1914.

Present : Ennis J. and De Sampayo A.J.

PERERA *v.* FERNANDO.

348-349—D. C. Chilaw, 4,942.

Trust—Evidence—Oral evidence to prove that a deed of sale was in reality a mortgage—Evidence Ordinance, s. 92.

Where a person transferred a land to another by a notarial deed, purporting on the face of it to sell the land, it is not open to the transferor to prove by oral evidence that the transaction was in reality a mortgage, and that the transferee agreed to re-convey the property on payment of the money advanced.

The admission of oral evidence to vary the deed of sale is in contravention of section 92 of the Evidence Ordinance.

The agreement to re-sell is not a trust, but is a pure contract for the purchase and sale of immovable property.

THE facts are fully set out in the judgment of De Sampayo A.J.

348.—*Bawa, K.C.* (with him *F. R. Dias*), for first defendant, appellant.

Samarawickreme, for respondent.

349.—*A. St. V. Jayawardene*, for appellant.

A. Drieberg (with him *G. Koch*), for respondent.

Cur. adv. vult.

November 6, 1914. ENNIS J.—

In this case the plaintiff by deed No. 89 of December 17, 1906, conveyed to one Diego Perera certain lands. Diego Perera died some three years ago, and his widow and executrix, the first defendant, sold the land to the second defendant. The plaintiff sought a re-conveyance of the land from the second defendant on the ground that the first defendant held it in trust. The learned District Judge ordered the second defendant to execute a conveyance to the plaintiff on payment by the plaintiff of the sum of Rs. 1,540.38 into Court. From this decree both defendants appeal.

In order to prove the trust oral evidence was admitted, and the admissibility of this evidence is the first question on the appeal. So far as I have been able to follow the argument of the plaintiff-respondent, this evidence is to show that the parties to the deed No. 89 were in the relationship of borrower and lender, and that the lands were really conveyed by way of mortgage. Such evidence, in my opinion, comes within the direct prohibition of section 92 of the Evidence Ordinance ; it is oral evidence to show that the transaction was other than that disclosed by the deed and to contradict the deed. It was then urged that it would be admissible under the second proviso to section 92, but evidence of a separate oral agreement under that proviso is only admissible when it is not inconsistent with the terms of the deed. Neither of these contentions give any ground, in my opinion, for the admission of the oral evidence. The deed purports to be a conveyance on sale, not a mortgage, and it is not alleged that Diego Perera did not use his own money, or that he acted as agent for another, or that he acted fraudulently, or any of the grounds upon which in Ceylon (*Somasunderam Chetty v. Todd ;* [1] *Pronchihamy v. Don Davith ;* [2] D. C. Jaffna, 7,409) oral evidence is admissible to prove a trust not inconsistent with the deed.

I would set aside the decree and dismiss the plaintiff's action with costs.

DE SAMPAYO A.J.—

The plaintiff, who was the owner of four lands, was indebted in the sum of Rs. 2,500 on a mortgage decree entered against him in respect of three of the lands, and in the sum of Rs. 1,000 on a usufructuary mortgage of the fourth land called Nittullagahawatta. By deed dated December 27, 1906, he transferred the four lands to one Diego Perera for the sum of Rs. 3,500, of which Rs. 2,500 was paid by Diego Perera in satisfaction of the mortgage decree, and the balance Rs. 1,000 was retained by him to be paid to the usufructuary mortgagee. Diego Perera having died, the first defendant who is his widow and the executrix of his will, sold the land called Nittullagahawatta to the second defendant by deed dated June 27, 1913. The plaintiff's case is that, although the transfer to Diego Perera was in form an absolute sale, it was executed on an agreement between them that Diego Perera should advance the sum of Rs. 3,500 for the purpose of paying the plaintiff's mortgage debts ; that the plaintiff should repay the amount by delivery of coconuts at a certain rate; and that Diego Perera should hold the lands in the meantime and re-convey them to the plaintiff on the repayment of the full amount advanced. He says that under this agreement he remained in possession of the first three lands and delivered coconuts to the value of Rs. 975, and that as the usufructuary

[1] *(1910) 13 N. L. R. 361.* [2] *(1911) 15 N. L. R. 13–16.*

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mortgage of the fourth land had not yet been discharged, he tendered to the first defendant the sum of Rs. 1,525, being the balance of the actual sum advanced by Diego Perera, which the first defendant however refused to accept. He accordingly brings this action, and prays that the first defendant be ordered to execute a conveyance of the three lands still held by her, and the second defendant to execute a conveyance of Nittullagahawatta purchased by him from the first defendant. He further says that the lands were originally transferred to Diego Perera for less than half their value, and claims in the alternative a rescission of the deed on the ground of *enormis læsio*.

The alternative claim failed, because the District Judge held on the evidence that the consideration for the conveyance was fairly equal to the value of the lands, but he has allowed the plaintiff's claim on the first cause of action, and both defendants have appealed.

The case against the second defendant may be disposed of at once. That depended on proof that the second defendant took the conveyance from the first defendant with notice of the alleged agreement. The only evidence on the point is the fact that the plaintiff, even after the transfer to Diego Perera, continued to be in possession of the first three lands, but I do not see how that fact can be said to have informed the second defendant of the agreement. Besides, it is the plaintiff's own case that he delivered the coconuts of those lands to Diego Perera, and a stranger may well think that the plaintiff was in possession on behalf of Diego Perera. Moreover, it is not one of those lands that the second defendant purchased, but Nittullagahawatta, which is in the possession of the usufructuary mortgagee. In my opinion, apart from the legal questions arising in this action, the plaintiff has failed to make out his case against the second defendant.

As regards the claim against the first defendant, the principal question is whether the plaintiff can establish the alleged agreement by oral evidence and enforce it by action. The defendants objected to oral evidence being admitted, and I think the objection should have prevailed. Counsel on behalf of the plaintiff-respondent contended that the relation arising out of the circumstances between the plaintiff and Diego Perera was that of borrower and lender, and that the transfer was in fact only a mortgage, with the effect that Diego Perera was bound to re-transfer the land on repayment of the sum of money in question. This being the plaintiff's case, it is clear that the admission of oral evidence to vary the deed of sale is in contravention of section 92 of the Evidence Ordinance and the whole law relating to the nature and effect of written documents (*Somasunderam Chetty v. Todd* [1]). It was sought to avoid this difficulty by suggesting that the agreement was proved, not so much by oral testimony, as by evidence of subsequent conduct. The

[1] *(1910) 13 N. L. R. 361.*

allusion is to the fact of possession of the lands by the plaintiff and of delivery of coconuts under the agreement. But conduct can only corroborate the oral evidence as to the original agreement, and thus the objection is not really met. Moreover, the suggestion amounts to the argument that part performance takes the agreement out of the statute, which has been frequently held to be untenable. Another aspect of the case is that arising from the provision of the Ordinance No. 7 of 1840, which requires a notarial instrument to establish any agreement relating to immovable property. Here the plaintiff refers to the alleged trust and relies on the decisions of this Court, which have laid down the principle that the Ordinance will not be allowed to be used for perpetrating a fraud, and of which *Ohlmus v. Ohlmus* [1] cited by the District Judge is an example. But those decisions when examined will be found not to apply to such a case as this. The argument as to the deed of sale being only a mortgage has been above disposed of, and the position then is reduced to this : that plaintiff seeks to enforce an agreement to re-sell the lands on repayment of the amount paid by the purchaser Diego Perera. Such an agreement does not constitute a trust, but is a pure contract for the purchase and sale of immovable property, and the Ordinance No. 7 of 1840 declares it to be void in the absence of a notarial instrument. The case *Amerasekera v. Rajapakse* [2] is in point. See also *Pronchihamy v. Don David.*[3] and the Jaffna case therein cited,[4] where the class of cases in which the Courts in Ceylon will allow oral agreements to be proved has been pointed out and the previous decisions have been distinguished.

I think that the appeals should be allowed with costs in both Courts.

Set aside.

[1] *(1906) 9 N. L. R. 183.*

[2] *(1911) 14 N. L. R. 110.*

[3] *(1911) 15 N. L. R. 13.*

[4] *Ibid., p. 16.*