1916.

Present : Wood Renton C.J. and De Sampayo J.

FERNANDO *v.* FERNANDO.

119—D. C. Chilaw, 5,141.

Enormis læsio—*Resulting trust—Oral agreement to re-convey land.*

By what purported to be a deed of sale, plaintiff, when seriously ill, conveyed to defendant certain lands for Rs. 600, subject to the verbal agreement that defendant should re-convey the lands to the plaintiff if he recovered. The lands were actually worth about Rs. 2,000. Although the deed purported to sell the lands to defendant for Rs. 600, no sum ever passed, or was intended to pass, from the defendant to plaintiff.

Held, in an action for cancellation of the deed, that the doctrine of *enormis læsio* did not apply, as the transaction was not a sale, and that plaintiff could not rely on a resulting trust. The Court ordered the defendant to pay Rs. 600 to plaintiff.

THE facts are set out in the judgment.

Bawa, K. C. (with him *Balasingham*), for the defendant, appellant.

A. St. V. Jayewardene (with him *Sansoni*), for the plaintiff, respondent.

Cur. adv. vult.

May 31, 1916. WOOD RENTON C.J.— 1916.

Fernando v. Fernando

The plaintiff sues in this action for a cancellation of what purported to be a deed of sale by him of certain lands to the defendant for Rs. 600, on the grounds that, at the time when it was executed, he was seriously ill and incapable of realizing its true character or the value of the properties conveyed, and that the conveyance itself was subject to a tacit condition that the defendant should re-convey the lands to the plaintiff if he recovered. The defendant in his answer denied those allegations, and pleaded that the transaction was an out-and-out sale for full and fair value. Various issues were framed at the trial, raising the questions whether the deed created a resulting trust in the plaintiff's favour, whether there had been a failure of consideration in whole or in part, and whether the plaintiff had the right to have the deed set aside on the ground of *enormis læsio*. The learned District Judge heard evidence on both sides, and gave judgment in the plaintiff's favour, holding in effect that the true value of the properties at the date of the conveyance was about Rs. 2,000; that there had, therefore, been a sale at a price so grossly disproportionate to that value as to entitle the plaintiff to relief on the ground of *enormis læsio*, and that at the date of the conveyance in question he was in such a state of body and mind as to render him incapable of really understanding the value of the properties with which he was parting.

The real difficulty with which we are confronted in disposing of this case arises from the circumstance that neither side disclosed the true facts in the preliminary pleadings. No sum of Rs. 600 ever passed, or was intended to pass, from the defendant to the plaintiff. There is, therefore, no room for the application of the doctrine of *enormis læsio*,[1] as the transaction was not a sale at all. In all probability the transfer was effected on the tacit condition set out in the plaint. But that condition the plaintiff is not in a position to prove, as it was purely an oral agreement, if it existed at all. The plaintiff cannot, therefore, rely on a resulting trust. Moreover, the evidence of the notary, which the District Judge has not said that he disbelieved, shows clearly that at the time of the execution of the deed the plaintiff did know what he was doing. He insisted on two of his lands being left out of the deed, and came back to that subject again and again. He was able to walk to the notary's office when the deed was about to be signed. In the teeth of these facts it is impossible to give him relief upon any ground allied to a plea of *non est factum*. Upon the other hand, the defendant deserves neither sympathy nor indulgence. The major portion of his evidence, in regard to the circumstances in which the deed came to be executed, is obviously false, and he has taken most

[1] *Voet, 18, 5, 16, and Juta's Digest, vol. II., col. 2583.*

1916.

WOOD RENTON C.J.

Fernando v. Fernando

unscrupulous advantage of the facility of the plaintiff, who is his own cousin. I think that there is nothing to prevent us giving judgment for the plaintiff, however, on the ground of failure of the consideration which appears on the face of the deed. It is not right that the defendant should be allowed to retain the plaintiff's properties under an instrument of this character without paying anything for them at all. I would set aside the decree of the District Court, and direct judgment to be entered in the plaintiff's favour for the sum of Rs. 600, and I would leave each side to pay its own costs of the action and of the appeal.

DE SAMPAYO J.—I agree.

Set aside.