1932 [In the Privy Council.]

Present : **Lord Atkin, Lord Tomlin, and Lord Macmillan.**

ANA LANA SAMINATHAN CHETTY *v.* VENDOR POORTEN.

Trust—Transfer of Crown land subject of decree—Advance of money to settle with Crown—Nature of conveyance—Security for money—Right to redeem—Roman-Dutch law.

On March 28, 1923, a decree was entered in an action brought by the Crown against a certain Syndicate whereby it was declared that the land in question was the property of the Crown, and whereby the Crown submitted to sell the land to the Syndicate, provided that a sum of Rs. 275,000 was deposited with the Settlement Officer within twelve months of the decree.

The defendant advanced to the Syndicate a sum of Rs. 210,000 for the purpose of making the deposit. On March 28, 1924, after the deposit had been made the Syndicate executed a deed which purported to be an assignment by the Syndicate to the defendant of the benefit of the decree. Subsequently the Crown was requested by the Syndicate to make the grant under the decree directly to the defendant, which was refused.

After the refusal, two deeds were executed dated March 2, 1925, and numbered 471 and 472.

Deed No. 471 was framed as an out and out conveyance by the Syndicate to the defendant of the whole of the estate with the exception of a defined portion.

The operative part of deed No. 472 was as follows :—

Now know ye and these presents witness that the party of the first part shall hold and stand possessed of the said lands as absolute owner and with full power and authority to manage and control the same, to fell and remove and dispose of the timber therein and to 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 one hundred rupees 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 discretion, and shall pay over the balance *pro rata* according to their respective interests among the parties of the second or third parts or their successors in title . . . .

Held, that the transactions effected by deeds Nos. 471 and 472 created a security for money advanced, which, in certain events, imposed upon the creditor duties and obligations in the nature of trusts.

Held further, that deed No. 472 did not impose upon the defendant an express obligation to sell; it only authorized him to sell and provided for the distribution of the proceeds, if he did sell.

Held also, deed No. 472 did not preclude the debtors from at any time redeeming the mortgaged property.

The principle of the Roman-Dutch law, which does not allow an agreement between debtor and creditor to the effect that, if the debt be not paid within the specified time, the property mortgaged should become the property of the creditor, is not less applicable in Ceylon than it is in South Africa.

APPEAL from a judgment of the Supreme Court.[1]

November 24, 1932. Delivered by LORD TOMLIN—

In this case the appellant appeals to His Majesty in Council from a decree of the Supreme Court of the Island of Ceylon, dated March 12, 1930, whereby a decree of the District Court of Colombo in favour of the appellant, dated July 19, 1929, was set aside and the action was dismissed with costs.

The relevant facts are set out in the succeeding narrative.

In the year 1923, an action as to title to an estate in Ceylon, consisting of about 14,000 acres of forest land, was in progress between the Crown and certain persons who and whose successors in title will be hereafter referred to collectively as the Syndicate. The appellant is the representative of a person, now deceased, who was a member of the Syndicate in two capacities, one original, and the other derivative.

The Syndicate had expended sums to the amount of Rs. 200,000 in acquiring the estate from those whom they believed to be the owners of it. After they had done so the Crown asserted title to it, and the action in question resulted.

On March 28, 1923, a decree was made in the action between the Crown and Syndicate whereby it was declared that the estate was the property of the Crown, but whereby also the Crown submitted to sell the estate to the Syndicate provided that a sum of Rs. 275,000 was deposited with the Settlement Officer within twelve months from the date of the decree.

The Syndicate, towards the end of the period allowed under the decree of March 28, 1923, for making the deposit, had succeeded in raising no more than Rs. 64,000 towards such deposit, and the respondent, who was approached to assist the Syndicate, provided at the last moment the balance, viz., Rs. 211,000. By means of the Rs. 64,000 already raised and the money provided by the respondent the deposit was in fact made just before the time for making it expired.

A sum of Rs. 5,160 was immediately repaid to the respondent, so that the sum actually provided by him was Rs. 205,840.

No definite agreement appears to have been made between the Syndicate and the respondent at the time when the money was provided as to the terms upon which it was provided, but the respondent then instructed his proctor to see that he was properly protected.

On March 29, 1924, after the deposit had been made, the Syndicate executed a deed which purported to be an assignment by the Syndicate to the respondent for Rs. 30,000 of the benefit of the decree of March 28, 1923. No sum of Rs. 30,000 was in fact paid or intended to be paid by the respondent to the Syndicate.

Having regard to the circumstances of its execution their Lordships are of opinion that the only purpose of this document was to give the respondent a temporary security for the money he had advanced.

Subsequently the Crown were requested by the Syndicate to make the grant under the decree of March 28, 1923, directly to the respondent, but this request was refused.

After the refusal two deeds were executed, respectively dated March 2, 1925, and numbered in the record 471 and 472.

[1] *31 N. L. R. 270.*

Deed No. 471 recited the deed of March 29, 1924, and the request made to the Crown, but not the Crown's refusal of such request, and was framed as an out and out conveyance by the Syndicate to the respondent of the whole estate with the exception of a defined portion of 1,000 acres on the south-eastern side thereof, which had apparently been otherwise disposed of, to hold unto the respondent, his heirs, executors, administrators, and assigns absolutely and for ever.

Deed No. 472 was of even date with deed No. 471. Upon its construction and effect the result of this appeal mainly depends. It was made between the respondent of the first part and the persons then constituting the Syndicate of the second and third parts, the group of persons who were of the third part being persons claiming derivative interest under original members of the Syndicate.

This deed contained recitals in the following terms:—

"Whereas the party of the first part 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 referred to in the schedule hereto in the terms of the decree in their favour in case No. 3,656 of the District Court of Badulla, on the 28th day of March, 1923, and the said parties of the second part have by a deed No. 448 dated the 29th day of March, 1924, and attested by the Notary attesting these presents assigned to the party of the first part all their right, title, and interest in and to the said decree and covenanted therein to convey the said land to the party of the first part in the event of the Crown refusing to issue a Crown grant in his favour instead of issuing a Crown grant in their favour.

"And whereas the Crown grant in question is to be issued in favour of the parties of the second part, and not in favour of the party of the first part and the parties of the second part and third part have therefore at the request of the party of the first part conveyed to him the said lands by deed No. 471 bearing even date with these presents and attested by the Notary attesting these presents.

"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."

The operative part of the deed was as follows:—

"Now know ye and these presents witness that the party of the first part shall hold and stand possessed of the said lands as absolute owner and with full power and authority to manage and control the same, to fell and remove and dispose of the timber therein and to 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 rupees one hundred (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 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 a full and complete discharge to such purchaser for the payment of such purchase money."

Possession was taken by the respondent of the property conveyed by deed No. 471 after the execution thereof, and he has since remained in possession. The respondent after going into possession admittedly cut and sold a considerable quantity of timber and alleges that he expended large sums in cultivating and improving the estate. No account of receipts or expenditure has ever been rendered by the respondent.

On March 30, 1925, the Crown executed a conveyance of the estate to the Syndicate or the survivors of the original members thereof.

Efforts to sell the estate were apparently made from time to time both by the respondent and members of the Syndicate, but without result.

On March 14, 1926, certain of the Syndicate, having had interviews with the respondent with a view to redeeming the estate and being dissatisfied with the position, wrote to him a letter which, omitting formal parts, was in the following terms :—

"We trust that you will not, in the midst of your other engagements, forget to send us in time the promised reply as to the amount you will accept in settlement of your claims on Tenketiya. Both in our interview at Galagedera on the 5th instant and at the Grand Oriental Hotel on the 11th and 12th instant we made our position quite clear to you. You are fully aware that the present unsatisfactory state of affairs cannot possibly continue any longer without irreparable loss to us. We have already informed the people who have offered to help us with the necessary moneys of your promise to give us a reply within four days as to the amount to be paid to you, and we hope not only to have the reply in time, but that in naming the amount you will consider not only your interest as financier in the matter and the possibility of your making a profit by holding on to the land indefinitely, but also your responsibility to us as our trustee in respect of the land."

The answer of the respondent on the same day was as follows :—

"In reply to your letter of this day I am willing to take Rs. 500,000 (five hundred thousand rupees) as consideration for reconveyance of the Tenketiya lands provided that the claims of the Bandas and any other claims in respect of the lands are settled by you.

"As an alternative I have no objection to paying you rupees thirty per acre in full settlement of all your interests in the land provided that all claims are settled by you."

The amount claimed by the respondent was regarded by those seeking to redeem exorbitant, and as no sale was effected the action out of which

this appeal arises was begun by certain members of the Syndicate (including the person of whom the appellant is the representative) against the respondent and the other members of the Syndicate who did not join as plaintiffs.

By reason of his twofold interest the person whom the appellant represents was entered on the record twice as the third plaintiff and as the fifth plaintiff and in the subsequent proceedings reference is sometimes made to this record as though the third and fifth plaintiffs were two different persons.

The action was in the nature of an action for breach of trust and redemption. After it was begun the plaintiffs obtained leave to amend their plaint by adding an allegation that the respondent had by a document dated July 26, 1926, fraudulently and in breach of trust given to one Fombertaux an option of purchase over the site and to add Fombertaux as an additional defendant to the action.

The amended plaint stated (paragraph 7) the willingness of the plaintiffs to redeem upon the footing that the amount due to the respondent was the aggregate total of the sum advanced, money expended, interest at 9 per cent. per annum to the date of the plaint, and a sum of Rs. 25,000 for reasonable compensation and profit for the respondent's services, such aggregate total amounting, apart from expenditure, to Rs. 274,090.

By paragraph 8 of such plaint the plaintiffs pleaded that by reason of deed No. 472 and of the facts alleged in the plaint, the respondent held the estate in trust for the plaintiffs and the defendants other than the respondents. In paragraph 10 the plaintiffs expressed their willingness to pay what was due and alleged that the Rs. 500,000 claimed by the respondent was unreasonable. In paragraph 11 they claimed an account of all moneys expended by the respondent and asked the Court to declare what sum was reasonable and equitable compensation and profit for his services.

In paragraph 13 the plaintiffs alleged that the respondent was fraudulently and in breach of trust attempting to effect a fictitious sale to a nominee of his own at a price less than the market price, and in paragraph 17 the option of July 27, 1926, to Fombertaux was stated and alleged to be fraudulent and in breach of trust.

The prayer of the amended plaint was in the following terms :—

"Wherefore the plaintiffs pray—

(1) That the Court do declare the sum of Rs. 274,090 to be a reasonable sum to be paid to the first defendant in respect of the said loan and compensation and profit or in the alternative that the Court do declare what sum is reasonable.

(2) That the first defendant be ordered to render an account of moneys expended by him on the management, control and working of the said property and of moneys received by him in respect of the said property and that the plaintiffs be allowed to contest or surcharge the same.

(3) That the Court do order the first defendant, on receipt of the said sum and the amount of moneys so expended when the account is taken, to reconvey to the plaintiffs and the second, third, fourth, fifth,

sixth and seventh defendants or their assigns respectively the said property in the schedule described and that in that connection the Court may give all necessary orders and directions.

(4) For an injunction restraining the first defendant from selling the said property without the plaintiffs' approval during the pendency of this action.

(4*a*) That the said deed No. 1,221 dated 27th July, 1926, attested by Leslie Mack, Notary Public, be declared null and void and cancelled accordingly.

(5) For costs ; and

(6) For such other and further relief in the premises as to this Court may seem meet. "

By his answer the respondent, while admitting deeds Nos. 471 and 472, alleged that the plaintiffs had no right or title to obtain a reconveyance, and denied that he held the estate in trust for the plaintiffs and the other defendants. He further denied the plaintiffs' right to any account or to any declaration as to his compensation. He denied the allegations of paragraph 13 of the amended plaint, and while admitting the option given to Fombertaux, denied that it was fraudulent or in breach of trust. The two concluding paragraphs of the respondent's answer (in which answer he is throughout referred to as the first defendant) were in the following terms:—

" 14. Further, the first defendant states that he has duly performed and is willing to perform the terms of agreement as set out in the said deed No. 472 and that no cause of action has accrued to the plaintiffs against the first defendant.

" 15. As a matter of law the first defendant states that the plaintiffs have no rights of action in any event until the first defendant sells the said lands in terms of the said deed No. 472 and that this action is premature and cannot be maintained."

In fact, Fombertaux never exercised the option of July 26, 1926, and the question in regard to it was, therefore, not pursued.

Further, before the trial of the action the respondent settled with all the members of the Syndicate except the person whom the appellant represents.

The person who the appellant represents died before the trial and the appellant was substituted for him.

The District Judge gave his judgment on July 19, 1929. After considering the question of the admissibility of oral evidence to prove whether under the deeds Nos. 471 and 472 the respondent held the estate upon a trust and ruling it was admissable, he held that the deeds Nos. 471 and 472, taken by themselves, indicated a trust, and that the evidence showed that the respondent at the time of the advance was willing to give back the property directly he was paid his money, and that there being no express provision applicable if the respondent refused or failed to sell, he must in that event reconvey the estate if called upon to do so and upon being paid the money due to him. The learned Judge further held that the respondent had failed to sell the estate and had become liable to retransfer the shares of the person whom the appellant represents.

The operative part of the formal decree was in the following terms :—

"It is ordered and decreed that the first defendant is holding the property set out in schedule hereto in trust for the plaintiffs and second to seventh defendants.

"It is further ordered and decreed that the said first defendant do file in Court an account showing the expenses incurred by him in the management of the property described in schedule hereto and all moneys realized by him by the sale of timber or other produce of the said property—this account should be filed within one month from date hereof with notice to the substituted plaintiffs (*sic*) in place of the third and fifth plaintiffs deceased who will be entitled to falsify or surcharge those accounts.

"It is further ordered and decreed that first defendant on receipt of money due to him and the amount of money incurred by him in the management of the said property as aforesaid do reconvey to the substituted plaintiffs in place of the third and fifth plaintiffs their shares of the said property.

"It is further ordered and decreed that the first defendant do pay to the substituted plaintiffs in place of the third and fifth plaintiffs deceased their costs of this action and also to the added defendant his costs up to 31st day of July, 1928."

This decree, even upon the assumption that the learned Judge was right in his conclusion, does not seem, in their Lordships' opinion, to give effect accurately to that conclusion. It makes no provision in regard to interest and contemplates a reconveyance to the redeeming plaintiff of his shares on payment, not of his proportion, but of the whole of what was due to the respondent.

The respondent appealed. The appeal was heard by Fisher C.J. and Akbar J., and judgment was given on March 10, 1930.

The appeal was allowed and the action was dismissed.

The Chief Justice said the question for decision was with regard to the effect of deed No. 472, and that in his opinion the relationship created by that document was not that of trustee and *cestui que* trust, but was purely contractual, and that he did not think that it was correct to regard the land as being a security for a debt.

Mr. Justice Akbar held that the respondent was right when he pleaded that no rights could accrue to the plaintiff till the property had been sold and that the action was premature, and further that there was no such trust as contended for by the plaintiff.

The formal decree provided (*inter alia*) for the payment by the plaintiff of the taxed costs of the action in the Court below up to and including July 31, 1928, of the added defendant Fombertaux.

Having regard to the views which were taken by the learned Judges in the Court below, there was no discussion below of the Law of Ceylon in regard to trusts and mortgages, and their Lordships have therefore been without assistance from the lower Courts on these matters, which seem to them of some importance in the case.

In their Lordships' judgment, the first question is as to the construction and effect of the deeds Nos. 471 and 472.

Having regard to the circumstances leading up to and surrounding their execution and to the language employed therein, these deeds, in their Lordships' opinion, clearly do not operate to vest in the respondent an absolute interest in the property conveyed.

It cannot be overlooked that the Syndicate had expended about Rs. 200,000 on the property before they got into conflict with the Crown, and that they provided Rs. 64,000 towards the total sum which had to be deposited under the decree made in the Crown's favour. They could, therefore, have had no interest in entering into an arrangement by which in effect the whole property passed absolutely to the respondent and their expenditure was wholly lost.

But the language of deed No. 472 is, their Lordships think, inconsistent with any such conclusion. By the terms of the documents (1) the respondent cannot sell below a certain price without the consent of the original members of the Syndicate; (2) if he does sell he has imposed upon him an obligation to deal with the proceeds in a specified manner; (3) the distribution of the proceeds of sale includes payment to the respondent of "such sums as shall be due and payable to him for moneys advanced to the Crown for the said purchase from the Crown"; (4) the ultimate balance of the proceeds of sale is to be distributed "*pro rata* according to their interests amongst the said parties of the second and third parts or their successors in title and such other person or persons as shall have a legal claim or interest in the said lands"; and (5) the purchaser is relieved of any obligation to see to the application of the purchase money.

In these circumstances and upon this language their Lordships conclude without hesitation that the transaction effected by deeds Nos. 471 and 472 was the creation of a security for money advanced, which in certain events imposed upon the respondent, who was the creditor, duties and obligations in the nature of trusts.

Deed No. 472 does not, however, impose upon the respondent an express obligation to sell, it only authorizes him to sell and provides for the distribution of the proceeds, if he does sell.

The question is what is the position if the respondent does not sell or so long as the property remains unsold.

The policy of the Roman-Dutch law, being the law which governs in Ceylon so far at any rate as this case is concerned, appears to be against allowing the mortgage property to become the property of the creditor if the mortgage debt is not paid off within the specified time. In this respect the 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." This trend of policy is well illustrated by the case of *John v. Trimble*[1] decided in the Transvaal High Court. In that case the debtor agreed with the creditor that the mortgaged property should be reconveyed if the debt was paid off within two years, but that otherwise the creditor was to be free to sell and pay himself. More than two years after the agreement the debtor sought to

[1] *(1902) 1 T. H. 146.*

redeem, but the creditor nevertheless sold to the defendant. It was held that the debtor was entitled to redeem against the defendant. Innes C.J. in his judgment accepted the view that the policy of the law was against allowing an agreement between debtor and creditor to the effect that if the debt be not paid at the proper time the property was to become the property of the creditor, and held that the transfer by the creditor to the defendant could not operate as a sale so as to defeat the debtor's right to redeem the property.

So far as Ceylon is concerned the case of *Scribohamy v. Rattaranhamy*[1] seems to their Lordships to indicate that the benevolence of the Roman-Dutch law towards the mortgagor is not less in Ceylon than it is in South Africa.

The conclusion must therefore be that nothing in deed No. 472 can preclude the debtors from at any time redeeming the mortgaged property. The fact that the respondent settled with all the debtors except one cannot put that one in a worse position, and their Lordships are of opinion that the appellant, as representing the person with whom no settlement was made, is entitled to redeem his shares on payment of his rateable proportion of the total amount due to the respondent.

In ascertaining the amount due to their Lordships think that no regard should be had to the provision of deed No. 472 as to "compensation or profits." That provision is expressed to operate only in the event which has not happened of the respondent exercising his power of sale. It is, however, right that reasonable interest should be allowed on moneys advanced or expended.

Bearing these considerations in mind, their Lordships think that the appeal should be allowed and that the decree below should be discharged except so far as the costs of the added defendant Fombertaux were ordered to be paid. That direction should stand.

Their Lordships do not, however, think that the decree of the District Judge should be restored, but that a decree should be framed providing for the following matters:—

(*a*) A declaration that upon the true construction of deeds Nos. 471 and 472 and in the events which have happened the appellant is entitled to redeem upon the terms hereinafter appearing the shares of the person whom he represents in the property conveyed by deed No. 471.

(*b*) A direction for the taking of the following inquiry and accounts:—

(i.) An inquiry as to the amount of the shares in the property in question of the person whom the appellant represents.

(ii.) An account of what is due to the respondent for principal moneys advanced to provide the deposit under the decree of March 28, 1923, and for moneys properly expended by him in the management and control of the property, together with interest at such rate as the Court shall deem reasonable upon the moneys advanced or expended from the respective dates of such advance or expenditure to the date of decree.

[1] *1 C. L. R. 36.*

(iii.) An account of rents and profits (including proceeds of sale of timber and other produce) of the property received by the respondent or by any other person or persons by the order or for the use of the respondent or which without the wilful default of the respondent might have been so received, with interest at such rate as aforesaid upon such rents and profits from the respective dates of receipt to the date of decree.

(iv.) An account of the costs payable to the appellant by the respondent under their Lordships' direction as to payment of costs hereinafter contained and remaining unpaid.

(c) A direction that the amounts certified under account (iii.) shall be deducted from the amount certified under account (ii.) and that upon payment by the appellant to the respondent of the proportionate part of the balance so found corresponding with the shares which shall be certified under inquiry (i.) to be the shares in the property of the person whom the appellant represents, less any costs payable to the appellant under account (iv.) remaining unpaid, the respondent shall reconvey to the appellant the shares in the property of such person.

(*d*) Such other directions as the Court may deem necessary or appropriate for working out the decree.

The respondent has throughout contended that the action was premature and ought to be dismissed, and disputed the plaintiffs' right to redeem. In these circumstances their Lordships are of opinion that the respondent ought to pay the costs of the person whom the appellant represents and of the appellant of the action up to the decree and of the appeal before the Supreme Court and of the appeal to His Majesty in Council.

Any subsequent costs in this action in working out the decree or otherwise will remain to be dealt with in due course by the Court having seisin of the matter.

Their Lordships will accordingly humbly tender to His Majesty advice in accordance with the conclusions which are indicated in this judgment.

Appeal allowed.