

1921.

Present : Ennis A.C.J. and De Sampaio J.

THEEVANAPILLAI *et al.* v. SINNAPILLAI.

219—D. C. Jaffna, 13,799.

Trust—Transfer of land to one person on the verbal understanding that he was to convey it to another when his debts were settled—Oral evidence to prove trust.

The land in question was conveyed to the first defendant on an express verbal understanding that she was to convey to her son S when his debts were settled.

Held, that oral evidence could be led to prove the trust.

THE facts appear from the judgment.

E. W. Jayawardene (with him *Arulanandan*), for the appellant.

H. J. C. Pereira, K.C. (with him *Croos-Dabrera*), for the respondents.

March 23, 1921. ENNIS A.C.J.—

In this case the plaintiffs claimed a conveyance from the defendant of a piece of land to the second plaintiff subject to a life interest in favour of the first plaintiff. The learned Judge directed a conveyance to be made, and the defendant appeals. It would seem that the land belonged to one Arunachalam, who is married to Muttupillai, and had a daughter Thankapillai, who is married to Velupillai. Arunachalam also had an illegitimate son, Somasunderam, by the first defendant. Somasunderam was about to be married to the first plaintiff, and Arunachalam promised to convey to him the piece of land in question. For some reason the marriage was hurried on, and Arunachalam gave a promissory note for Rs. 500 as security for the future conveyance of the land, as he was unable to execute a deed at the moment. Somasunderam then married the first plaintiff, and the second plaintiff is the daughter of that marriage.

Arunachalam died shortly afterwards without executing a conveyance to Somasunderam. Veluppillai administered his estate. Somasunderam threatened to sue on the promissory note he held, whereupon Veluppillai agreed to convey the land and give effect to his father-in-law's promise. But by an agreement between Somasunderam and his mother, the first defendant, as Somasunderam was in debt, Veluppillai conveyed the land to the first defendant on January 19, 1918, and the first defendant undertook to convey the land to her son Somasunderam as soon as he should be free from debt. It appears that Veluppillai in administering the estate of Arunachalam had been put to some expense, and Somasunderam acknowledged that he ought to bear a share of that expense, and the sum of Rs. 300 appears to have been agreed upon as the share which Somasunderam should bear. On the date of the conveyance to the first defendant of the land, the first defendant executed a mortgage bond for Rs. 300. No money was passed on the bond, but a debt of Veluppillai was satisfied. Somasunderam then died, and his widow and daughter now bring the action against the first defendant.

The learned Judge has found as a fact that the land was conveyed to the first defendant "on an express verbal understanding that she was to convey it to Somasunderam when his debts were settled, and it could be safely done." He also came to the conclusion that no consideration was paid. He, therefore, held that the defendant held the land in trust for Somasunderam and decreed a conveyance. On appeal a long argument on the question of fact was addressed to us, but I see no reason to interfere with the finding of fact arrived at by the learned Judge. There is evidence in support of his finding. It was contended on appeal that the plaintiff-respondents should not have been allowed to lead evidence in proof of the trust in the Court below. This was the substance of the contention. It was also urged that prior to the Trusts Ordinance, No. 9 of 1917, there was no case of a trust on all fours with the present case. It is, however, unnecessary to consider whether there were any previous cases, because this matter has now to be dealt with on the basis of the Trusts Ordinance, 1917, and on the basis of the Evidence Ordinance. The respondents urge, and I think rightly, that this case is not a case of a constructive trust within the meaning of chapter IX. of the Trusts Ordinance, and if that be so, it can only be an express trust. But it was urged for the appellant that such would not be valid unless in writing as required by section 5 of the Trusts Ordinance. This contention was met by Mr. Pereira, for the respondents, by pointing out that section 118 of the Trusts Ordinance allowed of the application of English law where there was no specific provision in the Ordinance, and he pointed out that by the English law of secret trust that is an express trust which has not been clothed in the legal formalities required by law a failure to perform

1921.

ENNIS A. C. J.

Theevanapillai v. Sinnapillai

1921.
 ENNIS A.C.J.
*Theevana-
 pillai v.
 Sinnapillai*

the trust is itself an act of fraud, and Mr. Pereira urged that the proviso at the end of section 5 covered the present case in consequence. In my opinion this contention is right, and quite apart from the fact that evidence of fraud may always be led, the plaintiffs, who are the representatives of a person who is not a party to the conveyance to the defendant, are entitled under section 99 of the Evidence Ordinance to adduce evidence of a contemporaneous agreement varying the terms of the agreement. The document takes the form of a conveyance on sale. The evidence led shows that it was executed in pursuance of a contemporaneous agreement that the land should be held on trust to be conveyed by the defendant to her son Somasunderam. In the circumstances, I am of opinion that the decree appealed from is right, and would dismiss the appeal, with costs.

Mr. Pereira, for the plaintiff-respondents, voluntarily expressed his willingness that we should add that the plaintiff-respondents will pay the mortgage debt of Rs. 300 and interest incurred by the first defendant.

DE SAMPAYO J.—I agree.

Appeal dismissed.

