1960 [IN THE PRIVY COUNCIL]

*Present :* **Viscount Simonds, Lord Tucker, Lord Jenkins, Lord Morris of Borth-y-Gest, Mr. L. M. D. de Silva**

BEATRICE PERERA, Appellant, *and* N. A. PERERA and others, Respondents

*Privy Council Appeal No. 24 of 1957*

*S. C. 99–100—D. C. Colombo, 6,306/L.*

*Vendor and purchaser*—Exceptio rei venditae et traditae—*Section 238 of Civil Procedure Code—Judgment debtor is not immune from the consequences of his own act.*

Under the doctrine of the *exceptio rei venditae et traditae* the purchaser who had got possession from a vendor, who at the time had no title or had no right to convey title, could rely upon a title subsequently acquired by the vendor.

By section 238 of the Civil Procedure Code—

"When a seizure of immovable property is effected under a writ of execution and made known as provided by section 237 and notice of the seizure is registered . . . under the Registration of Documents Ordinance, any sale, conveyance, mortgage, lease, or disposition of the property seized, made after the seizure and registration of the notice of seizure and while such registration remains in force is void as against a purchaser from the Fiscal selling under the writ of execution and as against all persons deriving title under or through the purchaser."

*Held*, that the words "all persons" do not include the judgment-debtor The Section was designed and enacted to protect persons against the acts of the judgment-debtor and not to protect or to benefit the judgment-debtor himself. Accordingly, it cannot protect a judgment-debtor who sells property pending seizure and buys it for himself subsequently from the execution-purchaser. In such a case, under the doctrine of the *exceptio rei venditae et traditae*, the title which the judgment-debtor obtains from the execution-purchaser enures to the benefit of the person to whom the judgment-debtor had previously transferred by private alienation pending the seizure.

When J. sold certain immovable property to L. he inadvertently omitted to mention the fact that, in consequence of a decree entered against him, a notice of seizure under section 237 (1) of the Civil Procedure Code had been served on him and registered in respect of that property. At the execution sale which took place after the sale to L. the property was bought by T., who, shortly afterwards, sold it to the plaintiff who was the wife and nominee of J. In the present action for declaration of title brought by the plaintiff against the second defendant, to whom the property had been devised by L.—

*Held*, that inasmuch as section 238 of the Civil Procedure Code did not render void as between themselves the deed of conveyance from J. to L., there was no statutory provision which hindered the operation of the common law. Title passed automatically from the plaintiff as J.'s nominee to the second defendant (as L.'s successor) under the doctrine of the *exceptio rei venditae et traditae* at the moment that T. transferred the property to the plaintiff.

APPEAL from a judgment of the Supreme Court reported in *57 N. L. R. 440*.

*Jeseph Dean*, for the plaintiff-appellant.

No appearance for the defendants-respondents.

*Cur. adv. vult.*

March 8, 1960. [Delivered by MR. DE SILVA]—

This is an action for declaration of title brought in July, 1951, by the appellant in the District Court of Colombo in respect of certain property which had previously been sold by her husband one Julius Perera to one Lewis on Deed D 9 of the 17th April, 1950. Lewis had died in August, 1950, leaving the property to his daughter the second respondent who was the second defendant in the action. Probate of Lewis' will was issued to the second defendant's husband who was the first defendant and is the first respondent. The appellant also asked for an order of eviction. The third, fourth and fifth respondents are persons in occupation under the second respondent.

The learned District Judge gave judgment for the appellant subject to the payment by her of a sum of Rs. 12,304·79 as compensation to the respondent. This compensation was in respect of a similar sum belonging to Lewis which had been utilised to pay off a mortgage on the property.

The appellant and respondent both appealed to the Supreme Court. The former complained that the order for compensation was insupportable and the latter contended that the appellant was not entitled to a declaration of title or to a writ of ejectment. The Court of Appeal (Gratiaen, J., with whom Gunasekara, J., agreed) held that the respondent was entitled to succeed, set aside the order of the District Judge and dismissed the action. For reasons which follow their Lordships are of opinion that the decision of the Supreme Court must be upheld. In view of that opinion the correctness of the order for compensation does not arise for consideration.

The Supreme Court accepted the findings of fact of the District Judge and those that are relevant to a decision of this appeal can be shortly stated. The appellant (plaintiff) has been found to be a nominee of Julius her husband. At the end of 1949 and in the beginning of 1950 Julius was in serious financial difficulties. His property was under seizure in several cases one of which was D. C. Colombo 9041/S. In that case judgment had been entered for Rs. 1,000 and interest payable on a promissory note. In April, 1950, Lewis, who was Julius' uncle, reluctantly agreed to assist Julius to settle his debts so as to prevent his property, worth about Rs. 30,000, from being sold in execution. He received from Julius a document indicating that Rs. 16,000 was required to meet his liabilities. An agreement was arrived at and was implemented on the 17th April, 1950, whereby Julius sold the property to Lewis for

Rs. 16,000 subject to the vendor's right to repurchase it for the same amount within five years. The conveyance contained the following warranties and assurances :—

> " And I the said vendor for myself and my heirs, executors, administrators and assigns do hereby covenant, promise and declare with and to the said vendee, his heirs, executors, administrators and assigns that the said premises hereby sold and conveyed are free from any encumbrance whatsoever and that I have not at any time heretofore made done or committed or been party or privy to any act, deed, matter or thing whatsoever whereby or by reason whereof the said premises or any part thereof are, is, can, shall or may be impeached or encumbered in title, charge, estate or otherwise howsoever and that I and my aforewritten shall and will at all times hereafter warrant and defend the same or any part thereof unto him and his aforewritten against any person or persons whomsoever and further also shall and will at all times hereafter at the request of the said vendee or his aforewritten do and execute or cause to be done and executed all such further and other acts, deeds, matters, assurances and things whatsoever for the further and more perfectly assuring the said premises hereby sold and conveyed and every part thereof, unto him or his aforewritten as by him or his aforewritten may be reasonably required."

The Rs. 16,000 was paid to the creditors whose names had been disclosed in the document handed by Julius to Lewis. At the same time Lewis was placed in possession of the property as owner and Julius acted as rent collector from his former tenants who attorned to Lewis. When Lewis died and the property passed to the second respondent the appellant and Julius acknowledged her as the new owner.

The material upon which the appellant's case was constructed arose from the following further facts. When Julius persuaded Lewis in April, 1950, to save the property from forced sales he had (perhaps through inadvertence as stated by the Supreme Court) omitted to mention in the statement of his debts payable under the decree in D. C. Colombo No. 9041/S (mentioned above) under which at the time a notice of seizure under section 237 (1) of the Civil Procedure Code (set out below) had been served on him and registered. Lewis was unaware of the decree and of the seizure. It will be seen presently that the appellant (Julius' nominee) is claiming on a title derived through execution proceedings in case 9041/S against Julius. The registration of the seizure had been kept alive by the judgment-creditor's proctor, a Mr. Rasanathan. In pursuance of the seizure the property was put up for sale by the Fiscal and purchased in February, 1951, for Rs. 250 by one Thiagarajah who was Rasanathan's father-in-law. He has been held by the Courts in Ceylon to have been Rasanathan's nominee. A few days after Thiagarajah had obtained a Fiscal's Transfer on the sale in execution he sold it to the appellant for Rs. 3,000. She then instituted this action. In effect Julius is trying to evict the devisee from Lewis to whom he had transferred the property and who had helped him out of his difficulties.

The learned District Judge held that Thiagarajah was a nominee of Rasanathan but found that it was " not possible to hold that Thiagarajah was a nominee for Julius Perera ". Chiefly for this reason he was unable to hold that the execution proceedings were a fraud contrived by Julius (as alleged by the respondent) and the Supreme Court found itself "unable to hold that the learned Judge was wrong in rejecting this argument (of fraud) on the evidence before him". The District Judge held that the transfer to Lewis was void under the provision of section 238 of the Civil Procedure Code (set out below) and that the appellant, though Julius' nominee, got good title from Thiagarajah and that she was entitled to succeed. The Supreme Court held that although the title passed through the execution proceedings in the first instance to the appellant the benefit of that title passed immediately thereon to Lewis' devisee under the Roman Dutch Law doctrine of the *exceptio rei venditae et traditae*.

The only question which arises on this appeal is whether the Supreme Court was right in so holding. It will be necessary to consider the doctrine itself and also whether the sections of the Ceylon Procedure Code referred to above in any way hinder or modify the application of the doctrine.

Sections 237 and 238 are to the following effect :—

" 237.—(1) If the property is immovable, the seizure shall be made by a notice signed by the Fiscal prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise."

The only other subsection of this section has no bearing on the questions arising in this case.

" 238. When a seizure of immovable property is effected under a writ of execution and made known as provided by section 237 and notice of the seizure is registered before the first day of January, nineteen hundred and twenty-eight, in the book formerly kept under section 237 or is registered on or after the first day of January, nineteen hundred and twenty-eight, under the Registration of Documents Ordinance, any sale, conveyance, mortgage, lease, or disposition of the property seized, made after the seizure and registration of the notice of seizure and while such registration remains in force is void as against a purchaser from the Fiscal selling under the writ of execution and as against all persons deriving title under or through the purchaser."

It is argued for the appellant that as a purchaser from Thiagarajah she is a person " deriving title under or through the purchaser " at the fiscal's sale and that consequently section 238 makes " void " as against her (and in effect against Julius she being Julius' nominee) the conveyance by Julius to Lewis. Their Lordships do not agree.

As observed by the Supreme Court the words " all persons " in section 238 are words of the " utmost generality " and " are ex facie wide enough to include the judgment-debtor himself ". But the section has been designed and enacted to protect persons against the acts of the

judgment-debtor and not to protect or to benefit the judgment-debtor himself. The implication therefore arises that in this context "all persons" do not include the judgment-debtor. It is reasonable and just to hold that such an implication arises and the necessity for so holding is illustrated by the facts of this case. To hold that the judgment-debtor is rendered immune by section 238 from the consequences of his own act namely the conveyance by him to Lewis, would be to permit gross injustice because by so holding Julius who had sold a property and had had the advantage of the consideration would be enabled to evict his vendee (actually vendee's devisee). He would do so by taking advantage of a consequence of the non-disclosure by him to Lewis (whether deliberately or by inadvertence it matters not) of something he should have disclosed namely the decree and seizure in case 9041/S. If this disclosure had been made Lewis would without doubt have paid off the judgment debt or made some other arrangement before accepting the conveyance from Julius.

Their Lordships observe that in the case of *Anund Lall Doss v. Shaw* [1] the Board, dealing with a section of the Indian Civil Procedure Code which declared "null and void" a private alienation after a seizure in execution proceedings had been effected, thought it could not be "null and void against all the world including even the vendor". The language of the section was in many ways different from section 238 and the facts in the case were also different but the view expressed supports the view taken by their Lordships.

If, as held by their Lordships, section 238 does not render void as between themselves the deed of conveyance from Julius to Lewis there is no statutory provision which hinders the operation of the common law. Their Lordships are of opinion that the title passed by operation of law automatically from the appellant as Julius' nominee to the second respondent under the doctrine of the *exceptio rei venditae et traditae* at the moment that Thiagarajah transferred the property to the appellant. This doctrine and its development are discussed in a judgment of the Board delivered by Lord Phillimore in *Gunatilleke v. Fernando* [2]. Relying on the authority of Voet Book 21 Title 3 he there set out in terms appropriate to that case the basic principle relevant to the present case thus :—

> "under this exception the purchaser who had got possession from a vendor, who at the time had no title, could rely upon a title subsequently acquired by the vendor."

In the present case it might perhaps be suggested that it could not be said that Julius (at the time he executed the conveyance in favour of Lewis) had no title. It could be suggested that he had a title which he could not alienate. A reference to the authority relied on by Lord Phillimore shows that the *exceptio* is applicable to such a case. Voet Book 21 Title 3 Section 1 (Gane's translation) is to the following effect :—

> "When the right of an alienator is confirmed the right also of him to whom, if you have regard to the start of the matter, the alienation had been wrongfully made, is confirmed at the first moment of acquisition of ownership by the original vendor."

[1] *1872 Sutherland's Weekly Reporter p. 313.*
[2] *(1921) 22 Ceylon N. L. R. 385.*

Any " alienation wrongfully made " and not necessarily an alienation by a person without title is covered. Julius when he was under a prohibition against alienation made a wrongful alienation which was ineffective and the doctrine is applicable to his conveyance. It will also be seen that under the doctrine " at the first moment of acquisition " of title by Julius (under the deed in favour of his nominee) that title passed to the second defendant as Lewis' successor.

For the reasons which they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. As the respondents have not appeared there will be no order as to costs.

*Appeal dismissed.*