

Present : De Sampayo J. and Dias A.J.

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WEERAMAN v. DE SILVA.

398—D. C. Matara, 8,606.

Trust—Execution-creditor buying property through another—Civil Procedure Code, ss. 272 and 282—Partition action—Does decree wipe out trust?

The plaintiff, an execution-creditor, obtained an order of Court to bid for property at the execution sale. But with a view to purchasing the property at a price less than the appraised value, which was the limit placed as a condition in the order issued to him, he purchased the property through the defendant. The sale was confirmed in due course, and Fiscal's transfer was issued to defendant.

Held, that the plaintiff was entitled to sue the defendant to enforce the trust.

A land, a share of which was bought by the defendant in trust for the plaintiff became the subject of a partition action, was sold under the partition decree, and a sum of money was in Court representing the share in question. The plaintiff was declared entitled to it. The partition decree had not the effect of wiping out the trust.

THE facts are set out in the judgment of the Acting District Judge (G. P. Keuneman, Esq.):—

The defendant in this case purchased the lands mentioned in the second paragraph of the plaint at a Fiscal's sale held on March 7, and has obtained Fiscal's transfers for all the lands so sold.

The plaintiff in this case sues the defendant for a re-transfer of the lands marked A to H in the second paragraph of the plaint, and for a sum of Rs. 1,200, or such sum as the Court may find due to him in connection with case No. 7,872, on the ground that the lands, though bought in the defendant's name, were actually purchased for and on behalf of the plaintiff and with the plaintiff's money and in trust for him,

The lands were sold under writ in execution of a decree in favour of plaintiff entered in case No. 6,280 of this Court. The plaintiff applied for and obtained an order enabling him to bid for the lands at the said sale. The plaintiff, though armed with this order, was disinclined to purchase the lands, as according to the order given by Court he would have to purchase the lands at the appraised value. The plaintiff states that as there were disputes as to the exact shares the judgment-debtors were entitled to, he did not wish to purchase the lands at the appraised value, and so he got the defendant, a cousin of his, to bid for and purchase the lands at the Fiscal's sale.

The lands were sold for Rs. 298; the land called Liyana-arachchigewatta having fetched Rs. 285 and the rest of the lands being sold for Rs. 13.

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Fiscal's transfers were obtained for all the lands, but when they were obtained, one of the lands, Liyana-arachchigewatta, was the subject-matter of a partition case (D. C. 7,872 of this Court).

The plaintiff states that owing to the pendency of the partition case he could not obtain a transfer of Liyana-arachchigewatta, which was apparently the most valuable land; he, therefore, got the defendant to intervene in the case, and that he (the plaintiff) took all the necessary steps in the case and spent all moneys required for the case.

The land Liyana-arachchigewatta was sold under the decree in case No. 7,872, and there is a sum of Rs. 981·35 to the credit of the defendant in that case, which the plaintiff has prevented the defendant from withdrawing by an injunction obtained in this case.

The plaintiff in support of his case, that the lands were purchased with his money and in trust of him, has produced from his custody all the receipts for money paid in connection with the Fiscal's sale (P 1, P 2, and P 4 to P 7). The documents P 5 to P 7, it will be noticed, are receipts given in plaintiff's favour. The Fiscal's transfers were also produced by the plaintiff from his custody, and it is admitted by the defendant that the payments made to the surveyor for plans to accompany the Fiscal's transfers were made by the plaintiff.

I think that plaintiff has conclusively proved his case. The documents produced by the plaintiff, his own evidence, and that of his witnesses clearly prove that the lands were bought by the defendant in trust for the plaintiff, and that the payments were all made by plaintiff.

Mr. de Kretser has commented on the fact that the letter of demand sent by the witness James Senaratne is about the same time as the issue of summons in this case, but I do not think that that point helps the defendant's case in any way. It may be that the plaintiff, irritated by the treachery of the defendant, had asked James Senaratne also to press for the money due.

I accept the evidence of Mr. Gunaratne and of the other witnesses called by the plaintiff. The defendant has not given evidence himself or calls any witness to prove that he made any payments. His position at the trial was that he had sold a land to plaintiff on P 20 and that a sum of Rs. 300 was retained by plaintiff, which sum of money the plaintiff had paid on behalf of defendant. I do not attach much importance to this suggestion. The defendant in his answer had made no such statement, and it is apparent that being forced to admit that plaintiff paid the money the defendant had subsequently thought of this defence.

The next point raised by the defence is that plaintiff cannot ask for a re-transfer as there is no notarial agreement. I do not think I need dwell on this point at any length, as a similar case (D. C. 6,624) was decided by the Supreme Court on December 17, 1915, where it was held that the plaintiff was entitled to obtain a re-transfer.

I answer the issues as follows:—

Issue 1.—Yes.

Issue 2.—Yes.

Issue 3.—The plaintiff is entitled to claim a conveyance of the lands A to H mentioned in the plaint, and that plaintiff is entitled to the money in deposit in case No. 7,872.

I give judgment for plaintiff. Decree to be entered: (1) declaring plaintiff entitled to the lands A to H in the second paragraph of the plaint; (2) that defendant be ordered to execute a conveyance in favour of plaintiff for the said lands; (3) that plaintiff be declared entitled to the sum of Rs. 981·35 in deposit in case No. 7,872 of this Court; (4) For costs.

A. St. V. Jayawardene (with him *H. V. Perera*), for the appellant.

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H. J. C. Pereira, for the respondent.

Cur. adv. vult.

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June 10, 1920. DE SAMPAYO J.—

We have to consider a point of law which was not taken before the District Court or in the petition of appeal. But as its decision does not depend upon any investigation of any new facts, we should, I think, dispose of this appeal on a consideration of that point. The plaintiff brought this action against the defendant to have it declared that shares of certain lands transferred to the defendant by the Fiscal were, in fact, the property of the plaintiff, and to have a reconveyance made in his favour by the defendant. It appears that the plaintiff was the execution-creditor in a previous case, and on a writ issued by him the shares in question were sold at the execution sale. The defendant, as the last bidder at the sale, was declared the purchaser, and the conveyances were issued to him in the usual course. But it appears that the plaintiff was the real purchaser, and had furnished the money for the payment of the price of the land, and he says that he purchased the shares in the name of the defendant for his convenience, and that the defendant held them for him and is now bound to transfer at his request. The point of law arises in this way. Under section 272 of the Civil Procedure Code the holder of a decree in execution of which property is sold, may, with the previous sanction of and subject to such terms as may be imposed by the Court, bid for or purchase the property. It appears that the plaintiff, as execution-creditor, applied for and obtained such an order, but, with a view to purchasing the property at a price less than the appraised value, which was the limit placed as a condition in the order issued to him, he interposed the defendant and purchased the property through him. It is contended that, under section 272, the plaintiff was prohibited from purchasing, excepting at the appraised price whether directly or indirectly. Counsel for the defendant relies for this contention on certain principles stated in the English text books; for instance, in *Snell on Equity*, 15 ed., p. 87, it is stated that "no trust will result where public policy would be thereby defeated as where the subject-matter of the conveyance is a British ship or is land given to qualify the grantee to a vote at a parliamentary election or is money deposited in a third party's name in evasion of the Savings Bank Acts, in all which cases the apparent donee retains the benefit for himself." In *Chellappa v. Selvadurai*¹ section 272 of the Civil Procedure Code was construed as enacting that a decree-holder may only bid for and purchase the property with the previous sanction of the Court and in accordance with the terms mentioned in the order. This decision is somewhat in

¹ (1912) 15 N. L. R. 139.

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conflict with the previous decision referred to in the judgment. But for the purpose of this appeal we may accept that decision so far as the meaning of section 272 is concerned, that is to say, it would be an evasion of section 272 for an execution-creditor to purchase at the execution sale either without the sanction of the Court or in contravention of the terms imposed by the Court, whether he does so himself or through an agent. But the same decision held that any objection to a Fiscal's sale for the disregard of the provisions of section 272 must be taken within time under section 282 of the Civil Procedure Code, and that after the confirmation of the sale any objection to the sale would come too late. In the present case not only was no objection taken in connection with the execution sale in the previous case but the sale was confirmed, and the Fiscal's transfer has, in fact, been issued to the defendant. Consequently, the latter part of the decision applies to this case. It is too late for the defendant to take the objection that the plaintiff evaded section 272 of the Civil Procedure Code and therefore the sale by him in the defendant's own name was invalid. The subsequent case of *Silva v. Siadoris*¹ is a direct authority against the appellant. The facts of this case are on all fours with the facts in that case, and it was held there that the plaintiff in that case was entitled to sue the defendant to enforce the trust and to obtain a reconveyance of the property in his own favour. I am content to follow that decision, and to hold that the plaintiff in this case is similarly entitled. There is one other point which has been urged on behalf of the defendant. It appears that one of the lands, the share of which was sold at the execution sale, became the subject of a partition action. The land was sold under the decree, and a sum of money is now in Court representing the share in question and ostensibly payable to the defendant, who was a party to the partition action. The plaintiff here, in addition to the claim for reconveyance, has asked that that sum of money be declared to belong to him and be paid to him. This relief was also granted by the District Judge. It is contended that the partition decree wiped out any trust attaching to the share in favour of the plaintiff, and that, therefore, he is not entitled to this sum of money. But I think the contention is not sound. On this point such cases as *Sultan v. Sivunadian*² may be referred to. In that case the trustee had been the purchaser at the sale under the partition decree and had obtained a certificate of sale, and it was held that the certificate of sale did not possess such a conclusive effect as to prevent a person from claiming the property sold on the ground of a secret trust between himself and the purchaser. In the course of the judgment Wood Renton J. made this observation in reference to a previous decision in *Catherina Hamy v. Babahamy*,³ that, when

¹ (1915) 1 O. W. R. 225.² (1911) 15 N. L. R. 135.³ (1907) 3 A. C. R. 33.

that case said the intention of the Partition Ordinance was to give an indefeasible title to the purchaser, it intended to say no more than that the title of the purchaser was indefeasible as regards the estate that passed to him under the decree. In the same way the title of the defendant may be said to be conclusive. He, nevertheless, owns the property subject to the original trust. I think the plaintiff is entitled to draw the money representing the share which was the subject of the trust. I would, therefore, dismiss the appeal, with costs.

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DIAS A.J.—I agree.

Appeal dismissed.
