1952 *Present :* **Nagalingam A.C.J. and H. A. de Silva J.**

OLIVE HUGHES, Appellant, *and* PERERA *et al.*, Respondents

S. C. 169—D.C. Colombo, 5,481

Insolvency—Fidei commissum *created by last will—Sale by assignee of* spes successionis *—Vendee's right to institute partition action in respect of the fideicommissary property—Insolvency Ordinance (Cap. 82), s. 71—Different categories of property that vest in assignee*—Exceptio rei venditae et traditae—*Applicability to forced sales.*

One of the *fideicommissarii* in a *fideicommissum* created by last will was adjudicated insolvent and the assignee in insolvency sold to A. with leave of Court and by public auction the insolvent's *spes successionis*. Subsequently, after the death of the *fiduciarius*, the uncertificated insolvent sold his fideicommissary interests to B. In an action instituted thereafter by a successor-in-title of A. for the partition of the fideicommissary property—

Held, that the partition action was not maintainable as the assignee's sale of the *spes successionis* could not be said to have conveyed to the purchaser A. any title to the fideicommissary property. Proof that the insolvent was entitled to a *spes successionis* in respect of the land in question did not establish that the insolvent was entitled to the land itself within the meaning of section 71 of the Insolvency Ordinance.

Held further, that the acquisition of title by the insolvent after the death of the *fiduciarius* did not enure to the benefit of A., the purchaser from the assignee. The principle of *exceptio rei venditae et traditae* cannot apply to forced sales as distinct from private alienations.

Obiter : An uncertificated insolvent cannot deal with any immovable property that may have belonged to him prior to adjudication or even subsequent thereto but prior to the grant of a certificate of conformity.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *H. W. Jayewardene* and *D. R. P. Goonetileke*, for the sixteenth defendant appellant.

E. G. Wikramanayake, Q.C., with *Kingsley Herath*, for the plaintiff respondent.

Cur. adv. vult.

April 24, 1952. NAGALINGAM A.C.J.—

The sixteenth defendant in this action, which is one under the Partition Ordinance, appeals from the interlocutory decree entered by the learned Additional District Judge of Colombo directing a partition of the land, the subject-matter of the action, among the plaintiff and defendants, first to fourteenth, to the exclusion *inter alios* of the sixteenth defendant himself. The sixteenth defendant claims the share that has been allotted to the plaintiff and the sixth to the fourteenth defendants, and the contest in this case is between the sixteenth defendant on the one hand and the plaintiff and the sixth to the fourteenth defendants on the other.

2——J. N. B 20709-1,592 (10/52)

All these parties derive their title from the same source, and the question for decision is who has, if any, the superior title—the sixteenth defendant, or the plaintiff and the sixth to the fourteenth defendants.

For the purpose of this appeal it is only necessary to consider the following facts: One Johannes Pieris by last will P15 of 1919 devised the land in question to his wife Mary, "subject to the condition that she shall not be entitled to sell or mortgage the same or any part thereof during her lifetime and after her death the same shall devolve on her and my seven children . . . . (the names are set out) . . . . in equal shares."

Johannes Pieris died in 1933, leaving him surviving his wife and six children, one child having predeceased the testator.

The contest relates to the interests of Wilfred, one of the surviving children. Wilfred was adjudicated insolvent on April 11, 1938, during his mother's lifetime. With leave of Court obtained the assignee appointed in his insolvency proceedings caused the interests of the insolvent to be sold by public auction and at that sale one Edward became the purchaser, and conveyance P20 of 1943 was duly executed in his favour. Edward's interests under this deed have devolved on the plaintiff and the sixth to fourteenth defendants. The widow died on December 3, 1946, and two days after her death Wilfred by deed 16 D1 conveyed a $\frac{1}{6}$ share of the land to the second defendant, who by deed 16 D2 of May 18, 1948, conveyed that interest to the sixteenth defendant-appellant. Wilfred was refused a certificate and is an uncertificated insolvent or, to use the English phraseology, an undischarged bankrupt.

While the sixteenth defendant impugns the validity of the conveyance P20 of 1943 executed by the assignee, the plaintiff in turn challenges the validity of the conveyance 16 D1 executed by the insolvent. The assignee's deed is attacked on the footing that the assignee being a creature of the Statute cannot exercise powers that are not vested in him by the Ordinance and that the power to sell immovable property that is conferred on an assignee by the Ordinance is limited to such property as could be said to have vested in the assignee prior to the sale by him and that as both at the date of the sale and the execution of the conveyance by him no right, title or interest of the insolvent had vested in him, the deed was inoperative to convey any title to the purchaser. The insolvent's deed 16 D1 is said to be ineffective to pass title for the reason that the insolvent having been an undischarged bankrupt at the date the conveyance was executed by him his title, if any, to the property would have vested by operation of law on his assignee and he would have been incompetent to execute a transfer of that title.

The validity of the insolvent's deed may be disposed of at once. It was said that it was unnecessary on this appeal to go into the question of its validity, for if it were shewn that the plaintiff had no interest in the land, then the action would have to be dismissed, and it would be futile in that event to enter upon a consideration of the sufficiency of the deed to pass title. This, no doubt, is a proper view, but I cannot refrain from making the observation *quantum valeat* that it is too well established a proposition of law that an uncertificated insolvent cannot

deal with any immovable property that may either have belonged to him prior to adjudication or even subsequent thereto but prior to the grant of a certificate of conformity, that it could be contended with any degree of success that 16 D1 is an effective deed of transfer.

I now turn to address myself to the problem whether the assignee's deed can be said to have conveyed a good title to the purchaser. This question involves a consideration of the terms of section 71 of the Insolvency Ordinance which deals with the different categories of property that can be said to vest in an assignee upon the adjudication of an insolvent.

The section in the first place draws a broad distinction between (*a*) property that may belong to the insolvent at the date of the adjudication, and (*b*) property that the insolvent may become entitled to subsequent to the date of the adjudication but prior to the grant of the certificate of conformity. The nature, character and quality of the property of an insolvent that vests in the assignee at the date of adjudication of the insolvent is described by this section as " all lands in this Island to which any insolvent is entitled and all interest to which such insolvent is entitled in any such lands and of which he might according to the laws of the Island have disposed ". The clause, " and all interest to which such insolvent is entitled to in any such lands ", refers to an interest in the land short of full dominium such as a usufruct or a leasehold, and as any discussion relating to the dominium of a land would apply to the lesser interest, no further notice need be taken of this clause, particularly as such a course would conduce to greater clarity of thought.

The question then narrows down to a determination of what the section refers to as " all lands to which any insolvent is entitled and of which he might according to the laws of the Island have disposed ". Two essentials are postulated before a property could be said to vest in the assignee. The first is that it should be property to which any insolvent is entitled ; the second is that the property must be capable of being disposed of by the insolvent according to the laws of the Island. It is needless to emphasise that proof of the existence of one of the essentials without proof of the other would be wholly inadequate. It is to be noted that in regard to the first essential there must be proof that the insolvent *is entitled* to the land. The words, " is entitled ", are perfectly plain in their meaning and shew that the property should belong to the insolvent *in praesenti*, that is, at the date of the adjudication, not that the property could become vested in the insolvent at a future date. It may be useful to contrast at this stage the language used in respect of the first essential with the language used to describe the second broad category, to which reference has already been made, relating to property that the insolvent may acquire after his adjudication but prior to his obtaining a certificate. The words there are, " all such lands in this Island as he *shall* purchase, or as *shall* descend, be devised, revert to or come to such insolvent before he shall have obtained his certificate ". It will be seen that into this category fall all property that the insolvent may become possessed of after the date of his adjudication but prior to his obtaining the certificate, so that while in regard to the first category

emphasis is laid on property that is already vested and in possession of the insolvent, the feature accentuated in regard to the second category is that it is property to which the insolvent is not entitled to and not in possession of at the date of adjudication but becomes entitled to or acquires after his adjudication.

Now, what was the nature of the right or title of the insolvent to the land in question at the date of his adjudication ? He had a fideicommissary interest in the land under the last will of his father. It has been settled by a long series of decisions of this Court, and the contrary has not been contended for, that the interests of a fideicommissary under a last will as distinct from those under a deed *inter vivos* is merely a *spes successionis* and one which on his death does not devolve on his heirs. But it is said on behalf of the plaintiff that even a *spes successionis* is a species of property which can be disposed of and can be effectively transferred. This contention, there can be little doubt, is in itself a sound one. Nathan [1] enumerates various kinds of property that are capable of being sold and bought :

> " The first requirement of sale, then, is merx, a thing capable of being sold and bought freely. The thing may be movable or immovable, corporate or incorporate, existent or non-existent, certain or uncertain."

And under this definition he includes the sale of a *spes*, and he explains the point thus :—

> " If there is an agreement for the sale of certain produce, in other words, the hope or expectation (spes) of produce, the sale will hold good, for it is quite allowable to sell an expectation (spes) as for instance of a catch of fish, the spes taking the place of the thing."

Nathan bases his statement of the law upon Voet [2]. Berwick in his translation appends a note to section 13 :—

> " The word res (which he uses as the equivalent of merx) includes things non-existing as well as things existing and all res may be sold which are commercible. And in the case of future fruits the sale is considered as made *iam tunc* when they come into existence. There may even be a sale *sine re* as when a chance is sold, for example, the chance of a take of fish or game or largess thrown to the crowd, even though nothing should be caught or secured."

But where an expectation or chance is sold, it must be remembered that what is sold is not the subject of expectation or chance as, in the illustrations already referred to, not the fish or game or largess, but the expectation or chance of a taking of fish, game or largess. In other words, the *spes*, chance or expectation is the subject of the sale, but on a sale of the *spes*, where there is in fact a take of fish, game or largess, the

[1] *1st ed. Vol. 2 p. 698 sec. 851.* [2] XVII. I. *Secs. 13 to 21.*

property in the fish, game or largess is transferred. I think, therefore, the distinction is clear that on a sale of a spes what is sold is the mere expectation or chance and not the article which is the content of the expectation or chance ; so that by establishing that a *spes* can be the subject of a sale, one does not establish the proposition that the content of the spes is something in existence.

It would therefore follow that the proof that the insolvent was entitled to a *spes successionis* in respect of the land in question does not establish that the insolvent was entitled to or possessed of the land itself. If, therefore, proof of the right to sell the *spes successionis* is insufficient to establish that the insolvent was entitled to the land, what then is the test that could be applied to determine whether a person " is entitled " to a property ? The test suggested at the argument was whether the property would pass on his death to his heirs. This would appear to be a fairly satisfactory test, although I am not prepared to say that as at present advised it must apply to all cases without exception. It certainly would cover a large multitude of cases that one can readily think of and would include even the case of fideicommissary interests created by deed *inter vivos*. Judged by this test, the case of a *spes* would fail.

The conclusion I reach, therefore, is that when the assignee purported to sell the interests of the insolvent he sold no right or title of the insolvent to the land, for the insolvent was not entitled to any at the date of his adjudication and the deed of conveyance executed by the assignee conveyed no title to the purchaser.

On the mother predeceasing the insolvent, there can be little doubt he became entitled to a $\frac{1}{6}$ share in the land, and this would have vested in the assignee, and if the assignee thereafter sold and conveyed the property such a conveyance would pass good title to the purchaser. Even now, there is nothing to prevent an assignee appointed in the insolvency proceedings from selling the insolvent's share for the benefit of creditors, for what would then be sold would not be merely a *spes* but the share of the land itself.

Mr. Wickremenayake advanced another contention in the alternative, relying upon the Roman-Dutch Law plea of *exceptio rei venditae et traditae* that the acquisition of title by the insolvent after the death of his mother enured to the benefit of the purchaser from the assignee, and relied upon the well known cases of *Rajapakse v. Fernando* [1] and *Gunatilleke v. Fernando* [2]. Both these are cases of private alienation and not sales in execution or forced sales. In the case of *Gunatilleke v. Fernando* [2] Lord Philimore expressed the view that under the Roman-Dutch Law, unlike in the case of the English Law, the doctrine of the subsequent acquisition of title enuring to the benefit of the earlier purchaser was not based upon estoppel, but that the question under the Roman-Dutch Law was what was the property purported to be conveyed, and that on all principles of construction the recitals could only be looked at for the purpose of assisting the Court to arrive at the determination of the actual effect of the conveyance.

[1] *(1920) 21 N. L. R. 495.*

[2] *(1921) 22 N. L. R. 385.*

Ordinarily, in a private alienation there is almost invariably a covenant to warrant and defend the title conveyed, and even if there be no express covenant, the law implies one, and the vendor is under an obligation to warrant and defend the title conveyed by him ; and if he had conveyed the property without title, then if he acquires title subsequently by virtue of the implied or express warranty, he is bound to make good the title. In the case of an execution sale, there is no such warranty. It is only necessary to illustrate this point by reference to the two deeds in question. In the deed 16 D1 of the insolvent there are clauses undertaking to warrant and defend the title conveyed, but in the assignee's deed P20 there is a total absence of any warranty clause.

In sales held under execution, the principle is the same in regard to sales under the Insolvency Ordinance, all of which sales come under the category of forced sales, no warranty of title can be even implied though there be no express clause negativing an undertaking to warrant and defend the title ; so that the Fiscal or assignee cannot be called upon to implement or perfect the title conveyed, which would appear to be the basis of the exception under the Roman-Dutch Law. The principle, therefore, of the *exceptio rei venditae et traditae* cannot apply to such sales. The case of *Stuart v. Senanayake* [1] also supports this view.

For the foregoing reasons I hold that no title passed on the assignee's conveyance P20. The plaintiff has no interest in the land and is not competent to institute this action.

I therefore set aside the judgment of the learned District Judge and dismiss the action with costs both of appeal and of the lower Court.

H. A. DE SILVA J.—I agree.

Appeal allowed.