1922.

Present: Bertram C.J. and Schneider J.

RANASINGHE *et al.* *v.* FERNANDO *et al.*

35—D. C. Negombo, 14,913.

Proof of trust—Oral evidence—If there a difference between express and resulting trust?—Ordinance No. 7 of 1840, s. 2.

Where a person has obtained possession of a property of another, subject to a trust or condition, and fraudulently claims to hold it free from such trust or condition, he cannot be allowed to claim the advantage of the Statute of Frauds. Where such a state of affairs is alleged, oral evidence may be led to establish the trust.

In the application of this rule, no distinction is drawn between express and resulting trusts.

THE facts appear from the judgment.

Bawa, K.C. (with him *Croos-Dabrera* and *C. de Silva*), for the appellants.

Pereira, K.C (with him *Canakeratne*), for the respondents.

October 9, 1922. BERTRAM C.J.—

This is an appeal from a judgment of the District Court of Negombo. The subject of the action was a transaction between the first and second plaintiffs on the one side and the first defendant on the other. The second and third defendants play only subsidiary parts. The first plaintiff was in difficulties, and in the hope of being able to realize the best possible value for his properties, so as to discharge his liabilities, he made an arrangement with the first defendant

by which he and his wife and the third defendant, in whom two of the three properties subsequently to be referred to, were vested, were to transfer those three properties to the first defendant with a view to one of these properties—a valuable coconut estate—being sold, and the proceeds devoted first of all to paying the liabilities of the plaintiffs to the first defendant, afterwards to settling the liability of the plaintiffs to another creditor, and finally with a view to the balance being handed over to the first defendant for the discharge of his other liabilities. That was the object of the transaction as the learned Judge has found it, and I see no reason to differ from that view.

In order to carry out the arrangement the first and most valuable of the properties, Katukenda, was transferred to the first defendant. The plaintiff was indebted to the first defendant on a mortgage. It was, therefore, stated that the transfer was to be in discharge of the mortgage, and a small incidental liability connected with the transaction. The second property, Madangahawatta, was included in this transfer. With regard to the third property, which consisted of the interests of the second plaintiff in a property subject to a partition suit, a transfer was impossible. But an agreement was executed under which the second plaintiff agreed to convey her interests in the land on the conclusion of the partition suit. With regard to the consideration for this agreement, it was as follows: The first plaintiff was indebted to the first defendant, not only under the mortgage bond above referred to, but also on a judgment recovered upon a promissory note. It is said that the promissory note represented interest on the mortgage debt. But that point appears to be disputed, and will be the subject of further inquiry. This judgment debt was stated as the consideration for the agreement to convey the interest of the second defendant. It will thus be seen that both these deeds were of a fictitious nature, and their object was to carry out a trust, a trust of which there is no written evidence. The learned Judge has found that those were the facts, and I entirely agree with the view he has taken as to the facts.

The more one looks at the transaction, the more certain one is that it is a case such as was found by the learned Judge, and that the action of the first defendant almost from the first was fraudulent and unscrupulous. It is unnecessary for me to go into this part of the case more fully, as the learned Judge has himself dealt with it so adequately.

Certain questions of law, however, have been raised. Mr. Bawa, who appears for the first defendant, insists that the learned Judge in the Court below had no right to go into this question of the trust, inasmuch as the allegation as to the existence of the trust was supported only by oral evidence. With regard to that question, I have little or nothing to add to my recapitulation of the authorities

1922.

BERTRAM C.J.

Ranasinghe v. Fernando

to be found in my judgment in *Nanayakkara v. Andris.*[1] It has been established by a chain of authorities, which cannot now be disputed, both in England and in this country, that where a person has obtained possession of a property of another, subject to a trust or condition, and fraudulently claims to hold it free from such trust or condition, he cannot be allowed to claim the advantage of the Statute of Frauds. This is settled law, notwithstanding the more drastic terms of our own Ordinance. On this latter point I observe a further expression of opinion by Lord Atkinson in *Adaicappa Chetty v. Caruppen Chetty.*[2] I see no reason, however, to vary the opinion to which I have previously given expression that the more drastic terms of our Ordinance do not prevent the application of the English equitable doctrine. Moreover, that English equitable doctrine has been applied in a series of cases in our own Courts of which *Gould v. Innasitamby* [3] is the best known and which are binding upon us.

Mr. Bawa, however, ingeniously attempted to draw a distinction between all previous cases and this case. He insists that this is a case of an express trust, if it is a trust at all; and that all previous cases have dealt with implied or resulting trusts. I do not think that that distinction can be supported. It is a distinction never drawn, to the best of my recollection, in the numerous English cases by which the English equitable doctrine was gradually built up. That doctrine is always stated in plain and unqualified terms. Nor has the distinction ever been recognized in our own Courts. Indeed, Moncreiff J. in *Gould v. Innasitamby* (*supra*) stated explicitly that all the English decisions to which he referred were quite independent of section 8 of the Statute of Frauds, which refers to implied or resulting trusts. In my opinion, therefore, the legal point raised by Mr. Bawa cannot be sustained.

With regard to the further point that this deed was a deed in fraud of creditors, I am not satisfied that the first plaintiff had any real fraudulent intention. It is quite true that after the arrangements he had made for the sale of the property had broken down, and he had been left in the lurch by the first defendant, he did take refuge in this deed to procure his liberty from arrest. That, however, was a subsequent proceeding, and does not to my mind necessarily show that he had an original fraudulent intention. In the result, with regard to the main aspects of the case, I am of opinion that the appeal must be dismissed with costs.

But there are certain matters of detail which require working out. The learned District Judge has set aside three of the deeds executed in this case, and has awarded mesne profits to the plaintiff. This appears to leave the first defendant at large to enforce his mortgage debt. I think that this would not be a satisfactory result, as it would only lead to further litigation, and it is most desirable that in

[1] *(1921) 23 N. L. R. at p. 197.* [2] *(1921) 22 N. L. R. 417.*
[3] *(1904) 9 N. L. R. 177.*

this case all the matters between the parties should be finally settled. I think, therefore, that the right course for us to pursue is to carry out the arrangement which the parties originally intended. For this purpose, in my opinion, the deeds referred to by the learned Judge, together with two earlier deeds by which the first plaintiff had conveyed his interests in Katukenda and Madangahawatta to the third defendant, and the Fiscal's transfer of Periyamulla to the first defendant, should be cancelled, and the former property should be sold, and an account taken between the parties. Various incidental matters will require to be adjusted in the course of the account, and the second defendant, who has not contested the action but will be interested in this account, should, I think, be heard.

With regard to all these points and the other incidental matters with which he deals, I agree with the order proposed by my brother Schneider.

SCHNEIDER J.—

I have already agreed with the judgment delivered by my Lord the Chief Justice immediately upon the conclusion of the argument of this appeal. At his request I have drawn up this formal declaration of our order upon the appeal.

The decree appealed from is set aside, and the case remitted for further hearing for the purposes indicated below.

After the further hearing: (1) the District Judge should declare the first and second plaintiffs entitled to the lands Katukenda and Madangahawatta in the shares to which they were entitled in the said lands before April 20, 1918, but subject to the mortgages which existed over them at the said date, to wit, the mortgage created by bond No. 4,523 dated April 15, 1915 (D 15) in favour of the first defendant over the said land Katukenda, and the mortgage created by bond No. 14,452 dated September 17, 1917, over the land Madangahawatta, which said bond is referred to in deed No. 8,725 marked D 4, if the existence at that date be proved of that bond.

(2) He should declare the second plaintiff entitled to lot J awarded in partition action No. 12,405 in lieu of her undivided one-eleventh share of the land Periyamulla.

(3) He should award to the plaintiffs as against the first defendant the mesne profits of the land Katukenda as found by the decree of the District Court, but subject to an allowance for expenses of cultivation as from the month of June, 1918, until the plantiffs are restored to the possession of it, or until it is sold in execution of the decree herein. In the calculation of the mesne profits allowance should be made in favour of the plaintiffs, for the fact that such mesne profits might have been paid as often as the crops were picked by the first defendant, but were not paid. This allowance should be made in view of the fact that the amount decreed payable to the first defendant on the bond in his favour carries interest at 9 per

1922.

SCHNEIDER J.

Ramasinghe v. Fernando

centum per annum from April 20, 1920. The amount so ascertained to be due to the plaintiffs should be set off against the amount payable by them upon the bond ascertained as hereinafter indicated.

(4) He should ascertain the amount due as principal and interest upon the said bond No. 4,523 (D 15) up to April 20, 1918, and include in the decree an order in the form of a mortgage decree as of that date in favour of the first defendant for such amount, declaring the land Katukenda specially bound and executable under that decree. Such amount should be decreed to carry interest at 9 per centum per annum.

(5) As between the first defendant and the second defendant he should take an account of the moneys paid by the second defendant to the first defendant as consideration for deed No. 15,515 (D 9) upon the sale of Madangahawatta, and as consideration for deed No. 164 (D 1) upon the sale of lot J. After such accounting, he should include in the decree an order in favour of the second defendant against the first defendant, upon the footing that the moneys so paid by her carried interest at the rate of 9 per centum per annum as from the dates of such payments. The amount decreed is to carry interest at 9 per centum. If the second defendant should prove that she paid or discharged bond No. 14,453 of September, 1919, mentioned in D 9 at any time after the date of that deed, viz., September 21, 1918, he should include in the decree an order in the form of a mortgage decree in her favour for the sum paid by her, declaring the land Madangahawatta bound and executable under that decree as from the date of that payment.

(6) He should expressly declare that the first defendant's right to levy execution to recover the whole of any sum which may be due to him from the plaintiffs upon decrees already obtained by him, such as the decree in action No. 12,636, or his right to recover in these proceedings or otherwise moneys which he may have paid to any of the creditors of the plaintiffs, is untouched by the decree in this action.

(7) As regards the costs of parties in the lower Court, the District Judge should direct that the first defendant should pay to the plaintiffs their costs of the action, and that the second defendant should bear her own costs.

Sent back.