Present : Bertram C.J. and De Sampayo J.

1921.

FERDINANDO *v.* FERDINANDO *et al.*

85–86—D. C. Colombo, 920.

Land Registration Ordinance, No. 14 of 1891, s. 17—Gift by father to son—Subsequent sale to son-in-law—Prior registration—Fraud—Collusion.

The first defendant transferred to his son in 1908, by a deed which was never registered, a tract of land, subject to a life interest in his favour. The son, nevertheless, possessed and improved the land. He contracted a marriage distasteful to the family, and died in 1918, leaving a widow and child. The widow (plaintiff) sent a letter of demand to the first defendant for the title deed. Three days thereafter, by a deed which was registered, the first defendant transferred the land to his son-in-law (second defendant), who was aware of the earlier deed; the consideration was stated to be Rs. 5,000, which included a debt of Rs. 2,750 which was already due from the first defendant to second defendant. The second defendant soon after transferred the property to the third defendant.

Held, that in the circumstances of this case (see judgment) there was collusion between the first and second defendants, and that, consequently, the second defendant did not get a superior title by registration.

The mere existence in the mind of a man, who has obtained a conveyance for valuable consideration, of knowledge of the existence of a prior and unregistered conveyance, is not sufficient to deprive him of the right to gain priority by registration. Section 17 makes an express exception in the case of (*a*) fraud and (*b*) collusion. This implies that a man may be guilty of collusion without being guilty of fraud, and *vice versâ*. Fraud may involve a conspiracy of mind with mind, but it does not necessarily involve it. There may be something in the position or the conduct of the subsequent purchaser which may make his contract fraudulent, as, for example, a fiduciary relationship to the other party, the relationship of solicitor and client, the part which he played in the previous transaction, or implied representations in connection with the two transactions. Further, though fraud may involve a conspiring of mind with mind, such a conspiring is not necessarily fraud. It may involve no conscious moral dishonesty. Even where it does involve such a conscious moral dishonesty, it may, nevertheless, be questioned whether this amounts to fraud if the object in view does not involve any deprivation of a man's legal rights.

Collusion means, as the derivation of the word implies, "the joining together of two parties in a common trick." It carries with it the implication of something indirect and underhand. It is permissible for a person who knows of the existence of an unregistered conveyance to obtain another from the same source

1921.

Ferdinando v. Ferdinando

and to gain priority by registration. But this is where the parties are supposed to be acting independently in their own interests. It is otherwise where, though to an exterior view they are simply independent parties to a transaction as vendor and purchaser, they are, in fact, acting together for a common and indirect end. There, even though the result they aim at is permitted by the law, their contract amounts to collusion.

THE facts are set out in the judgment.

Bawa, K.C. (with him *Canakaratne*), for third defendant, appellant.

Pereira, K.C. (with him *Coomaraswamy*), for second defendant, appellant.

A. St. V. Jayawardene, K.C. (with him *Croos-Dabrera*), for respondent.

Cur. adv. vult.

December 21, 1921. BERTRAM C.J.—

This appeal raises an important question under section 17 of the Land Registration Ordinance, No. 14 of 1891, namely, the meaning of the word "collusion" as raised in that section. The action is brought by Gertrude Taylor Ferdinando, the administratrix of the estate of her late husband, Don Peter Richard Ferdinando, against his father, the first defendant, Rev. Don Peter Gerard Ferdinando, alleging that he, in collusion with the second defendant, conveyed to him (the second defendant) a property which had been already transferred to her husband, and that there was fraud and collusion on the part of the first and second defendants in obtaining the deed granted to her husband. Similar charges are made against the third defendant with regard to a subsequent transfer. The facts are as follows:—

On July 27, 1908, the Rev. Don Peter Gerard Ferdinando, who is a retired Wesleyan minister advanced in years, transferred to his two sons, Don Peter Richard Ferdinando and Don Charles Gerard Ferdinando, a tract of land in the Salpiti korale, comprising some 68 acres of land, subject to a life interest in his wife Berthina Ferdinando. The younger brother, Charles Ferdinando, went to England. It is stated, and not denied, though no deed is produced in evidence, that at some unstated point of time Charles Ferdinando re-conveyed the half share of the property so granted to him to his father. Richard Ferdinando was put in possession of the property from the date of the execution of the deed, and is said to have spent considerable sums of money in planting and improving it. He was allowed to draw the income derived from the estate, notwithstanding the fact that his father and mother retained a life interest. In 1914 he married the present plaintiff, a lady belonging to another community. The marriage was distasteful to the family. On October 4, 1918, he died, leaving him surviving his widow and an

infant daughter. The question of the right of this widow and daughter to succeed to his interest in the estate in question seems at once to have presented itself to both parties. On October 28 (between three and four weeks after her husband's death) the plaintiff had written to her father-in-law a formal proctor's letter calling upon him to send to the proctor "all the title deeds of the properties that belonged to his late son, Mr. D. P. R. Ferdinando," and in particular the title deeds of the estate in question. The first defendant made no reply to this very formal communication, but took immediate steps of another description. The deed of July 22, 1908, had never been registered. Three days after the receipt of the proctor's letter the first defendant executed a transfer of the same property to the second defendant, who was his son-in-law. The consideration was stated to be Rs. 5,000. Of this consideration, Rs. 2,750 had been previously advanced, and the balance was paid shortly afterwards in the form of two cheques to the value of Rs. 1,655. This deed is said to have been immediately registered, though neither the deed nor the date of its registration has been given in evidence. About three months later, on February 9, 1919, the second defendant, who had never taken formal possession of the property, transferred it to the third defendant. It appears that he had put the matter into the hands of a third party in Moratuwa as a broker, asking him to find a purchaser. The second defendant himself carried on business at Haputale. It happened that the person acting as broker in Moratuwa found as a purchaser the third defendant, who is himself living up-country, and had previously had some years' acquaintance with the second defendant. The deed for this second transfer was drawn by a Moratuwa notary, but attested by a notary practising at Bandarawela. The second defendant never saw the third defendant. Payment was made through an agent, who was retained by the second defendant at Haputale for the purpose of his business there.

In order to decide the question at issue, it is necessary to go into the facts a little more closely. There is very little doubt that the first defendant regarded the deed of gift, which he executed in favour of his two sons, as being in the nature of a testamentary instrument. Its real object was to dispose of the property after his death, and he may have looked upon it morally, if not legally, in that light. He says that it was understood that his son Richard would give him financial assistance in connection with the marriage of his daughters, but that this was not done. Instead of Richard, the first defendant had to have recourse to his son-in-law, the second defendant. Even before the execution of the conveyance on July 8, 1908, second defendant had lent him Rs. 1,000, and had taken a mortgage of this very land to secure it. On December 29, 1915, he had borrowed from his son-in-law a further sum of Rs. 1,750 to assist him in connection with the marriage of one of his daughters. There can be little doubt

1921.

BERTRAM C.J.

Ferdinando v. Ferdinando

in my mind that the first defendant viewed with distaste the prospect of this estate, which he had intended to pass to his sons on his own death, passing instead to his son's widow, with whom he was not on friendly terms, and that realizing that he was already indebted to his son-in-law to the extent of Rs. 2,750, and knowing that the deed of July 22, 1908, had not been registered, concerted with his son-in-law the scheme of transferring the estate to the latter, taking for this purpose further consideration in the form of the cheques above referred to. I can feel no doubt that the second defendant fully understood this scheme. He says that he did not know of the existence of the previous deed. I think it is impossible to accept this denial. He was familiar with the estate, and must have known that it was in the possession of his brother-in-law Richard. He must have been acquainted with the general family circumstances, and there can be little doubt that he shared the feelings of his father-in-law.

The question we have to consider, in the first place, is whether this transaction constituted "fraud or collusion in obtaining such last-mentioned deed . . . . or in securing such prior registration" within the meaning of section 17 of the Land Registration Ordinance. If it did, this of itself defeats priority of persons claiming under the second deed, and there is no need to consider the further question, whether the transfer from the second defendant to the third defendant was collusive or without consideration.

The learned District Judge has avoided the decision of this question by finding that the transfer to the second defendant was made without consideration. He points out that the mortgage debt of Rs. 1,000 was prescribed, and holds that the payment of the prescribed debt is no consideration at all. He believes that the other debt of Rs. 1,750 was not seriously treated as a debt by the parties, and would never have been paid but for this transaction. He says nothing about the cheques. This is not a satisfactory finding. It is clear, at any rate, that there was a legally enforceable debt for Rs. 1,750, and whether or not payment of a prescribed debt is "valuable consideration" within the meaning of section 17, it seems to me clear that the payment of the debt of Rs. 1,750 was sufficient valuable consideration for the purpose. We must next ask ourselves, therefore, whether the transaction was a fraudulent transaction. I am not satisfied that it was. I do not think that there was any element of conscious dishonesty about the proceeding. I think that the first defendant may very well have supposed that he had a moral right to do what he was doing. He may have thought that his son's widow had no moral claim to the property; that he would never have conveyed it to his son if he had not thought that his son would survive him, and he may have felt himself justified in giving priority to the claims of his son-in-law. Any reasoning he may have so employed may have been sophistical, but I do not think that it would be correct to describe

his action as fraudulent. But the further question arises: Was there "collusion" in obtaining the deed or securing its registration? That is the substantial question to be decided on this appeal.

For this purpose it is necessary to examine the authorities. It is settled beyond question that for a man to take a conveyance from a person whom he knows already to have granted a prior deed and to register its conveyance in advance of that deed is not "fraud" within the meaning of the section. (See D. C. Kandy, 67,295; *Ramanathan, 1877, 198; Kirihamy v. Kiribanda*;[1] and numerous other cases discussed in Mr. Jayawardene's book on *The Registration of Deeds in Ceylon*.) But this is as far as the cases go. That is to say, they simply decide that the mere existence in the mind of a man, who has obtained a conveyance for valuable consideration of knowledge of the existence of a prior and unregistered conveyance, is not sufficient to deprive him of the right to gain priority by registration. The section, however, makes an express exception in the case of (*a*) fraud and (*b*) collusion. This implies that a man may be guilty of collusion without being guilty of fraud, and *vice versâ*. There are several cases in which this reference to fraud has been exemplified. Fraud may involve a conspiracy of mind with mind, but it does not necessarily involve it. There may be something in the position or the conduct of the subsequent purchaser which may make his contract fraudulent, as, for example, a fiduciary relationship to the other party (*Lavris v. Kirihamy*[2]), the relationship of solicitor and client (*Battison v. Hobson*[3]), the part which he played in the previous transaction (*Kirihamy v. Kiribanda* (*supra*)), or implied representations in connection with the two transactions (*Dasenaike v. Abeysekera*[4]). Further, though fraud may, as I have observed, involve a conspiring of mind with mind, such a conspiring is not necessarily fraud. It may involve no conscious moral dishonesty. Even where it does involve such a conscious moral dishonesty, it may, nevertheless, be questioned whether it amounts to fraud if the object in view does not involve any deprivation of a man's legal rights. It was, I think, for this reason that the word "collusion" was used as an alternative to the word "fraud." "Collusion" means, as the derivation of the word implies, "the joining together of two parties in a common trick." It carries with it the implication of something indirect and underhand. One can well understand that the law should say: "It is permissible, even if you know of the existence of an unregistered conveyance, to obtain another from the same source and to register your own deed thus obtained and so gain priority. All parties in such a case stand upon their legal rights. The prior grantee knows the law as well as the subsequent grantee. The person who registers first is entitled to a reward for his diligence."

[1] *(1911) 14 N. L. R. 284.*
[2] *(1894) 3 Bal. N. C. 38.*
[3] *(1896) 2 Ch. 403.*
[4] *(1911) 7 Tam. 5.*

1921.

BERTRAM C.J.

Ferdinando v. Ferdinando

But this is where all parties are supposed to be acting independently in their own interests. It is otherwise where, though to an exterior view they are simply independent parties to a transaction as vendor and purchaser, they are, in fact, acting together for a common and indirect end. There, even though the result they aim at is no doubt permitted by the law, their contract amounts to collusion. This has been held by Wood Renton C.J. in the case of *Mariku v. Fernando*.[1] There the District Judge said: "My belief is that he (plaintiff) and the vendor . . . . . conspired together to see what could be done to make a little more out of rights which the vendor had already alienated." Wood Renton C.J. expressed the opinion that that amounted to collusion in obtaining the deed itself.

There is another case in which the facts show collusion, but which Layard C.J., who heard the case on appeal, decided on the ground that "mere knowledge of the person obtaining a subsequent lease or transfer that there was a prior deed in existence does not amount to fraud or collusion" (*Brown v. Vannissatamby*[2]). But in that case the facts found by the learned District Judge were something more than that. What the District Judge said was, referring to the person concerned in that case, "They had laid their heads together to oust the plaintiff." It is this "laying of heads together" for an indirect purpose, particularly when it is accompanied by pretence, that it is the essence of collusion, and it may be noted that in the leading case on the subject, D. C. Kandy, 67,295 (*supra*), it was observed with reference to the second mortgage: "All that is proved respecting the second mortgagee is that knowing of the first mortgage he took steps to secure himself. He is not said to have done anything underhand or to have made any pretence." Where, in these circumstances, anything underhand or anything involving a pretence is done in concert, there is, in my opinion, collusion. And in my opinion both these elements figure in the present case.*

This view of the case makes it unnecessary for us to discuss whether or not the transfer from the second defendant to the third defendant was a collusive transaction. Had it been necessary to do so, one point of comment would have been this. Three material witnesses were: The third defendant himself, who was in Court; the person who acted as broker; and the notary who drew the deed, both of whom lived at Moratuwa. Not one of these witnesses was called. It looks as though those who advised the third defendant deliberately, and, no doubt with good reason, put before the Court the minimum evidence possible for the purpose of discharging the onus which rested on them. It is, therefore, not surprising that the learned Judge regarded this part of the case with suspicion.

There is no appeal on the question of the improvements. There can be little doubt that plaintiff's intestate spent much money

* See, however, *75 D. C. Jaffna, 13,170*, reported later in this volume.

[1] *(1914) 17 N. L. R. 481.*

[2] *(1905) 4 Tam. 147.*

in improving the estate, and that the purchaser of the first defendant's life interest (for that is what the third defendant now becomes) will get the benefit of those improvements. It is unfortunately the case, however, that on the previous decisions of this Court the plaintiff's intestate, who merely occupied by the permission of his father and mother, is not a "*bona fide* possessor," and is therefore not entitled to compensation for improvements. No doubt, however, he had already received a certain amount of compensation in the revenue, which he drew from the estate up to the time of his death.

I have already noted two circumstances in connection with the evidence in the case. Among the most important documents, the two cheques said to have been paid by second defendant to the first defendant in connection with the purchase, and the deed by which first defendant's younger son is said to have re-conveyed to him his interest in the property. All these documents were referred to; none of them was produced. This loose procedure is much to be regretted. It would, I think, have been better if the learned Judge had noted these facts and declined to admit the evidence, except on production of the documents, or on their admission by the other side, more particularly in view of the fact that he appears to have disbelieved the *bona fides* of the cheques.

There is an oversight in the judgment of the learned Judge and in the consequential decree. He directs judgment to be entered for the plaintiff "as prayed in paragraphs (*a*), (*b*), and (*c*) in the prayer of the plaint." Paragraph (*c*) is the claim for compensation for improvements, which the learned Judge rightly disallows. Paragraphs (*a*) and (*b*) contain claims in the alternative, whereas the decree in pursuance of the judgment gives both the remedies asked for. In my opinion the second alternative—paragraph (*b*)—is the one in respect of which the plaintiff is entitled to judgment, that is to say, the claim that she be declared entitled to an undivided half share. Her husband, it is true, occupied a defined half share, but this was by permission of his father, and he could not convert an undivided share into a divided share in this manner. The decree should be amended accordingly.

In my opinion the appeal should be dismissed, with costs, and I think that first defendant should be equally responsible for plaintiff's costs with third defendant in the Court below. The learned Judge has exempted him from this liability. I think that second defendant was rightly made a party. He was himself charged with fraud and collusion, and he was interested in the result of the action, inasmuch as third defendant, if unsuccessful, would have a remedy against him. But it will be sufficient if he pays his own costs here and below.

DE SAMPAYO J.—I agree.

Appeal dismissed.