

Present: Dalton and Lyall Grant JJ.

1926.

HAMEED *et al.* v. ZEYNAMBU *et al.*

13—D. C. Galle, 22,833.

Transfer of immovable property—Reservation of the option to obtain a re-transfer—Assignment of the option—Assignee's right to enforce the option.

The first plaintiff transferred for consideration certain immovable property to the first defendant subject to the exercise of an option to obtain a re-transfer on payment of Rs. 3,000 before the expiration of four years. The second plaintiff obtained an assignment of the option for consideration on a duly registered notarial instrument. The first defendant had due notice of the assignment.

Held, that the option to re-purchase was an assignable interest and that the assignee was entitled to enforce it.

A PPEAL from a judgment of the District Judge of Galle.

Hayley (with *B. F. de Silva* and *Ismail*), for plaintiffs, appellant.

Drieberg, K.C. (with *H. V. Perera*), for defendants, respondent.

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September 24, 1926. DALTON J.—

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The facts in this case are as follows: The first plaintiff Abdul Rahaman Abdul Hameed, by deed marked D1 dated July 15, 1921, sold and conveyed certain immovable property to the first defendant Zeynambu Nachia, who is the wife of the second defendant Abdul Mohideen, in consideration of the sum of Rs. 2,000, subject to a provision in the following terms:—

“ If the said vendor, or his heirs, executors, or administrators shall be desirous of obtaining a re-transfer of the said premises and shall before the expiration of four years from the date hereof repay a sum of Rs. 3,000 before a notary public ”—

he might obtain the preparation of a deed at his own expense and the vendee would transfer the property back to the vendor. By deed D2 dated January 28, 1924, the first plaintiff assigned all his rights under D1 to his wife Halma Umma for the sum of Rs. 50. This deed was never registered. Thereafter, by deed P1 registered on June 2, 1925, the first plaintiff, in consideration of the sum of Rs. 250, assigned all his rights under D1 to the second plaintiff Meera Lebbe Abdul Rahaman. Notice of this second assignment was given to the first defendant by letter P2 dated June 12, 1925. This letter also asked her to re-convey the property in terms of the deeds he had executed (D1). The sum of Rs. 3,000 was to be paid on the signing of the re-conveyance. First defendant answered by her proctor (P3) that she was ready to re-convey the property to the first plaintiff in terms of P1 and to no one else. This was accepted by plaintiffs (P4), but this acceptance was subsequently withdrawn, as the proctor of the two plaintiffs (who were not separately represented) found on examination of the Land Register that a caveat had been lodged in respect of this land by a creditor of the first plaintiff. The record of the lower Court gives no information as to the date of this caveat. He, therefore, insisted on a re-conveyance in favour of the second plaintiff, the assignee of the first plaintiff. Defendant maintained her objection, subject to her offer already made, and thereupon, on July 14, 1925, the two plaintiffs filed their plaint bringing Rs. 3,000 into Court and claiming a re-conveyance of the property to the second plaintiff. The defendants' answer pleaded that first plaintiff had no right to assign his rights under D1, and the sole issue framed was as follows:—

Are the plaintiffs entitled to ask for a transfer in favour of the second plaintiff ?

It will be seen that this issue is in such broad and indefinite terms as to give the defendant a very wide scope for defending the action. Evidence was accordingly tendered and admitted to show

inter alia that, apart from a denial of any right to assign, there had in fact been an assignment by the first plaintiff of his rights prior to the execution of P1 in favour of the second plaintiff. The learned District Judge came to the conclusion that the first plaintiff's rights were assignable, and that defendant had no right to refuse to accept the Rs. 3,000 from first plaintiff's assignee. But he comes to the conclusion that first plaintiff's assignment to second plaintiff was probably bad. This conclusion is presumably based on the fact of the existence of the prior assignment D2. Then the learned Judge continues:—

“ I hold that the plaintiffs are entitled to ask that the defendant re-transfer the property to the first plaintiff and that the second plaintiff is entitled to ask the first plaintiff to re-transfer it to him in view of his assignment. ”

This appears to be contrary to the previous conclusion, that the assignment to the second plaintiff was bad. Finally, he holds that the second plaintiff cannot ask the defendant to do more than re-transfer the property to the first plaintiff, and as the plaintiffs were asking for more than that their claims should be dismissed.

The first matter raised upon the appeal is the application of counsel for the appellant to lead further evidence in respect of the document D2 which was tendered by the defendant in the Court below and admitted without objection. Nothing that I have heard in the course of the argument has satisfied me that the Court should grant this request. First plaintiff was a party to that document and was quite aware of its existence although he may have been surprised that the defendant should produce it. Further, it was admitted, although only a copy, without objection. This application therefore must be refused. The plaintiff, however, is successful on another point. In view of the fact that D2 has not been registered, under the provisions of section 17 it is void as against the second plaintiff who claims an adverse interest thereto on P1, on valuable consideration. This is not questioned by counsel for respondent. The position he takes up is that the undertaking to convey is enforceable only by and to the first plaintiff with whom the contract was made, and that there is no undertaking to convey to an assignee as the second plaintiff. I entirely agree with him that the deed D1 is a contract of sale and has all the requisites of a conveyance of land notarially executed in due form of law. It contains an undertaking by the vendee to re-convey on certain conditions within a limited time. The vendor then cedes his rights under the contract to the second plaintiff. There can be no objection as to the form of the cession which has all the requisites to make it effective; but his right to cede or assign is questioned by defendant, the vendee. Stress is laid upon the clause of D1 undertaking to re-convey to the vendor or his heirs and administrators. As the word “ assigns ”

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is not included it is argued that there is a clear intention to avoid any possibility of an assignment of the rights under the deed. But there is no doubt that those rights pass on death and are not purely personal to the vendor, and as a general rule a right which passes on death is in law capable of assignment. In *Eastern Rand Exploration Co. v. Nel*¹ Innes C.J. stated the common law, in the following terms: "generally speaking, the question of whether one of two contracting parties can by cession of his interest establish a cessionary in his place without the consent of the other contracting party depends upon whether or not the contract is so personal in its character that it can make any reasonable or substantial difference to the other party whether the cedent or the cessionary is entitled to enforce it. Subject to certain exceptions founded upon the above principle rights of action may by our law be freely ceded." This case does not come within any of the exceptions mentioned by Sande (*Cession of Actions*). The addition of the word "assign" was not necessary to the deed to give the power of cession or assignment; therefore the mere omission of the word cannot be taken under the circumstances to be evidence of any intention that the power to cede or assign should be expressly excluded.

The three essentials of a valid cession of action as set out by Maasdorp (*Institutes, Vol. IV., p. 174*) are present here, namely, a right of action capable of being ceded, an intention to cede based upon some legal ground, and a formal cession according to law.

For these reasons I am of opinion that the learned Judge was wrong in dismissing plaintiff's claim. His order must therefore be set aside. The appeal is allowed. The second plaintiff is entitled to an order in terms of the prayer of the plaint together with costs of the action. On execution of the re-conveyance, the Rs. 3,000 will be paid out to the defendant. Under the circumstances I would direct that the first plaintiff pay his own costs of trial, so far as they can be separated from those of the second plaintiff, as his conduct in executing D2 was most unsatisfactory.

The second plaintiff is entitled to costs of appeal.

LYALL GRANT J.—

I agree that this appeal should be allowed. The contract is clearly an assignable one and has been properly assigned. The previous assignment to the second plaintiff's wife was not registered and cannot prevail over the later registered one.

The parties are agreed that the effect of the caveat had expired before the action was brought.

The defendant is therefore not entitled to refuse to execute a transfer in favour of the second plaintiff.

¹ (1903) T. S. 42.

In regard to costs, I think the defendant should pay the costs of the second plaintiff. She has all along taken up the attitude of refusing to convey to him. The first plaintiff should, in my view, bear his own costs, as his conduct in making a previous assignment was not candid, and this conduct when it came to the defendant's notice afforded her some justification for refusing to convey to the second plaintiff.

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Appeal allowed.
