1946 *Present :* **Howard C.J. and de Silva J.**

FERNANDO, Appellant, *and* THAMEL *et al.*, Respondents.

213—D. C. Chilaw, 12,024.

Trust—Sale of land by deed—Transferor's informal writing on same day promising to reconvey—Circumstances indicating trust and establishing transferee's fraud—Admissibility of informal writing in proof of trust—Evidence Ordinance, s. 92, proviso (3)—Trusts Ordinance (Cap. 72), ss. 83, 96.

By notarial deed the plaintiffs conveyed a land to the defendant. On the same day the defendant gave the plaintiffs an informal document by which he undertook to give a retransfer of the land within a period of three years on payment of a certain sum.

There were circumstances tending to show that the transfer of the land was to be in trust and establishing fraud on the part of the defendant. It was proved that no money was paid by the defendant on the day of transfer, that he merely undertook to free the property from a mortgage which it was subject to, that the plaintiffs were reluctant to grant the transfer and only did so on an agreement to retransfer and that there was gross disparity between the price and the value of the property.

Held, that the informal document was admissible to prove that the defendant held the property in trust for the plaintiffs.

Held, further, that the informal document was not admissible under proviso (3) to section 92 of the Evidence Ordinance.

APPEAL from a judgment of the District Judge of Chilaw. The facts appear from the headnote.

H. V. Perera, K.C. (with him *L. A. Rajapakse, K.C.*, and *S. R. Wijayatilake*), for the defendant, appellant.

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for the plaintiffs, respondents.

Cur. adv. vult.

June 21, 1946. HOWARD C.J.—

This is an appeal by the defendant from a judgment of the District Judge of Chilaw entering judgment for the plaintiffs as claimed and declaring that the defendant holds the land in dispute in trust for the plaintiffs.

By deed No. 4447 of September 22, 1941 (P2) the plaintiffs, who are husband and wife, transferred to the defendant for a sum of Rs. 650 the land, the subject of this action. This deed on the face of it is an out and out transfer. The plaintiffs, however, claimed that the defendant held the property in trust for the plaintiffs by reason of the circumstances in which P2 was made. The plaintiffs at the time were indebted to one James Fernando in a sum of Rs. 650 on a mortgage bond. Being unable to pay this amount they approached the defendant for a loan. The defendant agreed to pay off the mortgage and it was in these

circumstances that P2 which the plaintiffs now seek to set aside was executed. On the same day that P2 was executed the defendant gave the plaintiffs the document P3. This is an informal document by which the defendant undertook to give a retransfer of the land in question within a period of 3 years if the plaintiffs paid him Rs. 671 within the said period and asked him to execute a deed of transfer at their expense. Before filing their action the plaintiffs offered Rs. 671, but the defendant asked for more money as the land had gone up in price. On the defendant refusing to retransfer the property the plaintiffs instituted this action asking for a declaration that the defendant held the land in trust for the plaintiffs and deposited the sum of Rs. 671 in Court. The District Judge held that P3 being an informal document subsequently made cannot be used to vary P2 which is an outright transfer. He, however, admitted P3 to prove that the defendant held the property in trust for the plaintiffs. The only question that arises for consideration is whether the District Judge was right in so admitting P3. It is contended by Mr. Nadarajah on behalf of the plaintiffs that P3 was admissible under proviso (3) to section 92 of the Evidence Ordinance (Cap. 11) as being a separate oral agreement constituting a condition precedent to the transfer of the property.

For proof that the agreement to retransfer constituted a condition precedent Mr. Nadarajah emphasised the evidence of the second plaintiff. The latter stated that the defendant came to know that James Fernando had demanded the money due on the mortgage. He offered to pay off James Fernando's mortgage and take the property on mortgage himself. The second plaintiff says she told the defendant she would think it over but would not sell the property. Eventually, according to the second plaintiff the defendant said he would give an undertaking to retransfer the land. It was after these preliminaries that the parties went to the Notary's office. The defendant had not brought the money, but agreed to settle James Fernando's debt. The documents P2 and P3 were then made. The second plaintiff states that if the defendant had not agreed to retransfer, she would not have given him a transfer. I do not think that P3 and the oral agreement referred to by the second plaintiff constitute a " condition precedent " to the granting of P2 within the meaning of those words in proviso (3) to section 92 of the Evidence Ordinance. These words mean that a written agreement shall not be of any force or validity until some condition precedent has been performed or that the written agreement was conditional on some event which has never occurred. No such condition has been proved in this case. Hence oral evidence or evidence supplied by a non-notarial document was not admissible under this proviso. In this connection I would refer to the 9th edition of Woodroffe's Law of Evidence, pp. 666–668. Mr. Nadarajah also maintains that there was an express trust. And alternatively that there was a constructive trust under section 83 of the Trusts Ordinance (Cap. 72) inasmuch as it cannot reasonably be inferred from the attendant circumstances that the plaintiffs intended to dispose of the beneficial interest. It is also argued that there was a constructive trust under section 96 of the Trusts Ordinance (Cap. 72) as the defendant has not the whole beneficial interest.

Our attention has been invited to a number of authorities. Mr. Nadarajah in particular has relied on the case of *Nanayakkara v. Andris* [1]. Bertram C.J. after referring to a dictum of Lord Redesdale in *Lindsay v. Lynch* [2] in regard to the equitable doctrine that " Courts of Equity will not permit the Statute of Frauds to be made an instrument of fraud stated that the application of the doctrine is confined to two classes of cases of which the first is :

> " Cases where the defendant has obtained possession of the plaintiffs' property, subject to a trust or condition, and claims to hold it free from such trust or condition. "

This equitable doctrine was comprehensively explained in the judgment of Stirling J. in the case of *In re Duke of Marlborough* [3]. The headnote of this case is as follows :—

> " By an indenture dated in 1890 the Duchess of M., in consideration of natural love and affection, assigned to her husband the Duke a leasehold house belonging to her. The deed was in form an absolute assignment. The Duke subsequently mortgaged the house for the purpose of raising money to pay his debts. The Duchess joined with the Duke in covenanting to pay the mortgage debt, but the equity of redemption was reserved to the Duke alone. Upon the death of the Duke in 1892, the Duchess claimed to be entitled to the house subject to the mortgage. There was evidence that she had assigned the house to the Duke solely to enable him to mortgage it in his own name, and that it was part of the arrangement between them that he should reassign to her, which, if he had lived, he would have done :—
>
> *Held*, that the case fell within the authorities which forbid the Statute of Frauds to be used to cover what would amount to a fraud, and consequently that the statute could not be successfully pleaded in opposition to the claim of the Duchess."

This equitable doctrine has also been recognised by the Ceylon Courts in the case of *Theevanapillai v. Sinnapillai* [4]. At pages 317–318 Ennis A.C.J. stated as follows :—

> " 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

[1] *(1921) 23 N. L. R. 193 at p. 197.*
[2] *(1804) 2 Sch. Lefr. 4.*
[3] *(1894) 2 Ch. 133.*
[4] *(1921) 22 N. L. R. 316.*

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 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."

It is to be observed that with regard to the facts in this case it was not evidence of fraud preceding the agreement that was sought to be proved. It was the subsequent conduct of the defendant in failing to convey the property that constituted fraud. Mr. Perera has cited various cases in support of this appeal. In *Sanmugampillai v. Anjappa Kone*[1] Soertsz J. at p. 467 stated that it was not possible for the appellants to succeed since there is no evidence to establish their case of a trust. But in this case there is the evidence of the second plaintiff with regard to the circumstances in which P2 was given. In *Carthelis Appuhamy v. Saiya Nona*[2] it was held that a non-notarial document containing an agreement to retransfer and signed by the defendant the same day as the deed of transfer was of no force or avail at law as it was not contained in a notarial document. Further that there were no circumstances that could bring the case within the sections of the Trusts Ordinance relating to constructive trusts. I am of opinion that this case is distinguishable. In the present case there are circumstances tending to show that the transfer was to be in trust. The evidence of the 2nd plaintiff that no money was paid by the defendant on the day of transfer, that he merely undertook to free the property from the mortgage, that she was reluctant to grant the transfer and only did so on an agreement to retransfer are circumstances indicative of a trust. Moreover there is a gross disparity in the price under P2, namely, Rs. 650 and the value of the property at the time of the transfer which is put by the second plaintiff at Rs. 1,750 or Rs. 2,000. Mr. Perera also relied on the judgment of *Mohamadu v. Pathumah*[3]. In that case, however, fraud was not established and hence the equitable doctrine to which I have referred was not applicable. Fraud was not even alleged in the plaint. In the present case the issue of fraud has been determined in favour of the plaintiffs. Nor can that determination be questioned. In this connection one has to bear in mind not only the evidence of the second plaintiff with regard to the real nature of the transaction and the circumstances in which P2 was granted but also the evidence of the defendant himself. The latter admits the agreement to retransfer the property and also that he had no money at the time of the transfer. He also says that when he gave P3 he had no intention of retransferring the land, but would do so now if he was paid

[1] *(1944) 45 N. L. R. 465.* [2] *(1945) 46 N. L. R. 313.*

[3] *(1930) 11 C. L. Rec. 48.*

Rs. 2,000, and his expenses. It is difficult to conceive a clearer case of fraud or one in which Equity would grant relief to prevent the defendant from taking advantage of the Statute of Frauds to keep the plaintiffs' property.

For the reasons I have given the appeal is dismissed with costs.

DE SILVA J.—I agree.

Appeal dismissed.