Present : Pereira J. and Ennis J.

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MADAR SAIBO *et al. v. SIRAJUDEEN et al.*

203 and 204—D. C. Kandy, 21,521.

Purchase of land by a partner—Is it property of partnership ?—Joinder of plaintiffs—Action in respect of separate lands to which each is separately entitled—Civil Procedure Code, s. 17—Fraudulent deed valid until set aside.

PEREIRA J.—In Ceylon, land bought by a partner of a firm in his own name out of the assets of the partnership is not deemed the property of the partnership, but it is the property of the partner in whose favour the conveyance is executed.

Joinder by two persons in one action of claims in respect of separate lands to which each is separately entitled is obnoxious to section 17 of the Civil Procedure Code, but the irregularity may be waived by the defendant.

A fraudulent deed, unlike a deed executed by a person not competent in law to enter into contracts, is, under the Roman-Dutch law, valid until it is set aside or cancelled, and when it is cancelled, the cancellation refers back to the date of the deed.

THE facts appear from the judgments.

E. W. Jayewardene, for first defendant, appellant.

H. J. C. Pereira and *F. J. de Saram*, for second defendant, appellant.

Bawa, K.C., Schneider, Drieberg, A. St. V. Jayewardene, and *Arulanandam*, for plaintiffs, respondents.

Cur. adv. vult.

November 3, 1913. PEREIRA J.—

In this case the plaintiffs seek to have certain deeds of conveyance executed by the first defendant in favour of the second defendant (to use the words of the plaint) " set aside and declared null and void," on the ground of fraud on the part of the two defendants and collusion between them. The plaintiffs are partners of the firm of " P. V. M. Madar Saibo," and although it is stated in the plaint that the lands described in schedules A, B, and C are the property of the partnership, it is clear from what follows in the plaint itself, and in the proceedings in the case, that, in a legal point of view, the lands mentioned in the first schedule are the property of the first plaintiff, the lands mentioned in the second schedule are the property of the second plaintiff, and those mentioned in the third schedule are the property of the firm. In the course of his

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opening address to the Court the plaintiff's counsel would appear to have stated: "The effect of the partnership deed of 1905, when the second plaintiff was admitted into the firm, was not to vest title in the second plaintiff in respect of the lands which at the date belonged to the first plaintiff alone." Clearly, the title deeds of the lands described in the three schedules are, respectively, in favour of the two plaintiffs (individually) and the firm of "P. V. M. Madar Saibo." It has been said that under the English law land bought by a partner of a firm in his own name out of the assets of the partnership is deemed the property of the firm. However that may be, it is clear from our Ordinance, introducing the English law as to partnership into this country (Ordinance No. 22 of 1866), that the law as to conveyance of land and rights in land is still the law of the country and not the English law, and I am not, therefore, prepared to hold that the Court can look upon the lands described in the three schedules respectively as the property of any but those in whose favour the conveyances have been executed. It may be that when land is bought by one of two partners of a firm in his own name out of assets of the partnership, the other partner has a right to claim a conveyance from the first of the land in favour of the firm, but such a conveyance should be claimed and obtained before the firm can appear in Court and seek any redress on the footing that it is the owner of the land. In view of the facts mentioned above, there is clearly in the present case a misjoinder of plaintiffs and a misjoinder of causes of action. The complaint in the case is that the first defendant, professing to act as the agent of the plaintiffs or manager of their firm, has fraudulently conveyed the lands to the second defendant. Now, clearly, in respect of the conveyance of the lands described in the first schedule, a cause of action accrued to the first plaintiff and him alone; in respect of the conveyance of the lands described in the second schedule, a cause of action accrued to the second plaintiff; and in respect of the conveyance of the lands mentioned in the third schedule, a cause of action accrued to the firm of "P. V. M. Madar Saibo." There were, thus, at least three causes of action; and three persons practically have joined in suing thereon. This is obnoxious to section 17 of the Civil Procedure Code, which enacts: "Nothing in this Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action." The words of the old Indian Code of Civil Procedure, from which the provision has been borrowed (see section 31 of the Indian Code), are slightly different. It enacts: "Nothing in this section shall be deemed," &c. In view of the more comprehensive words of our Code—words that would appear to exclude the operation of the other sections of the Code—sections such as section 22, which provides for the waiver of objections (to irregularities) by the defendant—it is a question whether contravention of the provision cited above of

section 17 is not absolutely fatal to an action. Having given the matter my best consideration, I agree, not without much hesitation, with my brother Ennis, that in the circumstances of the present case the irregularity was one that might be waived by the defendant, and that it has practically been waived. No objection based on section 17 to the constitution of the action was ever taken. The issue suggested by the defendants' counsel—"Can the plaintiffs as partners maintain this action in respect of the properties described in schedules A and B?"—involves no such objection.

To proceed now to the merits of the case. It is not necessary that I should here recapitulate the facts and circumstances marshalled by the District Judge in his judgment. I think that there is sufficient in those facts and circumstances amounting to a *primâ facie* case against the defence of fraud and collusion. They certainly established the necessity for evidence by the second defendant of a fact especially within his knowledge, namely, the payment by him of the consideration mentioned in the deeds, but the second defendant has abstained from giving evidence himself of that fact. As has been pointed out in the case of *Ossen Lebbe v. Dias*,[1] the acquisition of property *oneroso titulo* removes every presumption of fraud, and it was within the power of the second defendant to prove, if that was the case, such acquisition in the present instance. His omission to do so must naturally tell heavily against him. I think that the decision arrived at by the District Judge on the main question in the case is right. He has, however, declared the deeds in question null and void. As has been often laid down by this Court, a fraudulent deed, unlike a deed executed by a person not competent in law to enter into contracts, is, under the Roman-Dutch law, valid until it is set aside or cancelled, and when it is cancelled, the cancellation refers back to the date of the deed. See *Ossen Lebbe v. Dias*,[1] and authorities cited by Wood Renton J. in his judgment in *Haramanis v. Haramanis*.[2] As regards the lands belonging to the second plaintiff, the first defendant had no authority to execute the deeds. He was the attorney of the first plaintiff only, and he could not alienate the property of the second plaintiff. However, as all the deeds were fraudulently executed, it would perhaps be best that all the deeds should be set aside or cancelled.

The District Judge will amend the decree accordingly. I think that the plaintiffs should have their costs in both Courts.

ENNIS J.—

In this case the plaintiff sued (1) to have eleven deeds set aside and declared null and void (or that the second defendant be decreed to re-transfer the lands to the plaintiffs); (2) that the plaintiff be declared entitled to the lands and premises; and (3) in the

[1] *2 Bal. 41.*

[2] *(1907) 10 N. L. R. 332, 338.*

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alternative, that the defendants be decreed to pay the plaintiffs Rs. 100,000, the value of the lands, and that the said deeds be re-formed accordingly.

The plaint set out that the plaintiffs were partners, and the lands and premises formed part of the partnership property of this firm, but that the deeds for some of the lands (schedule A) were in the name of the first plaintiff, the deed for one land (schedule B) was in the name of the second plaintiff, and the deeds for the rest (schedule C) were in the names of both plaintiffs. The first plaintiff for many years carried on business on his own account, and on April 20, 1900, executed a power of attorney in favour of the second plaintiff and M. M. Sawool Hamood jointly and severally. In 1905 the first plaintiff took the second plaintiff into partnership by a deed notarially executed, which provided that the lands in the name of Madar Saibo should, *inter alia*, constitute the capital of the partnership. In 1906 Sawool Hamood, by virtue of a power of substitution in the power of attorney, appointed the first defendant in his stead. On December 20, 1911, first defendant transferred the lands and premises to the second defendant, executing the eleven deeds it is now sought to set aside on the ground of fraud and collusion.

In March, 1911, criminal proceedings were instituted against both defendants, in the course of which the first plaintiff and the second defendant gave evidence. The first plaintiff died shortly after, and the evidence given by him in the criminal proceedings has been put in evidence in this case. The evidence given by the second defendant in those proceedings was also admitted in evidence in this case.

On the appeal the first point argued was whether this evidence of the second defendant was properly admitted. It is a statement made by a party to the case, and as such would be admissible as an admission, whatever the inference it may suggest.

The next point taken on the appeal was that there had been a misjoinder of plaintiffs and causes of action. At the first hearing of the case no such issue was raised, but after the evidence of the second plaintiff the following additional issue was suggested and consented to: "Can the plaintiffs as partners maintain this action in respect of the properties described in schedules A and B?" This issue does not, in my opinion, clearly raise the question of misjoinder of parties and causes of action. It has also not been dealt with in the judgment of the District Court. Section 22 of the Civil Procedure Code provides that objections to misjoinder of plaintiffs not taken before the hearing shall be deemed to have been waived, and section 17, which also deals with misjoinder of plaintiffs, expressly provides that nothing in the Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action. A consideration of these two sections seems to indicate that objection to misjoinder of plaintiffs and distinct causes of action can be taken at any time,

even on appeal. The Code defines " cause of action " as " the wrong for the prevention or redress of which an action may be brought." The wrong alleged in this case was the fraudulent disposal of the landed property of the partnership by the defendants in collusion, but no action could be brought until the deeds were executed, as no contract for the sale of lands has any force in law (Ordinance No. 7 of 1840) unless and until it is in writing notarially executed. The illustration to section 35 of the Code must, it would seem, be construed in the light of Ordinance No. 7 of 1840, although it might by itself have a wide signification. The English law of partnership as applied to Ceylon (Ordinance No. 22 of 1866) does not alter the position, as the provisions of Ceylon Ordinances have been expressly excepted. The effect of Ordinance No. 7 of 1840 would be to make each deed a separate contract of sale on which an action could be brought, but in this case the separate causes of action would not, I consider, be " distinct " causes of action as contemplated by section 17, for they are all based on the same wrong, by the same defendants, done before the suit was instituted against the joint interests of the plaintiffs. The Code distinguishes separate causes of action from distinct causes of action, for separate causes of action by joint plaintiffs may be joined under sections 35 and 36, while by section 17 nothing in the Ordinance will allow the joinder of plaintiffs in distinct causes of action. There has not, therefore, in my opinion, been a misjoinder of causes of action. The proposition is, however, one open to doubt, but the substantial rights of the parties have not been prejudiced, and the defect, if any, would not justify an interference on appeal (section 39 of Ordinance No. 1 of 1899).

On the question of fraud and collusion. As regards the first defendant, the evidence is clear that he assigned the property specified in the schedule to the plaint to the second defendant on the deeds executed on December 20, and has not accounted for the alleged purchase money, Rs. 61,320. As regards the second defendant, the evidence is that the price for which the property was alleged to have been sold is considerably below its value; that he must have known from the documents that the first defendant had no power to convey the legal title to the lands in schedule B and to half the lands in schedule C, and he took no steps to get the second plaintiff to join in the sale; that he did not take possession of the property. The payment of the consideration by him has been put in issue, and he has not gone into the witness box to prove the payment; his statement in the criminal proceedings that he told the second plaintiff on November 10, when the second plaintiff was in Kandy, that he was going to pay part of the consideration (Rs. 16,500) then, and his further statement that the second plaintiff was in Kandy on December 20, the day the deeds were signed, and the second plaintiff knew of, and agreed to, the

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sale, have been proved to be false by the evidence of the second plaintiff and the documentary evidence supporting it, which showed that the second plaintiff was not in Kandy on November 10 or on December 20. These facts lead to a strong inference that the second defendant knew of the fraud, and acted in collusion with the first defendant. Further, the failure of the second defendant to give evidence in the case leaves the payment of the alleged consideration unproved. It has been urged on appeal that certain facts in favour of the second defendant have not been considered. One was that the first plaintiff knew of the transaction in January and took no steps till March; but is this so? The argument rested on the evidence of the kanakapulle and the entry in the "Land Purchase Account" in the firm's books "On account credit entry on land purchase account, Rs. 75,823.36." The first plaintiff arrived in Kandy on January 17, the entry closing the land purchase account was made on January 13, and the kanakapulle says that some days after the arrival of the first plaintiff the first plaintiff asked him about the entries, and that he informed the first plaintiff that another kanakapulle had made an entry in the rough cash book on instructions of the first defendant.

The first plaintiff in his evidence in the criminal proceedings said that he did not see this entry till he looked into the books (presumably in March). There is a discrepancy in this evidence, but I am unable to see that it brings home to the first plaintiff a knowledge of the sales in January, as the entry in the account is merely a closing entry of the land purchase account. The amount does not tally with the sums alleged to have been paid in November and December. It is, in fact, inconsistent with those payments, and does not in any way disclose them.

In my opinion the deed for the land in schedule B is null and void, and the deeds for the lands in schedules A and C should be cancelled, and I agree with my brother Pereira that it would be best to cancel them all, subject to which amendment I would affirm the decree with costs.

Affirmed.