1918.

Present: Ennis J. and Shaw J.

SAPARAMADU *v.* SAPARAMADU.

129—D. C. Negombo, 12,325.

Estoppel—Owner holding registered conveyance present at Fiscal's sale—Failure to notify his title to purchaser.

The first defendant took a conveyance from the second defendant of the land in question and registered the same. Thereafter the land was sold in execution against the second defendant. The first defendant was present at the sale, but did not notify to the bidders at the sale that he had purchased the same. The purchaser brought an action for declaration of title.

Held, that the first defendant was estopped from setting up title to the same.

THE facts are set out in the judgment of the District Judge (M. S. Sreshta, Esq.):—

The plaintiff purchased the land in question on February 8, 1915, at a Fiscal's sale held upon a writ issued against the second defendant. On February 14, 1915, the second defendant had sold this land to the first defendant. The plaintiff alleges that this deed was executed in fraud of creditors; and further, that the first defendant is estopped from claiming title to this land, having failed to notify his title at the Fiscal's sale. He accordingly brings this action to have it declared that the deed executed by the second defendant in favour of the first defendant is null and void, and that the plaintiff is the owner of the land in question.

The defence is that this deed was executed for valuable consideration, and that the first defendant warned all intending purchasers at the Fiscal's sale that he had purchased this land.

The question was to whether the deed in question was executed in fraud of creditors is easily decided. It has not been established that the second defendant rendered himself insolvent by executing this deed. Although there are suspicious features in this transaction, there is, therefore, not sufficient material for holding that this deed was executed in fraud of creditors.

The next question is whether the first defendant is estopped from denying the plaintiff's title. It is admitted that the first defendant was present at the Fiscal's sale. But did he notify to the intending purchaser that he was the owner of this land? There is conflicting oral evidence on this point. The Fiscal's officer who held the sale, who is a Vidane Arachchi, says that the first defendant did so notify. But it should be remembered that the first defendant, who is the Police Vidane of this village, is a subordinate of his, and that he (the Vidane Arachchi) would, therefore, be strongly inclined to give evidence in his favour. Moreover,

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the Vidane Arachchi's demeanour was unsatisfactory. There are certain circumstances in this case which turn the scale in the plaintiff's favour. Firstly, the first defendant's own brother gives evidence that he did not hear the first defendant make the alleged notification, although he (witness) was present when the conditions of sale were read. This witness was obviously giving evidence against the first defendant with much reluctance; he felt bound to tell the truth; he was himself one of the bidders, but he had a sneaking desire to help, if possible, his brother, the first defendant, so he says that as many other people were talking, he might not have heard the first defendant making the alleged notification. I am satisfied that this witness is telling the truth when he says that he did not hear the first defendant make the alleged notification. Why should he give false evidence against his own brother, and in favour of the plaintiff, who is only a nephew?

The next circumstance in plaintiff's favour is the fact that he paid Rs. 210 for this land. The Vidane Arachchi says it was valued at Rs. 400. We know what low prices are fetched at a Fiscal's sale. If there is the slightest dispute, the price goes down considerably. So the fact that the plaintiff paid so much as Rs. 210 for this land shows that he was not aware of any defect in the title of the judgment-debtor, the second defendant. Would he have paid such a proportionately large sum at a Fiscal's sale if he were aware that it had been already sold to the first defendant—a headman? Would he have cared to launch into litigation with a headman and risk losing all the money he paid, not to speak of costs? Decidedly no. It is also to be noted that the first defendant's own brother, Moises, bid at the sale. Would he have so bid if the first defendant had notified that he had purchased this land? The third circumstance in plaintiff's favour is the fact that a settlement was proposed on behalf of the first defendant, that on payment of a sum of money the plaintiff was to part with his rights to this land. . . . . The willingness of the first defendant to settle the matter so advantageously to the plaintiff indicates that he felt that the plaintiff was in the right.

I find accordingly that the first defendant, though present at the Fiscal's sale, did not intimate to the purchaser that he was entitled to this land. As to why the first defendant failed to do so, it is not necessary to record any finding. But evidently the first defendant did not wish to disclose the deed in his favour by the second defendant, who was the judgment-debtor. The first defendant, perhaps, received no consideration for the transfer in his favour, and did not publish to the people of the village, of which he was headman, that he had made a purchase which would appear to them to be a fraudulent one. This is, however, a mere hypothesis.

Judgment for the plaintiff declaring him the owner of the premises in question, and for costs.

E. W. Jayawardene (with him *E. G. P. Jayatilleke*), for the first defendant, appellant.—There is no evidence to support the finding that the first defendant failed to notify his title at the sale. Even if he did not, he is not estopped, as there was no duty cast on him to speak. He was the owner upon a registered title. Plaintiff should have taken the precaution to ascertain the state of title by

making a search in the Land Registry, which if he did he would have found that the judgment-debtor had parted with his title. The law does not impose a duty to speak where the plaintiff could have by reasonable inquiry learnt facts which would have put him on his guard. Council cited *8 N. L. R. 380, 14 N. L. R. 152, 18 N. L. R. 461, 19 N. L. R. 284, I. L. R. 14 All. 362* and *I. L. R. 20 Bom. 290.*

Croos-Dabrera (with him *A. St. V. Jayawardene*), for the plaintiff, respondent, not called upon.

July 1, 1918. ENNIS J.—

This was an action for declaration of title to land. The plaintiff was purchaser at a Fiscal's sale in execution against the second defendant. The land was seized by the Fiscal on January 15 and sold on February 8. It appears that on January 14 the first defendant took a conveyance from the second defendant of the same land and registered on January 25. At the trial the plaintiff contended that the sale to the first defendant was a fraudulent one, and one without consideration. He also contended that as the first defendant had failed to notify his title to the purchaser at the sale, that he was estopped from denying the plaintiff's title. The learned Judge held in favour of the first defendant on the first of these contentions, and against him on the second. The finding of fact appears to be that the first defendant was present at the auction, and stood by and allowed the plaintiff to purchase the property, knowing that the plaintiff was being deceived. It has been suggested that the fact that the first defendant registered his purchase was sufficient notice to the purchaser, but this does not necessarily prove that the plaintiff should have been aware of this purchase. The cases on the point seem to indicate that, where circumstances exist which would put the purchaser upon an inquiry, he may be presumed to have the knowledge. Such circumstances appear to be possession, as in the case of *Fernando v. Kurera* [1] and other circumstances of that character, and there is nothing in this case to suggest any circumstance that might have put the plaintiff on his guard and on inquiry into the title. On the contrary, the finding of fact is such as to indicate that every factor was present which would lead him to believe that the second defendant was, in fact, the owner when the property was auctioned, *e.g.*, the first defendant's own brother bid at the auction.

I would dismiss the appeal, with costs.

SHAW J.—I agree

Appeal dismissed.

[1] *(1915) 18. N. L. R. 461*