Mar. 15, 1910

Present: Mr. Justice Wood Renton and Mr. Justice Grenier.

ISSAN APPU *et al.* *v.* GURA

D. C., Kegalla, 2,632.

Partnership for working a plumbago pit—No notarial document—Action for dissolution—Ordinance No. 7 of 1840, ss. 2, 21, and 22.

Section 2 of Ordinance No. 7 of 1840 should not be allowed to be used in such a way as to perpetuate and cover a fraud.

THE facts are fully set out in the judgment of Wood Renton J.

A. St. V. Jayewardene, for the appellants.—This action must fail, as the alleged partnership, which was for the working of a plumbago pit, was not contained in a notarial document. [WOOD RENTON J. : You cannot now take that objection. You are estopped by your conduct. You have admitted the partnership in your pleading, and you have gone to trial without taking the objection.] This objection goes to the very root of the case. Even under the English Law where the doctrine of part performance is recognized, it has been held that an action may not be maintained even on an executed contract, which was not under seal, where the law says that such contracts should be under seal (*Hunt v. Wimbledon Local Board*,[1] *Young v. Corporation of Leamington*[2]).

The Full Court has held in Ceylon that no action lies for the recovery of damages for breach of a non-notarial agreement to enter on land and prospect for plumbago, and that the doctrine of part performance has not been recognized in Ceylon to the extent to which it prevails in the English Courts of Equity (*Perera v. Amarasooriya*[3]).

Pate v. Pate[4] does not apply to the present case, as there was no interest in land involved in that case. Section 22 of Ordinance No. 7 of 1840 specially enacts that section 21 must not be construed as exempting any instrument affecting land from the operation of section 2. Counsel cited *Lindley on Partnership, 6th ed., 88; Supreme Court Civil Minutes, July 1, 1908.*

Samarawickrama, for respondents, not called upon.

[1] *(1878) 4 C. P. Div. 48.*
[2] *(1883) 8 A. C. 517.*
[3] *(1909) 12 N. L. R. 87.*
[4] *(1907) 11 N. L. R. 254.*

March 15, 1910. WOOD RENTON J.— *Mar. 15, 1910*

Issan Appu v. Gurú

In this case the plaintiffs-respondents sued the appellants, claiming a dissolution of a partnership, into which they alleged that they and the defendants had entered for the working of a plumbago pit, and claimed, *inter alia*, an account of the profits and losses of the undertaking. They alleged that the pit had been worked under the agreement for a certain period, but that thereafter the first, second, and third defendants, who are the present appellants, had refused to allow them to inspect the books or to take part in the management of the pit. In their answer the appellants expressly admitted the existence of the partnership, and said that the pit in question had been worked under the agreement constituting a partnership to January 14, 1908, when operations were stopped on account of certain losses incurred, and that on March 15, 1908, accounts were looked into and finally adjusted between the parties, and that on that date the plaintiffs-respondents of their own accord withdrew from the partnership. The fourth defendant, who is not an appellant, associated himself in his answer with the allegations in the plaint, and his position need not be further considered for the purposes of the decision of this appeal. On the pleadings, as I have already summarized them, parties went to trial on an issue, the burden of establishing which was clearly on the appellants. What was the date of the cessation of partnership—did it terminate in March, 1908? Evidence was adduced on both sides, and the learned District Judge came, with propriety, to the conclusion that the appellants had entirely failed to prove that the partnership had been wound up voluntarily as alleged by the first, second, and third defendants. He ordered a dissolution of the partnership, and the taking of an account of the profits and losses of the plumbago pit from the last account stated, which, he says, seemed to be in November, 1907. In support of this appeal, Mr. A. St. V. Jayewardene put before us three points: first, that in spite of the attitude assumed by his clients towards the question of the existence of a partnership in their pleadings and at the trial, it is still open to them to contend that, in virtue of the provisions of section 2 of Ordinance No. 7 of 1840, the respondents' action must fail, since an agreement for the working of a plumbago pit involves the establishment of an interest in land, and as there has admittedly been here no notarial agreement, the informal agreement referred to in the plaint is of no force or avail in law; in the second place, that, as no term was fixed for the duration of the partnership, it is determinable by a notice on either side at will; and in the last place, that, in any event, the learned District Judge has given the respondents in his decree something more than they asked for.

I would propose to say a few words in regard to each of these points in turn. It is quite clear, in my opinion, that to allow the appellants at this stage to set up section 2 of Ordinance No. 7 of 1840, after

Mar. 15, 1910

WOOD RENTON J.

Issan Appu v. Gura

their admissions in the pleadings, and their acceptance of the issue on which the case proceeded to trial, would be tantamount to permitting them to perpetrate a fraud upon the respondents, and unless there is clear affirmative authority compelling us to uphold the plea with which I am now dealing, I for one will take no part in giving effect to it. In support of his argument on this point, Mr. Jayewardene referred us to two classes of authorities: in the first place, a series of English decisions, of which *Hunt v. Wimbledon Local Board*,[1] approved of by the House of Lords in *Young v. Corporation of Leamington*,[2] may be taken as examples, in which it has been held that the provisions of section 174, sub-section (1), of the Public Health Act, 1875, enacting that every contract made by an urban authority, whereof the value or amount exceeds 50 pounds, shall be in writing and sealed with the common seal of such authority, is obligatory, and not merely directory, and applies to an executed contract, of which an urban authority have had the full benefit and enjoyment, and which has been effected by their agent duly appointed under their common seal; and in the next place, to the decision of the Supreme Court in *Perera v. Amarasooriya*,[3] in which it was held that no action will lie for the recovery of damages for breach of an informal agreement to enter on land and prospect for plumbago. and that the doctrine of part performance has not been recognized in Ceylon to the extent to which it prevails in the English Courts of Equity.

In my opinion, none of these decisions support Mr. Jayewardene's argument on the point now before us. In the English cases, which were decided under section 174, sub-section (1), of the Public Health Act, 1875, it was expressly pointed out that the *ratio decidendi* turned on the language of that section itself. In the case of *Young v. Corporation of Leamington*, Lord Blackburn in the House of Lords expressly said that he was not giving a decision which ran counter to the recognized doctrine of English Courts of Equity that corporations might be liable *quasi ex contractu* to pay a fair price for work and labour and material of which they had had the benefit even under informal contracts. As regards the local case, it is pointed out by His Lordship the Chief Justice and by Mr. Justice Middleton, in *Perera v. Amarasooriya*, that the appellants might well have been entitled to recover damages for *dolus malus*, if, as was not the case, an express issue of fraud had been raised and tried in that action. There is nothing in the case of *Perera v. Amarasooriya* to conflict with the earlier and numerous and clear decisions of the Supreme Court in such cases as *Gould v. Innasitamby*[4] decided by Mr. Justice Moncreiff and Mr. Justice Middleton, and *Ohlmus v. Ohlmus*[5] decided by Mr. Justice Wendt and Mr. Justice Grenier, that section 2 of

[1] *(1878) 4 C. P. Div. 48.*
[2] *(1883) 8 A. C. 517.*
[3] *(1909) 12 N. L. R. 87.*
[4] *(1904) 9 N. L. R. 177.*
[5] *(1906) 9 N. L. R. 183.*

Ordinance No. 7 of 1840 should not be allowed to be used in such a way as to perpetrate and to cover fraud. In the former of these two cases, Mr. Justice Moncreiff used language which appears to me to be directly applicable, of course *mutatis mutandis*, to the circumstances before us. " The question, " he said " is not one of enforcing an agreement which is not according to law, but whether a defendant is to be allowed to plead the Statute of Frauds in order that he may dishonestly keep the property of another man, of which he got possession by refusing to return it when required. " I would hold that Mr. Jayewardene's first point fails.

[His Lordship then proceeded to discuss the other points raised by the appellant, and dismissed the appeal.]

GRENIER J.—

I am entirely of the same opinion, and have nothing to add.

Appeal dismissed.