[FULL BENCH]

Feb. 16, 1910

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

AMMAL *v.* KANGANY

D. C., Kandy, 18,984.

Purchase of land—Conveyance to minor by the seller at the request of his father—Payment of price by father—Delivery of deed to father.

Where a father by a notarial conveyance buys a land in the name of a minor child, the title to the land vests in the minor, though the father pays his own money for the land and himself accepts the delivery of the deed of conveyance.

Ranhamy v. Bastian Bedarala[1] and *Perera v. David Appu*[2] overruled.

APPEAL from a judgment of the District Judge of Kandy. One Muttusami, who was the owner of the land in dispute, sold and transferred the same by deed No. 5,479 dated March 23, 1889, to one Pitche, who was at that time a minor. Pitche, on September 10, 1907, sold and transferred the land to plaintiff. Plaintiff brought this action for declaration of title against the defendant, who he alleged was in wrongful possession. The defendant claimed to be entitled to possession of the land under a deed of lease dated March 15, 1890, from Pitche's father Arumugam, to whom deed No. 5,479 (of 1889) in favour of Pitche was delivered, and who had paid his own money for the land to Muttusami. The defendant contended that under the circumstances the title to the land vested in Arumugam. The District Judge held that title vested in Pitche by deed No. 5,479, and entered judgment for plaintiff.

The defendant appealed.

The case was referred to a Full Bench.

H. A. Jayewardene, for the appellant.—The father who paid his own money for the land had no mandate from his minor child to nominate him as purchaser; the title to the land vests in the father (*Voet 18, 1, 8; Ranhamy v. Bastian Vedarala*;[1] *Perera v. David Appu*[2]). This deed could not be looked upon as a deed of donation by the father to the child. There was no acceptance. Counsel also

[1] *(1897) 2 N. L. R. 360.*

[2] *(1903) 6 N. L. R. 236.*

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cited *Murugesu v. Appuhamy*,[1] *Affefudeen v. Periatamby*,[2] *Fernando v. Canangara*,[3] *Avichi Chetty v. Fonseka*,[4] *De Silva v. De Silva*,[5] *Wijetunga v. Misi Nona*.[6]

De Sampayo, K.C., for the respondent, not called upon.

Cur. adv. vult.

February 16, 1910. HUTCHINSON C.J.—

This case was referred to a Court of three Judges in view of certain decisions " with regard to the acceptance by a father of a gift made by him to his son."

The plaint states that by deed No. 5,479 of March 23, 1889, Muttusami, being the owner, sold and transferred certain land to Pitche, son of Arumugam; that Pitche in 1907 sold and transferred it to the plaintiff, and that the defendant is wrongfully in possession; and the plaintiff claims for a declaration of his title and to recover possession. The defendant admits that Muttusami was the owner, and admits the execution of the deed No. 5,479, but says that it was executed by Muttusami in the name of Pitche, a minor, at the request of Pitche's father, who paid the consideration for the transfer and was put in possession, and that the deed was delivered to the father, who became the owner of the land under the deed; and the defendant claims to be in possession under a lease from Pitche's father, and to be entitled to compensation for his improvements. He also denies the execution of the conveyance to the plaintiff by Pitche.

The issues agreed on were:—

(1) Did Pitche gain title to the land by deed No. 5,479 ?

(2) Did Pitche by the deed of 1907 convey the land to the plaintiff ?

(3) Damages.

(4) Is the defendant entitled to compensation ?

The District Judge, by the judgment now under appeal dated October 5, 1909, answered the first, second, and fourth issues in the affirmative. The defendant appeals, and his counsel has contended that the first issue ought to be answered in the negative, on the ground set up in the defendant's answer. He contends that where a man buys land and pays the purchase money himself out of his own money, but the deed of transfer is, by his direction, executed in favour of his infant son, the father obtains a good title to the land by virtue of the deed, unless there are circumstances to show that he intended to make a gift of the land to his son.

[1] *(1907) 3 Bal. 275.*
[2] *(1909) 12 N. L. R. 313.*
[3] *(1897) 3 N. L. R. 6.*
[4] *(1905) 3 A. C. R. 4.*
[5] *(1908) 3 A. C. R. 179.*
[6] *(1908) 2 Leader Law Reports 82.*

Reference was made in support of this contention to *Voet (Berwick's translation) 18, 1, 8;* and to *Ranhamy v. Bastian Vedarala;*[1] *Perera v. David Appu;*[2] *Affefudeen v. Periatamby;*[3] *and Murugesu v. Appuhamy.*[4]

Where one man, A, buys and pays for land out of his own money, but procures the vendor to convey it to another person, B, it is a question of fact, having regard to all the circumstances, whether he intended that B should be merely a trustee for him. If it appears that that was his intention, it may be that he may be able to enforce the trust and compel B to account to him for the property and transfer it to him. But that proposition is by no means the same thing as the proposition that a transfer to B is a transfer to A. If any of the authorities quoted assert that a transfer to B may of itself give a good title to A, that is, that it may be treated as equivalent to a transfer to A, they are opposed to the enactment of the Ordinance for the Prevention of Frauds and Perjuries, the main object of which was to prevent this very thing, and to require that a transfer of land by one man to another must be in writing, signed and attested in a particular manner. Here there is no such transfer to the father. At the most the right which he acquired by the transaction of 1889 was a right to compel his son to execute a transfer to him.

The question of acceptance of the transfer on behalf of the son, who was a minor in 1889, does not seem to me to have any bearing on this case. If the transfer by Muttusami to Pitche required acceptance by some one on Pitche's behalf to make it effectual, it was so accepted by the natural and proper person for that purpose namely, Pitche's father. I would dismiss the appeal with costs.

MIDDLETON J.—

His Lordship set out the facts, and continued:—

The District Judge found on issue (1) that Pitche gained title to the land in dispute by deed 5,479; (2) that by deed 1,715 of 1907 he conveyed the land to the plaintiff; (3) that no damages occurred; (4) that defendant is entitled to compensation for planting, and gave judgment accordingly.

The defendant appealed, and the principal point raised and argued before the Full Court was whether in view of the decisions in *Ranhamy v. Bastian Vedarala,*[1] *Perera v. David Appu,*[2] and *Murugesu v. Appuhamy*[4] the Court was justified in holding that the title to the land in dispute had vested in Pitche, and had been conveyed by him to the plaintiff.

[1] *(1897) 2 N. L. R. 360.*
[2] *(1903) 6 N. L. R. 236.*
[3] *(1909) 12 N. L. R. 313.*
[4] *(1907) 3 Bal. 275.*

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At the argument the defendant's counsel also referred to *Wijetunga v. Misi Nona*,[1] but in that case the Court held that the proof was not sufficient to bring the case within the decision in *Ranhamy v. Bastian Vedarala* and *Perera v. David Appu*, *ubi supra*.

The principle of those cases was that when A bought land in the name of B without B's mandate or authority and accepted the transfer, A must be deemed to be the purchaser (*Voet 18, 1, 8, Berwick's translation 13*). But Voet goes on to say *Quamvis insertum conditionis instrumento nomen alienum non impediat, quo minus actionem habeat, qui se non alieno, sed suo nomine emisse probat.*

Under the Dutch system it is said the sale of land had to be carried out in the presence of the Court, but under our Ordinance No. 7 of 1840, for the Prevention of Frauds and Perjuries, it is enacted by section 2 that no sale, purchase, transfer, &c., of land or other immovable property . . . . . shall be of force or avail in law unless executed before a notary and witnesses. The effect of this enactment appears to me to be that no person can claim to have title by sale or purchase in immovable property unless he has a notarial conveyance in his name. It seems to me that the effect of this section was overlooked by the Courts deciding the cases relied on for the appellant.

The person in whom the property is vested by notarial conveyance is, *primâ facie*, the true owner, and must be considered so, subject to the right of any person claiming to be the true owner to have it declared by the Court that he is *de jure* the owner, and that the conveyance in the name of the former should be set aside. Until the Court decides this in the claimant's favour, he has no title by purchase or sale in the absence of a notarial deed in his favour.

In the present case the land was conveyed to Pitche though a minor, but the purchase money is said in the deed to have been paid to Muttusami by Arumugam's son Pitche.

In my opinion the title at the present moment is vested in the plaintiff, who apparently bought from Pitche after he came of age, for valuable consideration. When the defendant hired the land from Arumugam and his wife, they had no legal title vested in them enabling them to execute the lease, and in my opinion it is void.

It is true that the defendant's deed of lease from Arumugam and his wife recites that they bought the land in the name of their minor child Pitche with their own money, but they must have put or caused to be put the legal title in Pitche, and he was not deprived of it before he sold to the plaintiff. Even if there were a claim in this action in reconvention to set aside the deed in the name of the plaintiff, the defendant is not the person entitled to make it.

We then come to the question of compensation. The defendant here is a lessee from persons who are not the legal owners, but the plaintiff will get the benefit of any improvements the defendant

[1] (*1908*) *2 Leader Law Reports 82.*

may have made while acting as lessee, and on the well-known principle of the Roman-Dutch Law, he will not be entitled to enrich himself at the defendant's expense. The plaintiff, however, admits that the defendant is entitled to compensation.

I think, therefore, it would be right and equitable to treat the defendant as if he stood in the position of a lessee to a lessor who has acquiesced in or consented to the planting improvements, and to hold that he has a tacit hypothec for the value of them, but not a *jus retentionis*, as we held in the case of *Punchirala v. Cader Mohideen*[1] (139, D. C., Kandy, 18,626), following the ruling of Maasdorp C.J. in *De Beer's Consolidated Mines v. London and South African Exploration Co.*[2] cited in Mr. Walter Pereira's book on the Right of Compensation for Improvements. The amount of compensation will be ascertained as the learned District Judge proposes in his judgment, and the appeal will be dismissed with costs.

WOOD RENTON J.—

The question raised by this appeal is whether, in view of the provisions of section 2 of Ordinance No. 7 of 1840, the pure Roman-Dutch Law, by which, where a father buys with his own money a piece of land in the name of a minor child, but himself accepts delivery of the deed, he becomes the owner of the land, inasmuch as he could have no mandate from the minor to nominate him as the purchaser, is in force in Ceylon. I would answer this question in the negative. In the cases in which an affirmative answer to it has been given (see, *e.g.*, *Ranhamy v. Bastian Vedarala*[3] and *Perera v. David Appu*[4]) the effect of Ordinance No. 7 of 1840 was not considered. The case of *Affefudeen v. Periatamby*[5] is clearly distinguishable. There the *ratio decidendi* was that the transaction was a donation and not a sale. Moreover, in that case His Lordship the Chief Justice raised the very question now submitted to us, while in my judgment I pointed out in effect that, in view of the decision in *Perera v. David Appu*, the matter was not open to reconsideration by a Bench of two Judges.

Appeal dismissed.

[1] *S. C. Min., Feb. 4, 1910.*
[2] *10 S. C. 359.*
[3] *(1897) 2 N. L. R. 360.*
[4] *(1903) 6 N. L. R. 236.*
[5] *(1909) 12 N. L. R. 313.*