

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of James Perera Seneviratne Gunatilleke v. Daniel John Fernando, from the Supreme Court of the Island of Ceylon; delivered the 21st February 1912.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.

LORD SHAW.

LORD MERSEY.

LORD ROBSON.

[DELIVERED BY LORD SHAW.]

This is an Appeal from a decision of the Supreme Court of the Island of Ceylon, dated the 12th July 1910. This decision, pronounced by Wood Renton and Grenur, JJ., reverses a judgment of the Acting Judge of the District Court of Colombo, dated the 20th December 1909.

In their Lordships' opinion, some difficulty was created in the course of the case by failure to observe what is the true nature of the suit. It is a possessory suit, for a declaration that the Plaintiff is entitled to the possession of certain premises in Colpetty, within the municipal boundary of Colombo. What follows in the prayer of the Plaint is consequent upon this possessory declaration, namely, that the Defendant's claim to these premises should be declared groundless, and that, if the Defendant be in possession, he should be ejected. Their

Lordships think that the true view of the nature of the action was, however, kept fully before the Supreme Court, and that the conclusions thereupon, and of the rights of parties with reference thereto, have been correctly reached in the judgment appealed from.

The Plaintiff (Respondent) claims possession by virtue of a deed dated the 7th December 1893, executed in his favour by Swarisge Palis Swaris of the first part, and Maria Felsing, mother of Palis, and now wife of the Plaintiff, of the third part.

The question in this case is whether the Plaintiff (Respondent) by that deed acquired a title to possession of the premises sufficient to exclude the title set up by the Appellant. This question depends upon another, namely, what is the scope and effect of the title under which the premises were held by Palis and his mother at the date of the conveyance granted to the Plaintiff by them in December 1893. That title is a deed of gift dated the 23rd September 1882, being the deed under which the said property was held at the date of the subsequent transactions. By that deed of gift Maria Felsing bore to "give, grant, assign, transfer, and set over unto the said Swarisge Palis Swaris, " his heirs, executors, administrators, and assigns, " as a gift absolute and irrevocable, under and " subject to the conditions and reservations " hereinafter mentioned," the property. These conditions and reservations, however, were of a radical character, namely, "to have and to " hold . . . subject, however, to the following " conditions and reservations, that I, the said " Maria Felsing, shall have the right of possess- " sing and enjoying the rents, income," &c., " until the said Swarisge Palis Swaris shall " have arrived at the age of twenty-five years." This event happened. The conditions then

proceed: "and that, after the said Swarisge Palis Swaris shall have arrived at the age of twenty-five years, if I, the said Maria Felsingher shall be living then, the said Swarisge Palis Swaris shall not be at liberty to sell, mortgage, or alienate the said lands and premises during my lifetime, but shall only possess and enjoy the rents, income, and produce thereof." The event here contemplated also happened, and, so far as possessory rights are concerned, these clauses quoted appear to cover the facts which have emerged. No ulterior rights are brought into this case, and the sole question is the possession of the property in 1893, the title standing, as it did, under the deed of 1882. Has there been a sufficient transfer of that right of possession by the later deed? In their Lordships' opinion, agreeing with that of the Court of Appeal, there has.

It may be explained that Palis attained the age of twenty-five years in 1891. He died unmarried and without issue in 1896. In 1893 accordingly the position plainly was that that clause of the deed above cited applied which declares that Palis was entitled to a life-rent and enjoyment of the premises, but should not be at liberty to sell, mortgage, or alienate them. Under the deed of the 5th December 1893, which was registered on the 7th of that month, it is narrated that "whereas the said Swarisge Palis Swaris attained his age of twenty-five years in the year 1891, and since then he is in possession of the said premises, taking the rents, profits, and income thereof; and whereas he hath agreed and concluded, with the consent and approval of his donor the said Maria Felsingher, testified by her being a party hereto and joining in executing these presents, to sell and convey the said premises unto" the Respondent. A conveyance follows: "And the

“ deed further witnesseth that the said Maria
 “ Felsing, for and in consideration of the
 “ premises aforesaid, doth hereby consent and
 “ approve and give and grant liberty, power, and
 “ license unto her son, the said Swarisge Palis
 “ Swaris, to sell, convey, assign, and $\frac{1}{4}$ assure
 “ unto the said Daniel John Fernando and his
 “ aforewritten absolutely the premises aforesaid
 “ and every part thereof, and doth ratify and
 “ confirm the same freed and discharged from all
 “ her claims whatsoever therein and thereto, and
 “ from all restrictions, conditions, and reserva-
 “ tions whatsoever, anything in the said deed”
 of 1882, to the contrary, “ notwithstanding.”

The learned Judges of the Supreme Court, adopting the view of Mr. Justice Wendt in a connected case, held that Maria Felsing's interest in the property passed under this deed. Mr. Justice Wood Renton observes, “ After careful consideration, I am unable to construe this
 “ deed in any other sense than as a transfer for
 “ her part by Maria Felsing in favour of the
 “ Appellant (the Respondent in this Appeal,
 “ Mr. Fernando), of all her interest, whatever it
 “ might be, in the property sold.” Their Lordships are of the same opinion. It does not appear to them to be a reasonable view that a deed in the terms of that of 1882 did not fully reserve in the circumstances stated the life-interest of Maria Felsing, nor do they entertain any doubt that the consent, concurrence, and ratification of that lady by the deed of 5th December 1893 was competently given and is effective in law. This being so, the case made by the Appellant on the point appears to fail.

The Appellant, however, founds upon a deed dated about six weeks prior to that of December 1893, namely, the deed of 23rd October of that year. By the deed of 23rd October Palis bound himself within twelve calendar months to sell, in

respect of an arrangement for loan, to one Francis Perera Wanigaratne "free from all encumbrance whatsoever, the aforesaid pre-mises." Wanigaratne bound himself within the same twelve months to purchase and take the conveyance, and Palis bound himself before execution to "release the said premises from all present and now existing encumbrances and alienations." As already explained, at the date of this deed Palis had reached the age of twenty-five, and he was expressly precluded by the only deed under which he had any rights in the property, namely, that of 1882, from being "at liberty to sell, mortgage, or alienate the said lands" during the lifetime of Maria Felsing. The deed of 23rd October was accordingly granted in excess and violation of his rights. Their Lordships think that it, accordingly, or anything had or done under it, cannot stand in the way of the rights effectively granted to the Respondent under the deed of 15th December 1893. They will humbly advise His Majesty that the Appeal should be dismissed with costs.

In the Privy Council.

JAMES PERERA SENEVIRATNE
GUNATILLEKE

v.

DANIEL JOHN FERNANDO.

DELIVERED BY LORD SHAW.

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