[PRIVY COUNCIL]. 1921.

Present : Viscount Haldane, Lord Atkinson, and Lord Phillimore.

ADAICAPPA CHETTY *v.* CARUPPEN CHETTY.

43—D. C. Colombo, 48,270.

Ordinance No. 7 of 1840, s. 2—Trust—Borrowing money to purchase land—Transfer executed in favour of creditor to secure repayment—Subsequent oral agreement to transfer half share of land to creditor for cost price and in consideration of waiver of interest—Acknowledgment of such transfer—Parol evidence to prove the agreements—Mortgage.

The added-defendant being desirous of buying some pieces of land applied to a money-lending firm, of which plaintiff and defendants were partners for a loan. For securing the repayment of the sum with interest, the transfers were executed in the name of the first defendant. Subsequently, the firm requested the added-defendant to let them have absolutely for their benefit a half share of all the property alleged to be held in trust for him for the actual cost of such share, and in consideration offered to forego all claim for interest. The added-defendant accepted this offer, and acknowledged verbally the title of the firm to the half share on the footing of the agreement. In this action the added-defendant intervened and sought to establish by parol evidence that half share of the land was held in trust for him by the firm.

Held, that parol evidence was inadmissible to establish the alleged trust.

"The object of the (first) agreement was to create something much more resembling a mortgage or pledge than a trust. The arrangement differed absolutely in nature and essence from that entered into, where one man with his own proper moneys buys landed property, and gets the conveyance of that property made to another. In such a case that other has no claim upon the property vested in him. It would be a fraud upon his part to contend that it belonged to him, or to insist that he was entitled to a charge or incumbrance upon it, or had a right to retain the possession of it against the will of the man who purchased it. But in the present case, until the purchase money with interest was repaid to the firm, the first defendant had a right to insist that his firm had a claim upon this land, and that he (first defendant) had the right, in the interest of the firm, to retain the ownership of it . . . . It was in effect a parol agreement providing for the conveyance of land to establish a security for money and creating an incumbrance affecting land that first defendant desired to prove the existence of by parol evidence." The parol evidence was inadmissible under section 2 of Ordinance No. 7 of 1840.

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"The second parol agreement was as invalid as the first. It was clearly a contract or agreement for effecting the sale, transfer, or assignment of land, and for the establishment of security or incumbrance affecting land . . . . If that agreement were carried out according to its terms, a proprietary interest which did not exist before would be created or established in half the lands, namely, the proprietary interest of the firm, and a security would be created and established which did not exist before, namely, the security of the other half of the land for half the purchase money, but not for any interest on that money. The second agreement, therefore, falls within the express words of this same section 2 of Ordinance No. 7 of 1840, and not being in writing would be invalid."

THE facts are fully set out in the judgment of the Privy Council. The following is the judgment of the Supreme Court :—

February 26, 1920. ENNIS J.—

This is an appeal from an order holding that certain evidence in a partition action was inadmissible. The appeal is by the added defendant who intervened in the action and asserted that the lands were held in trust for him as to an undivided half share. His case was that the lands consisted of four allotments, and that he had a deed for one allotment in his own name and wished to buy the other three, that he borrowed money from the first defendant and purchased the other three allotments, and as security for the repayment of those moneys and interest he conveyed the lot he had in his own name and caused his vendors to convey the remaining three allotments to the first defendant. In the course of the trial it was asserted that the first defendant was really acting for, and on behalf of, a firm consisting of the plaintiff and the first and second defendants. The legal ownership of the lands in dispute on the deeds I have mentioned vested in the first defendant, Caruppen Chetty. The appellant admitted that the trustees was to hold one-fourth share in lieu of interest. It appears that there was some agreement between the partners to divide up the partnership property, an agreement which was arrived at consequent upon the proceedings in an action between them. Under that agreement the three partners agreed to convey 17/33 of the land to the plaintiff, and 8/33 each to the first and second defendants. The agreement proceeded to make these conveyances. Now, as the legal ownership was vested in the first defendant only, the document was effective as a conveyance from the first defendant to the plaintiff for 17/33 of the land, and effective as a conveyance from himself as a member of the partnership to himself personally of 8/33 and from himself to the second defendant of 8/33. The first and second defendants in their answer allowed 33/66 shares to the added defendant. Their case was that the plaintiff should contribute some portion of the land he had acquired from the first defendant to make up that share. The first defendant by this document admits that he took the land

originally in trust for the added defendant, subject to payment by him of the amounts advanced. The only question on appeal is as regards the admissibility of oral evidence to prove that the plaintiff is bound by the trust. The first defendant was the only trustee on the original deeds, and the plaintiff would, therefore, be affected to the extent of one-half of the difference between the 17/33 and 16/33, for the legal owner was trustee as to half for the added defendant, and with regard to the other half he was trustee for the firm of " A. S. T.," and his agreement and conveyance to the plaintiff would be in respect of the half which undoubtedly belonged to the firm, and made the plaintiff the legal owner of that share. As against him the added defendant could, therefore, claim only 1/66 part, but, in the absence of an admission by the plaintiff of any trust in favour of the added defendant, the added defendant could only establish his claim by means of oral testimony, as he has no documentary evidence of the existence of the trust. I am in accord with the learned Judge for the reasons given by him that such oral testimony would be inadmissible to establish the added defendant's claim as against the plaintiff. The position of the added defendant, as against the first and second defendants, is not prejudiced by the result of this appeal, as the first and second defendants have admitted the existence of the trust.

I would dismiss the appeal, with costs.

LOOS J.—I agree.

The added defendant appealed to the Privy Council.

A. St. V. Jayawardene, K.C. (with him *Mr. E. B. Raikes*), for the appellant.—There are two agreements relied on by the appellant. As regards the second, by which he alleges the parties agreed to hold the land in half shares, it must be conceded that it cannot be established in view of section 2 of Ordinance No. 7 of 1840—The Ceylon Statute of Frauds. The appellant is entitled to fall back on the first or original agreement, and it is on this basis that the District Judge decided the case. By this agreement three out of the four lands were purchased by the appellant in the name of the Chetty firm with money borrowed from the firm. We are entitled to prove that the money was borrowed by the appellant, that at the time the lands were purchased the relation of creditor and debtor existed between the parties, and that it was the appellant who paid for the lands, although the lands were taken in the name of the Chetty firm. If we can prove this, it would clearly be a fraud on the part of the Chetty firm to claim the lands as their own. The money was ours, and the Chetty firm, by having their name on the deed, became a trustee for us. The position is clearly stated in *Lewin on Trusts*: " But no trust will result unless the person advance the money in the character of a purchaser; for if A discharge the purchase money by way of a loan to B, in whose name the conveyance is taken, no

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trust will result in favour of A, who is merely a creditor of B, and, on the other hand, should B advance the purchase money, but only on account of A, then A is the owner in equity, and B who takes the conveyance stands in the light of a creditor." From the facts which the appellant's counsel stated he was in a position to prove, it could be established beyond doubt, that the appellant borrowed the money, and it was with the money so borrowed that the lands were purchased. The fact that the Chetty firm were the lenders cannot alter the principle. Some members of the firm admit these facts. We were also prepared to prove a most significant fact, viz., that the lands have always been in our possession. This is clearly inconsistent with the claim of the plaintiff, and requires some explanation. The lower Courts were not justified in refusing to give appellant an opportunity to lead the evidence which he wished to lead to establish these facts. It is only after the evidence has been led, that the Court would be in a position to decide whether there was a trust or not. In cases of this kind Ordinance No. 7 of 1840 has never been held to prevent a party from establishing the truth, and showing that a person in whose name a deed has been drawn up is only a trustee for the real owner. Section 92 of the Evidence Ordinance, No. 14 of 1895, has no application, as the appellant was not a party to the deed of sale. That section only applies to parties to documents. Counsel referred to *Rochefoucauld v. Boustead*,[1] and contended that in that case, too, the purchase money was provided by the trustee in whose name the lands were purchased, but it was held that it had been proved that he had purchased on behalf of the plaintiff who claimed to be the real owner.

[VISCOUNT HALDANE.—But in that case it was clearly proved that the person who purchased the property was acting as the agent of the other party.]

That is so, but our complaint here is that we are prevented from leading any evidence at all. The strong circumstance that we have been in possession and taken the produce all these years cannot be explained on any other ground except that we were considered the real owner of the lands. Further, we borrowed only a sum of Rs. 45,000, but the lands have been valued in the plaint at Rs. 120,000. It is submitted that it would be a fraud on the part of the plaintiff to deny the agreement under which the appellant came on the land, and thus deprive him of the fruits of his labour and expenses. Counsel also referred to sections 83 and 84 of the Ceylon Trust Ordinance, No. 9 of 1917.

The fourth land in dispute was conveyed by the appellant to the Chetty firm, but we are prepared to prove that the conveyance was without consideration, and that the plaintiff's firm were to hold it in trust for us along with the other lands.

[1] *(1897) 1 Ch. (C. A.), 196.*

[LORD ATKINSON.—The conveyance of this land by you to the Chetty firm is very much against your contention that the lands were to be held in trust. Can you explain why the appellant conveyed his land ?]

Evidently it was in consequence of some arrangement between the parties. It adjoined the other lands. But, in the absence of evidence, it is not possible to say definitely why this conveyance was made. Perhaps if the appellant is given an opportunity, he might give very good reasons for his act. This emphasizes the necessity for evidence to be led. Section 83 of the Trust Ordinance, No. 9 of 1917, is clearly applicable here. In conclusion, he contended that this was essentially a case in which evidence should be allowed to be led to prove the existence of a trust. Otherwise the plaintiff would be using the Statute of Frauds to perpetrate a fraud on the appellant.

The respondents were not represented.

Cur. adv. vult.

The following is the judgment of the Privy Council:—

June 21, 1921. Delivered by LORD ATKINSON :—

This is an appeal from the decree of the Supreme Court of Ceylon, dated February 26, 1920, which affirmed a decree of the Court of the District Judge, Colombo, dated February 18, 1918, in a suit instituted in his Court on July 28, 1917.

The suit was brought by Adaicappa, since deceased, one of a firm of money lenders, who carried on business in Colombo, Ceylon, against Caruppen Chetty and Velappa Chetty, the two remaining partners of the firm, to obtain partition of four plots or parcels of land, portion of an estate named the Pelpita estate, in which they claimed to be entitled to under the provisions of a deed bearing date November 30, 1916, in certain undivided shares.

This deed was executed by the three former partners, namely, Adaicappa Chetty, Caruppen Chetty, styled in the proceedings the first defendant, and Velappa Chetty, styled in the proceedings the second defendant, and the undivided shares secured to them by the deed were 17/33 to the plaintiff and 8/33 to each of the two remaining partners, the first and second defendants. The plaintiff in the suit averred in his plaint that three of these plots of ground had been purchased from one K. P. M. Sidambaram Chetty, out of the funds of their firm, while it was carrying on business for a sum of Rs. 10,000, and that by a deed dated October 23, 1911, the lands had been conveyed to the first defendant. It was further averred in this plaint that the lot No. 4 of these lands had been similarly purchased by them from one K. A. D. Martinus Perera for a sum of Rs. 360, part of the funds of the firm, and by a deed bearing date August 26, 1913, in like manner as in the other instance, conveyed to the first defendant.

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It was further averred in the plaint that the three former partners and their predecessors in title had been in possession of these lands for over ten years, and had thereby acquired a title thereto under paragraph 3 of the Prescription Ordinance, 1871, that the property was worth Rs. 120,000, that the common possession of the lands and premises was inconvenient, and that the plaintiff desired to have them sold and partitioned under the terms of the Partition Ordinance, 1863. Neither the first nor second defendants filed any answer in the first instance to this plaint. But K. A. D. Martinus Perera, who may conveniently be styled Perera, was, by order of the District Judge, added as a defendant, and on October 26, 1917, he filed an answer to the plaintiff's claim upon which the questions arise which call for a decision on this appeal. After some immaterial traverses of the statement contained in the plaintiff's plaint, he, in paragraph 6 and the succeeding paragraph of it, sets forth at much length the case upon which he relies to entitle him to the relief he prays for. He states that the plaintiff and defendants were a firm of money lenders, and had been in the habit of financing him, lending him money at interest. As much turns upon the nature and character of the arrangement made by Perera, not with the first defendant alone, but with the firm, it is better to state it in his own words. The passage in his answer runs thus :—

> The added defendant being desirous of purchasing the said land for the purpose of planting rubber applied to the said firm of Ana Seena Thana to lend him the moneys required for the purpose. The said firm agreed to lend the moneys required for purchasing and opening up the said lands or so much thereof as might be required by the added defendant, on condition that the same should be repaid with interest at 10 per centum per annum, and that the deeds for the lands so purchased should be taken in the name of the first defendant, in order to ensure the due repayment of the said sum with interest.
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> 7. The added defendant accordingly, with a sum of Rs. 10,000 borrowed from the said firm, purchased the premises referred to in paragraphs 3, 4, 5, and 6 of the plaint for his own benefit, but took the transfer thereof in the name of the first defendant for the purpose hereinbefore set forth.

When one refers to the deed dated October 23, 1911, the execution of which is witnessed by Perera, and by which the alleged arrangement is claimed to have been carried out, one finds a statement more in accord probably with the actual facts, to the effect that the purchase money, Rs. 10,000, " had been well and truly paid " by Caruppen Chetty (the first defendant) to the vendor Sidambaram Chetty. He then deals in his answer with the acquisition of lot 4 of these lands. By a certain deed dated December 3, 1912, it was conveyed to him by seven co-owners, and was by him, by deed dated August 26, 1913, number 133, conveyed to the first defendant. When one refers to these deeds, it appears that the purchase money, which was Rs. 360, was stated to have been paid by the purchaser to the

vendors, the receipt of which the latter acknowledges. In the second there is a statement to a like effect that the purchase money had been paid by the first defendant to Perera. Yet the latter, in the 9th paragraph of his answer, claims that by these transactions, not by an express parol agreement, the existence of which he never once mentions, the first defendant became a trustee for him, and the firm became trustees for him of all the lots, No. 4 as well as the others, to be re-conveyed to him if by him so required, on the money advanced by the firm being repaid with the stipulated interest thereupon due. As regards lot 4, it is certainly a novel application of the equitable doctrine of resulting trusts, that where an owner of property, as this deed represents Perera to have been, sells and conveys it to a purchaser who pays him the purchase price, all which this deed recites in the case to have been done or to be done, the purchaser is converted into a trustee for the vendor whom he has paid. There is not in Perera's answer a single suggestion that there was any parol agreement between him and the first defendant or any other person that this lot 4 should be held so. Both the District Judge of Colombo and the Supreme Court of Ceylon held that no trust such as is relied upon was created by the dealings of the parties in this case. For reasons to be given presently, their Lordships concur with them in this opinion. They think these learned Judges were right in the conclusion to which they came. It is then set forth in this answer that in or about the month of October, 1911, erroneously stated as 1912, a new arrangement was entered into between the appellant, and apparently from the dates almost contemporaneous with the first indenture modifying it. It was according to the answer this: This firm, the appellant avers, requested him to let them have, absolutely for their own benefit, a half share of all the property, alleged to be held in trust for him, for the actual cost of such share, and offered to the appellant, in consideration of his trouble in purchasing and planting the property, to forego all claim for interest on the money advanced by the firm; that he accepted this offer, and acknowledged the title of the firm to this half share on the footing of this agreement. If the appellant's claim be well founded as to the existence of the resulting trust mentioned in reference to all these properties, then this new arrangement amounted to a parol agreement by the *cestui que trust* to sell to the trustees for the considerations mentioned the beneficial interest in one-half of the trust property. And it is this latter agreement which the appellant claims to have carried out. He does not pray that the alleged resulting trust affecting the whole property may be declared and carried out; but after stating that he has expended Rs. 54,802·76 in purchasing and planting the entire property, that the firm had advanced to him Rs. 30,432·03, to enable him to expend this sum that the firm should be debited with half this expenditure and credited with half the advance, leaving him in debt to them in the

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sum of Rs. 7,530·65, which he states he is ready and willing to pay. He prays: "That the shares in the said properties which the plaintiff (*i.e.*, Adaicappa Chetty) and the defendants (*i.e.*, the two other members of the firm) may be held to be entitled to, and the portions which may be allotted to them, may be declared to be held by them, subject in respect of one-half thereof to the said trust in his (Perera's) favour."

That amounts in effect very much to a prayer that the second parol agreement may be specifically performed. He then prays in the alternative that the said shares and portions may be declared to be held by them, subject to a tacit hypothec to secure payment to him of compensation for improvements, and subject to his right to retain the same until such compensation is paid. The two original defendants had not up to this period filed any answer. Then, in obedience to an order of the Court, they ultimately did so on February 25, 1918. In it, after some immaterial traverses of statements in the plaint, they adopt and practically repeat the statements in Perera's answer. They claim, however, that at the time the action was brought Perera was entitled to 33/66 of the several lots of land, that they were each entitled to 8/66, and the plaintiff entitled to 17/66, thus modifying the division made by the deed of November 30, 1916, by the provisions of the parol agreement of October, 1911; in fact, dividing by two, the share secured to Adaicappa Chetty by that instrument. The fraud charged by all the defendants against the plaintiff, Adaicappa, is that he brought this action. It is unnecessary to go into the history of this deed of November 30, 1916, at any length. It is enough to say that it appears from the documents that the Chetty partnership was dissolved; that there was litigation between the partners; that a settlement of the litigation was arrived at; and that, in pursuance of that settlement, this deed was executed, in which it is apparent these alleged trust properties were treated as assets of the partnership.

When the case came before the District Judge, the appellant's advocate was asked what he proposed to prove in evidence in support of his case, and he replied, as appears from the Judge's notes, that he proposed to prove that the first defendant was the managing partner of the firm; that as such Perera asked him for a loan; that this land was valuable; that he (Perera) would get it cheap, plant, and cultivate it; the firm to advance the money for working it; that Perera purchased; that the first defendant thought it prudent to have a transfer as a hold on Perera; that it was bought in the first defendant's name, and that the lands already got he transferred to the firm; that the firm were legal owners, subject to trust; that first defendant thought it better to secure a share of the property; that this course was suggested by Perera, viz., when the property came to full bearing to transfer half to the

added defendant firm and retain half ; that this agreement was noted in the partnership books, but not signed. He further stated that he proposed to prove the alleged trust by oral evidence, the notice of the trust by the production of the plaint and answers, and by oral evidence to prove that the deed of November 30, 1916, was taken subject to the trust. The respective advocates agree that the date in paragraph 10 of the added defendant's answer should be 1911, not 1912, and that the agreement about halving the land was made immediately after October 23, 1911.

Both parties agreed that the question of the admissibility of the evidence should be disposed of first.

In giving judgment the learned District Judge points out that there is no mention of any trust in the indenture of November 30, 1916, or of the earlier deed dissolving the partnership dated April 5, 1915, that the added defendant Perera now sought, by means of oral evidence, to deprive the plaintiff in the suit of half the lands conveyed to him by the former deed. He held that there was no question of trust, but merely an oral agreement that this deed of November 30, 1916, should mean, not that defendants transferred to the plaintiff 17/33 of the whole land, but 17/33 of half the land ; that the oral evidence offered of such an agreement was obnoxious, both to the Ordinance relating to frauds and perjuries and to the Evidence Ordinance, No. 14 of 1895, section 92. He further stated the lands in the present case were not purchased by the defendants with money advanced by the added defendant, but by money belonging to the firm, which was treated as a loan to the added defendant. The learned Judges in the Court of Appeal concurred. They held that the added defendant could not establish his claim by oral evidence.

The first question which it is necessary to determine is what is the real nature, the true aim, and purpose of the transaction described in the 6th paragraph of Perera's answer. The purchase money was paid by the Chetty firm through the medium of Perera. It was never lent to him to dispose of it as he pleased. If he got command of the money at all, he only had command of it in order to devote it to a particular purpose, the purchase of these lands. He was to repay it with interest at 10 per cent., and the conveyance was made to the first defendant : " The deed of the land so purchased to be taken in the latter's name." Not for the purpose, in the view of either party, of being held in trust for Perera or for Perera's sole benefit, but to secure to the firm the repayment of the money sunk in the purchase with interest. The object of the agreement was, in their Lordships' view, to create something much more resembling a mortgage or pledge than a trust. The arrangement differed absolutely in nature and essence from that entered into, where one man with his own proper moneys buys landed property and gets the conveyance of that property made to

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another. In such a case that other has no claim upon the property vested in him. It would be a fraud upon his part to contend that it belonged to him, or to insist that he was entitled to a charge or incumbrance upon it, or had a right to retain the possession of it against the will of the man who purchased it. But in the present case, until the purchase money with interest was repaid to the firm, the first defendant had a right to insist that his firm had a claim upon this land, and that he (the first defendant) had the right, in the interest of his firm, to retain the ownership of it. It is true that the deed which conveyed the land to the first defendant did not contain any provision for redemption. It was not a formal mortgage in that respect, but the agreement the parties entered into was much more an agreement to create a security resembling a mortgage than to create a trust. It was in effect a parol agreement providing for the conveyance of land to establish a security for money, and creating an incumbrance affecting land, that Perera desired to prove the existence of by parol evidence. The parol evidence, which must be taken to have been tendered, was properly held to have been inadmissible, for the simple reason that the agreement, if proved by it, must, under Ordinance No. 7 of 1840, sub-section (2), have been held not to be of "any force or avail in law." This section is much more drastic than the fourth section of the Statute of Frauds. The latter section does not render a parol agreement of or concerning land invalid. It merely provides that the agreement cannot be enforced in a Court of law unless it, or a note or memorandum of it in writing, be signed by the party to be charged therewith, or some person thereunto lawfully authorized, be given in evidence. Under the latter Statute if the defendant in a suit brought to enforce the agreement has signed it, or a note of it in this manner, the agreement can be enforced though the plaintiff has not signed either. But the party who has signed it or the memorandum cannot sue to enforce it against the party who has not signed either. In both cases the contract entered into is the same. It is not illegal or invalid, but it can only be enforced in a Court of law if proved in a certain way.

The fourth section of the Statute of Frauds has consequently often been well described as merely an enactment dealing with evidence. In the present case the second parol agreement is, in their Lordships' view, as invalid as the first. It was clearly a contract or agreement for effecting the sale, transfer, or assignment of land, and for the establishment of a security or incumbrance affecting land. The firm were, for the considerations mentioned, to hold half the land conveyed by the deed of November 30, not as a security for the repayment to them of money advanced by them, but for their own benefit, and the remaining half was to remain as security for the entire debt. The first defendant would under this agreement become trustee of half the lands for the firm as absolute owner.

If that agreement were carried out according to its terms, a proprietary interest which did not exist before would be created or established in half the land, namely, the proprietary interest of the firm, and a security would be created and established which did not exist before, namely, the security of the other half of the land for half the purchase money, but not for any interest on that money. This second agreement therefore falls within the express words of this same section 2 of Ordinance No. 7 of 1840, and not being in writing would be invalid.

Evidence tendered by a party litigant relying upon an agreement as valid and enforceable, which, if admitted, would establish that the agreement was of no force or avail, is inadmissible. It would be a travesty of judicial procedure to admit it. Their Lordships are, therefore, of opinion that this appeal fails, and should be dismissed, and they will humbly advise His Majesty accordingly.

As the respondents have not appeared, there will be no order as to costs.

Appeal dismissed.