

1944

*Present: Moseley S.P.J. and Wijeyewardene J.*PERUMAL, Appellant, *and* HARDING, Respondent.

164—D. C. Galle, 38,843.

*Trust—Claim to recover property—Constructive trust treated as express trust—
Prescription—Trusts Ordinance (Cap. 72) s. 111 (1) (b).*

The plaintiff as *cestui que* trust of a constructive trust sued the defendant for declaration of title to an immovable property. The defendant had purchased the property with notice of the trust from the trustee within ten years of the institution of the action.

Held, that the provisions of section 111 (1) (b) of the Trusts Ordinance read with section 111 (5) operated against the defendant relying on the possession of the trustee in support of his prescriptive title, as the trust was a constructive trust which would be treated as an express trust under the Law of England.

A PPEAL from a judgment of the District Judge of Galle.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C.*, and *Peri Sunderam*), for the defendant, appellant.

N. Nadarajah, K.C. (with him *N. Kumarasingham*), for plaintiff, respondent.

Cur. adv. vult.

June 15, 1944. WIJEYEWARDENE J.—

The plaintiff-respondent filed this action in respect of an undivided half share of Kanapathy estate, the entirety of which was owned originally by one G. E. Gunasekere and mortgaged for securing the loans made to him by Somasunderam Chettiar who was carrying on business under the vilasam of Ar. Ar. Sm. through his attorney and agent Narayan Chettiar, son of Murugandi Sami. In satisfaction of a mortgage decree entered against G. E. Gunasekere the estate was sold and conveyed to Ar. Ar. Sm. Narayan Chettiar by P 2 of 1919. The plaintiff, as administrator of the intestate estate of Somasunderam Chettiar, filed action No. 24,593 in the District Court of Galle in 1927 against Narayan Chettiar pleading that the latter was holding the land in trust for Somasunderam Chettiar and asking for a decree against him. During the pendency of that case, Narayan Chettiar died and his widow and son, Velayuthem Chettiar, who was the administrator of Narayan's estate, were substituted as defendants and the decree entered against them in the District Court in February, 1938, was affirmed in appeal in June, 1938 (see P 1). Neither that action nor the decree in that action was registered. In spite of that decree Velayuthem Chettiar executed an administrator's conveyance D 1 of August 21, 1938, in his own favour as heir of his father in respect of a half share of the estate and conveyed the same to the defendant-appellant by D 2 of the same date. The consideration for the transfer is, according to the deed D 2, the payment of a sum of Rs. 250 and the discharge of a debt of Rs. 1,750 alleged to have been due from Velayuthem to the defendant-appellant. The deeds D 1 and D 2 have been duly registered.

The present action went to trial on thirteen issues, six of which were as follows:—

- Issue 1.*—Did Somasunderam Chettiar carry on business or money-lending under the vilasam of Ar. Ar. Sm.?
- Issue 2.*—Was Narayan Chettiar at all times material the Agent of the said Somasunderam Chettiar?
- Issue 3.*—Was the property in dispute purchased by Narayan Chettiar as Agent and Trustee for Somasunderam Chettiar?
- Issue 4.*—Did defendant by deed 193 of August 21, 1938, purchase the said property with notice of the said trust?
- Issue 5.*—If so, does the defendant hold the said property in trust for plaintiff?
- Issue 8.*—Have the defendant and his predecessors in title acquired a prescriptive title to the premises in question?

The District Judge answered these issues and several of the remaining issues in favour of the plaintiff and entered judgment for him.

It was admitted by the Counsel for the defendant-appellant that the District Judge had answered correctly issues 1, 2 and 3 in the affirmative but it was argued that the issues 4 and 5 should have been answered in the negative and issue 8 in the affirmative.

The evidence of Rudrapathy shows that the defendant went with Velayuthem to Court in connection with the action No. 24,593 in the District Court of Galle and asked him to bring about a settlement of the dispute in that action. That evidence stands uncontradicted and has been accepted by the District Judge. The defendant's witness Mr. de Silva, the Notary employed by the defendant to attest the deed D 2, states that he searched the Register of Encumbrances at the request of the defendant before the execution of the deed and that "he must have told Perumal (the defendant) that there were entries showing that Ar. Ar. Sm. were interested in this (property) and there were seizures". The document D 3, which appears to be an incomplete part of the extract from the Register of Encumbrances produced in the District Court, contains an entry referring to a caveat entered by Ar. Ar. Sm. Anamalay Chetty and appears to have contained, according to Mr. de Silva's evidence, a further entry in respect of a prohibitory notice against the estate of Ar. Ar. Sm. dated May 2, 1929. The deed P 2 mentioned the purchaser as Ar. Ar. Sm. Narayan Chettiar while the deeds D 1 and D 2 refer to Narayan Chettiar as Murugunanda Swamiar Narayan Chettiar otherwise known as Ana Roona (Ar.) Ana Roona (Ar.) Savanna Mana (Sm.) Narayan Chettiar while it refers to his son as Moona Roona (Mr.) Navanna (N.) Velayuthem Chettiar. In view of the descriptions given in these three deeds I am unable to entertain the suggestion that the defendant may have thought that Narayan Chettiar was known in his personal capacity both as Mr. S. Narayan Chettiar and as Ar. Ar. Sm. Narayan Chettiar. The defendant could have given evidence on most of these points and explained his position but was not called as a witness. In these circumstances the defendant cannot complain if it is presumed that he knew that the property was held under deed P 2 in trust for Somasunderam Chettiar or that he wilfully refrained from making any inquiries regarding the description of Narayan Chettiar in the deeds and the entries in the extract from the Register of Encumbrances. Taking into consideration all these facts I hold that the defendant had notice of the trust. It may be noted that under section 3 of the Trusts Ordinance the defendant would be considered as having the necessary notice "when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by any person whom the court may determine to have been his agent for the purpose of receiving or obtaining such information".

By virtue of sections 65 and 66 of the Trusts Ordinance the plaintiff is, therefore, entitled to institute a suit against the defendant for a declaration that the property is comprised in the trust as the defendant had notice of the trust when D 2 was executed. I hold that the District Judge has answered issues 4 and 5 correctly.

On issue 8, the Counsel for the defendant-appellant argued that Narayan Chettiar and his administrator had adverse possession from 1927 to 1938

and that the character of that possession was not altered by the proceedings in D. C. Galle, 24,593 so far as the defendant-appellant was concerned. He contended that the title of his client based on the registered deed D 2 should remain unaffected by any fictional change in the character of the possession wrought by the entering of the decree in that case, as that decree was unregistered. It is not necessary to examine closely the soundness of this argument, as this argument even if sound, does not help the defendant in view of section 111 (1) (b) which enacts that a claim to recover trust property shall not be barred by the provisions of the Prescription Ordinance. It was sought to overcome this difficulty by arguing that under the deed P 2 Narayan Chettiar held the property as a trustee of a "constructive trust" and not as a trustee of an express trust as contemplated by the Trusts Ordinance and therefore the plaintiff was not entitled to relief under section 111 (1) (b). It is, I think, correct to say that Narayan Chettiar was the trustee of a constructive trust as known to our Ordinance. But the Privy Council decision in *Arunasalam Chetty v. Somasunderam Chetty*¹ shows that under the English Law he would have been regarded as the trustee of an "express trust". The true position therefore of Narayan Chettiar was that he was a trustee of "a constructive trust" which would be "treated as an express trust by the Law of England". The plaintiff is thus enabled by section 111 (5) to claim the benefit of section 111 (1) (b).

In view of the decision I have reached on issues 1, 2, 3, 4, 5, and 8 it is not necessary to express any opinion on the questions of *res judicata* and registration. I may, however, state that I am of opinion that the unregistered decree P 1 could not have been pleaded as *res judicata* against the defendant, if the deed D 2 had been executed for valuable consideration and there was no fraud or collusion in obtaining the deed. But the evidence in the case shows that Velayuthem acted in concert with the defendant dishonestly and devised a scheme for depriving the plaintiff of the fruits of his victory in D. C. Galle, 24,593. They schemed to bring about this result by bringing into existence a subsequent deed and went to the Notary and got him to attest the deeds D 1 and D 2. Though Velayuthem and the defendant appear on the face of D 2 as independent parties to the transaction, they were, in fact, acting in concert and having a common interest in their attempt to render the decree P 1 nugatory. I hold, therefore, that the defendant cannot claim priority for his deed under section 7 of the Registration of Documents Ordinance, and the decree P 1 could be pleaded as *res judicata* against him.

I would dismiss the appeal with costs.

MOSELEY S.P.J.—I agree.

Appeal dismissed.

¹ (1920) 21 N. L. R. 389.