

*Present:* Wood Renton J. and Grenier J.

1911.

SULTAN *v.* SIVANADIAN *et al.*

329—D. C. Jaffna, 7,610.

*Partition—Certificate of sale under s. 8 of the Partition Ordinance—  
Conclusive effect—Secret trust.*

A certificate of sale granted under section 8 of the Partition Ordinance does not possess such a conclusive effect as to prevent a person from claiming the property sold on the ground of a secret trust between himself and the purchaser.

THE facts are fully set out in the judgment of Wood Renton J.

*van Langenberg* (with him *A. St. V. Jayewardene*), for appellant.

*Bawa* (with him *Balasingham*), for respondent.

*Cur. adv. vult.*

December 5, 1911. WOOD RENTON J.—

The defendant-respondent obtained judgment against one Ayiniappillai in D. C. Jaffna, 7,341, for the recovery of a sum of money due on a mortgage bond, and the land described in the plaint was seized in execution as the property of his judgment-debtor. The plaintiff-appellant claimed the property; the claim was dismissed; and the present action has been brought by the plaintiff-appellant, under section 247 of the Civil Procedure Code, to have the land seized in execution declared his property and released from seizure. No evidence has as yet been led, but the case for the plaintiff-appellant may be shortly stated thus. He alleges that the original owners of the land were Pathumma Nachchia, Vavu Sultan Nachchia, his own sister, and Mohammdu Ussan Mali Mohammdadu Lebbai. Pathumma Nachchia owned a half, Vavu Sultan Nachchia 88/96ths of a half, and Mohammdadu Lebbai, who is an uncle of the plaintiff-appellant, the remainder. Pathumma Nachchia brought a partition action No. 5,009, D. C. Jaffna, and in that action her half share was sold. The appellant says that it was bought by him with his money, but in the name of his sister Vavu Sultan Nachchia. The certificate of sale, under section 8 of Ordinance No. 10 of 1863, was executed in favour of and in the name of Vavu Sultan Nachchia. The appellant alleges that under the circumstances of this case Vavu Sultan Nachchia held the share in question on a secret trust in his favour. The 88/96ths share owned by Vavu Sultan Nachchia and another two lands were under a mortgage to Ramen Chetty at the date of the partition action in D. C. Jaffna, 5,009, the mortgagors being Vavu Sultan Nachchia, the plaintiff, and one Meera Saibo Mohammdadu Lebbe Marikar. The bond was put in suit, and judgment was

1911. obtained against the mortgagors. In order to pay off the judgment debt, the appellant borrowed from Ayiniappillai, who has been made an added party in the present action, a sum of Rs. 785, and with that he satisfied the judgment. Ayiniappillai, as a security for this loan, insisted upon a transfer in his favour of the three lands above mentioned, subject to a secret condition that the transfer was to operate only as a usufructuary mortgage, and that on repayment of the loan he was to execute a retransfer of the lands to the appellant. The transfer was effected by deeds Nos. 974 and 975 of August 8, 1908. The appellant was allowed to continue in possession of the lands, and in lieu of interest the rent was stipulated for by a notarial lease for a term of one year as regards one land and by a verbal lease for the other two lands. The notarial lease expired on August 23, 1909. In December, 1908, Ayiniappillai became indebted to the appellant in the sum of Rs. 1,250, and on the expiration of the notarial lease the property was released by an agreement between the appellant and Ayiniappillai from the encumbrance attaching to it in favour of the latter in view of the debt. The appellant alleges that from August 23, 1909, he has remained in possession of the property as owner, independent of Ayiniappillai, and he claims a declaration of title thereto, and prays that the land be released from seizure. The defendant-respondent and Ayiniappillai traverse all the material allegations in the plaint.

When the case came on for trial a variety of issues was framed, but the learned District Judge has so far dealt only with issues (1), (2), (3), and (4).

- (1) Was the plaintiff the owner of the land in question when the deed No. 974 was executed, or was Vavu Sultan Nachchia the owner ?
- (2) If he is not the owner, is he entitled to maintain this action ?
- (3) Can plaintiff rely on the agreement relied on in the 2nd paragraph of the plaint to prove title, as the same is not notorially executed?
- (4) Do the averments in the plaint disclose any title to the lands in question in the plaintiff?

He answers these issues as follows:—

Issue (1).—Vavu Sultan Nachchia, and not the plaintiff, was the owner.

Issue (2).—The appellant cannot maintain this action, inasmuch as, even if he succeeded in establishing the secret trusts in his favour in connection with the sale to Vavu Sultan Nachchia and the mortgage to Ayiniappillai, he could not establish such a title in himself at the date of seizure as would form a good foundation for his claim, or for an action under section 247 of the Civil Procedure Code when that claim had been dismissed.

Issue (3).—The appellant would be entitled to rely on the agreement referred to in paragraph 2 of his plaint, even although it is not notarially executed, if he first proved that the value of the land was in excess of the amount paid for it by Ayiniappillai.

Issue (4).—The averments in the plaint do not disclose any title to the lands in question in the appellant.

On these findings the learned District Judge dismissed the appellant's action with costs. In my opinion he ought not to have done so. If the appellant's case as stated in his pleadings is well founded; if, as the learned District Judge has rightly held, he is entitled to establish the existence of the secret trusts by oral evidence; and if he should, in fact, succeed in doing so, he will have proved a sufficient title to the property at the date of claim to make the present action maintainable. The decree of the Court holding that such trusts have been established will not create new rights which were not in existence at the date of seizure. It will be declaratory of rights with which the appellant was invested at the respective dates of the issue of the certificate of sale to Vavu Sultan Nachchia and the transfer to Ayiniappillai. I do not think that the conclusive effect given to a decree for partition or sale by section 9 of Ordinance No. 10 of 1863 can be extended to a certificate of sale granted under section 8. I do not think that Sir Joseph Hutchinson C.J., in the case of *Catherina Hamy v. Babahamy*,<sup>1</sup> when he said that the intention of the Partition Ordinance was to give an indefeasible title to the purchaser to whom the land was sold when the sale was affirmed and completed by the certificate of the Court under section 8, intended to say anything more than that the title of the purchaser was indefeasible as regards the estate that passed to him under the decree. Mr. Bawa argued that, whatever might be the position of Vavu Sultan Nachchia, as regards Pathumma Nachchia's half share bought in her name under the decree for sale in the partition action, the plaintiff-appellant could establish no secret trust as to the 88/96ths share of a half belonging to her in her own right. I do not think, however, that the Court is in a position to give an opinion on this point until the evidence has been gone into. I would set aside the decree of the District Court dismissing the plaintiff-appellant's action, and send the case back to the District Court, directing that, if within twenty-one days from the notification to the plaintiff-appellant by the District Court of the receipt of the record there, the plaintiff-appellant shall institute against Vavu Sultan Nachchia and Ayiniappillai the appropriate proceedings for the purpose of obtaining a declaration of the secret trusts on which he relies, and for the execution, if necessary, of conveyances of re-transfer of the land in dispute, the proceedings in the present action shall be stayed, pending the result of such independent action against Vavu Sultan

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Nachchia and Ayiniappillai, and that thereafter the present action shall proceed to trial and judgment in due course. If such independent action is instituted, the plaintiff-appellant shall be entitled to the costs of this appeal as against the defendant-respondent and the added party respondent in any event. All other costs will be costs in the cause. If, however, such independent action as above mentioned is not taken within the period indicated, the appeal will stand dismissed with costs.

GRENIER J.—

As the facts are fully stated in the judgment of my brother, I will not repeat them. There are two points, however, on which I should wish to say a few words. I think that it was open to the appellant to prove the secret trust he relies on in support of, and as establishing, his title. If his statement be true that he has been in possession of the property in question since August, 1909, as owner, independent of Ayiniappillai, then it seems to me that his assertion of title is not groundless. The appellant made his claim to the property when it was seized in execution, and at that time he had a title which, although it was not a paper title but one founded upon secret trusts, was still capable of proof by oral evidence. He should not be deprived of the opportunity of proving this title.

The case of *Catherina Hamy v. Babahamy*<sup>1</sup> was not, in my opinion, intended to go so far as to make a certificate of sale under section 8 of the Partition Ordinance exclusively operative in favour of the purchaser. The title conveyed by such a certificate is undoubtedly indefeasible, but there is nothing to prevent a person from claiming the property on the ground of a secret trust between himself and the nominal purchaser. Such a claim, if successful, will in no way challenge or defeat the title. It will only have the effect of substituting the real purchaser for the nominal one.

I agree to the order proposed.

*Sent back.*

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<sup>1</sup> (1907-8) 3 A. C. R. 33.