1930

Present: Fisher C.J. and Akbar J.

SOMASUNDERAM CHETTY *et al.* *v.* VANDER POORTEN.

174—D. C. Colombo, 20,662.

Contract—Transfer of land settled by Crown—Purchase money provided by transferee—Agreement to recoup by sale of land—Oral evidence to contradict agreement—Trust—Action for reconveyance.

The plaintiffs transferred a land settled on them by the Crown to the defendant, who provided them with the funds necessary to purchase the land from the Crown. A contemporaneous notarial agreement was entered into between the parties by which the defendant " held and stood possessed of the said land as absolute owner and with full power and authority to manage and control the same . . . ., to put the said lands to such use as he shall think fit in his absolute discretion and to sell the lands for the best available price . . . ., and to apply all the moneys realized by him in respect of sale, in payment of such sums as shall be due and payable to him for moneys advanced to the Crown and moneys expended on the management, control, and working of the said lands . . . ., and shall pay over the balance *pro rata* according to their respective interests " to the plaintiffs or their successors in title.

Held, that the relationship created by the agreement was a contractual one and not of *trustee* and *cestui que trust*, and that no oral evidence was admissible to contradict the terms of the agreement.

Held further, that the plaintiffs were not entitled to ask for a reconveyance of the land on payment of the purchase money or for an accounting till the land had been sold by the defendant.

THE paintiffs sued the first defendant for breach of contract with respect to a land purchased by them from the Crown or alternately as a trustee. It was alleged that the plaintiffs acquired

a right to have a tract of land, 14,000 acres in extent, conveyed to them by the Crown on the payment of a sum of Rs. 275,000. The defendant at the request of the plaintiffs provided them with funds to purchase the property, which was subsequently transferred by them to the defendant.

At the same time a notarial agreement was entered into between the parties by which the conditions under which the property was transferred were set out. It provided that the first defendant should stand possessed of the property as owner, should be at liberty to sell the land at a certain price, and after such sale should apply the moneys realized in payment of the loan due to him and of all moneys spent by him in the management and control of the land. The plaint averred that the defendant had failed to sell the land as arranged, and that the plaintiffs were ready and willing to repay all sums given and expended by him. They asked for a declaration that they were entitled to reconveyance of the land on payment of the said sum of money.

The plaintiffs claimed in the alternative that the defendant was a trustee for them. The defendant alleged in his answer that he has duly performed and is willing to perform the terms of the agreement, and that no cause of action had accrued to the plaintiffs and that, until he had sold the lands, the action was premature. The learned District Judge held that the defendant held the property in trust for the plaintiffs and that they were entitled, on payment of the money due, to demand a reconveyance of the property.

H. V. Perera (with him *J. R. V. Ferdinands*), for first defendant, appellant.—There is no trust; the terms of the agreement between the parties are embodied in the document P4. The rights and obligations arising upon this document are purely contractual; that document does not disclose any trust.

Oral evidence of intention, acts, or conduct is not admissible to contradict, vary, or add to the terms of the document P4. Counsel referred to section 92 of the Evidence Ordinance, *Balkishen Das v. Legge*,[1] *Balkishen Das v. Narain*,[2] and *Rama Raju v. Sabha Raju*.[3]

The trust alleged by the plaintiffs-respondents must be embodied in a notarial document. Counsel referred to Ordinance No. 7 of 1840 and *Adaicappa Chetty v. Caruppen Chetty*.[4]

In any event no cause of action had accrued to the plaintiffs on the date of institution of action; the action is premature.

Hayley, K.C. (with him *Francis de Zoysa, K.C.*, and *N. E. Weerasooria*).—The document P4 must be construed with reference to all the circumstances. The conduct of the respondent subsequent

[1] *22 All. 149.*
[2] *30 Cal. 738.*
[3] *25 Mad. 7.*
[4] *22 N. L. R. 417.*

1930.

Somasundaram Chetty v. Vander Poorten

to the execution of P4 shows that he admitted that he was a trustee; an examination of the language of P4 shows that there was no absolute conveyance in favour of the defendant-appellant.

Oral evidence of intention and conduct is admissible. Counsel cited the following authorities: *Nanayakkara v. Andris*,[1] *Ranasinghe v. Fernando*.[2]

H. V. Perera, in reply.—Oral evidence as to subsequent conduct is not admissible. Counsel referred to *Woodroffe and Ameer Ali's Commentary* on the Indian Evidence Act, s. 92.

March 12, 1930. FISHER C.J.—

In this case the original plaintiffs sued the defendant, the present appellant, claiming that he was under liability to them by reason of a breach of contract or alternatively as a trustee. The subject-matter of the action, a tract of land 14,000 acres in extent, was valued by the plaintiffs in the plaint at Rs. 1,852,522. The interest of the plaintiffs is now vested in the first respondent to the appeal. The second respondent was made a defendant in the action by the plaintiffs. He is only concerned in this appeal in respect of an order for costs.

The history of this case is as follows:—By an agreement with the Crown which is embodied in a decree dated March 28, 1923, certain persons, amongst whom were the original plaintiffs in the action, acquired a right to have the lands in question conveyed to them by the Crown " provided that a sum of Rs. 275,000 is deposited with the Settlement Officer within 12 months of this date. " On March 27, 1924, the persons entitled to exercise the right of purchase found themselves unable to pay the purchase money. They therefore went in a body to the appellant, who prior to that date had expressed himself as unwilling to advance them any money for the purpose of effecting the purchase, and made a final effort to get his assistance. The situation was desperate and they put themselves entirely in the hands of the appellant. In the result their efforts were successful, they handed over to the appellant the sum of Rs. 64,000 which they had raised amongst themselves, the appellant gave them a cheque for Rs. 275,000 and the purchase money was paid into the Treasury within a few minutes of the expiration of the time within which it had to be paid. The benefit of the decree was assigned to the appellant on March 29, 1924, and the assignors covenanted " that in the event of the Crown refusing to issue a Crown grant in favour of the said A. J. Vander Poorten and issuing a Crown grant in their favour the assignors will immediately thereafter execute a conveyance of the said land in favour of the said A. J. Vander Poorten. " The Crown declined to issue a Crown grant in favour of the appellant, and on

[1] *23 N. L. R. 193.* [2] *24 N. L. R. 170.*

March 2, 1925, two documents (P3 and P4), which for the purposes of these proceedings have been treated as inseparable, were executed. By P3 the lands in question were transferred to the appellant and by P4 the conditions upon which the property had been transferred to him were set out. The appellant entered into possession of the property and spent considerable sums on its development. Meanwhile, those who had conveyed the property to him executed a deed (P2) defining their various interests. To this document the appellant was not a party. There were various dealings by the transferring parties with their interests, and some efforts were made on their behalf to get a purchaser for the property. The appellant too, by a document dated July 27, 1926, gave an option, exercisable within 18 months, to purchase the property to the second respondent to the appeal. Certain correspondence passed between the parties and on July 29, 1926, the plaintiffs brought the present action. The plaint sought to fix the defendants with liability " for having failed to sell or arrange the sale of the said premises and the plaintiffs being ready and willing to repay to the first defendant the said sum of Rs. 205,840 together with reasonable compensation and profit and moneys expended as aforesaid, the plaintiffs have called upon the first defendant to reconvey the said property to the parties described in the said agreements 471 and 472 (P3 and P4), but the first defendant has refused so to do unless he receives in addition to the said sum of Rs. 205,840 a sum of Rs. 294,160 and has failed to render any account of the moneys expended by him as aforesaid. " (See paragraph 5 of plaint.) The plaintiffs alternatively claimed that the appellant was a trustee for them. They said that (paragraph 12) " the property is now reasonably worth Rs. 150 per acre," and (paragraph 13) that the appellant " fraudulently and in breach of trust aforesaid is attempting to effect a fictitious sale to a nominee of his at a price less than the market price with the object of securing the said property for himself and is further preventing a sale at a better price by the plaintiffs. " The appellant in his answer said that he had duly performed and is willing to perform the terms of the agreement set out and that no cause of action had accrued to the plaintiffs against him. In conclusion he alleged that no cause of action could arise against him until he sold the said lands and that the present action was therefore premature.

The learned Judge of the District Court gave judgment in favour of the plaintiffs. He held *inter alia* that on payment of the money due to the appellant the third and fifth plaintiffs were entitled to demand a reconveyance of the property; that the appellant held the property in trust for the plaintiffs; that the appellant had failed to sell the property in terms of the agreement; and that the action was not premature, and he ordered the appellant to file an account.

1930.

FISHER C.J.

Somasunderam Chetty v. Vander Poorten

The present first respondent to the appeal is the legal personal representative of Somasunderam Chetty, deceased, who sued as third and fifth plaintiffs in two capacities.

The question for our decision is with regard to the effect of P4. That document after reciting *inter alia* that the appellant has "provided funds and assisted the parties of the second part to deposit with the Settlement Officer the purchase money for the conveyance to them by the Crown of the lands" in question and that "the parties of the second and third parts have required the party of the first part to enter into these presents and declare their interests in the said premises" proceeded as follows:— "Now know Ye and these presents witness that the party of the first part shall hold and stand possessed of the said land as absolute owner and with full power and authority to manage and control the same, to fell, remove, and dispose of the timber therein and put the said lands to such use as he shall think fit in his absolute discretion, and to sell the said lands for the best available price with or without the timber therein—such price to be in his absolute discretion provided that if the price is less than Rs. 100 per acre he shall obtain the approval of the parties of the second part for such sale—and to apply all moneys realized by him in respect of the sale of such timber and of the said lands or any portion thereof in payment of such sums as shall be due and payable to him for moneys advanced to the Crown for the said purchase from the Crown and moneys expended on the management, control, and working of the said lands as aforesaid and of such compensation or profits for himself as he shall think reasonable and equitable in his own discretion and shall pay over the balance *pro rata* according to their respective interests amongst the said parties of the second and third parts or their successors in title and such other person or persons and shall have a legal claim to or interest in the said lands, provided however that it shall not be obligatory on any purchaser from the party of the first part to see to the application of the purchase money by the said party of the first part in manner herein provided and receipt by him shall be full and complete discharge to such purchaser from the payment of such purchase money."

This document was notarially executed and was stamped with a Rs. 10 stamp.

Evidence of subsequent acts and of other documents subsequently executed was tendered on behalf of the plaintiffs at the trial in order to show the relationship of the parties and the interest of the plaintiffs in the land after the transfer. For the appellant it was contended that this evidence was inadmissible and that P4 alone can be looked at for the purposes of ascertaining the rights of the parties.

In my opinion the latter contention is correct and I do not think that the judgment accords with the situation created by P4. So far as the questions arising in this case are concerned, I think P4 is self-explanatory and we cannot have resort to matters which took place after it was executed for the purpose of determining the rights of the parties. The document itself and the evidence of the circumstances incidental to its execution clearly indicate that P4 was intended to definitely set out the rights of the parties. In my opinion the relationship created by that document is not that of trustee and *cestui que* trust but is purely contractual. Nor do I think it is correct to regard the land as being a security for a debt. By P3 the transferors parted with all their interests in the land itself and P4 contains no agreement by the appellant to reconvey. P4 undoubtedly put the appellant in a very predominating position. It was almost as if he had said : " Transfer the property to me and trust to my generosity." The appellant, however, has not taken up that position. He admits that he is under a contractual obligation to the first respondent, and I think the only question is whether at the time the action was brought he had committed a breach of contract. By P4 he is obliged to sell at some time, but as regards price his discretion is unfettered provided he sells at not less than Rs. 100 an acre. It is, of course, quite as much to his interests as to that of the respondent to get a good price for the property, but inasmuch as the matter of price is entirely within his discretion in the absence of proof of anything amounting to fraud the first respondent does not seem to have any say in the matter. The appellant is entitled to say " this is my property, to be sold at any price I think reasonable provided it is not less than Rs. 100 an acre."

The agreement P4 is dated March 2, 1925, and the action was brought on July 29, 1926. Can it be said that it is unreasonable not to have sold a property of this character within a period of a little over 16 months? There can be no doubt that the appellant has endeavoured to sell the property. A witness for the plaintiff said " I believe he has been trying to sell the property." A witness was called by the plaintiff who deposed that he was in the process of considering the desirability of buying the property but before he could do anything " litigation started and there the matter ended."

In my opinion no failure to sell has been proved against the appellant which would constitute a breach of P4, and he had therefore not been guilty of a breach of contract at the time the action was brought. Inasmuch, however, as he admits in his answer that he is under some contractual obligation to the respondent it is to be hoped that the parties will see their way to elucidate the question of the exact nature and extent of that obligation by negotiation.

1930.

FISHER C.J.

Somasunderam Chetty v. Vander Poorten

The decree will be set aside and judgment will be entered dismissing the action with costs as against both the defendants. The respondent will pay the second defendant's costs in the Court below up to and including July 31, 1928, and also the costs of this appeal.

AKBAR J.—

This is an appeal from the order of the District Judge holding that the first defendant was a trustee in respect of the property which is the subject-matter of this action and ordering the first defendant to file an account in respect of it within a month of the date of the decree and further ordering the first defendant on receipt of the money due to him on the accounting to reconvey to the substituted plaintiff the shares of the third and fifth plaintiffs in the property. To understand the point arising in this appeal it is necessary to state that by decree entered in a case under the Waste Lands Ordinance, No. 3,656, D. C., Badulla, the Crown agreed to sell to the plaintiffs in that case a large tract of Crown land known as Thanketiya at the rate of Rs. 20 per acre provided the sum of Rs. 275,000 was deposited with the Settlement Officer within 12 months of the date of the decree, namely, March 28, 1923. The interests of the plaintiffs in that case are represented by the plaintiffs and second to the seventh defendants in this case to a large extent and may for the purpose of this appeal be taken as identical. After various efforts made by the plaintiffs and the second to the seventh defendants (hereinafter referred to as the plaintiffs) to raise the sum they managed to secure a cheque for the amount from the first defendant on the very last day the money was due, namely, March 27, 1924, the plaintiffs providing Mr. Vander Poorten with cheques amounting to Rs. 64,000. The evidence of the first plaintiff in this case, whose interest has since been bought by the first defendant and who has withdrawn his claim in this case, shows that the first defendant was at first not willing to lend the money and that in fact it was only by an accident that he consented to give the sum due and that the plaintiffs were in very desperate straits when they pleaded with the first defendant for the loan of the money. The material part of his evidence on this point is as follows:—"Before Mr. Vander Poorten handed us that cheque we threw ourselves on Mr. Vander Poorten's mercy again and he could have dictated and taken any terms he wanted at that time. We were prepared to accept any terms bar giving him the whole property. The great point was that we should have lost all that we had in the business unless we consented. We would have lost our property and money as well. No terms were mentioned on that occasion, except that he said that he would come to our rescue and help us and that we must do our best and try to realize this money as soon as possible. He said that he is not doing this for any personal benefit but that he sees our

plight and that he would not let the Government deprive us of this land. He asked Mr. Weerasuriya to look after his interest." This evidence clearly shows that had it not been for Mr. Vander Poorten coming to the assistance of the plaintiffs the latter would have lost the whole land and the sums that they had already spent in respect of it, namely, nearly Rs. 200,000. Then come two important documents executed on the same day, March 2, 1925, namely, the two documents numbered 471 and 472 and marked P3 and P4. By P3 the plaintiffs conveyed to the first defendant their right, title, and interest in the land, which is the subject-matter of this action. The other document is P4 executed immediately after P3 and is signed by the first defendant, wherein it is recited that the first defendant had provided funds and assistance to the plaintiff to deposit the purchase money for the conveyance to the plaintiffs by the Crown of the land above mentioned and that P3 had been executed on the same day, and then the document proceeds as follows:—"And whereas the parties of the second and third parts have required the party of the first part to enter into these presents and to declare their interests in the said premises:

"Now know Ye and these presents witness that the party of the first part shall hold and stand possessed of the said land as absolute owner and with full power and authority to manage and control the same, to fell, remove, and dispose of the timber therein and put the said lands to such use as he shall think fit in his absolute discretion and to sell the said land for the best available price with or without the timber therein—such price to be in his absolute discretion provided that if the price is less than Rs. 100 per acre he shall obtain the approval of the parties of the second part for such sale—and to apply all moneys realized by him in respect of the sale of such timber and of the said lands or any portion thereof in payment of such sums as shall be due and payable to him for moneys advanced to the Crown for the said purchase from the Crown and moneys expended on the management, control, and working of the said lands as aforesaid and of such compensation or profits for himself as he shall think reasonable and equitable in his own discretion and shall pay over the balance *pro rata* according to their respective interests amongst the said parties of the second and third parts or their successors in title and such other persons or persons as shall have a legal claim to or interest in the said lands. provided however that it shall not be obligatory on any purchaser from the party of the first part to see to the application of the purchase money by the said party of the first part in manner herein provided and receipt by him shall be full and complete discharge to such purchaser for the payment of such purchase money.

"In witness whereof . . . . ".

1930.

AKBAR J.

Somasunderam Chetty v. Vander Poorten

The first plaintiff's evidence with regard to this document P4 is as follows:—"Mr. Weerasuriya was acting on behalf of Mr. Vander Poorten with regard to those further arrangements. 471 and 472 were executed before the same notary on the same day. All parties consented to the terms of the deeds before they were executed. The terms agreed to by the parties were embodied in the deed. The deed 471 (P3) purported to be a deed of transfer. Deed 472 was executed more in the interests of the syndicate. The chetties and others wanted it made clear that they were not going to give an out-and-out conveyance, and therefore the agreement was signed. The chetties wanted some assurance. They wanted the conditions limiting the full ownership put down in the deed 472. Mr. Vander Poorten said he did not mind that being done. There was complete agreement between the two parties regarding these two documents. According to the terms of the agreement it was agreed that Mr. Vander Poorten should not sell the property under Rs. 100 an acre unless he got the permission of the syndicate. That is because we realized that Rs. 100 was about the lowest possible figure that could be put on the property at that time. The market value of the property at that time was about Rs. 150 an acre. We expected Mr. Vander Poorten to try and get at least Rs. 150 because the more he got the more we and he would have been benefited. If he got more we would have given him something more. I believe he has been trying to sell the property. I know that even Mr. Meedeniya who was in England at the time was trying to sell the property there."

The second plaintiffs evidence on the same subject is as follows:—"I was asked to sign an absolute transfer, that is, the deed No. 471, but I objected strongly saying there was no meaning in signing a transfer a second time. I said we had assigned the decree to secure Mr. Vander Poorten's interests, and that if we signed another transfer it will argue against us. Then there was some talk about the Crown grant and I said let there be an agreement to prove that it is not an absolute transfer that is being given and then I consented to sign the transfer. Therefore the deed 472 was drawn up and both documents were signed at the same time. I was the only one who insisted that there should be an additional document and they all agreed."

He says further on as follows:—"It was I who wanted a contemporaneous agreement and he asked me to draft, and I drafted the deed 472. I drafted it in Mr. Weerasuriya's office. In doing so I was acting on behalf of myself and the others, because I thought they were erring. The terms and conditions which are in 472 were made by all the parties and it was read and explained to them. Documents 471 and 472 were one document and we thought we hit upon the main features of the contract between the parties."

It is urged for the respondents that the true intention of the parties as evidenced by the surrounding circumstances, by the conduct of the first defendant, and even by the very terms of P4, was to create a trust over the property, whereby the first defendant was given the land as security for his loan, but he was to sell the land, and from the proceeds after recouping himself for the loan and other expenses, the balance was to be distributed among the plaintiffs, in the shares set forth in the document P2 (to which, it may be here mentioned, the first defendant was not a party). The respondents' counsel then went on to urge that the first defendant had committed a breach of this trust in the manner set forth in paragraphs 5 and 13 of the plaint, and that therefore the respondents as *cestuis que trustent* were entitled under section 58 of Ordinance No. 9 of 1917 to ask for a reconveyance of their shares. The first point that has to be decided in this case is whether there was a trust as alleged or whether the terms of the agreement are confined to the document P4. On the question of conduct reference was invited to documents P6 and P7 under which the first defendant bought the interests of the first plaintiff and the third defendant in the land after this action was started. I do not see why the first defendant's effort to put a stop to the activities of some of his more powerful antagonists, who were trying to involve him in costly litigation, should be construed as proving the trust in the case of his other antagonists (see *Vissanji, Sons & Bharoocha*[1]). Then reference was invited to the documents P5 and P11, and the use of the word " trustee " in a letter sent to the first defendant by some of the plaintiffs. I fail to see how the use of the word " trustee " in this letter can be adduced as evidence of conduct on the part of the first defendant showing that the transaction was in effect a trust. Lastly, as shown in P12, an action was brought by the first defendant and some of the plaintiffs in respect of the 1,000 acres expressly excluded in P3 and P4. I am unable to appreciate how first defendant's conduct with regard to one land can be construed as showing the true nature of the transaction relating to another land.

It is true that the document P4 bears on the face of it certain expressions which limit the rights of full ownership as evidenced by P3. But when two such formal documents as P3 and P4 are drawn and executed at the same time one after the other, and especially when P4 was expressly drafted to conserve the rights of the syndicate, one would have thought that P4 was exhaustive on the subject. In fact the last recital in P4 says expressly that " the parties of the second and third parts have requested the party of the first part to enter into these presents and to declare their interests in the premises." But no, the argument is that the real transaction is something more than the explicit promise contained

[1] *I. L. R. 36 Bom. 387.*

1930

AKBAR J.

Somasunderam Chetty v. Vander Poorten

in P4 to be performed by the first defendant. I do not think that the respondent is entitled to go behind P4 which has been stamped as an ordinary deed and not as a trust and to prove a trust by oral evidence of conduct and circumstances, contradicting in some respects the plain terms of P4. P4 declares that first defendant is in possession as absolute owner and that he can fell, remove, and sell the timber in any manner he likes and that he can sell the land at any price he likes, provided that if he proposes to sell the land at less than Rs. 100 per acre he is to obtain the approval of the parties of the second part. And *after such sale*, first defendant is to apply all moneys realized by the sale of timber and of the land in payment of all moneys due to him on the loan and as the costs of the management and control of the land; and first defendant is further enjoined to pay himself "such compensation or profits for himself as he shall think reasonable and equitable in his own discretion"; and after all this has been done, the balance is to be distributed amongst the rest. This document makes it clear that the plaintiffs had no right to ask for an accounting till a sale had taken place. To ask, therefore, for an accounting before a sale had taken place on the footing of a trust and to ask that the property should be reconveyed to the plaintiffs will amount to a variation of the terms of the document P4. This I think the plaintiffs are not entitled to ask in view of section 92 of the Evidence Ordinance (*Balkishen Das v. Legge*,[1] *Balkishen Das v. Narain Sahu*, [2] and *A. Rama Raju v. Sabha Raju*. [3]).

Even supposing there was a trust as alleged, what is the breach of trust or the cause of action alleged ? They are said to be indicated in paragraphs 5 and 13 of the plaint. The alleged defaults on the part of the first defendant are (*a*) that he failed to sell or arrange a sale, (*b*) that the plaintiffs were ready and willing to repay the sum of Rs. 205,840 loaned and the other sums due and had called on the first defendant to reconvey the property and that the first defendant had refused to comply unless he received a further sum of Rs. 294,160, (*c*) that first defendant had failed to render an account, (*d*) that first defendant is attempting fraudulently to effect a fictitious sale.

On the question whether Mr. Vander Poorten has failed to arrange a sale, the first fact that strikes one is that the land in question is over 14,000 acres in extent and is a dense forest in an inaccessible and malarious place far from the haunts of men and is valued at Rs. 1,852,560. It is not a property for which a purchaser can readily be found, the plaintiffs themselves having failed to find a purchaser for one year from the date of the decree till first defendant came to their rescue. Mr. Vander Poorten has given evidence to prove that he made every endeavour to sell the property and that

[1] *I. L. R. 22 All. 149.* [2] *I. L. R. 30 Cal. 738.*
[3] *I. L. R. 25 Mad. 7.*

he failed to get a purchaser. This evidence is corroborated by the first plaintiff. He then entered into an agreement, D2, dated July 26, 1926—just 3 days before this action was filed—with the added defendant by which the latter was given an option to purchase the property at Rs. 150 per acre. As one would expect, owing to this precipitous action the option has expired and the proposed sale has fallen through. I cannot see how it can be stated that the first defendant has failed to sell this property; the date of the agreement is March 2, 1925, the action was filed in July, 1926, and no time limit was fixed for the sale of the property. As regards the plaintiffs' allegation that they were willing to pay the sums due to the first defendant, the truth of this assertion depends on the evidence of Mr. Adamaly, who the plaintiffs say was the purchaser who was willing to buy the property. On this point Mr. Adamaly's own evidence is emphatic. Far from being willing, anxious, and ready to buy the property his evidence was as follows:—"I heard of the land Thanketiya. Certain proposals were made to me by my Proctor, Mr. de Witt, to buy the land. I said I would investigate the matter. I know that a certain sum of money had to be paid to Mr. Vander Poorten before the land could be purchased. I did not ask my Proctor to find out the amount that had to be paid because I was not interested in the amount Mr. Vander Poorten had to get. I was not prepared to pay anything. I was prepared to investigate the matter and see whether the land was worth. I mentioned the matter to Mr. J. W. Oldfield, and we intended sending a man to report on the land. Before we could do anything litigation started and there the matter ended. I did not say that Mr. Vander Poorten was trying to prevent my buying the land. I cannot say that he brought a case to prevent my buying it. I cannot say if I asked any of the owners to find out what Mr. Vander Poorten wanted. They mentioned the amount they wanted for the land, Rs. 120 an acre they said. It was on that basis that I spoke to Mr. Oldfield. Before we could send a man to inspect the place litigation started and then I was told that nothing can be done. I was not prepared to bring any money into Court at any time. I could not do anything before I found out what the property was worth. I know Mr. Vander Poorten. I would not say he is a friend of mine. He discussed this matter with me. On the last date when I came to give evidence he came and spoke to me.

"About a month or two before the action started they came and asked me to buy it. I do not deal in timber lands ordinarily. I would not touch this land until I get a report on it. Mr. Oldfield is a very well known planter. He is the director of Messrs. Lee, Hedges & Co. Until I get a report from a responsible person I am not prepared to make any offers or pay any money. The whole thing was in the air and nothing definite."

1930.

AKBAR J.

Somasundaram Chetty v. Vander Poorten

In these circumstances, it is only a vivid and oversanguine imagination that can construe Mr. Adamaly's evidence as that of a willling and anxious purchaser, ready to buy the property whose anxiety was damped by the intrigue and impossible conduct of the first defendant. It is argued on this evidence of Mr. Adamaly that the plaintiffs wrote letter P11 to the first defendant, and the latter's reply P5 is set forth before us as indicating first defendant's unwillingness to account and as showing that his demand for Rs. 500,000 was unconscionable. As a matter of fact the first defendant has filed his timber account (see D3); and his claim to be repaid Rs. 528,177.23 in respect of the loan, and his working expenses and interest cannot be construed as unconscionable in view of the fact that by P4 the first defendant was given a free hand to charge any sum as " compensation or profits for himself as he shall think reasonable and equitable in his own discretion. " I cannot conceive how a casual letter like P5 can be interpreted as a refusal to account and as indicating an inequitable and excessive demand in view of the fact that the actual sum due to him is over Rs. 500,000 and is calculated on a basis which appears to be reasonable in all the circumstances.

It appears to me that the first defendant was right when he pleaded that no rights could accrue to the plaintiffs till the property had been sold and that this action was premature. In my opinion there was no such trust as is contended for by the respondents. How uncertain the respondents were as to the exact terms of this alleged trust is proved by the contrast in the trust alleged in the plaint and the trust put forward by counsel at the hearing of this appeal. In paragraphs 5 and 10 of the plaint it is alleged that the trust was to reconvey the property to the plaintiffs on payment of Rs. 205,840 and first defendant's working expenses and reasonable compensation and profits. If this is the trust alleged, it will not only require a notarial document for its validity (see *Adicappa Chetty v. Caruppen Chetty* [1] and *Arseculeratne v. Perera* [2]) but it will be in direct contradiction of the plain terms of P4. It was to meet this difficulty I think that respondents' counsel was obliged to argue that there was a failure of the trust in that first defendant refused to account and that he was attempting to commit a fraud as set out in paragraph 13 of the plaint. On these two allegations it was argued that the plaintiffs as *cestuis que trustent* were entitled to claim a reconveyance in terms of section 58 of the Trust Ordinance, No. 9 of 1917. As I have explained, the evidence shows that there is no truth in the allegation that the plaintiffs were prepared to pay the amount due to the first defendant. They have not offered ever to pay any sum nor have they brought any money into Court. What they are trying to do is to ask for an accounting before such

[1] *22 N. L. R. 417.* [2] *28 N. L. R. 1.*

accounting is due in law. Such an accounting is going to lead to nothing, except, perhaps, to worry the first defendant and to force him to come to terms with the plaintiffs—a manœuvre which seems to have succeeded so far as some of them are concerned. I would hold that there was no trust and that the terms of the agreement are confined to P4. I would hold further that no cause of action has accrued to the plaintiffs, that the action is premature, and that the plaintiffs' action should be dismissed with costs in both Courts. They should further pay the costs in both Courts of the added-defendant.

Appeal allowed.