

**REV. KIRALAGAMA SUMANATISSA THERO**  
**v.**  
**ALUWIHARE AND ANOTHER**

COURT OF APPEAL.

ATUKORALE, J. (PRESIDENT) AND B. E. DE SILVA, J.

C. A. 585/76 (F) – D.C. MATALE 2027/L.

AUGUST 7, 1984.

*Sanghika property – Mortgage of sanghika property – Bond put in suit and sold under hypothecary decree – Purchase at sale – Purchaser's title as against defendant in hypothecary action – Section 26 of the Buddhist Temporalities Ordinance – Section 15 of the Mortgage Act – Admissibility of fresh evidence in appeal*

The plaintiff priest who was the Viharadhipathy of the Kalapitiya Purana Vihara mortgaged a field belonging to the temple to the 1st defendant who put the bond in suit against the plaintiff. Hypothecary decree was entered and the field was sold in execution and bought by the 2nd defendant. The Court confirmed the sale. The plaintiff then sued the original mortgagee as the 1st defendant and the purchaser at the sale as the 2nd defendant contending that the mortgage decree and sale under it and purchase were ab initio null and void and no title passed to the 2nd defendant to the said field. The District Judge held the property was *pudgalika* and dismissed the action. The plaintiff appealed.

At the hearing of the appeal Counsel for the appellant sought to mark two deeds but this was objected to.

**Held—**

(1) The evidence from the documents and grain tax receipts showed that the field was owned and possessed by the temple of which plaintiff was Viharadhipathy.

(2) Although in view of section 26 of the Buddhist Temporalities Ordinance the mortgage of temple land is not valid yet the decree was entered against the plaintiff on his default by a Court of competent jurisdiction and it cannot be said that the decree and consequent sale at which the 2nd defendant bought are a nullity. The plaintiff was a party to the mortgage action and is bound by the decree and sale on it in view of the provisions of section 15 of the Mortgage Act. If the plaintiff was aggrieved by the decree in the mortgage bond action he should have taken action to have the decree set aside. No such action was taken.

(3) Fresh evidence in appeal may be justified if it can be shown that such evidence could not have been obtained with reasonable diligence at the trial. But this was not the case here and the documents were inadmissible.

**Cases referred to :**

(1) *Sirinivasa Thero v. Sudassi Thero* (1960) 63 NLR 31.

(2) *T. Christina and Three Others v. S. Cecilin Fernando* (1962) 65 NLR 274, 279.

*T. B. Dissanayake, P.C.* with *Mrs. A. Hegoda* for the plaintiff-appellant.

*Harsha Soza* for 2nd defendant-respondent.

*Cur. adv. vult.*

October 5, 1984.

**B. E. DE SILVA, J.**

The plaintiff has filed this appeal from the judgment of the learned District Judge dismissing the plaintiff's action against the defendants.

The plaintiff filed this action as Viharadhipathy of the Kalapitiya Purana Vihara which is a temple exempt from the provisions of section 4 (1) of the Buddhist Temporalities Ordinance, for a declaration of title and ejectment of the defendants from the land in suit in this action.

The plaintiff pleaded that one Madahapola Dhammadassi Thero was the Viharadhipathy of the said Vihara and on his death the incumbency devolved on his senior pupil Hapugoda Piyadassa Thero on whose death the said office devolved on Kahawatta Saranatissa Thero. The said Kahawatta Saranatissa Thero by P 1 appointed his senior pupil the plaintiff to the office of Viharadhipathy of the said Vihara. The plaintiff in the mistaken and erroneous belief that he was entitled in fact and in law to do so purported to mortgage by deed 4161 dated 23.6.69 (P 17) the premises in suit to the 1st defendant for a sum of Rs. 2,500 with interest thereon at 18% per annum. The plaintiff states that the said property mortgaged is ab initio bad and void and of no force in law for the following reasons :

- (1) That the said property is *Sanghika*.
- (2) That the said property is subject to a Buddhist Charitable Trust.
- (3) That the plaintiff as Viharadhipathy is precluded from mortgaging *Sanghika* or trust property by virtue of the provisions of the Buddhist Temporalities Ordinance.

The plaintiff states that the aforesaid mortgage would create only an unsecured debt recoverable from the plaintiff in his personal capacity. The 1st defendant put the bond in suit in case No. MB 1031 of the District Court of Matale and having obtained a hypothecary decree took out an order to sell. At the execution sale the said mortgaged property was purchased by the highest bidder the 2nd defendant. The plaintiff alleges that all proceedings in case No. MB 1031 are ab initio bad and of no force or consequence in law. In the circumstances no title passed to the 2nd defendant. The plaintiff has prayed :

- (1) That the plaintiff be declared entitled to the said property as Viharadhipathy of Kalapitiya Purana Vihare and be placed in possession of the said land.
- (2) For a declaration that the Mortgage Bond No. 4161 dated 23.6.69 was ab initio void and of no force or consequence in law to create any hypothecary rights in respect of the said property.
- (3) For a declaration that all proceedings in action No MB 1031 are bad and ineffectual in law.
- (4) For a declaration that the 2nd defendant had no title to the land described either on the execution sale or the conveyance made in his favour.

The 2nd defendant filed answer and pleaded inter alia :

That the plaintiff being well aware of his rights to the land in suit hypothecated the same to the 1st defendant inducing the 1st defendant to give the plaintiff a loan of Rs. 2,500 on Mortgage Bond No. 4161 dated 23.6.69. The plaintiff neglected to repay the said loan to the 1st defendant and the 1st defendant put the said bond in suit in D.C. Matale MB 1031 and obtained a hypothecary decree in the said action against the plaintiff. The 2nd defendant pleaded :

- (a) That the plaintiff is estopped from pleading in the present action that the hypothecation of the said property is bad in law.
- (b) That the plaintiff cannot reagitate in the present action the rights of parties as the decree and orders entered in D.C. Matale action MB 1031 operate as *res judicata* between the plaintiff and the defendants in the action.
- (c) In any event, the Fiscal's conveyance bearing No. 1132 of 22.2.1973 upon which the defendant purchased the land in suit conveyed to the 2nd defendant whatever right or interest the plaintiff had to the land in suit.

At the trial the plaintiff led in evidence P2 and P3 to show that this property belonged to the Vihara and was *Sanghika* property. The grain tax receipts P4 to P16 were led to show that the temple paid the grain tax in respect of this field.

The defendant led in evidence 1D1 the Fiscal's conveyance 1D2 order confirming the sale in D.C. Matale No. 1031, and 1D3 order delivering possession of the premises by the Fiscal to the 2nd defendant.

At the hearing of the appeal learned Counsel for the plaintiff moved to mark in evidence the deeds 15765 of 23.10.48 and 221 of 11.9.48 marked 'A' and 'B' respectively. The admission of these documents in appeal was objected to by Counsel for the defendant. Reception of fresh evidence in appeal may be justified if it can be shown that this evidence could not have been obtained with reasonable diligence at the trial. It has not been shown that this evidence could not have been obtained with reasonable diligence at the trial. In the circumstances this evidence cannot be received in evidence in appeal.

Learned Counsel for the appellant contended that upon a consideration of the documents P2 and P3 and the grain tax receipts there was sufficient proof to establish that the field belonged to the temple. He submitted that the learned District Judge had erred when he held that there was no definite evidence to establish this property to be the property of the temple. He drew the attention of Court to the provisions of section 26 of the Buddhist Temporalities Ordinance which provided thus :

"No mortgage, sale, or other alienation of immovable property belonging to any temple, shall be valid or of any effect in law."

It was submitted by Counsel for the appellant that the mortgage bond was void and unenforceable and that the decree entered in the case was bad and of no force or avail in law. Consequently the conveyance in favour of the 2nd defendant conveyed no title to the plaintiff. The attention of Court was drawn to the decision in *Sirinivasa Thero v. Sudassi Thero* (1).

It would appear from a consideration of the documents P2 and P3 and the grain tax receipts P4 to P16 that the premises in suit were owned and possessed by the temple of which the plaintiff was the Viharadhipathy. In view of the provisions of section 23 of the Buddhist Temporalities Ordinance a mortgage of temple land is not valid. In this case however a further question arises in view of the defence taken by the 2nd defendant whether having regard to the judgment and decree entered against the plaintiff in the Mortgage Bond action and sale of the premises to the 2nd defendant in pursuance of the mortgage

decree the plaintiff could have and maintain this action. The plaintiff had mortgaged these premises to the 1st defendant. The 1st defendant had put the mortgage bond in suit.

At the trial in the Mortgage Bond action the plaintiff who was the defendant in the case was in default and judgment was entered against him. Thereafter the property was sold by the Fiscal and purchased by the 2nd defendant at the Fiscal's sale. Vide Fiscal's conveyance 1D1 and order confirming the sale 1D2. The plaintiff has asserted that the proceedings in the Mortgage Bond action are ab initio void and convey no title to the 2nd defendant. The question does arise whether the Mortgage Bond decree is a nullity. The Mortgage Bond decree has been entered by a Court of competent jurisdiction and it cannot be said that the said decree and consequent sale to the 2nd defendant are a nullity. Vide *T. Christine and Three others v. S. Cecilin Fernando* (2). The plaintiff cannot seek to have the decree and sale in the Mortgage Bond action set aside on the ground that the said decree and sale are a nullity. Besides section 15 of the Mortgage Act provides thus :

"Every party to a hypothecary action, and every person entitled to notice of the action and to whom notice of the action is issued under section 9 and in the manner provided by section 10, and every person who is added as a party under section 12 or section 13, shall be *bound by the decree and sale* in the hypothecary action."

The plaintiff was a party to the Mortgage action and is bound by the decree. If the plaintiff was aggrieved by the decree in the Mortgage Bond action he should have taken action to have the decree in the Mortgage Bond action and sale to 2nd defendant set aside by the Appellate Court. No such action was taken. Issues have been raised in this case whether in view of the judgment and decree in the Mortgage Bond action the plaintiff could maintain this action. In view of the provisions of section 15 of the Mortgage Act cited above the plaintiff is bound by the mortgage decree and sale to the 2nd defendant. The learned District Judge has correctly answered the issues that in view of the judgment and decree in the Mortgage Bond action No. MB 1031 the plaintiff cannot maintain this action as the said judgment and decree operate as *res judicata*. The judgment and decree of the learned District Judge are affirmed and the appeal is dismissed with costs.

**ATUKORALE, J. – I agree.**

*Appeal dismissed.*