1939 *Present :* **Keuneman and de Kretser JJ.**

VELAN ALVAN *v.* PONNY *et al.*

343—D. C. Jaffna, 11.091.

Tesawalamai—*Sale of property by one spouse to another*—Tediatetam—*Jaffna Matrimonial Rights and Inheritance Ordinance, No. 1 of 1911, s. 19 (a)—Consideration in a deed—Oral evidence to contradict terms of document—When allowed—Evidence Ordinance, s. 92.*

Property acquired by one spouse from the other for valuable consideration is *tediatetam* property within the meaning of section 19 (*a*) of the Jaffna Matrimonial Rights Ordinance, No. 1 of 1911.

Oral evidence that the consideration in a deed is different to that stated in it cannot be admitted in a case except where the validity of the document is in question or where relief was sought in respect of the document itself.

Oral evidence is not allowed where the effect of the deed comes up for consideration incidentally.

***Lunaiha Umma v. Hameed* (*1 C. W. R. 30*) referred to.**

APPEAL from a judgment of the District Judge of Jaffna.

N. E. Weerasooria, K.C. (with him *S. Subrahamanyam*), for plaintiff, appellant.

N. Nadarajah (with him *P. S. W. Abeywardene*), for defendants, respondents.

Cur. adv. vult.

July 20, 1939. KEUNEMAN J.—

In this case the plaintiff brought action against the defendants (*a*) for a declaration that he was entitled to an undivided one-eighth share of certain premises. He further prayed (*b*) that deed P 4, No. 5,016, dated June 1, 1936, executed by the first defendant in favour of the second and third defendants, be declared to have been executed secretly and collusively without notice to the plaintiff and that the same be declared not valid under the law of *Tesawalamai*, and (*c*) for an adjudication that the consideration mentioned in the said deed was fictitious consideration for the share conveyed and that the market value was only Rs. 540, and (*d*) for an order on the second and third defendants to convey the share in question to the plaintiff. In substance, the plaintiff as a co-owner claimed the right of pre-emption under the *Tesawalamai*.

The following issues were framed :—

" (1) Is deed No. 841 of January 23, 1929, supported by valuable consideration?

(2) If not, is the property conveyed *tediatetam* within the meaning of Ordinance No. 1 of 1911 or is it separate property of the first defendant?

(3) As deed No. 5,016 of June 1, 1936, purports to convey a divided northern half of the entire land, is the present action for pre-emption of an undivided half share or quarter share of the entire land maintainable?

(4) In case plaintiffs succeed in this action, are the defendants entitled to compensation for improvements made? If so, in what amount?
(5) Is deed No. 841 dated January 23, 1929, a deed of sale or a deed of donation?
(6) What is the market value of the share sold by the first defendant to second and third defendants?
(7) What is the share of the land, dealt with by deed No. 5,016 of June, 1936?"

The learned District Judge dismissed the plaintiff's action with costs and the plaintiff appeals.

In his judgment the District Judge held that the first defendant acquired the premises in question from her husband for valuable consideration after her marriage by deed P 2 of January 23, 1929, and that the property in question thus became the *tediatetam* property of the wife, and in consequence of section 20 of Ordinance No. 1 of 1911 a half share of the property reverted to the husband. On the death of her husband his half share devolved upon his brothers and sisters, and the plaintiff thus became entitled to a one-eighth share of the property. The District Judge further held that it was not open to the defendants to lead oral evidence to prove that deed P 2 was not given for valuable consideration, in view of the statement in the deed that it was a transfer for valuable consideration, namely, a sum of Rs. 1,000, being the dowry money of the first defendant. The District Judge held that the defendants were precluded by section 92 of the Evidence Ordinance from leading such oral evidence to change the character of the transaction. He held further that the first defendant's transfer P 4 in favour of the second and third defendants purported to convey not the whole land but a divided northern block, and stated that the first defendant, who was only entitled to an undivided half share of the property, had no authority to mark out and sell a divided block. The District Judge held that the first defendant could not be held to have transferred an undivided share to the second and third defendants, and that the right of pre-emption only applied to the sale of undivided shares, and that the plaintiff's action accordingly failed.

I do not think the District Judge's argument on this last point can be supported. On an examination of the deed P 4, I think the District Judge was right in holding that the first defendant purported to sell a divided northern block out of the property in question. If we presume that the first defendant was entitled in fact to an undivided half share of the whole property, it is no doubt strictly true to say that the first defendant had no title to sell the whole of a divided block, but this does not mean that the first defendant's deed was devoid of any legal effect. The result that would follow in law is that the second and third defendants would be entitled to an undivided half share of the northern block only, and not of the whole land. I think this must be regarded as a sale of the undivided share of the property, such as would support an action for pre-emption.

The ground on which the District Judge rested his judgment accordngly failed. Counsel for the respondents, however, argued that the

District Judge's findings on the other aspects of the case were wrong. He contended in the first place that section 19 of Ordinance No. 1 of 1911 only applied to acquisitions for valuable consideration by either of the spouses from strangers, and not to acquisitions from each other. He pointed out that under section 9 of that Ordinance it was open to the spouses to make voluntary grants, gifts, and settlements to and upon eachother, and argued that the effect of such transactions was to vest the other spouse with title, although such title was made subject to the debts and engagements of the transferring spouse. He further argued that the interpretation given by the District Judge to section 19 would lead to an anomalous state of affiairs. However clear may be the intention of one spouse that the whole property should be vested in the other, if the transaction is for valuable consideration, half would automatically revert to the transferring spouse in view of the fact that it was *tediatetam* property. I think Counsel for the respondents is probably right in arguing that this case was not in the contemplation of the draftsman of the Ordinance. The question, however, we have to decide is whether the meaning of the words of section 19 is sufficient to cover the case of an acquisition by one spouse of the property of the other for valuable consideration. The language used is undoubtedly very wide, *viz.*, " (*a*) property acquired for valuable consideration by either husband or wife during the subsistence of marriage ". It was open to the draftsman to restrict that language to acquisitions from strangers, but he has not done so. I am of opinion, in view of the language used, that it is not possible for us to say that it does not cover the case of one spouse acquiring property from the other for valuable consideration, and however unfortunate the result may be, I think we must uphold the interpretation given by the District Judge. I may add that the language of sections 17 and 18 supports this interpretation. Under these sections property received for pecuniary consideration does not fall within the class of " property derived from the father's side " or " property derived from the mother's side ". All such property if received during the subsistence of the marriage would, I think, be clearly *tediatetam* property. Again, the decision of the Divisional Court in *Avitchy Chettiar v. Rasamma*[1] that property acquired by a wife during the subsistence of the marriage out of money which formed part of the separate estate is *tediatetam* property is in keeping with the view I have expressed. (See the argument of Garvin A.C.J.)

Counsel for the respondents disputed one further finding of the District Judge, namely, his exclusion of the oral evidence to show that deed P 2 was not given for valuable consideration. In the recitals of deed P 2, the vendor husband stated that he had previously appropriated and spent a sum of Rs. 1,000, being the dowry money of his wife, and in the operative clause the vendor made the conveyance " in consideration of the sum of Rs. 1,000 already received " by him from his wife. The consideration stated in the deed was valuable consideration within the meaning of section 19. The wife Ponny in this case gave evidence to contradict this statement, but the District Judge held that such evidence was not admissible, in view of section 92 of the Evidence Ordinance.

[1] *35 N. L. R. 313.*

Counsel for the respondents argued that he was entitled to lead oral evidence under Proviso (1) to section 92, and that what he was seeking to establish was "want or failure of consideration". He cited *Woodroffe and Ameer Ali on Evidence, 9th ed., p. 660*:—"The section prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract, but does not prevent a party to a contract from showing that there was no consideration, or that the consideration was different from that set out in the contract".

There are, however, other words in the proviso which we have to consider. What is provable under the proviso is any fact "which would invalidate any document, or which would entitle any person to any decree or order relating thereto". Now it is clear in this case that no attempt is being made to "invalidate" the document. On the contrary all parties are agreed that the document is valid, and the only question for determination is the effect of the document. Further, I am of opinion that the present action is not an action to obtain any decree or order "relating thereto". I think that these words mean "decree or order relating to the document". In the present case there is no claim relating to the document. The effect of the document only comes up for determination incidentally in connection with the proof of the plaintiff's title and of his right to claim pre-emption. I do not think that the words "relating thereto" apply to such a case. I think oral proof is restricted to cases where it is sought to prove that the document is invalid, or to obtain a decree or order directly relating to the document, *e.g.*, a decree for rectification of a document, and that oral evidence is not allowable where the effect of a document incidentally comes up for determination.

No case has been cited to us where oral evidence has been admitted to prove that the consideration was different from that stated in the deed, except where the validity of the document was in issue, or where relief was being sought in respect of the instrument itself. An instance of the latter kind is to be found in *Perera v. James Appuhamy*[1], where the plaintiff sued the defendant for reconveyance of premises conveyed to the defendant on a deed. The deed on the face of it purported to be a sale, but the plaintiff was held entitled to lead evidence to show that no consideration passed, and that the conveyance was on trust. As I said before an action for rectification of a deed would be another instance. I think we are driven to the same conclusion, when we take the words "want or failure of consideration" in their context, viz., "such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in law or fact". These are grounds on which a document can be declared invalid, or on which relief can be granted in respect of the document. I cannot imagine proof, for instance, of fraud being admitted for a purely collateral purpose.

The nearest case to the present one which I have been able to find is *Lunaiha Umma v. Hameed*[2]. There, a Moorish lady sued her husband for the sum of Rs. 7,000, being proceeds of a sale of property belonging

[1] *3 C. W. R. 341.* [2] *1 C. W. R. 30.*

to her. The defendant pleaded that this sum was by agreement between him and his wife to be taken as consideration of the transfer to her and to her child of certain other property belonging to him. The transfer in question purported to be "in consideration of love and affection . . . . . and for divers other good causes and considerations". The last words were held to be merely a notarial flourish, and the Supreme Court held that there was only one answer, and that in the negative, to the application "to show by *vivâ voce* evidence, that what purports to be, on the face of it, an out-and-out deed of gift by her husband to her on the ground of natural love and affection, was in fact a transaction for other and valuable consideration". The Supreme Court, however, gave no reasons for this decision.

I am of opinion that the claim to lead oral evidence in this case for the purpose of showing that the deed P 4 was given for a consideration different from that stated in the deed cannot be permitted.

The issues in the case will be answered as follows :—

(1) Yes.

(2) Need not be answered, except to say that the property conveyed by P 2 was the *tediatetam* property of the wife.

(3) Yes.

(5) Deed 841, P 2, is a deed of sale.

(7) Deed 5016, P 4, dealt with an undivided half of the northern block of the land in question.

The District Judge has not dealt with issues (4) and (6).

I allow the appeal, and order that the plaintiff be declared entitled to an undivided one-eighth share of the premises mentioned in paragraph (1) of the plaint. I also order that the case be remitted to the District Court for the determination of issues (4) and (6). The District Judge may decide these issues on the evidence already led, or if he thinks fit, may permit the parties to lead further evidence. The plaintiff-appellant is entitled to the costs of the appeal. The costs of the trial already held will be in the discretion of the District Judge.

DE KRETSER J.—I agree.

Appeal allowed.