

1916.

Present: Shaw J.

THE KING *v.* APPU.

69—*D. C. Negombo, 3,086.*

Cheating—Penal Code, s. 403—Representation by mortgagor that land was free from encumbrance—Land subject to lease.

A representation by a person that a land is "free from encumbrance" amounts to a representation that it is not subject to any lease.

A person mortgaging a land representing that it is "free from encumbrance" would be guilty of cheating, if the land was subject to a lease at the time.

Accused in this case was acquitted on the ground that there was no evidence of a criminal intention on his part.

THE facts are set out in the judgment.

A. St. V. Jayewardene (with him Amerasekera), for appellant.

Dias, C.C., for respondent.

April 6, 1916. SHAW J.—

The accused has been convicted of cheating, under section 403 of the Penal Code, and sentenced to pay a fine of Rs. 500, or in default three months' rigorous imprisonment.

The accused was the owner of some land situated at Dagonna, which was subject to a mortgage for Rs. 500, and in respect of which he had, on May 8, 1913, granted a lease to one Pelis Appuhamy for ten years, the whole rent for the term, viz., Rs. 500, having been paid in advance.

Shortly after this lease had been granted one Peduru Appu, who was at one time an accused in this case, and has been discharged, entered into negotiations with Sithambarampulle, the complainant, who was acting for his son-in-law Chelliah, for a mortgage for Rs. 1,500, to be secured on this land and two other lands belonging to Peduru Appu, the arrangement being that, prior to the execution of the mortgage, Peduru Appu should purchase the land from the

accused and obtain a transfer from him. The negotiations with Sithambarampulle were conducted by Peduru Appu in the presence of the accused; no disclosure was made by either of them of the existence of the lease to Pelis.

Sithambarampulle, having inspected the land and agreed to make the loan on behalf of his son-in-law, put the matter into the hands of Mr. Croos Daberera, his proctor and notary. Mr. Daberera made search at the Registrar's office and found no registered deed affecting the land except the mortgage for Rs. 500, which it was arranged should be paid off at the time of completion out of the money to be borrowed from the complainant. On June 11 the parties attended at Mr. Daberera's office for the completion. The transfer to Peduru was executed, the purchase price being Rs. 2,500; the mortgage from Peduru to Chelliah for Rs. 1,500 was executed, and Rs. 1,330 of the amount of the loan was paid by Sithambarampulle; the Rs. 500 mortgage, with the interest due, was paid off and discharged, and Rs. 750 of the balance was paid to the accused and Peduru Appu gave him a promissory note for Rs. 1,500, the balance of the purchase money. No mention was made by either the accused or Peduru of the lease to Pelis, and both Peduru and the accused, at the request of Mr. Croos Daberera, signed declarations, the first, that all the lands mortgaged by him, and the second, that the land in question, were "free from all encumbrances".

Two years afterwards the mortgage bond was put in suit by Chelliah, and this land was sold by the Fiscal. The lease to Pelis was then for the first time discovered, and was found to have been registered the day after the mortgage was executed, and one day before the mortgage itself was registered. The land was bought at the Fiscal's sale by Chelliah for Rs. 350, the low price being no doubt accounted for by the existence of the lease, which had still some eight years to run. The other lands mortgaged by Peduru having failed to realize the full sum due on the mortgage, the present proceedings were instituted.

I quite agree with the finding of the District Judge that the representation that the land was free from encumbrances was made by the accused to Sithambarampulle, Chelliah's agent, for the purpose of inducing him, and did induce him, to lend the money. It is true that Sithambarampulle stated under cross-examination that "the accused did not induce me to lend money on the mortgage", but it appears from Mr. Daberera's evidence that Sithambarampulle had asked Mr. Daberera to obtain the declaration, and Mr. Daberera states that he should not, as the mortgagee's proctor, have allowed the transaction to have gone through if the accused had not made the declaration.

I have felt some doubt whether a representation that a land is "free from encumbrance" amounts to a representation that it is

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not subject to a lease. In the circumstances of the present case I think it did. In *Wharton's Law Lexicon* "incumbrance" is defined as "a claim, lien, or liability attached to property", and a lease has in England been held to be an "incumbrance" where a vendor had contracted to give vacant possession (*Caballero v. Hently*¹); although generally upon a sale in England, where the delivery of vacant possession is not an essential part of the contract, a lease from year to year is not an "incumbrance" (*Davies v. Davies*²); a lease at an inadequate rent has been held to be an "incumbrance" with a clause prohibiting a married woman from incumbering her property (*Baggett v. Men*³). In this Colony a lease has been held not to be an "incumbrance" within the meaning of section 8 of the Partition Ordinance (*Peiris v. Peiris*,⁴ *Samaraweera v. Cunji Moosa*⁵), but the construction in those cases turned on the special wording of the Ordinance, and in my view, apart from any restricting words that may accompany it, the word "incumbrance" would certainly include a lease, like that under consideration in the present case, for a considerable term the consideration for which has been paid in advance.

This technical legal expression has been used by the accused in a document written by Mr. Daberera in English, and signed by the accused. It is clear that he cannot have understood the meaning of the English word, or whether it included a lease, and the representation intended to be made by the accused depends upon the Tamil word used by Mr. Daberera in his translation of the document to the accused. We are not told what the Tamil word was, so are not in a position to decide whether or not the accused represented or intended to represent that the land was not subject to any lease.

But this point ceases to have much importance, because I think that the evidence given by Pelis and that of the accused himself raises so much doubt of the criminal intention of the accused as to entitle him to an acquittal. I see no sufficient reason to hold that Pelis, who was called as a witness for the prosecution, was a party to any fraud. It appears from the evidence that, prior to the transfer to Peduru and the mortgage to Chelliah, Peduru and the accused came to Pelis and told him that Peduru desired to buy the land, and asked him to cancel the lease, and that he agreed to do so on condition that he was paid Rs. 500, the sum he had paid as consideration for the lease, out of the purchase money; and he gave document E to that effect. After the transfer Peduru appears to have been put in possession, and the trouble arose in consequence of his failing to pay the vendor the balance of the purchase money, or the Rs. 500 due to Pelis. I am not satisfied of the guilty

¹ L. R. 9 Ch. 447.

² L. R. 16 Q. B. 951.

³ 18 L. J. Ch. 228.

⁴ (1906) 9 N. L. R. 231.

⁵ (1915) 18 N. L. R. 408.

intention of the accused, who may well have considered that the lease was disposed of. The Judge comes to the conclusion that the document E is a false document, made for the purposes of the defence, and bases his opinion on the fact that on the very day after the transfer the lease to Pelis was registered; but this was the very thing one would expect Pelis to do under the circumstances, as the Rs. 500 was not payable to him for three months, and he would therefore have been without remedy if he had allowed Peduru to gain priority of registration and the money was not eventually paid. I am by no means satisfied that E was not made prior to the transfer.

In view of the doubt that exists of guilty intention on the part of the accused, I set aside the conviction, and acquit him of the offence charged.

Set aside.

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