

1949

Present : Nagalingam and Windham JJ.

WILLIAM SINGHO, Appellant, and SILVA, Respondent

S. C. 435—D. C. Matara, 18,049

Res judicata—Decree for sale under Partition Ordinance—Sale—Subsequent amendment of decree—Prior agreement between purchaser at sale and third party for conveyance—Third party not bound by amendment.

A person whose interests accrued to him prior to an order of Court is not a privy in estate of his predecessor for the purposes of *res judicata*.

APPEAL from a judgment of the District Judge, Matara.

C. E. S. Perera, for 2nd defendant appellant.

E. B. Wikramanayake, K.C., with *M. H. A. Azeez*, for plaintiff respondent.

Cur. adv. vult.

May 9, 1949. NAGALINGAM J.—

This is an action *rei vindicatio*. The plaintiff-respondent by deed of conveyance P4 of 1942 conveyed to the 1st defendant certain undivided interests to which he was entitled in the land the subject-matter of this action with a condition annexed thereto whereby the latter covenanted with the former to reconvey the property on repayment of the consideration within a period of 5 years from the date of execution of the deed. Before the expiry of the period of 5 years another co-owner of the land instituted a partition action to which the 1st defendant was made a party. The plaintiff intervened in the action and was himself made a party defendant. The plaintiff though given a date to file answer did not file one and though represented by Proctor did not put in an appearance either in person or by Proctor at the trial. After trial a decree for sale was entered on June 4, 1945. In the decree, however, the 1st defendant was declared entitled to the proper share that he was entitled to under the deed P4 but no mention was made in it of the right the plaintiff had under the deed. At the sale held under the decree a third party was declared the purchaser. The 1st defendant objected to the sale and at the inquiry held into the objection terms of compromise were arrived at on December 19, 1945, under which the 1st defendant was declared the purchaser on his paying for the land a sum more than four times the price realised at the auction sale. The 1st defendant was allowed time to deposit the money and the 1st defendant entered into an agreement 2D1 of January 12, 1946, by which he agreed to sell to the 2nd defendant the land for a sum named therein and received part of the consideration which he deposited to the credit of the partition case in fulfilment of his undertaking to pay the price he agreed to buy the land for, obtaining at the same time credit for the balance purchase price.

The plaintiff who evinced no interest in the proceedings after his intervention made an application to Court six days after the money had been deposited, namely, January 18, 1946, to have the decree entered in the case amended by incorporating therein a reference to the condition

under which the 1st defendant purchased the property from him. To this application the 2nd defendant who had already acquired an interest in the land by virtue of the agreement 2D1 was not made a party. The application came up for consideration before a Judge other than the Judge who entered the decree and the application was allowed and order was made on July 24, 1946, directing the decree to be amended by making the rights of the 1st defendant subject to the condition contained in the deed P4 by the addition of the following :—“ Provided however that if the said vendor pays back to the said vendee the purchase money hereof (Rs. 1,140) within 5 years of this date (2D2) the said vendee shall reconvey the property mentioned in the schedule below to the said vendor ”. The decree directing the sale of the land, however, remained unimpaired. The 1st defendant in pursuance of the agreement 2D1 conveyed by deed P5 of July 30, 1946, the land even before a certificate of sale was issued in his favour and in order to put the title of the 2nd defendant on a firmer footing he executed conveyance P6 of October 2, 1946, after obtaining the certificate of title.

In this state of the facts the plaintiff claimed against the 1st and 2nd defendants a declaration of title to the undivided interests he had conveyed by deed P4 to the 1st defendant. The plaintiff made also certain other persons parties defendant but as their rights are not involved in this appeal I shall take no notice of them. It is the 2nd defendant who contests the claim of the plaintiff. The case of the plaintiff rests entirely upon the amendment made to the partition decree which he has set out as the basis of his title. The 2nd defendant contests the validity of the plaintiff's claim on several grounds.

The first point taken on behalf of the 2nd defendant is that it was not competent to the District Court to have amended the decree in the way it was in fact amended. Though the Judge who heard the application to amend the decree assumed jurisdiction to amend the decree by holding that the failure to conserve the rights of the plaintiff in the decree was due to an error or accidental slip in entering up of the decree, the facts rather tend to show that the omission was deliberate as the decree entered was a decree for sale and not one for partition. The trial Judge had before him the fact that there was the condition attached to the deed P4 but the learned Judge's failure to advert to the petitioner's rights may at the highest be accounted for on the ground of a failure to make a proper adjudication on the facts before him, but to say that the failure was due to an error or accidental slip is clearly an unwarranted assumption. I think therefore that the contention of the 2nd defendant is sound that the Judge who purported to amend the decree acted *ultra vires*.

Besides the amendment had the effect of making an otherwise perfectly intelligible and intelligent decree into one which was not merely contrary to law but which was entirely incapable of being given effect to. The decree was a decree for sale. It declared the parties entitled to their respective shares. It further directed that the land be sold and that the proceeds be distributed among the co-owners in proportion to their shares. The effect of the amendment was to declare that the first defendant should reconvey an undivided share in the land to the plaintiff on

the latter repaying the purchase money under the deed P4. It is plain to see that in view of the decree for sale the direction that the 1st defendant should reconvey a share in the property was utterly meaningless. The decree cannot even be regarded as one directing a sale of part of the property and allotting the remainder to one of the co-owners. Even if the decree had purported to do so such a decree would be contrary to law. See Case No. 20 F/D. C. Jaffna 233¹ and *Uduma Lebbe v. Babu et al.*² The amendment to the decree was therefore hopelessly irregular.

Mr. Wickremanayake, however, contends that as the 1st defendant was a party to the proceedings which culminated in the amendment of the decree he is bound by it, though irregular. That, I think, is a proposition sound in law for at the worst the District Judge who amended the decree made a wrong order and it has been said tritely that a Judge may make a wrong order as well as a right order and such an order would be binding on the parties. Mr. C. E. S. Perera for the appellant on the other hand argues that the second defendant not having been a party to the proceedings is not bound by the order for amendment and that he is entitled to show that the order of amendment was an erroneous order. Mr. Wickremanayake's rejoinder to this argument is that the 2nd defendant is a privy in estate to the 1st defendant and therefore bound by the order of amendment.

This contention brings one to a consideration of the question, who is a privy in estate? Had the 2nd defendant acquired his interest subsequent to the order of amendment, then clearly the 2nd defendant would have been privy in estate to the 1st defendant and would be bound by the decree. But in this case the 2nd defendant had acquired his interest under 2D1 anterior to even the application made by the plaintiff to have the decree amended. His rights therefore had accrued to him not subsequent to the order of amendment but prior to it and he cannot therefore be deemed to be privy in estate to the 1st defendant and no judgment or order made against the 1st defendant in respect of the interests he had parted with can affect the rights of the transferee of those interests, namely, the 2nd defendant. Hukm Chand in his *Treatise on the Law of Res Judicata*³ quotes a citation which is worth reproducing :

“It is well understood though not usually stated in express terms in works upon the subject that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit”.

And he cites certain American cases for the proposition —

“Nor is a vendee of land affected by a judgment concerning it on a suit instituted against his vendor by a third person after the grant”.

In India too the same principle has been adopted. It has been held that a judgment against the vendor in a suit begun after the sale does not create privity in the vendee⁴.

In the present case it will be seen, when both the application and the order were made, the first defendant had already agreed by a valid

¹ (1899) *Koch's Reports* p. 6

² *1 Matara Cases*, 27.

³ 1894 edition at p. 184.

⁴ *I. L. R. 35 Bombay* 297.

document to convey his rights to the 2nd defendant and no order made against the 1st defendant could tend in the slightest degree to prejudice the rights of the 2nd defendant under his agreement.

Mr. Wickremanayake, however, contends that the agreement to convey land conveys no interest in the land itself but would give rise to an action for damages on failure to perform the contract. The agreement 2D1, however, does not expressly stipulate for the payment of damages in the event of default being made in conveying the property which is altogether an express agreement to reconvey the land to the 2nd defendant within seven days of the 1st defendant obtaining the certificate of sale in the partition action. I do not think that in view of the terms of the agreement it is possible to contend that specific performance cannot be compelled. The agreement therefore must be deemed to pass sufficient and adequate interest in the land to the 2nd defendant to enable him not merely to compel the 1st defendant to perform specifically the agreement but also to compel third parties deriving title from the 1st defendant subsequent to the agreement to perform specifically the terms of the agreement. The plaintiff is one who would fall within the category of third parties deriving title from the 1st defendant after the 2nd defendant had acquired his rights under the agreement. No act that the 1st defendant may do or suffer to be done after the execution of the agreement can prejudice the 2nd defendant. I am therefore of opinion that the 2nd defendant's title was in no way affected by the amendment of the decree which was inoperative to vest in the plaintiff title to any undivided share in the land.

For these reasons the judgment of the District Judge is set aside and the plaintiff's action is dismissed with costs both in this Court and the Court below.

WINDHAM J.—I agree.

Appeal allowed.

