

1942

Present : Soertsz and Keuneman JJ.

MARUTHAPPAH v. ZOUHAR

10—D. C. Colombo, 1,418

Building—Sale of adjoining premises—Portion of first floor projecting over ground floor of another—Description of premises in plan—Right to projection.

In a decree for sale in a partition action certain premises depicted in a plan (D 1) were ordered to be sold in blocks. Two of the premises adjoining each other bore the assessment numbers 212 and 216. D (1) showed that a portion of first floor of No. 212 projected over the ground floor of No. 216. For the purposes of the sale a new plan P 3 was made. It referred to the assessment numbers but did not depict the said projection. At the sale separate blocks were sold as partitioned in P 3, and plaintiff became the purchaser of lot 216 and defendant the purchaser of lot 212. In the conveyance to the plaintiff the block is described as the allotment of land presently bearing assessment No. 216: the western boundary as premises bearing assessment No. 212 according to plan P 3. In the conveyance to the defendant the block is described as premises bearing assessment No. 212 eastern boundary of lot 216 according to plan P 3.

Held, that the plan P 3 was an essential part of the description of the land purchased.

Held, further, that plaintiff became the owner of everything above the portion of the ground floor depicted as No. 216 in plan P 3 including the portion of the building projecting over it and that defendant is restricted to that only which is above the portion depicted as No. 212 in the same plan.

A PPEAL from a judgment of the District Judge of Colombo.
The facts are stated in the headnote.

H. V. Perera, K.C. (with him *N. K. Choksy* and *D. W. Fernando*), for the plaintiff, appellant.—What was sold to the plaintiff was an allotment of land within certain boundaries. He is entitled, therefore, to all the air space above that land. The case of *Laybourn v. Gridley*¹ is directly in point. That case was followed in *Mitchell v. Moseley*².

N. E. Weerasooria, K.C. (with him *A. E. R. Corea*), for the defendant, respondent.—What in fact were sold to the plaintiff and the defendant

¹ *L. R. (1892) 2 Ch. D. 53.*

² *L. R. (1914) 1 Ch. 438.*

were the two buildings bearing the Municipal assessment numbers 212 and 216. The controlling words in the conveyances are "premises bearing assessment number", and not "allotment of land".

H. V. Perera, K.C., replied.

Cur. adv. vult.

September 16, 1942. KEUNEMAN J.—

In a decree for sale entered in D. C. Colombo, No. 233, under Ordinance No. 10 of 1863, premises bearing numbers 212, 216, 220, 222, and 224, situated along Keyzer street and Third Cross street in the Pettah, Colombo, were ordered to be sold in blocks. The whole area was depicted in plan D 1 No. 33 by H. C. Stotesbury, Licensed Surveyor. This plan showed both the ground floor and the first floor, and it is clear from the plan that a portion of the first floor of No. 212 projected over the ground floor of No. 216. In these proceedings this projection has been described as a room, used as a kitchen in connection with No. 212, and this is the portion now in dispute.

For the purposes of the sale, a new plan No. 14378 was made by P. B. Weerasinghe, Licensed Surveyor. This is the plan P 3, and consists only of the ground floor plan. There is reference in this plan to the assessment numbers. In it the projection in dispute in the first floor of No. 212 is not depicted. According to the conditions of sale (*vide* P 5 relating to No. 212, and P 6 relating to No. 216), the separate blocks were sold as partitioned in P 3, but the whole premises is referred to as depicted in D 1.

At the sale plaintiff became the purchaser of lot 216, and the defendant the purchaser of lot 212, and the question in dispute is as regards the projection referred to.

In the conveyance to the plaintiff, marked P 2 (certificate of title No. 38 of March 2, 1937), the block is described as the allotment of land presently bearing assessment No. 216, the western boundary is given as premises bearing assessment No. 212 and the extent is 2.21 perches, according to the partition plan No. 1,437 (P 3 made by P. B. Weerasinghe.) Certain other blocks purchased by the plaintiff are then described, and it is added that all these blocks are part of the whole premises of 9.80 perches described in the plan No. 33 (D 1 made by H. C. Stotesbury).

In the conveyance to the defendant, the block is described as the premises bearing assessment No. 212, the eastern boundary is given as No. 216 and the area as 3.46 perches according to plan P 3, and it is added that this block is part of the whole premises depicted in D 1.

On examination of these deeds it is clear that defined areas depicted on plan P 3 were conveyed. There is no question that the projection in question is immediately above the portion depicted as No. 216 in P 3. "The grant of the land includes the surface and all that is *supra*—houses, trees, and the like—*cujus est solum jus est usque ad caelum*—and all that is *infra*, i.e., mines, earth, clay, &c." (per Cozens-Hardy M.R. in *Mitchell v. Moseley*¹.) No doubt, as the learned Judge added, this only applies when you can find nothing to the contrary in the conveyance.

¹ (1914) 1 Ch. D. 438 at 450.

Can it be said that there is anything to the contrary in the conveyances in this case? Counsel for the respondent argues that the references to the premises as bearing assessments numbers 212 and 216, respectively, taken in conjunction with the description of the whole premises as being in accordance with plan D 1 must be so regarded. But I think it is a very strong point in favour of the plaintiff that the actual conveyances of the particular blocks in question were made in accordance with plan P 3, and in that plan the reference to the first floor is (I think, deliberately) omitted. The reference to the precise area further helps to confirm this opinion.

I think the plan (P 3) was "an essential part of the description, showing the dimensions exactly, and indicating the area of the buildings on the ground floor; there is nothing in any way to indicate what is above; therefore, it is clear that what was above was intended to pass to the grantee of the land." (per North J. in *Laybourn v. Gridley*').

This rule will operate in two directions. The purchaser of lot 216 becomes the owner of everything above the portion of the ground floor depicted in P 3 as No. 216, including the portion in dispute, and the purchaser of lot No. 212 is restricted to that only which is above the portion depicted in P 3 as No. 212.

There is very strong similarity between the facts of the present case and the facts in *Laybourn v. Gridley* (*supra*). That case was followed in *Mitchell v. Moseley* (*supra*).

I think the dismissal of the plaintiff's action was wrong. I set aside the judgment of the District Judge and enter judgment for the plaintiff as prayed for, except as regards damages, which will be assessed at Rs. 5 a month from date of action until plaintiff is restored to possession. The plaintiff is entitled to costs in both Courts.

SOERTSZ J.—I agree.

Appeal allowed.

