

1944

*Present: Soertsz and Wijeyewardene JJ.*

FERNANDO, Appellant, and JAYASEKERA, Respondent.

284—D. C. Kalutara, 23,345.

*Contract—Agreement to re-transfer land by vendee—Payment of purchase price within stated period—Valid tender essential to cause of action.*

Where the defendant purchased a land from the plaintiff subject to an agreement to reconvey the land on payment of the purchase price within a stated period,—

*Held*, (in an action by plaintiff for a re-transfer), that valid tender of the sum within the period is essential to plaintiff's cause of action.

**A** PPEAL from a judgment of the District Judge of Kalutara.

*L. A. Rajapakse*, for plaintiff, appellant.

*E. B. Wikremanayake* (with him *H. Wanigatunge*), for defendant, respondent.

*Cur. adv. vult.*

May 22, 1944. WIJEYWARDENE J.—

This action was filed in November, 1942. The material allegations in the plaint were:—

*Paragraph 2.*—The defendant lent to the plaintiff who borrowed from the defendant the sum of Rs. 150 and the plaintiff agreed to mortgage with the defendant her half share of the land called Gorakagahawatta . . . for the payment of the said sum with interest thereon at 16 per cent.

*Paragraph 3.*—The defendant fraudulently obtained her cross mark to a deed of transfer bearing No. 741 dated October 29, 1937—(D 3)—in the defendant's favour and when she protested he granted to the plaintiff writing dated October 29, 1937 (P 1), agreeing to hold the same in trust till the payment of the amount and to convey and to cancel the said deed on payment of the sum of Rs. 157 (Rs. 7 being the cost of the said deed) with interest thereon at the rate of 16 per cent.

*Paragraph 4.*—The plaintiff tendered to the defendant the amount due from her but he fraudulently declines to cancel the said deed or to be re-transfer the said premises to the plaintiff.

The amount due under the agreement P 1 at the time of the action was, according to the plaintiff, Rs. 287. The plaintiff alleged that the defendant had wrongfully cut down some trees on the land and assessed the damages sustained thereby at Rs. 60. Setting of this sum of Rs. 60 against the sum of Rs. 287 the plaintiff brought into Court Rs. 227 and prayed for (a) declaration of title in respect of the half share of the land and (b) cancellation of the deed D 3 or an order on the defendant to execute a conveyance in her favour for the half share of the land.

The defendant filed answer disputing the plaintiff's right to the reliefs asked for and denying specifically the averments in paragraph 4 of the plaint. He further questioned the plaintiff's right to set off any sum alleged to have accrued to her by way of damages against the amount due in terms of P 1.

The evidence led by the plaintiff fails entirely to prove the allegation in paragraph 3 of the plaint that the defendant obtained her cross mark to the deed D 3 fraudulently. That evidence serves only to establish the fact that the defendant was at first willing to consider her proposal that he should lend her Rs. 150 on a mortgage, but subsequently changed his mind and refused to enter into such a transaction and requested that the property should be sold to him. In compliance with that request the plaintiff executed deed D 3 and the defendant then gave an informal agreement P 1 agreeing to re-transfer the property within a certain time.

The document P 1 is open to some suspicion owing to certain erasures and alterations. I would refer to one alteration. As the document stood before that alteration, it was an agreement by the defendant to transfer the property within four years. The word "four" has been altered to "six" but the alteration has not been initialled by the defendant. The defendant who gave evidence stated that the document had the word "four" when he signed it and that he did not consent at any time to the period being altered from four years to six years. I may add that the document P 1 or a copy of it was not filed with the plaint as required by section 50 of the Civil Procedure Code and the document was listed about five months after the institution of the action.

In this case it was an all-important matter to ascertain whether the agreement was, in fact, for four years or six years. If the agreement was for four years the plaintiff's action must necessarily fail, as the plaintiff's son who was the only witness who gave evidence on this point stated that the first time the plaintiff asked for a re-transfer was "about a year" before he gave evidence in Court in July, 1943. That would show that the re-transfer was asked for in or about July, 1942, after the expiry of four years from the date of P 1. The failure of the defendant to accede to that request could not give the plaintiff a cause of action, as in agreements of this nature time is of the essence of the contract—*Jeramias Fernando v. Perera*<sup>1</sup>.

Unfortunately, the District Judge has not recorded his finding on this important question but has held against the plaintiff on the ground that P 1 was not notarially attested and was not, therefore, binding on the defendant. Mr. Rajapakse who appeared for the plaintiff-appellant, argued that the defendant held the land in trust for the plaintiff and that the judgment in *Jonga v. Nanduwa*<sup>2</sup> which was delivered after the decision in this case, was an authority against the view taken by the District Judge. Now the only trust pleaded in this case is the trust alleged to arise on P 1 which is merely an agreement to re-transfer by a vendee to a vendor on receipt of a sum of money. Though the District Judge has not referred to any authorities in his judgment he appears

<sup>1</sup> (1926) 28 N. L. R. 183.

<sup>2</sup> (1944) 45 N. L. R. 128.

to have sought to follow in this case the Privy Council decision in *Adai-cappa Chetty v. Caruppen Chetty*<sup>1</sup>. I do not think it necessary to consider which of these authorities governs this case, as there is another ground on which the present appeal could be decided.

According to the plaintiff's son, whenever the plaintiff went to meet the defendant about the transfer, she could not meet him. On none of these occasions did the plaintiff take any money with her to be tendered. The amount that has been brought to Court is clearly less than the amount due under P 1. The plaintiff cannot seek to set off against the amount actually due, a sum of money alleged to be due to her as unliquidated damages when there is a dispute between her and the defendant with regard to his liability to pay any damages. As no valid tender has been made at any time, even within six years, the plaintiff's action must fail.

I would dismiss the appeal with costs.

SOERTSZ J.—I agree.

*Appeal dismissed.*



<sup>1</sup> (1921) 22 N. L. R. 417