1950 *Present :* **Dias J. and Gunasekara J.**

MARIKKAR, Appellant, *and* LEBBE, Respondent

S. C. 334—D. C. Kandy, 2,012

Trusts Ordinance (Cap. 72)—Sections 5 (3) and 84—Transfer of immovable property to one person for consideration paid by another—Transferee's position as trustee—Oral evidence—Date of action and rights of parties—Appeal—Questions of fact—When Court will interfere.

Out of money which defendant was holding in trust for the plaintiff certain immovable property was bought in the name of the defendant.

Held, that, under section 84 of the Trusts Ordinance, the plaintiff was entitled to a declaration that the defendant held the property as trustee for the plaintiff and to a conveyance of the premises by the defendant to the plaintiff.

Held further, (i) that, under section 5 (3) of the Trusts Ordinance, extrinsic oral evidence was admissible to establish the trust.

(ii) that, although the defendant had not obtained legal title to the property prior to the date on which the plaint was filed, the action was maintainable if the plaintiff could show that he was vested with legal rights to the ownership of the property.

(iii) that the appellate Court is free to reverse the conclusions of a trial Judge if the reasons for his judgment are unsatisfactory ; but this should be done in the rarest cases and when the Court is convinced by the plainest considerations that it is justified in holding that the trial Judge has formed a wrong conclusion.

APPEAL from a judgment of the District Court, Kandy.

F. A. Hayley, K.C., with *Cyril E. S. Perera*, *H. W. Jayewardene* and *M. Rafeek*, for the defendant appellant.

H. V. Perera, K.C., with *S. J. V. Chelvanayagam, K.C.*, and *H. W. Tambiah*, for the plaintiff respondent.

Cur. adv. vult.

March 21, 1950. DIAS J.—

This appeal involves the determination of two questions. The first involves a question of mixed law and fact, namely, whether the Deed P54, dated October 19, 1945, in favour of the defendant appellant created him a trustee of the interests conveyed by that deed for the plaintiff respondent? And secondly, a pure question of fact, namely, what sum if any is due from the defendant to the plaintiff?

The defendant appellant is the paternal uncle of the wife of the plaintiff respondent. He is a well-to-do business man. He had been employed in the Ceylon Government Railway and had also been a postmaster. He is a member of the Nawalapitiya Urban Council and was once its vice-chairman. He is a Justice of the Peace and an Unofficial Magistrate. Therefore, the defendant, not only is a man of influence and position,

but also, being a business man, knows or should be aware of business methods. On the other hand, until the events we have to consider took place, the plaintiff appears to have been a trader in timber on a modest scale. Therefore, while he too must be regarded as a man who knows business methods, from the positions occupied by the two men, one feels that a higher standard is to be expected from a person like the defendant.

Owing to conditions created by the second World War, the naval and military authorities in Ceylon were in urgent need of large supplies of timber and were prepared to pay fancy prices for them. Therefore, about February, 1944, the plaintiff began to supply timber to the authorities. It is true he had some capital and a stock of timber, but substantial sum of ready money were needed to pay the suppliers of timber and, as the plaintiff puts it, "to get his tenders accepted". His father-in law (the brother of the defendant) rendered some help, but this was inadequate. The plaintiff, therefore, naturally approached the defendant to act as his financier.

The District Judge has found that the agreement between the plaintiff and the defendant was as follows:—(*a*) The defendant was to finance the plaintiff in regard to the latter's timber business; (*b*) As security, the plaintiff undertook to indorse and hand over to the defendant all cheques and drafts received from the authorities in payment for timber supplied; (*c*) This money the defendant was to keep for the plaintiff. In other words, the plaintiff's case is that the defendant became the trustee of this money for the plaintiff; (*d*) The sums of money which the defendant advanced to the plaintiff were to be regarded as loans to the plaintiff; and (*e*) in consideration for the assistance provided, the defendant was to be given a half share of the profits of the timber business.

Although the defendant attempted to prove that he and the plaintiff were partners, the District Judge has disbelieved him on this point. Counsel for the defendant in appeal did not argue that this business was a partnership. I am of opinion that the learned District Judge has rightly rejected the defendant's contention that he and the plaintiff were partners. The finding affects the credit of the defendant in regard to other questions of fact.

The business, therefore, belonged to the plaintiff. His contracts with the naval and military authorities terminated on November 9, 1945. During this period not only did the plaintiff supply large quantities of timber to the authorities and received in payment cheques and drafts for large sums of money, which he in pursuance of this agreement indorsed or paid over to the defendant, but the defendant for his part also made advances of considerable sums of money to the plaintiff to finance the business as agreed on.

The case for the plaintiff may be summarized as follows:—The money in the hands of the defendant, after deducting the sums advanced by the latter on account of the plaintiff, were held in trust for the plaintiff. With a portion of that money on October 19, 1945, certain premises in Kotmale Road, and Ambagomuwa Road, Nawalapitiya, were purchased in the name of the defendant in trust for the plaintiff. It is further

alleged that the parties having fallen out, the defendant wrongfully took possession of the account books of the business, thereby rendering an accounting impossible. The plaintiff, therefore, in this action asked for an accounting of all moneys deposited by him with the defendant; for the recovery of the money found to be due after such an accounting; for a declaration that the defendant is holding the said premises conveyed in his name as trustee for the plaintiff; and for a conveyance of those premises by the defendant to the plaintiff. Plaintiff valued his action at Rs. 125,000.

The answer of the defendant is a total traverse of the plaintiff's case. His case as outlined in the answer is that in April, 1944, the defendant and the plaintiff commenced business *in partnership* with a capital exceeding Rs. 1,000 and that the capital and the nett profits were to be shared between the plaintiff ($\frac{1}{2}$), plaintiff's father-in-law ($\frac{1}{2}$) and the defendant ($\frac{1}{2}$). The defendant pleaded that this partnership offended against the provisions of s. 18 (*c*) of the Prevention of Frauds Ordinance (Chap. 57) and that, therefore, plaintiff's action was not maintainable. The defendant further pleaded that in May, 1945, accounts were looked into for income tax purposes, and the partners took their respective shares of the profits, and the business was finally closed in October, 1945. He also pleaded that from April 1, 1945, to the end of October, 1945, a sum of Rs. 46,836.34 was due to him from the plaintiff, being money advanced by him to the plaintiff. Curiously, he made no claim in reconvention for this sum, but " reserved his rights " to sue the plaintiff for this sum. He denied that he took the books of the business and asserted that they were with the plaintiff. He further pleaded that the alleged trust cannot be enforced because it was not in writing, and not in accordance with the requirements of the law. He finally pleaded that the plaint disclosed a misjoinder of causes of action.

The parties went to trail on the following issues:—

1. Was the plaintiff in 1944-45 carrying on the business of supplying timber to the Services and other buyers? The learned District Judge answered this issue in the affirmative.

2. Did the defendant agree to lend and advance to plaintiff a portion of the money required for carrying on the said business? This issue was answered in the affirmative.

3. Was it agreed—(*a*) that plaintiff should endorse and deliver to defendant for collection all cheques received by the plaintiff as payment for timber supplied by him? (*b*) that defendant should hold in trust for the plaintiff all moneys in excess of the amount needed to pay defendant back his advances? Both the questions raised in this issue were answered in the affirmative.

4. (*a*) What is the full amount of defendant's advances to plaintiff ? The District Judge held that the amount was Rs. 495,503.

   (*b*) What is the value of the cheques endorsed by plaintiff to defendant ? The District Judge held that this was Rs. 657,463.

   (*c*) What amount, if any, is the excess over 4 (*a*) ? The District Judge held that this amounted to Rs. 161,960.

5. If issue 4 (*c*) answered in favour of plaintiff—

(*a*) Did defendant hold such excess in trust for the plaintiff? This issue was answered in the affirmative.

(*b*) Was such excess or any portion of it paid as a contribution for the purchase of the property described in the Schedule of the plaint? The District Judge held in the affirmative.

6. If issue 5 is answered in favour of the plaintiff, did defendant hold the said profits in trust for the plaintiff? This issue has been answered in the affirmative.

7. Is the defendant liable to (*a*) render an account in terms of prayer (*a*) of the plaint, and pay the plaintiff the amount found due on the account? The Court answered this issue in the affirmative—(*b*) convey and deliver possession of the property in question to the plaintiff? The Judge held that this issue did not arise.

8. What amount, if any, is due to the plaintiff ? The District Judge assessed this at Rs. 5,965.

9. Did the defendant expend moneys for and on behalf of the business referred to in the issues ? The Judge while answering this issue in the affirmative, also held that such moneys were *not expended in cash.*

10. If so, has such expenditure to be taken into account in obtaining the amount put in issue in 4 (*c*) ? The Judge held that this issue does not arise.

11. Were the plaintiff and the defendant engaged in the said business in partnership? This issue was answered in the negative.

12. Was the capital of the said partnership over Rs. 1,000 ?

13. If so, is the plaintiff entitled to maintain this action ? The District Judge held that issues 12 and 13 did not arise.

14. Were the accounts of plaintiff and defendant in respect of the said business looked into and settled in or about May, 1945, for the Income Tax Year ending March 31, 1945? The Judge answered this issue in the negative.

15. What sums, if any, were contributed by defendant between April 1 and October, 1945? The Judge held that this issue does not arise.

16. What sums were received by the defendant in respect of the said business for the said period ? The finding of the learned District Judge is " As in D178 under the head ' Plaintiff's Case' ". D178 is a statement prepared and produced by the defendant showing the monetary position both from the plaintiff's and defendant's points of view for the whole period involved.

17. Is the plaintiff liable to pay defendant the deficiency, if any ? The District Judge has recorded that this issue was withdrawn. He also held that there was no deficiency.

18. Was the business in fact a partnership with a capital of over Rs. 1,000 ?

19. If so, can plaintiff recover any sum whatsoever on the account in his plaint ? The Judge held that issues 18 and 19 did not arise.

20. Is there a misjoinder of causes of action in contravention of s. 35 (1) of the Civil Procedure Code? The Judge has recorded that issue 20 was withdrawn. It is to be noted that immediately after the issues were framed, counsel for the defendant moved that issue 20 should be taken up for decision in the first instance. Counsel for the plaintiff objected, and the Judge recorded "As issue 20 will not dispose of the case, this question of misjoinder will be decided later along with the other issues. Besides, there is no argument on facts to enable me to decide this issue at this stage".

It will be convenient in the first place to deal with the question of trust. On the findings of the learned District Judge, it is clear that the plaintiff had, in pursuance of the agreement between the parties, entrusted to the defendant large sums of money which he had received from the naval and military authorities.

The premises in Kotmale Road and Ambagomuwa Road, Nawalapitiya, belonged to a man named Abdul Rahiman Saibo. This man had executed what was tantamount to an English-law mortgage of these properties to one Karuppiah. The transaction took the form of an out and out conveyance to Karuppiah with an agreement by the latter to re-transfer the same to Abdul Rahiman within seven years on repayment of the money to Karuppiah. At the dates material to this action, Abdul Rahiman had instituted D. C., Kandy, 1,349, against Karuppiah to redeem the mortgaged lands. That case was instituted in August, 1944, and did not terminate until October 16, 1946—see P69. Therefore, during the dates material to the present action, D. C., Kandy, 1,349, was pending. Legal title to the premises was vested in Karuppiah, while Abdul Rahiman was trying to redeem the lands and obtain a conveyance for them in his favour from Karuppiah. About the middle of 1945, i.e., after plaintiff had been supplying timber to the authorities for a few months, he went to India to meet Abdul Rahiman. Plaintiff says that he undertook that journey because he wanted to buy these premises *for himself*. On the other hand, the defendant says that the plaintiff went to India *as his agent*, and that it was he who wanted to purchase the property. It is curious that, if defendant wanted to purchase these lands for himself, he should not have gone himself, but should send the plaintiff who at this time was extremely busy with his timber contracts needing his presence in Ceylon. It is also curious that, if plaintiff was not the principal but only the agent of the defendant, he should have told Abdul Rahiman that he was the purchaser, or that Abdul Rahiman should in his power of attorney P53 of August, 1945, to Ismail, authorize his attorney to convey the property to the plaintiff and not to the defendant. Abdul Rahiman is a neutral witness. There is no reason at all why he should side either with the plaintiff or the defendant. His evidence on

this point is clear and specific. In my opinion, the learned District Judge rightly accepted his evidence. Abdul Rahiman's evidence is that plaintiff came all the way to India and told him that he (plaintiff) came to buy the property. He wanted to buy it for himself. Abdul Rahiman agreed. In that connection he sent a power of attorney to his son-in-law Ismail authorizing him to enter into an agreement with plaintiff to transfer the property. P53 is the power of attorney. When plaintiff was in India he gave Abdul Rahiman Rs. 2,000 by cheque. P52 is the cheque. Abdul Rahiman says that the agreement was to sell the property for Rs. 120,000. Over and above that plaintiff agreed to give Abdul Rahiman Rs. 5,000. Out of that sum of Rs. 5,000 plaintiff gave him Rs. 2,000 by cheque P52. It is plaintiff's private cheque. The power of attorney P53 to Ismail recites "Whereas I have agreed with *A. M. T. Lebbe* (*plaintiff*) to sell and transfer *unto him*" the said premises. If defendant's evidence is true, and plaintiff was merely his agent, there is no reason why Abdul Rahiman should falsely state otherwise, or that plaintiff should give Abdul Rahiman his personal cheque, or that the power of attorney should not have stated that the agreement was to sell to the defendant, or that the attorney should be authorized and empowered to put the deal through with the defendant. It is, therefore, quite clear that plaintiff as a principal and not as defendant's agent was negotiating for the purchase by him of the premises in question. The District Judge has held that the evidence of the defendant is false when he swore that plaintiff acted as his agent. I am unable to hold that the learned Judge erred in reaching that conclusion.

Unfortunately, when the lawyers in Ceylon went into the questions involved they discovered that the matter was not as simple as it had seemed to be. Therefore, Abdul Rahiman had to come to Ceylon. Mr. Ameen, Proctor and Notary Public, Kandy, was entrusted with the matter and on October 19, 1945, three documents were executed, namely, Deed 5,041—P54, Deed 5,042—D28, and the agreement D 25.

P54 recites the relevant facts and by it Abdul Rahiman as assignor transferred to the defendant (the assignee) "all rights, advantages and benefits in and to the action No. L 1,349, and in and to the right to obtain a retransfer together with all rights on agreement No. 2,384, and in and to the properties in the schedule, unto the asignee and his aforesaid absolutely and for ever with full power and authority unto the assignee to have himself added or substituted as party plaintiff to the said action No. L 1,349 aforesaid and to prosecute the said action in such manner as advised ". The consideration for this assignment is stated to be Rs. 120,000. The assignor Abdul Rahiman undertook to warrant and defend the assignee's title to the interests conveyed. The notary's attestation clause in deed P54 shows that of the consideration of Rs. 120,000, a sum of Rs. 60,000 was retained with the assignee (defendant) to deposit in Court in case No. L 1,349, a sum of Rs. 30,000 was acknowledged to have been received previously, and the balance Rs. 30,000 was also retained with the assignee to be paid as agreed upon. One of the attesting witnesses to deed P54 is the plaintiff.

The agreement D25 executed at the same time and place between Abdul Rahiman and the defendant refers to P54. They mutually agreed

that out of the consideration of Rs. 120,000 referred to in P54, the defendant was to deposit Rs. 60,000 to the credit of D. C., Kandy, 1,349 L for the use and benefit of the defendants to that action (Karuppiah). Abdul Rahiman acknowledged receipt of Rs. 30,000 out of the consideration stated in P54 and the parties mutually agreed to various collateral matters such as the manner in which the balance consideration of Rs. 30,000 was to be paid, and what this defendant had to do in connection with the action against Karuppiah.

The other deed D28 executed on the same day is a mortgage, the mortgagor being Abdul Rahim and the mortgagee the defendant, in regard to a sum of Rs. 5,000 lent to Abdul Rahiman. The notary Mr. Ameen in the attestation clause certified " That the full consideration herein was paid in cash in my presence ". The District Judge has held, and I agree with him, that this bond D28 is a separate and independent transaction which has no connection with the transaction embodied in the documents P54 and D25.

D28 was produced only when Abdul Rahiman Saibo was being cross-examined after the plaintiff had given evidence. He, therefore, had no opportunity of explaining D28. Abdul Rahiman Saibo says that he had arranged *with the plaintiff* to borrow Rs. 5,000 on a mortgage on the same day. He says it was the plaintiff who gave him the money, and out of that loan he paid Rs. 1,400 as expenses for the deed. The lands mortgaged in D28 are different lands from the premises dealt with in P54.

Plaintiff's case is that under deed P54 the defendant became the trustee of the plaintiff. The defendant denies this, and further urges that oral evidence cannot be led to vary or contradict the terms of that deed.

I am of opinion that extrinsic evidence is admissible in the circumstances of this case. If the plaintiff's contention is true, then a Court of Equity has the right to examine the transaction independently of what P54 says. S. 5 (3) of the Trusts Ordinance entitles the Court to do so—see *Valliammai Atchi v. Abdul Majeed* [1]. To deny plaintiff the right to do so, would be to enable the defendant to perpetrate a fraud.

Besides the plaintiff and the defendant there are available two neutral and independent witnesses who are in a position to state why, and the circumstances under which P54 came to be executed not in favour of the plaintiff, but of the defendant. One of them has given evidence, namely, Abdul Rahiman. The other is Mr. Ameen, the notary, who must have been interviewed by and instructed by the parties before he drafted the documents. No question of professional privilege arises in this case, because the three parties involved have given evidence, and Abdul Rahiman could have had no possible objection to the notary being called. This is one example how in this case, one side or the other, by failing to call a material witness in regard to matters on which they are in dispute, have rendered difficult the task of the Court in deciding the complicated questions of fact which arise in this case. The learned District Judge on this question whether P54 created a trust held " I

[1] *(1947) 48 N. L. R. 289 (Privy Council).*

find that the defendant had no money of his own to purchase the property described in the plaint, and that it was bought with funds belonging to the plaintiff for the price of Rs. 120,000 ".

Abdul Rahiman's evidence has been accepted by the District Judge. In June, 1945, when plaintiff interviewed Abdul Rahiman in India. the defendant and the plaintiff had not fallen out. According to the plaintiff, they had " looked into accounts in March, 1945 " when the clerk John was engaged. According to the defendant accounts up to March 31, 1945, were looked into in May, 1945. Thereafter, their relationship continued until November 9, 1945, when the plaintiff's contracts with the Services terminated. The parties fell out about that period, that is to say after October 19, when deed P54 was executed. In fact, there is force in Mr. H. V. Perera's contention that, once the defendant had obtained possession of the deed P54 in his name and obtained title to the lands, his attitude towards the plaintiff changed, and led to the animosity and squabbles which developed thereafter. In spite of Mr. Hayley's powerful argument, I am of opinion that when all the facts and circumstances are viewed as a whole, the conclusion is irresistible that it was the plaintiff and not the defendant who wanted to acquire these lands. Why the deed P54 was eventually executed in the name of the defendant may be due to various reasons. One which comes to mind is that should the plaintiff be sued and judgment obtained against him, these properties would not, it may have been hoped, be liable to seizure under the writ of a judgment creditor of the plaintiff. At this date plaintiff trusted the defendant, and that is the reason which he gave to Abdul Rahiman when the latter wanted to know why P54 was being executed in favour of the defendant.

On the facts as found by the learned District Judge, this transaction comes within the provisions of s. 84 of the Trusts Ordinance: " Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee the transferee must hold the property for the benefit of the person paying or providing the consideration "—see *Ranasinghe v. Fernando* [1], *Wijeytilaka v. Ranasinghe* [2], *Sangarapillai v. Kandiah* [3]. The evidence demonstrates that at the date P54 was executed both the plaintiff and the defendant were in accord that the defendant had in his possession more than Rs. 120,000 which had been entrusted to the defendant by the plaintiff. The latter wanted to buy the land in question out of that money, but for some reason acquiesced in by both parties, the actual transfer was made in favour of the defendant, it being understood that. in due course, the defendant would execute a transfer of it in favour of the plaintiff. It is to be noted that a transfer of land by a trustee to the person beneficially interested is liable to a stamp duty of only Rs. 10 under item 23 (4) of the schedule to the Stamp Ordinance. It was open to the defendant, when he realized that the plaintiff was not calling Mr. Ameen, to have called that witness himself, but he failed to do so. Furthermore, there is the clear evidence of Abdul Rahiman who swore: "The deed

[1] *(1922) 24 N. L. R. 170.* [2] *(1931) 32 N. L. R. 306.*
[3] *(1916) 19 N. L. R. 344.*

(P54) was explained to me. I saw it was in favour of the defendant. I said ' My agreement was with plaintiff '. I asked what the matter was? Plaintiff replied. He said he had a business, and it was impossible for him to get the transfer in his name, and he would get a deed from the defendant who was his father-in-law's brother. *The defendant was there then. Defendant said nothing.* I had no prior dealings with the defendant ". That evidence, if true, amounts to an admission by the defendant that what the plaintiff told Abdul Rahiman Saibo is true. There is no reason why Abdul Rahiman Saibo should state what is untrue. The defendant's evidence is entirely different. His story is that Abdul Rahiman Saibo " came and asked me to deposit the money (in D. C., Kandy, 1,349/L) and take over the properties before instituting action. . . . . I agreed to buy those properties for Rs. 90,000 from Abdul Rahiman . . . I sent the plaintiff to India to fix up the final value of the property with Abdul Rahiman Saibo, and the plaintiff paid him Rs. 2,000 on that occasion. I did not pay for the property with plaintiff's money". It is to be observed that this story was not put to Abdul Rahiman Saibo when he was cross-examined by the defendant.

The exhibit P69 shows that defendant was substituted as a plaintiff in D. C., Kandy, 1,349/L on January 29, 1946. On September 5, 1945, the plaintiff (Abdul Rahiman Saibo) moved to deposit Rs. 60,000 to the credit of the case. Before the money was actually deposited, on October 22, 1945. This defendant appearing by his proctor, Mr. Ameen, moved to be substituted or added as a party plaintiff. He also moved for a deposit order for Rs. 60,000. That money was actually deposited on October 22, 1945 (see journal entry showing that Kachcheri Receipt No. 1361/Y5 for that sum had been filed of record). On January 29, 1946, the defendant was added as 2nd plaintiff to that action. On October 16, 1946, the case was settled and the terms of settlement P70 was filed. On the following day the defendant deposited a sum of Rs. 50,000 in Court. Decree was entered on October 23, 1946, and on the same day two sums of Rs. 8,000 and Rs. 102,000 were drawn out of Court. On November 6, 1947, the Secretary of the District Court executed the deed of transfer P55 for the premises in favour of this defendant.

The defendant's story is that he made the first deposit of Rs. 60,000 from his own cash which he had in his house, and that the second deposit of Rs. 50,000 was made up from rents derived from boutiques belonging to his brother, and from cash. The learned District Judge has disbelieved the defendant's story particularly as there was no independent evidence to support it. He holds that the defendant had no money of his own to purchase this property, and that the money utilized was that of the plaintiff which he held in trust for the plaintiff. It is impossible to say that the learned Judge has reached an erroneous conclusion.

The rights of parties to an action are determined as at the date of the action—*Silva v. Fernando*[1], *de Silva v. Goonetileke*[2], *de Silva v. Edirisuriya*[3]. Ordinarily, an action is instituted on the date the plaint has been filed and accepted by the Court. The present action was instituted on November 8,

[1] *(1912) 15 N. L. R. 499 (Privy Council).*
[2] *(1931) 32 N. L. R. at p. 219 (Four Judges).*
[3] *(1940) 41 N. L. R. at p. 463.*

1946. At that date this defendant had no legal title to the property in question. His rights under deed P54 was an incorporeal right or a *chose in action*. He obtained title under the conveyance P55 on November 6, 1947, i.e., nearly one year after the present action had been instituted. This point was not raised by the defendant either at the trial or at the argument in appeal.

The terms of settlement P70 is dated October 16, 1946, i.e., before the present action was filed. Paragraph 1 of P70 says that when certain things were done, the added plaintiff (the defendant) will be declared entitled to the premises . . . . and the defendants (i.e., Karuppiah) will execute a transfer in favour of added-plaintiff when he submits a draft deed for the signature of the defendants. Paragraph 17 of P70 states that this defendant was to be given possession on November 1, 1946. The defendant admitted that he is in possession. Decree was entered in accordance with these terms of settlements on October 23. 1946. I am, therefore, of opinion that although the defendant had not obtained the formal deed P55 in his favour at the date this action was filed, he nevertheless both under the terms of settlement P 70 and under the decree was vested with legal rights as owner of the premises in question—see *Fernando v. Coomaraswamy*[1], *In re Alim*[2]. Therefore at the date the present action was filed—namely, on November 8, 1946, the defendant had rights in the lands in question. He cannot deny and has not attempted to deny that he had such rights. Plaintiff's claim, therefore, is well founded. I agree with the learned District Judge that the defendant holds these lands in trust for the plaintiff.

The rest of the case involves questions of fact. As pointed out by the District Judge, the main dispute centres round the question whether besides making advances by cheque in order to finance the plaintiff's business, the defendant had made cash disbersements to the value of Rs. 187,545, which sum the plaintiff denies.

[His Lordship then discussed the evidence, and continued:]

The learned District Judge on a review of the whole case found on the facts against the defendant. Can a Court of Appeal say that the trial Judge has reached a wrong conclusion? When a case comes up in appeal, the burden lies on the appellant to show that the judgment appealed from is wrong. If all he can show is nicely balanced calculations which lead to the equal possibility of judgment on either the one side or the other being right, he cannot be said to have succeeded—*Suppramainai Chettiar v. Saundaranayagam*[3]. In *Ebrahim Lebbe Marikar v. Arulappapillai*[4] the Privy Council said "The District Judge had the great advantage of hearing the evidence of these two witnesses at first hand and of observing their demeanour in the witness box. Having done so he unhesitatingly accepted the evidence of Phillips in preference to that of the appellant whom he was unable to regard as a witness of truth. In these circumstances, it would be quite impossible for their Lordships to differ from the conclusions at which he arrived, even if . . . . they felt inclined so to do on an examination of the printed evidence before

[1] *(1940) 41 N. L. R. 466.*
[2] *(1921) 3 C. L. Rec. 5.*
[3] *(1947) 48 N. L. R. at p. 161.*
[4] *(1939) 18 C. L. R. 209.*

them''—see also *Naba Kishore Mandal v. Upendra Kishore Mendal*[1], *Powell v. Streatham Manor Nursing Home* [2]. It is no doubt correct that the appellate Court in cases tried by a Judge without a jury is free to reverse the conclusions of the trial Judge if the reasons for his judgment are unsatisfactory—*Watt v. Thomas*[3]—but this should be done in the rarest cases and when the appellate Court is convinced by the plainest considerations that it is justified in holding that the trial Judge has formed a wrong conclusion—*Yuill v. Yuill*[4]. These principles have long been followed in our Courts—see *R. v. Charles*[5] *and Perera v. Peiris*[6].

Not only do I feel that the judgment appealed from cannot be upset on a pure question of fact, but the more the facts are considered the stronger is the conviction that the plaintiff's claim is a just one, and that the defendant's story is false. Having regard to who the defendant is, it is incredible that he should have made large cash advances on plaintiff's account without obtaining a single receipt. The witnesses he called to prove that he made such cash payments gave such improbable evidence that it is not surprising that the trial Judge rejected their evidence. The criticisms of the Judge regarding the book D10 produced by the defendant are justified. The rejection of D10 also involves the rejection of the extract D10E. The claim of the defendant for a sum of Rs. 98,500 for transport, loading and payments to suppliers of timber, &c., is based on no proof beyond the *ipse dixit* of the defendant. The interpolation made in the book D115 produced by the witness Suppramaniam, and the very improbable story told by the witness Siripina about the two post-cards D125 and D126 lead to more than a suspicion that the defendant had been fabricating false evidence to support his case.

Therefore, the finding of the learned District Judge that the evidence has failed to establish that the defendant made cash payments on account of the plaintiff in addition to his payments by cheque is justified. The counsel for the defendant produced the statement D178 showing the financial position according to the respective cases of the plaintiff and the defendant. Counsel for the plaintiff in his address at the close of the case has relied on D178. Therefore the learned Judge was justified in acting on that statement. I see no reason to disturb the findings of the District Judge on the figures he has arrived at.

Plaintiff has filed a cross appeal. He submits that the decree entered in this case should be varied by ordering the defendant to convey and deliver possession of the Nawalapitiya property to the plaintiff. There was a prayer to this effect in the plaint. I hold that the decree should be amended accordingly. Subject to this variation, the judgment and decree appealed against should be affirmed with costs.

I greatly regret the delay which has occurred in delivering this judgment. This was due to causes entirely beyond our control, particularly as I had to leave for Jaffna on circuit immediately after the argument of this appeal was concluded.

GUNASEKERA J. agreed in a separate judgment.

Appeal dismissed.

[1] *(1922) A. I. R. P. C. at p. 40.*
[2] *(1935) A. C. 243.*
[3] *(1947) A. C. 484.*
[4] *(1945) P. 15.*
[5] *(1907) A. C. R. 125.*
[6] *(1946) 47 N. L. R. at p. 59*