Present : De Sampayo J. and Dias A.J.

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369—D. C. Galle, 16,178/S.

Sale of land subject to a mortgage—Mortgagee estopped from denying mortgagor's title.

A, B, and C (who were brothers) owned equal shares of a piece of land. B effected a mortgage of his share in favour of A, and in the bond his share was described as one-sixth share of the soil and of all the trees on it. During the pendency of the mortgage plaintiff bought the shares of B and C and paid A the amount due to him on the mortgage.

A claimed to be exclusively entitled to the second, third, and fourth plantations on the land.

Held, that A was estopped by reason of the mortgage bond from disputing B's right to the plantations.

THE facts are set out in the judgment of the Acting District Judge (F. J. Soertsz, Esq.):—

The plaintiff sues the first defendant to be declared entitled to a one-third of all the soil and plantations of a defined portion of the land Kerawakmullewatta.

The second and third defendants are his vendors, and have been added for the purpose of warranting and defending the title they conveyed to him.

The plaintiff's sheet anchor is document P 2. His reliance on it is whole-hearted, and he has even infected the Vidane Arachchi with his enthusiastic confidence in this document to the extent that this official has favoured us with his judicial views on the subject. "I consider," he says, "that the complainant's share is right, as there is no separation of any planter's share in the mortgage bond annexed to the bill of sale." I wish I could say as much. But, while I concede to P 2 very strong evidentiary value, I cannot hold that it operates as an estoppel and prevents the first defendant from denying plaintiff's title to one-third of the soil and plantations.

I admit the plaintiff has been influenced by this document P 2, and, perhaps, would even not have purchased the one-third if he did not feel satisfied, on the strength of that mortgage bond, that his vendees were entitled to one-third of the plantations as well, but yet I cannot hold that there is an estoppel. The words of section 115 of the Evidence Act are "When one person has by his declaration, act, or omission intentionally caused or permitted another person to believe a thing to be true . . . . neither he nor his representative shall be allowed . . . . to deny the truth of that thing." The word "intentionally" is crucial, and must be allowed full significance. The word is not "voluntarily," but "intentionally," and I think it will be far-fetched to say that when the first defendant took the mortgage bond P 2 from his brother in those terms, he intended

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to permit or cause the plaintiff or another person to believe the averment in the bond as regards plantations and to act upon that belief. No doubt, he has by his carelessness, indifference, or negligence brought about that state of things, but it cannot be said that he intended it.

The difference may be summed up by saying that the first defendant has caused the plaintiff to act in this manner, but without intending it.

I answer the second issue in the negative.

As I have already said, although P 2 does not operate as an estoppel, it serves as a strong piece of evidence in favour of the plaintiff, and the only question is, whether the first defendant has placed before me more cogent evidence in support of his case than P 2 affords against him. I think he has.

The question in dispute is, whether the second, third, and fourth plantations are common, or whether the first defendant is entitled to the planter's share thereof, and on that question the weight of P 2 is, I think, more than counterbalanced by the plaintiff's own document, P 4.

P 4 was read in evidence to establish the correctness of the soil share the plaintiff claimed, but it throws a flood of light on the controversy with regard to the plantations. Perhaps that was not noticed at the time P 4 was put in. In the case with which P 4 deals, the first defendant in this case was the fifteenth defendant, and the second and third defendants were the eighteenth and nineteenth defendants respectively, and the three of them and some others joined in filing one answer, and in stating in the ninth paragraph of that answer "that the fifteenth defendant (*i.e.*, first defendant in this case) planted the younger plantations in the said lot, and the said plantation consists of 80 coconut trees, 12 breadfruit trees, and 25 arecanut trees." This piece of evidence is at least as strong as P 2 on the other side, and the first defendant's case is further supported by D 1, a document of the year 1893, and by several other documents, as well as by the fact that the second and third defendants have been living for many years away from the village and are not at all likely to have had anything to do with these plantations.

I enter judgment for the plaintiff for one-third of the soil of first plantation, and Rs. 25 a year for his share of the produce which the first defendant has been in possession of. The planters' shares of second, third, and fourth plantations are excluded in favour of the first defendant.

The plaintiff, apart from the question of plantation, had to institute this action, as there seems to have been a substantial dispute as to the extent of his soil share, and I, therefore, award him half costs.

A. St. V. Jayawardene, for the appellant.

H. E. Garvin, for the respondent.

May 10, 1920. DE SAMPAYO J.—

The real dispute in this case is as to certain plantations on the land in question. The plaintiff sought to vindicate one-third share of the soil and of all the trees on the land which he purchased on April 6, 1918, from the second and third defendants. The first defendant would appear to have disputed his right both to the

share of the soil and of the plantations, but at the trial the dispute was confined to the second, third, and fourth plantations, which the first defendant claimed for himself. The District Judge decided in favour of the first defendant, over-ruling an objection founded on estoppel, and the plaintiff has appealed. We have only to consider the question of estoppel. It appears that the second and third defendants are brothers of the first defendant, and each of them was entitled to an equal share. In the year 1910 the second defendant effected a mortgage of his share in favour of the first defendant. In the bond his share was described as one-sixth share of the soil and of all the trees on it. This mortgage was in subsistence at the time of the purchase by the plaintiff, and, in fact, in the deed of sale he reserved a certain sum of money out of the consideration, with the view of paying the mortgage and redeeming the land. The plaintiff set up this circumstance as estopping the first defendant from disputing the right of the second defendant, and, necessarily, also the right of the third defendant, each to one-sixth share of the soil as well as of the plantations. The District Judge held, as a matter of fact, that the plaintiff was influenced by the terms of the mortgage bond, and would not have purchased the share if he was not satisfied on the strength of the mortgage bond that his vendees were entitled to one-third of the plantations as well as the soil. But he considered that the first defendant could not, in the words of section 115 of the Evidence Act, be said to have "intentionally" caused or permitted the plaintiff to believe what he did as to the right of his vendors. He gave a very strict construction to the word "intentionally" in the section of the Ordinance. That point has been the subject of more than one decision of this Court. Reference may be made to *Sadris Appu v. Cornelis Appu*[1] and *Stuart v Hormusjee*.[2] The word "intentionally" was fully discussed and considered in those cases with reference to certain judgments of the Privy Council; and, in the first of these cases, this passage occurs: "It is a principle of natural equity that when A allows another to hold himself out as the owner of A's property and a third person purchases it for value from the apparent owner in the belief that he is the real owner, A shall not be permitted to recover, unless he can prove that the purchaser had direct notice of the real title, or that there existed circumstances which ought to have put him on inquiry which, if pursued, would have led to a discovery of it." Now, the first part of that proposition is satisfied in this case by the finding of the District Judge that the first defendant did, in fact, cause the plaintiff to believe what he did, and there is no evidence, nor did the first defendant in any way attempt to prove, that the plaintiff, when he purchased from the second and third defendants, had notice of the real state of the title, or that there were circumstances which ought to have put him on an inquiry.

[1] *(1905) 8 N. L. R. 380.*

[2] *(1915) 18 N. L. R. 489.*

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As regards the word "intentionally," it was laid down that it was used in the Evidence Ordinance so as to bring the law of estoppel in India and Ceylon into line with the law of England on the same subject, and, accordingly, what was emphasized was not so much any express intention on the part of the person who makes the representation, but the character of his conduct which would naturally lead a reasonable man to believe a certain state of fact and to act upon it. The circumstances of the case quite show that the conduct of the first defendant was such that he must be taken to have intended any person dealing with his mortgagor to act on the belief that the mortgagor was entitled to the share mortgaged. It is true that in the case there is no specific evidence that in connection with the purchase the first defendant produced his mortgage bond and showed what he had, in fact, taken on mortgage. But the plaintiff had, according to the finding of the District Judge, held the inquiry necessary for the purpose of informing himself as regards the terms of the mortgage bond, and, finally, after he had made the purchase, he paid the first defendant the amount of the debt due on the bond and redeemed the mortgage. I think the District Judge was wrong in holding that the section of the Evidence Act was not satisfied by the actual circumstances of the case. I would accordingly modify the decree appealed from, and declare that the plaintiff is entitled to a one-third share, not only of the soil, but of all the trees on the land. I think the plaintiff is entitled to the costs of the action and of the appeal.

DIAS A.J.—

I entirely agree. The question is not so much whether the first defendant intended the plaintiff or any one else to act upon the mortgage bond, which the first defendant accepted from his brother in 1910 on the footing that the latter was entitled to a share of all the plantations also, but the question is, whether the plaintiff or any one else also did, in fact, act upon that representation in the bond and so altered his status to his prejudice. If so, I think an estoppel as defined in section 115 of the Evidence Act certainly arises. I agree to the order proposed by my brother De Sampayo.

Varied.