Present: De Sampayo J.

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SIYATU *v.* BANDA.

113—C. R. Gampola, 2,144.

Lease executed for defrauding creditors—Action by lessor against lessee to obtain declaration that lease was void—May lessor bring an action to cancel deed if the illegal purpose is carried out fully or in part?—Prescription.

A executed, in 1901, a deed of lease of his land in favour of B for 99 years. B granted a sub-lease to C in 1912 for four years. A brought this action in 1915 for a declaration that both the leases were null and void, and alleged that he executed the lease without consideration in favour of B to defraud D, a creditor of his, who lent him (A) Rs. 500 on a mortgage of the land in 1903, and that he was all along in possession, in spite of the lease, till C disturbed his possession in 1913.

Held, that the action was not barred by the Prescription Ordinance, 1871.

"The cause of action in such cases as this is not the execution of the deed, but any act on the part of one party contravening the original intention, and interfering with the rights of the other."

Held, further, on the facts, that A had not executed the lease in favour of B for defrauding D, but that if there was any fraudulent intent the fraud was not carried out, as D had succeeded in recovering his money.

THE facts are set out in the judgment.

Bawa, K.C., for plaintiff, appellant.

Bartholomeusz, for defendants, respondents.

June 13, 1916. DE SAMPAYO J.—

This is an action in which the plaintiff seeks to have two deeds declared null and void, and to be quieted in possession of certain lands. The first of these deeds is No. 5,951, dated March 25, 1901, by which the plaintiff leased his half share of the lands for 99 years to the first defendant and one Alweera Mudianselage Dingiri Banda and the second of them is No. 2,868, dated July 27, 1912, by which the first defendant granted a sub-lease of his interest in the lands to the second defendant for a term of four years. The consideration for the deed No. 5,951 is a sum of Rs. 500, acknowledged to have been received in advance as rent for the whole period. But the plaintiff's case is that there was, in fact, no consideration whatever, and that the deed was executed by him in order to defraud his

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creditor, one Beale, conductor, who lent him Rs. 500 on a mortgage of the same lands on September 10, 1903. He says, and has called witnesses to prove, that he has been in possession of the lands all along, notwithstanding the lease; and he further refers, as showing the true character of the transaction, to the fact that the first defendant's co-lessee, Dingiri Banda, by deed No. 1,347, dated February 5, 1912, assigned his interest to the plaintiff's daughter Tikiri Menika, who in July following assigned the same to the plaintiff. One more fact that may be mentioned in this connection is, that the second defendant, on the strength of his sub-lease from the first defendant, attempted to disturb plaintiff's possession by cutting the crop of one of the fields in 1913, and was prosecuted for criminal trespass and convicted. The plaintiff says that he only then came to know of the sub-lease, and that it was the first intimation to him that the first defendant intended to set up any claim on the basis of the old lease. That incident is the proximate cause of the present action.

I may at once dispose of the plea raised by the defendants that the plaintiff's action is barred by limitation, inasmuch as more than three years have elapsed since the date of the lease. The action no doubt comes under section 11 of the Ordinance No. 22 of 1871, and the period of prescription is three years from the time of the accrual of the cause of action. But the cause of action in such cases as this is not the execution of the deed, but some act on the part of one party contravening the original intention and interfering with the rights of the other: *Senaratne v. Jane Nona.*[1] Consequently the plaintiff's action, so far as prescription is concerned, may be maintained.

The real questions in this case are whether the deed of lease was executed without consideration and for the purpose of defrauding Beale, and if so, whether the intended fraud was carried out so as to disentitle the plaintiff to any relief against the first defendant. The Commissioner expresses himself as unable to accept the plaintiff's word that no consideration passed, and I do not think the circumstances justify a contrary opinion. It is true that the payment in advance of such a large sum as Rs. 500 on a lease is not usual among villagers, but the lease for 99 years was practically a sale, and it is shown that at this time the plaintiff was pressed for money in order to pay off two mortgages. Moreover, the other lessee, Dingiri Banda, was not called to support the plaintiff's account of the matter; and Dingiri Banda's assignment to plaintiff's daughter appears on the face of the deed to have been for the consideration of Rs. 299.20, though plaintiff says that he only paid him Rs. 50 as a *santosum* or present and that the assignment itself was without consideration. This assignment is significant, because the creditor Beale had long before that been paid, and there was no object

[1] *(1913) 16 N. L. R. 389.*

whatever in stating in the assignment any but the true facts if the original lease had been a mere colourable transaction. The plaintiff even more signally failed to prove that the intention of himself and his lessees was to defraud Beale. The Commissioner has rightly compared the respective dates of the lease and Beale's mortgage. The former was in March, 1901, and the latter two and a half years after it, and it is hardly possible, under ordinary circumstances, to conclude that one was executed to defeat the other. The plaintiff, being confronted with this difficulty, tried to avoid it by vaguely suggesting that at the time of the execution of the lease he had begun negotiations with Beale about borrowing money from him, but it is obvious that he was not speaking the truth. In my opinion the Commissioner is right in holding on the materials before him that the lease was not executed to defeat any creditor.

It being thus found that no fraud existed, it is, of course, unnecessary to decide the further point, whether, in the circumstances of this case, the alleged fraud can be said to have been carried out. But as the affirmative was strenuously maintained by counsel for the defendant, I may here say a word about it. The law is that where the intended fraud is not accomplished, the maxim *in pari delicto potior est conditio defendentis* has no application, and the party who has delivered the property may lawfully reclaim it before the alleged purpose is carried out. See *Mohamadu Marikar v. Ibrahim Naina*[1] and the authorities therein cited. The facts in this case touching this matter may be shortly stated. Beale, on discovering the existence of the lease, prosecuted the plaintiff for cheating in 1905. The plaintiff was tried in the District Court on that charge, and in the course of the trial thought better of his situation and came to a settlement with Beale. He got his brother to pay Beale and withdrew his defence, and pleaded guilty to the charge, and the Court imposed a very light punishment. Thus, Beale was not, after all, deprived of his money, though the prosecution was undoubtedly the means by which that result was produced. Now, the statement of the proposition of law above given does not appear to be quite complete. The case of *Kearley v. Thomson* shows that it is not necessary that the illegal purpose should be fully accomplished, and it is sufficient if a material part of it is carried out. Thus, where a person was upon conviction required to find security for good behaviour and gave money to his surety to be deposited, it was held that the illegal purpose was sufficiently complete when the deposit was made and the security executed, and that he could not recover the money by repudiating the transaction before the security was forfeited. *Herman v. Jeuchner.*[3] To apply this principle to the facts of the present case, was the fact of Beale being driven to take criminal proceedings

[1] *(1910) 13 N. L. R. 187.* [2] *(1890) 24 Q. B. D. 742.*

[3] *(1885) 15 Q. B. D. 561.*

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the carrying out of a material part of the fraud? And was the settlement with Beale through plaintiff's brother, in order to escape condign punishment, an exercise of the *locus penitentiæ* before the carrying out of the intended fraud? These questions should, it would seem, be answered in the negative. In *Petherperumal Chetty v. Muniandy Servai*,[1] where a conveyance had been executed to defeat an equitable mortgage, and the equitable mortgagee brought an action impeaching the transaction and claiming priority, the Court so declared and ordered payment, and thereupon the mortgagor procured money by a fresh loan and paid off the mortgage. In reference to a similar argument as in the present case, the Privy Council there observed that whatever might have been the original design; the creditor was not, in fact, defrauded of his debt. For "he was paid his debt, together with the costs of the litigation, which he successfully prosecuted, and if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take." According to this, Beale, cannot be said to have been defrauded, for he was fully satisfied, except perhaps as regards any expense he might have incurred in connection with the criminal prosecution. It may, therefore, be held that, if there was any fraudulent intent involved in the deed of lease, the fraud was not carried out, but this does not help the plaintiff, because, as I have said, I agree with the Commissioner that he failed to prove that the lease was executed for any illegal purpose.

The plaintiff says he has been in possession since the date of the lease, and his counsel is apprehensive that he may hereafter be unable to depend on prescriptive title as against the defendants. I do not think the judgment in this case will have such an effect; but for greater caution it may be declared that the dismissal of this action will be without prejudice to any right founded on possession. The appeal is dismissed, with costs.

Appeal dismissed.

[1] *(1908) I. L. R. 35 Cal. 551.*