1956 *Present :* Weerasooriya, J., and H. N. G. Fernando, J.

R. G. DE SILVA, Appellant, *and* M. V. ZOYSA *et al.*, Respondents

S. C. 118—D. C. Balapitiya, 423

Sale of immovable property—Conveyance coupled with clause for reconveyance—Oral evidence of mortgage—Admissibility—Tender of money—Quantum of evidence.

In a transfer of immovable property, what purports to be a conveyance coupled with a clause for reconveyance on payment of a certain sum of money within a stipulated period cannot be proved by oral evidence to have been in reality a mortgage.

Quantum of evidence necessary to prove tender of money before the due date considered.

APPEAL from a judgment of the District Court, Balapitiya.

Sir Lalita Rajapakse, Q.C., with *Bertram J. de Zylva*, for the 2nd defendant-appellant.

S. C. E. Rodrigo, for the plaintiff-respondent.

Cur. adv. vult.

March 28, 1956. H. N. G. FERNANDO, J.—

The plaintiff in this action has been granted a decree declaring that two deeds executed by him are in the nature of mortgage bonds and that he is entitled to obtain a discharge of the bonds on payment of specified sums of money.

By a notarial document dated 11th October, 1949, described on its face as a Bill of Sale, the plaintiff sold and conveyed certain immovable property to the 1st defendant for a sum of Rs. 750, " reserving the right to have a reconveyance within two years on payment of the said principal and interest ". By a second notarial document of 1st July, 1950, described as a transfer, the plaintiff sold and conveyed to the 1st defendant for a sum of Rs. 470 " the right to re-purchase " the same property, which right had been reserved to the plaintiff by the earlier deed, while again reserving the right to re-purchase the right now sold on any date " within one year, three months and eleven days " of 1st July, 1950. It will be seen that, while the reservation in the first deed was a right to a reconveyance if a sum of Rs. 750 together with interest was paid before 11th October, 1951, the effect of the second deed was that the right to a reconveyance would be lost unless the plaintiff *in addition* re-paid within the same stipulated period a further sum of Rs. 470 with interest. In so far as the 1st defendant was concerned, the second payment which he made had the consequence of increasing the amount which the plaintiff would have had to pay for the reconveyance and thus of diminishing the chance of the exercise of the right to claim the reconveyance.

It was admitted that the plaintiff was entitled to remain in possession of the land in terms of the first deed and did in fact continue in possession. It is also in evidence that the plaintiff borrowed two sums of Rs. 250 and Rs. 120 from the 1st defendant in December, 1949. These loans represent the amount of consideration for the second deed of July, 1950, and it may be assumed that the necessity for the second deed arose because the plaintiff was unable to repay those loans. These circumstances do indicate that the plaintiff in all probability regarded his transactions with the 1st defendant as being loans upon the security of land and hoped for an improvement of financial circumstances to release him from his liabilities. But the difficulty in which the plaintiff finds himself is that the legal form of the transactions was that of a sale coupled with a clause for a reconveyance and not that of a mortgage.

In view of the recent judgments of the Privy Council and of this Court, it is now too late to take up the position which the plaintiff has attempted to take in this case. Their Lordships of the Privy Council in *Saverimuttu v. Thengavelautham et al.* [1] approved the principle laid down in *Perera v. Fernando* [2] that "where a person transferred a land to another by a notarial deed, purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage and that the transferee agreed to reconvey the property on payment of the money advanced". If what purports to be a sale pure and simple cannot be proved by oral evidence to have been in reality a mortgage, neither can a conveyance coupled with a clause for reconveyance on fulfilment of a stipulated condition be shown to have been a mortgage. This latter proposition was clearly recognised by this Court in the recent case of *Setuwa v. Ukku* [3] after an examination of all the relevant authorities. The finding of the learned District Judge that the transactions which are the subject of this action constituted a mortgage cannot therefore be sustained.

Counsel for the appellant has argued that the deeds relied on by the plaintiff do not even establish a valid agreement to reconvey the property, for the reason that they are signed only by the transferor, and that there is no notarially attested writing binding the transferee to reconvey. It is not, however, necessary to decide whether this argument should succeed since the plaintiff's action must fail even upon the assumption that there was a valid agreement to reconvey.

The learned District Judge, having held on the law that the transaction between the plaintiff and the 1st defendant was in reality a mortgage, went on to find upon an issue of fact that the plaintiff did tender to the 1st defendant on or about 3rd August, 1951, the two amounts which he had to repay as a condition precedent to the reconveyance of the property. But this finding is quite unsupported by the evidence. The plaintiff stated in chief that he tendered the money to the 1st defendant at the latter's boutique at Ratmalana once on 3rd August, 1951, and again two days later: on each occasion he was informed that the 1st defendant would come to the plaintiff's village (in the Southern Province) to receive the money; but the 1st defendant failed to go to the

[1] *(1951) 55 N. L. R. 529.* [2] *(1914) 17 N. L. R. 486.*
[3] *(1955) 56 N. L. R. 337.*

village as promised. The plaintiff also stated that he then informed the Debt Conciliation Board about the transaction. In cross-examination the time of the tender was changed to the first week in September, and there was the additional allegation that the Debt Conciliation Board asked the 1st defendant to accept the money. This last allegation would have been decisive if it was supported either by the evidence of an officer of the Board or even by the production of a copy of the plaintiff's application to the Board. But no such evidence was available at the trial. Having regard to the purposes for which the assistance of the Board is usually sought, the probabilities are all in favour of the 1st defendant's version that the plaintiff made his application to the Board only in an endeavour to secure an arrangement for payment by instalments and not in order to tender immediate payment.

As to the alleged tender at Ratmalana, there was not only the contradiction as to the date of the tender. The plaintiff apparently allowed the sands to run out without writing any letter to the 1st defendant on the subject of the repayment and without consulting his lawyers as to the action he should take in order to secure the reconveyance. Even when he came into Court, he did not, as is usual in such cases, bring in the moneys payable for the reconveyance. Moreover his cause of action was not upon the footing of a conditional transfer and a tender in fulfilment of the condition, which would have been the obvious course if there had in fact been a tender in due time. The allegation of tender was quite irrelevant to the plea that the transactions were in reality a mortgage. The choice of this plea is to my mind a strong indication that the plaintiff's advisers had themselves little confidence in his ability to prove the tender. The plaintiff has in my opinion failed to discharge the burden of proving the tender, and the relevant issue should have been answered in favour of the defendants.

For these reasons I would set aside the decree entered in favour of the plaintiff and dismiss his action with costs in both Courts.

WEERASOORIYA, J.—I agree.

Appeal allowed.