

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice,
and Mr. Justice Middleton.

1909.
September 1.

DISSANAIKE v. ELWES.

D. C., Kandy, 18,928.

Kandyan Law—Sale of immovable property by minor—Voidable.—Death of minor—Action by executor to recover property sold—Validity of sale—Repudiation by minor—Repudiation by executor.

A sale of immovable property by a Kandyan minor is not void, but only voidable.

Where a Kandyan married minor sold immovable property in December, 1895, with the knowledge and consent of her husband, and died in January, 1905, without in any way repudiating the transaction, and after her death her executor sought to vindicate the land sold,—

Held, that he was not entitled to do so, as the sale being voidable and not void, and the minor not having repudiated it, the executor could not, after the minor's death, repudiate it.

THE plaintiff, as executor of the last will and testament of his wife Ukku Menika *alias* Bandara Menika, deceased, sought to vindicate two contiguous allotments of land, which were in the possession of the defendant. The plaintiff further averred that Bandara Menika was born on April 10, 1877, and died on January 29, 1905, and that she was a minor when the defendant took possession of the said lands. The defendant admitted that Bandara Menika was the owner of the said allotments of land, and alleged that she by deed of transfer dated December 7, 1895, sold and conveyed the same to him for Rs. 4,000 with the knowledge and consent of her husband, the plaintiff, who signed as an attesting witness to the deed. In the alternative the defendant claimed a refund of the purchase money, and also compensation for improvements effected by him.

The Additional District Judge (A. C. G. Wijekoon, Esq.) held that the deed of transfer executed by Bandara Menika in favour of the defendant was void, and that the plaintiff was entitled to a declaration of title to the lands. As regards the claim for refund of the purchase money, he held that the defendant's claim was prescribed on the authority of *Marthelis Appu v. Jayewardene et al.*¹ The District Judge awarded the defendant Rs. 1,247·10 as compensation for improvements, and declared that he was entitled to retain possession of the lands until the amount was paid.

¹ (1908) 11 N. L. R. 272.

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H. A. Jayewardene (*A. B. Cooray* with him), for the defendant, appellant.

Elliott (*Samarawickreme* and *R. L. Pereira* with him), for the plaintiff, respondent.

Cur. adv. vult.

September 11, 1909. HUTCHINSON C.J.—

The first question in this case is whether by Kandyan Law a sale of his or her property by a minor is void or is only voidable. If we hold that the sale is only voidable, the other questions which have been discussed need not be considered.

The fact that the minor is a married woman at the date of the sale does not affect the question. For, although a Low-country Sinhalese woman under twenty-one years of age attains majority by marriage (by virtue of the Roman-Dutch Law, which, in the case of Low-country Sinhalese, is preserved by section 2 of Ordinance No. 7 of 1865), it has been decided that this rule does not apply to Kandyan, so that a Kandyan woman who marries under the age of twenty-one is still a minor until she attains that age.

If *Sawer* and *Armour* are to be taken as authorities, a sale of his land by a minor was not wholly void by Kandyan Law, but the seller could "break the bargain" on repayment of the purchase money which he had received. No decision of the Courts clearly negating that rule has been quoted to us. Transfers by a minor on sale or as a gift have, after some conflict of opinion, been held to be wholly void in cases to which the Roman-Dutch Law applied; but there seems to be no case reported in which the Kandyan Law on the subject has been clearly laid down. In the absence of any such authority, and until the Legislature deals with the matter; I think that we ought to take the rule of Kandyan Law to be as stated by *Sawer*.

The transfer on which this defendant relies was made to him by *Bandara Menika* on December 7, 1895. The consideration which he paid for the land was Rs. 4,000. He took possession after his purchase, and is still in possession. The District Judge has found, and I think we cannot reject his finding, that *Bandara Menika* was born in April, 1877, so that at the date of the transfer she was a minor of the age of eighteen. She was married at that date, and her husband was one of the witnesses who attested the execution of the transfer. She attained her majority in April, 1898, and died in January, 1905, without having done anything to show that she repudiated the sale. The plaintiff was her husband, and is the executor of her will, which has been duly proved. He brought this action on January 16, 1908, just before the expiration of ten years

from the day when Bandara Menika attained her majority. If, therefore, the sale was not wholly void, it cannot now be repudiated by Bandara's executor, and the appeal should be allowed, and the action dismissed with costs in both Courts.

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C.J.

MIDDLETON J.—

This was an action by the executor of a deceased Kandyan married minor to recover possession of two pieces of land. The defence was that the lands were sold to the defendant in December, 1895, for Rs. 4,000, with the consent of the deceased's husband; alternatively, that the deceased was not a minor at the date of the sale, and that defendant had since thereby acquired a title by adverse possession; that if she was a minor, she was estopped by her conduct from denying the validity of the sale, and thereafter on attaining majority by acquiescence in the sale; that the sale was for the benefit of the minor, and could not be repudiated, and that the action in any case could not be maintained without a tender of the purchase money by the plaintiff.

The defendant claimed in reconvention to recover, in case the plaintiff be declared entitled to the land, the purchase money Rs. 4,000 and a further sum of Rs. 3,000 for compensation for improvements to the lands.

The issues settled were as follows:—

- (1) Was Bandara Menika, plaintiff's testatrix, born on April 10, 1877, and was she a minor when she transferred the lands to defendant on December 7, 1895?
- (2) If Bandara Menika was a minor, is she estopped by her conduct after she attained her majority by acquiescing up to the date of her death in the sale, and permitting the defendant to remain in possession without asserting title thereto?
- (3) If the said Bandara Menika was a minor at the time of the execution of the deed, the sale being for her benefit, can she or the plaintiff repudiate the said deed?
- (4) Can plaintiff have and maintain this action without tendering to the defendant the sum of Rs. 4,000 paid by him at the execution of the said deed?
- (5) Whether defendant has planted and improved the lands in claim and enhanced their value to the extent of Rs. 3,000?
- (6) What damages, if any, has plaintiff sustained?
- (7) If plaintiff be declared entitled to the land, whether defendant is entitled to recover Rs. 4,000 consideration for the transfer and Rs. 3,000 for compensation?
- (8) Whether the claim for Rs. 4,000 consideration is prescribed?

1909. The District Judge gave judgment declaring the land in dispute
 September 11. the property of the plaintiff's testator, and decreed the ejectment
 MIDDLETON of the defendant and quiet possession to the plaintiff, and further
 J. awarded the sum of Rs. 1,247·10 as compensation to the defendant.

The defendant appealed on the ground (1) that the deed was good according to the Kandyan Law; (2) that he had obtained a title by prescription; and (3) that the compensation had been wrongly assessed, and he should have been awarded the purchase money in addition.

As regards the Kandyan Law, the passages from *Perera's Armour*, p. 2, and *Perera's Collection*, p. 27, *Modder*, p. 1182, were all considered in *Muttiah Chetty v. Dingiria et al.*¹ That case decided that a Kandyan minor married woman did not attain majority by marriage.

I have sent for the record in *Muttiah Chetty v. Dingiria et al.*, and I find that the learned District Judge, who was acting as Commissioner of Requests, and gave the judgment appealed against in that case, certainly stated as follows:—"I am of opinion under the Kandyan Law (1) a minor is protected from the evil effects of contracts entered into by such minor during his or her minority; (2) that such contracts are void in law; (3) that a Kandyan husband joining with his wife in any contract does not legalize such void contracts."

When the case came before the Supreme Court, the only point argued was that which was decided, and the question was never raised whether the contract in question was void or voidable, but following the judgment appealed against the judgment of the Supreme Court may have the appearance of confirming a judgment which held such a contract void.

If, however, the judgment appealed against in that case is further examined, I think it appears from the observations of the learned Commissioner that he thought the Court had an equitable jurisdiction to set aside such a contract, even if it were consistent with the existence of positive law, and that his real ruling on the question was that the contract was voidable and not void.

The Supreme Court judgments all seem to me to decide merely the abstract question whether a Kandyan minor attained majority by marriage? In my opinion, therefore, it cannot be said the Supreme Court decided in that case that the contract was void, but rather that it was voidable, only as being prejudicial to the minor. If, however, that case decided that the contract in question was void, its fullest force would be to rule that a promissory note entered into by a Kandyan minor in conjunction with her husband was void against the wife on the ground of minority. This would merely be the application of the principle of section 1 of the Infants Relief Act of 1874 to Kandyan minors in respect to the repayment

¹ (1907) 10 N. L. R. 371.

of money lent, and would not affect consequentially or necessarily the voidability of transfers of land, which is governed by special traditions embodied by *Sawer* and others.

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J.

In *Siriwardene et al. v. Loku Banda*¹ Burnside C.J. held that a deed of conveyance of land by a Kandyan infant was voidable and not void. Under Roman-Dutch Law the conveyance by a married woman under the age of twenty-one of the Maritime Provinces of her immovable property with the consent of her husband would be a perfectly good conveyance as the Roman-Dutch Law confers majority by marriage.

The case in *Vanderstraaten*, p. 251, was of the same kind as in *Muttiah Chetty v. Dingiria et al.*, of liability on a bond. In *V. Ukku v. Yatawila Arumedureya*² the liability was on a lease, and I should gather that in each of those cases the Court thought that to hold the minor to the obligation would be detrimental or prejudicial to her.

We find, however, in *Muttiah v. De Silva*³ Bonser C.J. holding that a joint and several promissory note granted by a father and minor son must be held good as against the son, because it must be presumed to have been made with the consent of the father. This was under the Roman-Dutch Law. Also, under the Roman-Dutch Law, a sale by a minor of immovable property has been held void (*3 Browne 12 and 150*). (See also *3 S. C. C. 46* and *6 N. L. R. 367*, and the authorities quoted there.)

I do not think, therefore, we are concluded by the decision of the Full Court in *Muttiah Chetty v. Dingiria et al.*, and I am strongly of opinion that we should hold, if possible, that the contracts of minors are, as a general rule, not absolutely void under Kandyan Law, but voidable.

According to *D'Oyley's Notes*, p. 26, *Perera's Collection*, *Sawer's Digest*, all Kandyan deeds of transfer of land were revocable at pleasure during the life of the alienator on repayment of the purchase money and value of the improvements, but the heirs of the alienator were excluded from this liberty after his death.

Again, *Perera's Collection*, p. 29, *Sawer's Digest*, p. 28, a youth under sixteen could break a bargain and resume possession of land he had sold on refunding the value which he had received.

Again, *Perera's Collection*, p. 29, *Sawer's Digest*, p. 29, the heirs of a minor had the right to interfere and prevent his selling his property when it came to their knowledge, and if he did so without their knowledge and died in non-age, they apparently had a remedy to set it aside. The same rules apply to females. Armour repeats the same doctrines from *Sawer*, p. 2.

I gather from the texts, therefore, that a minor's sale of immovables was not absolutely void but voidable, and was allowed to be

¹ (1892) 1 S. C. R. 218.² *Møller* 119.³ (1895) 1 N. L. R. 358.

1909. avoided only on repayment of the purchase money and probably
September 11. and equitably of the value of improvements. I do not think,
MIDDLETON therefore, we should be conflicting in any way with the ruling in
J. *Muttiah Chetty v. Dingiria et al.* by holding here that the minor had
entered into a voidable contract. But here the minor sold the
land with the consent of her husband, who now seeks to set aside
the sale without even tendering the purchase money. The husband,
however, is probably not the only heir, but even if the other heirs
object, the minor did not die in non-age, but after she attained
majority and without repudiation of the sale, and no detriment or
disadvantage to the minor is proved. I would hold, therefore, that
this is a sale which ought not to be avoided, and would dismiss the
plaintiff's action and allow this appeal with costs.

Appeal allowed.
