1921.

Present : Bertram C.J. and Garvin A.J.

FERNANDO *v.* FERNANDO.

161—D. C. Negombo, 14,389.

Lease of entirety of land—By mistake only a portion included in deed of lease—Sale by lessor to plaintiff who thought that the entirety of land was subject to lease—Discovery of mistake four years after purchase—Action to restrict lessee to the portion set out in the deed—Estoppel—Claim in reconvention to rectify mistake in deed—Evidence Ordinance, s. 92.

Plaintiff's vendors intended to lease the entirety of a land to defendant, but by mistake only a portion of the land was comprised in the deed of lease. Plaintiff was aware of the lease, and thought he was buying the land, subject to a lease of its entirety. Four years after the purchase, he discovered the mistake in the deed, and brought this action to restrict the rights of the defendant to the terms of the deed. The defendant pleaded estoppel.

Held, that the plea was misconceived, and that the defendant ought to have claimed in reconvention that the lease should be rectified on the footing that the lease was in its present form owing to mistake, and that the plaintiff knew the true extent of the land leased and was bound by the same equities. Relief was granted to defendant by the Supreme Court on that footing.

THE facts appear from the judgment of the District Judge (W. T. Stace, Esq.) :—

The facts in this case are simple and clear. The land in dispute belonged to the father of one Carlina. He gifted a half share to his daughter Carlina. She leased it notarially to one Marthinu during her father's lifetime. After his death, she, as his heir, became entitled to the other half. She allowed Marthinu to occupy and enjoy the produce of that half, too, on an informal receipt. Marthinu sub-leased the whole land to the defendant in this case and one Gomes, half on a notarial agreement, the other half by endorsing the informal receipt. When that lease expired, Gomes retired, and the defendant took the lease. The lease was notarial, and referred to only half the land. But the defendant occupied the whole land, both he and the lessor, Carlina, evidently believing that the whole and not the half was what was leased to him. It is in my opinion not important whether the lessor on that occasion actually pointed out the four boundaries of the whole land to the defendant. As he already knew the land, that would hardly have been necessary. But it is evident that the lessor, believing that she had leased the whole land, treated the lease as a lease of the whole land, allowed defendant to occupy the whole land, and, in general, conducted herself in such a way as to lead defendant to believe that he was taking on lease and would enjoy the produce of the whole land.

The present plaintiff is a successor in title of Carlina. He has discovered that the lease only entitled defendant to half the land, and sues him to recover possession of the balance half and for damages. Defendant resists this claim, on the ground that Carlina's conduct led him to believe that he was leasing the whole land, and that plaintiff, as her representative, is estopped from denying that.

Mr. Vandergert, for the plaintiff, objected to the evidence that the lessor had pointed out the boundaries of the whole land, and said it was the land to be leased, on the ground that such evidence would be obnoxious to Ordinance No. 7 of 1840. The objection is not sound. He also objected to the evidence of the lessor that she told plaintiff, when she sold him the land, that the whole was leased, on the ground that such evidence contravenes section 92 of the Evidence Ordinance. This objection is also unsound.

In my opinion the question of estoppel does not arise. Defendant had been the co-lessee with Gomes of the whole land in two halves, one on notarial agreement, one on an informal receipt. He knew all about the land and the agreement and the conditions under which it was leased. It then appears that both he and the lessor intended that his present lease should cover the whole, and they probably instructed the notary accordingly. But the notary drew up the deed for half the land, probably carelessly following only the terms of the previous notarial lease. Neither lessor nor lessee detected the mistake. Defendant has been misled, not by any conduct of the lessor, but by his own carelessness in not verifying the notary's work. What was the fact in regard to which the defendant has received a false impression ? His false impression clearly was that he believed the notary had drawn up the deed according to instructions, whereas that was not the case. The case of this false impression was not any act, conduct, or omission on the part of the lessor. What the lessor represented to defendant was not in any way misled by it. The lessor did not represent to defendant that the lease deed was drawn up correctly and gave him the whole land. Or at least there is no evidence of that. Hence, the defendant's false impression was not caused by any conduct of the lessor, but by his own failure to verify the deed, and no estoppel arises.

I answer the issues as follows :—

(1) Plaintiff's predecessors in title did not represent to the defendant that the portion of land leased to him was the whole land. She represented only that the portion of land intended to be leased to him was the whole land.

(2) No.

It is right that defendant should suffer, because his false position is the result of his own carelessness.

Judgment for plaintiff as prayed for, with costs, except that the damages will be Rs. 150 plus Rs. 50 a year from date of filing action to delivery of possession.

Samarawickreme (with him *Croos-Dabrera*), for the defendant, appellant.

F. de Zoysa, for the plaintiff, respondent.

1921.

December 13, 1921. BERTRAM C.J.—

Fernando v. Fernando

The subject of this appeal is what is admittedly a mistake in a deed. The plaintiff purchased from his vendors land which was at the time subject to a lease. There is no question that the vendors at the time they made the contract of lease intended to lease to the defendant the whole of the land in question. By a mistake, however, in drawing up the deed, only the southern portion of the land was comprised in the lease. The mistake was not realized, and the lessees, who were already in possession of the entire land, continued in possession of it. When the plaintiff purchased the land, he fully appreciated this position, and he thought that he was buying the land subject to a lease of its entirety. Four years after the purchase, he discovered the mistake in the deed, and he brings this action in order to restrict the rights of the defendant to the terms of his deed. The case does not appear to have been correctly appreciated in the Court below. The defendant set up a case of the nature of an estoppel. He says that when the land was sold to the defendant, the vendor and her husband showed the defendant the entire land within the boundaries given in the plan, and represented to the defendant that what they were passing to the defendant was the said entirety, and further pleaded that the plaintiff's vendors executed the deed of lease in question having induced the defendant to offer as rent for the lease a sum adequate for the entire land.

It is plain that this plea is misconceived. What the defendant ought to have pleaded was that the lease was drawn up in its present form through a mutual mistake of the parties thereto, and a claim in reconvention ought to have been made that the lease should be rectified so as to represent the true intent and meaning of the parties; and he should further have pleaded that the plaintiff knew the true extent of the land leased, and was bound by the same equity as his vendors. This was not done, and, consequently, the learned Judge has delivered a judgment in which he discusses simply the question of the suggested estoppel.

In this Court, Mr. Samarawickreme, who appears for the appellant, has pointed out the true position, and has cited to us two Indian cases which explain the principles governing the question. They are *Dagdu valad Jairam v. Bhana valad Jairam*[1] and *Rangasami Ayyangar v. Souri Ayyangar*.[2] Both these cases are cases of mutual mistake. In the first there was a deed containing an indemnification clause inserted by the common consent of the parties, but drawn up in such a way, so it was contended, as to have a wider scope than the parties really meant it to have. There was no counter claim or cross suit for rectification, because the procedure of the Moffussil Courts did not allow of such a procedure. Jenkins C.J., in giving judgment, said: "The position has been thus described in the

[1] *(1904) 28 Bom. L. R. 420.*

[2] *(1915) 39 Mad. 792.*

argument in *Paget v. Marshall* [1] adopted by the Court. If two persons contract, and they really agree to one thing, and set down in writing another thing, and afterwards execute a deed on that wrong footing, the Court will substitute the correct for the incorrect expression, in other words, will rectify the deed." "It is true," he proceeded, "that rectification is not claimed in this suit as a relief by the defendants . . . . but as a Court guided by the principles of justice, equity, and good conscience, we can give effect as a plea to these facts, which in a suit brought for that purpose would entitle a plaintiff to rectification."

The other case (*Rangasami Ayyangar v. Souri Ayyangar* [2]) was of a similar character. There was a mutual mistake. It was there said: "It is clear that if he went to Court as plaintiff, the defendant could have claimed relied by way of injunction against the plaintiff from interfering with his possession, and to have his sale deed rectified. Does the fact that the defendant is resisting the plaintiff's claim disable him from setting up the plea which could have availed him as plaintiff? We think not."

Both these cases proceed upon an interpretation of section 92 (*a*) of the Evidence Act, which is identical with the corresponding section in our own Ordinance. The result of that section is that it is open to a party to a document or his representative in interest to prove any fact, such as mistake, which would entitle any person to any decree or order relating thereto. Strictly speaking, the defendant should have asked for this relief in his answer and by reconvention. But I think it is in our power to grant him relief even under present circumstance.

Mr. de Zoysa, who appears for the respondent, cited as an authority on the other side the case of *Tamlim v. James*.[3] That case, however, is concerned with quite a different subject. That was an action for specific performance, and the defendant set up his own mistake, in which the plaintiff did not share, as a reason why specific performance should be refused, and his plea was rejected.

I think, therefore, that the plaintiff is entitled to have the appeal allowed. But, inasmuch as the pleadings are very defective, and the correct position has not been ascertained until the case came into this Court, and inasmuch as if we were proceeding strictly we should have to remit the matter to the Court below, so that the pleadings might be amended and the relief granted in due form, I think that, although the appeal must be allowed, it should be allowed without costs. With regard to the costs in the Court below, the claim of the plaintiff was a thoroughly unconscientious proceeding, and I think his action should be treated as dismissed, with costs.

GARVIN A.J.—I agree.

Appeal dismissed.

[1] *(1884) 28 Ch. Div. 255, at page 262.*
[2] *(1879) 15 Ch. Div. 215.*
[3] *(1915) 39 Mad. 792.*