1937 *Present :* **Hearne J. and Fernando A.J.**

DE SILVA *v.* DE SILVA.

258—D. C. Galle, 33,787.

Sale—Agreement to repurchase within a stated period—Action to redeem brought after time limit—Nature of transaction—Pactum de retrovendendo.

Plaintiff made a conveyance of property to defendant for a consideration. It was provided in the deed that if the vendor were to repay the said consideration with interest then the vendee shall retransfer the premises on any day within one year from its date. Plaintiff instituted an action after the expiration of the year to redeem the premises on the footing that they were transferred to the defendant as security for the repayment of a debt.

Held, that the transaction was a contract of sale with a right to repurchase, time being of the essence of the contract.

Saminathan Chetty v. Vander Poorten (*34 N. L. R. 287*), *Wijewardena v. Pieris* (*15 C. L. Rec. 7*), and *Fernando v. Perera* (*28 N. L. R. 183*) referred to.

THE plaintiff instituted this action to redeem premises which had been conveyed by him to the defendant by deed P 1. The deed which was a conveyance of the premises to defendant provided that "if the said vendor were to repay the sum of Rs. 300 with interest thereon . . . . then the said vendee shall retransfer the said premises on any day within one year from the date of this deed". The defendant admitted that the plaintiff had tendered the principal sum with interest after the stipulated period and claimed that on the expiration of the period he became the absolute owner of the property. The learned District Judge held that the contract was a sale and dismissed the plaintiff's action.

H. V. Perera, K.C. (with him *G. P. J. Kurukulasuriya*), for the plaintiff, appellant.—The question to be decided is whether the transaction created by P 1 is a security for money advanced or a sale with a contract for a repurchase. No matter, what name or designation parties give to a contract or a transaction, the Court will inquire into the substance of the transaction and give effect to what it finds its substance or true nature to be. (*Wille on Mortgage, pp. 75 and 76 ; Zandberg v. Van Zyl*[1].)

The policy of the Roman-Dutch law appears to be against allowing the mortgaged property to become the property of the creditor if the mortgage debt is not paid off within the specified time. Roman-Dutch law recognizes something which bears a close resemblance to the principle of English law embodied in the maxim "Once a mortgage always a mortgage". (*Saminathan Chetty v. Vander Poorten*[2].)

Whether a transaction is a sale or a mortgage should be decided on a consideration of the contents of the documents themselves and the surrounding circumstances leading up to and surrounding their execution. This is permitted by section 83 of our Trusts Ordinance. (*Balkishen Das v. W. F. Legge*[3] ; *Narasingerji Jayanagerji v. Pannganti Parthasardhi Rayanam Garu*[4].)

[1] (*1910*) *A. D. at 309.*
[2] *34 N. L. R. 287.*
[3] *I. L. R. 22 All. 149.*
[4] *I. L. R. 47 Mad. 729.*

In the present case the sequence of events preceding this transaction combined with the facts, (*a*) that the property was in fact bought by the plaintiff from the defendant for a sum of Rs. 650 and resold on the same day to the defendant for a sum of Rs. 300 with a stipulation to recovery within one year if the plaintiff were to repay the sum of Rs. 300 with interest thereon at 18 per cent. per annum ; (*b*) that the beneficial interest was outstanding in the plaintiff, apart from a collateral agreement ; (*c*) that the purchase price was inadequate clearly indicate that the intention of the parties was to treat the transaction as a security for money advanced and not a sale.

Colvin R. de Silva (with him *M. T. de S. Amarasekera*), for the defendant, respondent.—*Primâ facie* the Court assumes that the nature of a transaction is such as it purports to be and the onus is on the plaintiff to show that it is something different. The onus is a heavy one, particularly where the transaction is contained in a notarial document.

It is conceded that the Roman-Dutch law regards with jealousy the efforts of a mortgagee to gain possession of a mortgaged property, but it is one thing to look with jealousy on a mortgage transaction and it is another to look into a transaction with jealousy to find out whether it is possible to interpret it as a mortgage.

The case of *Saminathan Chetty v. Vander Poorten* (*supra*) does not aid the appellant inasmuch as it is readily distinguishable. The same applies to the Indian cases cited. These are all cases where the contents of the documents themselves indicate the possibility that the real transaction was something different from what it purports to be as designated.

It is in such circumstances that evidence of extrinsic surrounding circumstances is allowed. Such evidence is allowed not under section 83 of the Trusts Ordinance, but under section 92, proviso 6, of our Evidence Ordinance.

In the present case the document itself raises no doubt or difficulty of interpreting language that would entitle the plaintiff to lead evidence of surrounding circumstances. Transactions of this nature cannot be regarded as mortgages save in exceptional circumstances. (*Wijewardena v. Pieris* [1].)

The plaintiff has failed to prove that this is a mortgage. Where the transaction is a sale with a contract to reconvey, time is of the essence of the contract (*Jeremias Fernando v. Perera* [2].)

H. V. Perera, K.C., in reply.—Each case must depend on its own circumstances. In *Jeremias Fernando v. Perera* there was a collateral agreement in pursuance of which the vendor was in possession. Here there was no such agreement.

In *Wijewardena v. Pieris* (*supra*) there were no circumstances to show that the beneficial interest in the land or any residue thereof was outstanding in the plaintiff. Here the beneficial interest was admittedly in the plaintiff.

Cur. adv. vult.

[1] *15 Law Rec. 7.*

September 20, 1937. HEARNE J.—

The plaintiff instituted an action to redeem certain premises which had been conveyed by him to the defendant by deed (P 1), alleging that the premises were transferred to the defendant as security for the repayment of a debt of Rs. 300 and interest at 18 per cent. per annum. The plaintiff remained in possession after the execution of P 1.

According to P 1 the plaintiff for a consideration of Rs. 300 made a formal conveyance of the premises to the defendant "Provided however that if the said vendor were to repay the sum of Rs. 300 with interest thereon at the rate of 18 per cent. per annum to be computed from this date, then the said vendee shall retransfer the said premises on any day within one year from the date of this deed".

The defendant admitted that the plaintiff had tendered the principal and interest to him but stated that the tender was made after the period stipulated in the deed had expired. The Judge found, as in fact the plaintiff admitted, that the tender was made after the stipulated period had expired and he rejected the plaintiff's evidence to the effect that the defendant had misled him regarding the period within which he (the plaintiff) was entitled to redeem. The defendant further pleaded that on the expiration of the stipulated period the plaintiff's right to a conveyance as well as his right to possess ceased and the defendant thereupon became the absolute owner of the premises.

The question before the Court was whether the transaction created a security for money advanced or whether it was a sale with a contract for a repurchase. The Judge held that it was a sale and dismissed the plaintiff's suit.

"It is a general principle of law" as Counsel for the appellant quoted "that no matter what name or designation the parties give to a contract or transaction, the Court will inquire into the substance of the transaction and give effect to what it finds its true substance or nature to be". This is of course subject to the rule that "*prima facie* the Court assumes that the nature of a transaction is such as it purports to be, and the onus is upon the person who asserts that it is something different to prove that fact" by evidence that is legally admissible to prove that fact.

The general principle I have quoted "applies particularly to contracts of security. Hence though the parties call their contract a mortgage or pledge the Court may hold it in fact to be a contract of another description; or *vice versa* may hold a contract to be a mortgage or pledge though the parties designate it as a contract of another description".

"Each case must depend upon its own facts; no general rule can be propounded which can meet them all".—*Wille at pp. 75 and 76.*

Thus in *Saminathan Chetty v. Vander Poorten*[1] the transaction effected by the deeds themselves construed in the light of circumstances leading up to their execution was, as the Privy Council held, no more than the creation of a security for money advanced; in *Wijewardena v. Pieris*[2] a most important consideration was that "there were no circumstances to show that the beneficial interest in the land or any residue thereof was outstanding in the plaintiff"; and in *Jeremias Fernando v. Perera*[3]

[1] *(1932) 34 N. L. R. 287.*
[2] *15 Cey. Law. Rec. 7.*
[3] *(1926) 28 N. L. R. 183.*

although the vendor remained in possession she did so in consequence of a collateral agreement to this effect and, as was held, the vendor understood the transaction to have effected a sale with a contract for repurchase.

The facts of this case require careful scrutiny. It may be that the parties intended to effect a pledge and not a sale. Considerations pointing to this being the case are that, while the transaction was on the face of it a *pactum de retrovendendo* attached to a contract of sale, the stipulation for reconveyance was created in favour of a vendor who retained the beneficial interest apart from a collateral agreement and who was indebted to the purchaser in the exact amount of the purchase price. But, notwithstanding these considerations, I am not prepared to displace the judgment for the reason that the Judge found, and in my opinion, had ample grounds in particular the plaintiff's conduct for finding that the plaintiff understood the transaction to be what, on the face of P 1, it is, a sale with a right to repurchase within a certain time, that time being of the essence of the contract.

On all the Judge's findings of fact I am in agreement with him and I would, therefore, dismiss the appeal with costs.

FERNANDO A.J.—I agree.

Appeal dismissed.