Present: Wood Renton C.J. and Ennis J.

1915.

SINNATAMBY *v.* JOHNPULLE *et al.*

72 and 73—D. C. Colombo, 37,092.

Principal and agent—Agent granting a lease in excess of authority—Ratification—Estoppel.

Where an agent, purporting to act on behalf of his principal, exceeded his powers in granting a lease of land—

Held, that the principal was in law capable of ratifying the lease, and that a notarial instrument was not necessary to prove the ratification.

A principal can ratify the unauthorized act of an agent only when he is fully aware of its nature.

THE facts are set out in the judgment of the Supreme Court dated June 19, 1914 (see *18 N. L. R. 245*), on the first appeal.

The case was sent back by the Supreme Court for further inquiry and adjudication upon the issue, namely, whether the defendants were estopped by their conduct from denying the validity of that agreement. The learned District Judge answered this question against the first defendant and in favour of the second defendant. The plaintiff appealed (No. 72) against the dismissal of his case against the second defendant, and the first defendant appealed (No. 73) against the finding that he is estopped from denying the validity of the agreement.

De Sampayo, K.C. (with him *Retnam*), for appellants, in appeal No. 73.—The evidence shows that the estoppel relied on by the plaintiff is really ratification; but ratification was neither pleaded nor put in issue, nor even referred to by counsel in the Court below. It is not proved that first defendant was aware of the contents of the agreement, especially of the unauthorized act of his agent in subjecting him to a penalty of Rs. 3,000. For a valid ratification there should be a knowledge of the fact to be ratified, and an intention to ratify it (*Edwards v. The North-Western Railway Co.*[1]).

Power of an agent to execute a deed can only be given by an instrument under seal (*Hunter v. Parker*[2]).

A deed may be defined as a writing attested by a notary (*Tissera v. Tissera* [3]). A claim subjecting the principal to a penalty of Rs. 3,000 is not incidental to an agreement to lease. When a person contracting with an agent knows that the agent's authority is bad, and nevertheless contracts with him beyond the limits of his authority, he does so at his peril (*11 A. & E.* 589).

There can be no ratification of a part of a contract.

[1] *(1890) L. R. 5 C. P. 445.* [2] *7 M. & W. 322.* [3] *2 N. L. R. 238.*

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Bawa, K.C. (with him *Arulanandam*), for appellant, in appeal No. 72.—There is ample evidence to show that the first defendant was aware of the contents of the agreement. With such knowledge he received payments and other benefits.

Subsequent ratification is sufficient, and dispenses with proof of prior authority, though the prior authority is required to be given in writing and under seal (*Tupper v. Foulke* [1], *9 C. B. N. S. 797*).

The authority to the agent to execute the agreement need not be in writing (*Meera Saibo v. Paulu Silva* [2]). A party can be precluded by estoppel from denying the execution of a deed (*Doe v. Bold* [3]).

In this case the agent professed to act for the principal, and even if he exceeded his authority the principal can by ratifying such acts render himself liable.

The second defendant obtained the lease with full knowledge of the agreement in favour of the plaintiff, and he acted dishonestly. He is therefore rightly made a party (*4 C. A. C. 18*).

The penalty provided for is not an adequate remedy, nor is it alternative. The intention to be alternative should be clearly expressed (*Jafferjee v. Theodoris* [4]).

The second defendant is privy in estate to the first defendant, and as such privy the remedy of specific performance lies against him.

De Sampayo, K.C., in reply.

Tisseverasinghe, for the second defendant, respondent.—Specific performance cannot be granted, for several reasons. Damages in the case are alternative, and not accessory to the principal obligation, and therefore specific performance is not available (*Mathes v. Raymond* [5]). The first defendant has put it out of his power to execute the lease (*Holmes v. Marikar* [6], *1 N. L. R. 282*). It has not been shown that the act of the second defendant was fraudulent and collusive (*4 C. A. C. 18*). There is no mutuality in the agreement, and the terms are vague and uncertain (*(1865) L. R. 1 Ch. 117*). To buy a land and take a transfer of it from a person with knowledge of an agreement to retransfer is not fraud (see 3,728—D. C. Chilaw,[7] *138 L. T. 432, 14 N. L. R. 417*). There is no privity in estate, as the second defendant claims adversely to the first defendant.

Bawa, K. C., in reply.

Cur. adv. vult.

May 4, 1915. Wood Renton C.J.—

[His Lordship stated the facts, and continued]:—

It is clear that as regards both defendants the estoppel relied upon by the plaintiff is ratification. Before adverting to the facts it may

[1] *(1861) 30 L. J. C. P. 214.*
[2] *(1899) 4 N. L. R. 299.*
[3] *11 Q. B. Rep. 127.*
[4] *5 Bal. 20.*
[5] *3 N. L. R. 270.*
[6] *2 Br. 351.*
[7] *S. C. Min., June 29, 1910.*

be desirable that I should say something as to the law applicable to them. Both sides agreed at the argument of the appeals that the question whether or not ratification had been established must be decided in accordance with the law of England. It results from the evidence, and the finding of the District Judge is, I think, to the same effect, that while Casie Chetty exceeded his powers as an agent he was purporting to act in the matter of the agreement of August 18, 1910, on behalf of the first defendant. In that state of the facts the first defendant was in law capable of ratifying the agreement, although it had been made in the first instance without his authority (*Keighley Maxsted & Co. v. Durant* [1]). It was argued by Mr. de Sampayo on behalf of the first defendant that as the effect of such a ratification would be to establish in him an interest in land, it could only be proved by an instrument notarially attested. I am unable to take that view. The "interest in land" had already been legally constituted by the deed of August 18, 1910, by an agent purporting to act on the first defendant's behalf, but in fact exceeding the scope of his agency. All that was necessary was that the first defendant should *ex post facto* create Casie Chetty his agent for the purpose of the agreement in question. The *ratio decidendi* in the case of *Meera Saibo v. Silva* [2] seems to me to apply to the point now under consideration. There remains the question of fact. There is no doubt that a principal can ratify the unauthorized act of an agent only when he is fully aware of its nature. Such knowledge may be proved either by direct evidence of its existence or by showing that it is a necessary inference in the circumstances of a case taken as a whole. The first defendant put himself in a bad position by a denial of the agreement, and the incident as to his prior agreement with Martin leaves an unfavourable impression upon the mind. He would appear, however, even if he was not weak minded, to have been a person of a somewhat facile disposition. There is nothing in the evidence here to show that the first defendant ever knew of the clause in the agreement imposing upon him in the event of default a liability to a penalty of Rs. 3,000. A penal stipulation of that character is not a necessary incident in contracts of this character. It is a special provision, which must be shown to have been brought either actually or constructively to the knowledge of the first defendant before he can be held to have adopted it by ratification. The appeal of the first defendant is, in my opinion, entitled to succeed up to this point; but I agree with my brother Ennis, whose judgment I have had the advantage of reading, that the decree should stand as regards the sum of Rs. 500, which the District Judge finds was in fact paid by the plaintiff in pursuance of the agreement. The judgment of the District Court as regards the second defendant is clearly right. I agree to the order which my brother Ennis has proposed.

[1] (1901) *A. C. 240.*

[2] (1899) *4 N. L. R. 229.*

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[His Lordship stated the facts, and continued]:—

On the first defendant's appeal it was argued that there was no estoppel under section 115 of the Evidence Ordinance, as there was no representation by the first defendant, other than the power of attorney, upon which the plaintiff acted at the time he entered into the agreement. It has been found by the learned District Judge that the plaintiff was induced "to pay the expenses incurred in the action against Xavier. and the judgment debt due to Martin," by reason of the first defendant's approbation of the agreement, and the estoppel is asserted by virtue of the acts subsequent to the agreement. I see no reason to doubt the fact that these payments were made, but before the contention can succeed it must be shown that the first defendant ratified the agreement. On this it was urged by the first defendant's counsel that the ratification would be effective only if made by a written document notarially executed, as required by section 2 of Ordinance No. 7 of 1840. In my opinion this section does not apply, as ratification does not create the obligation, but only gives validity to the authority under which the obligation has been contracted. The rule of English law, that when a deed is required, any authority to execute it must also be by deed, has been cited in support of the argument. The laws of Ceylon, however, do not provide for the distinction found in English law between deeds, *i.e.*, documents signed, sealed, and delivered, and documents under hand only. Deeds in the sense in which the word is used in English law do not exist in Ceylon, and the English rule cited applies in England to deeds only. It was next argued that there was no ratification by the first defendant, as he had not a full knowledge of the facts. The evidence recorded goes only to the extent of showing that the first defendant knew that Casie Chetty had agreed to execute a lease to the plaintiff, but not of showing that he knew the terms of the proposed lease, or that Casie Chetty had exceeded his authority. The proposed lease provided for a rental of Rs. 75 per month for five years, and it is in evidence that the property was sub-let at rentals amounting to Rs. 210 per month. A failure to execute the lease was to entail a penalty of Rs. 3,000, while the total rents during five years is only Rs. 4,500. It would require very strong evidence to show that these terms were reasonable, to raise a presumption that first defendant knew of them, and there is no evidence that he did in fact know the terms. In my opinion it has not been established that the first defendant ratified the agreement, and in the circumstances the plaintiff is not entitled to specific performance, or to recover the penalty for non-performance of the agreement.

With regard to the plaintiff's appeal, I am in entire agreement with the learned District Judge, and in any event my view of the

case as against the first defendant would debar the plaintiff's appeal from succeeding.

As regards the Rs. 500 claimed from the first defendant, I see no reason to differ from the learned District Judge that this amount was paid to or on behalf of the first defendant, and I understand that counsel does not wish the case to go back for any further evidence on the point.

I would dismiss the plaintiff's appeal with costs, and give judgment for the plaintiff for Rs. 500 as against the first defendant, each side to bear its own costs both in the Court below and on the appeal.

Appeal No. 72—dismissed.

Appeal No. 73—judgment varied.