

1937

*Present : Poyser S.P.J. and Soertsz J.*

THIRUNAYAKAR *v.* THIRUNAYAKAR.

237—D. C. Kurunegala, 16,891.

*Public officer—Purchase of land by unregistered overseer—Breach of General Orders—Action to recover land—Contract not contrary to public policy.*

An unregistered overseer is not a public officer who is bound by the General Orders of the Government.

An action may be brought by a public officer to recover land purchased by him in the name of another in breach of the General Order which prohibits the acquisition of land without the sanction of Government.

**T**HIS was an action brought by the plaintiff to recover land, which he had bought with his own money in the name of the defendant. At the time the plaintiff purchased the land, he was an unregistered overseer in the Public Works Department. It was contended that the action was not maintainable as the plaintiff in acquiring the property without the sanction of Government was acting against the General Orders. The learned District Judge held that the plaintiff was not a public officer.

*H. V. Perera* (with him *N. E. Weerasooria*), for defendant, appellant.—The plaintiff is a public officer and as such he is prohibited from buying property without the permission of Government. He has acted contrary to the General Orders. An overseer has been held to be a public servant within the meaning of the Public Servants' Liabilities Ordinance, (*Weerasinghe v. Wanigasinghe*<sup>1</sup>). In buying property in the brother's name the plaintiff has been guilty of a fraud. The object was to prevent the Government from knowing that he was buying property. The evidence shows that the plaintiff was making large profits. The department would have dismissed him if it knew this. The purchase of property would have suggested that the plaintiff was making money out of the department, which he has tried to keep in the dark. The conduct of the plaintiff has been fraudulent. Counsel cited *Fernando v. Fernando*<sup>2</sup>, *Emie Nona v. Winson*<sup>3</sup>, *In re Great Berlin Steam Boat Co.*<sup>4</sup>, *Kerr on Fraud* 384.

*Croos da Brera* (with him *C. T. Olegasagarem*), for plaintiff, respondent.—The plaintiff is not a monthly paid servant. He is not therefore a public officer within the meaning of the General Orders. There is no absolute prohibition against the purchase of property by a Government servant. What is required is that the permission of the Government should be obtained. It is purely a departmental matter. There was no issue on the question whether the plaintiff made any profit improperly nor is there any evidence to show that. Even if the profit was improperly made the purchase of property in another's name does not for that reason become bad. There is nothing immoral or illegal in what the plaintiff has done.

Counsel cited *20 Halsbury* 761, 762 and *White & Tudors Leading Cases on Equity* 759.

*H. V. Perera*, in reply.

*Cur. adv. vult.*

March 24, 1937. POYSER S.P.J.—

The facts of this case are briefly as follows:—In 1922 the plaintiff, by deed P<sup>4</sup>, purchased a certain land with his own money but had the deed of transfer executed in the name of two of his sisters and two of his brothers of whom the defendant is one. The defendant only is sued as the sisters have already transferred their shares to the plaintiff and the other brother is now in a lunatic asylum.

Similarly, in 1928, by deed P 8, the plaintiff purchased another property the transfer of which was executed in favour of the defendant.

At the time the plaintiff obtained these transfers he was an unregistered overseer in the Public Works Department; it was for that reason he did

<sup>1</sup> (1932) 34 N. L. R. 185.

<sup>2</sup> (1932) 35 N. L. R. 154.

<sup>3</sup> (1933) 35 N. L. R. 221.

<sup>4</sup> 26 Ch. Div. 616.

not have the transfers executed in his own name, not wishing, to use his own words "the Government to know that I had bought property in my name."

The District Judge has accepted the plaintiff's evidence and entirely disbelieved the defendant. He consequently declared the plaintiff entitled to the lands claimed and ordered the defendant to transfer his rights on P 4 and P 8 to the plaintiff.

In the lower Court the point was taken that the plaintiff by acquiring property without the sanction of the Government did an act which was contrary to public policy and therefore could not ask a Court of Equity to rescue him from the consequence of such an act.

The Judge's finding on this point was that "the plaintiff did obtain the transfer in question in order to circumvent General Orders appertaining to public officers and concealed the fact that he was acquiring property", but he also found that the plaintiff was not a public officer and consequently did not reject his claim on this ground.

On appeal the only point taken was that the plaintiff had acted fraudulently and deceitfully, and therefore it would be against public policy to grant him any relief against his brother.

The basis of that argument is that the plaintiff was a public officer. The material orders are as follows :—

*General Orders (Sixth Edition)—152.* No Public Officer is allowed to acquire or be a part owner of any land in the Colony other than a garden or ground attached to his dwelling house, and not cultivated with a view to the sale of produce. He may not acquire or be a part owner in any concession in the Colony, nor within the same territory be the owner of house property other than a house for his own occupation.

153. General Order 152 is not binding on officers who are natives of Ceylon (including Burghers), but such officers must obtain the sanction of Government before they purchase land.

The trial Judge was of the opinion, having regard to the definition of public officer, in Order 322, that General Orders did not apply to the plaintiff.

General Order 322 occurs in Chapter VII. which deals with the Widows' and Orphans' Pension Fund, and is as follows :—

322. 'Public Officer' shall mean and include—

(1) Any person who holds any permanent office in the service of this Colony which is—

(a) Separately provided for on the Estimates, and

(b) Has been declared to be pensionable by notification published in the *Government Gazette*, and

(c) Who draws a salary from the Colonial Treasurer of Rs. 250 per annum or upwards, either in respect of one or of two or more such offices held permanently and conjointly.

I do not think this definition can be taken into account as regards Chapter IV. which deals with discipline. That Chapter, however, does appear to indicate that the orders therein set out only apply to salaried officers and the plaintiff is not a salaried officer but is paid a daily wage.

An unregistered overseer, as the plaintiff is, has been held to be a public servant entitled to the protection of the Public Servants' Liabilities Ordinance. See *Weerasinghe v. Wanigasinghe* ; but I do not think he is a public officer and therefore Rule 153 would not be applicable to him.

Assuming however that the plaintiff was a public officer I would still hold, for the following reasons, that the judgment appealed from should be affirmed. There is no evidence that the plaintiff defrauded or deceived the Government or any one else, his evidence is, and it is the only evidence on this point, that he was making a reasonable profit on his Government contract and he did not want the Government to know that.

There is no evidence that he improperly made a profit from his Government contracts, and consequently all the plaintiff has done is to disregard a general disciplinary order which has not the force of law.

The general principles in regard to the maxim "*In p. t. delicto potior est conditio defendentis*" which was invoked on behalf of the defendant are conveniently set out in *Pollock's Principles of Contract* (7th ed.), p. 379, and may be summarized for the purposes of this case as follows:— "No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

As previously pointed out the plaintiff's cause of action was not founded on an immoral or illegal act and he is entitled to succeed in his claim.

The appeal is dismissed with costs.

SOERTSZ J.—I agree.

*Appeal dismissed.*

---