1956 *Present :* Weerasooriya, J., and Sansoni, J.

D. THOMAS *et al.*, Appellants, and
D. R. FERNANDO, Respondent

*S. C. 190—D. C. Colombo, 6,646/L*

*Evidence Ordinance, s. 92—Deed of sale—Parol evidence to contradict its terms relating to the consideration—Admissibility.*

The consideration is an essential term in a contract of sale. Section 92 of the Evidence Ordinance debars a party to the deed of sale from adducing parol evidence to prove that the consideration for the deed was not money and therefore the deed was not a sale but represented an entirely different transaction.

APPEAL from a judgment of the District Court, Colombo.

*H. A. Koattegoda*, with *P. Ranasinghe*, for the defendants appellants.

*C. V. Ranawake*, with *C. Wickremenayake*, for the plaintiff respondent.

*Cur. adv. vult.*

February 3, 1956. SANSONI, J.—

The plaintiff sued three defendants in this action for a declaration of title to four lands, damages for alleged wrongful possession of those lands by the defendants, and for ejectment. He based his claim on a deed dated 23rd February 1952 by which their owner Venjo Fernando conveyed them to him. That deed purports to be a deed of sale by Venjo Fernando to the plaintiff for a consideration of Rs. 3,000. The defendants by their first answer pleaded that the plaintiff had procured the execution of this deed by fraud and undue influence, without paying Venjo Fernando any part of the consideration, and they claimed that no title passed to the plaintiff. They further pleaded that when Venjo Fernando died on 26th February, 1952, her title passed to her grandson and sole heir, the 1st defendant. By an amended answer they claimed alternatively that as the consideration of Rs. 3,000 had not been paid by the plaintiff to Venjo Fernando, the plaintiff was liable to pay that sum to the 1st defendant in the event of the Court holding that the plaintiff was entitled to the lands in dispute.

When the trial began the defendants' Counsel stated that as he had insufficient evidence to establish the pleas of fraud and undue influence, he rested his case only on the claim for the payment of the consideration as set out in the amended answer. The plaintiff 's Counsel then suggested the following issues :—

1. Was there consideration for the deed in question ?
2. Damages (damages agreed upon at Rs. 25 a month).

The defendants' Counsel then suggested :

3. Was the consideration of Rs. 3,000 mentioned in the deed 1458 of 23rd February 1952 paid to Venjo Fernando ?

4. If not, is the plaintiff liable to pay the said sum to the 1st defendant ?

The plaintiff 's Counsel finally suggested :

5. Even if issue (4) is answered in the affirmative, can the minor claim this money in this case ?

The notary who attested the deed was called as a witness for the plaintiff. It then became clear that Venjo Fernando executed this deed without any prior agreement between her and the plaintiff that he should buy, or that she should sell, the lands. The consideration of Rs. 3,000 seems to have been fixed by the notary because a figure had to be mentioned for the purpose of stamping the deed. The plaintiff was not present when the deed was executed, nor had he given any earlier instructions to the notary to prepare the deed. The plaintiff also gave evidence, in the course of which he said : " I knew Venjo was going to transfer the properties to me. I did not know whether she was going to sell or gift the lands to me. She only told me that the lands would be written in my name ".

In view of this evidence the learned District Judge took the view that although the deed purported to be a deed of sale the transfer was not in fact a sale. He held that it was a donation and accordingly gave judgment for the plaintiff and dismissed the defendants' claim in reconvention. The defendants have appealed.

It was in the light of the evidence of the notary that the learned Judge analysed the transaction and reached the conclusion to which I have referred. Apparently that evidence was regarded by him as relevant and admissible on issue (1) which seems to have been suggested by the plaintiff 's counsel in anticipation of the evidence which the notary and the plaintiff were to give. The plaintiff stated that as he had assisted and looked after Venjo (who was his sister) in her last illness, and as she was expecting further assistance from him, she had executed the deed in his favour. The plaintiff 's counsel seems to have argued that on these grounds the consideration for the deed was not Rs. 3,000 as recited in it but something else, namely, the assistance already rendered and to be rendered by the plaintiff to Venjo. Although no objection was raised by the defendants ' Counsel to issue (1) or to the evidence of the notary, he seems to have become alive to the situation when the plaintiff gave evidence, and he objected to it. I understand the objection to be that such evidence was not admissible to contradict or vary the consideration recited in the deed or any other term of it. It seems to me that since the plaintiff came into Court on the basis that title to the lands in dispute had vested in him on this deed which on the face of it (though not so stated in the plaint) was a sale for a consideration of Rs. 3,000, and the *only defence* on which the defendants went to trial was the alternative claim in the amended answer for the payment of the consideration of Rs. 3,000, the plaintiff was precluded from raising the issue whether there was consideration for the deed. It follows that the evidence of

the notary and of the plaintiff should also not have been admitted, since what the plaintiff tried in effect to prove by means of that evidence was that the consideration for the deed was not money and that therefore the deed was not a sale but represented an entirely different transaction, and the admission of such evidence contravened the provisions of S. 92 of the Evidence Ordinance.

I would refer to *Nadarajah v. Ramalingam* [1]. Bertram C. J. in that case held that the consideration for a grant is a term of the grant, and having regard to the essentials of a sale the consideration is an essential term in a transaction of sale. He also held that a party to a deed of sale was not entitled to contradict its terms relating to the consideration.

This is not one of those cases where one party to a deed attempts to go behind a statement in the deed regarding the actual payment of consideration, in which event the other party will be permitted to show what the real consideration was. Here the plaintiff has without justification contradicted the term of the deed relating to the consideration, although no attempt was made by the defendant to attack any term of the deed. Further authority for this view will be found in *Velan Alvan v. Ponny* [2]. Keuneman J. held that oral evidence was not admissible to prove that the consideration was different from that stated in the deed, except in cases to which proviso (1) to S. 92 applies, namely, where the validity of the deed was in issue, or where a decree or order was being sought relating to the deed itself. He accordingly decided in that case that oral evidence was not admissible to prove that a deed which purported to be a transfer for valuable consideration was a deed of donation.

It follows that the deed in question must be treated as a valid deed of sale by Venjo to the plaintiff for a consideration of Rs. 3,000, and as this sum has admittedly not been paid by the plaintiff, it is now due to Venjo 's sole heir, the first defendant.

I would therefore set aside the judgment and decree under appeal and direct that a decree be entered declaring the plaintiff entitled to the lands described in the Schedule to the plaint, and to possession, and ejectment of the defendants therefrom, and ordering the plaintiff to pay into Court a sum of Rs. 3,000 for the benefit of the minor 1st defendant. The decree will further provide that the plaintiff is not entitled to enforce his right to possession of the lands, or to eject the defendants therefrom, until payment into Court of the said sum of Rs. 3,000, and that as from the date of such payment he will also be entitled to damages at the rate of Rs. 25 per mensem till he is restored to possession. Since the plaintiff was neither ready nor willing to honour his obligation to pay the purchase price mentioned in the deed, he was not entitled to claim damages for being kept out of possession of the lands in dispute prior to such payment.

As the plaintiff has failed on the only matter in controversy at the trial and on this appeal, he must pay the defendants their costs in both Courts.

WEERASOORIYA, J.—I agree.

*Appeal allowed.*

[1] *(1913) 21 N. L. R. 38.*

[2] *(1939) 41 N. L. R. 106.*