

EDWIN AND ANOTHER
V.
SUGATHADASA DE SILVA

SUPREME COURT.
RANASINGHE, C. J.
TAMBIAH, J. AND
BANDARANAYAKE, J.
S. C. APPEAL NO. 43/86.
C.A. APPEAL NO. 416/79.
D. C. MATARA NO. 8086/P.
JUNE 13, 1989.

Partition — Fideicommissum — Abolition of Fidei-Commissa and Entails Act No. 20 of 1972. — Sale in execution — Fiscal's Deed of Conveyance and relation back of deed to date of sale — 289 CPC. — Meaning of "deemed".

The six original owners in 1938 gifted an undivided 27A 20P to A W subject to a fideicommissum in favour of his children. A W transferred the corpus to D whose interests however were sold in execution on 5.5.1962. At the sale A W bought the interests. The sale was confirmed by Court on 22.11.1973 and the Fiscal's Deed of Conveyance was executed on 29.11.1973. The plaintiff and 1 to 14 defendants as heirs of A W claimed that their fiduciary interests became enlarged to absolute ownership on the passage of the Abolition of Fideicommissa and Entails Act No. 20 of 1972 and instituted a partition suit after the execution of the Fiscal's Conveyance. The 15th defendant claimed 15 Acres out of the corpus on the basis of a deed of transfer of 1.10.1974 from D.

Held

1. The moment a Fiscal's Conveyance is executed in pursuance of a Fiscal's sale, the grantee therein is, under and by virtue of the provisions of section 289 of the Civil Procedure Code, deemed to have been vested with the legal estate from the time of the sale.
2. At the time of institution of action the title had been already perfected by the execution of the Fiscal's Transfer which relates back to the date of the sale against D and therefore A W became the absolute owner on the passing of the Abolition of Fideicommissa and Entails Act No. 20 of 1972. D therefore had no title to pass to the 15th defendant.
3. Per Ranasinghe C. J. — "The term "deem" is a concept very familiar in modern legislation. What is intended to be achieved by the use of this term is to treat as a fact something that has not been established as a fact or even shown not to be a fact".

Cases referred to:

1. *Marimuttu v. Commissioner*, for Registration of Indian and Pakistan Residents 57 NLR 307, 309.
2. *St. Aubyn v. A. G.* [1951] 2 All ER 498.
3. *Abubakker v. Kalu Etana* 9 S.C.C. 327.
4. *Silva v. Hendrick Appu* 1 NLR 13.
5. *Silva v. Nona Hamine* 10 NLR 44.
6. *Ponnammah v. Weerasuriya* 11 NLR 217.
7. *Selohamy v. Raphiel* 1892 1-SCR 73.

APPEAL from Judgment of the Court of Appeal.

H. L. de Silva P.C. with *Anil Silva* for Plaintiffs-Respondent-Appellant.

P.A.D. Samarasekera P.C. with *Chandra Amerasinghe* and *Weerasinghe de Silva* for 15th Defendant-Respondent.

Cur. adv. vult

July 19, 1989

RANASINGHE, C.J.,

The plaintiffs-appellants instituted these proceedings in November 1976, to have the land called Kindedyahara alias Danketimulle, 28A, 1R, 20P in extent, and more fully described in the schedule to the plaint, partitioned. The title pleaded by the said appellants is: "that the six original owners of the said corpus by their deed P1, dated **20th June 1938**, gifted an undivided extent of 27A, 20 P to Ariyadasa Wimalaguneratne subject to a fidei-commissum in favour of his children; that, by deed P7 of **12th June 1954**, the said Ariyadasa Wimalaguneratne, transferred the said extent of 27A, 20P to Dionis; that the interests which Dionis obtained upon P7 were sold in execution against him, under and by virtue of the decree in D.C. Matara case No. 861, and purchased at the Fiscal's sale, held on the **5th May 1962**, by the aforesaid Ariyadasa Wimalaguneratne; that the said sale was confirmed by Court on **22.11.1973**; that the Fiscal's Conveyance, P8 was executed in favour of the said Ariyadasa Wimalaguneratne on the **29th November 1973**; that the

interests so purchased by Ariyadasa Wimalaguneratne, devolved on the plaintiffs-appellants and the 1st-14th defendant-respondents: that, by virtue of the provisions of section 7 of the Abolition of Fidei Commissa and Entails Act No. 20 of 1972, the fiduciary interests of the said Ariyadasa Wimalaguneratne became enlarged into absolute interests: that, therefore, the plaintiffs-appellants and the 1st-14th defendants-respondents are entitled to the corpus sought to be partitioned, free of the conditions set out in P1.

The contesting 15th defendant-respondent claims an extent of 15 acres on the basis that Dionis, referred to earlier, conveyed to him an extent of 15 acres upon deed 1501 of **1st October 1974**. The contention put forward on behalf of the 15th defendant-respondent is: that, though the fiduciary interests of Dionis were sold on the 15th May 1962, the Fiscal's Conveyance P8, in favour of the purchaser, Ariyadasa Wimalaguneratne, was executed only on 29th November 1973: that, prior to the execution of the said Fiscal's Conveyance, P8, the provisions of Act No. 20 of 1972, came into operation on the **12th May 1972**: that on the said date, 12.5.1972, the person who was entitled to the fiduciary interests in the corpus was still Dionis: that, the moment the provisions of Act No. 20 of 1972, came into operation, Dionis's fiduciary interests became enlarged into absolute interests: that, therefore, 13D1 operated, in law, to convey absolute title in respect of the said extent of 15 acres to the 13th defendant-respondent: that the said Ariyadasa Wimalaguneratne, at best became entitled only to such interests as were sold in execution as against Dionis, namely the fiduciary interest created by P1.

The submissions put forward on behalf of the plaintiffs-appellants and the 1st - 14th defendants-respondents, are that the moment the Fiscal's Conveyance (P8) was executed on 29th November 1973, by virtue of the operation of section 289 of the Civil Procedure Code, the title so conveyed, related back to the date of the sale; that the purchaser, Ariyadasa Wimalaguneratne, is deemed to have been vested with the legal title to the property so sold, as from 5.5.1962: that, therefore, on the 12th May 1972, the person who, in law, held the fiduciary interest,

contemplated by section 7(1) of Act No. 20 of 1972, was Ariyadasa Wimalaguneratne: that Ariyadasa Wimalaguneratne thus became entitled to an absolute interest in the corpus as from the 12th May 1972.

The question that arises for consideration is: whether the benefit of the provisions of Section 7(1) of Act No. 20 of 1972, which came into operation on 12.5.1972, enured to Ariyadasa Wimalaguneratne upon his obtaining the Fiscal's Conveyance, P8, on 22.11.1973 on the basis that, under and by virtue of the provisions of section 289 Civil Procedure Code (Cap. 101) the said Ariyadasa Wimalaguneratne has to be "deemed" to have been vested with legal title in respect of the interests, which were sold to Dionis upon P7 and which were subsequently seized and sold as against Dionis and purchased by Ariyadasa Wimalaguneratne on 5.5.1962, as from the date of the said sale on 5.5.1962, or whether it is Dionis, who could, in law, claim such benefit, as the title to the interests so sold as against him on 5.5.1962, continued, in terms of the self-same section 289, to vest in him even on 12.5.1972, the date on which the provisions of the said Act No. 20 of 1972, came into operation? In other words, which of them could, on the date of the institution of these proceedings, claim to have been, in law, vested with the fiduciary interest, created by the deed of gift, P1 of 1938, as on 12.5.1972?

The moment a Fiscal's conveyance is executed in pursuance of a Fiscal's sale, the grantee therein is, under and by virtue of the provisions of section 289 Civil Procedure Code, "deemed" to have been vested with the legal estate from the time of the sale. Thus, upon the execution of such conveyance, the title so conveyed to the grantee immediately relates back to the date of the sale and the conveyance operates to vest in such grantee the legal title to the interests so conveyed as from the date of the said sale. Ordinarily the title to interests dealt with by a deed would pass over to the grantee only at the time and date of the execution of such deed. The provisions of the said section 289, however, operate to vest the grantee with such title from a date anterior to the actual execution of such document. This process of ante-dating is effected by deeming that that which did not take place did, in truth and in fact, take place.

The term "deem" is a concept very familiar in modern legislation. What is intended to be achieved by the use of this term is to treat as a fact something that has not been established as a fact or even shown not to be a fact. It is not an impossible conception to deem that a thing happened even though it is known positively that it did not happen — *Marimuttu vs. Commissioner for Registration of Indian and Pakistani Residents* (1) Where a person is deemed to be something, what it means is that though he is not in reality that something he is required to be treated as if he were that something; where a person or thing is to be deemed to be or to be treated as something which in reality it is not it shall have to be treated as so during the entire course of the proceedings — **Bindra: Interpretation of Statutes** (6th Ed) p. 912 -14. Sometimes the term is used to give a comprehensive description that includes what is obvious what is uncertain and what is, in the ordinary sense, impossible — *St. Aubyn vs. A. G.*, (2).

The provisions of section 289 Civil Procedure Code, came up for consideration in the case of *Abubakker vs. Kalu Etana*, (3). In that case the 1st Defendant's interests in the property in dispute had been seized and sold in June 1884 and had been purchased by 'T' who obtained the Fiscal's Conveyance only on the 12th December 1888. 'T', however, had transferred the interest he had purchased at the said sale to the plaintiff on the 6th November 1888. The plaintiff instituted proceedings as against the defendants in January 1889. The Supreme Court held that the moment the Fiscal's Conveyance was executed 'T's title to the interests sold by him to the plaintiff is deemed by virtue of the provisions of section 289 of the Civil Procedure Code, to have vested in him as from June 1884, the date of the execution of the sale; and that, therefore, 'T' is deemed to have had paper title to those interests at the time he executed the transfer to the plaintiff on the 6th November 1888; that the plaintiff thus had title to the property at the time the action was instituted in January 1889. What is important to note is that the Fiscal's Conveyance, the execution of which was necessary for the grantee to be treated as having been vested with title from the date of the sale, was in fact executed before the proceedings were initiated.

Learned President's Counsel, appearing for the 15th defendant-appellant contended that, when the question to be determined is in whom the title to property is vested on any particular date, the doctrine of "Relation back", as spelt out in the provisions of section 289 of the Civil Procedure Code, cannot be availed of. In support of this contention learned President's Counsel relied on the cases of: *Silva vs. Hendrick Appu*,⁽⁴⁾ *Silva vs. Nona Hamine*,⁽⁵⁾ *Ponnammah vs. Weerasuriya*,⁽⁶⁾

In *Silva v. Hendrick* (supra) the earliest of these three cases, the interests of the original owner of the property were seized by the execution-creditor, Haramanis, and were sold by the Fiscal on the 7th of June 1893. Haramanis thereafter assigned his interests in the 32 trees standing on the land on the 8th June 1893 to the plaintiff. The execution sale in respect of the soil was on the 11th July 1893. The seizure of the 32 trees was on the 13th September 1893. Nine days later a claim was made; and it was dismissed by the Court. Within 14 days of such dismissal, the plaintiff brought a 247 action. He, however, obtained the Fiscal's conveyance after the institution of the proceedings, but before the trial and moved to produce it at the trial. Two of the three judges held against the plaintiff and dismissed the action on the basis that the plaintiff had no title at the time of the institution of the proceedings. Browne J., however, dissented, and observed that there is no reason why a plaintiff may not, before having his title perfected, that is when he has not a title at all, but only an imperfect title capable of being easily perfected, institute an action to enforce his rights under that title against the disputant. Withers, J., who took the view that: "No doubt the grantee of the conveyance is vested with the legal estate from the time of the sale, but not for the purpose of saving a plaintiff who makes a claim before a Fiscal and institutes an action to establish that claim without that which gives him a good cause of action," also went on to say: "I would co-operate with Browne J. (i.e. allowing the subsequently accepted Fiscal's conveyance to be produced at the trial) if I thought the law of procedure admitted it. But I know of no provision which allows a plaintiff who has no title (i.e. legal estate) when he institutes a suit, and who gains one in the course of a course to make use of that acquisition in support of his claim, which is dependent on the particular title acquired."

Lawrie, J., merely took the view that, as the plaintiff had not, at the time he came into Court, the title which he asks the court to decree to him, the plaintiff's action must be dismissed.

The judgment in the case of *Silva vs. Nona Hamine*, (5) was delivered on 19.11.1906 by a Full Bench of the then Supreme Court. The interests of the original owners in the subject matter in dispute in that case were seized and sold in the year 1886. Weerasinge, the purchaser of the said interests transferred them in 1889 to Weerakoon who mortgaged those interests in 1896 to the plaintiff. The plaintiff put the bond in suit, obtained a decree and the said interests were seized in 1905. The defendants, who were the heirs of one of the original owners, claimed the said property. The said claim having been upheld on 19.7.1905, the plaintiff instituted a 247 action against the defendants on 1.8.1905. The sale to Weerasinghe was confirmed in January 1906 and a Fiscal's conveyance was issued on 23.1.1906 to Weerasinghe. The plaintiff produced the said Fiscal conveyance at the trial on 12.4.1906.

Chief Justice Hutchinson having expressed the view that a formal transfer was necessary to pass the property went on at page 45 to state :

"It was there argued that on the execution of the Fiscal's transfer the purchaser's title related back to the date of the purchase. For some purposes that may be so, but I doubt whether it would affect the rights of third parties who may have intervened in consequence of the purchaser's delay in perfecting his title and in any case it cannot affect the question in this case, which is, whether Weerakoon had a good title at the date of the seizure. Perhaps, if the purchaser had done all that he had to do in order to complete his title, and the delay in obtaining the transfer was merely the fault of the Fiscal, the Court might hold that that must be taken to have been done, which ought to have been done, and that the Ordinance should date from the sale or at least from the date when the purchaser had done all he could to obtain it. But that is not so here."

Chief Justice Hutchinson concluded that the action must fail, because the plaintiff had no title at the time when the action was brought.

Wendt, J., who too concurred in the plaintiff's appeal being dismissed, having observed that until the execution of the Fiscal's conveyance the judgment-debtor remained vested with the title, concluded, at page 49 :

"It is true that upon the execution of the conveyance the purchaser, by the doctrine of relation back, became vested with the title as from the date of the seizure; but that does not help plaintiff in this case."

Middleton, J., who had referred the case for further argument before a larger Bench, observed, at page 51, that though he himself had earlier "conceded" to the reasoning of Burnside, C. J., in *Abubakker's case* (supra), yet having heard the further argument in this case felt "bound to admit that the principle cannot be held to apply in a case like this, where a competing title was paramount at the date when the contestatio began."

In the last of the aforesaid three judgments *Ponnammah vs. Weerasuriya* (supra) the original owner had mortgaged the interests in question on the 15th May 1880. The said interests were seized and sold to the 2nd defendant in 1889. The sale had been confirmed on the 11th April 1901. The 2nd defendant transferred the said interests to the plaintiff-respondent on 27.1.1905. The Fiscal's conveyance in favour of the 2nd defendant was issued only on the 14th July 1906. The plaintiff's action against the 1st defendant-respondent, and the 2nd defendant-respondent, who are sons of the original owner, was instituted on the 5th July 1908, nine days before the aforesaid Fiscal's conveyance was issued.

Wood Renton, J., in affirming the District Judge's view on the necessity of a Fiscal's conveyance, stated at page 218:

"The cases of *Abubakker vs. Kalu Etana* (supra) and *Selohamy vs. Raphael*⁽⁷⁾ in which it was held that a Fiscal's conveyance of land sold in execution has relation back to the date of the execution sale, and therefore enures to the benefit of a party, to whom the execution purchaser had conveyed before obtaining the Fiscal's conveyance, are clearly distinguishable. In these cases the Fiscal's conveyance was obtained before action brought. Here it was obtained after that date"

Grenier, A.J., whom the head-note of the report of the case itself refers to as being "dubitante", found no difference in principle between the cases, which were cited at the hearing and said to be distinguishable in that in those cases the Fiscal's conveyance had been obtained before the action was instituted, and the case before him, and also saw nothing to prevent the plaintiff from producing the Fiscal's conveyance in favour of the 2nd defendant and relying upon it for his title. Even so, Grenier A.J., found himself unable to resist the weight of the Full Court judgment in *Silva vs. Hendrick Appu* (supra).

A consideration of the facts and circumstances of the three cases cited by learned President's Counsel for the 15th defendant-respondent — *Silva vs. Hendrick*, *Silva vs. Nona Hamine*, and *Ponnammah vs. Weerasuriya* — makes it clear that the judgments of the Supreme Court in these cases did not dissent from, still less overrule, the judgments in the earlier cases of *Abubakker vs. Kalu Etana* (supra) and *Selohamy vs. Raphael*⁽⁷⁾ that they did only distinguish the said earlier line of authority: that the common feature in all these three cases, and the most significant, is that the Fiscal conveyance issued to the purchaser at the sale was effected before the proceedings between the parties were initiated in Court: that it was this feature which was highlighted by Middleton J., in *Silva vs. Nona Hamine* (supra) and by Wood-Renton J., and Grenier, A.J., in *Ponnammah vs. Weerasuriya* (supra).

As already indicated, the Fiscal conveyance P8 is earlier in point of time to 15D1, and is also at least twelve months prior to the institution of the proceedings in this case.

The resulting position, in law, then clearly is that, upon the execution of the Fiscal conveyance, P8, Ariyadasa Wimalaguneratne became, in the eye of the law, the person who was vested with the fiduciary interest in the aforesaid property as from 5.5.1962. The said Ariyadasa Wimalaguneratne was thus the person who, in law, became entitled to claim the benefit of the provisions of section 7(1) of Act No. 20 of 1972. He is also, it must be noted, the person who would have, but for the conveyance P8, been the person entitled to avail himself of the benefit of the proviso to the said sub-section (1) of Section 7 of the said Act No. 20 of 1972.

In this view of the matter I am of opinion, that the deed 15D1 does not operate to convey the interests set out therein, or any part thereof, to the 15th defendant-respondent: that the plaintiff-appellant and the 1st to the 14th defendants-respondents would, as the intestate heirs of the said Ariyadasa Wimalaguneratne, be entitled to all the interests which the said Ariyadasa Wimalaguneratne was entitled to (inclusive of those referred to in 15D1) at the time of his death.

The appeal of the plaintiff-appellant is allowed. The judgment of the Court of Appeal, dated 5.5.1986, is set aside, and the judgment and the decree of the District Court are affirmed.

The 15th defendant-respondent to pay to the plaintiff-appellant the costs of both appeals, to the Court of Appeal and to this Court.

TAMBIAH, J., — I agree

BANDARANAYAKE, J., — I agree

Appeal allowed