ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 OF 1997

BETWEEN:

DOROTHY R. REY

Appellant

and

ASHFORD COLE

First Respondent

and

ALBERTINA JOHN

Second Respondent

Before:

The Hon. Mr. Satrohan Singh	Justice of Appeal
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Odel Adams	Justice of Appeal [Ag.]

Appearances: Mr. S. John for the Appellant
Mr. B. Commissiong for No.1 Respondent
Miss M. Commissiong with him
Mr. L. Lewis for Second Respondent

1998: July 28

JUDGMENT

ALBERT REDHEAD J.A.

This is an appeal against the judgment of Mitchell J. in which he declared inter alia that the appellant, Dorothy Rey, as the executrix of the estate of Enid Beatrice John is estopped from turning the first-named respondent, Ashford Cole, out of the lands conveyed by deeds of gift to him. That the first-named appellant is entitled to have the whole interest

in the said parcels of land conveyed to him. The judge also granted an order directing the appellant to convey the said parcels of land to the first-named respondent.

The facts as found by the learned trial judge are that the deceased, Mrs. John, was a 71 year old lady, well educated and strong minded, retired person, in good health. She lived at her home in Arnos Vale in the year 1988.

She had lived and worked for most of her life in New York. But was a pensioner at the time of trial and preferred to spend the greater part of the year in St. Vincent.

Her husband had died, but she had two daughters the appellant being one of them. Mrs. John and the appellant did not have a close relationship.

In or about the year 1988 while on her annual period of residence in St. Vincent she met and became acquainted with the first-named respondent, Ashford Cole, who was a distant relative of hers. The first-named respondent was engaged in doing body motor repair work in the yard of the house where he lived across the road from the deceased. Mrs. John used to visit the body work yard to chat with the first-named respondent and his workers daily.

The deceased lived alone and Cole who is a good cook began cooking for her from time to time. He used to take the deceased to the beach to soak her legs for arthritis. He ran errands for her and assisted her in a variety of ways.

For many years prior to 1988 Mrs. John had allowed the second-named respondent, her niece, to live on and work the land on the property. In return the second-named respondent looked after the property particularly in her prolonged absence in the U.S.A.

In 1989 the Planning Development stopped the repair business of the first-named Respondent in which he was carrying out in his yard. Mrs. John became aware of the first-named respondent's problem. He was

unable to make a living as a result of the action of the Planning Department. Mrs. John told Cole that he was like a son to her. She told him that she would give him an area of her land to the South of her house to do his car repair business.

The learned trial judge said:

> "I am satisfied that she gave him all of the land shown on Exhibit Acc1"

The learned judge found that Mrs. John assisted in the measuring of the land and told Cole to get a lawyer to prepare a deed.

The first-named respondent went to Mr. Jack, a lawyer, who prepared a deed exhibited Acc2. Mr. Jack visited Mrs. John and satisfied himself that she knew what she was doing and that she agreed to give Cole the land. Mrs. John signed the deed on 14th June, l989 in the presence of Mr. Jack's clerk.

The learned trial judge also found that this was the first of two deeds with the habendum clause erroneously stating that the first-named respondent is to "have and hold the same unto and to the use of the donor her heirs and assigns for ever" which Joseph J previously ruled in Suit 483/91 did not vest the land in the first-named respondent.

Mrs. John in fact by two separate deeds Nos. 3365 of l989 and 1952 of l990 dated 14th June, 1789 and 14th March 1990 respectively conveyed a total of 25,594 sq.ft. of land to the first-named respondent. Mitchell J. in his judgment ordered that both deeds be rectified by deleting the words Donor her and substituting therefor "Donor his".

In 1990 the first-named respondent applied in the first instance to borrow $10,000.00 to expand his business and CBC agreed to lend him the money on mortgage of part of his property to give CBC a proper mortgage, the land had to be surveyed. When the survey was being done it was discovered that the garage was too close to and extended over the boundary line. That is when Mrs. John conveyed the second lot to Cole who had given CBC the mortgage of the entire 25,594 sq.ft. for two loans

totalling $30,000.00. Mrs. John also backed a note to the bank in that amount for the first-named respondent.

Six grounds of appeal were filed on behalf of the Appellant.

I deal first of all with the first and second grounds of appeal i.e. the learned trial judge erred in law and in fact in holding that res judicata did not apply to the instant case that [2] the learned trial judge erred in law in holding that the plaintiff/respondent had not previously had the opportunity to argue for rectification. These two grounds could in my view be taken together.

Learned Counsel, Mr. John referred to Suit No. 483 of l991 in which the first-named respondent was seeking rectification of deeds given to him by Mrs. John. Joseph J. held after referring to Form 18 Atkins Court Forms 2nd Edition [1985] issue, 223 para. 8 that she did not think that she could consider the application for rectification on affidavit evidence particularly when there was a suggestion of misrepresentation on the part of one of the parties to the documents. It is as a result of this refusal that the first-named respondent brought an action against the appellant that has led to this appeal.

Mr. John, learned Counsel for the Appellant argued that the first-named respondent is not now entitled to bring this action against appellant because of the principle of res judicata in referring to:

Henderson v Henderson 1843-60 ALL ER 378 he argued that in the same proceedings before Joseph J. Counsel could have requested that the affidavits be treated as pleadings under 028 rule 8

He further argued that it was the negligence of the Counsel in failing to do so.

The Headnote in Henderson reads in part as follows:-

> "….the plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which property belong to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time"

On the other hand, Mr. Commissiong argued that the effect of Joseph J's judgment was to create special circumstances to prevent the doctrine of res judicate from applying to any subsequent action by the first-named Respondent to have the issue of rectification relitigated.

Moreover he argued that res judicate should not be applied where it would create injustice for that argument he referred to inter alia:-

Carl Zeiss Stiftung v. Rayner and Keller Ltd [1966] 2 All ER P.536, at 554

Arnold v National Westminster Bank PLC 3 ALL ER.977

In Arnold v. National Westminster Bank at page 982 Browne-Wilkinson, V.C. said:-

> "Accordingly, I must decide the question on first principles. Res Judicata, whether cause of action estoppel or issue estoppel, is based on fundamental principle that it is unjust for a man to be vexed twice with litigation on the same subject matter coupled with the public interest in seeing an end to litigation. So far as cause of action estoppel is concerned, the rule is absolute. You cannot sue twice for the same relief based on the same cause of action even if, new facts or law have subsequently come to light. But it is clear that the rule as to issue Estoppel as the authorities which I have quoted demonstrate there are circumstances in which issue estoppel where the injustice of not allowing the matter to be relitigated outweighs the hardship to the successful party in the first action in having to relitigate the points".

Mr. Commissiong learned Q.C. argued that in the circumstances of this case there will be great injustice to the first-named Respondent if rectification were not open. He would be left with a debt of $152,000 to the Banks without any property or means to paying it off. He would have lost his livelihood and all the money he invested on the encouragement of Enid Beatrice John.

Having regard to the authorities referred to, I yield to the argument of Mr. Commissiong.

Mitchell J. having found that the rule as to issue estoppel was not applicable in this instant case.

He opined at page 42 of the record:

> "I find that the plaintiff did not in fact have an opportunity earlier to argue his entitlement to rectification. Joseph J……. having left it to the plaintiff to bring these proceedings by writ on the facts of this case the plaintiff's claim for rectification is not a matter that is res judicata".

With that I am fully in agreement.

The learned judge then went on to order rectification of the two deeds.

Mr. John learned Counsel for the Appellant argued that the two deeds cannot be rectified because they were voluntary and incomplete and moreover the Testator showed a contrary intention when she subsequently left the said lands to her grandchildren by will. As I understand the argument of Mr. John the gift being an imperfect gift, the first-named Respondent being a volunteer, equity will not assist him.

Mr. John further argued that there is no evidence that the Testator, Mrs. Enid Beatrice John; put the first-named Respondent in possession of all the land in question. Neither is there any evidence to show that Mrs. Enid John acquiesced in Cole mortgaging the land to the Bank or knew that he did so. All that is revealed by the evidence is that the Testator guaranteed a loan, she backed the loan for him. By doing so she was giving him an independent security.

Finally, Mr. John argued that rectification of the deeds ought not to have been granted when third party rights are involved.

The record shows that on the 9th December, l992 the Appellant conveyed to the second-named respondent 3,757 sq. ft. of the disputed land for $18,785.00. This deed of conveyance was not registered until 1995.

The learned trial judge who visited the locus during the hearing of the action, said:-

> "I am satisfied that the Plaintiff has occupied all the land he was given by Mrs. John. He has roofed over all the area he needs for his garage and the rest he leaves partly in bush and small areas of it are cultivated from time to time by Albertina John. I have noted

> that Albertina John is in the process of attempting to concretize her claim by commencing to block in her chattel house.
>
> The evidence is that Mrs. John, before the date of the first deed, put the plaintiff in possession of all the land. First I believe that she helped the Plaintiff measure out the bounds i.e. she physically put him in possession. Secondly, I believe and approve of him putting up the land to the banks on two mortgages. She backed the note in the first mortgage. She encouraged him to use the land for his business and to put up the land to the banks as security for loans".

In my judgment having regard to the fact that the Testator attempted, if I may use that word, to convey the two lots of land by the two separate deeds to the first-named Respondent and his being put into possession by the Testator the trial judge was justified in making the above findings that Mrs. John put the first-named Respondent in possession of all the land. And that with her encouragement he put up the land to the banks as security for the loans.

On 16th May, l991 the first-named Respondent conveyed both pieces of land to Development Corporation as security for a loan of $152,000. On 20th June, l992 in Suit 483/91 Joseph J. held that these deeds did not convey any title in the land to the first-named Respondent.

Michell J. however, on 10th June, l997 in his judgment, the subject of the instant appeal, the learned trial judge ordered rectification of those deeds. At most the financial institution has very dubious, if any, security at all. One thing that is clear is that title did not pass to the Development Corporation by that conveyance of 16th May, l991.

Learned Counsel, Mr. Lewis argued that the first-named Respondent could not convey a legal title to the Development Corporation and therefore could not place himself in any detriment by the mortgage.

Finally, Mr. John argued that the will was never revoked and therefore the contents are valid. The Testator having shown a contrary intention by her will to give Cole the land, then rectification should not be ordered. Learned Counsel referred to Williams Mortimer and Sunnucks on Executors Administrators and Probate 16th Edition Chapter 42:

> "A probate, even in common from, unrevoked, is conclusive both in courts of law and equity, as to the appointment of executor, and the validity and contents of the will……..".

Having regard to Joseph J's judgment in which she held that the deeds from Enid John did not convey title to the parcels of land to the first-named Respondent. This ruling was not appealed from. There was no argument before this Court on this point. This ruling of Joseph J. therefore stands. The effect is that the gift to the first-named Respondent is an imperfect gift and this court cannot perfect an imperfect gift. See Milroy v. Lord [1861-73] ALL ER.783 at page 789.

At page 789 Turner L.J. said:-

> "I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement binding on himself……..I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift".

Having regard to this and other authorities on this subject. This court could not order rectification of the deeds.

In Inwards And Others v Baker [1965] 446 where a father induced his son to spend money to build a bungalow in the expectation that the son would be allowed to remain there.

Lord Denning said at page 449:

> "All that is necessary is that the licensee, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be in equitable so to do. In this case it is quite plain that the father allowed an expectation to be created in the defendant's mind that this bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain his home. It seems to me that, in the light of that equity, the father could not in 1932 have turned to the defendant and said "you are to go. It is my land and my house". Nor could he at anytime thereafter so long as the defendant wanted it as his home".

Pascoe v Turner [1979] 2 ALL ER 945 which decided as follows:-

> "There were two alternatives available to the court. It could declare that the defendant had a licence to occupy the house for her lifetime or it could ordered the plaintiff to transfer the fee simple of the house to her. In the circumstances equity required the defendant to be granted a remedy assuring her security of tenure, quiet enjoyment and freedom of action in respect of repairs and improvements without interference from the plaintiff. The plaintiff would therefore be required to give effect to his promise and the defendant's expectations, and to perfect the gift. Accordingly the court would dismiss the appeal but vary the judge's order by declaring that the fee simple of the house was vested in the defendant"

I agree and endorse Mitchell J's pronouncement page 45-46 of the record when he said:

> "She [Enid John] encouraged him [the first-named Respondent] to use the land for his business and to put up the land to the banks as security for loans.
>
> The law is that when a property owner by her conduct induces or encourages or allows another to come upon her land or acquiesces in his remaining on the land and expending money on the land in the hope or expectation or promise that it will be his, then the landowner will be precluded from denying the right of the other to remain on the land. I have no difficulty in finding that Mrs. John would have been estopped from denying her deeds of gift in favour of the plaintiff [the first-named Respondent].
>
> And if she is estopped and so must be her Executrix".

If Enid John is estopped from denying the right of the first-named Respondent remaining on the land. Then in my view, Enid John could not subsequently do anything inconsistent with the first-named respondent's rights. If I am correct then that Enid John could not properly alienate the said land by will.

I would therefore dismiss the appeal but vary the judge's order.

It is declared that the first-named Respondent is the fee simple owner of the land which he is in actual occupation of that is to say the entire area of 25,594 square feet less the small areas cultivated from time to time by the second-named respondent and house spot occupied by the chattel house owned by the second-named respondent . The Registrar is directed to

execute such a conveyance within three months of today's date, failing which the Appellant is therefore ordered to convey to the first-named Respondent as fee simple owner the said land.

Costs to the first-named Respondent by the Appellant to be taxed if not agreed.

The Counter Claim stand dismissed.

By consent the second-named defendant is at liberty to file a consent order in addition to the orders we have made, if necessary to give effect to the effective execution of the orders herein.

[Sgd. on original]
A.J. REDHEAD
Justice of Appeal

[Sgd. on original]
I Concur SATROHAN SINGH
Justice of Appeal

[Sgd. on original]
I Concur ODEL ADAMS
Justice of Appeal [Ag.]