who, while accepting the findings of fact arrived at by the trial Judge, held that although under Roman-Dutch Law a person who conveys with an intention to defraud is not entitled to any relief, this was a case where the plaintiff could not be allowed to enrich himself at the expense of the defendant who was in possession of the land. The judgment does not indicate whether the execution of the deed actually resulted in the creditors of the vendor being defrauded. In the present case, however, there is clear evidence that Ediriweera succeeded in achieving what he set out to do when he executed P 1, and even if the Roman-Dutch Law maxim that no person ought to be enriched at the expense of another (*nemo cum damno alterius locupletior fieri debet*) is applicable in an appropriate case, it cannot avail the plaintiffs in the present case since any unjust enrichment accruing to the 1st defendant was at the expense of Ediriweera's creditors and not of the plaintiffs.

The same maxim was applied in favour of the plaintiff in *Mohamedu Marikar v. Ibrahim Naina*¹ but that case too can be distinguished from the present case as it was held there that, although the plaintiff's transfer was without consideration and intended to defraud third parties, the contemplated fraud was not effected. On the facts of that case it could have been urged, therefore, that as between the plaintiff and the defendant, who was the administrator of the estate of the deceased transferee, there would have been unjust enrichment accruing to the transferee's estate at the expense of the plaintiff if the impugned deed was allowed to stand.

In my opinion the appeal fails and must be dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed.
