

~~GH 2. 23, 1954~~

No. 14 of 1953.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

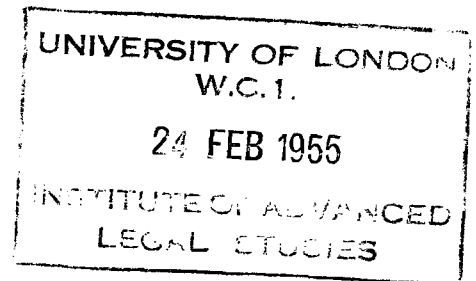
BETWEEN

SWAKINAPILLAI SAVERIMUTTU of
Valvettiturai (1st Defendant) *Appellant*

AND

- 10 1. PONNAMBALAM THANGAVELAUTHAM of
Valvettiturai (Plaintiff)
2. SAVERIMUTTU IGNATIUS THURAI-
INGHAM
3. THOMMAIPILAI SOOSAIPILLAI and
4. Wife VIRISITHAMMA
5. SWAMINATHAR MARUSILIN and
6. Wife MARIAMUTTU
7. SAVERIMUTTU JOSEPH SELVARATNAM
8. ARUNASALAM SOMASUNDERAM and
9. Wife MANKAYATKARASI
- 20 10. RASAMAH, widow of SIVAGURU RAMASAMY,
all of Valvettiturai (Defendants) *Respondents.*

37670



Case for the Appellant.

RECORD.

1. This is an Appeal from a Judgment and Decree dated the 26th day of July 1951 of the Supreme Court of the Island of Ceylon, which reversed a Judgment and Decree dated the 21st day of December 1949 of the District Court of Jaffna held at Point Pedro, in an action in which the first Respondent was the Plaintiff and the Appellant and the second to tenth Respondents were Defendants. pp. 64-68.
pp. 53-57.

30 2. The issue in this Appeal is as to the title to a parcel of land called Pannaikaddaiyadi at Valvettiturai as set out in the Schedule to the first Respondent-Plaintiff's Plaint and in particular as to whether a trust relating to this land was established. p. 18.

3. The first Respondent (hereinafter called "the Plaintiff") instituted these proceedings in the District Court of Jaffna held at Point Pedro by

his Plaintiff dated the 19th day of September 1946 which is set out in full in the printed Record at p. 16. In paragraph 2 of the said Plaintiff the Plaintiff set out that the Appellant (first Defendant) and his late wife Annammah were the owners of certain land called "Pannaikaddaiyadi" by virtue of a Dowry Deed No. 12,732 of 1907. By paragraph 3 it was alleged that the said land had been transferred by the Appellant and Annammah to one Karthigesar Iyadurai by Deed No. 3 dated the 12th November 1937, attested by S. Sivagnanam, Notary Public, numbered P.1 and set out in full in the printed Record. In paragraph 4 it was alleged that the said Iyadurai having held and possessed the said land conveyed the same to the Plaintiff by Deed No. 308 of the 24th June 1946, attested by P. V. Senathirajah, Notary Public, numbered P.4 and set out in full in the printed Record. By paragraph 5 the Plaintiff alleged that having been, either by himself or his predecessor in title, in adverse possession for more than 10 years, he had acquired a prescriptive title to the said land by virtue of Section 3 of Chapter 55 of the Legislative Enactments of Ceylon. In paragraph 6 it was alleged that the Appellant and the second to tenth Respondents (who were the Defendants in the District Court of Jaffna) wrongfully denied the Plaintiff's title to the land and were in wrongful possession thereof. In paragraph 7 it was alleged that the Plaintiff had sustained damages to the extent of Rs.50 and continuing at a rate of Rs.10 per month. In paragraph 10 it was further pleaded that the Appellant and the second to tenth Respondents were estopped from denying the Plaintiff's title since the Appellant and his late wife Annammah were in possession of the said land pursuant to a Lease Bond No. 4, dated the 12th November 1937, attested by S. Sivagnanam, and numbered P.3. In paragraph 11 it was alleged that the said land was reasonably worth Rs.900. By his prayer the Plaintiff prayed that he should be declared entitled to the said land; that he should be placed in peaceful possession thereof; that the first, third, fourth, fifth, sixth and seventh Defendants be ordered to pay damages to the extent of Rs.50 and a further Rs.10 per month from the 19th September 1946; costs and such other and further relief as to the Court should seem meet.

4. On the 28th January 1947 the Appellant and the fourth, fifth and sixth Respondents filed an answer. The second to seventh Respondents are the legal heirs of the Appellant's wife Annammah who died before the commencement of these proceedings. The position of the eighth, ninth and tenth Respondents is not clear but they too seem to have been related to the Appellant either by birth or marriage and there is no dispute between the Appellant and the Respondents other than the first. By paragraph 1 of the Answer it was admitted that the parties and the land the subject matter of the action were within the jurisdiction of the Court and that the Appellant and his wife Annammah were the owners of the said land by virtue of the Dowry Deed No. 12,732 of 1907. In paragraph 2 of the Answer it was stated that the said land, together with two other lands, was conveyed by the Deed No. 3 (P.1) by the Appellant and his wife Annammah to Iyadurai to be held in trust for them and to be reconveyed to them on their paying to the said Iyadurai the sum of Rs.2,000 with interest thereon from the 12th November 1937. In paragraph 3 it was alleged that Iyadurai fraudulently and collusively executed Deed No. 308 (P.4) in favour of the Plaintiff who was aware that the lands were held

in trust. In paragraph 4 the Plaintiff's alleged prescriptive title to the land was denied. In paragraph 5 it was stated that the Appellant and his wife Annammah were in possession of the three lands till the 31st July 1944 and thereafter the Appellant and the second to seventh Respondents were in possession of the said lands in pursuance of the said trust. In paragraph 6 it was denied that the Plaintiff had sustained damage as alleged or that a cause of action had accrued to him. In paragraph 7 the execution of the Lease P.3 was admitted but it was denied that there was by reason thereof any estoppel from denying the Plaintiff's title. It was
 10 further pleaded in paragraph 8 that, as Deed No. 308 (P.4) was executed after lodging a caveat under Section 32 of the Registration of Documents Ordinance Chapter 101 in respect of this and other lands, that deed could not operate to pass title to the Plaintiff; and that if the Deed No. 308 (P.4) is held to be valid, the first Respondent holds the lands subject to the aforesaid trusts. By their prayer the Appellant and the fourth to sixth Respondents prayed that the action be dismissed; that in the event of the Deed No. 308 (P.4) being held valid, a declaration be made that the Plaintiff held the lands subject to the aforesaid trusts for the benefit of the Appellant and the second to seventh Respondents; that the Plaintiff
 20 be ordered to execute a conveyance in favour of the Appellant and the second to seventh Respondents; costs and such other and further relief as should seem meet to the Court.

5. On the 10th December 1948 the hearing of the action began in the District Court of Jaffna held at Point Pedro before S. R. Wijayatilake, D.J. On the pleadings the following issues were framed and adopted :—

pp. 22-24.

(1) Did the first Defendant and his wife Annammah convey the land in question to Karthigesar Iyadurai in trust as alleged by the contesting Defendants.

30 (2) Had the Plaintiff notice of the trust alleged by the contesting Defendants.

(3) If either issue (1) or (2) is answered in the negative, is the Plaintiff entitled to judgment.

(4) If so, to what damages is the Plaintiff entitled.

(5) Are the Defendants estopped from denying the Plaintiff's title in view of the Lease Bond No. 4 of the 12th November 1937 (P.3).

(6) Is the agreement for a retransfer alleged in paragraph 2 of the Answer enforceable in law.

(10) substantially reproduced issue (1).

40 (11) Did Iyadurai agree to reconvey the said land to the first Defendant and his late wife Annammah on their paying to the said Iyadurai the said sum of Rs.2,000 with interest thereon from the 12th November 1937.

(12) If issue (10) or (11) or both are answered in the affirmative, does the Plaintiff hold the land in question subject to a trust.

(13) Did the first Defendant enter a caveat as set out in paragraph 8 (A) of the Answer.

(14) If so, does Deed No. 308 of the 24th June 1946 operate to convey title to the Plaintiff for the land in question.

(17) Are the Defendants in wrongful possession of the land described in the Schedule to the Plaintiff.

(18) If not, can the Plaintiff claim damages.

(19) Are the Defendants in possession of the said land in pursuance of the trust alleged in paragraph 2 of the Answer.

(20) If not, are the Defendants in wrongful possession of the 10 said land.

6. The onus being on the Appellant and other Defendants to establish the existence and terms of the trust which they sought to set up to defeat the Plaintiff's claim, their case was heard first. The evidence may be summarised as follows :—

(A) S. Sivagnanam, Proctor and Notary Public, was called and gave evidence to the effect that he was the Notary who had witnessed the Deed No. 3 of the 12th November 1937 (P.1) and the Lease (P.3). He went on as follows :—

p. 25, ll. 14-21.

“ The transferee is my uncle. The first Defendant and his 20
 “ wife were the transferors. After the execution of the Lease
 “ Bond (D.3) an informal writing was executed. The transferors
 “ wanted the land transferred on (D.2) to be transferred within a
 “ certain period if the consideration on the transfer was paid
 “ with interest. Iyadurai was a party to that agreement. I did
 “ not witness this writing. The Deeds (D.2) and (D.3) were
 “ written at Point Pedro in a house near the Sivan Temple.
 “ It is the house of one physician Kandiah. So far as I remember
 “ an informal writing was also executed simultaneously.”

And again :—

30

p. 25, ll. 30-39.

“ It was my uncle the transferee who took me to Point Pedro
 “ to execute these deeds. I cannot say whether the transferors
 “ were reluctant to execute the deeds. I went in a car to Point
 “ Pedro, and returned immediately after the execution. On this
 “ occasion I was executing an out and out transfer and a lease.
 “ The informal writing was in my hand writing. When I started
 “ from Valvetty to go to Point Pedro I knew that I was taken
 “ there to execute a transfer and a lease. After the 2 deeds
 “ were executed the parties wanted an informal writing. My
 “ uncle Iyadurai is dead. When the grantors wanted an informal 40
 “ writing Iyadurai said that he was prepared to give it, provided
 “ there was a particular period.”

p. 26, l. 39-
 p. 34, l. 3.

(B) The Appellant himself next gave evidence of the circumstances leading up to the transactions of the 12th November 1937, of the existence and contents of the trust ; in particular he said :—

p. 27, ll. 25-29.

“ I remember the time when my wife and I were in Physician
 “ Kandiah's house at Point Pedro. Prior to that Iyadurai came

“ to me to demand a settlement of the debt. He also said that
 “ if I was not in a position to settle the debt to transfer my lands
 “ to him in trust. Before that he also promised to re-transfer
 “ the land to me provided I pay off the debt within 8 years.
 “ He also wanted me to sell one of the lands and pay off the
 “ debts.”

And again :—

“ Q. When did he suggest to you that the transfer should be
 “ in trust ? p. 27, l. 38-
p. 28, l. 8.

10 “ A. He suggested in November 1937. My wife and I
 “ were not agreeable to the suggestion because we did not want
 “ to part with this land. Subsequently we executed the transfer
 “ deed. Iyadurai is dead now. My transaction was with
 “ Iyadurai. I consented to transfer this property to Iyadurai
 “ because he said that he would re-transfer it within 8 years,
 “ and that he would hold it in trust and that he would not betray
 “ me. He also told me to deposit whatever income I get in the
 “ bank and settle the debt in instalment within that period.
 20 “ The suggestion about the transfer was made in my house, and
 “ the deed was executed in the physician’s house at Point Pedro.
 “ My wife refused to sign the deed, and Iyadurai told us that
 “ he would not betray us and wanted us to sign the deed. Then
 “ we signed it. He also said that a lease bond was to be executed
 “ for Rs.20 and he did not want the money in respect of the lease
 “ bond. Besides these two deeds there was no other deed
 “ executed and there was also an informal writing. That
 “ informal writing was handed over to me. Now it is in possession
 “ of one Ponniah.”

30 He also produced a copy of a telegram (D.14) which was sent to
 Iyadurai dated the 7th February 1946, as follows :—

“ Why no reply for my three letters, Ponniah and Sivagnanam p. 125.
 “ troubling me with the intention to sell lands for increased
 “ prices. I offered Ponniah full settlement in 1942, and he
 “ refused am old age much disturbed, five families will be homeless
 “ if you break agreement. Please instruct Ponniah Sivagnanam,
 “ reply immediately.”

and a letter from Iyadurai to the Appellant dated the 8th March p. 128.
 1946 (D.15).

40 (c) Ramalingham Kandiah, in whose house the transactions of
 the 12th November 1937 took place, gave evidence to the effect
 that he remembered the parties talking about some transfer and p. 34, l. 14.
 some trust ; but beyond this his evidence was of little assistance.

(D) C. S. Ponniah, who was related by marriage to Iyadurai
 and had acted as his attorney while the latter was in Malaya, was
 called to give evidence on behalf of the Appellant, but did not prove
 to be a helpful or co-operative witness. He said that the lands p. 36, ll. 7-9.
 were held by him under some sort of trust, though it is by no means p. 37, ll. 11-13.

p. 37, ll. 18-20.

clear what trust, but denied that the informal paper containing the terms of the trust had been handed over to him as alleged by the Appellant.

(E) Virisithammah, the fourth Respondent and daughter of the Appellant, then gave evidence that she was present in Kandiah's house on the 12th November 1937. She said :—

p. 41, ll. 11-41.

“ I know Iyadurai. He visited us at the Physician's house
 “ to get the lands transferred in his favour and my mother was
 “ not agreeable to the suggestion. Iyadurai wanted us to transfer
 “ these lands conditionally for a period of 6 years. My mother 10
 “ was not agreeable to this suggestion and wanted to sell the
 “ lands to somebody else, and my mother said that she would
 “ mortgage those lands and settle the debt. Iyadurai said that
 “ he was in a hurry to go to Malaya and wanted my mother to
 “ transfer the property conditionally for a period of 8 years, and
 “ he said that he wanted my mother not to misunderstand him
 “ and that he would not betray her. Iyadurai wanted a transfer
 “ of these lands.

“ Q. Was it an out and out transfer, or any other form of 20
 “ transfer ?

“ A. He promised to give an agreement. It was Iyadurai
 “ who wanted to give an agreement as it was a transfer of the
 “ property. The agreement was for a transfer of the land in
 “ trust. It was only after Iyadurai undertook to give an
 “ agreement that my mother agreed to transfer the property.
 “ The agreement was in writing. Iyadurai told us that he
 “ had brought Sivagnanam to execute the deed. My mother
 “ told me that they had set their signatures to a paper.
 “ After my parents set their signatures to a paper Iyadurai took 30
 “ my father home and my mother remained with me at the
 “ physician's house. At that time I was not aware of the terms
 “ of the agreement. I came to know the terms only after the
 “ recovery of my child and when we returned home. After we
 “ returned home I saw the agreement.

“ *To Court* : I saw the document personally. The agreement
 “ referred to was contained in a piece of paper about 5 in. by 8 in.
 “ (The witness shows the size of the paper on a paper in Court
 “ which is about 8 in. by 5 in.)

“ I can give a summary of the contents. The agreement was 40
 “ Rs.1,200 for Elumullupattai and Rs.800 for Pannaikaddayadi
 “ and Muthiraikaddai, and these amounts to be repaid by instal-
 “ ments, and Iyadurai undertook to re-transfer the lands on
 “ repaying the amount due.

“ Q. Was any period laid down in the agreement ?

“ A. My mother was not willing, but the period mentioned
 “ was 8 years.”

p. 43, ll. 17-20.

She also gave evidence that the informal agreement was handed to Ponniah.

p. 136, ll. 17-18.

(F) The Deed P.4 itself contained an express provision by 50
 which the transferor declined to warrant or defend his title.

7. The Plaintiff himself gave evidence on his side asserting that he had bought the land with knowledge of the Lease Bond but without any knowledge of any agreement between the Appellant and Iyadurai. pp. 46-50.

8. In his judgment delivered on the 21st December 1949 the learned District Judge accepted the evidence on behalf of the Appellant as to the existence and contents of the informal document of the 12th November 1937, executed at the time of the transfer of the property to Iyadurai. Of Mr. Sivagnanam's evidence he said :— pp. 53-57.

10 “ In these circumstances, Mr. Sivagnanam would not fail to remember what transpired on this visit to the physician's house. “ He has referred to the transaction and he acknowledges having “ written out the informal agreement simultaneously, with the two “ deeds attested by him. This witness who was called for the “ defence did not strike me as one who was inclined to help the “ Defendants and it was with a certain amount of restraint that he “ disclosed to Court the true nature of this transaction. Being a “ nephew of Iyadurai—perhaps his position is rather embarrassing. “ I am satisfied that Mr. Sivagnanam's evidence as to the execution “ of the informal agreement and its terms is true.” p. 55, ll. 24-32.

20 Of Mr. Ponniah, who was the only witness who gave evidence contrary to the Appellant's contentions on this point, he said :—

“ Ponniah struck me as a witness lacking in candour and it “ was apparent that he was trying his utmost to wreck the “ Defendant's case. This witness created a very poor impression “ in the box and I have little difficulty in rejecting his evidence.” p. 55, ll. 40-44.

Of the evidence of the Appellant and his daughter, the fourth Respondent, the learned Judge said :—

30 “ The first Defendant and fourth Defendant though interested “ parties did not appear to me to be merely relating a prepared “ story. In the light of Mr. Sivagnanam's evidence I think I can “ safely accept their evidence as to the true nature of the trans- “ action. The telegram (D.14) and Iyadurai's letter (D.15) also “ indicate the truth of their version. The bank receipt (D.1) of “ 16-11-1938 for Rs.130 is evidence of the payments by instalments “ arranged for in the informal agreement.” p. 56, ll. 1-7.

9. Having rightly (it is submitted) admitted oral evidence of the informal agreement handed to Ponniah, the learned Judge proceeded to interpret the agreement as representing the intention of the parties. Following the cases of *Nadarajah v. Kanapathy*, 49 N.L.R. 121, and 40 *Valliyammai Atchi v. Abdul Majeed*, 48 N.L.R. 289, the learned Judge held that a trust was created in favour of the Appellant and his wife Annammah. p. 56, ll. 8-28.

On the issue as to whether or not the Plaintiff was a *bona fide* purchaser without notice, the learned Judge said :—

“ The Plaintiff was lacking in frankness and his evidence far “ from establishing his *bona fides* tends to show that he was fully “ aware of the alleged trust and the attitude of the Defendants “ towards this transaction.” p. 56, ll. 35-38.

pp. 56, 57.

After answering issues 1, 2, 6, 10, 11, 12, 13 and 19 in the affirmative, issues 5, 17 and 18 in the negative, the learned Judge dismissed the Plaintiff's action with costs.

pp. 64-68.

10. From the judgment and decree of the District Court of Jaffna dated the 21st December 1949 the Plaintiff appealed to the Supreme Court of Ceylon. The appeal was argued on the 16th and 17th July 1951 and on the 26th July 1951 judgments were delivered allowing the appeal. Gratiaen, J., delivered the leading judgment and Gunasekara, J., agreed.

p. 65, ll. 34, 35.

11. While accepting the finding of the learned District Judge that an informal agreement had in fact been executed, the Supreme Court held that on the true construction of its terms no trust had been created as alleged by the Appellant and second to tenth Respondents; they appeared to reach this conclusion for the following reasons:—

p. 66, ll. 8-27.

(A) They rejected the finding of the learned District Judge that the consideration paid to Iyadurai on Deed P.1 was inadequate on the grounds that by his Plaint in the District Court of Jaffna 2625 instituted on the 11th March 1946 the Appellant valued all the properties conveyed by Deed P.1 at Rs.7,000 and that he admitted in evidence that the value of immovable property in this locality had since 1942 gone up "even by 10 or 12 times," so that it could not be said that the consideration of Rs.2,000 paid in November 1937 was too low.

p. 129.

p. 66, ll. 28-37.

(B) They considered the present case entirely different from the case of *Valliyammai Atchi v. Abdul Majeed*, 48 N.L.R. 289, on which the learned District Judge had based his judgment. They, however, expressed no grounds for this distinction.

p. 67, ll. 4-12.

p. 67, ll. 19-41.

(C) They relied on the cases of *Perera v. Fernando* (1914), 17 N.L.R. 486, and *Adicappa Chetty v. Caruppan Chetty* (1921), 22 N.L.R. 417, for the proposition that "where a person transferred 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." And that this proposition was applicable to the present case.

p. 67, l. 46-
p. 68, l. 3.

(D) They regarded the case as on all fours with the decision in *Carthelis Appuhamy v. Saiya Nona* (1945), 46 N.L.R. 313, and adopted the opinion there expressed by Kenneman, J.

(E) They appear to have considered that a transaction of the nature found by the learned Trial Judge to have been made on the 12th November 1937 was incapable of being construed as a trust if it bore any relation to a mortgage or a promise to re-convey property. They relied on *Perera v. Fernando* (1914), 17 N.L.R. 486, for this proposition and distinguished the decision of the Judicial Committee of the Privy Council in *Saminathan Chetty v. Vanderpoorten* (1932), 34 N.L.R. 287. Reliance was also placed on a *dictum* of Lord Atkinson in *Adicappa Chetty v. Caruppan Chetty* (1921), 22 N.L.R. 417.

12. Accordingly the Supreme Court, after remitting the case to the District Court of Point Pedro so that the value of the land might be assessed to decide the issue of damages, allowed the appeal, and on the 26th July 1951 a decree was entered to the effect that the Plaintiff was entitled to the land in dispute and ought to be placed in possession thereof. The costs of the trial and of the appeal were awarded to the Plaintiff. pp. 68, 69.

13. It is respectfully submitted that the judgment of the Supreme Court is open to the following criticisms :—

10 (A) It was not open to the Supreme Court to reverse the finding of fact of the learned District Judge as to the adequacy of the consideration furnished in the Deed P.1. p. 56, ll. 14-19.

The evidence in support of this finding was as follows :—

20 (i) The Appellant gave evidence that Iyadurai had pressed him to sell one of his lands called Elumullupattai as an alternative to the trust transaction which was in fact carried out, saying that the purchase price of this one land would more than satisfy the debt. The Appellant said that he was unwilling to agree to this ; yet, if the Plaintiff's contention that the transaction of the 12th November 1937 merely amounted to an out and out sale of land to Iyadurai, it would appear that the Appellant had sold not only Elumullupattai, but also two other lands as well, merely to satisfy the debt. It would, it is submitted, be most surprising if the Appellant had in fact agreed to such a proposition. p. 27, ll. 29-37.

(ii) The Appellant gave the following evidence :—

30 “ One of the three lands (i.e., of those transferred by P.1) is a residing land. That land is called Muthuraikkadayadi. That land is in extent 3 lachams odd. At the time I transferred these lands to Iyadurai a lacham of these lands was worth over Rs.1,000. The land Elumullupattai adjoins the residing land and abuts on the Point Pedro-Kankesanturai road. That land is in extent 4 lachams odd. I cannot definitely state the value of one lacham of the land called Elumullupattai at the time of transfer to Iyadurai. The 3rd land is the land in dispute called Pannaikaddaiyadi. A lacham of the land called Pannaikaddaiyadi was worth Rs.700 to Rs.750 at the time of the transfer. Soon after the transfer war broke out. After the war the value of the lands went up.” p. 31, ll. 4-14.

40 (iii) Virisithammah in her evidence confirmed that the value of one of the transferred lands was more than adequate to settle the debt of Rs.2,000. She said :—

“ Iyadurai asked my father to sell one of the lands, viz. Elumullupattai, and he said that by selling that land he would be able to settle all the debts and he would have Rs.500 in hand. My father was not agreeable to that suggestion . . .” p. 42, ll. 1-4.

(iv) Deeds relating to property in the neighbourhood (D.31, D.32 and D.33) were put in showing the prevailing values in 1928, 1931 and 1934. pp. 91, 99, 105. p. 74, ll. 3-5.

p. 73, l. 12.

(v) At the inquiry subsequently the Plaintiff himself put the value of Elumullupattai in 1951 at Rs.15,000 to Rs.20,000, values having declined since 1949 by 50 per cent.

p. 26, l. 5.

The evidence to the contrary was as follows :—

p. 56, l. 19.

(i) Sivagnanam in cross-examination said that at the time of the transfer the lands were only worth Rs.2,000. The learned District Judge, however, was not impressed with the witness's evidence on this point.

p. 50, l. 32.

(ii) Ponnusamy Sathasivam was called and gave evidence that in 1937 these lands would have been worth Rs.1,600 to 10 Rs.1,700.

It is submitted that this evidence is overwhelmingly in favour of the Appellant's contention and the learned Judge was right in coming to the conclusion that the three lands were worth considerably more than Rs.2,000.

p. 66, ll. 18-28.

p. 33, l. 26.

The method by which the Supreme Court came to the conclusion that the consideration paid in November 1937 was not too low was manifestly inaccurate. The Appellant himself said that the figure of Rs.7,000 was nominal and this is borne out by the result of the inquiry into the value of the lands in 1951, pursuant to the decree of the Supreme Court dated the 26th July 1951, where it was held that the value of one land only and that not the most valuable "Muthuraikkaddayadi" was Rs.7,500, the value of land having only slightly depreciated since 1946. And from the evidence given at this inquiry it is clear that the Plaintiff's estimate of Rs.900 in the Plaint in the present case for the value of Pannaikaddaiyadi adjoining the land in dispute was equally wide of the mark. Furthermore, the observation of Gratiaen, J., that it must be remembered that the Appellant was at the time in no position to strike an advantageous bargain does not seem to be supported by the evidence which was to the effect that it was Iyadurai who was in a hurry to go to Malaya. No reliance ought, therefore, to be placed on the estimated value of land as declared in pleadings.

p. 77, l. 5.

pp. 73-77.

p. 17, l. 30.

p. 66, l. 36.

(B) The grounds on which the Supreme Court distinguished the case of *Valliyammai Atchi v. Abdul Majeed*, 48 N.L.R. 289, are not clear since the learned Judge was content merely with saying that the case was entirely different. It is respectfully submitted that the only distinction on the facts is that in *Valliyammai's* case the debt owed to the transferee Natchiappa, a sum of Rs.203,356 which was expressed to be the consideration for the conveyance of the property, had been repaid by the time action had been brought, and that in addition to the transferee there were other, but clearly not such substantial, creditors of the transferors, whereas in the present case only sums by way of interest on the principal debt had been repaid and the rest tendered; and there were no other creditors besides the transferee Iyadurai. It is submitted, therefore, that the principles laid down in *Valliyammai's* case are applicable in the present appeal. It was argued there, as here, that the evidence at the most showed that the conveyance 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

p. 28, ll. 30-35.

p. 32, ll. 30-46.

argument was rejected by the Privy Council, who were satisfied from the parol evidence, as was the learned District Judge in the present case, that a trust had been created : *per* Sir John Beaumont at p. 291.

(c) It is somewhat surprising that the Supreme Court did not even mention the case of *Nadarajah v. Kanapathy*, 49 N.L.R. 121, on which the learned District Judge also based his judgment, let alone attempt to distinguish it. The facts in that case, which, it is submitted, strongly resemble those in the present case, were as follows :—

10

By Deed P.1, notarially attested, the plaintiff's mother, since dead, and the co-plaintiffs transferred certain lands to the first defendant. These lands were subject to mortgage decrees in favour of the second and third defendants. The consideration for the transfer was the amount due on the decrees. There was an oral agreement between the parties that the first defendant was to retransfer the lands on payment to him within a reasonable time of the amount due on the mortgage decree which he had undertaken to settle and that he should hold the land on trust till then. The Supreme Court held that the agreement created a trust and was enforceable in law although it was not notarially attested, since to hold otherwise would be to allow the Statute of Frauds to be used as a protection or vehicle for frauds. Howard, C.J., at p. 124 found it impossible to distinguish the case from that of *Valliyammai Atchi v. Abdul Majeed*.

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(D) The issue in the present case is the construction of the informal agreement of the 12th November 1937 ; it is quite clear from the cases of *Valliyammai* and *Nadarajah* that in certain circumstances similar to those in the present case an enforceable trust can be created, and it is respectfully submitted that the correct test for the Court to apply is to discover, if it can, what the parties intended. The original document having been lost, the learned District Judge rightly admitted oral evidence as to its contents and as to the circumstances surrounding its execution, from which alone he could discover the intention of the parties. The most important facts to be taken into consideration when determining the intention of the parties are as follows :—

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(i) The terms of the agreement itself as deposed to by the Notary Sivagnanam in whose hand it had been written, the Appellant and the Appellant's daughter Virisithammah, the fourth Respondent.

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(ii) The learned District Judge was satisfied, after hearing evidence of the events that led up to the execution of the document that its true nature was that of a trust and not merely an option to repurchase or a mortgage.

(iii) There was evidence that rightly satisfied the learned District Judge that the consideration furnished in the Deed P.1 did not represent the true value of the lands transferred.

p. 56, l. 25.

p. 56

p. 56.

(iv) The Appellant and his family remained in possession of the lands : the learned District Judge was not satisfied that this was explained merely by reference to the Lease P.3.

(E) In *Perera v. Fernando* (1914) 17 N.L.R. 486, a case on which the Supreme Court strongly relied, there was really no evidence that the informal agreement executed between the parties was intended to create a trust. On its true construction the document merely purported to be a mortgage and, not being formally executed, was not enforceable. The Plaintiff in that case remained in possession of only 3 out of 4 of the lands in question, and the Court found that the consideration furnished on the transfer was fairly equal to the value of the lands. 10

(F) The case of *Carthelis Appuhamy v. Saiya Nona* (1945), 46 N.L.R. 313, which the Supreme Court considered to be on all fours with the present case, is, it is respectfully submitted, clearly distinguishable. At page 315, Kenneman, S.P.J., said :—

“ The Deed P.3 on the face of it conveyed the full interest of the owners (the Plaintiff) without reservation of any condition or equitable right. The first Defendant was thereafter placed in possession of the lands. There was no evidence of any gross disparity between the value of the land at the time of the price paid under P.3, or of any other circumstance which may tend to show that the transfer was to be in trust.” 20

Not only are the facts of that case different in two most material aspects, namely on the questions of possession and value of the land, by the passage itself postulates that in certain circumstances, that is to say, when the intention of the parties is clear, a trust may be created. It is therefore an authority in favour of the Appellant's contention that, depending on the intention of the parties, a trust may be created in these circumstances. 30

(G) The judgment of the Supreme Court seems to have been influenced by their opinion that a transaction of this nature cannot be considered as a trust if it in any way tended to operate as a security for money lent or bears any relation to a mortgage or a promise to reconvey property. No doubt it is a matter of construction of the transaction in order to ascertain the intention of the parties, but it is abundantly clear from the cases of *Nadarajah v. Kanapathy*, 49 N.L.R. 121, *Perera v. Fernando*, 17 N.L.R. 486, where on the facts it was held no trust was created, and in particular *Valliyammai's* case, where this argument was advanced by the appellant but rejected by the Judicial Committee of the Privy Council, that such a transaction can be construed as a trust, even though the primary object of the transaction may have been to provide security for money. 40

It is quite true that the case of *Saminathan Chetty v. Vanderpoorten* (1932), 34 N.L.R. 287, is not directly in point, since the case turned on the construction of two deeds. It is at least, however, of interest that the learned District Judge in that case admitted oral evidence to establish a trust. This was not necessary for the

10 decision in the case and his judgment was restored on the grounds that on the true construction of Deeds 471 and 472 the transaction therein was a security for money advanced which, in certain events, imposed upon the creditor duties and obligations in the nature of trusts. There is nothing in the judgment in that case, however, to indicate that, had the only evidence of the transaction set out in fact in Deed 472 been oral evidence (as in the present case), such evidence would not have been admitted and effect given to the transaction although its object was the security of money. On the contrary the fact that the Trial Judge's admission of oral evidence to prove a trust is nowhere expressly criticised, lends support, it is submitted, to the Appellant's contentions in this appeal.

20 (H) It is respectfully submitted that the *dictum* of Lord Atkinson in *Adaicappa Chetty v. Caruppen Chetty*, 22 N.L.R. at p. 423, when read in the light of the facts of that case and in particular the learned Judge's preceding remarks, in no way supports the Supreme Court's broad proposition. The facts in that case were that the added-defendant, being desirous of buying some pieces of land, applied to a money lending firm, of which the plaintiff and defendant were partners, for a loan. For securing the repayment of the sum with interest, the transfers were executed in the name of the first defendant. Subsequently, the firm requested the added-defendant to let them have absolutely for their benefit a half share of all the property alleged to be held in trust for him for the actual cost of such share, and in consideration offered to forgo all claims for interest. The added-defendant accepted this offer, and acknowledged verbally the title of the firm to the half share on the footing of the agreement. In this action the added-defendant intervened and sought to establish by parol evidence that half share of the land was held in trust for him by the firm. It is important to appreciate that the added-defendant did not seek to set up an express undertaking to hold the land on trust, as in the present case, but alleged that by virtue of the original purchase, the land was held in trust for him by application of the doctrine of resulting trusts. This is clearly seen when the whole of the passage from Lord Atkinson's judgment, from which the Supreme Court extracted a short *dictum*, is considered ; at page 423 he said :—

40 " In the second (deed) there is a statement to the like effect
 " that the purchase money had been paid by the first defendant
 " to Perera (the added-defendant). Yet the latter in the 9th
 " 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 reconveyed to him if by him so required,
 " on the money advanced by him being repaid with the stipulated
 " interest thereupon due. As regards lot No. 4 it is certainly a
 " novel application of the equitable doctrine of resulting trusts
 50 " that where an owner of property, as this deed represents Perera
 " (the added-defendant) 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 so be held.”

The Appellant respectfully submits that so far from supporting the conclusions of the Supreme Court in the present case, it is implicit in this passage, and in particular the last sentence thereof, that had there been an express oral agreement (as there was in the present case), the result would, or at any rate might, have been different, 10
 it depending on the construction of the oral agreement whether or not a trust had been created.

p. 56. 14. The Supreme Court did not disturb the finding of the learned District Judge that the Plaintiff purchased the land with notice of the trust, if indeed a trust existed ; and the Appellant does not appeal from this finding.

p. 77. 15. From the judgment and decree of the Supreme Court dated the 26th July 1951 the Appellant was on the 1st February 1952 granted by the Supreme Court conditional leave to appeal to the Privy Council, the leave 20
 p. 81. being made final on the 25th March 1952.

16. The Appellant humbly submits that the Judgment and Decree of the Supreme Court dated the 26th July 1951 reversing the Judgment and Decree of the District Court of Jaffna dated the 21st December 1949 was wrong and ought to be set aside for the following amongst other

REASONS

- (1) BECAUSE the evidence established that it was the intention of the parties to the informal agreement of the 12th November 1937 that the lands should be conveyed on trust. 30
- (2) BECAUSE the Supreme Court applied the wrong test in construing the agreement of the 12th November 1937 ; the proper test was the intention of the parties.
- (3) BECAUSE the Supreme Court misdirected themselves as to the law, and did not properly apply the law to the facts as found by the learned District Judge.
- (4) BECAUSE the first Respondent purchased the land with notice of the trust and therefore held the land on trust for the benefit of the Appellant and the second to tenth Respondents. 40
- (5) BECAUSE the Judgment of the District Court of Jaffna was right and ought to be restored.
- (6) BECAUSE the Judgment of the Supreme Court was wrong and ought to be set aside.

STEPHEN CHAPMAN.

No. 14 of 1953.

In the Privy Council.

ON APPEAL

*from the Supreme Court of the Island of
Ceylon.*

BETWEEN

SWAKINAPILLAI SAVERIMUTTU *Appellant*

AND

PONNAMBALAM THANGAVELAUTHAM

and Others *Respondents*

Case for the Appellant.

WILLIAM A. CRUMP & SON,

10/11 Lime Street,

London, E.C.3,

Solicitors for the Appellant.