

1816

*Present* : De Sampayo J.TIKIRA *v.* BELINDA.252—*C. R. Kandy*, 7,846.

*Estoppel—Fiscal's sale—Writ holder holding a mortgage over land sold—  
Writ holder bidding at sale—Existence of mortgage not disclosed at  
sale.*

Plaintiff was present at a Fiscal's sale held under his own writ, and was himself a bidder. What was seized and sold was the absolute title to 4/6th share, without any disclosure of the usufructuary mortgage which plaintiff held over the land in question. The plaintiff wrote to the Fiscal asking the Fiscal to carry out the sale subject to the mortgage, but Fiscal did not carry out the sale subject to the mortgage, nor was the existence of any mortgage disclosed at the sale either by the Fiscal or by the plaintiff. The defendant purchased the property without knowledge of the mortgage.

*Held*, that plaintiff was estopped from setting up the usufructuary mortgage as against the defendant.

**T**HE facts are set out in the following judgment of the Additional Commissioner of Requests (F. R. Dias, Esq.):—

There is clearly no defence to this action. The plaintiff is the assignee of a duly registered usufructuary mortgage of 1902 in regard to the field in claim. The mortgagor died, and title passed to her six children, of whom the plaintiff was one. In a certain action brought by the plaintiff against his brothers and sisters he obtained a declaration of title to 1/6, and under a writ against four of the defendants in that case for damages and costs their 4/6 shares were sold by the Fiscal in 1913 and bought by this defendant. He is now disputing the plaintiff's right to possess those 4/6 shares on the ground that he has absolute title under his Fiscal's transfer. It is contended on his behalf that the plaintiff is estopped from denying his title because those shares were sold under his own writ, and he himself was a bidder, and by his omission to notify his mortgage to the bidders he induced the defendant to buy those shares as if the title to them was free and unencumbered.

There was no duty cast on the plaintiff to give the defendant or anyone else any such information at the time of sale. When he instructed the Fiscal to carry out the sale, he distinctly requested him in writing to carry out the sale subject to the mortgage and assignment in his favour. So far as he was concerned there was no concealment, and what was sold

was the right, title, and interest of the four judgment-debtors in and to this field, that is to say, 4/6, subject to the payment of that proportion of the outstanding mortgage. No estoppel therefore arises in the case, and the plaintiff is entitled to immediate possession of these 4/6.

Enter decree for plaintiff as prayed with costs, and damages at Rs. 15 a year from September 2, 1915, till defendant is ejected.

*J. W. de Silva*, for defendant, appellant.

*Bartholomeusz*, for plaintiff, respondent.

*Cur. adv. vult.*

September 11, 1916. DE SAMPAYO J.—

One Ukku was the owner of a field called Buangekumbura. She left six heirs, of whom the plaintiff was one. The plaintiff's right having been disputed, an action was brought by him against his co-owners, and judgment went in his favour for 1/6th share. To recover the costs of that action he caused 4/6th share belonging to four of his co-owners to be seized and sold in execution in 1914. The defendant purchased that share at the sale, and obtained a Fiscal's transfer. It appears, however, that Ukku had in 1900 effected a usufructuary mortgage over the entire land in favour of one Horatala Duraya, from whom the plaintiff obtained an assignment of the mortgage in 1911. The plaintiff as assignee of the mortgage now seeks to eject the defendant. A plea of estoppel set up by the defendant has been rejected by the Commissibner, and judgment has been given for the plaintiff.

It appears that the plaintiff was present at the Fiscal's sale held under his own writ, and was himself a bidder. What was seized and sold was the absolute title to 4/6th share without any disclosure of the usufructuary mortgage, though plaintiff himself was the holder of the mortgage at that time. He, however, depends on a letter written by him to the Fiscal asking the Fiscal to carry out the sale subject to the mortgage. The Fiscal did not carry out the sale subject to the mortgage, nor was the existence of any mortgage disclosed at the sale either by the Fiscal or by the plaintiff. The defendant undoubtedly purchased the property without knowledge of the fact. In this state of facts I think the plaintiff is estopped by conduct from setting up title against the defendant. The letter which he wrote to the Fiscal, and of which the defendant was not aware, does not save him. He was himself the writ holder, and was present at the sale in that capacity and as a bidder. The case is quite distinguishable from *Fernando v. Kurera et al.*,<sup>1</sup> on which reliance is placed. The argument founded on that decision that no duty lay on him to speak cannot be maintained in the circumstances of this case.

The judgment appealed from is set aside, and the plaintiff's action dismissed, with costs in both Courts.

*Set aside.*

<sup>1</sup> (1915) 18 N. L. R. 461.