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Present : Lyall Grant and Akbar JJ.

WIJEYETILEKE *v.* RANASINGHE

147—D. C. Ratnapura, 4,573

Statute of Frauds—Agreement to transfer lease of Crown land—Trust—Covenant against assignment—Ordinance No. 7 of 1840, s. 2.

Where a writing, which was not notarially executed, was expressed in the following terms :—

" I, the undersigned D. E. R., have this day received from A. W. the sum of Rupees Six hundred and Thirty-eight, agreeing to give him a half share of all the rights that I have secured from Government in leasing the right to collect tea seeds from Miyanowita estate for a period of 10 years,"—

Held, that the agreement was of no force or avail in law to transfer a half share of the leasehold rights mentioned.

Held also, that where one of the covenants of the aforesaid lease was that the rights and obligations of the lessee should not be transferred or assigned without the written consent of the Tender Board, the plaintiff was not entitled to ask for specific performance of the agreement to transfer the leasehold rights.

Where a transaction between a Proctor and his client is impugned on the ground of undue influence, the principle stated in section 111 of the Evidence Ordinance applies so long as the confidence arising from that relationship continues, even though that relationship has actually terminated.

THE plaintiff, who is a Proctor practising in Ratnapura, sued the defendant for a declaration that he was entitled to the half share of the lease of a Crown land taken in the name of the defendant. The plaintiff alleged that the defendant agreed to tender for the lease, but the venture should be a joint one and the profits should be shared equally between them. According to plaintiff, the defendant received a sum of Rs. 638 in cash from him as his half share of the money deposited by the defendant in the Kachcheri as rent for the first year of the lease. At the same time the following document was drawn up :—

" I, the undersigned Don Edmund Ranasinghe of Rakwana, have this day received from Mr. Arthur Wijetileke the sum of Rupees Six hundred and Thirty-eight (Rs. 638), agreeing to give him a half share of all the rights that I have secured from Government in leasing the right to collect tea seeds from Miyanowita estate for a period of 10 years. "

The defendant's case was that the receipt was given after he had deposited the full amount at the Kachcheri, and that in giving the receipt he yielded to the importunity of the plaintiff. He raised pleas of undue influence and want of consideration in attacking the validity of the document.

The learned District Judge gave judgment for the plaintiff.

H. H. Bartholomeusz (with *A. E. Keunemann* and *Choksy*), *for* defendant, appellant.

R. L. Pereira, K.C. (with *de Zoysa, K.C., E. G. P. Jayetilleke, N. E. Weerasooria*, and *E. Navaratnam*), for plaintiff, respondent.

April 30, 1929. LYALL GRANT J.—

This is an appeal from the District Court of Ratnapura. The plaintiff sought (1) to have it declared that the defendant was a trustee for him in respect of the half share of a certain Crown lease. He asked (2) for an accounting and payment of half the nett income arising out of the working of the lease. He further asked the Court (3) to order the defendant, on the written consent of the Tender Board being obtained, to execute an absolute conveyance and assignment of a half share of the leasehold, or if such consent were not obtained, a conveyance and assignment as between the plaintiff and the defendant.

Judgment was given for the plaintiff as prayed for, and from this judgment the defendant appeals.

Certain facts are common ground between the parties, but on other material particulars there is considerable discrepancy between the accounts given by the plaintiff and the defendant respectively.

On these points the learned District Judge has accepted the plaintiff's version.

It is common ground between the parties that in February, 1924, the Forest Department advertised in the *Gazette* a certain piece of land called Miyanaowita as open to tenders for a lease for the purposes of cultivating tea seed, that the defendant in the same month tendered for a 10 years' lease of the land, that his tender was accepted, that he obtained the lease, and proceeded to manage the land.

It is also agreed that the defendant obtained the two sureties required and secured their signatures to the tender form. Further it is a matter of agreement that the defendant brought the tender form to the plaintiff's office to be filled up by the plaintiff and that the amount of the tender is in the plaintiff's handwriting. It is also agreed that on April 2 the defendant paid to the Forest Department the first year's rent and also that all other charges were paid by him. On the other hand, the defendant admits that on the same date

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(April 2) he was paid by the plaintiff Rs. 638, being half the first year's rent and expenses of obtaining the lease, and that he gave the receipt P 15, which runs as follows :—

" Ratnapura, April 2, 1924.

" I, the undersigned Don Edmund Ranasinghe of Rakwana, have this day received from Mr. Arthur Wijetileke the sum of Rupees Six hundred and Thirty-eight (Rs. 638), agreeing to give him a half share of all the right that I have secured from Government in leasing the right to collect tea seeds from Miyanaowita estate for the period of 10 years.

" Signed D. E. RANASINGHE.

(On a 6 cent stamp.) "

It is also substantially agreed between the parties that the plaintiff had during a number of years prior to this transaction acted in various legal matters, including a number of Court cases, on behalf of the defendant and members of the defendant's family.

The plaintiff however does not admit that on April 2, 1924, he was the defendant's legal adviser or that he acted as such in the transaction.

The lease which the defendant obtained from the Crown contains a prohibition against assignment in the following terms :—

(2) " That the lessee's obligations and rights under the lease shall not be assigned or otherwise transferred or sublet without the consent or authority of the Tender Board previously obtained in writing. "

The defendant's explanation of how he came to take the lease is as follows :—In 1923, Miyanaowita, a tea seed-producing land, was lying vacant, a previous lease having expired.

The defendant obtained an introduction to the District Forest Officer and told him he wished to lease it. The District Forest Officer promised to let him know if the land was to be leased. In February, 1924, he received by post a copy of the *Gazette* notice calling for tenders. On this he obtained a tender form, which he took to the plaintiff to be filled up. After his tender was successful he paid the amount on April 2 by a cheque which he had obtained from a Chetty in Colombo.

Up to this time, according to the defendant, no suggestion had been made by the plaintiff that he should have an interest in the lease. The defendant says that on the afternoon of April 2, after paying the rent and charges, he went to the plaintiff's office to pay him his fee (Rs. 10) for his assistance in drawing up the tender. He asserts that the plaintiff then begged for a share in the benefits

of the lease, recapitulating all his services on previous occasions, particularly in connection with one case, that he pressed Rs. 638 on him, and finally dictated the receipt and agreement P 15.

The plaintiff's story is that in 1923 he was contemplating opening certain land in tea and found that the cost of tea seed was heavy, that he happened to see the *Government Gazette* notice about Miyanaowita, and on February 14 happened to go to Rakwana, where he met the defendant at the resthouse. The plaintiff then told the defendant about the advertisement and said he wanted to make a tender, and asked the defendant to make inquiries. His impression at the time was that the defendant knew nothing about the advertisement, and he says the defendant made no suggestion that he would like a share. The defendant obtained the information and gave it to the plaintiff. At the subsequent discussion as to the price to be offered the plaintiff suggested to the defendant that they should go half shares and that the defendant should take the lease in his own name.

In regard to the payment of Rs. 638, he says that the defendant came to him on the morning of April 2 and told him that the consideration had to be paid that day. The plaintiff then paid his half share in notes as he thought there would be trouble in getting the Kachcheri to accept a cheque. The defendant gave him the receipt P 15, which was not dictated by the plaintiff.

The learned District Judge accepts the plaintiff's story *in toto*, but there are various important features in the case which he has omitted to consider. He does not deal with the defendant's evidence in regard to the part he played in having the land put up to tender. That evidence is amply corroborated by the Forest Officer and by Mr. Ekanayake.

This is very important evidence in view of the plaintiff's suggestion that the original proposal came from him and that the defendant was glad to accept whatever the plaintiff chose to give him. It supports the defendant's story and casts grave doubts upon the truth of the account given by the plaintiff. Nor has the District Judge adverted to the fact that the whole consideration for the lease was paid by a Chetty's cheque; a fact which negatives the plaintiff's suggestion that he gave the defendant half the price in notes in order to enable him to make the payment at the Kachcheri.

The learned District Judge has accepted the plaintiff's story of meeting the defendant at Rakwana resthouse as against the defendant's denial, in spite of the fact that the story is entirely uncorroborated and that the defendant has led evidence which casts grave doubts on its truth.

The resthouse-keeper has shown that, although on other dates the plaintiff's presence at the resthouse has been noted, there is no such entry on that date or in that month. As there is a legal

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obligation on the resthouse-keeper to insist on an entry in his book by every visitor to the resthouse, the non-existence of such entry at any rate raises a presumption unfavourable to the plaintiff. But that is not all. The plaintiff says he travelled on February 14 from Ratnapura to Rakwana—a distance of about 28 miles—for the purpose of appearing in a case, the number of which he gave, which was to be tried there on the 15th. The defendant has produced the Police Court records both of the Ratnapura and Rakwana Police Courts which show that the case was tried at Ratnapura on that date.

It is clear from the judgment that the learned District Judge attaches great weight to the evidence of the plaintiff from his personal knowledge of him as a pleader in his Court.

This personal knowledge may to some extent have diverted the mind of the learned District Judge from the probabilities of the case and the consideration of the weight of the evidence adduced on behalf of the defendant. One must add, however, that the evidence given by the defendant in respect of certain subsequent transactions which have little bearing on the relevant facts is such as to disincline one to believe his unsupported testimony.

In my view the plaintiff has failed to prove his story and up to a point the probabilities are strongly in favour of the account given by the defendant.

Even accepting the plaintiff's story, it is doubtful whether he can succeed.

It is quite clear that he is not entitled to the remedy of specific performance, in view of the prohibition against assignment contained in the lease.

The Court will not compel the defendant to fulfil a contract of assignment when the effect of fulfilment would be to work a forfeiture of the lease. (*Fry: Specific Performance, s. 958; Lewis v. Bond* [1]; *Gregory v. Wilson.* [2])

I do not understand what is meant by the plaintiff's demand for a conveyance or assignment as between himself and the defendant as distinguished from an absolute conveyance and assignment.

The plaintiff however seeks a declaration that the defendant was a trustee for him in respect of a half share. For evidence of the alleged trust he must rely on P 15, which by section 92 of the Evidence Ordinance is the only admissible evidence of the contract between the parties.

[1] *18 Beav 85.* [2] *9 Hare 687.*

The plaintiff reads this document as an undertaking to give him a joint lease and he relies upon section 84 of the Trusts Ordinance, which reads as follows:—

> "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."

I do not think section 84 can be applied to the case of a lease with a prohibition of assignment. The consideration for a lease is much more than the payment of the first year's rent. It includes an undertaking, not only to pay the rent in subsequent years as it falls due, but also to fulfil a number of personal obligations. It seems likely that the section is intended to apply to an out-and-out conveyance of land.

P 15 appears to me to be nothing more or less than an agreement to transfer an interest in immovable property, and not being notarially executed to be of no force or avail in law by section 2 of Ordinance No. 7 of 1840.

It is for the same reason equally unavailing to prove a trust by section 5 of the Trusts Ordinance, No. 9 of 1917

No doubt, in fact, the defendant did agree to give the plaintiff a half interest in the lease, but that is simply an agreement which the law says is void unless proved in a certain way, and it is not so proved.

It is, however, argued for the plaintiff that the payment of part of the price creates a trust. On this point I hold on the facts that the plaintiff did not pay part of the price. The price was paid from an independent source—by a cheque drawn by a Chetty—and the money received by the defendant from the plaintiff was not appropriated to the payment.

Even if one accepts the plaintiff's evidence on this point, I do not think he has proved a trust by payment of the price. He merely advanced money to enable the defendant to get a lease in the defendant's own name.

The whole alleged trust lies in the agreement contained in P 15, and for the reasons previously set out, I do not think this agreement can be admitted to proof.

The fact that some consideration may have been paid for this promise does not to my mind validate an agreement which is by law void *ab initio*. In this connection I would refer to the case of *Adicappa Chetty v. Caruppen Chetty*.[1]

[1] *22 N. L. R. 417.*

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Even if the plaintiff were to establish a trust, I think he would fail on the ground of having exercised undue influence. It is quite clear that the plaintiff had for years acted as legal adviser to the defendant and members of his family and I hold that he acted as such in the present transaction. It was on the ground of legal services rendered that the plaintiff thought that the defendant was under an obligation to him. Although the defendant does not appear to have treated the plaintiff with complete confidence, I think that the plaintiff was in a position to exercise undue influence upon the defendant to obtain from him the document P 15, and that he did in fact obtain the document by the use of such influence.

The appeal is allowed and the plaintiff's action dismissed with costs in both Courts.

AKBAR J.—

The plaintiff, who is a Proctor of over 20 years' standing, practising in the Ratnapura District Court, sued the defendant in this case for a declaration that the defendant is a trustee for the plaintiff in respect of a half share of a lease of a Crown land called Miyanaowita. The lease is admittedly in the name of the defendant as the sole lessee, but the plaintiff's case is that, on his suggestion on some date in March, 1924, according to the plaint, which was later altered to February, 1924, and finally fixed as February 14, 1924, the defendant agreed to tender for the lease of this land, the agreement being that the lease should be taken in defendant's name, but that the venture should be a joint one and that the profits should be shared equally between them. Thereafter the tender form was admittedly drawn up by the plaintiff wherein the defendant is given as tendering for the lease on February 26, 1924, at the rate of Rs. 1,206 annual rental for 10 years. It may be noted by me that the two sureties who were required to guarantee that the tenderer would perform the conditions of the lease were procured by the defendant.

According to the plaintiff's version the defendant informed the plaintiff some time later that the tender was accepted by the Government and that the rent for the first year, namely, Rs. 1,206 together with a deposit of Rs. 50, had to be deposited on April 2, 1924. On April 2, 1924, the defendant came to the plaintiff early in the morning and recovered Rs. 638 in cash from him, being the half of Rs. 1,206 and Rs. 50 and an additional Rs. 20 which had been previously paid by the defendant when he got the tender form from the Government office. It was on that occasion that the receipt (P 15) was written out by the defendant and given to the plaintiff. Later in the day the defendant paid the full sum to the Government Agent, Ratnapura, not, let it be noted, in cash but by cheque which, according to the defendant, he had obtained from a Chetty

in Colombo, S. P. L. K. Karuppen Chetty by name, with whom he had certain dealings. This document (P 15) is in the following terms :—

"I, the undersigned Don Edmund Ranasinghe of Rakwana, have this day received from Mr. Arthur Wijetileke the sum of Rupees Six hundred and Thirty-eight (Rs. 638), agreeing to give him a half share of all the rights that I have secured from Government in leasing the right to collect tea seeds from Miyanaowita estate for the period of 10 years."

"Sgd. D. E. RANASINGHE.
(On 6-cent stamp.)"

As an agreement to transfer a half share of leasehold rights it is of no force or avail in law under section 2 of the Ordinance of Frauds, No. 7 of 1840.

The drastic nature of this section has been well explained in a series of cases, notably in two of them which went before the Privy Council (see: *Adicappa Chetty v. Caruppen Chetty*[1] and *Arsekularatne v. Perera*[2]), and the judgment of the Privy Council in the case of *Arsekularatne v. Perera.*[3] Unlike the case of *Arsekularatne v. Perera* (*supra*), the plaintiff here, as I shall explain later, asks for an accounting incidentally in his claim for specific performance of an invalid agreement.

The plaintiff, who is a lawyer of considerable experience, hopes to get over this difficulty by proving a constructive trust and relies on sections 84, 90, 94, and 96 of the Trusts Ordinance, No. 9 of 1917, and the leading local cases of *Gould v. Innasitamby*[4] and *Ohlmus v. Ohlmus*,[5] which were decided before the Trusts Ordinance. He seeks to prove this trust by the proof of two facts which appear to be material to his case, viz., that the original idea to tender for this lease emanated from his brain as he was in want of tea seed to plant up his jungle land of "a hundred odd acres", and that, indeed, he was generous and liberal in offering a half share of the lease to the defendant. The second fact the plaintiff attempts to prove is that he paid a half share of the first year's rent and the initial expenses of the tender before the full money was deposited on April 2, 1924.

On both these questions of facts the trial Judge has held strongly in favour of the plaintiff.

In weighing the degree of credence which should be attached to a witness's testimony there are, of course, advantages and disadvantages when the witness gives evidence before a Judge who knows him. The Judge may, of course, know the character and reputation of the witness by experience, but there is the danger of

[1] *(1921) 22 N. L. R. 417*
[2] *(1926) 28 N. L. R. 1.*
[3] *(1927) 29 N. L. R. 342.*
[4] *(1904) 9 N. L. R. 177.*
[5] *(1906) 9 N. L. R. 183.*

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an unconscious bias in favour of such a witness, especially when he is a tried and experienced lawyer who often appears before him. In this state of affairs I think it is my duty to examine the evidence of the plaintiff on these two points with some minuteness, to see if the trial Judge's conclusions on these two material points are correct. In his letter on August 19, 1926 (P 19), to the Tender Board, the plaintiff wrote saying that it was in February or March, 1924, that he and the defendant agreed to take the lease jointly. In paragraph 2 of his plaint he says that it was in or about March, 1924, which was altered to February, 1924, at the trial as he was " put upon inquiry " when the date of the tender was given as February 22, 1924, in the answer. In his evidence-in-chief on July 19, 1927, he stated that it was at Rakwana (a town which is about 28 miles from Ratnapura and over which there is a Police Court and a Court of Requests held on certain days of the week, concurrently with the Police Court and Court of Requests of Ratnapura) that he had first broached the subject to the defendant. He had, according to his recollection, gone there professionally and met the defendant at the resthouse. It was on September 9, 1927, in cross-examination for the first time that the plaintiff fixed by reference to his diary the case in connection with which he went to Rakwana (P.C. Ratnapura, 25,917). The plaintiff was Counsel for the accused in that case and the defendant was surety or bailsman for the accused. The plaintiff says that he went to Rakwana thinking that the Police Court case would be taken up there, but that in fact it was not taken up. He finally fixed the date later in his cross-examination as February 14, 1924, as the date on which he was at Rakwana because the Police Court case was fixed for February 15.

The trial in this case was resumed on September 10, 1927, when the resthouse-keeper gave evidence to prove that the plaintiff's name did not appear in the resthouse book for the months of January, February, March, or April, 1924. All visitors have to enter their names in the book, but it is, of course, possible, as the District Judge says, for a mistake to have occurred on February 14 in the resthouse book, but the District Judge is wrong in stating that the Counsel for the defendant assumed that the plaintiff had spent the night at Rakwana and that there was no evidence to support such an assumption. The evidence of the plaintiff recorded at the bottom of page 137 and the top of page 138 warrants this assumption.

After part of the examination-in-chief of the defendant, the case was postponed from September 10 to October 21, 1927, and in the meantime the defendant naturally strained every nerve to get documentary evidence to disprove the plaintiff's statement that he was at Rakwana on February 14 and 15. He produced a series of documents (D 26 to D 30) showing not only that the case

P. C. Ratnapura, No. 25,917, was called in Ratnàpura before the additional Police Magistrate, but that the case does not figure at all in the Rakwana Court roll and does appear in the Ratnapura Court roll. Further, the documents show that the plaintiff appeared in Ratnapura in D. C. Ratnapura, cases Nos. 4,061 and 3,981, on February 15, 1924. My difficulty has been increased by the District Judge's omission to comment on the evidence furnished by these exhibits (D 26 to D 30).

It will be remembered that the plaintiff's case was that he was in want of tea seeds for the opening up of his jungle land and that the defendant was agreeably surprised when he made the generous offer of a half share. Indeed the plaintiff stated that the defendant on February 14 gave him no indication that he had heard of the Government notification calling for tenders. It is a curious commentary on his need of tea seeds when he now admits that he has planted this land up with rubber (see his evidence recorded at pages 95, 97, and 98 and his explanation of the document D 1).

The defendant has, by calling the witnesses E. W. Ekanayake and D. W. Abeygoonesekera, corroborated by documentary evidence, proved beyond any doubt that the defendant had interested himself in Miyanaowita and thought of tendering for the lease in December, 1923. The District Judge has completely ignored the evidence of these witnesses and the documents produced by them.

Now I come to the events of April 2, 1924. The two versions are so diametrically opposed, but the document speaks for itself. The words of the receipt flatly contradict the plaintiff's case. It is an agreement " to give the plaintiff a half share of all the rights I have secured from Government in leasing the right to collect tea seeds from Miyanaowita estate for the period of 10 years. " The word " secured " seems to corroborate the defendant's story that the receipt was given after the deposit of the full money at the Kachcheri. But in coming to a decision on this point, the important factor, to my mind, is the fact that the payment was made by a cheque (D 3) of Karuppen Chetty for the sum of Rs. 1,256 a fact which has not been taken account of by the District Judge.

The plaintiff's case is that the receipt, which is in the defendant's handwriting, was written by the defendant and he did not look at the terms of the receipt; the defendant's version is that it was dictated by the plaintiff. The plaintiff admitted that he was told by the defendant some days before April 2 that the money had to be paid, and yet he had to make up Rs. 638 by ransacking several almirahs. His explanation as to why he did not give a cheque does not seem to be very convincing. The plaintiff admitted that he was entirely ignorant of the fact that the defendant had a cheque for the whole amount in his pocket and meant to make payment by this cheque. If the plaintiff's case is true, then the defendant must

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have made up his mind to trick the plaintiff from the beginning, and plaintiff in his evidence made an admission to this effect (see his evidence at the bottom of page 131 and the top of page 132). And yet the defendant sent him the accounts (see P 2, P 3, and P 4).

The defendant's case, on the other hand, is that he gave receipt (P 15) after he had deposited the full amount at the Kachcheri when he succumbed to the plaintiff's importunity, and he has raised various pleas in law attacking this receipt as invalid on the ground of undue influence, want of consideration, &c., which are all set forth in the issues on which the trial proceeded. There is no doubt that the plaintiff was the Proctor for the defendant and his relatives for many years past (see D 10, D 11, D 16, D 17, D 12, D 14, D 15, D 8, D 9, D 13, D 7, D 19, and D 25).

The letters P 9 and P 11 seem to corroborate the letters quoted above.

Even if we ignore the definite evidence of the defendant that even in this transaction the plaintiff acted as his solicitor, yet the rule stated in *Demerera Beauxite Co., Ltd., v. Louisa Hubbard and others* [1] by the Privy Council would, I think, be applicable here, viz., that although the relationship of a solicitor and client, in a strict sense, has terminated, the principle applies so long as the confidence naturally arising from that relationship is proved, or may be presumed to continue. But before I proceed to discuss the various issues of law which arise in this case, it might be simpler to state my conclusion on the facts, especially on the two points sought to be proved by the plaintiff.

There are two other facts which I should mention here. The circumstances under which the plaintiff came to obtain the gemming lease (D 31) do not seem to be satisfactory, nor the transactions which led to his buying a land 114 acres in extent which was sold on order of Court in a partition case in which he was a Proctor for some of the parties and in which some of the parties had directly petitioned the District Judge to order a partition and not a sale (D 32 and P 31).

As stated in Halsbury, Vol. 26, p. 750, para. 1244, "a solicitor who represents any of the parties in an action in which property is sold under an order of Court cannot bid for the property without the leave of the Court." In the result, property, which was valued at over Rs. 14,000, was bought by the plaintiff for Rs. 7,200.

In arriving at a decision on the facts, it should be borne in mind that the value of the leasehold rights has gone up enormously owing to the prohibition by the Government of the importation of tea seeds from India. The value of the lease for 10 years to Government

[1] *(1923) I A. C. 673.*

is Rs. 12,060, but it is valued by the plaintiff at Rs. 200,000 in the plaint, and Rs. 50,000 in the answer. This unexpected inflation accounts, I think, for the many inconsistencies in the conduct of not only the plaintiff but also of the defendant. In spite of the findings of the District Judge, I am forced to the conclusion that the version of the defendant as regards the two salient facts, viz., the circumstances which led to his making the tender and his signing the receipt, is the truth.

Up to and including April 2, 1924, there is a remarkable contradiction between the plaintiff's evidence and the relevant documents produced in the case. It may be that the defendant has exaggerated the events that took place when the receipt was granted on April 2, but I have no doubt in my mind that it was after the money was deposited by the defendant that he agreed to allow the plaintiff to participate in the lease. It may well be that, had the price of tea seeds not gone up phenomenally, he would have kept his word as plighted in P 15. There would be nothing remarkable in this because, according to the plaintiff himself, he did not anticipate a profit of more than Rs. 500 or Rs. 600 a year for each of them. But when the price went up the defendant, ignorant of his legal position under P 15, began to adopt shifty and devious tactics. This explains, I think, why he temporized with the plaintiff, why he sent dubious accounts when pressed by the plaintiff (P 2 to P 4), the genesis of letters (P 6 to P 8), and why his evidence is contradictory to that of Mr. C. F. Dharmaratne, and why he gave the deed of lease to the plaintiff. But it also equally satisfactorily explains the efforts made by the plaintiff to wring out a trust from the document P 15, by the compilation of letters P 9, P 10, and P 11, especially P 11. I refuse to believe that the plaintiff's main object "in putting the defendant in Court" was "to publish to the world as much as I can what you are as a warning to them against you". One is sceptical of such remarkable altruism and consideration for the rights of possible strangers who might be deluded by the future machinations of the defendant, especially when such feelings prompt the plaintiff to activities which are directed towards the recovery of property which has gone up in price from Rs. 5,030 to Rs. 100,000.

Holding as I do that the plaintiff has failed to prove his two props to establish the constructive trust, his whole case fails. If the plaintiff had succeeded in proving that he had paid the Rs. 638 on the morning of April 2, 1924, and that he had engaged the defendant for the purpose of obtaining the lease on the understanding that it was to be held in trust for himself and the defendant jointly, his case would probably be covered by section 90 and the illustration (*f*) of the Trusts Ordinance, No. 9 of 1917, and probably by section 84 of that Ordinance.

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It is true that the consideration for the lease was not merely the sum of Rs. 1,256 deposited on April 2, 1924, but also the obligation to perform the covenants under the lease. But on the analogy of the cases *Re Lulham : Brinton v. Lulham* [1] and *Ex parte Grace* [2] the plaintiff would be entitled to succeed. But as I hold that the plaintiff has failed to prove the facts that are material, his case must rest on P 15, and as this document is not a notarial document he cannot succeed in enforcing the agreement (see *Amarasekera v. Rajapakse* [3] and the Privy Council case *Adicappa Chetty v. Caruppen Chetty* (*supra*)). Further, the plaintiff will have to discharge a heavy burden under section 111 of the Evidence Ordinance, No. 14 of 1895.

The remarks of the Judges in *Moody v. Cox and Hatt* [4], *Wright v. Carter* [5], and the local case of *Soyza v. Soyza* [6] will, I think, apply even if we accept the plaintiff's version as true. They will apply because the plaintiff did not explain, on his own showing, to the defendant that he was in want of the tea seeds for the opening up of his own land. Further, the evidence shows that the plaintiff made no effort to get sureties to the tender, but allowed the defendant to do this part of the work. The defendant was left to his own resources to find the necessary money to work Miyanaowita estate and to manage and work the estate single-handed without any extra recompense for his trouble in managing and working it. The plaintiff pays a half of one year's rent and he says he is entitled to share the profits for the full 10 years. The inequity of the whole position becomes clear if the lease had turned out a failure or if the defendant had broken any of the covenants of the lease. The sole person who would have to suffer the loss would be the defendant; even the slender thread on which the defendant might have relied, receipt P 15, was in the plaintiff's possession and could have been easily destroyed without anyone in the world being the wiser.

There is another ground on which the plaintiff, in my opinion, is bound to fail, even if we accept the plaintiff's case at its full face value. The District Judge has given judgment in favour of the plaintiff "as prayed for with costs". It will be seen from the plaint that the plaintiff claims (*a*) for a declaration of trust in respect of a half share of the lease.

(*b*) For a full and correct account and that the defendant be ordered to pay a half share of the sum found to be the nett income of the leasehold rights.

(*c*) That the defendant be ordered, on the written consent of the Government being obtained, to execute a conveyance of this half share or, if this consent is not obtained, "a conveyance and assignment between the plaintiff and the defendant".

[1] *53 L. T. 9.*
[2] *1 Bosanquet and Puller 377.*
[3] *(1911) 14 N. L. R. 110.*
[4] *(1917) 2 Ch. 71.*
[5] *(1903) 1 Ch. 27.*
[6] *(1916) 19 N. L. R. 314.*

It will be seen from the lease P 14, paragraphs 2 and 13, that one of the lessee's covenants is that his obligations and rights under the lease are not to be assigned or otherwise transferred or sublet without the written consent of the Tender Board. Fry, in the 6th edition of his book, p. 450, para. 958, says that " it would be idle for the Court to compel a grant of that which if granted would have been forfeited to make a legal relation which, if created, would be immediately dissoluble ". (See *Lewis v. Bond* [1] and *Gregory v. Wilson* [2].) The plaintiff is here asking the Court to do the very thing which Fry says a Court will not do. The total effect of the plaintiff's prayer is to ask for specific performance of something which the defendant is prohibited from doing under the lease.

I do not think the case of *Gentle v. Faulkner* [3] will apply, as there the covenant was " not to assign or underlet the demised premises ", but here it is wider, and prohibits the lessee from assigning or otherwise transferring his obligations and rights under the lease ; and clearly the rights of the lessee will include the equitable rights of enjoying half the income derived from the lease.

The plaintiff's prayer for accounting is not for past accounts, but for all accounts for the full 10 years of the lease, and is ancillary to the other parts of his prayer. Nor do I think that the case of *Lloyd v. Crispe* [4] will apply, because that was an action to recover a deposit of £50, and the remarks of Mansfield C.J. should be borne in mind. As regards the statement of law in that case, that it was the business of the defendant to get the consent of the lessor, there is no evidence here to prove that the defendant agreed to do so. Moreover, such a contract would require a notarial agreement to render it valid.

For the reasons stated above, I would set aside the judgment and dismiss plaintiff's action with costs in this Court and the Court below.

Appeal allowed.

[1] *18 Beav. 85.*
[2] *9 Hare 687.*
[3] *32 L. T. 708.*
[4] *5 Taunton 249.*