

Present: Pereira J. and De Sampayo A.J.

1914.

BOTEJUE et al. v. JAYATILEKE.

209—D. C. Negombo, 9,417.

Action for cancellation of deed—A person who conspired with the parties to the deed to bring about its execution cannot be made party to action.

In an action for the cancellation of a deed, the parties to the deed need be the only parties to the action. A person who has conspired with the parties to the deed to bring about its execution is not liable to be made a party to such an action when no damages are claimed as sustained by the plaintiff by reason of the fraudulent execution of the deed.

THE facts appear from the judgment.

Bawa, K.C. (with him *A. St. V. Jayewardene*), for third defendant, appellant.

De Soysa (with him *Jayatileke*), for plaintiff, respondent.

Cur. adv. vult.

August 7, 1914. PEREIRA J.—

On the 14th November, 1912, the first and second defendants by their deed No. 2,694 sold and conveyed to the plaintiffs the allotments of land described in the first paragraph of the plaint. The plaintiffs omitted to have this deed registered. They lay the blame at the door of the third defendant, who was the notary who attested the deed, and to whom they say the deed was entrusted to be registered. On the 11th December, 1912, the first and second defendants purported to sell and convey the same allotment of land to the fourth defendant by deed No. 8,585, which was registered on the 13th December, 1912.

The plaintiff impeaches deed No. 8,585 and its registration as fraudulent, charging the third defendant as the chief conspirator in bringing about its dishonest execution and registration. No damages are claimed as flowing wholly from the mere fact of execution and registration of the deed, but the plaintiff prays that the deed be declared void and that he be declared entitled to the land, and (averring that the third defendant has cut and removed certain trees on the land in claim) he further prays that the third defendant, along with the other defendants, be condemned to pay the plaintiff the loss. Now, to my mind, it is clear from the evidence that the third defendant was the chief conspirator in

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the conspiracy to bring about the execution and registration of deed No. 8,585, but he was not a party to the deed, nor has any legal relationship between him and any of the parties been established. That being so, it is manifest that his presence as a party to this action was not necessary so far as the plaintiff's prayer for a cancellation of deed No. 8,585 was concerned. Of course, an action for damages wholly attributable to a fraud may be maintained against all the participators in the fraud, but no such damages are here claimed. The relief claimed in consequence of the fraud pleaded is the cancellation of deed No. 8,585; and in order to obtain that relief, the parties to the deed alone were the proper parties to be sued.

The plaintiff's claim for damage is based on the causes of action averred in paragraphs 8 and 9 of the plaint. There is nothing in paragraph 8 that touches the third defendant, and, admittedly, there is not an iota of evidence in support of the averments in the 9th paragraph.

However, the third defendant himself is to blame for the turn the action took in the Court below. Beyond vaguely stating in his answer that the plaintiff could "not maintain the action by reason of misjoinder of parties and causes of action," he does not appear to have taken any serious objection to being sued for the purpose of enabling the plaintiff to obtain an adjudication on the question of the fraud that is alleged to have vitiated deed No. 8,585, and he has certainly been proved to be the leading conspirator in the perpetration of that fraud. I would therefore not interfere with the order against him for costs in the Court below.

I would set aside the order condemning him along with the other defendants in damage (second paragraph of decree) and allow him costs of appeal.

DE SAMPAYO A.J.—I agree.

Set aside.