

[IN THE PRIVY COUNCIL.]

1947 Present : Lord Thankerton, Lord Uthwatt, Lord Du Parcq,
Sir Madhavan Nair and Sir John Beaumont.

VALLIYAMMAI ATCHI, Appellant, and ABDUL MAJEED,
Respondent.

PRIVY COUNCIL APPEAL NO. 15 OF 1946.

S. C. 30—D. C. Colombo, 1,961.

Trust—Unconditional notarial transfer of land—Parol agreement of trust—Admissibility of oral evidence—Whether Section 2 of Statute of Frauds applicable—Formalities necessary to constitute trust—Section 5 of Trusts Ordinance—Effectuating fraud—Evidence Ordinance, sections 91 and 92.

M who was entitled *inter alia* to certain immovable property of the value of over Rs. 460,000 executed an unconditional notarial transfer of these properties to N for a consideration of Rs. 203,256. It was alleged by M that this transfer was in pursuance of a verbal agreement that N was *inter alia* to hold the properties in trust for him; to pay out of the income certain specified debts and interest to himself at 12 per cent. on the said sum of Rs. 203,256 and to reconvey the properties to M on the liquidation of the said sum of Rs. 203,256 and interest. N died and his widow claimed to hold the properties free of the trust. In an action by M for a declaration of trust and consequential relief—

Held, that oral evidence was admissible to establish the trust.

Held, further, that the formalities required to constitute a valid trust relating to land are to be found in section 5 of the Trusts Ordinance and not in section 2 of the Prevention of Frauds Ordinance; that the act of the widow in seeking to ignore the trust and to retain the property for the estate was to effectuate a fraud; that, therefore, under section 5 (3) of the Trusts Ordinance even a writing was unnecessary and sections 91 and 92 of the Evidence Ordinance had no application.

A PPEAL from a judgment of the Supreme Court reported in (1944)
45 N. L. R. 169.

D. N. Pritt, K.C., with *Stephen Chapman*, for the appellant.

C. S. Rewcastle, K.C., with *R. K. Handoo*, for the respondent.

April 24, 1947. [Delivered by SIR JOHN BEAUMONT]—

This is an appeal from a Judgment and Decree of the Supreme Court of the Island of Ceylon dated March 31, 1944, affirming a judgment and decree of the District Court of Colombo dated September 25, 1942.

The suit out of which this appeal arises was brought by one O. L. M. Abdul Majeed (hereinafter called "the plaintiff") against the appellant as executrix of the estate of her late husband, K. M. N. S. P. Natchiappa Chetty (hereinafter called "Natchiappa"). The plaintiff died after the hearing of the appeal in the Supreme Court, and by Order of Revivor made on June 4, 1946, the respondent was brought on record as the executor of his estate.

By the plaint filed on November 4, 1940, the plaintiff alleged (Paragraph 4) that he was entitled (a) to movable property of the value

of Rs. 250,000; (b) to a large number of immovable properties specifically described of the value of over Rs. 460,000; (c) to other immovable property of the value of Rs. 200,000. Paragraph 5 specified the debts for which he was liable at that date. In paragraph 7 it was alleged that in February, 1930, it was agreed between the plaintiff and Natchiappa, by his agent and attorney Ramanathan Chetty:—(a) that the plaintiff should execute a transfer of the properties referred to in paragraph 4 (b) in favour of Natchiappa; (b) that the deed of transfer should purport to be for a consideration of Rs. 203,300; (c) that Natchiappa should hold the said properties in trust for the plaintiff and should collect the rents, profits and income thereof as trustee of and for and on behalf of the plaintiff; (d) that the sum so collected should be devoted by Natchiappa to pay the rates and taxes then due as therein mentioned a secured debt of Rs. 1,515 due to a third party, to the payment of rates and taxes and expenses in connection with the repairs of the properties, and that he should pay himself interest at the rate of 12 per cent. per annum on the total sum which would be due to Natchiappa amounting to Rs. 203,256.66; (e) that whenever the plaintiff arranged for the sale of any of the said properties Natchiappa should convey and transfer such properties to such purchaser or purchasers so arranged and that the purchase price should be paid to Natchiappa and the same should be applied by him in liquidation of the said sum of Rs. 203,300 due to him from the plaintiff; (f) that on liquidation of the said sum of Rs. 203,300 and interest Natchiappa should reconvey unto the plaintiff or his heirs at the expense of the plaintiff or his heirs the said properties or such of the said properties as remained unsold; (g) that the plaintiff should remain in possession, as true owner of two of the said properties therein mentioned. (Paragraph 8.)—That in pursuance of the said agreement the plaintiff executed the Deed dated March 3, 1930 (which became exhibit P. 21 in the suit), and that thereupon Natchiappa became entitled to hold the said properties in trust for the plaintiff and for the purposes aforesaid. (Paragraph 9.)—That within a few weeks of the execution of the Deed of March 3, 1930, Natchiappa came to Ceylon and personally agreed to hold the said properties in trust for the plaintiff and to carry out the terms thereinbefore referred to. (Paragraph 15.)—That Natchiappa died on December 30, 1938; that the sum due to Natchiappa from the plaintiff in respect of the transaction between the plaintiff and Natchiappa had been liquidated out of the sums collected by Natchiappa, and there was no sum due and owing from the plaintiff to Natchiappa at the time of his death. (Paragraphs 17 and 18.)—That Natchiappa, by his last will dated December 3, 1938, appointed his widow, the defendant, to be executrix of his said will and that she duly proved the will. (Paragraph 20.)—That in or about January, 1940, the defendant fraudulently and in breach of the trust referred to in Paragraph 7 claimed that the estate of Natchiappa was entitled to the properties aforesaid. The plaintiff claimed a declaration that Natchiappa obtained the transfer dated March 3, 1930, in trust for the plaintiff on the terms and conditions set out in paragraph 7 of the plaint and held the said properties in trust for the plaintiff; and other consequential relief.

The suit was tried by the District Judge of Colombo who held that oral evidence of the trust set out in paragraph 7 of the plaint could be

given, and that such trust was proved. Accordingly, by decree dated September 25, 1942, he made the declaration asked for in the plaint, directed the defendant to transfer to the plaintiff the properties described in Schedule "C" thereto and as many of the properties as remained unsold out of the lands described in Schedule "B" thereto on payment by the plaintiff to the defendant of any sum of money found due on account being taken. The decree then directed that the appropriate accounts should be taken and ordered the defendant to pay the plaintiff the costs of the action.

From this decree the defendant appealed to the Supreme Court of the Island of Ceylon. The Supreme Court agreed with the finding of the Trial Judge that the trust alleged in paragraph 7 of the plaint had been proved. The learned Judges discussed the legal aspect of the matter in detail and came to the conclusion that there was nothing in the Evidence Ordinance or elsewhere in the Law of Ceylon to prevent oral evidence being given to prove the trust in the circumstances established in the case.

Before this Board three points were argued: First, that there was no evidence to support the finding that the trust alleged in paragraph 7 of the plaint was proved; that, at the most, the evidence showed only that the conveyance P 21 was in the nature of a mortgage involving an obligation to reconvey the property to the transferor on payment of the debt due to the transferee. Secondly, that no oral evidence was admissible to contradict, vary, add to or subtract from the terms of P 21 and that the alleged arrangements between the plaintiff and Natchiappa, whatever it amounted to, could not be proved. Thirdly, that the object of the arrangement made in 1930 between the plaintiff and Natchiappa was to defraud the unsecured creditors of the plaintiff, and that the Court should have refused any relief to the plaintiff on the principle of the maxim *ex turpi causa actio non oritur*.

Upon the first point their Lordships have been referred to the relevant evidence and they are satisfied that there was ample evidence, if admissible, to justify the finding that the trust alleged in paragraph 7 of the plaint was established. They accept the concurrent findings of the Courts in Ceylon upon this point.

This finding confines the question as to the admissibility of oral evidence within narrow limits. The question for determination is whether, the land in suit having been conveyed to Natchiappa by a disposition in writing, executed according to law, with no written conditions, but subject to a parol arrangement that he would hold the property upon trust in the events which have happened for the benefit of the transferor, it is open to the executrix of Natchiappa under the Law of Ceylon to maintain successfully that the trust cannot be proved and to retain the land for the estate of Natchiappa. Both the Courts in Ceylon answered this question in the negative, and their Lordships agree with them.

As the question was presented to the Board, the answer to the problem turns upon section 2 of the Prevention of Frauds Ordinance and section 5 of the Trusts Ordinance, and it will be convenient to set out the terms of those sections.

Section 2 of the Prevention of Frauds Ordinance (No. 7 of 1840) is in these terms :—

“No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing and security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorised by him or her in the presence of a licensed notary public and two or more witnesses, present at the same time and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses. Section 5 of the Trusts Ordinance, Ordinance 9 of 1917 is in these

terms :—

“(1) Subject to the provisions of section 107” (which relates to Charitable Trusts) “no trust in relation to immovable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed.”

Sub-section 2 deals with trusts of movable property.

“(3) These rules do not apply where they would operate so as to effectuate a fraud.”

The argument advanced on behalf of the appellant was that the parol agreement made between the plaintiff and Natchiappa in 1930 was an agreement for establishing an interest affecting land within the meaning of section 2 of the Prevention of Frauds Ordinance, and, not being in writing and executed in accordance with the terms of that section, was of no force or avail in law. It was further contended by Mr. Pritt that as the whole transaction of 1930, namely, the conveyance and the trust, was required by law to be reduced to the form of a document no evidence of the transaction apart from the document could be given under the terms of section 91 of the Evidence Ordinance. This latter argument appears to their Lordships to be superfluous since, if the verbal trust is of no force or avail in law by reason of section 2 of the Prevention of Frauds Ordinance the question whether it is capable of proof does not arise. The argument based on the Prevention of Frauds Ordinance assumes that under the Law of Ceylon the beneficial owner under a trust affecting land acquires an interest affecting land, and not merely a right to proceed against the trustee; an assumption which would seem to involve that the Law of Ceylon recognises the distinction between legal and equitable estates in land so familiar under English Law. No authority in support of this assumption was cited to their Lordships other than the definition of “Trust” in section 3 (a) of the Trusts Ordinance, a definition which must be read with the definition of “Beneficial Interest” in section 3 (g). However, their Lordships find it unnecessary to decide this question because, in their view, the formalities necessary to constitute a Trust relating to immovable property are those laid down in section 5 (1) of the Trusts Ordinance and not those in section 2 of the Prevention of Frauds

Ordinance. The Trusts Ordinance is a later enactment, and it deals expressly with trusts. If a trust disposition of land be executed in the manner required by section 5 (1) of the Trusts Ordinance it could not be challenged, in their Lordships' view, on the ground that it was not attested by two or more witnesses, as required by section 2 of the Prevention of Frauds Ordinance. If the formalities required to constitute a valid trust relating to land are to be found in the Trusts Ordinance, then section 5 sub-section 3 expressly provides that the rule that the trust must be executed in accordance with sub-section 1 is not to operate so as to effectuate a fraud. If Natchiappa, in his lifetime, had repudiated the trust upon which the property was conveyed to him, his conduct would have been manifestly fraudulent and the executrix of his estate can be in no better position. She was no doubt entitled to require that the trust be proved against her, who may have had no personal knowledge about the matter, but, once the trust is established, it would be a fraud on her part to ignore the trust and to retain the property for the estate. The position therefore is that as against the appellant it is not necessary that the trust set out in paragraph 7 of the plaint should be in writing and, if that is so, sections 91 and 92 of the Evidence Ordinance, which were so much discussed in the Supreme Court, do not come into the picture. The contract made in 1930 was not reduced to the form of a document; only part of it was so reduced; and the parol part of the contract was not required by law to be reduced to the form of a document.

On the third point argued, both the lower Courts held that there was no intention on the part of the plaintiff to defraud any of his creditors, and their Lordships see no reason to differ from this conclusion. It was suggested that both the lower Courts took the view that there was no intention to defraud the creditors because, in fact, no creditor was defrauded, but their Lordships do not think that this is a fair criticism of the judgments. Both Courts no doubt relied strongly on the fact that all the unsecured creditors were paid in full as one of the circumstances negating a suggestion of intention to defraud, but they also relied on other circumstances, particularly that the plaintiff had explained to the proctor of the largest of the unsecured creditors the arrangement which he had made with Natchiappa.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the respondent throughout.

Appeal dismissed.
