1971 *Present :* **H. N. G. Fernando, C.J., and Thamotheram, J.**

D. L. KARIAPPERUMA and another, Appellants, *and*
D. J. KOTELAWALA, Respondent

S. C. 111/66 (F)—D. C. Panadura, 8332/L

Contract—Informal agreement to convey immovable property—Fraudulent breach of such agreement—Whether a constructive trust can be inferred—Prevention of Frauds Ordinance (Cap. 70), s. 2—Trusts Ordinance (Cap. 87), ss. 5, 83 to 96.

A and B were co-owners and parties in a partition action. After interlocutory decree was entered, B gave an informal writing to A whereby he agreed to convey to A after the decision of the partition action a certain portion (44½ perches) of the corpus which had been mistakenly allotted to B instead of A in the interlocutory decree. After the final decree was entered, B, in breach of the informal writing, conveyed the portion to a third party C.

In the present action A claimed a declaration that the portion of 44½ perches was held in trust by either B or C or both of them. The trial Judge held that the provisions of section 96 of the Trusts Ordinance were applicable. His opinion was that, whenever there is a fraudulent breach of an informal agreement to transfer land, the person committing the breach must thereafter hold the property under a constructive trust.

Held, that the informal writing, for lack of due notarial execution in terms of section 2 of the Prevention of Frauds Ordinance, was not " of force or avail in law ". Section 96 of the Trusts Ordinance was not applicable for the reason that full title had already vested by operation of statute law in B before he made the informal promise.

APPEAL from a judgment of the District Court, Panadura.

C. Ranganathan, Q.C., with *H. E. P. Cooray*, for the defendants-appellants.

G. P. J. Kurukulasuriya, with *F. N. D. Jayasuriya*, for the plaintiff-respondent.

Cur. adv. vult.

May 29, 1971. H. N. G. FERNANDO, C.J.—

In a partition action No. 5739 D. C. Kalutara, Interlocutory decree was entered on 10th June 1960. By that decree certain shares were allotted to one D. L. Kariapperuma who was the second plaintiff in the action, and also to his wife who was third plaintiff. Certain other shares were allotted to one D. J. Kotelawala who was the 4th plaintiff. Thereafter Final Decree in that action was entered after commission for partition. According to the Final decree entered on 24th April 1961, the 2nd and 3rd plaintiffs were allotted Lot 15 in the final Plan of partition, which was a Lot in extent 1A. 2R. 28.07P.

On 27th September 1961 the former 2nd and 3rd plaintiffs executed an usufructuary mortgage of 40 perches out of Lot 15, and on 30th June 1962 they sold the entire Lot 15 to one T. S. Subasinghe.

In the present action D. J. Kotelawala (the former 4th plaintiff) sued D. L. Kariapperuma (the former 2nd plaintiff), as the 1st defendant, and the purchaser of Lot 15 as the 2nd defendant, for a declaration that a share of Lot 15, equivalent in extent to 44½ perches, is held in trust by either or both of the two present defendants.

According to the findings of the learned District Judge in the present action, the present plaintiff found at the time of the final survey in the Partition action that the Lot which was being allotted to him appeared to be much smaller than the extent to which he was entitled in respect of his former undivided holding. Examination of the Interlocutory decree then showed that certain shares which should have been allotted in that decree to the present plaintiff had been instead allotted to the former 2nd plaintiff, i.e., the present 1st defendant Kariapperuma. The present plaintiff's Proctor had then advised that the proper course to rectify the error would be to make an application in revision to the Supreme Court.

The present plaintiff thereafter discussed the matter with Kariapperuma who then stated that the matter could be adjusted without incurring the expenditure involved in an application to the Supreme Court. At that stage Kariapperuma gave to the present plaintiff a writing, a translation of which is marked P 13 :—

> " Agreement written and granted.
>
> Regarding Case No. 5739 of the D. C. Panadura.
>
> I, the undersigned Don Liyoris Kariapperuma (2nd plaintiff) of Dombagoda, have inadvertently included in the lots of the 2nd and 3rd plaintiffs 2/280 + 1/28 shares (44½ perches) on the Eastern side of the land, belonging to Don James Kotelawala the 4th plaintiff in the case.
>
> Therefore I do hereby agree that the said extent of land shall be conveyed to him by me and my wife the 3rd plaintiff by a deed of transfer after one month of the decision of the action.
>
> Sgd. D. L. KARIAPPERUMA."

Be it noted that this writing was given on 21st February 1961 which was about 2 months before the final decree was ultimately entered. Kariapperuma's subsequent conduct in disposing of the entirety of Lot 15 to the present 2nd defendant establishes perhaps that he did deceive the present plaintiff by giving him the writing P13, and thus prevented an application being made to this Court for the correction of the error in the Interlocutory decree.

On the facts found in favour of the present plaintiff, the learned District Judge has held that the provisions of s. 96 of the Trusts Ordinance applies in this case.

With the utmost respect, I cannot agree with the opinion of the trial judge and with the argument of Counsel for the plaintiff in appeal that the judgment of Keuneman J. in *Valliyammai Atchi v. O. L. M. Abdul Majeed*[1] (45 N. L. R. 169) is of any assistance to the plaintiff. In that case, the owner of certain properties had transferred them to a creditor in pursuance of an informal agreement that they would be held by the transferee in trust, the object of the transfer being to prevent the sale of the properties at the instance of the owner's unsecured creditors. The terms of the informal agreement were that the transferee would manage the properties, take the income and give credit to the owner for

[1] *45 N. L. R. 169.*

the income collected. Any of the properties could be sold at the instance of the original owner, but the proceeds of such sales had to be paid to the transferee. Finally, accounts between the original owner and the transferee were to be looked into, and the transferee was to re-transfer to the original owner any property which remained.

Although the facts in that case were complicated, and although difficult questions arose as to the admissibility of oral evidence in proof of a trust, what is important for present purposes is that there was in that case a transfer of property to a person, who according to the evidence had actually agreed to hold the property as a trustee. Keuneman J. in holding that there was a trust, did not in any way rely on s. 96 of the Trusts Ordinance. There is no reference in the judgment to that section.

The distinction between the present case and that of *Valliyammai Atchi* becomes clear from the judgment of the Privy Council in the appeal in that case (48 N. L. R. 289). There was in that case ample oral evidence that the transferee *actually agreed* to hold the property in trust for its former owner. The only question was whether oral evidence was admissible to establish the trust. On that question, Their Lordships first held that "the formalities necessary to constitute a trust relating to immovable property are those laid down in s. 5 (1) of the Trusts Ordinance, and not those in s. 2 of the Prevention of Frauds Ordinance". Their Lordships then relied on sub-section (3) of s. 5 of the Trusts Ordinance for holding that "the rule that a trust must be executed in accordance with sub-section (1) is not to operate so as to effectuate a fraud". If the transferee in that case "had repudiated the trust. . . ., his conduct would have been manifestly fraudulent". On this ground, it was held that parol evidence could properly be admitted to establish the creation of a trust under s. 5 of the Trusts Ordinance.

Thus *Valliyammai Atchi's* case was not one in which a constructive trust was held to exist by operation of law. Instead, it was held that an express trust had been created. But in the present case, the opinion of the District Judge appears to be that, whenever there is a fraudulent breach of an informal agreement to transfer land, the person committing the breach must thereafter hold the property under a constructive trust.

That opinion is not borne out by any of the provisions of the Trusts Ordinance dealing with the creation of a "constructive trust". Sections 83 to 91 and ss. 93, 94 and 95 deal with entirely different situations.

It occurred to me at one stage that s. 92 might assist the present plaintiff. It provides for a case "where a co-owner of property by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property". When the decree in the partition action incorrectly allotted excessive shares to the present 1st defendant, he did gain an advantage in derogation of the plaintiff's rights. But there is no evidence to show that the error from which that advantage resulted was induced by the 1st defendant having availed himself of his position as a co-owner. In the ordinary course, an interlocutory decree is prepared by the Proctor representing the plaintiff in a partition action. In this partition action, the same Proctor represented the present plaintiff and the present 1st defendant, who were co-plaintiffs in the action. The error was committed by the Proctor who was the agent of both parties, and was unfortunately adopted by the Court. There is thus no scope for the application of s. 92.

There remains for consideration only s. 96 which declares that "where the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest". What is contemplated in s. 96 is a case in which the legal title of the apparent owner of property is *in law* subject to some beneficial interest held by other persons; if so, the property is held for the benefit of the persons having such interests. The illustrations to s. 96 support the construction that the section is intended to protect interests which some persons may have *in law* in respect of property held by another. The section recognises an existing right; but it does not purport *to create* any right. In the instant case, however, the contention can be only that the 1st defendant agreed to transfer 44½ perches of land to the plaintiff, or else that when he fraudulently resiled from that agreement, the plaintiff became entitled to a beneficial interest in that extent of land. I find no support in s. 96 for this contention.

After judgment was reserved in the instant case, I quite fortuitously came upon another decision, given a few months after that of Keuneman J., which is directly relevant on the question whether any trust exists in the circumstances of this case.

In *Sanmugampillai v. Anjappa Kone*[1] (45 N. L. R. 465), a party having legal title to certain property became bound by a settlement recorded in an action to convey the property to X, or any nominee of X, on payment of Rs. 35,000. In pursuance of this settlement, the party bound by it transferred the property to a nominee of X on payment of that sum by the nominee. On the same day, the nominee entered into an informal writing, agreeing to transfer the property to X on payment to him of a sum specified in the agreement. Soertsz J. held that the nominee was not a trustee ; there was merely his informal agreement to transfer the property to X, but that agreement was void as being obnoxious to the Prevention of Frauds Ordinance.

It seems to me that the facts of the present case negative the existence of a trust even more clearly than the facts of the case decided by Soertsz J. In that case, there was at least the possibility of some implication of a trust, because the nominee could not have acquired title to the property, but for the fact that he was the nominee of X. In the present case, the 1st defendant's acquisition of a title to lot 15 did not depend on any assistance provided by the present plaintiff, but depended instead on the Interlocutory decree entered by the District Court.

The writing P 13, like the writing considered in the judgment of Soertsz J., is merely an agreement to convey 44½ perches of land to the present plaintiff ; even the word " trust " is not once used in P13, so that it furnishes no evidence that the 1st defendant agreed to hold that 44½ perches as a trustee. Such a writing, for lack of due notarial execution, is not " of force or avail in law " (s. 2 of Cap. 70).

The most favourable construction for the plaintiff of the facts of the instant case is that the representation made to him in P13 by the 1st defendant induced the plaintiff to desist from making an application to the Supreme Court for the rectification of an error in the Interlocutory decree entered by the District Court. Even if such a representation could have been constituted a cause of action entitling the plaintiff to some relief against the 1st defendant, the plaintiff did not in this action claim any such relief. As for the 2nd defendant, who has the legal title to the subject-matter of this action, he was certainly not called upon in this action to answer such a claim.

[1] *45 N. L. R. 465.*

For these reasons, the appeal has to be allowed, and the plaintiff's action is dismissed. In the circumstances, I order that the plaintiff will pay costs in both Courts only to the 2nd defendant.

THAMOTHERAM, J.—I agree.

Post-Script

I much regret that owing to an error in my note of the arguments in this appeal, my judgment attributed to Counsel for the respondent a submission different from that which he actually made. His submission that a trust arose in this case did not depend on the judgment of Keuneman J. in *Valliyammai Atchi's* case (45 N. L. R. 169), although it happens somewhat curiously that that judgment was of assistance in considering the question to be decided in the present case. But Counsel had depended instead on a judgment of the same learned Judge reported in the same volume of the Report—*Jonga v. Nanduwa* (45 N. L. R. 128).

In that case a land had been transferred to the defendants by a Deed (P2) which reserved to the vendor the right " to redeem this transfer " by paying a specified sum of money within a specified period. When the defendants were sued for the re-transfer, they pleaded that they had not signed the Deed (P2), and that the provision for the re-transfer was void under Section 2 of the Prevention of Frauds Ordinance.

Referring to Section 96 of the Trusts Ordinance, Keuneman J. stated that under that Section an obligation in the nature of a trust arises if " the person having possession of property has not the whole beneficial interest therein ", and if some other person has that beneficial interest. Having regard to this requirement in the Section, he pointed out that " it is clear that a person cannot be held to be a constructive trustee unless he owes some duty to the other persons interested ". He then applied the law to the facts of the case in the following passage :—

> The very terms of the grant here set out the condition, and the defendant must be regarded as having taken possession under the grant coupled with the condition. I think the defendant, who entered into possession under these circumstances, owed this duty to the first plaintiff, viz., to have the property available for the condition to be carried into effect. I do not regard this as a mere personal right

vested in the first plaintiff. In fact the defendant did not receive the " whole beneficial interest " but only the beneficial interest burdened with the condition, and this fractional portion deducted enured to the benefit of the first plaintiff. Although, in strict law, if this was treated merely as a contract, the condition could be defeated under the Ordinance of Frauds, yet in equity the obligation in the nature of a trust can be enforced. I hold that the present case comes within the scope of section 96 of our Trusts Ordinance which is a section of wide application.

* * *

On the facts in *Jonga v. Nanduwa,* the defendants entered into possession of the land by virtue of the Deed of Sale P2, and it was because of the condition in the Deed itself that the defendants did not receive the " whole beneficial interest " ; in other words, the Deed did not convey the full *dominium,* because the subject of the transfer was the ownership of the land, *less* the right to obtain a re-transfer. This right was not enforceable as such, because of section 2 of the Prevention of Frauds Ordinance ; but since the vendor did reserve that right to himself, the defendants had to hold the property to the extent necessary to satisfy the vendor's just equitable demands.

The facts of the instant case are in no way comparable. The present 1st defendant obtained title to the shares allotted to him by the interlocutory decree ; and at the time when that title accrued, there was no reservation whatsoever in favour of the present plaintiff either in the decree itself or even in any oral agreement between the parties. Hence the whole beneficial interest was vested in the first defendant by the decree, and there was no duty owed by him to the present plaintiff.

What happened in the instant case was that full title vested by operation of statute law in the 1st defendant, and that he thereafter made an oral promise to convey a part of the land to the plaintiff. That oral promise formed no part of the transaction in which the title vested in him, because the promise was made only at a later stage. That being so, there arises in this case merely the familiar question whether an oral promise to convey an interest in land has any validity in law. That question is clearly answered by Section 2 of the Prevention of Frauds Ordinance.

Appeal allowed.