1933 *Present:* **Dalton A.C.J. and Drieberg J.**

EMEE NONA *v.* WINSON.

106—D. C. Galle, 30,100

Constructive trust—Fraudulent purchase by decree-holder of property in defendant's name—Evasion of Court's order—Action by administratrix of decree-holder for declaration of trust—Trusts Ordinance, No. 9 of 1917, s. 83.

Where the plaintiff's intestate, the holder of a mortgage decree fraudulently purchased the mortgaged property below the appraised value in evasion of the order of Court, and the conveyance was executed in the name of the defendant,—

Held (in an action for a declaration that the defendant held the property in trust for the plaintiff's intestate), that the plaintiff was not entitled to prove a constructive trust.

APPEAL from a judgment of the District Judge of Galle.

N. E. Weerasooria (with him *D. E. Wijewardene* and *U. J. T. de Silva*), for defendant, appellant.

H. V. Perera (with him *M. C. Abeyewardene*), for plaintiff, respondent.

July 18, 1933. DALTON A.C.J.—

The plaintiff, as administratrix of the estate of her late husband Endoris Appu, sought to obtain a declaration of the Court that certain premises purchased in the name of the defendant were bought in trust for Endoris Appu.

The defendant, son-in-law of Endoris Appu, pleaded that at the date of his marriage to the daughter of Endoris Appu, the latter had promised to provide him and his wife with a house, and that in fulfilment of that promise Endoris had purchased the premises in question and conveyed them to defendant as an absolute gift to him and through him to his daughter.

The property was purchased at a judicial sale in execution on December 8, 1923, and thereafter an auctioneer's conveyance No. 549 of February 5, 1924, was made out in the name of the defendant. It is admitted by defendant that Endoris paid the consideration for the deed.

The parties went to trial on two issues only:—

1. Did Endoris pay the consideration on deed 549 for the benefit of the defendant or for himself?
2. Is the action prescribed?

The learned trial Judge has answered both issues in favour of the plaintiff, and came to the conclusion that Endoris paid the consideration on the deed for his own benefit. In the course of the trial, however, plaintiff gave a full and frank account of the circumstances under which the purchase was made.

Endoris was a wealthy man, a jeweller who had made money in Africa. At the time of his death he had money out on 120 mortgages, and he owned nineteen different immovable properties. He had lent money on

a bond (No. 250 of 1919) to one Mohamed Haniffa, the premises in question being mortgaged. This bond was put in suit in case D. C. Galle, 20,829, instituted on August 17, 1923, to recover Rs. 17,301 principal, and Rs. 6,797 or thereabouts as interest. Judgment was obtained, defendant Haniffa consenting to judgment for the amount claimed. The plaintiff Endoris then moved for leave to bid at the sale, and to purchase the property in reduction of his claim. Leave was granted, but on condition that plaintiff should not be allowed to purchase for less than the appraised value, which was Rs. 14,000.

The sale was held on December 8. There is no evidence to show that defendant was present or consented at that date to his name being used, or had anything to do with the sale. To get round the order of the Court, Endoris got the witness Wijesekere to bid for him. Wijesekere, a witness for the plaintiff in this case, says Endoris asked him to buy for him (Endoris) in his (Wijesekere's) name "because he wanted to buy for less than the appraised value". Wijesekere says he suggested the name of defendant his son-in-law, as his sons were minors at the time. This suggestion was adopted, for Wijesekere then made a bid for Rs. 5,000, and he received a receipt for one-tenth of the purchase price and charges (P 3), which was made out in defendant's name. The sale to defendant was thereafter confirmed, plaintiff Endoris certifying that he had received the balance nine-tenths of the purchase money from the purchaser, which of course on the evidence he had not done, being the purchaser himself. Defendant thereafter appears to have been in possession, acting as owner of the property, bringing and defending actions in respect of it, leasing it, receiving the rent and paying taxes for it, although Endoris on one occasion paid a large sum for repairs to it. There is evidence lastly to show that at the time of the mortgage action Haniffa was insolvent, but whether or not Endoris proved against the estate for the balance of his claim does not appear.

On this evidence being given, during the proceedings defendant's counsel moved to frame a further issue, as to whether the conveyance 549 was not a fraud on Haniffa and his creditors, but the learned Judge refused the application.

On the appeal, counsel for appellant argued that the learned Judge was wrong in coming to the conclusion on the facts that the consideration on deed 549 was paid by Endoris for his own benefit. In the event, however, of this Court holding on the evidence that the learned Judge's finding on that point could not be set aside, as I think it must hold, he argued that Endoris, or plaintiff, could not be heard to say that Endoris had bought for himself at less than the appraised value.

The holder of a decree in execution of which property is sold is prohibited from bidding for or purchasing the property without the previous sanction of the Court. This is enacted by section 272 of the Civil Procedure Code; see *Chellappa v. Selvadurai*[1]. The Court at the same time is empowered to impose terms as to credit or otherwise, as it may deem fit. Any person dissatisfied with any such order has the usual remedy in appeal. In the case cited above, the execution creditor was given leave to bid and purchase the property but at not less than the appraisement

[1] *15 N. L. R. 139.*

value, and no bid below that value was to be accepted. At the sale, the Deputy Fiscal, although fully aware of that order, disobeyed it. The property was not put up at the appraised value, and the execution creditor was allowed to purchase for a mere fraction of that value. This order, as Wood Renton J. points out, was binding upon both the execution creditor and the Deputy Fiscal.

In the case before us Endoris sought to evade the order made by the Court, an order binding upon him, by putting up a person to purchase the property on his behalf, having the property conveyed by the auctioneer to that purchaser, and then in these proceedings setting up a trust in the purchaser on his behalf. He disobeyed the order of the Court, and now comes to the Court by his administratrix for its protection and to give him the improper benefit he obtained by his unlawful act. If the learned trial Judge's finding on the facts is correct, the defendant, even if unaware at the time of the sale that his name was being used by Endoris, must have become aware of what had happened some time later and presumably acquiesced in what was done, namely, the evasion of the order of the Court and the purchase of the property to the benefit of Endoris and to the detriment of Haniffa and his creditors.

In support of her claim the plaintiff sets up Endoris' illegality, and fraud on Haniffa's creditors of which she also was fully aware. The remedy she seeks to obtain under the provisions of section 83 of the Trusts Ordinance is governed by the principles of equity as in force in England, and she cannot obtain that relief in equity by setting up and proving Endoris' illegality and fraud. Assuming even that the defendant became aware of that fraud and later acquiesced in it, the maxim *in pari delicto potior est conditio possidentis* would apply. Once all the facts are before the Court, the Court is bound to have regard to them, and it is no answer to say that no fraud was pleaded. (*Gascoigne v. Gascoigne*[1].) The local cases cited to us dealing with applications under section 282 of the Code to set aside sales in execution, on the ground of a material irregularity in publishing or conducting the sale, are not of any assistance on this question as it arises in the case before us. The plaintiff must fail.

The appeal must be allowed and the decree of the lower Court set aside, judgment being entered for defendant with costs in the lower Court, and costs of this appeal.

DRIEBERG J.—

I agree with the judgment of the Chief Justice. The defendant, if he was not aware of Endoris Appu's reason for buying the land in his name, must have come to know it thereafter. But even assuming that all that the defendant knew when the action was brought was that Endoris Appu had for some purpose of his own, to which no objection could be taken, bought the property for himself but in the defendant's name, and that he did not know of the element of illegality, which was that the Court had prohibited him from buying at less than Rs. 14,000 and that he had bought it for Rs. 5,000, this will not affect the position. Whether the parties are in *pari delicto* must be considered as matters stand when the Court has to consider whether it should lend it its aid to enforce an illegal transaction. This stage was reached when the real purpose and nature

[1] (*1918*) *1 K. B. 223.*

of the transaction was proved at the trial and each party sought to enforce his rights under it. In *Taylor v. Chester*[1] Mellor, J. said the maxim *in pari delicto potior est conditio possidentis* was not established for the benefit of plaintiffs or defendants but on grounds of public policy, and that "the true test for determining whether the plaintiff and the defendant were in *pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party".

An instance of the Court refusing to assist the plaintiff when the defendant was an innocent party in the transaction is afforded by the case of *Begbie v. The Phosphate Sewage Company*[2].

The defendants agreed to sell to the plaintiff the exclusive right to use a certain process in Berlin. They had patented it in England, but not in Berlin. It was found that the purchase was made for the purpose of floating a company, which was done, and with the object of defrauding the shareholders of it, for it was not possible to obtain a grant of an exclusive right of that kind in Berlin. In an action against the defendants to recover the money paid to obtain the agreement for the sale of the right, the defendants pleaded that, the agreement having been obtained for the purpose of defrauding intending shareholders by holding out the false assurance of an exclusive right, the plaintiff could not recover the money on the principle that money paid in furtherance of a fraud or other unlawful purpose cannot be recovered. It was found that a fraud had been practised on the shareholders, that the plaintiff knew that no exclusive right could be obtained in Berlin, but that the defendants were not aware that they had not obtained a patent for Berlin; they had instructed their agents to take out patents for the principal countries of Europe and they believed that a patent had been acquired for Prussia. Cockburn C.J. said: "The money sought to be recovered in this action, having been paid in order to obtain from the defendants the agreement whereby this fraud could be carried out, the rule of law insisted on by the defendants applies and is a bar to the plaintiff's right to recover . . . . The plaintiff cannot present his case to a jury without necessarily disclosing the unlawful purpose in furtherance of which the money was paid".

Nor can it be contended in this case that the fraud or deception has not been carried out. It was urged that there was no evidence that Endoris Appu had levied execution or recovered anything in excess of Rs. 14,000; but the fraud and deception of the Court was complete without this, for on the sale the debtor's liability was reduced by Rs. 5,000 and not by Rs. 14,000 as would have been the case if Endoris Appu had openly bid for and purchased it in his own name. Nor is it necessary that the illegality of the transaction should be pleaded by the defendant, *North-Western Salt Company v. Electrolytic Alkali Company*[3], where Haldane L.C. said (page 469): "If the action really rests on a contract which on the face of it ought not to be enforced, then as I have already said the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality".

Appeal allowed.

[1] *L. R. 4 Q. B. 309, on p. 314.* [2] *L. R. 10 Q. B. 491, on pp. 499 and 500.*

[3] *(1914) A. C. 461.*