[IN REVIEW.]

1909.
March 2.

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

## PERERA *v.* AMARASOORIYA.

*D. C., Galle, 8,250.*

*Ordinance of Frauds (No. 7 of 1840)—Authority to enter on land and prospect for plumbago—Interest in land—Part performance—Action* ex dolo malo.

An authority to enter on land and prospect for plumbago and to work the mines found there and take away plumbago is an agreement creating an interest in land, and should be notarially attested under section 2 of Ordinance No. 7 of 1840. Where it is not so attested, no action lies for the recovery of damages for breach of such agreement.

The doctrine of part performance has not been recognized in Ceylon to the extent to which it prevails in the English Courts of Equity.

HEARING in review of the judgment of the Supreme Court dated July 1, 1908. The material facts appear in the judgments.

*Bawa*, for plaintiff, appellant.

*Van Langenberg* (with him *A. St. V. Jayewardene*), for defendant, respondent.

*Cur. adv. vult.*

March 2, 1909. HUTCHINSON C.J.—

This is a hearing in review. The action was for damages; the cause of action is not clearly stated in the plaint, but it seems to be for breach of an agreement by the defendant to allow the plaintiff to prospect for plumbago in the defendant's land. The District Judge in his judgment treated the action as one for damages for breach of a partnership contract, and held that the plaintiff and the defendant were partners, and awarded the plaintiff damages for breach of the partnership contract. On appeal the judgment was set aside and the action was dismissed, because there was no allegation of a partnership, and no issue as to whether the plaintiff and the defendant were partners, and no evidence of any partnership between them, and because the agreement alleged in the plaint is an agreement creating an interest in land and was not in writing as required by Ordinance No. 7 of 1840.

The plaintiff alleges that "in May, 1905, the defendant authorized the plaintiff to prospect for plumbago" in the defendant's land, the plaintiff agreeing to pay the defendant one-tenth of the output as ground share; that the plaintiff opened a plumbago mine on the land and worked it with four other men as shareholders in one-third of it; that, subject to the one-tenth ground share of the

1909.
March 2.

HUTCHINSON C.J.

defendant, the mine is the property of the plaintiff and the other four men; that the defendant on and after April 1, 1906, unlawfully and fraudulently prevented the plaintiff from going on the land; that the plaintiff suffered damages to the extent of Rs. 8,000 through being prevented from winning the plumbago, which he had successfully prospected; and he claimed that sum as damages.

The appellant first contends that the plaintiff and the defendant were partners from the beginning under the "authority to prospect," because the four men who were his shareholders, and who, as he says in the plaint, were "employés of the defendant," were merely "dummies," and that the real and only shareholder with him was the defendant. It is impossible to draw such an inference from the statements in the plaint; there was no issue about it; and it is clearly unfounded. He also suggests that the defendant became a partner afterwards by purchase of their shares from two of the four shareholders. Such a purchase would not of itself make the defendant a partner, nor was it said in the plaint or suggested in the issues that the defendant so became a partner, nor does the evidence prove it.

With regard to the original claim as made in the plaint, and the defendant's answer that "the authority to prospect" was not executed in the manner required by Ordinance No. 7 of 1840, the appellant says, first, that such an authority is not an agreement for establishing an interest in land. He relied on *Elias v. Jeronis*,[1] a decision of the Full Court, which is dissented from by another Full Court in *Meregalpedigedera Saytoo v. Owittagedera Kalinguwa*.[2] When a Court is confronted by two conflicting decisions of Courts of co-ordinate jurisdiction, it must decide which of them it should follow (see *10 N. L. R. 148*). And in my opinion an authority to enter on land and prospect for minerals there and to work the mines, if any, found there and take away the minerals is obviously an agreement for the creation of an interest in land.

Secondly, it is argued that in this case there was part performance of the agreement, and therefore the Statute does not apply. In support of this argument reference was made to *Perera v. Fernando*.[3] That case does not decide that where there has been part performance of such an agreement as is referred to in section 2 of Ordinance No. 7 of 1840 an action will lie on the agreement although it is not in writing; but only that an action will lie for use and occupation where a person has been in occupation under a parol agreement, and that, for the purpose of showing what would be a fair sum to allow for use and occupation, the terms of the parol agreement may be proved. And if we admit that a man who has entered on another person's land under a verbal agreement for its sale or lease to him, and has spent money on it on the faith of the agreement, can recover the money he has so spent,

[1] *(1885) 7 S. C. C. 71.* [2] *(1887) 8 S. C. C. 67.* [3] *Ram. (1863–1868), 83.*

that is not the same thing as allowing him to enforce the agreement or to recover damages for breach of it. A man who enters into possession of land under an agreement such as is required by the Ordinance to be in writing, but which is not in writing, cannot sue on the agreement (*2 Browne, 256, 202;* see also *2 N. L. R. 80,255*). No local authority and no rule of Roman-Dutch Law has been quoted as showing that an action will lie to enforce or to recover damages for breach of such informal agreements; and in my opinion the plain terms of our Ordinance forbid it.

The appellant also suggested for the first time at this hearing in review that he ought to be awarded compensation for the improvements he has made on the land. I think that that claim should not be allowed, as there is no allegation of any such improvements, no issue on the point, and no evidence of any improvements.

Lastly, he contends in the alternative that he is entitled to recover damages for *dolus malus*. If that means fraud, it is true that the plaint alleges that the defendant "unlawfully and fraudulently" prevented the plaintiff from working the mine; but no specific act of fraud was alleged; it seems that what was meant by those words was that the defendant knew that the plaintiff had discovered plumbago, and that his object in preventing the plaintiff from working it was that he might work it himself. The defendant in his answer denied that he had any knowledge as to the veins of plumbago found by the plaintiff, or that his refusing to allow the plaintiff to resume operations was with the view of working the mine. And there is no issue as to any fraud. If, however, the plaintiff merely means by *dolus malus* that the defendant's act was wrongful, and that he is liable to repay the money which the plaintiff has spent unprofitably on the land, there might have been something to say for such a claim, if it had ever been made, and if evidence had been taken as to the money which the plaintiff had spent, and whether he had made a loss thereby. If that claim had been made at an earlier stage, we do not know whether or how far the defendant would have disputed it, or what evidence he might have produced to show that there had been no loss. The evidence, which was taken, but which was not directed to that point, would show that the plaintiff had lost about three to four hundred rupees; but if there had been any question about it, the evidence might have been very different.

The respondent also points out that one of the issues was whether the plaintiff worked the mine under the terms stated in paragraph 4 of the answer, that is, on a promise that, if there was a cessation of work by the plaintiff for three months continuously, the defendant was to have the right to prevent him from resuming work; and if so, did the plaintiff fail to work in breach of that term? The District Judge found that there was a time limit fixed; but he was not satisfied that the term was three months, and held that it was six months. He found that the plaintiff attempted to resume work

1909. March 2.

HUTCHINSON C.J.

in June, and he appears to have thought that the six months did not expire until June 30, and that therefore the plaintiff had not failed to work for three months. As I said in my judgment which is under review, neither party had ever said that the term was six months, and there was no evidence that it was so. I think that on this issue also the defendant ought to have succeeded.

In my opinion the decree which is under review ought to be affirmed, with costs to be paid by the appellant.

WENDT J.—

This is a hearing in review, preparatory to appeal by the appellant against the judgment of this Court dated July 1, 1908. The District Judge who tried the action awarded plaintiff Rs. 1,000 and costs. Both parties appealed, and a Bench of this Court (consisting of the Chief Justice and my brother Wood Renton) allowed defendant's appeal, and dismissed the action with costs. In the present review Mr. Bawa limited himself to asking that the judgment of the District Judge be restored.

Although in setting out the terms of the arrangement with defendant dated May 2, 1905, which is the foundation of the action, plaintiff only alleges that the defendant's authority to him was to "prospect for plumbago," it is clear from incidental averments that plaintiff relied upon an agreement whereby he was to enter upon defendant's land, open and work mines, and take and appropriate the plumbago won therefrom, yielding to defendant as "ground share" (*i.e.*, the landowner's share) one-tenth of such plumbago. He alleges that he opened and worked a mine, and then, averring that the mine is the property of himself and "four employés of defendant," in the proportion of two-thirds to himself and one-third to them, proceeds to state his cause of action, viz., that defendant since an unascertained date between April 1 and August 14, 1906, "unlawfully and fraudulently refuses to allow the plaintiff to step into the said land even." The plaintiff then alleges that but for defendant's wrongful act he could have worked the mine for at least two years and taken out about 200 tons of plumbago worth Rs. 20,000 at an expense of about Rs. 6,000, and "plaintiff's interest in the said mine being two-thirds, exclusive of the ground share of one-tenth," assesses his damages at Rs. 8,000, which he prays that defendant be condemned to pay. The basis of this action being plaintiff's present right to enter upon the land and work the mine, the plaint was defective for not showing what the period covered by the agreement of 1905 was, and that that period was still current. If it was intended to imply that plaintiff was to go on for ever or until the plumbago was exhausted, that circumstance would be material in ascertaining the application of the Ordinance of Frauds. The agreement by which plaintiff was to be entitled to enter upon the land and win and remove all the plumbago in it, appropriating

nine-tenths himself and rendering one-tenth to the defendant, was clearly an agreement for creating an interest in the land. Not being attested by a notarial instrument as required by Ordinance No. 7 of 1840, section 2, it was of "no force or avail in law." Consequently plaintiff's action founded upon it must fail. I entirely agree with the view taken of this point by the judgments under review.

The doctrine of "part performance" has never been recognized in Ceylon to the extent to which it prevails in English Courts of Equity, where (as I understand it) the fact of a part performance by one party entitles him, in order to prevent a fraud upon him by the other, to prove the terms of the contract and obtain as full relief for its breach as he could have recovered if there had been a formal writing. For one thing the terms of the two Statutes are different: in England "no action shall be brought" on the informal agreement—words which do not avoid the contract, while in Ceylon the contract is of "no force or avail in law." The principle of cases like *Hunt v. Wimbledon Local Board*[1] would seem to apply, in which the Courts have refused to admit the doctrine of part performance where the contract was of no avail owing to omission of the prescribed formalities. There is one solitary local case, reported *Ram. (1864) 83*, in which a man who had let his land on a parol agreement that was obnoxious to section 2 was held entitled to recover compensation from the hirer for the period of his actual use and occupation of the land. The Court expressly guarded itself from deciding that every part performance takes a case out of the Statute, and the decision has never since been extended.

Mr. Bawa contended that plaintiff and defendant were partners, and that that being established he was entitled to show by parol evidence what the partners' interests were in the land. He relied upon *Forster v. Hale*,[2] *Dale v. Hamilton*.[3] But the action was in no sense founded on a partnership. The averment that defendant's "employés" were co-shareholders with plaintiff did not imply that they were employed to represent defendant in the business of the mine. If there was a partnership, the transfer by two of the partners of their shares to defendant would *primâ facie* have worked a dissolution of that relation, rather than made defendant a partner with the others; and paragraph 7 of the plaint, unequivocally accepts defendant's disclaimer of interest, and states as the basis of the action that the mine is the property of the plaintiff and the four others. There is no prayer for dissolution, or for partnership accounts. There is no suggestion in the issues (which plaintiff himself formulated and defendant agreed to) that defendant was his partner at any time. Upon the evidence I agree in holding that no partnership was proved.

I have had the advantage of perusing the Chief Justice's draft judgment, and I concur with him as to the time limit and as to

[1] *L. R. 4 C. P. D. 48.* [2] *3 Vesey 696; 5 Vesey 308.* [3] *2 Phillips 266.*

1909.
March 2.

WENDT J.

plaintiff's claim for "compensation for improvements" and for damages *ex dolo malo*.

I think we should affirm the judgment under review with costs.

MIDDLETON J.—

The plaintiff in review seeks the reversal of this Court's judgment on the question of an alleged partnership between him and the defendant, or in the alternative that he is entitled to recover damages from the defendant either on the ground that the alleged contract between the parties has been partly performed and so comes within the equitable doctrine followed by the Court of Chancery in England, taking it out of the purview of Ordinance No. 7 of 1840, or on the ground that there has been such *dolus malus* on the part of the defendant that plaintiff is entitled to compensation.

I do not think it necessary to consider at any length the first contention, as the judgment of my lord and my brother Wood Renton, with which I entirely agree, and the plaint (paragraph 7) very clearly show that no partnership existed or was even alleged by the plaintiff to exist in the initial step of these proceedings. I would go further even than my brother and say that if the note taken by the learned District Judge is correct, the case was not at first opened as a case of partnership, but rather as an action for damages, and there is no claim for the taking of an account on the footing of a partnership set out in the plaint. The questions, therefore, I think, we have to decide are whether the plaintiff is entitled to succeed on either of the two latter grounds raised by his learned counsel.

The doctrine of part performance is, I take it, one which the Courts of Equity in England adopted when circumstances disclosed that if the Court held that no action would lie under the Statute of Frauds, its pleading and enforcement would work great injustice by reason of allowing one party who had been equally negligent of its observance as the other to take advantage of his own wrong and obtain an unjust aggrandisement at the expense of the other. If the doctrine were carried out under all circumstances, it would practically lead to a repeal of a legislative enactment of great use and importance, and I do not think in admitting it as a part of our law, which has been done in the case of *Perera v. Fernando*,[1] decided in 1864, we should do so without jealously regarding the facts of each case. This is a ruling of three Judges, and as such is binding on this Court by virtue of the decision of the Full Court in *Rabot et al. v. De Silva et al.*,[2] in spite of the later judgment of 1887 reported in *8 S. C. C. 67.*

We are not, I think, to make the Ordinance the instrument of fraud itself, nor to allow a person in *pari delicto* to enrich himself at the expense of his co-delinquent. The usual remedy granted by the Courts of Equity in England in such cases is a decree for specific performance, but this will only be granted if the Court is

[1] *Ram. (1863–1868), 83.*

[2] *(1907) 10 N. L. R. 140.*

able to ascertain the terms of the agreement satisfactorily (*Sugden's Vendors and Purchasers 154*). This leads me to consider what are the terms of the alleged agreement here as set out in the pleadings. So far as the plaint is concerned there is a mere averment of an authorization by the defendant to the plaintiff to prospect for plumbago on the defendant's land with a recital that plaintiff, having given a declaration as required by Ordinance No. 11 of 1896, sunk a three cubits mine on defendant's land, and that plaintiff agreed to pay defendant one-tenth of the output as ground share. There is no averment of any lease, or that the license was to continue for any specified period of time, nor are any conditions whatever averred in the plaint as attached to the alleged agreement.

The defendant pleads a covenant that the plaintiff worked the mine in question under a promise that if there was a cessation of work for three months continuously on the part of the plaintiff, the defendant was to have the right of refusing the plaintiff from resuming work (*sic*), and as the plaintiff had abandoned the pit for eight months continuously, the defendant, as he lawfully might, refused to allow the plaintiff to resume work. The plaintiff avers a part performance in the working of the mine at a loss and the payment of the ground share, but the time for which the mine was worked or was to be worked is not alleged. The omission as regards the time limit and of any terms as regards the land, which could be construed as an agreement for a lease to the plaintiff by the defendant, seem to me to negative the plaintiff's right to any relief by way of specific performance. If, moreover, there was nothing more than a mere license to prospect, which seems to me the case from the averments in the plaint, I cannot see that any action for damages will lie.

The plaintiff does not even aver that the defendant agreed to allow him to open the mine, or that he was to continue working it for any specified length of time. On the assumption, therefore, that the plaintiff had an agreement with the defendant, which was not governed by the Statute of Frauds, I do not think that on the pleadings any case is shown, upon proof of which the plaintiff would be entitled to damages as against the defendant. There is no alleged breach of an agreement to lease. At the most the plaintiff avers an authority to go upon the land for a specified purpose without any limitation as to time, which is a mere license revocable at the will of the grantor. There is no averment in the pleadings that on the faith of the authority to mine the plaintiff has gone to any great expense in excavating or in mining plant or otherwise. The only averment is that by reason of the withdrawal of the authority the plaintiff will be unable to excavate plumbago in large quantities at little expense, being thereunto unlawfully and fraudulently prevented by the defendant from taking advantage of the mining operations he has already engaged in. It seems to me, however, that a license to prospect and mine for plumbago is a

1909. March 2.

MIDDLETON J.

promise for establishing an interest in land, which would come under section 2 of Ordinance No. 7 of 1840.

This brings me to the question of *dolus malus* and the authority cited from the Digest (*Book 4, Tit. 3, Sect. 34*), which is translated at page 225 of Monro's translation :—" If you give me leave to quarry stone on your land, or to dig for chalk or sand, and I thereupon go to expense in the matter, but you refuse after that to let me take anything away, the only action that will apply in the case is that on *dolus malus*."

The defendant here has allowed the plaintiff to take some plumbago away, is he to be permitted, on the ground of part performance, to raise the question whether he has been fraudulently and capriciously prevented from taking all the advantage he was entitled to under the authority granted to him, and if so, what is the measure of his damages ?

It is not fully apparent, on the face of the pleadings, that the plaintiff has been fraudulently or capriciously prevented from continuing his mining, or that he has suffered any damage at all, and assuming as I do that section 2 of Ordinance No. 7 of 1840 must govern the law in the Digest so far as it might affect the position of parties subject to the Roman-Dutch Law in Ceylon, I do not think there is any room for holding that the doctrine of part performance is to take the case out of the Ordinance, so as to entitle plaintiff to maintain an uncertain action *ex dolo malo*, when he is clearly barred by the Ordinance.

The following cases were relied on by counsel for the appellant and respondent, and I have gone through them all :—*Perera v. Fernando*,[1] *Cowell v. Watts*,[2] *Forster v. Hale*,[3] *In re de Nicols. De Nicols v. Curlier*,[4] *Saytoo v. Kalinguwa et al.*,[5] *Silva v. Gunewardene*,[6] *Mudianse v. Mudianse*,[7] *Young & Co. v. The Mayor and Corporation of Royal Leamington, Spa*,[8] *Powell v. Lovegrove*,[9] *Nunn v. Fabian*,[10] *Pain v. Coombs*,[11] *Elias v. Jeronis*,[12] *Samnahamy v. Silva*,[13] *Hunt v. Wimbledon Local Board*,[14] *Charles v. Ramaliya et al.*,[15] *Secretary of State for War Department v. Ward*,[16] *Gray v. Smith*.[17]

I have dealt with the case on the pleadings as counsel for the appellant submitted that at least some case for relief was disclosed upon them ; I am unable to find any. As regards the question of estoppel, I cannot see how it can be relied on when the plaintiff himself in paragraph 7 of his plaint disclaims any partnership. I would dismiss the appeal with costs.

*Judgment in appeal affirmed.*

[1] *Ram. (1863–1868). 83.*
[2] *2 Hall and Twells. 224.*
[3] *5 Vesey, 308.*
[4] *(1900) 2 Chancery 410.*
[5] *8 S. C. C. 67.*
[6] *2 Browne 202.*
[7] *2 N. L. R. 86.*
[8] *L. R. 5 App. Cases 517.*
[9] *8 De Gex M. and G. 357.*
[10] *L. R. 1 Chancery Appeals 35.*
[11] *1 De Gex J. 34.*
[12] *7 S. C. C. 71.*
[13] *Ram. (1860–62), 101.*
[14] *4 C. P. D. 56.*
[15] *2 N. L. R. 255.*
[16] *2 Browne 256.*
[17] *43 Chancery Division 208.*