1903.
September 8.

DE ZILVA *v.* CASSIM.

D. C., Colombo, 11,747.

Fraud—Resulting trust—Colourable assignment—Right of assignor to cancel deed for failure of consideration—Letters of administration to estates of persons dead before the passing of the Civil Procedure Code.

No man can set up his own fraud to avoid his own deed.

But where the purpose for which an assignment is made is not carried into execution and nothing done under it, the mere intention to effect an illegal object, when the assignment is executed, does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it.

It is not sufficient to prove that there was some sort of a *benami* (confidential) transaction between the assignor and the assignee, as the result of which the assignee did not pay the whole consideration for his purchase. There must be proof that no consideration was paid for it.

Persons who engage in transactions involving a resulting trust must not expect the assistance of courts to extricate them from the difficulties in which their own improbity has placed them.

The rigors of section 247 of the Civil Procedure Code do not apply to the case of persons who had died before the passing of the Civil Procedure Code (1889).

THE plaintiffs prayed for a declaration of title for themselves and their co-owners in regard to a house, and they prayed also that it be sold under the provisions of the Partition Ordinance.

The house belonged originally to the estate of the late Dr. Misso and his wife, whose will directed that their joint estate be divided into nine equal parts among their children and grandchildren specially named in the will. The devisees so named were to enjoy their shares during their natural lives, and after their deaths their shares were to be divided equally amongst their children. One of the nine original devisees was a daughter named Sophia Dorothea Kelaart, and the house in question fell to her share. The executors did not convey to the heirs their several portions, but in a partition case No. 53,924 this property and some others were directed by the court to be sold in 1869. Sophia Dorothea Kelaart purchased it, subject to the conditions of the will, and possessed it till her death in 1883. She had eight children, all now dead, and the parties before the Court were the descendants of those children and purchasers from some of them.

One of the eight children of Sophia Dorothea was Francis, who survived his mother. In 1884 he sold his interest in the house to one K. David Perera by deed marked P 7. Francis died in 1887, leaving a widow (the second added defendant) and two

children (the third and fifth added defendants). K. David Perera, died in 1895, having by his last will appointed certain executors, who, as the third, fourth, and fifth plaintiffs in the case, claimed Francis's one-eighth share.

Francis's widow, Priscilla, impeached the validity of deed P 7 on the ground that it was not intended by her husband to be a valid conveyance, but that it was executed in collusion with David Perera, without any consideration, for the purpose of avoiding a seizure in execution by a creditor. She deposed that after the signing of the deed her husband joined with the other co-owners in collecting the rents, and that after his death in 1887 she lived in a part of the premises for several years, and exercised rights of ownership over her share by leasing it, &c.

The Additional District Judge (Mr. Felix Dias) upheld the deed, as it showed good consideration on the face of it and as the notary swore that the vendor had acknowledged to him to have received the full consideration of Rs. 1,000 before signing the deed.

The claim of Priscilla (the second added defendant) and her children (the third and fifth added defendants) and the husband of the third added defendant to an undivided one-eighth share of the premises in dispute being dismissed, they appealed.

The case was argued before Wendt, J., and Middleton, J., on 26th and 27th August, 1902.

Dornhorst, K.C., for the second, third, fourth, and fifth added defendants, appellants.

Van Langenberg, for the third, fourth, and fifth plaintiffs, respondents.

Cur. adv. vult.

8th September, 1903. MIDDLETON, J.—

This was an appeal from a decree in partition proceedings dismissing the claim of the second, third, fourth, and fifth added defendants to one-eighth share of a house No. 50, Fourth and Fifth Cross streets, Pettah.

The second added defendant was the widow of one Francis Gerard Kelaart, and the third and fifth added defendants their children, the fourth added defendant being the husband of the third.

The property was derived from one Sophia Dorothea Kelaart who had eight children and died in 1883.

Francis G. Kelaart died in 1887, but on the 29th September, 1884, he executed a notarial deed No. 1,541 (P 7), by which he conveyed his one-eighth share in the house in question, in a

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boutique No. 8, St. John's road, and in a house and ground at No. 6, St. Lucia's street, for Rs. 1,000 to Kankanige David Perera of the Pettah.

David Perera died in July, 1891, and the respondents are his executors.

The appellants now allege that the conveyance to David Perera was made collusively with him with the intention of defrauding Francis Kelaart's creditors, and without consideration, and seek to set it aside, and show the real nature of the transaction, and that the property was not intended to pass under the instrument —in fact, was, what is known as a *benami* transaction in India.

As an alternative, they allege that they have had possession of the said one-eighth share of the house in question for upwards of ten years, adverse to and independent of the said David Perera and his successors in title.

As a further and preliminary objection to the title of the respondents, the appellants say that, although the estate of Sophia Kelaart was above the value of Rs. 1,000, letters of administration were never taken out, and that the conveyance by Francis G. Kelaart to David Perera was in contravention of the terms of section 547 of the Civil Procedure Code, and gave no title.

I am unable to discover what is the Roman-Dutch Law bearing on matters of this kind, so am driven to follow such general principles of the English Law as appear to be applicable by analogy.

It is a principle of Roman-Dutch Law that no one can be allowed to avail himself of his own fraud, and of English Law that a man cannot set up his own fraud to avoid his own deed; but it has been held (*Symes v. Hughes, L. R. 9 Eq. 475*) that where the purpose for which an assignment is made is not carried into execution and nothing is done under it, the mere intention to effect an illegal object when the assignment is executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it (May *On Fraudulent and Voluntary Disposition of Property, p. 470-1*).

This principle seems to have been adopted in the Bombay High Court by West, J., in *Chenvirappa v. Puttappa, I. L. R., 11 Bombay* 708 (713-719), 1887, where the Judges were unwilling to affirm the broad principle adopted in Calcutta (*Ram Sarum Singh v. Musst Pran Pearee Moore's I. A., p. 551*) that the real nature of the transaction may be shown either by the defendant or by a party claiming under him, and even where the object of the transaction is to obtain a shield against a creditor, thus enabling the parties as between themselves to show that the property was not intended to

pass by the instrument creating the *benami* (Caspersz *On Estoppel by Representation and Res Judicata, pp. 72, 73*). Sargent, C.J., in *Babaji v. Krishna, I. L. R. 18 Bombay*, observed " that there was no authority which questions the right of a defendant to plead such a defence, *i.e.*, the truth as to fraud and collusion, whatever doubt there may be as to the plaintiff's right to avoid his own deed by setting up his own fraudulent act.

In this case the respondents, although called added defendants, were interveners in the partition proceedings with a view to asserting their claim to one-eighth share of which they were not in possession, and are more in the nature of plaintiffs than defendants.

In my opinion, the true principle to follow is that adopted by the English Courts and followed by West, J.

The first question to be asked here then is, was the creditor defrauded by the deed P 7 ?; secondly, was there consideration for it?

The only evidence given as to the defrauding of Andriesz, the creditor, is by Priscilla, the widow of Francis Gerard. If she is to be believed and she asserts it herself, the deed P 7 was given to prevent Andriesz selling the property transferred under the deed P 7, if the sale of the Kayman's gate property on which he had a mortgage was insufficient to pay the mortgage debt.

According to Priscilla the debt was Rs. 260, and the Kayman's gate property only realized Rs. 160, and so the sale, if there was no consideration, which she also alleges, would have deprived Andriesz of his resort to the other property. Assuming her evidence to be true, this would have defrauded Andriesz, and so, acting on the principle I have taken as a guide and considering the maxim in *pari delicto potior est conditio possidentis*, would prevent those claiming under Francis from obtaining relief from the consequences of what Priscilla avers was the fraud of Francis.

From this point of view the appellants' case fails out of the mouth of Priscilla, the first added defendant.

If, however, we assume that Andriesz was not actually defrauded, but that the transaction was in an inchoate stage with a mere intention to defraud Andriesz, the appellants may then show the truth of the transactions.

We have here to consider whether the appellants have proved there was no consideration for P 7.

The only person who gives any evidence that there was not is Priscilla, who says all she knows was derived from what her husband Francis told her.

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The deed P 7 itself alleges Rs. 1,000 as consideration, while the notary who attested it says that the Rs. 30.80 which were acknowledged as paid at its attestation were paid by him to Francis's creditor in case No. 39,461, C. R., Colombo.

Priscilla says the Rs. 30.80 came from David Perera out of the rents he had to pay Francis, and that it was not paid to her husband, but to the plaintiff in the C. R. case No. 39,461, and was devoted to the payment of Francis's debt, so that it came from David by her own admission.

At the time the deed was executed she admits that one of the houses purporting to be sold by P 7 was under seizure in case No. 39,461 on the 29th September, the very day on which the deed was executed, and the sale was not carried out; so that David Perera may have paid the whole judgment debt as part of the consideration for P 7.

David Perera, though only alleged to be a lessee, is said by Priscilla to have rebuilt the two St. John's road houses when they were burnt in 1882.

The St. Lucia's street house which was included in P 7 was taken from Priscilla forcibly, and she has done nothing to assert her alleged rights to it.

The evidence as to payment of rent to Francis himself is extremely inconclusive.

I think it is highly probable that there was some sort of *benami* transaction between Francis and David Perera as the result of which it may be possible that David did not pay the whole alleged consideration for his purchase under P 7, but that there was no consideration I think the appellants have distinctly failed to prove. Upon this ground, therefore, I think the appellants must fail.

As regards prescription, the next point relied upon by the appellants, it is clear there was no physical possession for ten years by Priscilla and Francis, her alleged predecessor in title.

As to the point raised by Counsel on both sides as to the want of administration (1) to Sophia's estate and (2) to Francis's estate, both these persons died before 1889, when the Civil Procedure Code was passed. I think therefore that we ought not to apply to either case the rigours of section 547.

Even if, however, we give the appellants the benefit of Francis as a predecessor in title, I am not satisfied on the evidence that a constructive possession for ten continuous years adverse to and independent of David Perera, by receipt of rent, has been proved.

It is true there is a receipt for rent in 1885 signed by Francis, and there is evidence to show that rent was paid to Francis and David, and that David divided the money with Francis, that

Priscilla alleges she put one Gordiano in as her tenant for a time, also that Priscilla came to demand rent from one Cyril de Zilva, an employé of Akbar Brothers who was a tenant of the premises, and that Akbar gave her money and receipts were filed. On the other hand, there is evidence from the said De Zilva that David Perera was applied to do the repairs by Akbar, and was present when repairs were done, and that he also received rent between 1887 and 1895, and that others were in possession who paid no rent to Priscilla.

So far as I can judge, all Priscilla has established is that after her husband's death she disputed with others their right to the house in question, not that he and she received rent continuously for ten years adversely to and without interruption from David Perera or his successors. This disputing is consistent perhaps with the view entertained by people leasing the property that there was a *benami* transaction between David and Francis, and the possibility, as I have before suggested, that there have been moneys due from David to Francis upon that matter.

We have been appealed to *ad misericordiam*, but people who enter on these *benami* transactions should understand it is a dangerous course; and as Hobhouse, J., said in *Kaleenath Kur v. Doyal Kristo Deb. 13 W. R. 87* (1887), "they must not expect the assistance of the Courts to extricate them from the difficulties in which their own improbity has placed them."

I think this appeal should be dismissed with costs.

WENDT, J.—I agree.