1947 *Present :* **Dias J.**

EHIYA LEBBE, Appellant, *and* A. MAJEED, Respondent.

S. C. 235—C. R. Matale, 8,816.

Trust—Notarial transfer of land—Not intended to be out and out sale—Informal agreement to re-transfer—How far enforceable—Trusts Ordinance, ss. 83 and 5—Jurisdiction of Court of Requests.

Plaintiff, on P 1 of 1943, conveyed a certain land to the defendant. On the same day by P 2 a non-notarial document, the defendant agreed to re-convey the land to the plaintiff on payment of the sum of Rs. 250 within two years. The defendant refused to re-transfer on tender of the money within the time. The Commissioner found on the facts that when plaintiff executed P 1 it was never in the contemplation of either party that the defendant was to hold the property as absolute owner but only till plaintiff's debt to the defendant of Rs. 250 was repaid.

Held, that in the circumstances the defendant was a trustee for the plaintiff in terms of section 83 of the Trusts Ordinance.

Held, further, (i.) that to shut out the non-notarial document P 2 would be to enable the defendant to effectuate a fraud and that section 5 (3) of the Trusts Ordinance would apply ;

(ii.) that the Court of Requests had jurisdiction to entertain and try the action although the land was worth over Rs. 300.

[1] *(1937) 39 N. L. R. at p. 248.*

APPEAL from a judgment of the Commissioner of Requests, Matale.

C. T. Olegasegarem, for the defendant, appellant.

N. E. Weerasooria, K.C. (with him *S. R. Wijayatilake*), for the plaintiff, respondent.

Cur. adv. vult.

June 3, 1947. DIAS J.—

The facts of this case lie in a narrow compass and are in the main undisputed.

The plaintiff by deed P 1 dated October 20, 1943, conveyed a certain land to the defendant. In form this deed purports to be an out and out sale by the plaintiff to the defendant for a consideration of Rs. 250.00. In the notary's attestation there is the following statement: "And I further certify that out of the consideration hereof Rs. 100.00 was paid in my presence, Rs. 100.00 was set off against the mortgage bond No. 11674 . . . . and the balance acknowledged to have been received previously."

There is evidence to show that the land which was conveyed was worth Rs. 750.00 at the date of the conveyance, and that it is worth Rs. 1,000.00 today.

On the same day on which the deed P 1 was executed, the non-notarial document P 2 was entered into between the parties whereby the defendant agreed to reconvey the land in question to the plaintiff within a period of two years if the latter paid to the defendant the sum of Rs. 250.00 and the expenses incurred in connexion with the deed.

The plaintiff's case is that within the two years he offered the money to the defendant and asked him for a reconveyance. This the defendant refused to do. The plaintiff, therefore, has brought the money into Court and asks that the defendant may be ordered to execute a deed at the plaintiff's expense reconveying the property to him.

Two questions emerge for decision. In the first place has the Court of Requests jurisdiction to try this action, the land being worth more than Rs. 300.00 ? In the second place, the deed P 1 being a notarial conveyance by the plaintiff to the defendant, can the plaintiff enforce the informal agreement contained in P 2 ?

On the first question, I think the Commissioner of Requests was right in holding that he had jurisdiction to try the case. It may be that the land in question is worth over Rs. 300.00, but the plaintiff's cause of action is for specific performance of an agreement, and not for a declaration of title to land or any such relief. The plaintiff's cause of action is below Rs. 300.00 in value, and, therefore, the Court of Requests had jurisdiction to entertain and try this action.

On the second point the solution to the problem lies in the answer to the question as to what precisely was the nature of the transaction embodied in the deed P 1 although it is in the form of an out and out conveyance ?

The plaintiff's evidence is that his father having died, he was in need of money for purposes of administration. He had borrowed money and his creditor had demanded repayment. He, therefore, turned to the defendant who was his relative and a co-owner of the land in question. He previously owed the defendant a sum of Rs. 100.00. He thus became the debtor of the defendant in a sum of Rs. 250.00, and it was agreed between them that the deed P 1 was to be executed in favour of the defendant who undertook to retransfer within two years on repayment of the debt. The plaintiff swears that he would not have executed P 1 if the defendant had not promised to reconvey the property on payment of the debt. He says that he never surrendered possession of the *corpus* until he was arrested on a charge of murder.

According to the defendant, he already had a usufructuary mortgage over the land on bond D 1 and he possessed the land and planted coconut trees and took the produce from the coconut trees. The plaintiff then wanted to borrow more money and told the defendant that if he did not buy the land, the plaintiff would have to sell it to an outsider. According to the defendant P 1 was an out and out sale for a money consideration. Then "a little while later" the plaintiff wanted the informal writing in order to show his sister or somebody else. Therefore he gave the plaintiff the document P 2. This statement carries no conviction. Who is the man who executes a notarial deed without having first thought out all its implications beforehand? I think it is clear that the informal document P 2 was part and parcel of the same transaction of which the notarial deed P 1 was a part, and was not an independent transaction.

The law is quite clear, although its application to a particular set of facts may cause difficulty. If the deed P 1 is a genuine sale by a vendor to a vendee for valuable consideration, then the informal agreement to re-transfer would be of no avail because it refers to immovable property and is not notarially executed—*Carthelis Appuhamy v. Saiya Nona*[1]. On the other hand, if it appears from the facts that, although the transfer is in form an out and out sale, there exist facts from which it can be inferred that the real transaction was either a money lending transaction where the land was transferred to the creditor as security, or that it was a transfer in trust, a Court of Equity would grant relief in such a case—*Fernando v. Thamel*[2].

There are certain tests for ascertaining into which category a case falls. Thus if the transferor continued to remain in possession after the conveyance, or if the transferor paid the whole cost of the conveyance, or if the consideration expressed on the deed is utterly inadequate to what would be the fair purchase money for the property conveyed—all these are circumstances which would show whether the transaction was a genuine sale for valuable consideration, or something else.

Section 83 of the Trusts Ordinance (Chap. 72) enacts that where the owner of property transfers it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee must hold such property for the benefit of the owner or his legal representative. Section

[1] *(1945) 46 N. L. R. 313.* [2] *(1946) 47 N. L. R. 297.*

5 of the Trusts Ordinance provides that a trust in relation to immovable property must be notarially executed, but section 5 (3) expressly provides that this rule does not apply where it would operate so as to effectuate a fraud.

On the facts and circumstances it is clear that when the plaintiff executed the deed P 1, it was never in the contemplation of either party that the defendant was to hold the property as absolute owner, but only until such time as his debt was repaid. To shut out the informal agreement P 2 would be to enable the defendant to effectuate a fraud.

In my opinion the Commissioner was right in finding for the plaintiff. The appeal is dismissed with costs.

Appeal dismissed.