1944 *Present:* **Howard C.J. and Wijeyewardene J.**

MOLAGODA, Appellant, *and* MOLAGODA, Respondent.

4—D. C. Kandy, 1,129.

Sale—Action to recover purchase price—Recital in deed that money was received—Defendant's plea that sale was, in fact, a gift.

Where the plaintiff sued the defendant to recover the consideration due on a deed of transfer of property, which contained an express recital " that the transferor had received the purchase price in full ",—

***Held*, that it was open to the defendant to prove by oral evidence that the deed of transfer was, in fact, a deed of gift.**

PLAINTIFF, as administrator of the estate of one Kambuwatawana sued the defendant to recover a sum of Rs. 1,600. By deed P 1 of August 9, 1940, Kambuwatawana conveyed certain lands to defendant for Rs. 2,000. Plaintiff instituted this action to recover the consideration due on the deed but claimed only a sum of Rs. 1,600 giving credit to the defendant for a sum of Rs. 400 due to him as an heir of the estate. The defendant pleaded that deed P 1 was in reality a deed of gift. The learned District Judge held that the defendant was debarred from relying on oral evidence to prove that the deed of transfer was in fact a deed of gift and gave judgment for the plaintiff.

N. E. Weerasooria, K.C. (with him *S. R. Wijayatilake*), for the defendant, appellant.—This case comes within the principle discussed in *Belgaswatte v. Ukkubanda et al.*[1]. The deed P 1 recites that the vendor received consideration. The plaintiff, however, as administrator of the deceased vendor, now takes up the position that no consideration passed. It is open, therefore, to the defendant to establish by parol evidence that P 1 was in reality a deed of gift executed in his favour for " love and affection ". See *Nadaraja et al. v. Ramalingam* [2]; *Kiri Banda v. Marikar* [3].

C. E. S. Pereira (with him *S. P. Wijewickreme*), for the plaintiff, respondent.—Document P 1 is obviously a deed of sale of immovable property. On a proper reading of section 92 of the Evidence Ordinance and its provisos (1) and (2) oral evidence is not admissible to contradict P 1 and change its character into one of gift. The plaintiff is not seeking in this action to invalidate the document. *Velan Alvan v. Ponny et al.*[4] is in point. See also *South v. Koelman*[5] and *Mohamadu v. Pathumah et al.*[6]

Cur. adv. vult

September 28, 1944. WIJEYEWARDENE J.—

This is an action by the plaintiff-respondent as administrator of the intestate estate of one Kambuwatawana to recover a sum of Rs. 1,600 from the defendant-appellant.

[1] *(1942) 43 N. L. R. 281.*
[2] *(1918) 21 N. L. R. 38.*
[3] *(1917) 20 N. L. R. 123.*
[4] *(1939) 41 N. L. R. 106.*
[5] *(1930) 11 C. L. Rec. 64.*
[6] *(1930) 11 C. L. Rec. 48.*

By deed P 1 of August 9, 1940, Kabuwatawana conveyed certain lands to the defendant for Rs. 2,000. He died shortly afterwards leaving as his heirs five children including the plaintiff and the defendant.

The plaintiff instituted this action alleging that the defendant failed to pay the sum of Rs. 2,000 due as consideration on transfer P 1. The plaintiff claimed only a sum of Rs. 1,600, as he was prepared to give credit to the defendant for Rs. 400 as the one-fifth share due to the defendant as an heir of the estate of Kambuwatawana.

The defendant filed answer pleading that no sum was due to the plaintiff, as the deed P 1 was, in reality, a deed of gift executed by Kambuwatawana for " love and affection ".

The District Judge held on the evidence that there was no money consideration for the deed P 1 but gave judgment for the plaintiff on the ground that the defendant was debarred by section 92 of the Evidence Ordinance from relying on oral evidence to prove that the deed of transfer P 1 was, in fact, a deed of gift.

The deed P 1 is in form a deed of sale by which the property was sold to the defendant for Rs. 2,000. In fact, the deed contains a warranty clause by which Kabuwatawana undertook to compensate the defendant, if he failed to settle any dispute in respect of the property sold under the deed. The deed, however, contains an express recital that Kambuwatawana has received " the purchase price of Rs. 2,000 lawful money of Ceylon in full ". The plaintiff, therefore, seeks in this action to deny the correctness of that recital Could he then prevent the defendant from showing the real character of the consideration for the deed P 1 ?

In *Kiri Banda v. Marikar* [1] the plaintiff sold some lands to the defendant for Rs. 4,000 the receipt of which the plaintiff acknowledged in the deed. The plaintiff sued to recover Rs. 2,500 alleging that he received only Rs. 1,500 out of the consideration. The defendant pleaded that the consideration for the conveyance was a sum to be determined by the number of acres sold at the rate of Rs. 150 per acre and that a survey of the lands was made for that purpose. The defendant stated further that according to the survey only a sum of Rs. 1,269.50 was the entire consideration due to the plaintiff and that he has, therefore, overpaid Rs. 230.50 which he claimed in reconvention. This Court held that the defendant was entitled to prove these facts and cited in support the following principle laid down by the Privy Council in *Shah Mukhun Lall v. Baboo Sree Kishen Singh* [2].

" The rules of evidence, and the law of estoppel, forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own salutary protection; one of which is, when one party, for the advancement of justice is permitted to remove the blind which hides the real transaction; as, for instance, in cases of fraud, illegality, and redemption, in such cases the maxim applies, that a man cannot both affirm and disaffirm the same transaction, show its true nature for his own relief, and insist on its apparent

[1] *(1917) 20 N. L. R. 123.*
[2] *(1868) 12 Moore's Indian Appeal Cases 157 at 185.*

character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms, that you cannot both approbate and reprobate the same transaction, has been applied by Their Lordships in this Committee to the consideration of Indian appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded, not so much on any positive law, as on the broad and universally applicable principles of justice ".

The case of *Kiri Banda v. Marikar* (*supra*) was followed in *Nadaraja v. Ramalingam* [1]. In that case the plaintiff had executed a deed of sale in favour of the defendant. The deed stated that the consideration was Rs. 4,000 and that it had been received by the plaintiff. The plaintiff instituted the action for the recovery of Rs. 1,500 alleging that only Rs. 2,500 of the consideration was paid to him. It was held that the purchaser could prove by oral evidence that the consideration for the transfer was Rs. 2,500 and not Rs. 4,000. After stating that the whole basis of the plaintiff's claim to relief under section 92 of the Evidence Ordinance is an equitable one, Bertram C.J., said:—

" The principle of English equity was that he who sought equity must do it. In this case the plaintiff comes into Court repudiating a statement with regard to the payment of the consideration, and if he is allowed to put that forward, he ought also to suffer the person whom he attacks to show the real nature of the transaction. "

The District Judge thought that these decisions did not apply to the present case and said that " when they stated that extrinsic evidence could be led to prove that the consideration was different, it applied only to the *quantum* of consideration and not to the nature of the consideration ". In other words, the District Judge thought that the equitable principle referred to in those cases would permit the defendant to show that the consideration was not Rs. 2,000 as mentioned in the deed and only Rs. 10 but not to show that the consideration had no pecuniary value and was merely the " love and affection " of the transferor to the transferee which would constitute a valid *causa* under the Roman-Dutch law. I am unable to appreciate the distinction sought to be drawn by the learned District Judge, and I would not restrict the application of an equitable principle in such an artificial manner in the absence of any strong reason for it. The decision of the Privy Council in *Hanif-un-Nissa & another v. Faiz-un-Nissa & another* [2] is clearly an authority against the view taken by the learned District Judge. The plaintiff in that case executed a deed transferring some property to the defendants, her daughter and grandchildren, for Rs. 60,000. It was, on the face of it, an ordinary deed of sale. It stated (i) that the consideration had been received by the vendor, (ii) that the vendees had been put in possession of the property, and (iii) that, if the vendees were deprived of possession of any part of the property sold, they would be entitled to receive from the vendor a proportionate part of the consideration. She instituted the action alleging that no consideration had ever passed between the parties

[1] *(1918) 21 N. L. R. 38.*

[2] *(1911) Indian Law Reports 33 Allahabad 341.*

and praying, *inter alia*, for the recovery of Rs. 60,000. The defendants pleaded that the alleged sale was not a sale at all and was only a gift. The High Court of Allahabad held that oral evidence was not admissible to prove that the deed which purported to be a deed of sale was a deed of gift and entered judgment in favour of the plaintiff (*vide* (*1905*) *Indian Law Reports 27 Allahabad 612*). The Privy Council set aside the judgment of the High Court and remitted the case to be dealt with on the evidence.

The Counsel for the respondent relied strongly on *Velan Alvan v. Ponny*[1], but, I am unable to see how that decision is relevant to the question to be decided in this case. In that case the first defendant's husband had conveyed to the first defendant a land " in consideration of the sum of Rs. 1,000 already received ". As the deed purported to be for valuable consideration, half of the property reverted to her husband under section 20 of Ordinance No. 1 of 1911 and on his death that half share devolved on the plaintiff, his brother, and some others. The plaintiff claiming thus to be a co-owner of the land instituted that action to assert the right of pre-emption under the *Thesawalamai* in respect of a transfer by the first defendant to the second and third defendants. The defendants resisted the claim stating that the plaintiff was not a co-owner, as the deed in favour of the first defendant was not for valuable consideration and no share, therefore, of the land reverted to the first defendant's husband or devolved through him on the plaintiff. The Court had to consider in that case the scope of section 92 of the Evidence Ordinance and held that the defendants were precluded by that section from leading oral evidence to change the character of the transaction. It was clearly not a case where the Court had to consider the application of the equitable principle referred to in the earlier decisions. The necessity for the application of that principle arises only where a Court *allows* a party to lead oral evidence under section 92 to vary the terms of a written contract. In those circumstances, the equitable principle referred to comes into operation and enables the opposing party to lead oral evidence to meet the claim put forward by the first party who has been allowed under section 92 to vary a statement in the written contract.

For the reasons given by me I hold that oral evidence was admissible to prove that the deed P 1 was a deed of gift.

I set aside the judgment and direct decree to be entered dismissing the plaintiff's action with costs here and in the Court below.

HOWARD C.J.—I agree.

Appeal allowed.

[1] *(1939) 41 N. L. R. 106.*