

SILVA v. GIMARAH.

C.P., Galle, 2,466.

1903.
August 5.

Partition suit—Ordinance No. 10 of 1863, s. 17—Alienation of land during pendency of partition suit—Validity of deed.

A partition suit was commenced on 13th November, 1900, and a preliminary decree entered on 28th August, 1901, declaring that A and B were entitled to one-third of the land, and they do pay to the plaintiff Rs. 89 as costs. Thereafter, on the 17th September, 1901, A and B passed a deed of conveyance, as regards their one-third share of the land to C. The plaintiff caused the Fiscal to seize the one-third share and levy out of it his costs. C claimed the said share as his.

In an action brought by the plaintiff against A, B, and C to have the deed declared null and void;—

Held, per LAYARD, C.J., that the judgment of the Full Bench in Annamalai Pillai v. Perera (6 N. L. R. 108), which was binding upon him in the decision of the present case, is questionable, as it did not appear to be fully argued whether there was privity of contract between a purchaser at a sale in execution and the judgment-debtor whose property was sold, nor was the question raised whether a purchaser in execution was or was not in the position of a person who took a conveyance from the execution-debtor, the owner.

THE plaintiff prayed that a deed executed by the first and the second defendants in favour, of the third defendant conveying to him certain shares of land be declared null and void, and that

1903.
August 5.

the said shares be decreed liable to be sold in execution of a writ issued by the plaintiff in case No. 6,006 in the District Court of Galle. The plaintiff alleged that that was a partition suit in which a preliminary decree had been entered in favour of the first and second defendants declaring them entitled to two-sixth parts the land; that by the same decree the first and second defendants were ordered to pay to the plaintiff Rs. 89.15 as costs; that the plaintiff obtained a writ of execution against the first and second defendants to recover the said cost, and pointed out to the Fiscal their said shares for seizure; and that the third defendant unlawfully claimed them, and his claim was allowed.

The Commissioner (Mr. J. D. Mason) found that the partition suit No. 6,006 was commenced on the 13th November, 1900; that the preliminary decree therein was entered on the 28th August, 1901; and that the first and second defendants' conveyance to the third defendant was dated 17th September, 1901. He held—

“ This transfer after commencement of legal proceedings to partition the land is void under section 17 of Ordinance No. 10 of 1863 (see *Annamalai Pillai v. Perera*, 6 N. L. R. 108). I decree that the deed executed by them in favour of the third defendant was void, and that the two sixth shares of Mahagedarawatta and of the houses thereon are liable to be sold in execution in case D. C., Galle. 6,006, in accordance with section 16 of the Partition Ordinance. ”

The third defendant appealed. The case was argued before Layard, C.J., on the 17th June, 1903.

Van Langenberg, for appellant.

Samarawikrama, for plaintiff, respondent.

Cur. adv. vult.

5th August, 1903. LAYARD, C.J.—

By a preliminary decree in a partition suit instituted by the plaintiff in the District Court of Galle, entered on the 28th August, 1901, first and second defendants were decreed entitled to two-sixths of certain property, the subject of that suit, and for a certain house thereon, and they were decreed to pay plaintiff's cost amounting to Rs. 89.15.

In pursuance of that decree plaintiff issued writ of execution to recover the costs, and pointed out the shares of the land and of the house decreed to the first and second defendants in the above-mentioned decree for seizure under such writ. The Fiscal duly seized the same, and the third defendant claimed the property

seized, having purchased the same from the first and second defendants after the commencement of the action above-mentioned, and his claim was allowed. Plaintiff then brought this action to have the deed in favour of the third defendant declared void and of no effect, and prayed that the shares of the said land and of the said house be declared liable to be sold in execution under the writ above-mentioned. The Commissioner has declared the deed in favour of the third defendant void, and the shares of the land and of the house thereon liable to be sold in execution of the writ issued in the partition suit. The third defendant has appealed.

1909.
August 5.
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LAYARD,
C.J.

I understand the appellant's counsel to admit that, in view of the judgment of the Full Court in the case *Annamalai Pillai v. Perera* (6 N. L. R. 108), he cannot contend that the deed in favour of the third defendant is valid, it having been executed by first and second defendants after the institution of the partition suit, but he points out that by that judgment it was also held by this court that a Fiscal's sale of an undivided portion of a land, whilst that land is the subject of a partition suit, is also invalid.

Respondent's counsel contends that section 17 of the Partition Ordinance does not apply to Fiscal's sales; it only prohibits the alienation by an owner of his undivided share during the pendency of the partition suit in respect of the land, and declares any such alienation void. He argues that there is no privity between a purchaser at a sale in execution of a decree and the judgment-debtor, whose property is sold, and that a person who purchases at the execution sale is not in the position of a person who takes a conveyance from the execution-debtor, the owner. I cannot find that this point was raised or properly argued before this court in the appeal in the cases above-mentioned, nor does the attention of the Judges, who took part in that decision, appear to have been invited to the following cases. It was held in the case of *Prosser v. Gwillim* (1 C. & K., p. 95), where a witness was called to prove a statement made by the execution-debtor before the property was seized under the writ of the execution-creditor by the Sheriff, that the evidence was inadmissible, as the execution-creditor does not claim the goods under the execution-debtor, but adversely to him. Again, in the case of *Richards v. Johnston* (4 H. & N. 660) Pollock, C. B., and three other Judges of the Court of Exchequer, decided that a Sheriff who came to seize the goods of a debtor armed with a writ of execution in favour of a creditor is not bound by estoppels which might have prevented the debtor himself from claiming the goods, the judgment-creditor being no party or privy to the acts of the judgment-debtor. The Indian Courts appear also to have held that a purchaser at a sale

1903.
August 5.
LAYARD,
C.J.

in execution of a decree is in a different position to a purchaser from the execution-debtor himself, and acquires the title of the judgment-debtor, not through the judgment-debtor, but by operation of law and adversely to him (*Bashi Chunder Sen v. Enayet Ali*, I. L. R. 20, Cal. 236, and *Lalla Parbhu Lal v. Mylne*, I. L. R. 14, Cal. 413). In a Privy Council case (*Anundo Mayee v. Dhonendro Chunder*, 14 Moo. I. A. 101) quoted in *Hukm Chand's* treatise on the *Law of Res Judicata*, p. 204, Lord Justice James is reported to have said:—" Their Lordships think that the title of a purchaser under a judgment decree cannot be put on the same footing as the title of a mortgagor or of a person claiming under a voluntary alienation from the mortgagor ". I have not been able to refer to the Privy Council judgment itself; the passage I quote above is taken from *Hukm Chand's* book, as well as the following quotation from a portion of Sir Barnes Peacock's judgment in delivering the judgment of the Privy Council in the case of *Dinendromath v. Ramkumar* (L. R. I. A. 65):—

" There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. Under the former the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter the purchaser, notwithstanding he acquires merely the right title, and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or encumbrances effected by him subsequent to the attachment of the property sold in execution ". The purchaser at an execution sale not being the representative of the judgment-debtor, and not deriving title from him, but adversely to him, it appears to me doubtful as to whether a purchase at an execution sale is void under the provisions of section 17 of the Partition Ordinance, which only seem to refer to the voluntary alienation of an undivided share by a co-owner during the pendency of a partition suit in respect of the land in which he is entitled to such share. I am, however, bound by the judgment of the Full Court in *Annamalai Pillai v. Perera* above-mentioned, and cannot allow any doubts I may have as to whether section 17 of the Partition Ordinance renders void a sale by a Fiscal under the circumstances mentioned in the case then under the consideration of the Full Court to affect my decision in the case now under my consideration. Even, however, following that judgment, there is nothing repugnant in it to the judgment of the Commissioner in this case. He merely declares the deed in favour of the third defendant void, which is in consonance with that judgment, and the property liable to seizure under the plaintiff's writ. He does not order the

sale to be at once carried into effect, or say that if a sale does take place under the writ before the final partition decree is entered, such a sale would be good. The plaintiff, in view of the judgment of the Full Court, would be possibly well advised in not further at once enforcing his writ and carrying out the sale of the property seized, but waiting until the final decree is entered up.

1903.
August 5.
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LAYARD,
C.J.

I would dismiss the third defendant's appeal with costs.
