1944 *Present:* **Soertsz and Jayetileke JJ.**

SANMUGAMPILLAI *et al.*, Appellants, *and* ANJAPPA KONE, Respondent.

48—D. C. Kandy, 387.

Trust—Land bought by a person as nominee of another—Informal agreement to retransfer—Validity of agreement—Prevention of Frauds Ordinance (Cap. 57), s. 2.

Where A purchased property as the nominee of B and paid the purchase price, and where A agreed by an informal writing to retransfer the property to B on the payment of a certain sum of money before a specified date,—

Held, that A did not hold the property in trust for B.

Held, further, that the informal agreement was obnoxious to the provisions of section 2 of the Prevention of Frauds Ordinance.

Where a case is sent back by the Supreme Court for further trial in the District Court and new parties are introduced to the action on the application of the appellants, such parties are bound by the findings of the Supreme Court at the first hearing in appeal.

APPEAL from a judgment of the District Judge of Kandy. The facts are stated by the learned Judge as follows:—

The defendants and the added defendants were admittedly the owners of Bass Rock estate and they executed a mortgage bond in favour of Messrs. Keell & Waldock who put the bond in suit, obtained decree and had the estate sold and became the purchasers thereof. Thereafter the defendants sued Messrs. Keell & Waldock in case No. 47,114 of this Court for a declaration that the latter were holding the said estate in trust for them and for an order directing them to convey the said estate to the defendants. That case was compromised and the terms of settlement have been produced. The relevant term to be noted is that

Messrs. Keell & Waldock were to convey the property to the defendants or to any nominee of theirs if the defendants paid the sum of Rs. 35,250 on or before November 30, 1936.

The defendants constituted Anjappa Kone their nominee and he purchased the estate from Messrs. Keell & Waldock upon the deed P 1 of November 30, 1936, he paying to Messrs. Keell & Waldock a sum of Rs. 35,250. On the same date that P 1 was executed the defendants and Anjappa Kone entered into an informal writing by which it was, *inter alia*, agreed that the defendants were to be entitled to obtain a reconveyance on payment of a certain sum of money before November 30, 1938. The physical possession of the estate was left with the first defendant who was appointed by Anjappa Kone his Superintendent.

N. Nadarajah, K.C. (with him *H. W. Thambiah* and *S. R. Wijayatilake*), for defendants and added defendants, appellants.

H. V. Perera, K.C. (with him *J. E. M. Obeyesekere* and *E. P. Wijetunge*), for plaintiff, respondent.

Cur. adv. vult.

September 1, 1944. SOERTSZ J.—

The plaintiff, the administrator of the estate of one Kone, brought this action, originally, against the first and second appellants only, alleging that they were disputing and denying the plaintiff's intestate title to a tea estate named Bass Rock estate, and asking for a declaration of title, a writ of ejectment, and damages.

The first and second appellants filed answer stating that Kone was their trustee in the circumstances set forth in paragraph 3 (*a*), (*b*) and (*c*) of the answer.

At the trial, the main issues that were adopted raised the question whether there was or was not a trust, and whether the first and second appellants were entitled to lead parol evidence to establish it.

The Trial Judge by agreement tried the latter issue as a preliminary issue, and held in favour of these two appellants. The parol evidence sought to be led in support of the Trust was the non-notarial document D 1. The plaintiff appealed, and this Court (Howard C.J. and Hearne J.) reversed the decision of the Trial Judge. The Chief Justice observed as follows:—" The parol evidence that was proposed to be called was . . . . to establish the matters referred to in paragraphs 3 (*a*), (*b*) and (*c*) " of the answer, but the " facts of this case cannot be distinguished from those in the Privy Council Case of *Adaicappa Chetty v. Caruppen Chetty* [1] ", and that, therefore, fresh evidence was inadmissible. In other words, Their Lordships must be understood to have held that D 1 purported to create not a trust but something much more resembling a mortgage or pledge than a trust *or* that it was a contract or agreement for effecting the sale of land, for according to the opinion of the Privy Council, those would be the true transactions resulting from the agreements set up in that case. Their Lordships here did not, however, expressly say under which of these alternatives D 1 came, nor did they say it was within both those alternatives. They merely ruled D 1 inadmissible and remitted the case for the other issues to be tried. The other substantial

[1] *22 N. L. R. 417.*

issue that remained to be tried was whether there was a trust. Now, it is obvious that when the case was so remitted, the establishment of the trust had to depend on evidence other than that afforded by D 1 which was rejected.

At the resumed hearing, senior Counsel who appeared for these appellants together with Counsel who had already appeared for them procured the adoption of certain additional issues, the chief of them being—

"(9) Did the deceased (*i.e.*, Kone) hold the property as a nominee agent and/or trustee for the defendant and two others ?

(10) Is the beneficial ownership in the property vested in the defendants and the two others ?

(11) Was the deceased given legal title as security for any sum or sums that may be due from the defendants and the two others ?

Counsel also sought and obtained the introduction into the case of these two others, as added parties. These added parties filed answer and the only new feature introduced into the case by their answer was that, on their part, there was a claim for an accounting by the plaintiff on behalf of Kone of the administration of the alleged trust in order to determine the relief the *cestuis que trustent* were entitled to. An examination of the amended pleadings and of the additional issues as well as the fact that the third and fourth appellants were brought into the case as added parties leads irresistibly to the conclusion that the appellants were making desperate efforts to break out of the position in which their case stood when it was remitted for trial according to the directions given by this Court, for D 1 was still their one and only hope if they could only secure a different interpretation of it. But the more their case was made to appear to change, the more did it, in reality, remain the same case. The appellants could establish their case of a trust only by adducing evidence other than D 1. They led no such evidence. They produced two letters D 4 and D 5 dated April 28 and June 22, 1938, respectively, which do not advance their case of a trust at all. Indeed D 4 seems to negative that case, for in it the appellants' proctors put their case to Kone as a case of an agreement to retransfer. The proctors write "This property was, we understand, transferred to you upon the basis that, if a certain sum together with the interest was paid to you, you would transfer that property". D 5 is Kone's reply to D 4 and it shows that Kone was prepared to abide by his informal agreement. He informs the appellants' proctors that the purchase price due at that date, is Rs. 32,000.

In this state of things, I do not see how it is possible for the appellants to succeed since there is no evidence whatever to establish their case of a trust. The first and second appellants were, certainly, bound hand and foot by the judgment given on appeal. Counsel for the appellant, however, sought a way out of this difficulty by attempting to differentiate the case of the original appellants from that of the added parties who, he contended, were not bound by the ruling given by this Court before they themselves came into the case, and that it was open to them, by means of additional arguments, to commend to us an interpretation of

D 1 different from that given by the earlier Bench. Counsel also submitted that issue 9 raised in addition to the question of trust the question of Kone being the appellants' nominee or agent.

In regard to the first contention, although the third and fourth appellants were not parties to the first appeal, when their co-appellants here sought to have them added, they readily consented. Indeed, as I have already observed, their introduction into the case appears to have been a concerted move in an optimistic attempt to circumvent the order made on the earlier appeal. In my opinion, when they came into the case without protest or objection, they came into it as it stood, and must be deemed, in all the circumstances, to have agreed to stand or fall with the original defendants, appellants. If that were not so, if the third and fourth appellants were entitled to contend for a different interpretation of D 1, and if they succeeded in that contention, the resulting position would be so embarrassingly contradictory that no Court of law can contemplate it with equanimity—two irreconcilable findings on the same question, on the same material, in the same case. As for the second contention, namely that issue 9 raised the question of nomineeship and agency, that question is the old question of the trust dressed in new but ill-fitting garments. However, to say one word in regard to this question of agency or nomineeship raised in issue 9, it seems to me utterly impossible, on the facts of this case, to hold that a trust resulted because Kone was an agent or nominee of the appellants within the meaning of section 90 of the Trusts Ordinance or within the ruling in the case of *Rochefoucauld v. Boustead*[1], both of which were, evidently, in Counsel's contemplation when he framed that issue.

This conclusion to which I have come really disposes of the appeal, but in view of the long and interesting argument adduced to us, on both sides, on the question of trust, I would say a few words about that. First of all, on the facts, it is impossible to entertain the submission made to us, in the first place, that there was an express trust. In D 1 drawn up by two Proctor-Notaries the word "trust" is not once used. It is difficult to resist the impression that it was studiedly avoided. Not one of the appellants thought fit to testify that there was an undertaking by Kone to hold the land in trust for them. As for the alternative submission that there was a constructive trust, that is to say an obligation in the nature of a trust, I do not see how this case can, on the material before us, be brought within any of the instances in Chapter 9 of the Trusts Ordinance (Cap. 72) or within any other known instance.

As Lord Atkinson observed in *Adaicappa Chetty v. Caruppen Chetty* (*supra*) in these cases, "the first question which it is necessary to determine is what is the real nature, the true aim and purpose of the transaction" which is relied upon as creating or giving rise to the alleged trust. In this case it is not difficult to answer that question; one has only to examine D 1 in which the word "trust" is not once used, but in which by clear words Kone undertakes to sell the property to the appellants, on payment of a certain sum, within a definitely fixed period, both parties agreeing in express terms that *time shall be of the essence of the agreement in all respects*, to be satisfied beyond reasonable doubt, that the transaction

[1] *L. R. (1897) 1. Ch. 196.*

contemplated is purely and simply, one for the future transfer of land. Their Lordships of the Privy Council found on the facts relied upon in *Adaicappa Chetty's* case, that in regard to a part of the agreement set up, there was " something more resembling a mortgage or a pledge than a trust " but on the agreement D 1 relied upon here, such a view of the matter does not seem to be justified. Here the agreement is single and inseparable and contemplates nothing but a sale of land. But, suppose this agreement is also comparable to that in the Privy Council case, still on either hypothesis, the appellants fail for, in both cases, the agreement is of no force or avail in law. Their appeal, on the facts relied upon by them, must fail unless we were free to hold that a trust of some kind or other should be found, on compassionate grounds, to rescue them from an evasion of, or a failure to comply with the relevant provisions of the Frauds and Perjuries Ordinance.

I would dismiss the appeal with costs.

JAYETILEKE J.—A agree.

Appeal dismissed.