[PRIVY COUNCIL.] 1920.

Present: Viscount Haldane, Lord Buckmaster, and Lord Atkinson.

ARUNASALAM CHETTY *v.* SOMASUNDRAM CHETTY.

D. C. Jaffna, 7,668.

Conveyance to a Chetty with a firm name annexed—Conveyance as agent of the firm—The trust created thereby is not constructive trust, but express trust—Prescription.

Where a property was conveyed to a Chetty with the firm name R. M. A. R. A. R., it was held that the property was transferred to him as agent of the firm, and not in his private capacity. As the Chetty to whom the property was so conveyed was express trustee and not constructive trustee, it was not open to him to plead prescription as against the other members of the firm.

"An express trust can only arise between the *cestui que* trust and his trustee. A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour."

THE facts appear from the judgment of the Supreme Court reported in *20 N. L. R. 321.*

March 3, 1920. Delivered by LORD BUCKMASTER:—

The appellant and the first respondent are the heirs at law of one Arunasalam Chetty, who died intestate in January, 1901. Arunasalam Chetty had two sons, the appellant and Ramanathan Chetty, who predeceased his father leaving an only son, the first respondent. The second respondent is the administrator of the estate of Arunasalam Chetty.

1920.

LORD BUCKMASTER.

Arunasalam Chetty v. Somasundram Chetty

The action out of which this appeal has arisen was instituted in the District Court of Jaffna by the first respondent on December 16, 1910, the claim being for one-half of certain lands and premises of which the appellant was in possession, an order for accounts and payment of the rents, and transfer of the land.

The real and, in substance, the only question raised in the action was whether the appellant was beneficially entitled to the property, or whether he had acquired it as trustee for his father. The second respondent was added as plaintiff by an order made by the District Judge on January 8, 1918, on the application of the plaintiff, owing to the defendant having alleged in his amended answer that the plaintiff could not maintain the suit in the absence of the administractor. This, however, did not remove but rather added to the plaintiff's difficulties, as a variety of technical questions were then urged by the appellant both against the constitution of the suit with the administrator and against the claim that the administrator could bring.

All these points have been decided adversely to the appellant, both in the District Court and in the Supreme Court, and it was found impossible to urge them further on the hearing of this appeal. Nor can the appellant any longer contest that these lands originally came into his possession as trustee for Arunasalam Chetty. In a dispute between the same parties raising the same issue with regard to lands similarly held, it was decided by the learned Judge who tried the case, by the Supreme Court, and by this Board that there was abundant evidence to establish his fiduciary relationship, and this reduced the appellant's case to the simple question of whether or no he can establish under the provision of the Prescription Ordinance Act of 1871 that he was in possession for ten years (the necessary statutory period) before the commencement of the suit. It is clear he took possession under a deed of transfer of May 1, 1900, and, as already stated, the suit was commenced in December, 1910. But section 14 of the Act provides that if at the time when the right of any person to sue for the recovery of any redeemable property shall have first occurred he has been absent beyond the sea, then, during such absence, the possession shall not be taken as giving the possessor any such right or title.

It is admitted that the respondent was, in fact, absent during the whole period, and also that, though absent himself, his agent, one Raman Chetty, received on his behalf rents and profits from the lands between the years 1901 and 1908, so that, in either view, the defence could not avail. Finally, it is to their Lordships plain that the appellant held these lands, not as constructive, but as express trustee, to whom the statute admittedly does not apply. The property was originally acquired by Arunasalam Chetty through his agent Subramanian Chetty, and by the latter transferred to the appellant by deed of May 1, 1900.

Now Arunasalam Chetty traded under a firm name of which the letters R. M. A. R. A. R. were the descriptive title. They were not the initial letters of the name of Subramanian Chetty nor of the appellant, but the conveyance was made in the first instance to Subramanian Chetty with this description, and, with the same description, it was transferred to the appellant. Upon the face, therefore, of the document of title there is the clear statement that the appellant was the agent of the firm.

The distinction between an express and a constructive trustee is clearly stated by Lord Justice Bowen in *Soar v. Ashwell* [1] in these words:—

> An express trust can only arise between the *cestui que* trust and his trustee. A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour.

It is plain, therefore, that the defendant never held the property as a constructive trustee. The trust sought to be enforced arose directly between him and Arunasalam Chetty, through whom the plaintiff claimed, and although it would be possible to show, even if the descriptive character of the firm were omitted from the deed, that the fact of the purchase being made with the money of Arunasalam Chetty created a resulting trust in his favour, yet this is unnecessary where the plain character of the fiduciary relationship is established upon the face of the document of title, and there is no evidence to contradict the necessary inference.

In their Lordships' opinion there has never been any justification whatever for the appellant's conduct in excluding the first respondent from his just share in the estate, and it is greatly to be regretted, in these circumstances, that the determination of this dispute, upon which apparently there has never been the slightest variation of judicial opinion, should have occasioned such costly and prolonged litigation. Their Lordships will humbly advise His Majesty that this appeal should be dismissed, with costs.

Appeal dismissed.

[1] *C. A. (1893) 2 Q. B. 390, at p. 396.*