

1945

Present: Soertsz A.C.J. and Keuneman S.P.J.

CARTHELIS APPUHAMY, Appellant, and SAIYA NONA et al.,
Respondents.

17—D.C. Kurunegala, 1,348

Trust—Sale of land by notarial deed—Transferee's informal writing on same day promising to reconvey—Validity of—Absence of circumstances creating constructive trust.

By a notarial deed (P3) of April 30, 1941, plaintiffs conveyed certain lands to the defendant. On the same day, in consequence of a prior oral agreement, a non-notarial document (P4) was signed by the defendant by which he agreed to retransfer the said lands on payment by plaintiff, within a certain period, of a sum equal to the consideration paid by the defendant on deed P3.

The deed P3 on the face of it conveyed the full interest of the owners, without the reservation of any condition or equitable right, and the defendant was thereafter placed in possession of the lands. There was no evidence of any gross disparity between the value of the lands at the time and the price paid under P3, or of any other circumstance which might tend to show that the transfer was to be in trust.

Held, (in an action for the enforcement of the condition to retransfer) that the writing P4 was of no force or avail at law as it was not contained in a notarial document.

Held, further, that there were no circumstances which could bring the case within the sections of the Trust Ordinance relating to constructive trusts.

Carthelis v. Perera (1930) 32 N. L. R. 19 and *Jonga v. Nanduwa* (1944) 45 N. L. R. 128, distinguished.

A PPEAL from a judgment of the District Judge of Kurunegala. The plaintiffs mortgaged certain lands to Ramanathan Chettiar who put the bond in suit, obtained judgment and was about to cause the lands to be sold. The plaintiffs then approached the first defendant, a distant relation, and asked him to pay the Chetty's claim, promising (in the words of one of the plaintiffs) "to transfer the property to him to be held on trust for us. We agreed to transfer the lands to the first defendant on condition that he would retransfer the lands to us within four years" on payment of the amount paid to the Chetty. As a result of this, documents P3 and P4 were made in circumstances set out in the headnote. The plaintiffs sued for the enforcement of the condition to retransfer. The learned District Judge held that a trust had been established and entered judgment for the plaintiffs.

H. V. Perera, K.C. (with him *S. W. Jayasuria*), for first defendant, appellant—By a notarial deed, P3, the owners conveyed the land in dispute to the first defendant. On the same day by a non-notarial document the first defendant promised to retransfer the land to the owners. The District Judge held that the transaction created a trust. It is submitted that no trust was created. The question is whether the person who gets title is getting the whole of the dominium. Here the

whole beneficial ownership was given over by P3. There is nothing but a sale with a subsequent agreement to retransfer. The agreement to retransfer, being informal, cannot be enforced. *Carthelis v. Perera*¹ is distinguishable as that was a case concerning a gift. *Jonga v. Nanduwa*² is inapplicable because there the notarial deed of transfer itself contained a condition giving a right to redeem on repayment of the consideration.

N. E. Weerasooria, K.C. (with him *C. E. A. Samarakody*), for plaintiffs, respondents—The transfer was an arrangement to pay a debt to a Chetty. There was no sale outright. The transferee was merely expected to hold the property in his name. Possession was given on that basis, not on the basis of vendee. If these facts were proved the trial Judge was right in his conclusion. Where a person enters into possession on the basis of a certain arrangement he cannot say that possession was given on the basis of a contract of sale—*Valliyammai Atchi v. O. L. M. Abdul Majeed*³; *Ranasinghe v. Fernando*⁴.

H. V. Perera, K.C., in reply—There is no condition subsequent as in *Ranasinghe v. Fernando* (*supra*). That was a case of an express trust. The present case is similar to *Don v. Don*⁵. The first defendant got the whole beneficial interest. There was, therefore, no trust.

Cur. adv. vult.

July 18, 1945. KEUNEMAN S.P.J.—

In this case the plaintiffs and the second and fourth defendants who were owners of the lands described in the schedule of the plaint had mortgaged them to Ramanathan Chettiar, who put the bond in suit D. C. Kurunegala No. 475, obtained judgment and was about to cause the lands to be sold. The owners of the lands then approached the first defendant, a distant relation, and asked him to pay the Chetty's claim, promising (in the words of the third plaintiff) "to transfer the property to him to be held on trust for us. We agreed to transfer the lands to the first defendant on condition that he would retransfer the lands to us within four years" on payment of the amount paid to the Chetty. As a result of this, on April 30, 1941, document P3, a notarial deed, was executed, by which the owners conveyed the lands to the first defendant—in that deed there was no mention of the agreement to retransfer. On the same day a non-notarial document was signed by the first defendant which embodied the agreement to retransfer. The first defendant was put into immediate possession of the lands, and the mortgage of the Chetty was paid off with the sum of Rs. 925 consideration paid by the first defendant on the deed P3. The plaintiffs within the period of four years tendered the sum of Rs. 925 to the first defendant who refused to accept it. The plaintiffs now sue for the enforcement of the conditions to retransfer, and have joined as parties the second and fourth defendants who were unwilling to be plaintiffs.

¹ (1930) 32 N. L. R. 19.

² (1944) 45 N. L. R. 128.

³ (1944) 45 N. L. R. 169.

⁴ (1922) 24 N. L. R. 170.

⁵ (1929) 31 N. L. R. 73.

The learned District Judge held that a trust had been established and entered judgment for the plaintiffs. He stated that "this was clearly a case where the first defendant had not the whole beneficial interest in the property dealt with by P3." I do not agree with this argument. It was incumbent on the plaintiffs to establish circumstances which proved that a trust had been created. The deed P3 on the face of it conveyed the full interest of the owners, without the reservation of any condition or equitable right. The first defendant was thereafter placed in possession of the lands. There was no evidence of any gross disparity between the value of the land at the time and the price paid under P3, or of any other circumstance which may tend to show that the transfer was to be in trust.

The case of *Carthelis v. Perera*¹ on which the District Judge relied dealt with entirely different circumstances to those disclosed in the present case. The only circumstance disclosed in the present case is the existence of the non-notarial agreement (P4) made on the same day as P3. I do not think that the statement of the third plaintiff that P3 was a transfer on trust is worthy of any consideration. At the highest it is an opinion expressed by the witness as regards a point of law the District Judge had to decide.

The District Judge relied on the case of *Jonga v. Nanduwa*². But there is a material difference between that case and the present one. In that case the notarial deed of transfer itself contained a reservation of the right to pay the vendee the amount of the consideration set out and so to redeem the transfer. In the application of section 96 of the Trust Ordinance, the Bench of Three Judges came to the conclusion that the deed of transfer did not convey the whole beneficial interest in the property to the vendee, but conveyed the property subject to the condition set out in the transfer deed, and that the vendee was accordingly bound to have the property available for the condition to be carried into effect.

In the present case the notarial deed (P3) does not set out any conditions, and on the face of it conveys the whole beneficial interest. The informal writing P4 is in form a mere agreement to retransfer, and it is of no force or avail at law as it is not contained in a notarial document. In other words no condition has been established in this case which shows that the whole beneficial interest has not been transferred under P3. Further there are no circumstances proved which can bring the present case within the sections of the Trust Ordinance relating to constructive trusts.

The appeal is allowed and the plaintiffs' action is dismissed with costs of this Court and the Court below.

SOERTSZ A.C.J.—I agree.

Appeal allowed.

¹ 32 N. L. R. 19.

² 45 N. L. R. 128.