1908.
July 1.

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice.
and Mr. Justice Wood Renton.

MARTELIS APPU *v.* JAYEWARDENE *et al.*

D. C., Chilaw, 3,386.

Agreement by married woman to sell land—Consent of husband—Refund of money advanced—Cause of action—Prescription—Compensation for improvements—Mala fide *possessor—Ordinance No. 7 of 1840.*

The plaintiff instituted this action on alleging that the first defendant, the wife of the second defendant, verbally agreed to sell him a piece of land, and that he advanced a sum of Rs. 720 as part of the consideration; that he was put in possession of the land, which he improved by building two houses. The plaintiff prayed that the first defendant be called upon to execute a transfer, or, in the alternative, to refund the sum of Rs. 720 and pay compensation for the improvements made by the plaintiff.

Held, that the agreement to convey the land was void, as it was not notarially executed, and also as it was entered into without the consent of the first defendant's husband.

Held, also, that the money advanced could be recovered, but that the claim for refund of such money was prescribed, inasmuch as it was not made within three years of the date of the cause of action.

WOOD RENTON J.—The cause of action for the money arose whenever it might have been recovered, *i.e.*, immediately on payment.

Held, further, that the plaintiff was entitled to compensation for any necessary improvements effected by him, he begin a *bona fide* possessor.

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APPEAL by the plaintiff from a judgment of the District Judge of Chilaw (R. G. Saunders, Esq.). The facts sufficiently appear in the judgment.

Garvin, for the plaintiff, appellant.

Wadsworth, for the defendants, respondents.

Cur. adv. vult.

July 1, 1908. HUTCHINSON C.J.—

This is an appeal by the plaintiff against a decree dismissing his action. In his plaint he says that the first defendant, alleging herself to be the owner of certain land at Mudukatua, agreed to sell it to him for Rs. 800, and received from him Rs. 720 from time to time between April, 1901, and September, 1901, and put him in possession of the land, and agreed to execute a valid transfer of it to him within a few months, when the second defendant, who is her husband, and who was absent, should return; that, though frequent demands were made, the defendants failed to execute the transfer; and that he had built two houses on the land and improved it at a cost of Rs. 500, and he asked that the first defendant be called on to execute the transfer, or, in the alternative, that she be ordered to pay to him the Rs. 720, and the Rs. 500 as damages.

The defendants in their answer said that the contract, if any, on which the action is based is void in law, inasmuch as it was not entered into with the consent of the second defendant; that it was also void as it was not executed in terms of section 2 of Ordinance No. 7 of 1840; that the claim for consideration (*i.e.*, the Rs. 720) is prescribed; that the compensation for improvements, if any, were not necessary. The first defendant admitted having received Rs. 720, for which, she said, the plaintiff was allowed to enjoy the produce of the land from April, 1901, to January, 1905; the second defendant said that his wife received the Rs. 720 without his consent or knowledge; and they denied that the plaintiff had made the improvements which he alleged.

In answer to interrogations, the first defendant swore that she did not agree with the plaintiff in 1901 to sell to him any land at Mudukatua, and that she took no money from him on such an agreement.

The District Judge, without any evidence being taken, held that the plaintiff could not maintain the action because the first defendant was a married woman, and her husband was not a party to the transaction. There were other issues agreed upon: the 3rd was whether the claim for Rs. 720 was prescribed, and the 6th and 7th referred to the claim for compensation for improvements; but the District Judge gave no opinion on them.

The first defendant had no power to dispose of the land without the written consent of her husband; and the agreement which the plaintiff alleges with her was of no avail for the purpose of disposing

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of the land. If she received the Rs. 720 from him on account of the agreement, she was bound to repay it; and his right to recover it accrued at once, and is now barred by the lapse of more than three years since the payment.

As to the claim for compensation for improvements, on which the District Judge has not touched, if the plaintiff's story is true he was put in possession of the land by the owner of it under an agreement with her to sell it to him, and he paid her Rs. 720 in pursuance of the agreement, and expended his money on the land in reliance on the agreement, it cannot be said, if those are the facts, that he took possession "in bad faith." For many purposes a man is presumed to know the law. But he is not necessarily a "*mala fide* possessor" because he knew or must be presumed to have known that his title is bad or defective. I had a similar case a short time ago, in which a man agreed to buy a piece of land; he knew that there were infants who had a share in it, but he relied on their mother's promise to apply to the Court, as in fact she did apply but without success, to obtain a valid transfer of the infants' share, and he trusted to his proctor to see that it was obtained; and he took possession and spent his money on the land, in the expectation and belief that he would shortly get a valid transfer. I considered, and I still think, that he was a *bona fide* possessor. I have not found any definition of "*mala fide* possessor," but I think that a man who takes possession in the mistaken belief that he has a good title, or that he is certain to obtain one, whether his mistake be of fact or of law, cannot be said to do so *mala fide*.

I think that the claim for Rs. 720 was rightly dismissed, not for the reason given by the District Judge, but because the claim is prescribed; but that the case should go back to the District Court for the trial of the question whether there was such an agreement as the plaintiff alleges with the first defendant, and whether he took possession in reliance on it, and of the issues 6 and 7 agreed upon; and for adjudication upon the claim for compensation for improvements. The costs of this appeal should be costs in the cause.

WOOD RENTON J.—

The appellant sued the respondents, who are husband and wife married under the Matrimonial Rights and Inheritance Ordinance, 1876 (No. 15 of 1876), for the recovery of the sum of Rs. 720, and for damages, on the ground that the first respondent agreed to sell to him for Rs. 800 a certain land at Mudukatua, of which she alleged herself to be owner, received from him from time to time between April 11 and September 14, 1901, the above-mentioned sum of Rs. 720 towards the price, and put the appellant in possession of the land in question, promising to execute a valid conveyance within a few months, when her husband, the second respondent, a public

servant then stationed in the Anuradhapura District, returned to Mudukatua; but failed equally with her husband to make good this promise on payment of the balance of the purchase money.

The respondents pleaded that the contract, if any, on which the appellant sued was void in law, on the grounds that it was entered into by the first respondent without the written consent of her husband, as required by section 8 of Ordinance No. 15 of 1876; that it was not executed in terms of section 2 of Ordinance No. 7 of 1840; and that the claim for the recovery of the alleged consideration was prescribed. The respondents further denied the alleged agreement to sell. The first respondent admitted the receipt of Rs. 720, but said it that it was in consideration for the produce of the land, which he was allowed to enjoy between April, 1901, and January, 1905. The second respondent alleged that this money was received by his wife without his consent or knowledge.

On these pleadings a variety of issues were framed. But the learned District Judge disposed of the case on one ground only. He held that the absence of the consent of the second respondent to the alleged agreement entered into by the first precluded the appellant from suing on it, and dismissed his action accordingly.

Mr. Garvin, for the appellant, contended before us (1) that even if the alleged contract by the first respondent was bad and unenforceable under section 8 of Ordinance No. 15 of 1876 and section 2 of Ordinance No. 7 of 1840, the money paid under it was recoverable under the Roman-Dutch Law; and (2) that, although on the face of the record itself it appeared that a period of more than three years had elapsed between the last payment to account (September 14, 1901) and the institution of these proceedings (June 2, 1905), the appellant's claim was not barred by prescription, inasmuch as the cause of action in this case did not accrue to him within the meaning of section 11 of the Prescription Ordinance (No. 22 of 1871) till the formal demand for the execution of a conveyance in pursuance of the contract had been made and refused.

The agreement itself was clearly unenforceable in the absence of the husband's written consent. But I think that the money paid under it was recoverable (see *Grigoris v. Tillekeratna*,[1] following C. R. Panwila, 3,713 [2]). The "cause of action," however, for that money arose whenever it might have been recovered, *i.e.*, immediately on payment, and consequently, whether the case comes under section 8 or section 11 of the Prescription Ordinance (No. 22 of 1871), it was barred at the date of the institution of the present action.

I agree with my Lord the Chief Justice in regard to the question of compensation, and I assent to the order that he has proposed.

Case remitted.

[1] *(1893) 2 C. L. R. 190.*

[2] *Grenier, Part II., 1873, 34.*