KALUHAMY *v.* APPUHAMY *et al.*

*D. C. (Interlocutory), Matara, 3,216.*

1904.
*December 13*

*Partition of land—Hypothecary action—Mortgage decree—Seizure of Crown land not bound by the mortgage decree—Claim inquiry—Civil Procedure Code, s. 247—Decree by consent—Crown land consented to by claimants to be declared executable—Claimants' want of title at time of consent—Fiscal's sale of land declared executable—Claimants' acquisition of title to the land after Fiscal's transfer—Their sale after acquisition of such title—Invalidity of the second sale.*

Where, in a hypothecary action, a mortgage decree having been obtained, the mortgagee caused to be seized land not bound by the decree as land belonging to the mortgagors, and certain persons put forward a false claim, which, on an action instituted by the mortgagee as plaintiff, was set aside by a decree given with the consent of the claimants, who allowed the non-mortgaged land that had been seized to be declared executable, as though it were their property; and where the same land was afterwards sold by the Crown, the true owner, to some persons, of whom were some of the claimants, and where the claimants after the purchase from the Crown sold the land they had already allowed to be decreed away to the mortgagee,—

*Held*, that the second sale was invalid, inasmuch as, though the claimants when they effected the sale had a true title, which was lacking to them when they consented to the decree, they were nevertheless bound by the decree which they had consented to for their own purposes.

THE plaintiff brought this case to have a land called Puwakgahaaddarawatta partitioned. His title to a share of this land arose as follows. He had a mortgage given him by Dines, Carolis, Pedris, and Babahamy of the nine-tenths part due to the planter's share of the trees. He put the bond in suit, and after obtaining a mortgage decree pointed out for seizure and sale not merely the interest actually mortgaged, but also two-sevenths of the soil which was the property of the Crown.

On seizure a claim was made by (1) Salman ,(2) Dingiappu, and (3) Don Andris. The plaintiff brought an action for a declaration of title under section 247 of the Civil Procedure Code. Thereupon the claimants, who had really no title to the land, collusively with the plaintiff allowed a decree to be entered against them for the nine-tenths part due to the planter's share and the two-sevenths part of the soil, which were declared by the decree bound and executable.

The plaintiff himself bought the interests at the Fiscal's sale.

Subsequently to the Fiscal's sale Salman and Dingiappu acquired title each to a one-sixth share of the two-sevenths of the land which they had consented to be decreed away as executable

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before they had any title whatever therein. They then sold their shares to one Luishamy. In the present action the learned District Judge declared that the sale to Luishamy gave her a valid title.

Against this order the plaintiff appealed.

The case came up for argument before Layard, C.J., and Moncreiff, J., on the 23rd November, 1904.

*Allan Drieberg*, for appellant.

*Loos*, for respondents.

*Cur. adv. vult.*

13th December, 1904. MONCREIFF, J.—

In 1884 Dines, Carolis, Pedris, and Babahamy mortgaged to the plaintiff " nine-tenths part due to the planter's share of the trees " on the Crown land Puwakgaha-addarawatta planted by Carolis and Pedris. The plaintiff obtained a mortgage decree in 1891 against Carolis, Pedris, Babahamy, and the widow of Dines. By the decree the above " nine-tenths part of the trees of Puwakgaha-addarawatta " was declared bound and executable. The plaintiff, however, pointed out for seizure and sale not only the planter's share, but two-sevenths of the soil of Puwakgaha-addarawatta.

A claim was put forward, I suppose to the whole of the property seized, by (1) Salman, (2) Dingiappu, (3) Don Andris.

The claim led to an action by the plaintiff against these claimants under section 247 of the Civil Procedure Code. The action was compromised and a decree entered by consent, by which the claim was set aside and " the planter's share of the trees of the new plantation and the two-sevenths part of the soil of the land called Puwakgaha-addarawatta " were declared bound and executable under the plaintiff's writ. The two-sevenths part of the soil had not been affected by the plaintiff's bond; but the plaintiff bought the interests so declared bound and executable and obtained a Fiscal's transfer for them on the 14th October, 1895.

On the 25th November, 1899, a Crown grant of Kudawellewatta, of which Puwakgaha-addarawatta is a divided portion, was given to the plaintiff, Carolis, Salman, Dingiappu, Punchiappu, and Kaluappu.

This is a suit for the partition of Puwakgaha-addarawatta, of which Kudawellewatta is said to be the southern boundary. The plaintiff has been allotted the planter's half share of all the plantations and the house. She claims the two-sevenths share of the soil and appeals. The respondents are: (1) Salman, the twelfth defendant; (2) Luishamy, the twenty-second defendant; (3) Carolis, the tenth defendant.

Salman, the twelfth defendant, has transferred his one-sixth to Luishamy, the twenty-second defendant. Luishamy also has the one-sixth share of Dingiappu, who was a party to the consent decree in the claim action, and one of the six purchasers under the Crown grant. Salman, the twelfth defendant, it must be remembered, was a party to the claim action and a grantee under the Crown grant. Carolis, the tenth defendant, was a planter of the land, a mortgagor, and one of the grantees named in the Crown grant.

It seems to have been known to all the parties, when the consent decree was entered in the claim action (12th August, 1891), that the land was the property of the Crown; that it was not affected by the mortgage bond; and that it was not declared bound and executable by the mortgage decree. But when the plaintiff brought her action under section 247 of the Civil Procedure Code she undertook to prove—in the face of the facts—that two-sevenths of the soil were excutable under her mortgage decree. The claimants, of whom Salman and Dingiappu were two, admitted by the consent decree that two-sevenths of the land were executable.

The allegation is that they "caused or permitted the plaintiff to believe a thing to be true and to act upon such belief." The "thing" was that two-sevenths of the soil of Puwakgaha-addara-watta were executable under the plaintiff's mortgage decree; but the claimants did not cause or permit the plaintiff to believe it. Nor did she believe it, for she knew it was not true. I think, therefore, that there was no estoppel *in pais* within the meaning of section 115 of the Evidence Ordinance. I must frankly confess that I cannot construe section 40 of the Evidence Ordinance; but Salman and Dingiappu and therefore Luishamy are, I should say, judicially bound by the consent decree. The decree was apparently collusive, but are the claimants who consented to it for their own purposes to be heard to say that it does not bind them? In the action the plaintiff undertook to prove that the property was liable to be sold in execution of her mortgage decree, and the claimants admitted that it was.

The position of Carolis is different. He never sold the land to the plaintiff; he did not mortgage it to her; the mortgage decree obtained against him did not affect it; he was not a party to the consent decree; he never said it was his land. Other persons claimed it, and the plaintiff had it seized and sold under the decree she obtained against him; but how was he responsible for that? The plaintiff knew that he had described the land as Crown land.

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Nor do I think that the plaintiff can rely upon the retort of *dominium acquisitum*. If a vendor has a right at the time of alienation which is defective, and that right is confirmed after sale, from the moment of confirmation the defective right of the purchaser also is confirmed (*Voet 21, 3, 1*). But at the time of the plaintiff's purchase at the Fiscal's sale Carolis had no right and pretended to none, and therefore this is not a case in which a vendor's right, defective at the date of sale, was confirmed afterwards.

*Voet* refers to the *Digest* (*6, 1, fr. 72, rei vindicatio*): "If you buy the farm of Sempronius from Titius, and it is delivered to you for a price paid, and thereafter Titius succeeds as the heir of Sempronius and sells and delivers the same land to another, it is more just that you should be preferred ..... If he is in possession and you sue him, you will be able to meet his exception with the replication *dominii* (*acquisiti*)." (See also *Dig. 21, 3, 2,*)

But I do not understand that Carolis sold this land to the plaintiff. If he had pointed it out for seizure, or had connived at the seizure, it might be different. But there is no evidence to that effect; and a Fiscal, when he sells in execution, does not sell as agent for the debtor—least of all when he is selling what does not belong to the debtor. He professes to sell the right, title, and interest of the judgment-debtor; but he took upon himself to sell in this case two-sevenths of the soil which were no part of the right, title, and interest of Carolis, and which Carolis had stated to belong to the Crown. Carolis was not the vendor. I do not think that when a judgment-creditor causes to be seized and sold and buys land which the judgment-debtor truly states to be Crown land, he can obtain a sound title to it subsequently simply because the judgment-debtor acquires it from the Crown.

Property which belongs to a third party is not saleable, unless the purchaser at least was ignorant of the fact, or the parties, if they were aware, negotiated *bonâ fide* (*Cens. For. 1 4, 19, 21*). A purchaser of such property who is ignorant of the truth has a claim for damages against the vendor who knowingly and willingly deceived him, but if he knows the truth, and has not secured himself as against his vendor, he cannot even recover the price he paid. (*Van der Keesel, 641;* see also *Codex, 8, 45, 27.*) *Van Leeuwen* (*Cens. For. 1, 4, 19, 14*), in observing that a vendor must not be enriched at the expense of the purchaser, and that he should not make profit out of fraud, adds: "Unless the purchaser knew from the beginning that the thing bought belonged to another, or that another person had some right over it—in which case the vendor is not even bound to restore the

purchase price, unless he has expressly stipulated that he should do so in case of eviction ..... And since this holds in a doubtful or uncertain case, as Grotius rightly says, it seems to me to hold much more in a case where a person has bought a thing knowing that it belongs to another or that another person has some right over it."

I do not think that one person can claim at the hands of another an interest in land which that other did not sell, and did not own until after the claimant had bought it at a Fiscal's sale, well knowing that it was not the property of the judgment-debtor.

I think that the appeal should succeed as regards Salman and Luishamy, and that they should pay the appellants' costs. As regards Carolis, the appeal should be dismissed with costs. The decree of the District Court should be varied by allotting to the plaintiff two-sevenths of the two-sixths of the land which the District Judge gave to Luishamy, *i.e.*, twelve forty-seconds to plaintiff and two forty-seconds to Luishamy.

LAYARD, C.J.—I agree.