

1946

Present : Howard C.J. and Soertsz S.P.J.

AMARASEKERA APPUHAMY, Appellant, and MARY
NONA, Respondent.

69—D. C. Ratnapura, 7,334.

Fraudulent alienation—Sale of land to defendant—Subsequent settlement order, under Land Settlement Ordinance, in vendor's favour—Vendor's fraudulent and collusive re-sale to plaintiff subsequently—Prior registration by plaintiff—Defendant's rights—Plea of exceptio doli—Registration of Documents Ordinance (Cap. 101), s. 7 (2).

Where P conveyed a land to the defendant pending settlement under the Land Settlement Ordinance and, subsequent to the publication of a settlement order in P's favour, sold it again fraudulently and collusively to the plaintiff—

Held, that, according to the Roman-Dutch law, the defendant, who was in possession of the land, could raise the defence of *exceptio doli*. It was not necessary to make P a party to the action.

Held, further, that as the transaction between P and the plaintiff was a sham the priority obtained by the prior registration of the plaintiff's deed was defeated.

A PPEAL from a judgment of the District Judge of Ratnapura.

H. V. Perera, K.C. (with him *E. A. P. Wijeyeratne*), for the defendant, appellant.

N. E. Weerasooria, K.C. (with him *E. B. Wikramanayake*), for the plaintiff, respondent.

Cur. adv. vult.

March 11, 1946. HOWARD C.J.—

In this case the defendant appeals from a judgment of the District Judge of Ratnapura declaring the plaintiff entitled to the land claimed in the plaint, but subject to her paying compensation of Rs. 750 up to November 9, 1943. The defendant was allowed a *jus retentionis* until compensation was paid. Prior to 1937 the land in dispute was taken up for settlement under the provisions of the Land Settlement Ordinance (Cap 319). Prior to the publication of the settlement order one Podinona by deed of February 8, 1938 (D 2), conveyed the land in question to the defendant for valuable consideration. On the same day Podinona wrote D 3 to the Settlement Officer intimating to him that she had sold this land to the defendant and that Crown grant be made in the latter's favour. The defendant by letter D 5 of the same date also wrote to the Settlement Officer asking that Crown grant be made in his favour. Thereafter the defendant entered into possession of the land and planted it with budded rubber. By a settlement order dated June 6, 1940 (P 1), and published in the *Government Gazette* of April 1, 1941, Podinona became entitled to the land in question. By deed of August 11, 1941 (P 2), Podinona sold the land in question to the plaintiff. By virtue of this deed the plaintiff claimed the property. The defendant who bases his claim on D 2 contended that the plaintiff and her husband were fully aware of the facts and had acted fraudulently and collusively with Podinona. The defendant asked for the dismissal of the plaintiff's action or in the alternative a *jus retentionis* until a sum of Rs. 750 had been paid to him by way of compensation for improvements. The plaintiff by her reply denied her knowledge of D 2 or that she had acted fraudulently or collusively with Podinona. The District Judge has found that the transfer of August 11, 1941 (P 2), by Podinona to the plaintiff was executed fraudulently and in collusion between Podinona and the plaintiff or her husband. In spite of this fraud the District Judge has held that the plaintiff can claim rights on the land. He comes to this conclusion in view of the fact that P 2 was a deed executed by Podinona after she was vested with title by the settlement order P 1.

Mr. Perera, on behalf of the defendant, has contended that in view of the finding of fraud the plaintiff's claim cannot be supported. Mr. Weerasooria, on behalf of the respondent, has not challenged the Judge's finding on the question of fraud. In view of Podinona's evidence such finding could not be challenged. Podinona, who was called by the plaintiff, stated in evidence that the plaintiff and her husband saw her and asked her for a deed after she had obtained the Crown grant. She

told the plaintiff and her husband that she had sold the land to a person and might get into trouble. The plaintiff's husband according to Podinona said there was no harm about it. It is difficult to conceive of a clearer case of fraud. Can the plaintiff in these circumstances put forward a claim to the property? The defendant is in possession and it is argued that according to Roman-Dutch law he can raise the defence of *exceptio doli* which is a plea *in rem* going to the merits and founded on the same facts as give rise to an action based upon fraud. It may be raised against all persons who have acted in a fraudulent manner. There is therefore no substance in Mr. Weerasooria's contention that the defendant cannot succeed in this action unless Podinona is joined as a party and a claim is made for the setting aside of P 2. Authority for the proposition I have outlined is to be found in Nathan's Common Law of South Africa, Vol. IV., paragraph 2170. We have also been referred to the case of *Vallipuram v. Vallipuram*¹. The headnote of this case is as follows:—

“ X was the original owner of a certain land. On September 15, 1928, he transferred it on a Bill of Sale to his son-in-law A, who in turn transferred it similarly to P on February 17, 1929. D obtained judgment for a sum of Rs. 123 against X in 1918. On September 14, 1928, he applied for writ against X. In execution of this writ, the land was seized and sold against X, on January 9, 1929, D becoming the purchaser. He obtained a Fiscal's transfer in his favour on April 8, 1929. In an action for declaration of title brought by P against D.—

Held, that once it is established that P was a party to the fraud, whereby it was attempted to prevent D from executing his judgment, the deed in his favour can be set aside without making X and A parties to the present action.

Per Dalton J. “. . . even if it be decided that X and his son-in-law should be parties, under the circumstances here, the only order I should make would be to send the case back to allow defendant to have them added, with the same result ”

In *Vallipuram v. Vallipuram* as in the present case the plaintiff who had been guilty of fraud endeavoured in spite of such fraud to set up his title. The defendant successfully pleaded this fraud without making the transferor to the plaintiff a party to the action. Another authority to the same effect is the Divisional Court case of *Suppiah Naidu v. Meera Saibu*² the headnote of which is as follows:—

“ Plaintiff's predecessor in title bought the lands in dispute in this case on a writ against one Hamidu who had previously gifted them to the 3rd, 4th and 5th defendants. In an action by plaintiff for declaration of title.—

Held, that it was open to plaintiff to raise an issue as to whether deeds of gift executed in favour of defendants were fraudulent, and that it was not necessary, for the decision of this issue, to make the donor a party to the action ”.

¹ (1930) 7 *Times Law Reports*, 99.

² (1907) 3 *Balasingham*, 129.

Apart from the defence set up by the defendant based on Roman-Dutch law, Mr. Perera has also called in aid the Privy Council case of *Hall v. Pelmadulla Valley Tea & Rubber Co., Ltd.*¹. In that case it was held by their Lordships of the Privy Council that the transaction which was being considered was a sham never intended to be anything more than a device for getting priority over the respondent's claim and that this amounted to fraud or collusion within the meaning of section 7 (2) of the Registration of Documents Ordinance (Cap. 101). In these circumstances the priority of the plaintiff's deed by prior registration was defeated. So in the present case the transaction between Podinona and the plaintiff was a sham and the priority obtained by the registration of P 2 is defeated.

For the reasons I have given the defendant is entitled to succeed. The judgment of the District Judge is set aside and judgment must be entered for the defendant dismissing the plaintiff's action with costs in this Court and the Court below.

SOBERTSZ S.P.J.—I agree.

Appeal allowed.
