Privy Council Appeal No. 76 of 1920.

Kadugoda Aratchige Martinus Perera - - - - *Appellant*

v.

Adaicappa Chetty and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST JUNE, 1921.

Present at the Hearing:

VISCOUNT HALDANE.
LORD ATKINSON.
LORD PHILLIMORE.

[*Delivered by* LORD ATKINSON.]

This is an appeal from the decree of the Supreme Court of Ceylon, dated the 26th February, 1920, which affirmed a decree of the Court of the District Judge, Colombo, dated the 18th February, 1918, in a suit instituted in his Court on the 28th July, 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 the 30th November, 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 the 23rd October, 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 the 26th August, 1913, in like manner as in the other instance conveyed to the first defendant.

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 the 26th October, 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 lands 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 the 23rd October, 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 the 3rd December, 1912, it was conveyed to him by seven co-owners and was by him by deed dated the 26th August, 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 ninth 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 so held. 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 sum 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 the 25th February, 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 the 30th November, 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 the 30th November, 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 the 30th November, 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 the 23rd October, 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 the 30th November, 1916, or of the earlier deed dissolving the partnership dated the 5th April, 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 the 30th November, 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 141 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 sixth 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 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 mortage 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 the 30th November, 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 the Ordinance 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.

In the Privy Council.

KADUGODA ARATCHIGE MARTINUS PERERA

v.

ADAICAPPA CHETTY AND OTHERS.

DELIVERED BY LORD ATKINSON.

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