Present: Lascelles C.J. and Ennis J.

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SOMASUNDERAM CHETTY *v.* ARUNASALEM CHETTY

359—D. C. Jaffna, 6,697.

*Chetty firm—*Vilasam*—Conveyance of land to an agent with the initials of the firm affixed—Title vests in agent, and not in partners of the firm—Trust—Action to compel agent to convey to members of the firm—Commission to record evidence issued to one Judge—Nomination of a pleader to record evidence made by another Judge—Irregular—Oath to be taken by Commissioner and interpreter.*

A conveyance to a Chetty with the initials of his firm affixed is not equivalent to a conveyance to an individual or individuals composing the firm. The conveyance passes title to the person named in the deed as transferee, but it is permissible to call evidence as to the meaning of the *vilasam*, in order to prove that the conveyance was made to the transferee in the capacity of an accredited agent of the firm.

In this case a commission to record the evidence of some witnesses was originally addressed to the District Judge of Ramnad. The Subordinate Judge of Ramnad nominated a pleader to record the evidence of the witnesses, and there was nothing to show that the power of the District Judge was properly delegated to the Subordinate Judge. Both parties, however, appeared before the pleader.

Held, that the appointment of the pleader by the Subordinate Judge was irregular.

LASCELLES C.J.—"The irregularity is substantial, and I cannot hold that it has been waived or is capable of being waived."

A pleader appointed to record evidence should administer the oath to himself and to the interpreter.

APPEAL from a judgment of the District Judge of Jaffna (M. S. Pinto, Esq.). The facts are set out as follows in the judgment of Ennis J.:—

"The plaintiff in this action sued for a declaration of title to a coconut estate, for the ejectment of the defendant, and for damages. The claim for damages was waived. The plaintiff's case is that the estate originally belonged to one Todd, under deed No. 2,449 of December 18, 1894, who by deed No. 319 of April 28, 1898, transferred it to R. M. A. R. A. R. Supramaniam Chetty, who by deed No. 911 of May 1, 1900, transferred it to R. M. A. R. A. R. Somasunderam Chetty.

"The defendant in answer asserted that the deed No. 911 was a transfer of the land to the Chetty firm of R. M. A. R. A. R., and not to the plaintiff personally, or, in the alternative, in the event of it being held that the deed No. 911 vested the legal title in the plaintiff,

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that it was held by the plaintiff in trust for Arunasalem Chetty, who traded under the firm, name, and style of R. M. A. R. A. R. ; that Arunasalem Chetty (1) died intestate in 1901, leaving as his only heirs-at-law his son, the plaintiff, Somasunderam Chetty, and a grandson, the defendant, Arunasalem Chetty (2), the son of his predeceased son, Ramanathan Chetty, who are equally entitled to the estate. The defendant further asserted that the transfer No. 911 was made without consideration, and that the plaintiff refuses to recognize the defendant's right.

" The plaintiff also claimed title by prescription. "

The learned District Judge dismissed plaintiff's action.

The plaintiff appealed.

Bawa, K.C., and *F. J. de Saram*, for plaintiff, appellant.

Joseph Grenier, K.C., *Kanagasabai*, *Elliott*, *B. F. de Silva*, and *J. S. Jayewardene*, for the defendant, respondent.

June 4, 1914. LASCELLES C.J.—

The first question arising on this appeal is whether the learned District Judge is right in holding that the deed P 2 of May 1, 1900 from R. M. A. R. A. R. Supramaniam Chetty to R. M. A. R. A. R. Somasunderam Chetty (the plaintiff) passed title, not to the plaintiff, but to the firm denoted by the initials R. M. A. R. A. R., namely, the firm carried on by Arunasalem Chetty, the father of the plaintiff and the grandfather of the defendant. In my opinion this part of the judgment cannot be sustained.

It is true that our Courts have frequently recognized the custom of Natucotta Chetties trading in Ceylon with regard to signing commercial documents. The firm has a *vilasam* or trade style consisting usually of the initials of the persons who constitute the firm, and an agent signing in Ceylon on behalf of his firm usually prefixes these initials to his own name. Examples of the recognition of this practice with regard to commercial documents may be found in *Ra-Ma-A. Sevugam Chetty v. Ka-Ru-Chu-Colopan Chetty*,[1] *K.N.P. Letchiman Chetty v. K. N. P Peria Carpen Chetty*, *Bank of Madras v. A. Ru-Su-Veiy*, *R. Virappa Chetty*,[3] *K. M. M. S. T. Walayappa Chetty v. V. R. M. S. Supperamaniam Chetty*.[4] *The Bank of Madras v. Ana Runa Suna Vaiyana Rana Weerappa Chetty*,[5] and in other cases. But there is no case which goes the length of holding that a conveyance of immovable property to a Chetty with the initials of the firm prefixed to his name vests title in the firm or in the persons

[1] *Ram. 63–68, 209.*
[2] *2 S. C. C. 193.*
[3] *3 S. C. C. 136.*
[4] *4 S. C. C. 91.*
[5] *7 S. C. C. 89.*

constituting the firm. The learned District Judge relied on *Kanappa Chetty v. Walathappa Chetty.*[1] This case is an authority for the proposition that it is permissible, under section 98 of the Evidence Ordinance, to prove the meaning of the initials prefixed to the Chetty's name by parol evidence.

In that case the evidence was ordered to be taken in order to ascertain whether the relation of principal and agent subsisted between the fifth defendant and the Chetty firm. If the relationship was established, the result would have been that the fifth defendant would have been accountable to the firm for the value of the land. So far as the legal title was concerned, it would still have been with the fifth defendant.

This case is thus no authority for the proposition for which the respondent contends.

I think the law on the subject is clear. The conveyance passes title to the person named in the deed as transferee, but it is permissible in these cases to call evidence as to the meaning of the *vilasam*, in order to prove that the conveyance was made to the transferee in the capacity of accredited agent of the firm.

There is, so far as I am aware, no authority for the proposition that a conveyance to a Chetty with the initials of his firm affixed is equivalent to a conveyance to the individual or individuals composing the firm.

Where a conveyance is made in accordance with Ordinance No. 7 of 1840 to a juristic person, there can be no doubt but that the legal title vests in that person, though it may be that the legal title is subject to some equity in favour of another.

But this point does not go to the root of the present case, as, although the learned District Judge has decided the case on the footing that the deed P 2 passed title to Aunasalem Chetty, he holds that, on his findings of fact, the defendant must succeed on his claim in reconvention, by which he seeks to compel the plaintiff to transfer the estate to Muttiah Chetty as the administrator of the estate of Arunasalem Chetty, or the half share, which the defendant claims, to the defendant himself.

The learned District Judge has found—and his findings are based on overwhelming evidence—that the deed P 1 from James Price Todd to R. M. A. R. A. R. Suppramaniam was a conveyance to Suppramaniam on behalf of the firm, and that the purchase money was provided by the firm. This fact, after having been contested, was admitted by the plaintiff at a late stage in the trial. With regard to the transfer P 2 to the plaintiff, he has found that no consideration passed for the transfer; that the transaction was in fact a transfer effected, for purposes of convenience, from one agent of the firm to another; that the stamp duty on the deed was charged to the estate; and that, after the transfer, the estate was managed,

[1] *7 N. L. R. 339.*

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not as the property of the plaintiff alone, but as the property of the firm R. M. A. R. A. R.

It was also proved that when the Karambagam estate (which was comprised in P 2) was sold, half the proceeds were paid to the plaintiff and half to the defendant, on the footing that this estate, at any rate, belonged to the firm, and not to the plaintiff.

On these facts the defendant is clearly entitled to succeed on his claim in reconvention. The plaintiff's claim to be beneficial owner of the property by virtue of his deed is fraudulent, and the Court will not allow the Ordinance of Frauds and Perjuries to be used as an instrument of fraud. It is well settled that parol evidence may be admitted to establish an implied or resulting trust without violating the Ordinance of Frauds (*vide Saibo v. Oriental Bank*,[1] *Gould v. Innasitamby*,[2] *Ohlmus v. Ohlmus* [3]).

On the findings of the District Judge, which, as I have said, are supported by an overwhelming volume of evidence, I have no doubt that the defendant is entitled to succeed on his claim in reconvention.

But we are confronted with a question of some difficulty in the shape of the plaintiff's objection to the admissibility of the evidence taken on commission in India. Several grounds of objection were put forward. I will deal with the most formidable.

It appears that the commission had originally been addressed to the District Judge of Madura. On October 4, on the motion of the defendant's proctors, the commission was amended and addressed to the District Judge of Ramnad, on the ground that the villages where most of the witnesses lived had been brought within the jurisdiction of the District Court of Ramnad. On November 29 there is an entry of service of notice on the plaintiff of issue of commission to the District Judge of Ramnad.

The official stamp on the back of the commission shows that the commission was received in the District and Sessions Court of Ramnad on October 31, 1911, and below this is affixed, under date November 13, 1911, the stamp of the Subordinate Court of Ramnad. On November 22 the parties consented to the evidence being recorded by a vakil nominated by the District Judge of Ramnad. Then on December 6 the Subordinate Judge of Ramnad nominated a pleader to take the examination of the witnesses. How the commission was transferred from the District Court of Ramnad to the Subordinate Judge, and how the Subordinate Judge came to appoint the examiner, is not explained. If there were reason to believe that the District Judge of Ramnad had made order under section 24 of the Indian Code of Civil Procedure, 1908, or otherwise, transferring the matter to the Subordinate Judge, we might have assumed the regularity of the proceeding. But it is pretty clear that no such order was made.

[1] *3 N. L. R. 148.* [2] *9 N. L. R. 175*

[3] *9 N. L. R. 183.*

The learned District Judge, in this connection, refers to a letter from the Subordinate Judge of Ramnad (which is not in evidence), and to a letter from the clerks of the Jaffna Court to the Subordinate Judge (also not in evidence). The result is we have a commission issued to the District Judge of Ramnad, and the commission carried out by another Judge of the Subordinate Court of Ramnad, without anything to show that the power of the District Judge was properly delegated to the Subordinate Judge. The learned District Judge takes the view that the plaintiff, having appeared before the examiner appointed by the Subordinate Judge, cannot now take exception to the competency of the Subordinate Judge. In view of the observations of Lindley J. in *Wilson v. Wilson.* [1] I do not think this view is sustainable.

In cases where the regularity of a commission is open to question, I think it would be unreasonable to expect counsel to elect between the alternatives of retiring from the commission and of continuing to represent his client, and so waiving his right to object to the admissibility of the evidence.

The irregularity is substantial, and I cannot hold that it has been waived or is capable of being waived.

But this is not the only respect in which the commission is irregular. No proper return was made to the commission. There is nothing to show that the examiner administered the oath to himself and the interpreter. The evidence taken on commission appears to have been read without the proof of the circumstances required by section 426 of the Civil Procedure Code to be proved before the evidence is admissible.

The evidence taken on commission must clearly be eliminated from the record for the purpose of this appeal. But, in my opinion, this will not affect the findings of fact. On the evidence taken in the District Court of Jaffna, coupled with the plaintiff's failure to appear in the witness box and his evasive and disingenuous answers to interrogatories, no jury could reasonably have come to any other conclusion than that at which the District Judge has arrived. There cannot, in my judgment, be any doubt that the property in question was conveyed to the plaintiff as an agent for and on behalf of the firm carried on by Arunasalem Chetty.

Then it is contended that the defendant's claim in reconvention is prescribed.

The defendant relies on the evidence of Muttiah Chetty, that after the death of Arunasalem Chetty, which seems to have been in 1901, the firm R. M. A. R. A. R. continued for the purpose of the estate in Ceylon, and that the Ceylon agent, Ramen Chetty, looked after the estate for the two co-heirs, and that it was not until August, 1908, that the plaintiff first claimed the whole estate. The plaintiff relies on paragraph 8 of the answer in its unamended form, which

[1] *9 Prob. Div. 8.*

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gives November, 1902, as the date when Ramen Chetty, in collusion with the plaintiff, refused to acknowledge the defendant.

But the plaintiff cannot rely on a portion of the answer which has been struck off the record, and the defendant has admitted receiving a considerable sum in respect of the rents and profits of the estate as late as 1907. I see no reason for holding that the claim in reconvention is prescribed.

For the above reasons, I think that the defendant is entitled to succeed on his claim in reconvention. The proper order, I think, will be that the decree of the District Court be set aside, except so far as it orders the plaintiff's claim to a declaration of title to be dismissed; that the defendant be ordered to execute, in the manner provided by sections 331, 332, and 333 of the Civil Procedure Code, a conveyance to the added defendant as the administrator of the estate of Arunasalem Chetty, deceased, of the property described in the schedule to the plaint; that the amounts deposited by the receiver appointed in case No. 6,868 of the District Court of Jaffna be paid to the added defendant as such administrator. The defendant is entitled to his costs here and in the District Court.

ENNIS J.—

His Lordship set out the facts, and continued :—

Three sets of issues were submitted, and they all appear to have been accepted as issues, although they overlap one another. Later in the case two additional issues were framed. In the course of the argument on appeal it was urged that the plaintiff was prejudiced owing to the absence of a definite issue as to a failure of consideration for deed No. 911. That consideration had not been paid is a circumstance in support of the contention that there was a trust, and an issue as to whether the land vested in trust was definitely raised. Moreover, it was definitely stated in the answer that deed No. 911 was without consideration. The plaintiff cannot, therefore, have been taken by surprise, and in the circumstances of the case I am unable to see that he was prejudiced by the absence of a separate issue.

In the course of the trial a commission was issued to take evidence in India for the defendant and it is urged by counsel for the appellant that all the evidence taken on that commission is inadmissible. The commission was directed to " the District Judge of Ramnad. " In some way it passed to the Subordinate Judge of Ramnad at Madura, who subsequently appointed a vakil to take the evidence. The original commission to the District Judge of Ramnad contained no authority to him to appoint another to take the examination. Application appears to have been made to the Jaffna Court to authorize the District Judge of Ramnad to appoint a vakil to take the examination. The application was allowed, but the document,

if any, by which the authority was communicated to the District Judge of Ramnad is not in the record. Apart, however, from any authority from the Court of Jaffna, the District Judge of Ramnad had authority under the Evidence by Commission Act, 1885 (48 and 49 Vic., ch. 74), section 2, to nominate some fit person to take the examination. The vakil who took the examination in this case was not, however, nominated by the Disrict Judge of Ramnad, but by the Subordinate Judge at Madura, who appears to have had no authority, either under the commission or under the Imperial Act, to make any nomination, even if he himself can be presumed to have been properly nominated by the District Judge of Ramnad. In the circumstances, it seems to me that the evidence has not been properly taken, and is inadmissible. The objection is, however, highly technical, for if the commission had issued, as seems to have been the intention, to the Court at Madura without specifying any particular Judge, no good objection to the admission of the evidence could have been maintained (*Wilson v. Wilson* [1]). Had this evidence been very material to the defendant's contention I think the case should be sent back, but in my opinion the appeal must fail on the evidence taken at Jaffna.

In the District Court it was held that the transfer deed No. 911 vested the property in Arunasalem Chetty (1), on the ground that by Chetty custom the transfer to R. M. A. R. A. R. Somasunderam Chetty was a transfer to the firm of R. M. A. R. A. R. If this were so the deed was unnecessary, as the previous transfer deed No. 319 to Suppramaniam Chetty would have vested the property in the firm, and no further transfer for the purpose would have been required. The Supreme Court has already expressed an opinion on this point with regard to this same deed No. 911 (*Somasunderam Chetty v. Toddy* [2]), holding that, notwithstanding the initials might refer to a firm, the property vested in Somasunderam Chetty. I am in entire accord with that view, and it is hardly necessary to consider the question further, as the real point of the case is whether the deed No. 911 vested the property in Somasunderam Chetty personally or as agent of the firm R. M. A. R. A. R.

It is asserted that Somasunderam's own personal initials were also R. M. A. R. A. R., and there is evidence in support of this. The added defendant, Muttiah Chetty, says, " So long as the old Arunasalem lived, his sons had the same *vilasam*, R. M. A. R. A. R. If a letter was written to Somasunderam Chetty, it would be addressed R. M. A. R. A. R. Somasunderam Chetty. " The contention based on this assertion is that deed No. 911 is on the face of it a sale to Somasunderam personally, and evidence is not admissible to show that the initials were intended as the firm's intials. It seems to me that such evidence would be admissble in a case such as this, where it is alleged that the instrument is being

[1] *9 Prob. Div. 8.*

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used to perpetrate a fraud. The evidence would be admissible under the first proviso to section 92 of the Evidence Ordinance. It is conceded that the estate was originally acquired with the money of Arunasalem, the senior, for his firm of R. M. A. R. A. R. The plaintiff Somasunderam was appointed Arunasalem's general attorney in respect of his property and business in 1899. The power of attorney D 56 recites that it is given by Arunasalem as he is growing old. Suppramaniam was at that time the agent of Arunasalam's business in Jaffna, and as such acquires the estate for Arunasalem's firm, which Somasunderam controls as general agent. In 1900 a new agent is appointed to Jaffna, and Suppramaniam executes the deed No. 911 to Somasunderam, reciting that he was carrying on the business of the firm in Jaffna " to go to my native place in India, and it is necessary that I should sell and transfer over the said coconut estate." The consideration mentioned in the deed is for a less sum than the consideration on the previous deed. The attestation to the deed does not state that the consideration wsa paid in the presence of the notary. Suppramaniam's books of accounts, which have been produced, contain no entry of the receipt of the consideration money. Arunasalem Chetty died in January, 1901. In April of that year an agreement D 2 is entered into between the parties to this case to manage the coconut estate in common, an agreement which would be unnecessary if the estates belonged to Somasunderam alone and had been paid for by him personally. These facts are more than sufficient to throw on the plaintiff the onus of proof of payment of consideration and of his good faith in the transaction. The plaintiff has, however, abstained from giving evidence, and his answers to interrogatories are distinctly evasive. In the circumstances, I nsider the finding that the property vested in him in trust is right.

As to whether the defendant's claim is barred by prescription. I agree with the finding of the District Judge. The evidence of Muttiah Chetty shows that the plaintiff first denied the defendant's claim in 1908.

It has been urged for the first time on appeal that Suppramaniam was entitled to one-tenth of the capital of the Jaffna business. The estate, however, never vested in Suppramaniam personally. He held it as agent of Arunasalem (1), and as such transferred the whole estate. If Suppramaniam had any claim, he can prefer it to the administrators of Arunasalem's estate.

I would vary the decree by ordering the plaintiff to execute a transfer of the whole property to the administrator of Arunasalem's estate, the respondents to have costs on this appeal.

Varied