Present : Ennis and Porter JJ.

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NANDUWA *et al. v.* BHAI *et al.*

415—D. C. Kandy, 28,568.

Estoppel—Person present at Fiscal's sale and not making known his title to purchasers—Intentionally—Evidence Ordinance, s. 115.

H sold a certain property to W on January 20, 1919 (registered on January 21, 1919). On a writ of execution against H, the property was seized on January 21, 1919, and sold by the Fiscal on March 17, 1919. On hearing of the sale W wrote a letter to the Fiscal stating his title, and on the date of the sale W went to the sale with his deeds and presented them to the auctioneer. W was present at the sale, but did not make his title known to the purchasers.

Held, W was not estopped by his conduct from asserting his title.

IN this case the subject of contention was the title to seven-eighths of the land called Bogahapitiyawatta with the houses thereon. It was common ground that seven-eighths of this garden belonged to Abdul Hameed and Abdul Majeed, the remaining one-eighth being the property of their mother, who was not a party to this action. The plaintiff's case was that Abdul Hameed and Abdul Majeed, by their deed bearing No. 668 and dated January 20, 1919 (D 1), which was duly registered on January 21, 1919, sold and conveyed their seven-eighths share to Ana Uduma Lebbe, who, by his deed bearing No. 370 and dated July 29, 1920 (P 8), sold and conveyed these shares to the plaintiffs. On the other hand, the first defendant claimed these shares as purchaser at a sale in execution against the property of Abdul Hameed and Abdul Majeed held on March 17, 1919, as shown by Fiscal's conveyances bearing Nos. 19,316 and 19,317, both dated June 11, 1919 (D 7 and D 8).

In their answer the defendants, *inter alia*, pleaded that that there was no consideration for the conveyance from Uduma Lebbe to the plaintiffs (P 8), and that they were not *bona fide* purchasers for valuable consideration, and that Uduma Lebbe and his privies-in-title, the plaintiffs, were estopped from contesting the first defendant's title, inasmuch as Uduma Lebbe was present at the Fiscal's sale held on March 17, 1919, and made no claim to the shares in question.

The District Judge (W. S. de Saram, Esq.) held that Uduma Lebbe was present at the Fiscal's sale on March 17, 1919, and notified his claim to the Fiscal's Officer who was conducting the sale, but that, inasmuch as Uduma Lebbe did not make his claim known to the purchaser, Uduma Lebbe and his privies-in-title, the plaintiffs, are estopped from denying the first defendant's title, and dismissed the plaintiff's action, with costs.

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Pereira, K.C. (with him *Soertsz*), for the appellants.—The sale to Uduma Lebbe is not tainted with fraud as held by the District Judge. The fact that Uduma Lebbe did not tell the purchaser at the Fiscal's sale of his title is not sufficient to estop him from asserting his title. The circumstances do not show that he intentionally did anything which might have caused the purchaser to act to his prejudice.

Jayawardene, K.C. (with him *Navaratnam*), for the respondents.—The sale to Uduma Lebbe was tainted with fraud. Notice to the Fiscal of Uduma Lebbe's title was insufficient. He was present at the sale, and the effect of his failure to disclose his rights to the purchaser and other bidders prejudiced the purchaser and made him act on the belief that Uduma Lebbe had no title. Counsel cited *20 N. L. R. 369, 14 N. L. R. 152, 18 N. L. R. 461, 21 N. L. R. 360, 19 N. L. R. 284, 1 C. W. R. 74, 6 C. W. R. 147, 20 Cal. 296.*

June 26, 1922. ENNIS J.—

This was an action for declaration of title to seven-eighths share of a land called Bogahapitiyawatta and the houses thereon. It appears that the land originally belonged to one Miskin, who died leaving a widow and two sons, Hameed and Majeed. They sold their seven-eighths share on January 20, 1919, to one Ana Uduma Lebbe. That conveyance is the document D 1, which was registered on January 21, 1919. Uduma Lebbe sold this share on January 20, 1920, to the plaintiffs. The defendants claim to be the purchasers at sales on two writs of execution against Hameed and Majeed, respectively. The seizure of the property under those writs was on January 21, 1919. The sale was on March 17, and the Fiscal's transfers (D 7 and D 8) are dated June 11, 1919. The only question on appeal put forward by the appellants is whether the learned Judge was right in holding that the conduct of Uduma Lebbe has estopped the plaintiffs from asserting their claim. The learned Judge has found as a fact that Uduma Lebbe was present at the sales in execution, and did not make his title to the land known to the purchasers at the sale. On these facts the learned Judge has held that an estoppel arises. Certain other facts were found by the learned Judge, namely, that on hearing of the sale Uduma Lebbe had caused a letter to be written to the Fiscal stating that he had a claim for seven-eighths share of the land which had formerly belonged to Hameed and Majeed; and, moreover, that on the date of the sale Uduma Lebbe went to the sale, took his deeds with him, and presented them to the auctioneer, informing the auctioneer that he was the owner of the land to be auctioned. In my opinion the learned Judge was wrong in holding that the conduct of Uduma Lebbe created an estoppel. The section of the Evidence Ordinance which relates to estoppels is section 115, and it sets out that, when

a person has by his omission intentionally permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed to deny the truth of that thing. The learned Judge appears to have overlooked the effect of the word " intentionally " in the definition of estoppel.

Mr. Jayawardene, however, has argued strenuously that the District Judge's finding is right, and has cited a large number of cases to us. The first of these cases is *Caruppen Chetty v. Wijesinghe.*[1] In that case, however, there was a definite finding that the respondent's silence on the occasion of the sale was due to a deliberate intention on his part to deceive the appellant for his own emolument. The next case was *Fernando v. Kurera.*[2] There my brother De Sampayo in his judgment expressly stated that there would be no estoppel, unless the party against whom it was set up meant his representation or conduct to be acted upon. In the case of *Rodrigo v. Karunaratna*[3] many of the English cases on the question of estoppel were analysed, and the Chief Justice in his judgment, after saying that there was no real difference between the Indian and English law on the subject, said that, in his view, the principle of the English law was clear, and he enunciated it in these words: " The action taken upon the belief must be directly connected with the false impression caused by the representation or conduct," and he proceeded to cite a number of cases, in each of which it was deemed essential that the representation or conduct complained of should have been intended to bring about the result whereby the loss had arisen, or that it was meant that the representation should be acted upon. There was also the case of *Tikira v. Belinda.*[4] In that case it was held that a person who had given a written notice to the Fiscal that he was the owner could not save himself by such a notice, where, on the facts of the case, it appeared that he himself was the writ-holder, and was present at the sale in that capacity and as a bidder. In the case of *Angohamy v. De Silva*[5] De Sampayo J. said that " for the purpose of an estoppel, the state of mind or the motive of the person making the representation is immaterial, the gist of the matter being the belief engendered by the representation in the mind of the person who acts on it. It may be that, if the representation consists in silence when the person concerned ought to speak, ignorance of the truth may prevent the inference of a representation," and in *Dingiri v. Banda*[6] it was held that " it is generally immaterial whether the person who is guilty of misrepresentation is ignorant of the true facts, so long as the other party is, in fact, misled, but where such a person makes the representation or stands by knowingly, there arises the additional element of fraud, and in such a case infancy does not relieve him from the consequences."

[1] *(1912) 14 N. L. R. 152.*
[2] *(1916) 18 N. L. R. 461.*
[3] *(1921) 21 N. L. R. 360.*
[4] *(1917) 19 N. L. R. 284.*
[5] *6 C. W. R. 74.*
[6] *6 C. W. R. 147.*

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The principal case relied on by Mr. Jayawardene was the Indian case of *Sarat Chundar Dey v. Gopal Chunder Laha.*[1] This case was decided by the Privy Council, and in the course of their judgment, at page 314, it was held that a person, who by his declaration, act, or omission had caused another to believe a thing to be true and to act upon that belief, must be held to have done so intentionally within the meaning of the Statute, if a reasonable man would take the representation to be true, and believe it was meant that he should act upon it. On this decision by the Privy Council it was argued that an omission by itself must be presumed to be intentional. In certain circumstances the intention may be presumed. But the evidence in the present case shows that Uduma Lebbe did not invite anybody to purchase at the sale. He took the precaution to inform the Fiscal by a letter addressed to him declaring that he claimed the land, and he went to the sale apparently for the sole purpose of trying to stop it by producing for the inspection of the auctioneer his deeds of title. His conduct at the sale shows clearly that he did not mean anybody to purchase at the sale without knowing that he had a claim. The fact that the auctioneer did not stop the sale, and that the purchasers did not know that Uduma Lebbe had made a claim, does not affect the position. The purchasers were not induced to make any purchase by any representation or omission of the plaintiffs. It does not appear that they knew that Uduma Lebbe was the owner, and their purchase was not due to an intentional act or omission of Uduma Lebbe's, and, therefore, the plaintiffs, who are the successors in title of Uduma Lebbe, are not estopped from setting up their title. In the circumstances, I would allow the appeal, with costs.

PORTER J.—I agree.

Appeal allowed.

[1] *20 Cal. 296.*