Present: Mr. Justice Middleton and Mr. Justice Grenier. *Feb. 22, 1910*

MOHAMADU MARIKAR *v.* IBRAHIM NAINA.

D. C., Puttalam, 2,068.

Conveyance of land to defendant to defraud third parties—No fraud effected—Action by plaintiff for cancellation of deed.

Plaintiff intending to defraud third parties, by whom he expected that he would be sued in respect of a certain land, executed without consideration a deed of conveyance, by which he purported to transfer the land to one Marikar Pulle. The contemplated fraud was not effected, as no action was instituted by the third parties. Plaintiff then sued Marikar Pulle's administrator for a declaration that the deed of conveyance was null and void.

Held, that plaintiff was entitled to succeed.

THE facts of this case are fully set out in the following judgment of the learned District Judge (T. W. Roberts, Esq.).

[The issues are set out in the judgment of Middleton J.]

The plaintiff in October, 1907, conveyed to the defendant's intestate the land, which is the subject of this case, by deed of transfer No. 2,909. In this case he impugns that deed on the grounds of fraud and want of consideration. He avers that defendant's intestate, Marikar Pulle, was his agent in charge of some of his business and lands, and persuaded him by a lie that certain persons were disputing the plaintiff's title to this land, and so induced him to temporarily convey to Marikar Pulle, in order that the task of litigation might be more conveniently carried through by Marikar Pulle, and that plaintiff might avoid the necessary journeys to Court from his distant village in Kalpitiya. Defendant denies the alleged misrepresentation *in toto*, and avers that the conveyance was for value received.

I have no hesitation in finding for the plaintiff on the fifth and seventh issues. As to the fifth issue, it is apparent that Marikar Pulle, in his numerous dealings with Caruppen Chetty and Mr. Muttukumaru, never conducted himself as anything other than the plain and simple agent of the plaintiff.

On the seventh issue, too, the evidence of Ponniah and the tax receipts together indicate that possession of the land in actual fact never went with the deed of 1907. Admittedly, Marikar Pulle possessed the land as agent for plaintiff, as he had done for years. But he does not appear to have ever held himself out as owner. He never whispered a word of this transfer to his neighbour Ponniah, whom he had frequent occasion to see. And for his payments of taxes on account of this land,

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he continued to receive receipts in favour of plaintiff. For such payments he must have known that he would in the course of his agency have to account to plaintiff, to whom he delivered these receipts. Yet, in spite of the conveyance, he continued to accept those receipts in the name of another person. And he continued to leave the original title deed, viz., the Crown grant, in the possession of the plaintiff. Taking this into consideration, I conclude that he never obtained possession. I will next consider the allegations of fraud and want of consideration.

I accordingly find that there was no fraud on the part of Marikar Pulle.

On the third issue, however, I find that there was no consideration, and no cause of a reasonable sort. It is clear, in the first place, that Marikar Pulle was almost a pauper.

In the next place, the fact that the deed did not carry independent possession with it indicates that it was no genuine conveyance.

Taken together, these facts confirm the plaintiff's statement that no consideration passed, in spite of the recital in the deed.

In the absence both of fraud and of consideration, what was the reason for this conveyance? I think the answer, or, rather, the clue to it, will be found in the endorsement on the Crown grant to the effect that the plaintiff's intestate had sold one-third of the land to certain persons.

Now, those are the persons whom, according to plaintiff, Marikar Pulle described as about to dispute the plaintiff's title. I am of opinion that they did dispute it, and that this conveyance was a benami transaction intended to make litigation possible, and at the same time to conceal from those claimants the admission of their claim, which stands out clear and unmistakable on the back of that grant from the Crown.

That is why the Crown grant was alleged to be lost, and why the plaintiff is, nevertheless, able to produce it. Doubtless, it remained in his possession all along.

In itself that transaction was not a fraud, it was the stepping stone to a fraud, the first link in the chain that would not be complete until Marikar Pulle had brought action and fought it out on the footing that the Crown grant was lost. But no case followed in fact.

I find then, on the third and fourth issues, that the consideration has failed and the conveyance is void.

The learned District Judge entered judgment for the plaintiff.

The defendant appealed.

Walter Pereira, K.C., S.-G. (with him *Soerts*), for the appellant.—On the findings of the District Judge the plaintiff ought to succeed. The plaintiff was guilty of fraud. The Roman-Dutch Law, which applies to this case, does not grant any relief to a person in the position of the plaintiff (see *1 Nathan 339; 2 Nathan 568; 3 Maasdorp 67; Voet 41, 1, 42*). Even under the English Law the

plaintiff cannot succeed, as he does not come into Court with clean hands; there is nothing to show that plaintiff had repented and repudiated the transaction before he brought the action. On the other hand, the Judge holds that plaintiff had come into Court with an entirely false story. Counsel referred to *De Silva v. Cassim,*[1] *Symes v. Hughes,*[2] *Groves v. Groves,*[3] *Brackenbury v. Brackenbury,*[4] *Pollock on Contracts 379-380 (7th edition).*

Sampayo, K.C., for the respondent.—No fraud has been carried out by the plaintiff. The mere fact that plaintiff had a fraudulent intention would not preclude him from obtaining the relief he asks for (see *Petherpermal Chetty v. Muniandy Servai et al.*[5]). Counsel also relied on *De Silva v. Cassim* and *Symes v. Hughes.*

Walter Pereira, K.C., in reply—In any event the plaintiff can only sue for a re-transfer.

Cur. adv. vult.

February 22, 1910. MIDDLETON J.—

This was an appeal against a judgment declaring a deed of conveyance of immovable property, No: 2,909, dated October 14. 1907, made in favour of the defendant's intestate, Marikar Pulle, by the plaintiff, to be null and void, and directing the same to be cancelled.

The plaint alleged a fraudulent representation to the plaintiff by the deceased, by means of which plaintiff was induced to convey. The answer denied this, and alleged purchase for valuable consideration, claimed in reconvention a declaration of title in favour of the defendant, damages, and costs.

The plaintiff filed a replication denying that there was any consideration for the deed, and the following issues were settled and agreed to:—

(1) Was the deed of transfer No. 2,909 of October 14, 1907, executed in the circumstances set out in paragraph 3 of the plaint?

(2) If so, is it thereby invalid?

(3) Was there consideration for the deed or not, and was there no good cause for its execution?

(4) If there was neither cause nor consideration, was that deed thereby invalidated?

(5) Did Marikar Pulle obtain possession of the land under the deed No. 2,909 or at any time?

(6) Damages.

(7) Was Marikar Pulle an agent managing the plaintiff's estate?

[1] *(1903) 7 N. L. R. 230.*
[2] *(1870) L. R. 9 Eq. 475.*
[3] *(1829) 3 Y. & J. 163.*
[4] *(1820) 2 J. & W. 391.*
[5] *5 All. L. J. 290.*

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The District Judge found that there was no fraud on the part of Marikar Pulle alone, no consideration, and no cause of a reasonable sort for the deed; that Marikar Pulle was the agent of the plaintiff, and that he had possession of the land, not in virtue of the deed, but as agent; and that the purchase was a benami one with a view to conceal from certain claimants to a portion of the land, an admission of their claim on plaintiff's title deed. He further found that the transaction was the stepping stone to a fraud, but not a fraud in itself and gave judgment for the plaintiff without costs. The defendant appealed.

The first point taken by the learned Solicitor-General was that, as the District Judge had found against the plaintiff on the first issue, judgment ought to have been in favour of the defendant on the pleadings. This point, however, was not pressed upon us, counsel for the plaintiff drawing attention to the fourth issue, which, in my opinion, is broad enough to sustain the case relied on for the plaintiff. The Solicitor-General, however, strongly contended that under the Roman-Dutch Law the plaintiff was not entitled to the relief he had obtained, and even if the rigour of the Roman-Dutch Law were modified by development on the lines of the English cases, yet plaintiff will be entitled to no relief unless he comes into Court with clean hands by reason of repentance before action brought, and he cited *3 Maasdorp 67, 2 Nathan 568, 1 Nathan 339, De Silva v. Cassim,*[1] *Symes v. Hughes,*[2] *Groves v. Groves,*[3] *Pollock on Contracts 379-380 (7th edition)*, and *Brackenbury v. Brackenbury.*[4]

The learned counsel for the plaintiff contended that this was a case in which the equity of the English Law of Chancery might well be applied to develop and soften the austerity of the Roman-Dutch system, and quoted *Petherpermal Chetty v. Muniandy Servai et al.*,[5] relying also on *Symes v. Hugès* and *De Silva v. Cassim, ubi supra.*

This is in effect an action for *restitutio in integrum*, and the action will not lie where both parties have been guilty of fraud (*Maasdorp, vol. III., 67,* quoting *Voet 4, 3, 8,* and *44, 4, 2*); Nathan also (*vol. II., 568, 569*) quotes the case of *St. Marc v. Harvey,*[6] where it was held that where both parties to a contract act fraudulently, the one has no remedy against the other upon breach of the contract or upon such circumstances as would ordinarily found an action for damages.

Nathan (*vol. II., 339*) enunciated the principle that a sale of immovables *coram lege loci*, even if in fraud of creditors, will as between the vendor and vendee be deemed valid. Pollock (*p. 379*) states the rule of English Law, that money or property paid or delivered under an unlawful agreement cannot be recovered back, subject to certain exceptions on the principle of *in pari delicto potior est condicio defendentis* He subsequently (*p. 386*) cites the rule giving as one

[1] *(1903) 7 N. L. R. 230.*
[2] *(1870) L. R. 9 Eq. 475*
[3] *(1829) 3 Y. & J. 163.*
[4] *(1820) 2. J & W. 391.*
[5] *5 All. L. J. 290.*
[6] *10 S. C. 267.*

of the qualifications being necessary, " unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself, " adding interrogatively, as possibly his own theory, " and the agreement is not positively criminal or immoral? " (*Tappenden v. Randall*[1]). There is no question here to my mind as to the immorality of the agreement which the parties entered into, even if it was not criminal, as it involved the suppression of evidence with a view to cheat a third party out of his title.

In *Symes v. Hughes*, as Pollock says, the plaintiff was suing in effect as a trustee for his creditors, so that the real question was whether the fraud upon the creditors should be continued against the better mind of the debtor himself (*Pollock on Contracts 384*).

In *Groves v. Groves, ubi supra*, it was held that the Court would not assist a party in getting back an estate conveyed by him for an illegal purpose, so as to enable the grantee to vote at an election or sit in Parliament, even though it had not been used for the illegal purpose. *Brackenbury v. Brackenbury, ubi supra*, was a case in which the same principle was followed.

Are we then here to assist the plaintiff, who has shown no signs of repentance or repudiation, but who came to Court with a false story as regards Marikar Pulle's share in the transaction?

In *Palyart v. Lekie*[2] it was held that the action to recover back money paid under an unlawful agreement by a party who had not given previous notice that he repudiates the agreement and claims the money back could not be maintained. See also *Ayerst v. Jenkins.*[3]

Under the Roman-Dutch Law he would not be entitled to any relief, and I have some doubt if this is a case to which should be applied the doctrine of equity derived from the English Law to soften the rigour of the Roman-Dutch Law. I have after some difficulty obtained the report of the case relied on by Mr. de Sampayo in the Allahabad Law Journal.

In that case a debtor transferred his property to evade recovery on it by an equitable mortgagee. The equitable mortgagee got judgment against both his debtor and the benami transferee, who paid up the sum due. The debtor sued the benami transferee to recover possession of the property. The Privy Council held that the plaintiff was entitled to recover possession of the property " as he was not carrying out the illegal transaction, but seeking to put every one as far as possible in the same position as they were in before the benami transaction was determined on, and it was the defendant who was relying upon the fraud and was seeking to make title to the lands through and by means of it, and despite his anxiety to effect great moral ends he cannot be permitted to do this ......

[1] *(1801) 2 B. & P. 467.* [2] *(1817) 6 M. & S. 290.*
[3] *(1873) L. R. 16 Eq. 275.*

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To enable a fraudulent confederate to retain property, transferred to him in order to effect a fraud, the contemplated fraud according to the authorities must have been effected. Then and then alone did the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with. "

The present case differs somewhat from the Indian one in the facts. Here the plaintiff set up a false case with a view to the recovery of his property, and his confederate, Marikar Pulle, is dead, and his administrator is supporting an apparently rightful title to the property on behalf of the heirs in virtue of a notarial transfer purporting to be for valuable consideration. It is true that the contemplated fraud has not been effected, and that the possession and the title deed are with the plaintiff. The Roman-Dutch Law lays down as an important principle that no person shall be enriched at the expense of another, and *Mayne's Hindu Law, 7th edition, p. 295, paragraph 446,* quoted with approval in the Privy Council case treating of benami transactions, says, if A (the transferor in benami) has not defrauded any one, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. I think, therefore, upon full consideration, that the judgment of the District Judge must stand, and this appeal be dismissed with costs.

GRENIER J.—

I am entirely of the same opinion, and would dismiss the appeal with costs.

Appeal dismissed.