The Deputy Commissioner for Workmen's Compensation expressed the view that A2 and A1 indicated that the applicant-respondent "first sought relief through the intervention of the Assistant Commissioner of Labour at Ratnapura" and held, therefore, that the failure to institute the claim in due time was due to "sufficient cause". He awarded Rs. 600 as compensation, in addition to costs.

Section 16 (1) of the Ordinance enacts that "no proceedings for the recovery of compensation shall be maintainable before a Commissioner unless . . . . the claim for compensation . . . . has been instituted . . . . within six months from the date of death". Section 16 (2) states that "The Commissioner may admit and decide any claim to compensation in any case notwithstanding . . . . that the claim has not been instituted in due time . . . . if he is satisfied that the failure so . . . . to institute a claim . . . . was due to sufficient cause".

The petition A2 or the letter A1 cannot be regarded as an application for compensation to the Commissioner of Workmen's Compensation (*vide* sections 2 and 34). The proceedings before the Commissioner do not show why the applicant-respondent sent A2 and A1 to the Assistant Labour Controller, Ratnapura. No evidence has been given seeking to explain the delay in making the claim before the Commissioner. The Crown Counsel, who appeared as *amicus curiae*, pleaded that the applicant-respondent addressed A2 and A1 to the Assistant Labour Controller, Ratnapura, owing to her ignorance of the provisions of the Ordinance. Even on that plea, I am unable to hold there is "sufficient cause" within the meaning of section 16 (2). If I hold that the ignorance of the provisions of section 16 (1) is a "sufficient cause" for failing to comply with its requirements, I would, in effect, be repealing that part of the Ordinance (*vide Roles v. Pascall & Sons*[1].)

I am compelled to reverse the order of the Commissioner and dismiss the application of the applicant-respondent. I make no order as to costs.

Appeal allowed.

1949 *Present :* **Canekeratne J. and Basnayake J.**

PUNCHIMAHATMAYA, Appellant, *and* MEDAGAMA, Respondent

S. C. 420—D. C. Kandy, 1,133

Partition—Transfer of undivided shares—Option to re-purchase—Action for partition by vendee—Divided block—Sale to third party—Trust—Is third party bound by condition ?

Plaintiff and her son by P1 transferred an undivided share of land to the first and second defendants. P1 reserved a right for re-purchase and was duly registered. First and second defendants brought an action for partition of the land and were in the final decree allotted a specific lot in lieu of their undivided shares. By 3D1 they sold this lot to the third defendant, a brother of the first defendant.

Held, that the third defendant held the lot subject to the condition for re-transfer.

[1] *(1911) 1 King's Bench 982.*

APPEAL from a judgment of the District Judge, Kandy.

Cyril E. S. Perera, with *M. P. Spencer*, for plaintiff appellant.

N. E. Weerasooria, K.C., with *T. B. Dissanayake* and *W. D. Gunasekera*, for first, second and third defendants respondents.

Cur. adv. vult.

April 8, 1949. CANEKERATNE J.—

This is an appeal by the plaintiff from a judgment dismissing her action.

The plaintiff and her son the fourth defendant transferred a half share of certain premises to the first and second defendants, husband and wife, by P1, dated April 1, 1935, which was executed before a Proctor-Notary at whose office the first defendant was working as a clerk. P1 was not signed by the transferees, but a right of re-purchase was reserved to the vendors. These defendants brought an action for partitioning the premises and by the final decree dated July 15, 1938, they became entitled to a specific lot, *i.e.*, the lot described in Schedule B to the plaint in the present action. By deed 3D1, dated September 20, 1943, these two defendants sold the lot to the third defendant, a brother of the first defendant. The learned Judge took the view that P1 created no trust between the parties, but only a contractual relationship which was wiped out by the final decree.

Since the decision in *Jonga v. Nanduwa* [1], it must be accepted that the grantee who takes possession of land under a grant coupled with a condition reserving a right of re-purchase to the vendor is bound by the condition. The legal reason for giving that judgment or the judicial motive which caused the case to be so decided has to be ascertained; it must stand as authority for the principle of law abstracted from the facts of the case. It decided that the grantee received the beneficial interest burdened with this condition, and that such a case falls within the scope of Section 96 of the Trust Ordinance (Chapter 72 of the Ceylon Legislative Enactments). The case could not have been decided as it was without the recognition and application of the principle or rule, that the transferee was a constructive trustee for the transferor; this is brought out in page 132 of the Report.

In the case of an express trust [2] the cestuique trust can sue the trustee for any of the many breaches of trust which he may possibly commit, or for performance of the trust. The trustee generally has the full legal property or ownership in the whole of the trust property and the beneficiary has not. All that the latter can do is to claim the assistance of a Court to enforce the trust and to compel the trustee to discharge it. Sometimes he may have no contingent interest in the property given to the trustee (*e.g.* where a property is settled on him, the balance after payment of debts to be divided among the cestuis-que-trust); sometimes he may have a contingent interest in the property. He may, then, have

[1] *(1944) 45 N. L. R. 128.*

[2] *Some of the rights referred to in this paragraph are available to a beneficiary under a constructive trust.*

a right against the trustee arising in respect of the trust property. The cestui-que trust has also rights enforceable against the trustee, against all who claim through or under him as volunteers, against his creditors, and against those who acquire the trust property with notice, actual or constructive of the trust.

Section 9 of the Partition Ordinance is divisible into two parts, the first part states the effect of the decree, the second relates to the evidentiary value of it. The decree shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in the said property. Four classes of persons are referred to—one having a right in the property, one claiming to have a right in it, one having a title in the property, one claiming to have a title in it; thus a defendant may withhold the possession of the share of the plaintiff from the plaintiff, or he may be disputing the plaintiff's right to a share on valid grounds or unreasonably.

The object of partition proceedings is to convert co-ownership into sole ownership for the purpose of separating the co-owners. This is done by dividing the property into several parts and awarding to each of the previous co-owners sole ownership in one of the divided lots; the question of a sale is not considered. The transfer of the lots is accomplished by the judgment of the Judge, the adjudication which operates to change ownership without a transfer executed by the parties whether every other co-owner was made a party to the action or not. The judicial award in a partition action transfers the co-ownership, of a number of litigants to one, in a particular lot. The result being that A who was only co-owner before, is now converted into a sole owner, A gets rights which he had not before, namely the co-ownership of his adversaries and others, the effect being to divest the co-owners of their rights in a particular lot and to invest one person in the entirety of one lot.

The trustee is the person who can institute an action for partition for he is vested with title; a beneficiary cannot [1]. The trustee can also be made a defendant. It was, however, held at one time that a beneficiary was entitled to intervene in the action [2]—the grounds of the decision being that if the person who claimed to be a beneficiary under the trust was not allowed to intervene and the partition proceedings went on, he would no longer have been able to dispute the right of the parties to whom lots were allotted after final decree had been entered (P. 109), but this question was set at rest by a Divisional Court in *Marikar v. Marikar* [3] which decided that a trust, express or constructive, is not extinguished by a decree for partition.

The learned Judge has relied on that part of the decision in *Galgamuwa v. Weerasekera* [4], which states that a beneficiary would lose his rights on the entering of a final decree unless he intervened. But, that part has been whittled away by the case of *Marikar v. Marikar* (*supra*). Perhaps the law may now enable a beneficiary to make an application to intervene

[1] *Daniel v. Saranelis Appu. (1903) 7 N. L. R. 163.*
Silva v. Silva, (1916) 19 N. L. R. 47.
[2] *Galgamuwa v. Weerasekera, (1919) 21 N. L. R. 108.*
[3] *(1920) 22 N. L. R. 137.*
[4] *(1919) 21 N. L. R. 108.*

in a partition action, and if the trustee consents to the share claimed by him being allotted to the beneficiary, a Judge may allot it; it is clear now that the persons who as owners are entitled to invoke the assistance of a Court in an action for partition, whether as plaintiffs or as defendants, are persons in whom a legal title is vested. It is necessary that a person should have a *jus in re*. The plaintiff had no right in the land at the time of the action. What contest could arise between her and the two defendants, if she was made a party? If she was not entitled to be a party, the fact that she sent a petition to Court stating that she would not be responsible to pay any of the costs of the action when she came to settle the sum of Rs. 500 due under P1 is not relevant. The Court informed her that if she claims a share she should take steps to intervene. It is worth pointing out that the beneficiary in *Marikar v. Marikar* (*supra*) though himself otherwise a party to the action did not assert a claim to his equitable right in it. It can hardly be contended that the rights under an agreement to sell are extinguished by a partition decree for only contractual obligations are created thereby though they may be with regard to property. Mr. Weerasooria expressly stated that he does not challenge this.

The main point urged by Counsel for the respondent was that the present case does not come within the scope of Section 93 of the Trust Ordinance, he contended that there must be an existing contract between the first and second defendants and the plaintiff before the remedial provisions of the section can be availed of. Mr. Weerasooria's argument is that there must be a valid contract, *i.e.*, executed in accordance with the Statute of Frauds, and containing a promise by the promisor to sell. P1 is the only writing which the appellant ever obtained. It contains no promise by the first and second defendants to transfer the property. The substantial case of the appellant is that the property was held by the transferees as trustees for her. There is a clear distinction between the duty imposed by a trust and the liability created by a personal contract between parties. The obligation of a trustee towards his beneficiary is not conceived by English Law as contractual, though it would not have come into existence but for the agreement which resulted in making one a constructive trustee and the other a beneficiary. A purchaser from a constructive trustee is amply protected, Section 98 of Chapter 72. The third defendant was aware of the partition proceedings and he admits that he used to talk to his brother about the action. The property was at the time of the action in the possession of the first defendant, but the third defendant who is himself a cultivator asserts that his brother cultivates it for him. He told the Notary, the same person who attested P1, not to search for encumbrances. He knew that the first and second defendants bought the land from the plaintiff and her son. P1 was duly registered and in the remarks column is the statement—reserving the right to re-purchase the same within ten years for Rs. 550 (3D2). A prudent Notary looking after the interests of his client should have, if search was not dispensed with, examined the register and an examination would have revealed the existence of this condition. The first and second defendants were constructive trustees and there was an obligation imposed on them which everyone entering into a contract relating to a

land with them was bound to know, for it stood open and patent on the register. The third defendant did not want a search made as he had a suspicion that there was something wrong and refrained from asking questions of his brother; he did not wish to make further inquiry as regards the previous obligations imposed on his brother and sister-in-law. It would hardly be possible in the circumstances of this case for him to assert that he acted honestly in obtaining a transfer of the property. There is no evidence to show that he was a transferee in good faith and for consideration. There is his evidence that he paid at the execution of the deed a sum of Rs. 1,000 for this lot, although it and five other lands were then subject to a mortgage of Rs. 6,000. The burden was on him to prove that he was a transferee in good faith. He did not even plead that he was such a transferee nor was there an issue framed on this point—The issue was did he purchase the land from the first and second defendants with notice of the trust. If he was a purchaser from an express trustee he must show that he acquired the property without notice; he would have found greater difficulty in proving that he was such a purchaser. The defendant, a purchaser from constructive trustees is in the same position as his transferors, he holds the lot subject to the condition for retransfer.

The learned Judge has unfortunately not been referred to the principles applicable to a case of this kind, and has completely gone astray. The judgment of the lower court is set aside and judgment should be entered in favour of the plaintiff in terms of prayer one of the plaint. The defendants will pay half the costs of the trial and the costs of appeal to the appellant.

BASNAYAKE J.—I agree.

Appeal allowed.

1950 *Present*: Nagalingam J.

HINNIAPPUHAMY, Appellant, *and* COMMISSIONER OF MOTOR TRANSPORT, Respondent.

S. C. 45—Case stated for the opinion of the Supreme Court under section 4 (6) of Ordinance No. 45 of 1938

Motor Car Ordinance, No. 45 of 1938—Case stated for opinion of Supreme Court—Requirement of proof of compliance with provisions of section 4 (6) (c).

By section 4 (6) (*c*) of the Motor Car Ordinance, No. 45 of 1938, the duty is cast upon the party requiring a case to be stated for the opinion of the Supreme Court (1) to send to the other party notice in writing of the fact that the case has been stated on his application, and (2) to supply that other party with a copy of the stated case.

Held, that before the Court could enter upon a consideration of the case stated there must be proof before it that the appellant attended to the requirements of section 4 (6) (c).