1955 *Present : Gratiaen J. and Sansoni J.*

B. M. G. SETUWA *et al.*, Appellants, *and* B. T. UKKU *et al.*, Respondents

S. C. 164—D. C. Kandy, 3,219

Sale of immovable property—Contract of re-purchase—Parol evidence of a mortgage—Admissibility—"Moratuwa mortgage"—Evidence Ordinance, s. 92—Trusts Ordinance, s. 6 (3).

It is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that in reality it is a deed of mortgage and not of sale. This rule equally applies where there is an agreement in the deed itself whereby the vendee undertakes to retransfer the property for consideration within a specified period and also where there is a separate agreement to the same effect, whether notarial or not.

Per GRATIAEN J — "The respondent did not rely on any proviso to section 92 of the Evidence Ordinance. Nor did he allege a trust of the kind which section 5 (3) of the Trusts Ordinance permits to be established by oral evidence. In the result, the learned trial Judge should not have admitted evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of two notarial instruments each of which unambiguously purported to record a transaction between a vendor and his purchaser (not between a mortgagor and his mortgagee)."

APPEAL from a judgment of the District Court, Kandy.

N. E. Weerasooria, Q.C., with *G. T. Samarawickreme* and *N. D. M. Samarakoon*, for the plaintiffs appellants.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, *D. R. P. Goonetilleke* and *V. P. Ranasinghe*, for the defendants respondents.

Cur. adv. vult.

February 22, 1955. SANSONI J.—

The question of law which arises for decision in this appeal has been before this Court on many occasions. It is this :—Where X by deed purports to sell a land for valuable consideration to Y who in turn by deed agrees to re-transfer the land to X, on payment of an agreed amount within a specified period, is it open to Y to show by parol evidence that the transaction was not a sale but a mortgage? One would normally expect that this question would have been decisively answered by now and so it has, except that there are a few judgments which have created doubts where it seems to me there should have been no room for doubt.

In this case the 1st defendant had borrowed a sum of Rs. 700 in 1929 from the 1st plaintiff and executed a mortgage bond as security. In 1937 the 1st defendant sold the land in dispute and another land to the 1st plaintiff for a sum of Rs. 1,410 of which Rs. 1,350 was set off against the principal and interest due on the mortgage and the balance was paid in cash. By a contemporaneous deed the 1st plaintiff agreed to retransfer the lands to the 1st defendant if she paid a sum of Rs. 1,410 within a period of 5 years. The 1st defendant failed to comply with the terms of this

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agreement, and the 1st plaintiff in 1949, gifted the land in dispute to the 2nd plaintiff. The two plaintiffs brought this action against the 1st defendant and 4 others asking for a declaration of title, ejectment and damages. The defendants in their answer pleaded that the deed of sale though in form a transfer was in fact a mortgage for repayment of the sum of Rs. 1,410 and that the 2nd plaintiff therefore had no title to the land. The learned District Judge admitted evidence, both oral and documentary of the circumstances surrounding the transaction of 1937 and the subsequent conduct of the parties. Such evidence was led by the defendants with a view to proving that the deeds of 1937 were executed as security for a loan and were not a pure contract of sale with an agreement to retransfer.

In my opinion such evidence, being non-notarial, should not have been admitted. The purpose of leading it was solely to contradict the two deeds which were clear and unambiguous, and section 92 of the Evidence Ordinance forbids the reception of such evidence for such a purpose. We were referred to the South African case of *Zandberg v. Van Zyl* [1] where it was held that the Court should have regard to the substance of the transaction and not to the form which it assumes, and that it should consider what was the intention of the parties judged by the surrounding circumstances and not by the label which they affixed to the documents. But there is no reference in the judgments delivered in that case to any provisions equivalent to the Prevention of Frauds Ordinance or to section 92 of the Evidence Ordinance. I think a proper comment on the argument that a Court should ascertain the true nature of the transaction is the remark of de Kretser, J., in *Sobana v. Meeralebbe* [2] that " to do substantial justice the Court must have evidence, and that evidence must come before it in a form recognized by law ". There was no plea in this case that any of the provisos to section 92 were applicable. The only admissible evidence of the transaction was, therefore, the deeds themselves. Hutchinson, C.J., and Wood Renton, J., in *Somasunderam Chetty v. Todd* [3] decided a very similar case to the present one. There, as here, a deed of sale of land was accompanied by a deed of agreement to retransfer the land within a specified period. The period elapsed without such retransfer being obtained. It was sought to lead evidence to prove that the transaction set out in the deeds was not the real agreement but that in reality it was one of mortgage. It was held that no such evidence was admissible in view of section 92 of the Evidence Ordinance.

The next case I should refer to is *Perera v. Fernando* [4] which has been referred to over and over again with approval in subsequent judgments of this Court. There, a person who transferred lands to another by a deed of sale for consideration sought to show that the transferee orally agreed to reconvey the lands on the latter being repaid the full consideration, and that the transfer was really a mortgage. It was held by Ennis, J., and de Sampayo, A. J., that the admission of oral evidence to prove the alleged agreement would be to contradict or vary the deed of sale and this was prohibited by section 92 of the Evidence Ordinance. It is true that in that case, unlike the present one, there was no deed of agreement to

[1] *(1910) A. D. 302.*
[2] *5 Ceylon Law Journal 46.*
[3] *(1910) 13 N. L. R. 361.*
[4] *(1914) 17 N. L. R. 486.*

retransfer the land, but the alleged oral agreement to retransfer was not provable because it was a pure contract for the purchase and sale of immovable property which is void, under the Prevention of Frauds Ordinance, in the absence of a notarial instrument. The judgment of de Sampayo, A. J., which set out these rules has recently been approved by the Privy Council in *Saverimuttu v. Thangavelauthan* [1] and I think it provides a sufficient answer to the proposition founded on *Zanberg v. Van Zyl* to which I have referred. It can hardly be suggested that when there is such a notarial instrument embodying an agreement to retransfer the door is in some mysterious way opened for the reception of oral evidence to prove that the deeds are not what they purport to be, for that is precisely what section 92 of the Evidence Ordinance forbids. If I may put it in another way, can it be seriously argued that although a deed of sale cannot be shown by oral evidence to be in fact a deed of mortgage yet a deed of sale which is accompanied by a deed of agreement to retransfer the property sold can be shown by oral evidence to be a deed of mortgage? It seems to me that if one deed of sale cannot be contradicted by oral evidence the execution of two deeds based on a contract of sale should be doubly effective to shut out oral evidence which would have the effect of contradicting or varying them.

In the case of *Don v. Don* [2] Dalton, J., and Drieberg, J., again held that one cannot lead evidence to show that a deed by which the owner purported to transfer a land to another was in reality a deed of mortgage, because section 92 of the Evidence Ordinance prohibits the admission of such evidence. Nor does it make a difference if any money is paid on the footing that it was treated as a mortgage, for such payment cannot be referred to an agreement which cannot be proved. I refer to this because it has been proved that such payments were made by the 1st defendant in this case and the learned District Judge has used such evidence to support his finding that the transfer was a mortgage. I would also say that the continuance in possession of the land sold by the 1st defendant is irrelevant on such an issue. In *Wijewardene v. Peiris* [3] the plaintiff against whom a mortgage decree had been entered conveyed the mortgaged property to the defendants (the mortgagees) who agreed to reconvey the property to the plaintiff on the latter paying a certain price by a certain date. It was argued for the plaintiff that the transaction constituted a mortgage while the defendants contended that it was a sale with a contract of repurchase. Koch, J., and Soertsz, A. J., held that the latter was the only possible construction of the transaction, and following the ruling in *Fernando v. Perera* [4] they held that tender of the price was a condition precedent to obtaining a reconveyance and that time was the essence of the contract.

In *de Silva v. de Silva* [5] Hearne, J., and Fernando, A. J., had to consider whether a conveyance of property for consideration, with a provision for a retransfer within one year if the vendor repaid the consideration with interest, was a sale with a contract for a repurchase or a security of money advanced. Hearne, J., referred to the principle of law that no matter what name the parties give to a transaction, the Court will inquire into the

[1] *(1954) 55 N. L. R. 529.*
[2] *(1929) 31 N. L. R. 73.*
[3] *(1935) 37 N. L. R. 179.*
[4] *(1926) 28 N. L. R. 183.*
[5] *(1937) 39 N. L. R. 169.*

substance of the transaction and give effect to what it finds its true substance or nature to be. He clearly had in mind the decision in *Zandberg v. Van Zyl* [1]. He did not consider the bearing which section 92 of the Evidence Ordinance has on this principle but after referring to *Saminathan Chetty v. Vanderpoorten* [2], *Wijewardene v. Peiris* [3] and *Fernando v. Perera* [4] he affirmed the finding of the District Judge that it was a sale with a right to repurchase within a certain time, that time being of the essence of the contract. The judgment of Hearne, J., would appear to have gone contrary to the rule which had by then been established that a deed of sale cannot be shown by parol evidence to be in reality a deed of mortgage. A similar case where a deed of transfer contained a reservation of the right to pay the vendee the amount of the consideration and obtain a retransfer was considered in *Jonga v. Nandarasa* [5] and it was held by a Bench of three Judges that such a deed did not convey the whole beneficial interest in the property to the vendee. But this is very different from saying that such a deed was a deed of mortgage. The vendor is bound even in such a case to pay the agreed amount within the specified period, which he need not do if it had been a mortgage. Canekeratne, J., in *Uduma Lebbe v. Kiri Banda* [6] had a similar deed to deal with and he so held. Whether a transfer can be said to have been executed in trust or not is an entirely different matter to which entirely different considerations apply. We are not considering that question on this appeal and I therefore do not intend to refer to decisions which have a bearing on it. Neither section 92 of the Evidence Ordinance nor the Prevention of Frauds Ordinance necessarily applies to cases of trusts. See *Valliamma Atchi v. Abdul Majeed* [7].

In *Sobana v. Meera Lebbe* [8] de Krester, J., and Wijeyewardene, J., also decided that a party cannot be permitted to prove by oral evidence that a deed which purports to be a sale was in reality a mortgage. In *Thangavelauthan v. Saverimuttu* [9] Gratiaen, J., and Gunasekara, J., again decided that an instrument which is in terms a sale cannot be construed as a hypothecation of immovable property. Gratiaen, J., followed the judgments of Ennis, J., and de Sampayo, J., in *Perera v. Fernando* (supra) to which I have already referred and explained the limited effect of the decision in *Saminathan Chetty v. Vanderpoorten.* [4] His judgment was affirmed by the Privy Council which is reported as *Saverimuttu v. Thangavelauthan* [10]. Mr. L. M. D. de Silva in delivering the judgment of the Board said, " In the case of *Perera v. Fernando* it was held 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.' It was further held that the agreement relied on amounted not to a trust but to 'a pure contract for the purchase and sale of immovable property'. Their Lordships are of opinion that *Perera v. Fernando* sets out correctly the law of Ceylon. In the case before their Lordships it was a writing (established by secondary oral evidence) that was invoked by the

[1] *(1910) A. D. 302.*
[2] *(1932) 34 N. L. R. 287.*
[3] *(1935) 37 N. L. R. 179.*
[4] *(1926) 28 N.L.R. 183.*
[5] *(1944) 45 N. L. R. 128.*
[6] *(1947) 48 N. L. R. 220.*
[7] *(1947) 48 N. L. R. 289.*
[8] *5 Ceylon Law Journal, 46.*
[9] *(1951) 54 N. L. R. 28.*
[10] *(1954) 55 N. L. R. 529.*

appellant but that makes no difference because the statute law referred to earlier excludes for the purposes mentioned in it not only oral evidence but evidence contained in a writing which is not notarially attested. "

In *Palingu Menika v. Mudianse* [1] Basnayake, J., had to consider the effect of a transfer of a land in the form of a deed of sale wherein the transferors reserved the right to repurchase the land within a period of 3 years on payment of a particular sum with interest. The disputed question was whether the transaction evidenced by the deed was a mortgage or a transfer with an undertaking to resell within a specified time. The learned Judge held that " in order to determine the nature of the transaction the circumstances leading up to and surrounding the execution of the document under consideration and the language employed therein may all be taken into account ". He cited in support the decision of the Privy Council in *Saminathan Chetty v. Vanderpoorten* [2]. With respect, I would say that the facts in that case were peculiar and the decision turned on those facts. The 2 deeds which had to be construed there showed that an absolute interest did not pass on what purported to be an out and out conveyance because a contemporaneous deed disproved such a theory, and when both deeds were read together their effect was to create " a security for money advanced which, in certain events, imposed upon the creditor duties and obligations in the nature of trusts ". I respectfully disagree with the view that oral evidence of a stipulation for payment of interest and the retention of possession by the vendor can be considered as negativing the conclusion that the transaction was clearly (on the face of the written instrument) a sale with an agreement for repurchase. Oral evidence as to what happened after the execution of the deed should not, in my opinion, have been admitted in order to interpret the deed in that case. Soertsz, A. J., was of the opinion in *Wijewardene v. Peiris* [3] that these are not matters which can effect the construction of a deed of sale and I respectfully agree with that opinion. In *Ehiya Lebbe v. Majeed* [4] Dias, J., was dealing with a plea that a deed of transfer was executed in trust but the learned Judge in the course of his judgment said:— " If it appears from the facts that, although the transfer is in form an out and out sale, there exist facts from which it can be inferred that the real transaction was either a money lending transaction when the land was transferred to the creditor as security or that it was a transfer in trust, a Court of Equity would grant relief in such a case ". He cites *Fernando v. Thamel* [5] in support of this proposition but that was a case in which a trust was pleaded and not that the transfer was security for a loan. If the latter plea had been advanced I think it would have had to be rejected in view of the many decisions I have referred to. To this extent I think the dictum of Dias, J., requires modification.

If I may sum up the result of the authorities I have referred to I would say that it is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that it is a deed of mortgage. This rule equally applies where there is an agreement in the deed itself whereby the vendee undertakes to retransfer the property for consideration within a specified period and also where there is a separate

[1] *(1948) 50 N. L. R. 566.*
[2] *(1932) 34 N. L. R. 287.*
[3] *(1935) 37 N. L. R. 179.*
[4] *(1947) 48 N. L. R. 357.*
[5] *(1946) 47 N. L. R. 297.*

agreement to the same effect, whether notarial or not. The question posed at the beginning of this judgment must therefore be answered in the negative. I would allow this appeal with costs in both Courts ; the plaintiffs are entitled to a decree as prayed for save that damages will be Rs. 100 up to date of action brought and at Rs. 150 per annum thereafter until the plaintiffs are restored to possession.

GRATIAEN J.—I agree entirely with my brother Sansoni. In *Saverimuttu v. Thangavelauthan* [1] the Judicial Committee of the Privy Council expressly approved the ruling in *Perera v. Fernando* [2] so that any earlier pronouncements of this Court which are in conflict with the *ratio decidendi* of *Perera v. Fernando* must now be regarded as having been overruled by implication.

The respondent did not rely on any proviso to section 92 of the Evidence Ordinance. Nor did he allege a trust of the kind which section 5 (3) of the Trusts Ordinance permits to be established by oral evidence. In the result, the learned trial Judge should not have admitted evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of two notarial instruments each of which unambiguously purported to record a transaction between a vendor and his purchaser (not between a mortgagor and his mortgagee). A rule of evidence which disentitles a transferor to contradict one such written instrument *a fortiori* disentitles him to contradict two of them, and it makes no difference whether the documents are severable or should be interpreted together as recording the unambiguous terms of a single transaction. *Perera v. Fernando* (supra) has laid down two separate and distinct propositions, namely, that where a person transfers a land to another by a notarial deed, purporting on the face of it to sell the land,

(1) it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage ;

(2) it is also not open to the transferor to prove by oral evidence that the transferee agreed to reconvey the property.

In the case now under consideration, the first of those propositions prevents the respondents from establishing by oral evidence that the appellant's rights and obligations (under either instrument) were in reality those of a mortgage. In addition, section 92 of the Evidence Ordinance prevents him from varying the unambiguous terms and conditions of the appellant's obligation to reconvey which are contained in the second instrument. Under our law, there must be some ambiguity in the language of a written instrument before evidence of the "surrounding circumstances" can be admitted as a guide to its interpretation. If it is felt that a relaxation of these rigid rules should be permitted in the case of what is commonly described as a "Moratuwa mortgage", the remedy lies with the legislature and not with us. In the meantime, the draftsman of a conveyance granted only "as security for a debt" must take special care to employ language which on the face of the instrument negatives an outright sale.

Appeal allowed.

[1] *(1954) 55 N. L. R. 529.*

[2] *(1914) 17 N. L. R. 486.*