1944 *Present:* **Jayetileke J.**

HATURUSINGHE, Appellant, *and* UKKU AMMA, Respondent.

100—C. R. Kandy, 33,473.

Minor—Deed of gift by a Kandyan minor—Void and not voidable—Minor not bound to apply for restitution—Recovery of property by action— Rei vindicatio.

A deed of gift by a minor is void and the minor, where he has lost possession of the property gifted, can recover it by an action *rei vindicatio.*

The minor in such a case is not bound to apply for restitution within three years of his attaining majority.

A Kandyan woman, who is a minor, does not attain majority by marriage.

***Muttiah Chetty v. Dingiria* (*10 N. L. R. 371*), followed.**

APPEAL from a judgment of the Commissioner of Requests, Kandy.

H. V. Perera, K.C. (with him *H. W. Thambiah*), for plaintiff, appellant.

E. A. G. de Silva, for defendant, respondent.

Cur. adv. vult.

October 19, 1944. JAYETILEKE J.—

This is an action for a declaration of title to an undivided three-fourth share of a field called Meegahapitiyacumbura. It is common ground that upon deed No. 1765 dated September 29, 1911, Kalingu and Kiri Banda became entitled to the field in equal shares. By deed No. 4514 dated January 22, 1915 (P 1), Kalingu gifted her half-share to Kiri Banda and Ukkuwa. At the date of execution of P 1 Kalingu was 18 years of age. She died on January 23, 1915, leaving as her sole heir the plaintiff. The birth certificate P 2 shows that the plaintiff was born on January 1, 1915. The plaintiff claimed the share to which Kalingu was entitled on the footing that P 1 is void and conveyed no title.

The defendant, who had purchased the interests of Ukkuwa, filed answer alleging that according to the Kandyan law a gift by a minor is valid and that even if it is not, the plaintiff's action is prescribed as he

failed to institute it within three years of his attaining majority. He did not dispute the plaintiff's title to an undivided one-fourth share which he purchased from Kiri Banda.

At the trial the following issues were framed:—

(1) Was Kalingu a minor when she executed deed No. 4514 of January 22, 1915.
(2) If so, was the said deed void or voidable?
(3) Is the plaintiff's cause of action, if any, prescribed?

The learned Commissioner decided issues (2) and (3) against the plaintiff and dismissed his action with costs.

I shall first deal with the question whether P 1 is void or voidable. No direct authority was cited to me, nor am I aware of any, in which this question was considered under the Kandyan law. But Counsel for the respondent invited my attention to a passage from Sawer at page 27 which reads:—

> " Should a youth sell his lands, his cattle or his goods before the end of his 16th year, he can break the bargain and resume possession of his lands, cattle or goods, on refunding the value which he may have received for the same. "

The Kandyan law fixed the age of majority at 16 years which was the age of puberty and manhood. But section 1 of Ordinance No. 7 of 1865 fixed the age of majority at 21 years and declared that, except as in section 2 excepted, no person shall be deemed to have attained his majority at an earlier period any law or custom to the contrary notwithstanding. This provision necessarily rendered inoperative the rule of the Kandyan law as regards the age of majority.

The exception provided by section 2 reads:—

> " Nothing herein contained shall extend or be construed to prevent any person under the age of 21 years from attaining his majority at an earlier period by operation of law. "

Under the Roman-Dutch law a person attains majority by marriage. The question whether a Kandyan woman similarly becomes a major on marriage was raised in a case reported in *Vanderstraatan's Reports at page 251*, in which it was held that whereas there was no trace in the Kandyan law of any rule by which marriage before the age of 16 conferred majority, and as Ordinance No. 7 of 1865 had substituted 21 years of age as the legal age, a woman over 16 years of age but under 21 years did not become a major on her marriage.

A divisional Bench took the same view in *Muttiah Chetty v. Dingiria*[1]. According to these decisions Kalingu was a minor in spite of her marriage at the time of the execution of P 1.

The passage from Sawer quoted above refers to a sale by a minor and is apparently based on the principle that the alienation cannot be said to be definitely prejudicial to the minor inasmuch as he received value for it. Sawer has not dealt with a case where the alienation is definitely prejudicial to the minor. On this point the Kandyan law is silent. Where there is no Kandyan law or custom having the force of

[1] *10 N. L. R. 371.*

law applicable to the decision of any matter or question arising for adjudication within the Kandyan Provinces we must have recourse to the Roman-Dutch law (Cap. 66, section 7).

The fact that Kalingu did not receive any consideration on P 1 is manifest on the face of it. In *Gunesekere Hamine v. Don Baron*[1], it was held that under the Roman-Dutch law a donation by a minor is *ipso jure* void. This case was cited with approval in *Silva v. Mohamadu*[2].

It follows from these decisions that P 1 is void and of no effect and that the *dominium* remained in Kalingu.

The remaining question is whether the action is barred by any provision in the Prescription Ordinance (Cap. 55).

The answer to this question turns on whether or not it is necessary for a minor to bring an action after he attains majority to get the void alienation out of the way, and whether the proper action is the action *rei vindicatio*, or the action for *restitutio in integrum*.

The plaintiff has instituted this action, which is a vindicatory action, seven years after he attained majority.

Voet says that an action by a minor is not necessary where he is *ipso jure* protected but as a matter of precaution the action is brought for greater security. (*4. 1. sec. 13.*)

The section reads:—

> "Nor is recourse to be had to restitution, whenever a person is *ipso jure* protected; for instance, if without the authority of a tutor, a contract has been made with his ward, and the latter has thereby been made the richer. For, restitution in respect of a prejudiced matter would be sought for in vain, if the law on the subject itself protects the person and preserves his rights intact. Nor do I doubt but that, nowadays, if an extra judicial transaction is *ipso jure* null and void, a person is safe against it without restitution, as Groenewegen establishes by many authorities, reasons, and decided cases. But since extra caution does no harm, and the more experienced practitioner usually takes the safer course and as those to whom the authority is given are readier to grant restitution nowadays, than was the case in Roman times, it has become usual in the Courts of different places, to apply for restitution even against contracts manifestly of no effect in law, for the sake of greater security than from any necessity to do so."

In *Breytenback v. Frankel*[3], Lord de Villiers referring to this section in Voet said:—

> "According to Voet such an action should not be brought when the minor is *ipso jure* safe (tutus), and as an illustration of such safety he mentions the case of a contract made with a minor without the authority of the guardian, by which the minor has not been benefited. Voet does not, however, say who is to judge whether the minor has been so benefited or not. He adds that as excessive caution can do no harm, and skilled practitioners are apt to take the safer course,

[1] *2 Browne 402.* [2] *19 N. L. R. 426.*

[3] *(1913) S. A. L. R. App. Div. 390.*

and as the Dutch Courts were more inclined to grant the aid of restitution than those of Rome, a general practice has been introduced for the sake of safety than from necessity to ask for restitution from the Courts against contracts labouring under manifest nullity. It is very difficult to gather from the authorities whether an action should be deemed necessary under the circumstances with which the Court has now to deal, but it is reasonably clear that it would have been deemed advisable. No decision of any South African Court has been cited in which the exact point has been decided, but we know that the tendency of those Courts has always been to uphold the general principle that a solemnly registered or duly executed instrument shall stand until set aside by a competent court and not to allow any person to be a Judge in his own cause. ''

In the course of the argument Lord de Villiers has made an observation that the universal practice in Holland must be taken to be the law, but there is nothing in his judgment to indicate that that was his considered opinion.

Vander Keesel, one of the latest writers on the Roman-Dutch law, says in his theses, which were published about the time when Ceylon passed into British hands, that though it is usual for the sake of greater security to apply for *restitutio in integrum* in transactions which are *ipso jure* void, it is not a matter of necessity. (*Theses 877 Lorensz Trans. page 324.*) This statement shows that an inveterate practice did not exist in Holland.

The last sentence in the quotation given above from the judgment of Lord de Villiers seems to be based on the law relating to the registration of immovable property that is in force in South Africa. Throughout the Union the registration of transfers of immovable property is compulsory. For the purpose of ascertaining who is the owner of a particular piece of land it is the registration that must be looked at. The registration is regarded as conclusive as between any non-registered claimant to land and third parties. This is made clear by the judgment of Solomon J.

He said :—

'' And as long as the property remained registered in the name of a third party it is impossible for the minor to transfer the *dominium*. In practice therefore it makes little difference whether the alienation by a guardian of the immovable property of a minor is held to be void or voidable, for in either case, if the minor repudiates it, he must bring an action to set aside the registration. But there is this important difference, that in the one case the action is a vindicatory one and in the other a *restitutio in integrum*. ''

In the absence of a similar provision in our Registration Ordinance it seems to me on principle, and apart from authority, that a person who executes a deed of transfer which is *ipso jure* void is under no obligation to institute an action to get rid of the effect of his act because the transfer is a nullity and the *dominium* remains in him. But there is clear authority both in the Roman-Dutch law and in the English law on the point.

The view expressed by Voet is supported by Story in his *Commentaries on Equity Jurisprudence*, 3rd Edition at page 294.

He says:—

"In the first place, then, let us consider in what way the Court will direct the delivery up, cancellation or rescission of agreements, securities, deeds or other instruments. It is obvious that the jurisdiction, exercised in cases of this sort, is founded upon the administration of a protective or preventive justice. If, therefore, the instrument was void for matters apparent upon the face of it, there was no call to exercise the jurisdiction with the possible exception of instruments forming a claim upon the title to land. The party is relieved upon the principle, as it is technically called *quia timet;* that is for fear that such agreement, securities, deeds or other instruments may be vexatiously or injuriously used against him when the evidence to impeach them may be lost; or that they may have thrown a cloud or suspicion over his title or interest."

There is also a judgment of the Privy Council on the point. In *Khirajmal v. Daim* [1] Lord Davey said:—

"The question, therefore, is whether the equity of redemption not only purported to be, but was in fact sold under the decrees. Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But on the other hand the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales would be a nullity and might be disregarded without any proceeding to set them aside—."

I must now turn to a consideration of two cases on which reliance was placed. The principal case to which reference must be made is *Silva v. Mohamadu* (*supra*). In that case, one Warlianu, who was a minor, sold certain shares of a land for a sum of Rs. 2,000 to the defendant. After he attained majority he conveyed the same share to the plaintiff.

The question for determination was whether the transfer to the defendant was void or voidable. Ennis and de Sampayo JJ. held that the transfer was voidable.

Counsel for the respondent placed particular reliance on the following passage in the judgment of de Sampayo J.:—

"It appears that, even in the case of void contracts, the universal practice in Holland was to apply for *restitutio in integrum* and, as Lord de Villiers observed in the course of the argument, what was the universal practice in Holland must be taken to be law with us. Thus it appears that the Roman-Dutch law is quite in accord with the general principle that a person cannot be judge in his own cause, and that where he wishes to get rid of the effect of his own act he must seek the assistance of the Court."

The next case which was greatly relied upon was *Ahamadu Lebbe v. Amina Umma* [2]. In that case the plaintiff, who was a minor, falsely represented himself to be of full age and induced the defendant to purchase

[1] *I. L. R. 32 Cal. 296.*

[2] *29 N. L. R. 449.*

his share of a land. Here, too, the deed was held to be voidable but restitution was not granted in view of the false representations made by the minor. In the course of the judgment delivered by Jayawardene A.J. he said:—

> "In view of these authorities (*Breytenback v. Frankel; Silva v. Mohamadu*), it must be now taken to be settled law that whether an act is void or voidable, restitution must be sought from the Courts and neither the minor nor his subsequent purchaser can treat the alienation as never having taken place at all."

I think it is to be remembered that in each of these cases what was being considered was a voidable contract. There can be no question that restitution must be sought from the Courts to avoid a voidable contract. That is because a voidable contract is valid until it is set aside.

With great respect, I would wish to say that the observation made by the learned Judges in those cases that restitution must be sought from the Courts in respect of an act which is void is *obiter* and not in accord with the authorities I have referred to.

What then is the position of a minor who has executed a deed which is *ipso jure* void? Where the minor is in possession of the property no difficulty can arise, but where he has lost possession he can recover it by an action *rei vindicatio* which is available to him as the *dominus* of the property.

In *Silva v. Mohamadu* (*supra*) Ennis J. said:—

> "Where the contract was void *ab initio* the proper Roman-Dutch action was the action *rei vindicatio* as the *dominium* had not passed, but where the contract was voidable only, the Roman-Dutch action was *restitutio in integrum*."

This view has the support of Voet (4. 4. sec. 16).

An action *rei vindicatio* can be brought under section 3 of the Prescription Ordinance within ten years of the date of dispossession. The plaintiff's action has been brought within ten years of the accrual of the cause of action and is thus not barred by prescription.

I would set aside the judgment of the learned Commissioner and send the case back for judgment to be entered in favour of the plaintiff for the share claimed by him in his plaint. The parties will be at liberty to adduce evidence on the question of damages. The plaintiff is entitled to the costs here and in the Court below.

Appeal allowed.