Present : Wood Renton J. and Grenier J.

Dec. 5, 1910

PORONCHIHAMY *v.* DAVITHAMY.

303—*D. C. Tangalla*, 1,074.

Conveyance of land by wife in favour of husband—Written consent of husband is not necessary—Ordinance No. 15 of 1876, ss. 9 and 13—Prescription.

The written consent of the husband is not necessary to a deed of conveyance of immovable property by the wife in her husband's favour.

THE facts are set out in the judgment of Wood Renton J.

H. A. Jayewardene, for the defendant, appellant.

Bartholomeusz (with him *Vytialingam*), for plaintiff, respondent.

Cur. adv. vult.

December 5, 1910. WOOD RENTON J.—

The respondent is the wife of the appellant, and she brings this action to obtain cancellation of a deed which she alleges that the appellant had fraudulently induced her to execute. The deed deals with a 5/48th share of the land described in the plaint. The land originally belonged to the appellant's mother, and he derived title to it from her partly by inheritance and partly by deed. By deed No. 108 of December 20, 1885, the appellant transferred the land to Babun Appu, who sold it to the respondent on deed 5,406 of August 20, 1888. The deed by the respondent in favour of the appellant is dated August 25, 1906, and it purports to be an out-and-out transfer of the land in consideration of the payment by the appellant to the respondent of a sum of Rs. 500. The appellant alleges in his answer, and he said in his evidence, that this consideration was actually paid. No consideration, however, passed in the presence of the notary. The deed by the respondent in favour of the appellant has not been signed by the appellant. There is nothing on the face of the deed to show that he is the husband of the grantor, and it is admitted that neither in the deed itself, nor in any other writing, has he given an express assent to his wife's disposition of her property.

It was argued in the Court below that the present action was not maintainable, inasmuch as it had not been brought within three years from the accrual of the cause of action, as required by section 11 of Ordinance No. 22 of 1871. The deed was executed on August

Dec. 5, 1910
WOOD RENTON J.
Poronchi-hamy v. Davithamy

23, 1906, and the action was not instituted till June 23, 1910. The learned District Judge over-ruled this point, on the ground that the respondent's cause of action accrued only when it became clear that the probable effect of the deed would be to defraud her, and that this had taken place when the appellant mortgaged the property by deed No. 1,566 dated November 1, 1906. On October 16, 1909, the respondent, in D. C. Tangalla, 1,025, applied under section 16 of Ordinance No. 15 of 1876 to have her deed in the appellant's favour cancelled. The District Judge held that she should bring a regular action to set aside the deed, and that judgment was affirmed by the Supreme Court in appeal. Under these circumstances he held that the present action was not barred by prescription. This question was scarcely touched upon in the argument before us in appeal, but I see no reason to differ from the view that the District Judge has taken of it. The District Judge held, however, purporting to follow the decision of the Supreme Court in *Ponnamal v. Pattaye*[1] that it was imperative that the husband should at least signify in writing his assent to any deed executed by his wife which had the effect of alienating her immovable property ; and as in the present case such written assent was admittedly wanting, the deed, in his opinion, was void, and accordingly he gave judgment in the respondent's favour, and ordered the appellant to bring the deed into Court for cancellation.

In *Ponnamal v. Pattaye*[1] the wife's deed was in favour of a third party. That case does not, therefore, decide the question whether the husband's written consent is necessary to a deed by the wife in her husband's favour. No authority was cited to us on this point in the argument, and I have myself been unable to find any. The point is therefore to be decided on the language of Ordinance No. 15 of 1876 itself. It is section 9 of that Ordinance which requires the written consent of the husband to the alienation *inter vivos* by the wife of her immovable property. A later section, however, section 13, expressly validates any grant, gift, or settlement of any property, movable or immovable by one spouse in favour of the other during the marriage. In the present case the learned District Judge has held that no consideration was paid by the appellant to the respondent in respect of the execution of the deed. The deed is, therefore, a voluntary grant within the meaning of section 13 of Ordinance No. 15 of 1876, and as such it appears to me, although I had some hesitation in coming to this conclusion, not to fall within the provision of the earlier section (section 9), which makes the husband's written consent necessary to dispositions by the wife *inter vivos* of her immovable property. The object of that requirement is, I think, to see that the wife is protected by her husband's advice in her dealings with third parties. I do not see that the husband's written consent would afford the wife any protection in her dealings

[1] *(1910) 13 N. L. R. 201.*

husband himself. I think, therefore, that the decision of with her [illegible] Judge cannot be maintained on the ground on the learned District [illegible] But I see no reason why the wife which he has expressly based it. [illegible] the present, if she should remain without redress in such a case as [illegible] is able to establish affirmatively the fact that she was fraudulently induced by her husband to execute the deed that she impugns. Mr. Hector Jayewardene contended, in answer to a question put to him by the Bench, that the doctrine of fiduciary relationship does not apply as between husband and wife. There has been considerable divergence of opinion in the English Courts (I say nothing as to the Roman-Dutch Law, because it was not touched upon in the argument before us) on this point, and in the latest case that I have been able to find (*Howes v. Bishop*[1]) the majority of the Court did not go further than to hold that the mere fact of marriage did not necessarily give rise to such a relationship. The effect of such a relationship, if it existed, would merely be to throw—I am taking the concrete case now before me—on the husband the onus of proving that the grant here in question had not been obtained from the wife by undue influence of any kind, that she had known what she was doing, and that she had done it voluntarily. So far as I am aware, however, no doubt has been thrown in any of the English decisions on the right of a wife to take on herself the burden of proving that a deed by her in her husband's favour had been obtained by him from her by fraud. Moreover, it may be that the wife in the present case comes within the class of persons who are entitled to set up a plea of *non est factum*. I do not think that this issue can be decided on the evidence as it stands. There is not sufficient proof before us as to the circumstances under which the deed of August 23, 1906, came to be executed, and as to whether or not the wife knew the nature of the instrument that she was executing.

I would set aside the decree under appeal and send the case back for framing of any issues suggested by the parties and accepted by the Court which will enable these points to be determined. Both sides, I think, should have as full power to call evidence in regard to all such issues as if the case were coming on for trial for the first time. The costs of the appeal, of the original and of the subsequent proceedings, should, I think, be left to the discretion of the District Judge.

GRENIER J.—

I agree to the order proposed by my brother. The only point about which I was doubtful was whether the written consent of the husband under section 9 of Ordinance No. 15 of 1876 was necessary to the alienation of the land in question. Viewed in the light of the provisions of section 13, I think that where the alienation is by the

[1] *(1909) 2 K. B. 390.*

Dec. 5, 1910

GRENIER J.

Poronchi-hamy v. Davithamy

wife in favour of the husband no written consent is at all necessary. The object of section 9 is to enable the husband to exercise such control over the wife as to prevent her from alienating her immovable property in a manner detrimental to her own interests. The provision is a wholesome one, and quite independent of section 13, which expressly validates transactions regarding immovable property between the spouses during the marriage.

Set aside.