Dec. 20, 1910

Present : Hutchinson C.J. and Grenier J.

SAMARAWEERA *et al. v.* FERDINANDIS *et al.*

304—*D. C. Matara*, 4,932.

Donation—Prohibition against alienation—Fiscal's sale—Breach of condition.

A deed of gift contained the following clause: "That the property gifted shall not be leased at a time for a period more than seven years, and whenever it is needful to sell or mortgage the land gifted, if any of the donors be willing to buy for the real value, it should be given to him only, and not sell or mortgage to any outsider. That in case of a breach of the said conditions it is directed that we, the said donors, or our heirs, &c., shall be declared entitled to the land back again."

Under a writ against the donee the land was sold by the Fiscal.

In an action by the donors against the purchaser at the Fiscal's sale for declaration of their title—

Held, that the purchaser at the Fiscal's sale had acquired good title; a forced sale by the Fiscal could not be said to be a voluntary alienation, and could not be said to be a breach of the condition contained in the grant.

THE facts are fully set out in the judgment of Hutchinson C.J.

Vernon Grenier, for the first defendant, appellant, relied on *Wijemanne v. Schokman.*[1]

Bawa, for the plaintiffs, respondents.

Cur. adv. vult.

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The plaintiffs sue for a declaration of their title to an undivided share of a piece of land. They say that the land formerly belonged to the four plaintiffs and to the second and third and fourth defendants and the predecessors in title of the other defendants (except the first), all of whom, by deed dated June 12, 1897, joined in granting it by way of gift to S. B. Dingihamy, on condition that it was not to be leased for more than seven years and was not to be sold or mortgaged to any one by the donors, and that in the event of a breach of the said condition the land should revert to the donors; that Dingihamy accepted the gift and entered into possession, but fraudulently entered into a scheme to defeat the condition, and accordingly leased to the first defendant more than the portion to which she was entitled; that the lessee was resisted and brought an

[1] *(1910) 13 N. L. R. 301.*

action, when he was declared entitled to this land only ; and he then brought another action (presumably against Dingihamy) for damages by reason of the failure of the lessors to make good the whole of their lease to him, and obtained decree, and in execution thereof had this land sold and bought it himself. The plaintiffs denied that he obtained any right to the land by his purchase, and they now sue him for declaration of their title to their share (four-ninths) of the land and to recover possession from him. The first defendant denies that any conditions exist in the deed of gift to Dingihamy which justify the plaintiffs in seeking to set it aside, or that there was any breach of the conditions, or that he was party to any fraud ; he claimed the land under his Fiscal's transfer, and said that neither the plaintiffs nor the other defendants ever offered or expressed a wish to buy the land.

The condition in the deed of gift as translated in P 1 filed in the record is as follows : " That the property gifted shall not be leased at a time for a period more than seven years, and whenever it is needful to sell or mortgage the land gifted, if any of the donors be willing to buy for the real value, it should be given to him only, and not sell or mortgage to any outsider. That in case of a breach of the said conditions it is directed that we, the said donors, or our heirs, &c., shall be declared entitled to the land back again."

The issues settled were :—

(1) Was the Fiscal's sale a breach of the condition in the deed of gift, and if so, are the donors entitled to the property ?

(2) Was there a scheme on the part of the donee to defeat the deed ?

(3) Was there any valid restriction on alienation ?

The District Judge said that the purchaser at a Fiscal's sale is in the position of any other purchaser, and therefore the defendant (*i.e.*, the first defendant) has no title. He said that there was no direct evidence on the second issue, and he did not answer it, but of course it ought to have been answered in the negative. And he held that there was a valid prohibition of alienation, and he declared the plaintiffs entitled to four-ninths of the land.

In *Wijemanne v. Schokman*[1] there was a grant to Hendrick Perera subject to the following condition : " The said H. P., his heirs, executors, administrators, assigns, shall not alienate or assign the land or any part thereof without the consent of Government in writing for that purpose " ; under a writ against the heir of Hendrick Perera the land was sold by the Fiscal ; and the Court held that the sale was not a breach of the condition. We are bound to follow that decision. The terms of the condition in our deed are not quite the same as in that case ; the condition is that whenever it is needful to sell the land—and that can, I think, only mean whenever the donee

[1] *(1910) 13 N. L. R. 301.*

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or her heirs or assigns find it needful to sell—the donors shall have the first option to buy it. And a sale by the Fiscal is not a sale by the donee or her heirs or assigns, and is not a breach of the condition. In the same way it has always been held in England that a sale by the trustee in bankruptcy of the grantee is not a breach of a similar prohibition against alienation by the grantee.

The appeal must be allowed, and the action be dismissed with costs in both Courts.

GRENIER J.—

I agree to allow this appeal. A forced sale by the Fiscal cannot be said to be a voluntary alienation, and therefore there was no breach of the condition contained in the grant in question. The security afforded by purchase at a public sale by the Fiscal would be seriously endangered if the conveyance by the Fiscal is liable to be set aside by reason of such a prohibition against alienation as the deed of gift P 1 contains. The District Judge thought that a purchaser at a Fiscal's sale was in the same position as any other purchaser, and therefore the first defendant had no title under his conveyance. In certain circumstances, no doubt, the title that is conveyed by the Fiscal is as liable to be defeated as a title which is passed by a private conveyance. This would be so, especially in cases where the execution-debtor had no title, and the property of a person who had the title was the subject of sale. But that is not the same thing as saying that where in a private grant or conveyance the grantee is prohibited from voluntarily alienating the property conveyed, that the Fiscal can be asked not to lay his hand on the property by reason of such an injunction, or that his transfer in case the property is sold passed no title to the purchaser.

The distinction between a forced sale by the Fiscal and a voluntary alienation is a very appreciable one, and has always been recognized in our law. In the present case there seems to me every reason for giving effect to this distinction in favour of the first defendant.

Appeal allowed.