

1949

Present : Canekeratne and Dias JJ.

MANOMANI, Appellant, and VELUPILLAI *et al.*,
Respondents

S. C. 177—D. C. Point Pedro, 2,339

Sale in execution—Decree without jurisdiction—Summons not served on defendant—Bona fide purchaser at sale—No rights pass to purchaser.

A decree against a defendant on whom summons has not been served is void and no rights can pass to a purchaser at an execution sale under such decree even if such purchase was *bona fide* and without notice.

Wijeratne v. Mendis Appu (1946) 47 N. L. R. 393 and Appukamy v. Thailanmal (1947) 48 N. L. R. 110 distinguished.

APPEAL from a judgment of the District Judge, Point Pedro.

F. A. Hayley, K.C., with *V. Arulambalam*, for plaintiff appellant.

E. B. Wikramanayake, K.C., with *H. W. Tambiah*, for defendant respondent.

Cur. adv. vult.

February 21, 1949. CANEKERATNE J.—

This is an appeal by the plaintiff from a judgment dismissing her action in respect of a half share of the land called Vattirampulee. It appears that the plaintiff who was married about 1903, according to customary rites, to one Sundrampillai was employed as a conductor at Attabage Estate, Gampola, lived there with her husband for some time. On October 10, 1907, she purchased this land by deed P 1, with her dowry money. There was a usufructuary mortgage on the land at the time of her purchase and a brother of Sundrampillai obtained an assignment of this mortgage. The 2nd defendant contends that the share claimed by the plaintiff passed to one K. Namasivayam, who purchased the land at a sale, in execution of a judgment entered against K. Sundrampillai and the plaintiff. On March 17, 1915, the purchaser conveyed the land to his mother Teivanapillai by D 5 and she by deed D 6 gifted it to her son Sundaram's daughter Sundaramani, and she by D 2, dated November 26, 1944, sold certain property including this land to the second defendant.

The two principal points that arose for decision at the trial were, whether the judgment entered in the action bound the plaintiff, and whether the 2nd defendant had acquired a title by prescription. Three witnesses were called on the plaintiff's side, the plaintiff, K. Namasivayam, and the plaintiff's mother; the only witness who gave evidence for the defendant was the Proctor, appearing for the defendants, who is a brother of the 2nd defendant. It is a matter of surprise that this gentleman who advised the 2nd defendant in the purchase of this property and who presumably was aware of the importance of his evidence should have appeared for her. Such is not, I think, the practice of the profession.

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The evidence of the plaintiff is that she left Attabage Estate on November 6, 1912, with one Gunasekere who was the dispenser on the estate, came to Colombo, got on board ship the same day and left for Malaya where they lived together for some years during which time she had no communication with her parents. In 1927 she returned to Ceylon with Gunasekera; she stayed a week at her parents' residence, then went to Matale, Gunasekere's native place, and on August 5, 1927, a marriage was solemnised between the two by the Registrar of Marriages D 11; after a short time they returned to Malaya. In 1929 Gunasekere died and after his estate had been administered she returned to Ceylon in March, 1931.

Sundrampillai preferred a charge of theft against the plaintiff on November 13, 1912, citing her as M. Manomani of Colombo. On December 23 the case was struck off the list, as there was no clue as regards the accused. The next step was taken by K. Namasivayam, a brother of Sundrampillai. On February, 1913, he instituted an action against K. Sundrampillai (first defendant) and wife Manomani (second defendant) of Puloly West, presently of Attabage Estate, Gampola (caption of P 5). The parents of the plaintiff thinking "that Sundrampillai might try to appropriate their daughter's property" tried to intervene in the action; certain notices were served on them but ultimately their application was disallowed, (P 6 and P 7 of September, 1913, and P 8 and P 9 of October, 1913). No evidence was given by Namasivayam at the hearing, but Sundrampillai appears to have given evidence on Commission at Gampola, P 13A. Decree was entered on November 28, 1913, the two defendants being ordered to pay the plaintiff the sum of Rs. 200 with interest, the description given in the caption is the same as that in P 5. The decree part of P 13A, appears to be a joint decree; as a general rule, each defendant would be liable to pay a proportionate part of the amount decreed. Counsel for the respondent attempted to argue that there was a valid decree against Sundrampillai for the entire sum and that the entire property could be sold in execution of the decree against the husband. The point was not taken in the answer nor was an issue framed on it. It would be inequitable to allow the respondent to argue the point in appeal, especially as it depends on disputed facts. We declined to accede to the request of Counsel to send the case back for this purpose, as in the absence of the record in the case, it would be extending an invitation for obtaining evidence inconsistent with what has already been recorded. It is worth mentioning that at the time of the judgment in the case the law was that a property acquired with money provided out of the funds which formed part of the separate property of a spouse remained the separate property of the parties.

About December 9, 1913, a prosecution was launched against Sundrampillai, at the instance of the plaintiff's father; he was charged with having contracted a marriage with one Sivappa in April, 1913. Fortunately for the accused the Magistrate discharged him; he seemed to take the view that the evidence did not show that the plaintiff was alive at the time of the marriage. Writ of execution was issued on November 19, 1914, directing the seizure of the property of Sundrampillai and his wife Manomani of Puloly West presently at Attabage Estate,

Gampola. The Fiscal reported on January 15, 1915, that no demand of the amount of the writ was made from the plaintiff as his officer was unable to find where she was living and the plaintiff in the action stated that he does not know where she lives, P 10 report. P 11 dated January 25, 1915, sent by the Fiscal's Officer shows that the place of residence of the second defendant, i.e., the present plaintiff, was not known. The land in question was sold and the purchaser, K. Namasivayam, obtained Fiscal's transfer, D 3.

There is apart from the documents produced by the parties only the testimony given by the plaintiff and Namasivayam. There is no contrasted evidence given by the defence. The non-acceptance of the plaintiff's testimony is due to an inference from other conclusions reached in the Judge's mind rather than from an unfavourable view of her veracity as a witness. The reason adduced by the learned Judge is that in answer to the question in cage 3 of D 11 she described herself as a spinster. It should be borne in mind that at this time, August 5, 1927, she found that Sundrampillai had married another, Sivappa, and had children by her. She would have become aware while staying with her parents in 1927 that the charge preferred against Sundrampillai for having contracted a marriage with Sivappa in 1913 had been dismissed. This circumstance perhaps induced her to have "her relationship with Gunasekere legalised", as she says, by entering into a marriage with him. The reasons given by the learned Judge are not satisfactory. He has also misdirected himself by taking into consideration statements found in D 1, namely, that no reference was made by her in action No. 1,213, D.C. Jaffna, to her marriage. This was an action for recovery of money to which she became entitled, as the widow of Gunasekere, from one Manicam who seems to have been trusted by the deceased and to whom she entrusted a cheque received as insurance money. It was not necessary for the purposes of her case to refer to a previous marriage; Sundrampillai's name was not referred to in the examination-in-chief, but a question appears to have been put in cross-examination about him and she appears to have answered that question. He has misdirected himself further by taking into consideration a passage in D 1 tending to show, if the extract is correct, that she returned in 1920. Counsel for the defendants desired to show that she did not make any mention of her previous marriage and tendered D 1 instead of the relevant portion, for this purpose. Counsel did not put a single question to show that she had come to Ceylon in 1920; his silence is an important circumstance in connection with this matter. Her statement in chief that she returned only in 1927 stands uncontradicted. Complaint may legitimately be made when a statement made by a witness in another case to which attention has not been called nor any reference made at the trial is read by, and taken into consideration, by a Judge in assessing the witness's evidence.

A careful examination of the documents in the case would have revealed the truth of her story as to her movements during the material time; instead of making such an examination the learned Judge was led to take a fragmentary view of the case by the value he attached to her answers in D 11.

That the plaintiff left the house on Attabage Estate on November 6, 1912, and eloped with Gunasekera can hardly be denied. The documentary evidence makes it clear that she was not living at this place at the time of the institution of action No. 1,161. That she did not return to this place at any time thereafter seems to be borne out by the same evidence too. That K. Namasivayam, the plaintiff in the action, must have been aware that the present plaintiff, Manomani, was not at Attabage Estate at the time of the institution of the action is made clear by the affidavit, P 13B. The probabilities are that service of summons on the plaintiff was directed to the address given in the caption and that this summons and the summons on the first defendant were taken to the house of Sundrampillai and were received by some person or persons therein. The absence of any change in the caption as relating to the plaintiff in extract P 5 or at any rate in the decree, part of P 13A, strongly supports this view.

The learned Judge has fallen into an error in thinking that the mortgagee, Supper, or his assignee was not in possession of the property under the mortgage. At the time of the transfer by Seethavapillai, P 1, the mortgage rights were in existence, the transfer to the plaintiff is made subject to the payment of the debt due to S. Murugar, there was an obligation placed on her to redeem "the said otty" which she did not perform. P 3 recites that the otty mortgage has not been redeemed and the heirs of the mortgagee assign their rights to K. Kovindapillai in September, 1908. The probabilities too strongly confirm the view that these heirs were in possession at the time of the execution of P 1 and till the execution of P 3. Has the 2nd defendant given proof, as she was bound to do, of adverse or independent title? She did not call her vendor or any of the predecessors in title of the vendor to give evidence. There is no evidence to show that the plaintiff entered into possession of the land after her purchase; her own evidence, which stands uncontradicted is that after the assignment Kovindapillai lived on it with his mother, brothers and sisters. Kovindapillai entered into possession in September, 1908, he was in possession at the time of the purchase by Theivanapillai P 5, and he continued to live as before in the premises thereafter. There is nothing to show that he divested himself of his rights; the evidence of Namasivayam tends to the contrary. Having a lawful right to possess, one would presume that he continued to possess in the character of a mortgagee.

When the plaintiff came to her native place in 1927, she was entitled to assume that Kovindapillai who was on the premises was still in possession thereof. The evidence of Namasivayam shows that Kovindapillai was living in the premises till his death which took place about 1936, about 11 years ago, or as the learned Judge finds about ten years ago. It is not clear when Savundramma, the vendor to the 2nd defendant, entered into possession. There only remains the statement of the Proctor that Savundramma, her parents and brothers were in possession from 1930; at one time he said from 1923. There is no finding by the learned Judge that she entered into possession in 1930; she was a daughter of Sundrampillai, and may have been living in the premises with her father and his brother Kovindapillai. From the fact that the learned

Judge does not allude to the evidence of this witness it may perhaps be inferred that he was not impressed by his evidence as to "the entire facts of the case." It is not surprising if he did so. The witness betrays an inability to give candid answers to questions; his conduct on an important occasion before he became a Proctor does not redound to his credit, but perhaps he has lived down the effect of it.

There has not been sufficient evidence to establish a title for prescriptive possession since the death of Kovindapillai. Counsel for the respondent referred to the case of *Wijeratne v. Mendis Appu and another*¹ and of *Appuhamy and another v. Thailamnal*². The latter is undoubtedly a case of a voidable transaction; the former inferentially and by reason of the passage quoted from an Indian case shows seems to be of the same kind. In these cases and in the case of *Zain-ul-Abdin Khan v. Asghar Ali Khan*³, a valid decree which bound the debtor was in existence at the time of the sale. Thus, in the present case there was no foundation for the exercise of jurisdiction by the Court of Requests at Point Pedro against the plaintiff⁴, who was not in Ceylon at the time of the institution of the action; the decree as against her was void. Whether the idea expressed in the words "a bona fide purchaser for value without notice" can appropriately be applied to the second defendant, the wife of a government servant who purchases a land in contravention of a regulation, may be a question. Sanction for a purchase of land by an employee of the government or by his wife must be obtained before the acquisition. The authority entrusted with the right of granting sanction would require to be satisfied about the title of the vendor.

The appeal is allowed with costs. The plaintiff is declared entitled to the share claimed, but it must be subject to the rights created by the usufructuary mortgage. If the respondent is entitled to claim compensation for any improvements, she may be entitled to assert her rights, if she is so advised, in a separate action.

The pronouncing of judgment was de'ayed to enable the parties, as there was some chance, to settle their dispute.

DIAS J.—I agree.

Appeal allowed.