

~~G.H.C. 2~~

23, 1954

In the Privy Council.

No. 14 of 1953.

ON APPEAL FROM THE SUPREME COURT
OF CEYLON

BETWEEN

SWAKINAPILLAI SAVERIMUTTU of Valvettiturai
(1st Defendant) APPELLANT

AND

1. PONNAMBALAM THANGAVELAUTHAM of Valvettiturai (Plaintiff) RESPONDENT
2. SAVERIMUTTU IGNATIUS THURAISSINGHAM
3. THOMMAIPILAI SOOSAIPILLAI and
4. Wife BIRISITHAMMA
5. SWAMINATHAR MARUSILIN and
6. Wife MARIAMUTTU
7. SAVERIMUTTU JOSEPH SELVARATNAM
8. ARUNASALAM SOMASUNDERAM and
9. Wife MANKAYATKARASI
10. RASAMAH widow of SIVAGURO RAMASAMY,
all of Valvettiturai (Defendants) RESPONDENTS.

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UNIVERSITY OF LONDON
W.C.1.
24 FEB 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

CASE FOR THE FIRST RESPONDENT

1.—This is an Appeal from the Judgment of the Supreme Court of Ceylon (Gratiaen and Gunasekara, JJ.) delivered on the 26th July, 1951, allowing the appeal of the first Respondent from the Judgment and decree of the District Court of Jaffna (Wijayatilake, D.J.) sitting at Point Pedro and dated the 21st December, 1949. RECORD
pp. 64-69
pp. 53-58

2.—The action was brought by the first Respondent as Plaintiff against the Appellant as the first Defendant and against nine other Defendants now joined as Respondents to this Appeal.

By his Plaint filed in the said District Court on the 19th September, 1946, the first Respondent claimed to be entitled to the possession of certain pp. 16-19

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land conveyed to him by one Karthigesar Iyadurai otherwise spelled Aiyadurai or Aiyathueai under a deed of transfer dated the 24th June, 1946. He further claimed to have acquired a prescriptive right to possession of such land by reason of the undisturbed and uninterrupted possession thereof by himself and his predecessors in title for more than a period of ten years and upwards next immediately preceding the date of his said action by a title adverse to and independent of the Defendants and all others whomsoever pursuant to the provisions of Section 3 of Chapter 55 of the Legislative Enactments of Ceylon. He further claimed that the Defendants (including the Appellant) were estopped from denying his title as the Appellant and his late wife Annammah had entered into possession of the said land pursuant to a lease thereof dated 12th November, 1937. 10

The said lease comprised an area of 2 lachams 13 28/32 kulies called Pannaikaddaiyady situated at Valvettiturai in the district of the said Court and the said Plaint contained a prayer for the following relief :

- (a) A declaration that the Plaintiff (first Respondent) was entitled to the possession of the said land.
- (b) An order that he be placed in peaceful possession thereof and that the Defendants be ejected therefrom.
- (c) An order for damages and costs as against the 1st (Appellant) 20
3rd, 4th, 5th, 6th and 7th Defendants.

pp. 20-21

3.—By their Answer to the said Plaint the 1st (Appellant), 4th, 5th and 6th Defendants admitted that they were in occupation of the said land but denied that the Plaintiff (the first Respondent) had any right or title thereto. They alleged that the conveyance whereby the Appellant and his wife Annammah had conveyed the said land and two other lands to the said Iyadurai on the 12th November, 1937, was subject to a trust under which the said Iyadurai was to re-convey the said lands to them on their paying to him the sum of Rs. 2,000 with interest thereon from the 12th November, 1937, and that from and after the said date the 1st to 7th (inclusively) 30
Defendants occupied the said lands pursuant to such trust.

They further alleged that the said Deed of Transfer from Iyadurai to the first Respondent was executed fraudulently and collusively in order wrongfully to deprive the 1st to 7th (inclusively) Defendants of their rights in the said lands and that at the date of the execution thereof the first Respondent was aware that the said Iyadurai held the said lands in trust as aforesaid.

It was further alleged that the said Deed of Transfer between Iyadurai and the first Respondent was executed after the lodging of a caveat under Section 32 of the Registration of Documents Ordinance Cap. 101 in respect 40
of the said land and would not operate to convey any right or title therein to the first Respondent and that the first Respondent held the said land subject to the trust aforesaid.

The said Answer accordingly prayed that :—

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- (a) The action be dismissed.
- (b) The Plaintiff (first Respondent) be declared to be holding the said land subject to the terms of the said Trust, and be ordered to convey the said lands to the 1st-7th (inclusively) Defendants in accordance with the terms thereof.

4.—Upon these pleadings issues were framed on the 10th December, 1948, by the said Court. pp. 22-24

5.—After hearing evidence and argument at the trial of the Action on the 10th December, 1948, 25th February, 27th May, 21st and 22nd July, 1949. Wijayatilake, D.J., delivered a reserved judgment on the 21st December, 1949. By his said judgment he dismissed the said Plaintiff and gave judgment for the Defendants in accordance with the prayer of the said Answer. A decree of the said Court issued accordingly. pp. 24-52
pp. 53-57
pp. 57-58

6.—It was common ground at the said trial that the said land Pannaikaddaiyady together with four other lands all the property of the first Defendant (Appellant) and his wife Annammah had been mortgaged by them in the year 1922 to one Kathiripillai Karthigesar and his wife Sivakolanthu as security for the sum of Rs. 1,650. Of the said sum Rs. 1,204.50 represented sums due from the first Defendant and his said wife to the said Karthigesar and his wife on promissory notes. By a Deed of Donation dated 10th January, 1928, the said Mortgagees had assigned their interest under the said lands to their son the aforesaid Iyadurai. pp. 82-83
(P. 7 : D. 4)

It was further common ground that thereafter the said Iyadurai instituted proceedings in the District Court of Jaffna against the Appellant and his said wife in pursuance of the said Mortgage Bond and that by a decree of the said Court dated the 24th March, 1931, it was adjudged that the Appellant and his said wife should pay to the said Iyadurai the sum of Rs. 2,973.10 in respect of principal interest and costs due on the said Mortgage Deed together with the costs of such action and further interest until payment at the rate of 9 per cent. per annum and that in default of payment the lands the subject of the said bond including the land Pannaikaddaiyady should be sold and the proceeds applied to the payment of the sums aforesaid. pp. 87-91
(P. 8 : D. 30)

Evidence was adduced to show that thereafter the said Iyadurai released two of his five lands (but not the said land Pannaikaddaiyady) from the said decree which lands were then sold by the Appellant and that the Appellant afterwards mortgaged further lands to the said Iyadurai thus enabling part payment of the said judgment debt to be made to the said Iyadurai on or about the 2nd May, 1931. pp. 93-96
(D. 6 : D. 5)
pp. 97-99
(P. 2 : D. 7)

It was further common ground at the said trial that in the year 1937 the said Iyadurai pressed the Appellant for a settlement of the said p. 103 (D. 8)
pp. 100-102
(P. 5)
pp. 103-104
(D. 9)

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pp. 106-108 (P. 1) judgment debt and of the interest due thereunder and that by a Deed of Transfer dated the 12th November, 1937, the Appellant and his said wife Annammah purported to sell and transfer the remaining three lands the subject of the said judgment and including the land Pannaikaddaiyady to the said Iyadurai "in consideration of the sum of Rs. 2,000 which is "justly and truly due from us in full satisfaction of the balance amount "due on mortgage decree entered in Case No. 265 D.C. Jaffna" (being the judgment referred to above) "in favour of Karthikesar Iyadurai." There-
 pp. 97-99 (P. 2) after by a Deed of Lease of the same date the said Iyadurai purported to demise the said three lands including the land Pannaikaddaiyady to the Appellant and his said wife for a term of six years ending the 12th November 1943, at a rent of Rs. 20 per annum. 10

The said deeds of transfer and of lease were notarially executed at Point Pedro by one Sivagnanam.

7.—On the face of the said deeds of Transfer and of Lease the whole interest of the Appellant and his wife in the said lands was conveyed to the said Iyadurai with the result that the Appellant and his wife exchanged the position of mortgagors for that of lessees.

It was however the contention of the Appellant as hereinafter appears that the said Deeds of Transfer and of Lease were accompanied by an Informal Agreement whereby the said Iyadurai agreed to re-convey the said lands including the land Pannaikaddaiyady to the Appellant and his wife on certain conditions and that the said Agreement imposed a trust upon the said Iyadurai. 20

The principle questions in this Appeal are whether the evidence adduced on behalf of the Defendants (Appellant) to establish such Informal Agreement was admissible and whether upon the evidence any such agreement was established and if so what were its terms and whether upon all the facts of the case such terms could constitute an agreement or trust of legal effect binding upon the said Iyadurai or upon the first Respondent who purchased the said land Pannaikaddaiyady from the said Iyadurai in the year 1946. 30

8.—The said Iyadurai thereafter took proceedings to enforce the further Deed of Mortgage and on 24th September, 1938, obtained judgment for the sum of Rs. 858 together with interest at the rate of 10 per cent. per annum from 8th July, 1938. On 16th November, 1938, the Appellant obtained a receipt from the Mercantile Bank at Jaffna in respect of a sum of Rs. 130 which he had paid to the credit of the account of the said Iyadurai at the said Bank. On 24th December, 1946, by a document notarially attested Iyadurai acknowledged the receipt of Rs. 1030 in full satisfaction of the said further Mortgage Judgment, Rs. 430 having been paid on that date and the balance having been previously paid. 40

9.—On the 8th September, 1940, the said Iyadurai and his wife gave a Power of Attorney to one Ponniah before leaving Ceylon for Malaya where he remained until or about the year 1946. 10

By letter dated 16th January 1946 to the Appellant the said Sivagnanam on behalf of Iyadurai demanded payment of Rs. 160 being the amount due in accordance with the provisions of the said lease and gave the Appellant one month's notice to quit Ellumullupattai one of the lands the subject thereof and to yield possession thereof to the first Respondent. RECORD
p. 120 (D. 16)

Thereafter by a Deed of Transfer dated the 3rd February, 1946, the said Ponniah as Attorney for the said Iyadurai conveyed the said land Ellumullupattai to the first Respondent for the price of Rs. 2,000 payment whereof was attested by the notary in whose presence the said deed was executed. pp. 122-124 (D. 19)

Meanwhile the Appellant having written to the said Iyadurai entered a caveat on the 5th February, 1946, at the office of the Registrar of Lands Jaffna against the registration of a transfer of any of the lands the subject of the said deeds of Transfer and of Lease dated the 12th November, 1937. pp. 124-125 (D. 17)

On the 7th February, 1946, the Appellant sent a telegram to the said Iyadurai referring to the intention of the said Ponniah and Sivagnanam to sell the said lands and alleging that he had offered the said Ponniah " full settlement in 1942 " but that this had been refused. pp. 125-126 (D. 14)

By a deed of Transfer notarially executed and dated the 11th February, 1946, the first Respondent resold the said land Ellumullupattai to one Nadarajah for the sum of Rs. 5,000. pp. 126-127 (D. 20)

By letter dated the 8th March, 1946, to the Appellant the said Iyadurai referred to the letters of the Appellant. He denied that he was guilty of any breach of agreement or breach of trust, but offered to reconvey the said lands to the Appellant at the current value thereof less one-tenth such value to be impartially assessed. pp. 128-129 (D. 15)

10.—By a Deed of Transfer dated the 24th June, 1946, notarially executed the said Iyadurai conveyed the said three lands including the land Pannaikaddaiyady to the first Respondent for the sum of Rs. 10,000 payment whereof was acknowledged by the notary attesting the same. Thereafter notices to quit all the said lands were served on the Appellant on behalf of the first Respondent but were not complied with by the Appellant. pp. 135-137 (P. 4)
pp. 137-138 (D. 27)
pp. 138-139
(D. 28 : D. 29)

Both the said Iyadurai and the said Annammah wife of the Appellant died prior to the hearing of the suit by Wijayatilake, D.J.

11.—The case for the Appellant at the trial was that the Deeds of Transfer and of Lease covering the three lands including the said land Pannaikaddaiyady executed on the 12th November, 1937, at Point Pedro were subject to an express trust. It was alleged that this trust (described as an Informal Agreement) was expressed in a document drawn up and signed contemporaneously with the said deeds and whereby the said Iyadurai was expressed to hold the said lands in trust to reconvey them to the Appellant on payment by instalments within 8 years from the said 12th November, 1937, of the sum of Rs. 2,000 with interest. 40

It was alleged that the said Iyadurai had stated that the Appellant need not pay the rent agreed by the said Deed of Lease that the payment

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made by the Appellant on the 11th November, 1938, was on account of the sum of Rs. 2,000 and interest due to Iyadurai and that the Appellant had offered to pay the said Ponniah the amount of Rs. 2,000 with interest on an occasion in 1942.

It was further alleged that on a subsequent occasion the Appellant had handed the said document containing the informal arrangement to the said Ponniah who had retained it and that the conveyance of the said land to the first Respondent on the 24th June 1946 was fraudulent and collusive as between the said Iyadurai and the first Respondent they well knowing that it constituted a breach of trust as aforesaid.

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pp. 26-34

12.—In support of the Appellant's case the Appellant himself gave evidence. He recited the course of his dealings with Iyadurai prior to the year 1937 as set forth above. He stated that in November, 1937, he and his wife Annammah were at the house of one Kandiah at Point Pedro. Iyadurai had previously come to him to demand a settlement of his debt and had suggested that if he was not in a position to do so the Appellant should transfer his lands to him in trust. He had already promised to retransfer the land provided the Appellant paid off the debt within 8 years.

He stated that he and his wife were at first unwilling to transfer the lands but Iyadurai said that he would retransfer them within 8 years and would hold them in trust and would not betray the Appellant. The Appellant asserted that Iyadurai told him to deposit whatever income he got in the bank and to settle the debt in instalments within the period of 8 years. He also told the Appellant that a lease bond was to be executed for Rs. 20 but that he Iyadurai did not want the money for the lease bond.

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Accordingly both the Appellant and his wife executed the deeds and there was also "an informal writing" which was handed over to the Appellant.

The Appellant asserted that he and his daughters had visited Ponniah the said Iyadurai's attorney on 3 or 4 occasions on two of which he had taken the informal writing with him. On the first occasion when he took the writing which occasion was in 1942 he took "about 2,000 rupees with him" and requested Ponniah to retransfer the three lands: the interview was in the presence of Sivagnanam and Ponniah's children. Ponniah stated he had no authority to transfer.

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The Appellant stated that prior to this visit he had made payments on account of the debt of Rs. 2,000 to Muttu the brother of Iyadurai and to one Sinnapah and had obtained receipts (not produced) from them, and that he had also made a payment of Rs. 130 to the bank of Iyadurai. He further said that some 5 or 6 months before visiting Ponniah in 1942 he had taken legal opinion. The second occasion on which he took the writing to Ponniah was after a lapse of one or two years and on this occasion he handed over the writing to Ponniah to enable the latter to send it to Iyadurai in Malaya to verify that it was a genuine document. The Appellant had again taken legal opinion prior to this second visit.

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He further emphasized that he only signed the Deed of Transfer and the Lease bond to afford Iyadurai security for the debt. At that time the value of the said lands was variously 1,000-700 Rs. a lacham.

In cross-examination the Appellant admitted that despite taking legal opinion he had taken no steps to enforce retransfer until after he had received notice to quit. He agreed that land had gone up by as much as 10 to 12 times in value since 1942 and admitted that in proceedings instituted by him against Iyadurai on the 11th March, 1946, he had stated the value at that date of the three lands in question at Rs. 7,000.

p. 33, ll. 20-22

p. 130, l. 7 (D. 18)

10 The Appellant did not produce any of the receipts which he said he had obtained on making the alleged payments to Muttu or Sinnapah or explain his failure to do so. A witness Thiruchittampalam a clerk of the Mercantile Bank of India was however called and confirmed that the Appellant had on the 16th November, 1938, paid Rs. 130 to the credit of Iyadurai at the said Bank.

pp. 24-25

No evidence was tendered by the Appellant as to the actual terms of the said informal writing.

13.—Sivagnanam a notary public and nephew of Iyadurai was called and said that he was present at Point Pedro on the 12th November, 1937, when the said Deeds of Transfer and of Lease were executed. He stated that he had attested both these deeds as constituting “an out and out “transfer and a lease.” The Appellant and his wife wanted the land to be retransferred within a certain period if the consideration on the transfer was paid with interest and Iyadurai consented to this : he said that when after signing the deeds the Appellant and his wife wanted an informal writing Iyadurai had said he was prepared to give it provided there was a particular period. Sivagnanam had himself written out the informal writing but had not witnessed it—the execution of the writing had been witnessed by one Thiagarajah whose whereabouts he did not now know and also by one Fernando. The three lands the subject of the deeds were only worth Rs. 2,000 at the time.

pp. 25-26

p. 25, ll. 33-34

Sivagnanam did not give any evidence as to the actual wording of the informal writing objection being taken thereto by Counsel for the first Respondent pending proof of the document itself. He was not thereafter recalled to give such evidence nor were either the said Thiagarajah or Fernando called as witnesses.

p. 25, ll. 21-28

14.—The fourth Defendant (now the fourth Respondent) a daughter of the Appellant was also called. She gave evidence substantially confirming the Appellant's account of the object and circumstances of execution of the said informal writing although it is not clear to what extent her evidence was “hearsay.” It is to be noted that in the first instance she stated that “Iyadurai wanted us to transfer these lands conditionally for six years ” although she subsequently stated that the period was eight. It is submitted that a period of six years conforming to that of the lease appears more logical than the period of eight.

pp. 40-46

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p. 41 Virisithammah alleged that she personally saw the informal writing the size of which she described but evidence by this witness was not had as to the written terms thereof save that she stated that "the agreement was Rs. 1,200 for Ellumullupattai and Rs. 800 for Pannaikaddaiyady and "Muthiraikaddai these amounts to be repaid by instalments and Iyadurai "undertook to retransfer the lands on repaying the amount due." She further stated that the rate of interest agreed upon was 10 per cent. per annum.

She stated that the second occasion when the Appellant visited Ponniah was in 1945.

pp. 35-40 15.—Ponniah was called for the Appellant. He stated that he had 10 tried to collect rent from the Appellant. He denied that he had ever seen the said informal writing or that the Appellant had ever approached him to retransfer the said lands before the latter part of 1945 when he was actively engaged in seeking purchasers for the said lands. He stated that on that occasion the Appellant had asked him to leave the Appellant a part of his residing land and a well situated thereon and had made offers in respect of other parts of the property which he had declined. He stated that at no time had he been shown a writing granted by Iyadurai.

pp. 34-35 Evidence was also given for the Appellant by one Kandiah.

pp. 46-50 16.—The first Respondent gave evidence that he had purchased the 20 land Ellumullupattai for Rs. 2,000 by Deed of Transfer dated the 3rd February, 1946. At that date he was not aware of any agreement between the Appellant and Iyadurai for the retransfer of such land or of any trust but knew that the Appellant and the other Respondents were occupying the land pursuant to a lease bond. He had thereafter purchased the other two lands including the said land Pannaikaddaiyady by Deed of pp. 120-122 (P. 6) Transfer dated the 24th June, 1946, for the sum of Rs. 10,000. The land Ellumullupattai was included in this deed which was executed by Iyadurai because of a suggestion that Ponniah had not had authority to convey it by the Deed of 3rd February, 1946. He had then paid Rs. 12,000 for the 30 three lands which amount was cheap at the prices then ruling although the three lands had been worth "within Rs. 2,000" in November, 1937.

pp. 135-137 (P. 4) The witness denied that he had been aware of the caveat and asserted that the resale of Ellumullupattai to Nadarajah was a genuine resale. The first Respondent had been present at the house of Iyadurai on the morning of the 24th June when the Appellant had asked Iyadurai to retransfer the lands for Rs. 6,000 but Iyadurai had refused.

Following his purchase the first Respondent had given notice to quit but the Appellant and the other Respondents had failed to do so. He gave evidence in support of the claim for damages. 40

p. 50 17.—One Sathasivam gave evidence that the value of the three lands in 1937 would have been Rs. 1,600 to 1,700.

18.—The case for the first Respondent was that the sum of Rs. 2,000 was a fair price for the said three lands in November, 1937. The Deed of

Transfer and the Deed of Lease of that date were unequivocal. The Appellant and the other Respondents had failed to produce or account for the informal writing on which they relied.

The evidence adduced to prove the Informal Agreement was inadmissible. If admissible such evidence did not prove any agreement which could be construed as a valid trust. The first Respondent had purchased *bona fide* at a fair price without notice of any agreement or trust which might prohibit his so doing.

19.—The learned District Court Judge delivered a reserved judgment pp. 53-56
 10 on the 21st December, 1949, in the course of which he stated that he accepted the evidence adduced at the trial that contemporaneously with the Deed of Transfer P1 and the Deed of Lease P3 an informal writing had been executed by the parties to the effect that Iyadurai was to retransfer the properties to the transferors (the Appellant and his wife) within a period of 8 years provided the amount due was settled with interest. The learned Judge rejected the evidence of Ponniah who denied having either seen or retained the alleged informal writing. Dealing with the question whether the properties transferred on the Deed P1 were worth at the time of the conveyance a sum more than the consideration paid the learned Judge took
 20 the view that the evidence at the trial despite the testimony of the witness Sivagnanam tended to the conclusion that the properties were worth more. The learned Judge then added “ All the circumstances surrounding the “ transaction I think point to a trust in favour of the transferors on P1. “ I think the principles set out in the recent Privy Council case reported in “ 48 N.L.R. 289 and followed by the Supreme Court in 49 N.L.R. 121 would “ apply to the facts of this case, although in the present case we have the “ additional feature of a Lease bond being executed simultaneously. I “ would accordingly hold that a trust was created in favour of the first “ Defendant and his wife.” The learned Judge further held that the entry
 30 of a caveat on the register on the 5th February, 1946, would have afforded pp. 124-125 (D. 17) sufficient notice to any intending purchaser. He further pointed out that the first Respondent had admitted that on the date when the transfer in his favour had been executed the Appellant had requested Iyadurai to retransfer the property. The learned Judge concluded his judgment by holding that the first Respondent was not a *bona fide* purchaser.

20.—On the 5th January, 1950, the first Respondent filed a petition pp. 58-62
 of Appeal to the Supreme Court of Ceylon to have the said judgment and decree of the District Court set aside on the ground *inter alia* that it was contrary to law and to the weight of the evidence, and that the learned
 40 District Court Judge had misdirected himself and that the said informal writing was unenforceable in law and further that there was no evidence that the first Respondent had notice of the alleged trust particularly in view of the fact that the informal agreement was neither executed nor registered as required by Section 93 of the Trusts Ordinance.

RECORD

pp. 64-68

21.—The Appeal was argued before the Supreme Court on the 16th and 17th July, 1951, and on the 26th of July, 1951, Gratiaen, J., delivered the Judgment of the Court in which Gunsekara, J., concurred, allowed the Appeal, set aside the Judgment and Decree of the District Court Judge and entered a Decree in favour of the Plaintiff in terms of paragraphs (1) and (2) of the prayer of the Plaint. It was also decreed that the case be remitted to the said District Court for the assessment of damages for wrongful possession from the 4th September, 1946, until date of ejectment.

pp. 17-18

pp. 64-68

22.—In the course of his Judgment Gratiaen, J., held that apart from the alleged trust the informal agreement relied on was by itself of no avail to the Defendant as being obnoxious to clear provisions of Section 2 of the Prevention of Frauds Ordinance. The learned Judge then went on to consider whether the creation of the alleged Trust had been substantiated. He observed that there appeared to be little substance in the suggestion of the Defendants that the consideration for the conveyance of the land had been inadequate, and added that if there was any trust at all it must presumably be an express trust. "If full effect," he said, "were to be given to the parol evidence tendered by the first Defendant no trust of any kind could in my opinion have been proved." The learned Judge then referred *inter alia* to an opinion of your Lordships' Board in *Adicappa Chetty v. Caruppan Chetty* (1921) 22 N.L.R. 417 in which it was held that parol evidence was inadmissible to prove an agreement in the nature of a mortgage or pledge similar to that alleged by the Appellant in this action. The learned Judge concluded his judgment by saying: "This case is on all fours with *Carthelis Appuhamy v. Sarya Nona* (1945) 46 N.L.R. 313" and stated his intention of following that decision. 10 20

pp. 76-77

23.—Pursuant to request of the Supreme Court made the 16th November, 1951, the said District Court having heard evidence by a report dated the 18th December, 1951, fixed the value of the said land as at 27th August 1951, in the sum of Rs. 7,500. 30

24.—From the Judgment and Decree of the Supreme Court of Ceylon Final Leave to appeal to Her Majesty in Council was granted to the Appellant on the 25th March 1952.

pp. 64-69

The first Respondent humbly submits that the Judgment of the Supreme Court and the said Decree dated the 26th July 1951, are right and should be affirmed and that the Appeal ought to be dismissed for the following, amongst other

REASONS

- (1) BECAUSE the Deeds of Transfer and of Lease dated the 12th November, 1937, and the Deed of Transfer dated the 24th June, 1946, constituted the sole admissible evidence in relation to the title to the land the subject of the proceedings. 40
- (2) BECAUSE the burden of proof of any agreement or trust as alleged by the Appellant and the other Respondents being upon them they failed to discharge such burden.

- (3) BECAUSE evidence of any oral agreement or oral declaration of trust was inadmissible as being
- (a) In contradiction of the said Deeds of Transfer and of Lease dated 12th November, 1937.
 - (b) Contrary to the terms of the Evidence Ordinance Sections 91 and 92.
 - (c) Obnoxious to the terms of Section 2 of the Prevention of Frauds Ordinance (Ordinance No. 7 of 1840) and to the provisions of Sections 5 and 93 Trusts Ordinance (Ordinance No. 9 of 1917).
- 10
- (4) BECAUSE in the absence of any sufficient evidence to explain the failure to produce the alleged informal writing oral evidence of its terms was inadmissible pursuant to the provisions of the Evidence Ordinance Sections 63-66 (inclusive).
- (5) BECAUSE no evidence was adduced as to the actual terms of the alleged informal agreement in writing such evidence as was adduced being confined to the alleged terms of an oral agreement made prior to the alleged informal agreement in writing.
- 20
- (6) BECAUSE the evidence adduced of any such informal writing was of no effect inasmuch as
- (a) it had not been notarially executed as required by :— Section 5 of the Trusts Ordinance and Section 2 of the Prevention of Fraud Ordinance ; nor
 - (b) registered as required by Section 93 of the Trusts Ordinance and Sections 6, 7 and 8 of the Registration of Documents Ordinance (Ordinance No. 23 of 1927).
- 30
- (7) BECAUSE the evidence adduced of such informal agreement or trust was at variance with the terms of the Answer filed in such proceedings insufficient to establish that the parties thereto intended to create legal liability and insufficient to establish the terms of such liability with any sufficient clearness or certainty.
- (8) BECAUSE there was no evidence or no sufficient evidence that the Appellant had ever complied with the terms of any agreement or trust such as alleged and because it was apparent on the evidence that he had breached any such terms, and upon the grounds stated in the Judgment of Mr. Justice Gratiaen in the Supreme Court of Ceylon.
- 40
- (9) BECAUSE there was no evidence or no sufficient evidence to establish that the first Respondent was guilty of any fraud or breach of trust or had notice of the said alleged trust or that the sale to him was in breach thereof or that he acted without *bona fides*.

H. J. PHILLIMORE.

ROBERT N. HALES.

In the Privy Council.

No. 14 of 1953.

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SWAKINAPILLAI SAVERIMUTTU

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(*1st Defendant*) APPELLANT

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PONNAMBALAM THANGAVELAUTHAM

of Valvettiturai (*Plaintiff*) AND OTHERS

RESPONDENTS.

CASE FOR THE FIRST RESPONDENT

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