Privy Council Appeal No. 14 *of* 1953

Swakinapillai Saverimuttu of Valvettiturai - - - - *Appellant*

v.

Ponnambalam Thangavelautham of Valvettiturai and others *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JULY, 1954

Present at the Hearing:

EARL JOWITT
LORD KEITH OF AVONHOLM
MR. L. M. D. DE SILVA
[*Delivered by* MR. L. M. D. DE SILVA]

This is an appeal from a judgment of the Supreme Court of Ceylon dated 26th July, 1951, which, setting aside a judgment of the District Court of Jaffna, entered a decree in favour of the first respondent (hereinafter called "the respondent") to this appeal.

The respondent instituted the action in the District Court of Jaffna to obtain a declaration that he was entitled to a land called Pannaikaddaiyady situated at Valvettiturai, an order for possession and damages. The appellant was the first defendant in the action. The 2nd to the 10th respondents were the 2nd to the 10th defendants.

The respondent in his plaint averred that the appellant and his late wife Annammah had at one time owned the land called Pannaikaddaiyady, that they had by Deed No. 3 of the 12th November, 1937 transferred the said land to one Karthigesar Aiyadurai who by Deed No. 308 of the 24th June, 1946 had transferred it to the respondent. He thus claimed to be the owner of the land and entitled to possession. He averred that the appellant and the 2nd to the 10th respondents were in wrongful possession of the land.

The 2nd to 10th respondents did not appear at the hearing of this appeal but it is common ground, and their Lordships are satisfied, that their position with regard to the land can be no higher than that of the appellant. As their Lordships have decided that the appeal must fail their case does not call for separate consideration and no further reference will be made to them.

It was pleaded in defence by the appellant that the transfer to Karthigesar Aiyadurai was subject to a condition that Aiyadurai was to hold the land in trust for the transferors and reconvey it to them on their paying to Aiyadurai a sum of Rs. 2,000 with interest. At the trial before the learned District Judge it was sought to support this plea, not by a notarially attested instrument, but by secondary oral evidence of an informal writing which it was alleged had been given by Aiyadurai to the respondent and his wife at the time of the execution of Deed No. 3. Secondary oral evidence was permitted on the ground that the original writing was not available to the respondent at the date of the trial. On the view, referred to later, of the facts taken by the learned trial judge secondary evidence was admissible.

It was pleaded further in defence that the respondent at the time the land was conveyed to him had knowledge that Aiyadurai held the land in trust and that therefore the respondent's position was no better than that of Aiyadurai. It will be necessary to consider this plea if the first plea that Aiyadurai held the land in trust succeeds but not otherwise.

Aiyadurai was dead at the time of the trial.

The learned District Judge held that a trust had been established. On appeal the Supreme Court took the view that no trust had been established and the question before their Lordships is whether upon the material placed before the learned trial judge and with due regard to his views on the credibility of the witnesses who gave evidence before him it can be said that a trust came into existence.

Section 2 of the Prevention of Frauds Ordinance (chapter 57, Volume 2, Legislative Enactments of Ceylon) is to the following effect:—

> "No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorised by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnessed".

The amendment to the section made by Ordinance 60 of 1947 leaves unaffected the questions arising for consideration in this case and the views expressed hereafter. No reference was made to it at the argument and no further reference to it will be made by their Lordships.

The section has been observed by Lord Atkinson in the case of *Adicappa Chetty* v. *Caruppan Chetty* (1921) 22 N.L.R. p. 417 to be "more drastic" than the corresponding section of the English Statute of Frauds in that the latter does not render an agreement not complying with the formalities required by it "invalid", whereas the Ceylon Ordinance does.

Subsection 1 of section 5 of the Trusts Ordinance (chapter 72) Volume II, Legislative Enactments of Ceylon is to the following effect:—

> "Subject to the provisions of section 107, no trust in relation to immovable property is valid unless declared by the last will of the author of the trust or of the trustee, or by a non-testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed."

Subsection (2) relates to movable property.

Subsection (3) says:—

> "These rules do not apply where they would operate so as to effectuate a fraud."

It thus appears that the law of Ceylon in the generality of cases refuses to recognise a transaction relating to immovable property unless the terms of the transaction have been embodied in a notarially attested document. Oral evidence and even evidence in writing which does not possess the authenticity of a notarially attested document are thus rendered of no avail in the generality of cases. It is evident that the aim of the Prevention of Frauds Ordinance is to prevent frauds by making evidence other than the evidence of a notarially attested document ineffective. Their Lordships think that the departures permitted by law from this general rule should not be extended as any undue extension would interfere seriously with the object sought to be achieved by the statute law of Ceylon.

Proof of fraud entitles the Court in certain circumstances to depart from the general rule. This principle has found statutory recognition in section 5 (3) of the Trusts Ordinance referred to above, and in some cases the provisions of the Prevention of Frauds Ordinance have been relaxed on proof of fraud on the ground that the "Statute of Frauds may not be made an instrument of fraud". It must however be remembered that this proposition has only a limited application. For instance it may be proved by evidence of the utmost reliability not supported by a notarially attested document that a person has entered into a plain and simple agreement to sell land to another for a consideration. A breach of such an agreement is undoubtedly dishonest, but the dishonest conduct resulting from the breach does not amount to fraud within the meaning of the proposition that the Statute of Frauds may not be used as an instrument of fraud. If the contrary view were taken the Ordinance would be totally ineffective. Their Lordships are of the view that in order that the Ordinance may not be deprived of all efficacy it is necessary that Courts should approach with caution the facts and the law on which any case, claimed to be an exception to the general rule referred to above, is founded.

By deed No. 3 of the 12th November, 1937, already referred to, the appellant and his wife transferred to Aiyadurai not only the land Pannaikaddaiyadi but also two other lands Elumullupattai, Muthiraikaddaiadi. The three lands were the subject matter of a mortgage decree in District Court Jaffna No. 265 on which at the relevant date a balance amount of Rs.2,000 was payable by the appellant and his wife to Aiyadurai. Five lands had originally been covered by the decree but two of them had been released. It is stated in Deed No. 3 that the consideration for the transfer effected by it was the balance amount due on the mortgage decree. Satisfaction of the decree was duly certified of record. On the face of D.3 it is an unqualified transfer for consideration.

Immediately after the execution of Deed No. 3, on the same day, the respondent by Deed No. 4 leased the property to the appellant and his wife for an agreed rental for a period of six years. As stated by the Supreme Court on the face of these documents "the relationship between Aiyadurai and the appellant had been converted from that of creditor and debtor to that of lessor and lessee".

The appellant (by secondary oral evidence of an informal agreement) sought to assert that the true position of the respondent was not that of a full owner and lessor but that of a trustee. He said, and the learned trial judge held, that he had handed the informal writing to one Pomiah, an attorney of Aiyadurai who had wrongfully failed to return it and it is not contested that in such circumstances secondary oral evidence was admissible.

In support of his case it was suggested that the consideration for Deed No. 3 of 12th November, 1937, was inadequate and this suggestion was accepted by the trial judge. The Supreme Court rejected the suggestion. On an examination of the evidence led for the appellant on the question of the value of the land their Lordships find that the oral evidence was not sufficiently disinterested, and the documentary evidence not sufficiently related, to the land transferred by the appellant as to form a safe basis for the view that the consideration paid on the transfer was below the value of the land. They think therefore that the view of the Supreme Court that the suggestion should be rejected should prevail. The Supreme Court drew the inference that the consideration was adequate from a valuation made by the appellant of the land in question and certain others for the purposes of a case instituted in 1946 and an admission by the appellant as to the extent of the general increase in the price of land in the years preceding 1946.

The oral evidence led to establish the execution of an informal writing and to prove its contents was that of three persons ; Sivagnanam a proctor and notary and nephew of the respondent, the appellant and Virisithamma

(4th defendant and 4th respondent to this appeal) a daughter of the appellant. Sivagnanam said that " an informal writing was also executed simultaneously " with the execution of the deed of transfer to Aiyadurai. He did not give evidence as to what the writing contained. The appellant said that he agreed to transfer the land to Aiyadurai because Aiyadurai had said if the debt owed by him to Aiyadurai was paid off within eight years he would retransfer the land to the appellant. He said an informal writing had been given by Aiyadurai to him. Virisithamma was the only witness who purported, speaking from recollection, to state what the contents of the informal writing were. She said: " I saw the document personally. The agreement referred to was contained in a piece of paper about 5 in. by 8 in. I can give a summary of the contents. The agreement was Rs. 1,200 for Elumullupattai and Rs. 800 for Pannaikaddayadi and Muthiraikaddai, and these amounts to be repaid by instalments, and Aiyadurai undertook to re-transfer the lands on repaying the amount due ". In answer to a question as to whether any period was laid down in the agreement she said that " the period mentioned was eight years ". In the course of cross examination in answer to a question by the trial judge she said for the first time " The rate of interest at ten per cent. was mentioned in the agreement ".

In the answer filed by the appellant the facts relied upon to sustain the plea of a trust were contained in the second paragraph which is to the following effect:—

> " These defendants state that the said land and two other lands were conveyed on the said Deed No. 3 by the 1st defendant and his late wife Annammah to Karthigesu Aiyadurai referred to therein to be held in trust for them and to be re-conveyed to them on their paying to the said Aiyadurai the sum of Rs. 2,000 with interest thereon from 12th November, 1937 ".

And in the prayer the appellant asked that the respondent be ordered to execute a conveyance in favour of the appellant (and the defendants who were the representatives of Annammah) on payment of the sum of Rs. 2,000 and such reasonable interest from 12th November, 1937, as the Court may order. No mention is made in the answer of the period of eight years or of the rate of interest. A period and a rate were necessary to render the agreement free from the infirmity of indefiniteness but these elements, if present in the agreement, had not impressed themselves sufficiently on the memory of Virisithamma as to make them part of the instructions given to the appellant's proctor for the purpose of filing answer. She said she " instructed the proctor at the time of filing answer ". If the witness Virisithamma showed at the time answer was filed a disregard for the material elements of the agreement to which reference has been made from lack of recollection or even from an incapacity to appreciate their importance her evidence would appear to have lacked that high degree of reliability and the certainty of accuracy upon which alone a court can arrive on oral evidence at a finding of fact affecting adversely a title founded upon a notarially attested document.

In these circumstances it would not have been unreasonable for the learned trial judge, without any reflection on the credibility and honesty of the appellant and his witnesses, to have dismissed the appellant's action on the simple ground that, considering the purpose for which it had been led, he could not regard the evidence as sufficiently reliable as to entitle the appellant to found a case upon it. But the trial judge has not so held and their Lordships hearing this case as an appellate tribunal do not feel disposed to act upon the view that the trial judge should have done so.

Accepting the secondary oral evidence of Virisithamma as to the contents of the informal writing it will be seen that it contained no reference to a trust and was in terms plainly an undertaking by Aiyadurai to retransfer the land to the appellant on the payment of a specified amount. It was sought to amplify the nature of the undertaking by

resort to the evidence as to what was orally stated before the agreement was signed. Objection was taken by the respondent to a consideration of this evidence on the ground that once the agreement was reduced to writing oral evidence to amplify it was not admissible. Their Lordships do not find it necessary to consider this objection because they find the further evidence, if admissible, to be too slender to be regarded as capable of adding to the terms of the agreement.

It was conceded by counsel for the appellant that a refusal however dishonest by a person (say A) to carry out a non-notarial agreement to transfer land for a consideration (to say B) cannot normally be enforced on the ground that the agreement gives rise to a trust in favour of B. But it was argued that if B transfers land to A for a consideration by an effective notarial document and A as part of the same transaction agrees orally or by a non-notarial agreement to retransfer the land to B for the same or another consideration a trust in favour of B arises. Their Lordships do not agree. They think that further facts clearly indicative of a trust must be proved before a trust can be said to arise. In the case of *Perera* v. *Fernando* [(1914) 17 Ceylon New Law Reports p. 486] it was held that: "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 reconvey the property on payment of the money advanced". It was further held that the agreement relied on amounted not to a trust but to "a pure contract for the purchase and sale of immovable property". Their Lordships are of opinion that *Perera* v. *Fernando* sets out correctly the law of Ceylon. In the case before their Lordships it was a writing (established by secondary oral evidence) that was invoked by the appellant but that makes no difference because the statute law referred to earlier excludes for the purposes mentioned in it not only oral evidence but evidence contained in a writing which is not notarially attested.

In the case of *Adicappa Chetty* v. *Caruppan Chetty* [(1921) 22 Ceylon N.L.R. 417] the facts were different but it was sought to establish by oral evidence that a person who held a land under a notarially attested document held it in trust for another. Lord Atkinson delivering the judgment of the Board held that parol evidence was inadmissible. He held that the agreement to establish which parol evidence was given sought to "create something much more resembling a mortgage or a pledge than a trust" and was consequently of no force or avail in law if it contravened the provisions of the Prevention of Frauds Ordinance.

It was urged by the appellant that the decision of the Board in *Valliamma Atchi* v. *Abdul Majeed* (1948, 48 C.N.L.R. p. 289) supported his case. In that case it was held on facts established by oral evidence that a creditor held on trust a land conveyed to him by a debtor by a notarial document which on the face of it purported to be an outright deed of sale and made no reference to a trust. Chief among the purposes of the trust were that the transferee should enter into possession, collect the income and therewith pay off the debt due to himself and debts due to certain other persons. The transferee was thereafter to reconvey the property to the transferor. One of the points argued in that case was "that there was no evidence to support the finding that the trust alleged in the plaint was proved; that at the most, the evidence showed only that the conveyance P21 was in the nature of a mortgage involving an obligation to reconvey the property to the transferor on payment of the debt due to the transferee". This argument was rejected and it is this rejection that the appellant seeks to rely upon. In rejecting the argument their Lordships said that they "have been referred to the relevant evidence and they are satisfied that there was ample evidence, if admissible, to justify the finding that the trust was established. They accept the concurrent findings of the Courts in Ceylon upon this point". What the evidence referred to was is not stated in the judgment although the purposes of the trust were, but it is clear that the judgment proceeded upon the basis that it was ample. No doubt the purposes of the trust would have formed

a part of that evidence. The decision does not in terms or otherwise detract from the force of the view expressed by the Board in the case of *Adicappa Chetty* v. *Caruppan Chetty*. If the agreement between the parties had been one creating "something much more resembling a mortgage or a pledge than a trust" it would have been held to have been of no force unless it had been contained in a notarially attested document. It is true that in the case of *Valliamma Atchi* v. *Abdul Majeed* and in the case now before their Lordships there are common elements. There is in each case an alleged agreement by a transferee of land to reconvey it to the transferor. The transferor is in each case indebted to the transferee at the time of the transfer. But these elements by themselves do not establish a trust. They establish an agreement to reconvey. The judgment in *Valliamma Atchi* v. *Abdul Majeed* does not indicate that the common elements mentioned are in all cases sufficient to give rise to a trust. It proceeded as already stated upon the view emerging from an examination of the particular facts of the case that there was ample evidence to establish a trust. In the case before their Lordships although the elements referred to as common elements exist, there is nothing of sufficient weight which, taken together with them, can support the proposition that a trust has been established.

For the reasons which they have given, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the first respondent.

(39058) Wt. 8082—47 100 7/54 D.L.

In the Privy Council

SWAKINAPILLAI SAVERIMUTTU OF VALVETTITURAI

v.

PONNAMBALAM THANGAVELAUTHAM OF VALVETTITURAI AND OTHERS

DELIVERED BY MR. L. M. D. DE SILVA

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