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NACHIAR *v.* FERNANDO.

D.C., Colombo, 10,518.

Duty of judge to frame such issues as will enable him to express his findings on the questions raised—Ordinance No. 7 of 1840—Inadmissibility of oral evidence to establish a resulting trust—Relevancy of evidence as to price of property having been paid by the defendant and not by the person who holds the title deed, to show when adverse possession began—Other exceptions to the Ordinance of Frauds.

Where, in an action *rei vindicatio*, plaintiff set up a chain of title, and defendant, admitting the execution of the title deeds pleaded by plaintiff, raised *inter alia* the issues that one of the plaintiff's predecessors in title had bought the property for her out of funds supplied by her, but took the conveyance in his own name, and that she never was the tenant of such predecessor or other subsequent paper title holders.—

Held, that the only issue framed by the Court below as follows—

"Has the defendant acquired title to the property in dispute by adverse "and uninterrupted possession for more than ten years previous to the "date of action?"—was too vague to permit the Court to express its findings on the many questions of fact on which the parties were at variance, or its finding on law as to the effect of those facts.

Held also, that defendant was entitled to prove that she had supplied to plaintiff's predecessors in title the funds necessary for the purchase of the house in question, not for the purpose of setting up title, but only to show the date from which she began her adverse possession.

Per BROWNE, A.J.—The general purport of the decisions as to what exceptions can be allowed or not to the strict observance of our Statute of Frauds may be summarized as follows:—

(1) When an agreement, being verbal, cannot be enforced, moneys paid thereon for the ulterior objects of the agreement may be recovered as moneys had and received for plaintiff's use or as *condictio indebitati*.

(2) If a title deed has been obtained by fraud, re-conveyance by the fraudulent holder will be ordered.

(3) If the deed was made in another's name, and the latter has possessed for years and died, and fraud is not proved, plaintiff will not be allowed to say that the property was bought with his money and to vindicate it from the deceased's heirs.

(4) If, on a verbal argeement to purchase jointly, the conveyance was made in defendant's name, and he fraudulently refused to allow plaintiff his share, plaintiff may vindicate his share, and defendant cannot set up the Ordinance.

IN this case the plaintiffs, who are wife and husband, sued the defendant to have the first plaintiff declared the owner of a certain house and ground in Hospital street in the Fort of Colombo and to have the defendant ejected.

In the chain of title pleaded by plaintiffs it appeared that Harmanis Fernando, the husband of the defendant, was the owner of the property in 1860; that he was adjudicated an insolvent in 1870; that his assignee sold it to one Allis Fernando in the same year; that Allis Fernando's right, title, and interest was sold by the Fiscal under a D. C. writ to Mr. J. N. Keith; and that

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Mr. Keith sold the property to Mr. Pakir Tamby, who gifted it to his daughter, the first plaintiff.

The defendant admitted the title deeds pleaded by the plaintiffs, but averred that Allis Fernando bought the property in 1870 out of funds supplied by her and for and on her behalf, and that she held possession of the property from and before 1870 by a title adverse to and independent of plaintiffs and their predecessors in title.

The paper title of the plaintiff's being admitted, the District Judge ruled the onus to be on the defendant as regards her title by prescription.

He framed the following issue: Has the defendant acquired a title to the premises in question by adverse and uninterrupted possession for more than ten years previous to the date of action?

He called upon the defendant to begin.

The defendant's counsel suggested the following issues:—

(1) Was the defendant the tenant of the plaintiff's donor, and is she in unlawful and forcible possession?

(2) Did Allis Fernando, from whom the first plaintiff deduces title, buy this property in 1870 for himself or in trust for the defendant?

(3) Were the plaintiff's in possession or ever in possession?

The District Judge disallowed these issues, and as the defendant would not begin entered judgment for the plaintiff.

On appeal by defendant the Supreme Court set aside the judgment and sent the case back for adoption of the procedure laid down in section 146 of the Civil Procedure Code as to the ascertainment of the proper issues, it being of opinion that the issue framed by the District Judge was too vague, " for it was " little more than this—Is the plaintiff or the defendant entitled " to succeed? "

On the case going back the District Judge examined the defendant, and upon her admissions framed the following issues, as being the only issues necessary for a proper determination of the dispute between the parties:—

(1) Is the paper title to the house in dispute at present in the first plaintiff?

(2) If so, has defendant acquired a superior title by prescriptive possession?

(3) Is the decree in the Court of Requests case a bar to the plaintiff's present action?

Defendant's counsel suggested as further issues the identical issues disallowed at the previous hearing.

The District Judge held that they were practically involved in the second issue made by him.

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He heard the second plaintiff's evidence, and, as defendant's counsel refused to lead any evidence on the question of defendant's possession, entered up judgment for plaintiff.

The defendant appealed.

H. J. C. Pereira. for appellant.—The questions of trust and tenancy raised in the defendant's pleadings and submitted in the issues suggested by him in the Court below were improperly rejected. If Allis Fernando bought the property in trust for the defendant, plaintiff's title would fail. The District Judge should have allowed the three issues suggested on behalf of the defendant and heard the case fully on both sides.

Rámanáthan, S.-G., for respondent.—The issue as to trust cannot be accepted because (1) the deed being out and out in favour of Allis Fernando, without a trusteeship appearing on the face of it, the Ordinance No. 7 of 1840 would not permit any such trusteeship from being established; and (2) the oral agrement as to trusteeship would be a fraud on the Insolvency Laws, it being admitted that defendant's husband was adjudicated insolvent, and any money which his wife, the defendant, had would belong to the insolvent and vest in the assignee of the insolvent (*D.C., Batticaloa, 18,598, Ram. 1877, 158; Ibrahim Saibo v. O. B. C., 3 N. L. R. 148*). The District Judge's answer to defendant's counsel is that, howsoever the defendant acquired possession, her title can only be prescriptive possession; and that she is estopped from setting up title independent of Allis Fernando, because she had acknowledged it in her own deed of release of 1881. In view of the marriage of defendant's daughter, Allis Fernando gifted one-eighth of the property in question to her, but as she died before the contemplated marriage, defendant and her other children, who were the heirs of the deceased, re-conveyed the one-eighth share to the grantor Allis Fernando and renounced all their right to it. Defendant is therefore estopped from claiming under Allis Fernando. The meaning of the issue as to prescriptive possession is determined by the Ordinance No. 22 of 1871, which necessitates proof that defendant was in possession by a title adverse to and independent of the plaintiff. Hence, the question of tenancy suggested by the defendant's counsel as an issue in the case is involved in the District Judge's issue. As defendant would not begin when it was her duty to do so, the District Judge was right in entering judgment in favour of the plaintiff.

H. J. C. Pereira in reply.

Cur. adv. vult.

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The assignee of the insolvent estate of the husband of the defendant sold and conveyed the house in question in Hospital street to the insolvent's brother, Allis Fernando, on the 8th July, 1870.

On the 21st January, 1875, Allis mortgaged the house to the Ceylon Savings Bank for Rs. 4,500, and subject to such mortgage he donated one-eighth of it on 13th July, 1875, to his niece, defendant's daughter Kate, as marriage provision. She dying before marriage, defendant and her sons did on 4th March, 1881, " remise, release, assure, and convey " the one-eighth back to Allis absolutely.

On writ against Allis (possibly in execution of a decree upon that mortgage) the house was by the Fiscal auctioned on 4th March, 1885, and conveyed on 9th July, 1885, to Mr. Keith, who on 11th June, 1885, sold and conveyed it to P. T. Meera Lebbe Marikar, who on 19th February, 1887, donated it to first plaintiff, reserving a life interest, which also he conveyed on 2nd June, 1896, to her.

At the hearing of this appeal it was admitted (for no proof thereof save in defendant's examination had been given in the lower Court) that the plaintiffs had, after their acquisition of immediate right of ejectment, sued the defendant in the Court of Requests for rent for the month of December, 1896, and January, 1897, but their action had been dismissed, the Commissioner discrediting the proof offered to show that defendant had been plaintiffs' tenant, and ordering them to litigate their disputes as to title in the District Court.

On the 23rd September, 1897, plaintiffs accordingly instituted this action, averring in their plaint in detail the paper title to the land; that Allis Fernando, Keith, and P. T. Meera Lebbe had severally " entered into possession " of the house; the conveyance to first plaintiff; that " the defendant, who was the first plaintiff's " donor's tenant at the date of the gift to first defendant, and who " has no right or title to the said house and ground, is presently " in the unlawful and forcible possession of the same, and denies " and disputes plaintiffs' title and asserts title in herself " and the plaintiffs' own title by prescriptive possession of themselves and their predecessors. Apparently, as the result of the Court of Requests action, they abstained from averring that the defendant had been tenant of themselves; and it will be noted that, after averring that defendant was a tenant at some time before June, 1896, they do not aver from what date her possession was unlawful and forcible.

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To this plaint defendant answered, admitting the execution of all the deeds averred in the plaint, but denying that plaintiffs or their predecessors in title had ever entered into possession of the premises, or that she had been the tenant of the plaintiffs' donor, or was at date of suit in unlawful or forcible possession, or that plaintiffs had the title by prescriptive possession which they claimed. She asserted that since her husband's second purchase of the house on 24th December, 1860, she had always lived in it; that Allis's ostensible purchase was one in trust for her, the defendant (in her evidence she stated that she supplied the funds wherewith he purchased it), and that she, notwithstanding divers acts of ownership exercised by Allis over the title deeds (referring no doubt to the mortgage and gift by him above mentioned), had, jointly with her husband till his death and thereafter by herself, been in the absolute possession of the house from the date of the conveyance to Allis, 8th July, 1870, and still was; and she further claimed title by prescriptive possession; and she prayed to be declared owner and quieted in possession.

At the first trial the learned Additional District Judge framed the issue,—Has the defendant acquired title to the premises in claim by adverse and uninterrupted possession for more than ten years previous to date of action?

Defendant's counsel objected thereto and suggested:—

(1) Was the defendant the tenant of the plaintiffs' donor, and is she in unlawful possession as alleged in paragraph 10 of the plaint?

(2) Did Allis Fernando buy this property on the 8th July, 1870, in trust for the defendant, or did he buy it for himself?

(3) Were the plaintiffs ever in possession or entitled to possess?

These issues, it was held, did not arise; and as they were not framed, defendant's counsel declined to call evidence and decree was entered in plaintiffs' favour. In appeal the action was remitted for due procedure under section 146 of the Civil Procedure Code, with the remark, "The issue framed in this case is far too vague, for it is little more than this,—Is the plaintiff or defendant entitled to succeed?"

At the re-hearing the same District Judge examined the defendant. There is no record whether or not counsel were able to agree upon issues, but the learned District Judge framed the following issues, "as being the only issues necessary for a proper determination of the disputes between the parties":—

(1) "Is the paper title to the house in dispute at present in the first plaintiff?"

Defendant had not in her answer or evidence denied this, which the plaint alleged, so I consider this issue did not arise.

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(2) " If so, has defendant acquired a superior title by prescriptive possession? "

This is but a précis of the issue formulated at the first trial, which this Court condemned. The learned District Judge fails to recognize that to answer the question requires previous findings of facts and a finding of law as to the legal effect of these facts.

(3) " Is the decree in the Court of Requests case (as to which defendant had been examined) a bar to the plaintiffs' present action? "

I do not see how this issue arose. Plaintiffs had not averred a tenancy under themselves, nor had defendant pleaded the Court of Requests decree in bar thereof. If plaintiffs' donor possessed from June, 1885, to June, 1896, and defendant had been his tenant, the title he conveyed to plaintiffs would not be lost or prejudiced by the decree in 1897 of no tenancy thereafter under plaintiffs for two months from 1st December, 1896.

I therefore do not see that issues were properly formulated " as to the question of fact or of law to be decided, " or that it was ascertained " upon what material propositions of facts or of law the parties are at variance " (section 146).

Defendant's counsel suggested three issues, which were rejected. The only witness called for the plaintiffs are the second plaintiff, who produced the title deeds and those relating to the gift to Kate and release thereof. Defendant's counsel declined to call evidence, decree went in plaintiffs' favour, and the second appeal has come before us in this action which has been pending now for over three years, and in my judgment has not yet passed to the stage preliminary to trial of having issues properly agreed to or settled.

These two abortive trials and appeals are an object-lesson to us, as I remarked at the argument, and I trust that at the first revision of the Civil Procedure Code this precedent will lead to section 80 being worded so as to also require the appointment of a date shortly thereafter for the filing or ascertainment of issues, and to section 146 being inserted as part of or next to it.

Now, judging from the pleadings and defendant's evidence, the material propositions of fact and law upon which the parties were at variance were—

(1) Whether plaintiffs' predecessors in title and they themselves had ever entered into possession, and if so, for what periods?

(2) Whether defendant had ever been, and possessed as, the tenant of plaintiffs' donor, and if so, for what period?

(3) Whether defendant after any such tenancy had ever been in forcible and unlawful possession, and from what date?

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(4) Whether, if never a tenant of plaintiffs' predecessor, defendant had ever held undisturbed and uninterrupted possession by adverse and independent title, and for what period or periods previous to the bringing of this action?

(5) Whether by any such possession for ten years defendant ever acquired title to the premises?

(6) Whether defendant supplied the funds whereby Allis Fernando purchased the house conveyed to him on the 8th July, 1870?

(7) Was such purchase by him in trust for the defendant?

(8) Has defendant held possession as in her own right thereafter and had plaintiffs and their predecessors in title knowledge thereof?

(9) Is defendant, by such purchase out of her moneys in trust for her, and such possession by her presently, entitled to the premises?

Affirmative answers to the first and second issues made after hearing the evidence on all the issues might result in judgment for the plaintiff, unless the answer to the third issue showed adverse possession of defendant for ten years between the tenancy and the action. On the other hand, such a finding on the third issue, or a negative finding on the first and second followed by affirmative answers on the fourth and fifth issues might result in judgment of title in defendant as she prays.

And in respect of the third, fourth, and fifth issues the matter of the sixth issue is not irrelevant, for the fact that defendant gave money to buy the house in 1870 would be strong evidence as to the character of her possession thereof subsequent thereto, and would mark the date from which such possession could properly be reckoned.

The question remains whether the sixth issue should be framed and decided for the purposes of the seventh and ninth issues also, and whether they too should be framed.

I venture to consider that in some cases the claim of title by trust, purchase, and possession is not wholly impossible. It appears to me that the general purport of the decisions as to what exceptions can be allowed or not to the strict observance of our Statute of Frauds, in the absence of any such provision as section 8 of the English Statute, may be summarized as follows:—

Verbal agreements respecting any interest in land are not of themselves illegal. Ordinance No. 7 of 1840 is only to prevent fraud being affected thereby (*Ram. 1864, p. 83*). Hence on the one hand when the agreement of the transaction, being verbal, cannot be enforced, moneys paid thereon for the ulterior purpose thereof

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are recoverable as moneys had and received for plaintiffs' use or *condictio indebiti* (*Morg. 82; Murray, 87: Ram. 1875, p. 267; 2 Gren. C. R. 34; 2 C. L. R. 191;* 34,472, D. C., Colombo, 10th November, 1863; 4,353, C. R., Gampola, 3rd July, 1899), as also are moneys otherwise recoverable, *e.g.*, for use and occupation (*Ram. 1863, p. 83;* 4,812, C. R., Matara, " Lux " p. 16, 13th March, 1899).

If a title deed has been obtained by fraud, reconveyance by the fraudulent holder will be ordered (*Ram. 1860, p. 6; Beven and Sieb. 77*), but if the deed was put in another's name and the latter has possessed for years and died, and it be not shown there was fraud therein, plaintiff will not be allowed to say that it was bought by his money and to vindicate it from the deceased's heirs, 53,611, D. C., Galle, *S. C. M., 6th February, 1889* (*Collective Court, Dowan Arachchi's Case*); 91,432, D. C., *Kandy, S. C. M. 1st April, 1884.*

If, however, a conveyance was on any verbal agreement of joint purchase made in defendant's name, and defendant thereafter fraudulently refused to allow plaintiff benefit therefrom, plaintiff may vindicate his share and defendant cannot set up the Ordinance (*Ram. 1869, p. 6; 2 Gren. D. C. 39; 3 S. C. C. 103*), and it has been held in England that plaintiff may prove by parol evidence that a land in Ceylon was conveyed to another in trust for her, and that the grantee knowingly is denying the facts or the trust, and is relying on the form of conveyance and the statute to keep the land for himself (*De La Rochefauld v. Boustead, 45 W. R. 272* [*1897*], *Ch. 196*).

In addition to these considerations there has yet to be considered by this Court, when occasion shall arise, whether it will affirm the principles expressed in the judgment of Mr. Berwick, District Judge, reported in *3 N. L. R. 150—153*, that the doctrine of implied trusts is in substance part of the Roman-Dutch Law, and that parol evidence to establish them would not violate our Ordinance of Frauds. Apparently the reasons contained in that decision were not referred to and not remembered by the learned judge who had been counsel for plaintiff in that case, when he in 91,432, D. C., Kandy, *ut supra*, said " part performance " of the contract did not take it out of the operation of the " Ordinance, and the same rule will in principle apply with " regard to resulting trusts."

At present, however, it appears to me we are concluded by the decision in *Dowan Arachchi's Case* from allowing any claim of title by a purchase by Allis out of defendant's moneys and by defendant's own possession thereafter to be set up by defendant,

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not only in answer to the claim of plaintiffs in succession of title from Allis, but even to have her title in this wise upheld and declared. The question is not being litigated by her with her alleged fraudulent trustee, and if in *Dowan Arachchi's Case* this Court did not allow it to be litigated with his heirs, it seems we should not suffer it to be raised between those whom the Fiscal's sale began to make Allis's successor in title. They may be privies in title with him, but there is nothing alleged to show they ever knew he had bought out of her moneys and that they now are privies in fraud as well. I consider it will be sufficient to apply here the same principles as (in 8,571, D. C., Colombo, *Browne's Rep. 75*) was recently done in another matter affected by our Statute of Frauds, and allow this defendant to give evidence under the sixth issue to show by way of defence only, and not of claim, what were the real state of facts or agreement between Allis and her, so as to sustain her defence under the fourth and fifth issues. We shall in this way probably sufficiently prevent the Ordinance of Frauds being utilized so as to work a fraud upon her, without enabling her to set aside the Ordinance and prove a title without notarial conveyance against those who presumably are innocent purchasers for value.

I would therefore set aside the decree and remit for trial of the first six issues.

BONSER, C.J.—

I agree in the order proposed by my brother Browne.

As regards the question of resulting trusts, I think that we are bound by the decisions of this Court referred to in his judgment, and that those decisions can only be reviewed by a Full Court. For my own part, I do not feel disposed to do anything to break down the barrier which has been raised by the Legislature against the admission of oral evidence in cases relating to land.