

1939

Present : de Kretser J.

SARDIYA v. RANASINGHE HAMINE.

29—C. R. Avissawella, 17,811.

*Deed of conveyance—Agreement to retransfer—Deed not signed by the vendee
Agreement binding on vendee.*

Where a conveyance contained an agreement to retransfer the land to the vendor within a stated period,—

Held, that the agreement to transfer was binding on the vendee although he had not signed the conveyance.

A PPEAL from a judgment of the Commissioner of Requests of Avissawella.

The plaintiff-appellant transferred a land to the defendant-respondent and in the recital there was "the condition that if the said Ranasinghe Hamine (the defendant) within a term of four years from this date were paid the said sum of rupees one hundred and fifty and requested to transfer the said premises, to retransfer the said premises under a valid deed". Demand was made within the period of four years for the retransfer, but the defendant put off the execution of the retransfer and the plaintiff brought this action against the defendant to compel her to execute a retransfer. The learned Commissioner of Requests held that as the defendant did not sign the deed she could not be compelled to execute a retransfer and dismissed the action. The plaintiff appealed.

P. A. Senaratne, for the plaintiff, appellant.—The Prevention of Frauds Ordinance requires that a transfer of land should be notarially executed in order to maintain an action. Under the corresponding Statute of Frauds in England it was held that "though the execution of a deed is necessary to bind the grantor, yet a party who takes the benefit of a deed is bound by it though he does not execute it". [*Norton on Deeds* (2nd ed., p. 26).] This principle has been followed from 1468 till it was enacted in the Law of Property Act, 1925. The earliest case available here is *R. V. Haughton-le-spring* (1819) 2 B. and Ad. 375. That was a case of service for over a year. The servant signed the contract, but the master did not. After the termination of the contract the latter refused to pay to the servant his wages. It was held that the master was liable. This principle was extended to contracts of land with restrictive covenants in *Formby v. Baker*¹; *May v. Belleville*²; *Elliston v. Reacher*³. Hence the defendant is bound to grant a retransfer.

C. V. Ranawake, for the defendant, respondent.—The English decisions cited have no application. The matter should be considered by reference to the principles under Roman-Dutch law. A covenant to reconvey (the pact *de retrovendendo*) between vendor and vendee can be incorporated in a deed of sale under the Roman-Dutch law. This is treated under a separate head "*De Lege Commissoria*" Voet XVIII. 3.7...Such a covenant, it is submitted, is not one of the ordinary incidents attaching to a contract of sale; it is a distinct contract which should be conclusively

¹ (1903) 2Ch 539 at p. 549.

² (1905) 2Ch. 605.

³ (1908) 2 Ch. 665 at p. 673.

proved, *i.e.*, by the signature of the vendee undertaking to reconvey. The learned Commissioner has judged the matter on the footing of two separate contracts which should be stamped as such; we need not go so far as that in view of the law referred to.

There is no evidence here that the vendee's husband acted as her agent; even were it so, it is the greater reason why the vendee should have indicated her consent in the deed; such consent cannot be implied. If the appellant's contention is to prevail it will throw open the door to fraud, especially, for instance, where a vendee remits money to a notary with a request that a transfer should be drawn up in his favour himself not attending at the notary's office. It would not be a difficult matter for a designing person to get inserted somewhere in the deed a mere line (the covenant to retransfer is so in the present case) incorporating a promise to retransfer upon payment of a certain sum. The *consensus ad idem* has not been established in this case. The promise to retransfer is a distinct and special contract, and is something more than a mere covenant attaching to the contract of sale.

Cur. adv. vult.

June 7, 1939. DE KRETZER J.—

On P 1 plaintiff transferred a land to the defendant "under the condition that if the said Ranasinghe Hamine within a term of four years from this date were paid the said sum of rupees one hundred and fifty and requested to retransfer the said premises, to retransfer the said premises under a valid deed". This is the translation filed but the original makes it clear that the vendee promised to retransfer the land when called upon as aforesaid. She refused to retransfer and was sued. The Court of trial has dismissed the action on the ground that the promise or agreement to retransfer was not signed by the vendee.

For the appellant it is contended that a party who takes the benefit of a deed is bound by it though he does not execute it. The following authorities were cited in support of this proposition, *viz.*, *Norton on Deeds*, p. 26; *L. R. 2 Chancery (1903)*, 539; *L. R. 2 Chancery (1905)*, 605; *L. R. 2 Chancery (1908)*, 665; *13 Q. B. D. 886*; and *2 Barnewall and Alderson 375*. It will be noted that this case requires no oral evidence to establish the agreement, and that it is not a contemporaneous oral agreement, but is a term of the deed itself and in fact forms part of the consideration for the transfer. It would be manifestly unfair to let the vendee take the benefit of the deed and refuse to be bound by its obligations. It would in fact amount to the Ordinance being used to perpetrate a fraud. The leading case on this point is *Nanayakkara v. Andris*¹, where Bertram C.J. in deciding the limits within which this equitable principle is to be applied mentioned in the first place "cases where the defendant has obtained possession of the plaintiff's property subject to a trust or condition, and claims to hold it free from such trust or condition". This is exactly the case here.

The decree will therefore be set aside, and the Court will enter an appropriate decree ordering the defendant to transfer the property.

The appellant is entitled to his costs in both Courts.

Appeal allowed.

¹ 23 N. L. R. 193.