Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

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SOMASUNDERAM CHETTY *v.* TODD *et al.*

D. C., Jaffna, 6,868.

Evidence Ordinance, s. 92—Sale of land—Notarial agreement to re-convey the land if price is repaid within six months—May oral evidence be led to prove that sale was intended to be a usufructuary mortgage?

A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of the money to the vendee within six months. The vendor did not exercise his right of re-purchase, but after many years entered into possession of the land. In an action by the vendee for declaration of title and ejectment the vendor pleaded that the conveyance to the vendee was not an absolute conveyance, but that it was intended to be only a usufructuary mortgage, and that anterior to its execution there was an oral agreement to the effect that the vendee should possess the lands until he had reimbursed himself with interest the amount of the advances made by him, and that thereafter he should re-convey the property to the vendor.

Held, that, as the parties had formally expressed in writing the terms on which the vendee was to re-transfer, it was contrary to the provisions of section 92 of the Evidence Ordinance to allow evidence of the oral agreement to be adduced.

ONE Todd, first defendant-appellant, who was the owner of the estate in dispute, which was burdened with three mortgages, sold it by deed No. 319 dated April 28, 1898, for the sum of Rs. 125,500 to one R. M. A. R. A. R. Supramaniam Chetty, who was to retain Rs. 93,930.97 and Rs. 13,000 to pay off the first two mortgages, and the balance Rs. 18,569.03 to pay off his own third mortgage.

By deed No. 320 of the same date Supramaniam Chetty covenanted to re-convey the land to Todd if he paid the sum of Rs. 125,500 to Supramaniam Chetty on or before October 1, 1898, and it was further agreed by the said deed that if the said sum of Rs. 125,500 was not paid on that date the deed No. 320 was to be no force or avail in law.

By deed No. 911 dated May 1, 1900, Supramaniam Chetty transferred the land to plaintiff-respondent (Somasundaram Chetty). Todd did not exercise his right of purchase under deed No. 320; but several years afterwards the third defendant, who held a power of attorney from Todd, entered into possession of land.

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Plaintiff brought this action for declaration of title, ejectment, and damages.

The defendants pleaded, *inter alia*, that the transfer of April 28, 1898 (No. 319), was not an absolute conveyance, but was intended to be only a usufructuary mortgage, and that anterior to its execution there was an oral agreement to the effect that Supramaniam Chetty should possess the land until he had reimbursed himself, with interest the amount of the advances made for the discharge of the encumbrances on the property, and that thereafter he should re-convey the land to the first defendant-appellant. They claimed that either the action should be dismissed, or that plaintiff should render accounts of the income and expenditure in the working of the estate. The District Judge (R. N. Thaine, Esq.) held that deeds Nos. 319 and 320 did not operate as a mortgage, and he gave judgment for the plaintiff.

The first and second defendants appealed.

A. St. V. Jayewardene, for the appellants.

[The arguments of counsel are summarized in the judgment of Wood Renton J.]

Bawa, for the respondent (not called upon).

Cur. adv. vult.

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The claim in this action is for declaration of the plaintiff's title to about 278 acres of land, and for recovery of possession, and damages. The plaint says that the first defandant, being the owner of the land, conveyed it by deed No. 319 of April 28,, 1898, to R. M. A. R. A. R. Supramaniam Chetty, who conveyed it to the plaintiff in 1900. The first two defendants in their answer (paragraph 2) denied that by deed No. 319 Supramaniam Chetty acquired any title to the land. They said (paragraph 7 to 10) that the first defendant was the owner of estates of about 647 acres in extent (of which the lands which are the subject of this action form part); that on April 28, 1898, he was indebted to various persons on mortgages of the estates and otherwise, and that in the early part of 1898 he agreed with Arunachalam Chetty, through his agent, the said Supramaniam Chetty, to convey the said estates to Arunachalam, who should pay off the mortgages and take the rents and profits until he had paid himself all sums so advanced by him, with interest, and should then re-transfer the estates to the first defendant. They then allege (paragraph 11) that subsequently it was agreed between Arunachalam and the first defendant, in order to carry out the said agreement, that the first defendant should sign a mortgage bond in

the form of a conveyance in favour of Arunachalam, and that Arunachalam should pay the first defendant Rs. 2,000 in certain instalments, and that the deeds No. 319 and No. 320 were executed on April 28, 1898, in accordance with that agreement. They alleged that Arunachalam made default in payment of the Rs. 2,000, and (paragraph 13) that he entered into possession of the estates in April, 1898, and that he was in possession as usufructuary mortgagee, on the terms that he should work the estates at his own expense and pay himself all the working expenses and the money expended in satisfaction of the mortgage debts, with interest, and should then transfer the estates to the first defendant; and that (paragraph 14) Arunachalam and his heirs and assigns having taken income from the estates far exceeding the sums so due to him, the first defendant is entitled to have the estates transferred to him. They said (paragraph 15) that Arunachalam carried on business in Ceylon and other places under the firm of R. M. A. R. A. R., and in April, 1898, the Jaffna branch of the business was managed by his agent, the said Supramaniam, and the deeds Nos. 319 and 320 were executed between the first defendant and Arunachalam; that Arunachalam died inestate in January, 1901, leaving an estate in Ceylon worth more than Rs. 1,000, and leaving as his only heirs his son, the plaintiff, and a grandson; and (paragraph 16) that in October, 1898, Arunachalam appointed the plaintiff his general attorney in respect of his property and business, and the plaintiff as such attorney procured the execution of the deed No. 911 by Supramaniam without consideration. They then claimed that either the action should be dismissed, or that the plantiff should render accounts of the income and expenditure in the working of the estates.

The third defendant filed an answer saying that he is rightfully in possession under a power of attorney from the first defendant.

Deed No. 319 dated April 28, 1898, recites that Todd is the owner of the estates, subject to a first mortgage to J. McClaren, a second mortgage to B. Messar, and a third mortgage to R. M. A. R. A. R. Supramaniam Chetty; and that the said R. M. A. R. A. R. Supramaniam Chetty, residing at Vannarponnai in Jaffna, has agreed to buy the estates from Todd for Rs. 125,500 burdened with the said mortgages, and that he should retain Rs. 93,930.97 and Rs. 13,000 to pay off the first two mortgages (which he undertook to pay), and the balance of Rs. 18,569.03 to pay off his own third mortgage, and in consideration of the premises Todd thereby sold and transferred the said estates to the said R. M. A. R. A. R. Supramaniam Chetty, to hold to him and his for ever

Deed No. 320, dated the same day, is an agreement between R. M. A. R. A. R. Supramaniam Chetty and Todd, whereby Suppramaniam Chetty binds himself to sell and transfer to Todd the estates which he had bought from him, provided that Todd should within six months from the date thereof pay to Suppramaniam

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Rs. 125,500, and Suppramaniam also agreed to pay to Todd Rs. 2,000 in ten monthly instalments; and it concludes: "It is further distinctly understood between the parties to this agreement that in case the aforesaid sum of Rs. 125,500 is not paid by the said J. P. Todd to the said R. M. A. R. A. R. Suppramaniam Chetty within the term of six months from this date, that is to say, on or before October 1, 1898, this deed and the agreement herein contained to be of no force or avail in law, and the parties shall thence forward be free from any liability under this agreement."

Then by deed No. 911, dated May 1, 1900, Supramaniam Chetty, reciting that he is the owner of the estates, and that he had been carrying on the business of a firm at Vannarponnai in Jaffna, and is now about to leave Jaffna to go to his native place in India, and that it is necessary that he should sell and transfer the said estates, and that he had aranged with R. M. A. R. A. R. Somasunderam Chetty (the plaintiff in this action) to sell and transfer them to him, sells and transfers them to the plaintiff in consideration of Rs. 120,000 paid to him by the plaintiff.

At the trial issues were settled, including issues as to whether the deeds 319 and 320 operated as a mortgage or as an out-and-out sale with a promise to re-convey on the terms and within the time stated in No. 320; whether the claim for re-conveyance is barred by prescription; whether there was such an agreement as alleged in paragraph 13 of the answer of the first two defendants; if so, whether the defendants can rely on it, as it is not notarially executed; was Supramaniam the agent of Arunachalam in April, 1898; and was deed No. 319 made, according to the custom prevailing among Nattu Cotta Chetties, in the name of the firm, with the name of the attorney Supramaniam affixed; and did the estates thereby vest in Arunachalam; and what was the value of the estates in 1898? The first defendant admitted the execution of the deeds 319, 320 and 911, and that he had not paid Rs. 125,500 according to the agreement made in No. 320, and the defendants admitted that the agreement alleged in paragraph 13 of the answer was non-notarial, and was oral, and was prior to the execution of deeds 319 and 320. No oral evidence was taken. It is not recorded that any was tendered, or that the Judge refused to admit it; but in his judgment he discusses the question whether Todd could lead evidence to prove the agreement pleaded in paragraph 13 of his answer, and decides that he could not, such evidence being not admissible under section 92 of the Evidence Ordinance. He also found that deeds 319 and 911 vested the title to the lands in the plaintiff; and that deeds 319 and 320 did not operate as a mortgage; and he gave judgment for the plaintiff. This is an appeal by the first two defendants.

The conveyance made by No. 319 is a conveyance to Supramaniam, not to Arunachalam. We are aware that it is a custom amongst chetties that an agent, when signing promissory notes or

bills or other commercial documents connected with the business of his principal, prefixes to his own name the initials of the firm whose agent he is; those initials show to those who are aware of the custom that he is an agent, and if they know the name of the firm which the initials represent, they also know who is the principal. But this is a case of a formal deed of transfer to Supramaniam, "residing at Vannarponnai in Jaffna"; and although it may be shown, and the prefixed initials go far to show, that he was an agent, and was buying with his principal's money, and would have to hold the land for and account for it to his principal, it is impossible to say that the transfer was to his principal. Similarly, the deed 911, by which he transferred the land to the plaintiff, vested the land in the plaintiff, although as between him and Arunachalam or his heirs it may be that the plaintiff holds the land as agent or trustee.

The appellants contend that they have the right to adduce evidence in proof of the agreement alleged in paragraph 13 of their answer, that is, to prove a verbal agreement made before the deeds 319 and 320, so as to show that the agreement set out in those deeds was not the real agreement, but that the real agreement was that Supramaniam should hold the lands as mortgagee only; and they contend that, as some evidence that that was the real agreement, they are entitled to prove that the value of the lands at the date of the execution of those deeds was more than the purchase money stated in the deeds.

The parties to those deeds were residents in Ceylon, and they and their legal advisers must have been well aware of the ordinary form of mortgage here, which does not take the form of a conveyance to the mortgagee. They were dealing with properties of considerable value, and we may be sure that they carefully considered the terms of their bargain and informed their legal advisers of it, and that the latter drew up the deeds in accordance with their instructions. The terms of the bargain, as expressed in the deeds, are quite short and simple, and are set out in the clearest language; and it is not alleged that there has been any fraud or any clerical error or mistake of fact or of law, or that the consideration stated in the deed of transfer was not paid. You can show by parol evidence, unless some enactment forbids it, that a transferee took the transfer subject to an agreement to re-transfer in certain events, or to hold as a trustee; or you can show that the deed was obtained by fraud or mistake, or with the object of defrauding some one. But where the parties have formally expressed in writing the terms on which the transferee is to re-transfer, and no fraud or mistake or illegality is alleged, it is contrary to sense and also to the express enactment of section 92 of the Evidence Ordinance to allow evidence of an oral agreement made before the formal agreement, not to explain the latter, or to show that there was any mistake in it, but to contradict it. The appellants' counsel in the Court below tried to evade this difficulty

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by asserting that the alleged prior oral agreement was in the nature of a secret trust. The answer to that is that there was no trust alleged, secret or otherwise, but only an ordinary commonplace agreement for a mortgage, which, if it really existed, would have been carried out by a mortgage in the ordinary way.

Reference has been made to cases decided in the Courts of England and India (where the ordinary form of mortgage is by conveyance to the mortgagee, with a proviso for redemption) in which there was a simple transfer, but the Courts allowed parol evidence to prove that the intention of the parties was that the transfer should be entitled to redeem the property on certain terms. Those are cases in which the parol evidence is not to contradict the formal conveyance, but to add to it another term which is not inconsistent with it; and many of them are cases in which the plaintiff proves that he was induced to execute the conveyance by the fraud of the defendant. But here the evidence is to be given in order to contradict the written agreement; if the agreement which the appellants seek to prove were proved, it would simply wipe out the formal agreement.

I think that the appeal should be dismissed with costs.

WOOD RENTON J.—

In this action, the plaintiff-respondent claims a declaration of title to a group of coconut estates more particularly described in the plaint, the ejectment of the defendants-appellants therefrom, and damages against them as trespassers. The first defendant-appellant is the husband of the second; the third defendant was joined as a trespasser along with the first and second; he does not appeal, and the real dispute in the action is between the plaintiff-respondent and the first defendant-appellant. The material facts are these: The first defendant-appellant, who was the owner of the estate in suit, having become heavily involved in debt, and in order to pay off certain mortgages with which the estate was encumbered, sold the properties to Supramaniam Chetty by deed No. 319 of April 28, 1898; Supramaniam Chetty in turn transferred the lands to the plaintiff-respondent by deed No. 911 of May 1, 1900. The defendants-appellants do not, and cannot, deny that this deed *ex facie* creates a valid paper title in favour of the plaintiff-respondent. But the first defendant-appellant alleges that the transfer of April 28, 1898, to Supramaniam Chetty was not an absolute conveyance, but was intended to be only a usufructuary mortgage, and that, anterior to its execution, there was an oral agreement to the effect that Arunachalam Chetty, Supramaniam's principal, or Supramaniam himself, should possess the lands until he had reimbursed himself, with interest, the amount of the advances made for the discharge of the encumbrances on the property, and that

thereafter he should re-convey the lands to the first deffendant-appellant. It should be mentioned here that, by an agreement of even date with the deed of transfer to Supramaniam Chetty, the latter covenanted to re-convey the lands to the first defendant-appellant, provided that he, within six months of the date of the agreement, paid the sum of Rs. 125,500 to the vendee, and that in default thereof the agreement should no longer be of force or avail in law. The first defendant-appellant admittedly did not take advantage of the option given to him by this instrument. When the case came on for trial sixteen issues were agreed upon by counsel on both sides. The scope of these, however, was reduced by subsequent admissions; and we are at present concerned only with the seventh and sixteenth, raising respectively the questions whether the defendants-appellants are entitled to rely on the alleged oral agreement above referred to, what was the value of the estate in 1898, and what was the income derived therefrom from April 28 in that year.

The learned District Judge has held, in effect, that the appellants are precluded by the terms of section 92 of the Evidence Ordinance from setting up an oral agreement contradictory of the terms on which, under the instrument of April 28, 1898, it was stipulated that a re-conveyance of the estate might be demanded. The District Judge has not dealt specifically with the issue as to the value of the estate, which seems to have been framed for the purpose of enabling the appellants to lead oral evidence tending to negative the idea that the deed of April 28, 1898, could have been meant by the parties to operate otherwise than as a mortgage.

I am clearly of opinion that the decision of the learned District Judge as to the former of the two issues above mentioned was right, and I think that the latter also must be answered adversely to the appellants. It was not contended before us that the present case can be brought within any of the provisos, to section 92 of the Evidence Ordinance. The appellants' counsel confined his argument to two points: (1) That there was nothing in section 92 to exclude an application of the well-known English cases, in which it has been held that in equity a party, whether plaintiff or defendant, could always show that an assignment of an estate, which was on the face of it an absolute conveyance, was intended to be nothing more than a security for debt; (2) that even if the English cases on that point were inapplicable in Ceylon in consequence of the peremptory terms of section 92 of the Evidence Ordinance, there was nothing in that section or in any of the decisions under the same section in the Indian Evidence Act to prevent him from proving by the circumstances of the case as a whole, and by the conduct of the parties as distinguished from mere oral evidence of the alleged anterior agreement, that only the creation of a mortgage was intended. I will deal with these points in turn. It is quite true that the first of

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Mr. Jayewardene'e contentions is supported by a strain of Indian authority. I may refer in this contention to the cases of *Rakken v. Alagappudayan*,[1] *Baksu Lakshman v. Govinda Kanje*,[2] and *Hem Chunder Soor v. Kally Churn Das*.[3] On the other hand, the latest decision of the Privy Council itself, *Bakishen Das v. Legge*,[4] directly negatives the appellants' contention on the point that I am now dealing with. In that case a deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of the money to the vendee on a future date fixed. The deeds were followed by transfer of the possession to the vendee and his receipt of the profits. The vendor did not exercise his right of re-purchase, but after many years gave notice of his intention to redeem, and brought this suit to enforce his right of redemption as upon mortgage upon conditional sale. It was held by the Privy Council that oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not admissible, being excluded by the enactment in section 92 of the Indian Evidence Act, and that the case had to be decided on a consideration of the documents themselves, with only such extrinsic evidence of circumstances as might be required to show the relation of the written language to existing facts. In delivering the judgment of the Privy Council, Lord Davey expressed himself thus:—

"Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Indian Evidence Act (Act 1 of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument, or their representatives, in any suit, for the purpose of contradicting, varying, or adding to, or subtracting from its terms, subject to the exceptions contained in the several provisos. It was conceded that this case cannot be brought within any of them. The cases in the English Court of Chancery, which were referred to by the learned Judges of the High Court, have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must, therefore, be decided on a consideration of the contents of the documents themselves, with such evidence of extrincis circumstances as may be required to show in what manner the language of the documents is related to existing facts."

When we called his attention to this authority, Mr. Jayewardene contended that it was at variance with the earlier decision of the Privy Council itself, in the case of *Bhagwan Sahai v. Bhagwan Din*.[5] There is, however, no analogy between the two cases. In

[1] *(1892) I. L. R. 16 Mad. 80.*
[2] *(1880) I. L. R. 4 Bom. 594.*
[3] *(1882) I. L. R. 9 Cal. 528.*
[4] *(1899) I. L. R. 22 All. 149.*
[5] *(1890) I. L. R. 12 L. 387.*

Bhagwan Sahai v. Bhagwan Din there was no question before the Privy Council of the admission of oral evidence in contradiction of the terms of a solemn written contract. The case turned on the construction of two written contracts, and the Privy Council held that a written document purporting to be one of sale, although it was accompanied by a contract reserving to the vendor a right to re-purchase the property sold on repaying the purchase money within a certain time, was not, on that account, to be construed as if it were a mortgage. Sir Barnes Peacock, in delivering the judgment of the Privy Council, followed the English Law on the point as defined in the case of *Alderson v. White.*[1] There is, however, nothing in section 92 of the Evidence Ordinance to conflict with the English Law on that subject. It does not follow that English cases and equitable doctrines should be applied where they are in conflict with section 92 of the Evidence Ordinance, and the decision of the Privy Council in the case of *Bakishen Das v. Legge* is a clear authority for the view that they are inapplicable.

In support of his argument on the second point, the appellants' counsel referred us to certain Indian cases; see, for example, *Khankar Abdul Rahman v. Ali Rafez* [2] and *Mohamed Ali Hassein v. Nagar Ali*,[3] in which it has been held that the decision of the Privy Council in *Bakishen Das v. Legge* does not exclude oral evidence of the acts and conduct of parties for the purpose of showing that an apparent sale was really a 2 mortgage. In Amir Ali's *Laws of Evidence, 4th ed., p. 481*, reference is given to cases, both earlier and later than the decision of the Privy Council in *Bakishen Das v. Legge*, in which the Courts have, for the purpose of judging the nature of a transaction, had recourse to the acts and conduct of parties and to the circumstances, as, for example, where it was sought to show that an *ex facie* sale was really a mortgage, to the circumstance that property which was worth Rs. 250 was apparently sold for Rs. 35. I have been unable to obtain access here to any reports of these decisions. They would seem, however, to have quite untouched the question whether, even assuming that evidence of conduct may be admitted to show that a transaction is not what on its face it appears to be, it is permissible thereafter to give oral evidence in order to prove what were the terms of the real transaction. The weight of Indian judicial authority supports the view that such oral evidence would be inadmissible (see *Achutaramaraju v. Subbaraju* [4] and *Rahiman v. Elahi Baksh*,[5] and other cases cited in Amir Ali's *ubi supra nn. (5 and 8)*. In the words of Amir Ali:—

"The true rule would therefore appear to be that any evidence, whether of conduct or otherwise, tendered for the purpose of contradicting, varying, adding to, &c., a document is excluded by the

[1] *(1858) 2 De G. and J. 105.*
[2] *(1900) I. L. R. 256.*
[3] *(1901) I. L. R. 28 Cal. 289.*
[4] *(1901) I. L. R. 25 Mad. 7.*
[5] *(1900) I. L. R. 28 Cal. 70.*

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terms of this section, unless it can be shown to be admissible under the provisos, as on the ground of fraud. If a case comes within the provisos, then any evidence of conduct or otherwise may be given. In short, the same principles apply to the admission of evidence of conduct as indirect evidence of the existence of a contemporaneous oral agreement as to the admission of direct evidence. Neither are admissible, unless the case can be shown to come within the provisos to the section."

The local case of D. C., Kalutara, No. 62,519 (*Record, p. 77*), is no authority in favour of the appellants. The proceedings in that case were instituted by third parties, to whom section 92 of the Evidence Ordinance does not apply; and, moreover, as the learned District Judge has pointed out in his excellent judgment, the decision turned on fraud. Even if it were competent to the appellants, in spite of the decision of the Privy Council in *Bakishen Das v. Legge*, to adduce evidence as to the value of the estate, for the purpose of showing that the conveyance of April 28, 1898, was a mortgage and not a conditional sale, their case would be in no way advanced. For the decision of the Privy Council in *Bakhishen Das v. Legge* would, in my opinion, effectually debar them from contradicting the written instrument, which gave the first defendant-appellant the option of procuring a re-conveyance within six months on payment to his vendee of Rs. 125,500 by oral evidence of the agreement on which they relied. It appears to me that we might as well strike section 92 out of the Evidence Ordinance altogether as give effect to the contentions put before us by the appellants in the present case.

I would dismiss the appeal with costs.

Appeal dismissed.