1938 *Present :* **Maartensz and Keuneman JJ.**

DIAS *v.* ALAHAKOON *et al.*

38—D. C. (Inty.) Galle, 33,457.

Movable property—Deed of sale—Right to a retransfer—Sale in execution—Roman-Dutch law.

A right to a retransfer reserved to a vendor in a conveyance gives rise to an action *in personam* under the deed.

Where such a right is sold in execution, it must be regarded as movable property for purposes of execution proceedings.

BY deed No. 630 of October 6, 1934, the defendant-respondent sold certain immovable property to Porolis de Silva : Under the conveyance, a right of retransfer was reserved to the vendor subject to certain conditions. This right was seized and sold in execution against the defendant and purchased by the appellant. On an application to set aside the sale, the District Judge held that the interest sold was immovable property and that the seizure and sale not being in accordance with the provisions of the Civil Procedure Code, the sale was void.

N. E. Weerasooria (with him *A. E. R. Corea*), for purchaser, appellant.—What was sold was the defendant's right to obtain a retransfer of a property sold by him under P 1. It was sold as movable property. The sale was attacked by the defendant on various specified grounds. On all these grounds the District Judge has held in my favour, but has set aside the sale merely on the ground that the right sold was not movable but immovable property. Assuming that he was right in so holding, a sale cannot be set aside on a ground not stated in the petition. See section 282 of Civil Procedure Code. The defendant sought relief under this section.

[MAARTENSZ J.—If the property was sold as movable, how could he have applied, under section 282, which refers to immovable property?]

Section 282 is certainly inapplicable.

The defendant was perfectly aware of the mode of seizure and manner of sale. After he had acquiesced in the proceedings which treated the interest sold as movable property, he could not subsequently question their validity. See *Samarasinghe v. Samaradewakere* [1], which follows the Privy Council decision in *Arunachalam v. Arunachalam* [2].

What the defendant had under P 1 was an action *in personam*. We relied on *Arnolis Appuhamy v. Harmanis Kalotuwa* [3], and the authorities cited there showing the distinction between rights *in rem* and rights *in personam*.

[MAARTENSZ J.—If the right to retransfer can be assigned only notarially because it is an interest in immovable property, why should it be any the less an interest in immovable property if it is sold in execution?]

I am seeking to distinguish between immovable property as such and a right relating to immovable property. There is no definition of immovable property in the Code, and we have to refer to the Roman-Dutch law

[1] *(1930) 11 Ceylon Law Rec. 13.* [2] *(1888) I. L. R. 12 Mad. 19.*
[3] *(1926) 8 Ceylon Law Rec. 110.*

for definition. *Arnolis Appuhamy v. Harmanis Kalotuwa* (*supra*) is in my favour. See also *2 Maasdorp, p. 5* (*5th ed.*), and *Walter Pereira's Laws of Ceylon, p. 282* (*2nd ed.*)

[MAARTENSZ J.—*Karuppen Chetty v. Silva et al.*[1], which deals with the sale of a lessor's interest in a lease, may help you.]

[KEUNEMAN J.—*Silva v. Selohamy et al.*[2] deals with the procedure applicable to the setting aside of a sale of movable property?]

Yes, it has to be by way of summary procedure, and substantial damage has to be proved by the petitioner. The District Judge has expressly held that there was no substantial damage.

N. Nadarajah (with him *U. A. Jayasundara*), for defendant, respondent.—What is important is the agreement in P 1. In that deed, the defendant transfers a land to Prolis who in turn stipulates about retransfer to defendant or his heirs, executors or administrators (not to assigns). This agreement comes within the ruling in *de Silva v. de Silva*[3]. The convenant agreed to in P 1 was obviously one which ran with the land. The vendor has also a right to call upon the vendee for a retransfer. He is in the position of a mortgagor, and therefore an interest in immovable property is involved. See *Berwick's Translation of Voet, p. 491*, which is followed in *Arnolis Appuhamy v. Harmanis Kalotuwa* (*supra*).

[MAARTENSZ J.—What is it on the face of the document? Is it a *jus in rem* or a *jus in personam*?]

2 Maasdorp, p. 5 (*2nd ed.*) deals with the distinction. See also *Misso v. Hadjiar*[4] and *2 Maasd. p. 14.*

The best test of the immovable character of the defendant's interest in the property sold is that a transfer of it has to be notarially executed. The equity of redemption to a mortgage has been held to be immovable property—*Parashram Harlal v. Ganesh Porgaumkar*[5] and *Saminathen Chetty v. Vander Poorten*[6].

The procedure adopted, although section 282 of the Civil Procedure Code may be inapplicable, can be justified under section 344—*Annamalay Chetty v. Sidambaram Chetty*[7]; *Muttiah v. Fernando*[8].

N. E. Weerasooria, in reply.—The passage in *2 Maasd., p. 14*, merely says that if a person has a real right, certain consequences follow. The question is whether there is a real right here. *Parashram Harlal v. Ganesh Porgaumkar* (*supra*) is not applicable in Ceylon where the law of mortgage is different from that of India. In the present case the defendant will have a *jus in rem* only if he has already clothed himself with the legal title.

Cur. adv. vult.

July 1, 1938. KEUNEMAN J.—

Under decree in this case the interest of the defendant-respondent under the deed P 1 No. 630 of October 6, 1934, was seized and sold on May 13, 1937, and was purchased by the appellant for the sum of Rs. 315. P 1 was a sale of the immovable property described in the schedule to that deed for the sum of Rs. 750 by the defendant to Porolis de Silva, and contained a proviso whereby on the payment of Rs. 750 on or before

[1] *(1916) 1 A. C. R. 113.*
[2] *(1923) 25 N. L. R. 113.*
[3] *(1937) 9 C. L. W. 61.*
[4] *(1916) 19 N. L. R. 277 at 278.*
[5] *(1895) I. L. R. 21 Bomb. 226.*
[6] *(1932) 34 N. L. R. 287.*
[7] *(1931) 33 N. L. R. 277.*
[8] *(1893) 2 A. C. R. 86.*

August 10, 1937, together with interest at 15 per cent. and on the preparation at the vendee's expense of a deed of retransfer and on written notice the vendee undertook to retransfer the premises to the defendant. What was seized under the decree was " the right to retransfer in favour of the judgment-debtor reserved in deed of transfer No. 630 of October 6, 1934 ".

The defendant sought to have the sale set aside on various grounds. On most of these grounds the learned District Judge held in favour of the appellant, and there is no occasion to disturb his finding on the facts. In particular he held that the defendant had not suffered substantial loss or any loss whatever. But the learned District Judge held further that the interest of the defendant which was sold was immovable property, and that execution proceedings had been taken under the sections of the Civil Procedure Code relating to movable property and not those relating to immovable property—in particular (1) that the full purchase price was demanded and not merely a deposit, (2) that the sale was held at the Fiscal 's Office and not on the land itself, (3) that the seizure and advertisement of the sale were not in accordance with the provisions relating to immovable property. The learned District Judge held that these were illegalities which rendered the sale void. The purchaser appeals from this order.

The first matter argued for the appellant was that the sale could not be set aside because the defendants had suffered no loss or damage. This would have been the case if the objection had related to " irregularities " under section 276 or section 282. Here if the learned District Judge is right in holding that the interest sold consisted of immovable property, the failure to have recourse to the procedure laid down for seizure and sale of immovable property would have been, I think, not merely an irregularity but an illegality, and I think the application to set aside the sale would have been, not a proceeding under section 276 or section 282, but a proceeding under section 344. I think that the argument on this point fails.

The next matter argued for the appellant was that the right to obtain a retransfer of the immovable property under P 1 was in fact movable property, and that the seizure and sale were correctly made. The Civil Procedure Code itself contains no definition of the terms "movable property " or " immovable property ". We must accordingly resort to the Roman-Dutch law in order to determine the nature of the property seized and sold.

Voet deals with *pactum de retrovendendo* 18.3.7—(see the translation in *Berwick's Voet at p. 48*), as follows :—" A vendor desiring to recover the thing under such a pact may either sue by the personal action " *ex vendito* " or by the " *actio praescriptis verbis* " . . . . Plainly the *rei vindicatio* is not available to a vendor in this case, for only an obligation to a performance (*obligatio ad factum*), viz., to a *retrovenditio* or resale, is embraced in the pact sued upon ; unless it has been agreed that on the price being restored within a certain time, " *res inempta sit* " " the thing is to be deemed as not purchased " or " *venditor rem recipiat* " " the vendor is to have the thing back, for in such case the vendor may elect whether he will vindicate the thing itself after offering the price, or prosecute his claim by the *actio venditi* ".

Berwick's comment on this passage is illuminating: "The '*vindicatio rei*' or action *in rem* lies for recovery of the thing itself specifically, when the plaintiff has a right of ownership or *jus in rem*. The '*actio venditi*' an action *in personam*, founded on contract, is a proceeding directed against the defendant personally, wherein he is condemned to fulfil the 'obligation', *i.e.*, personal contract he has incurred to make delivery of the thing and on failure to pay damages".

In *Arnolis Appuhamy v. Haramanis Kalotuwa*[1] Maartensz J. held on the strength of these authorities that in the case of the right to a retransfer of immovable property under a deed, the seizure of the right, title, and interest of the plaintiffs in the land in question did not operate to convey any interest in the land. What should have been seized and sold was the plaintiff's interest in the deed, and the Fiscal's transfer should have taken the form of an assignment of the agreement to the purchaser.

On application of these authorities to the facts of the present case, it is clear that the defendant had no action *in rem* for the recovery of the land. All that he had was the *obligatio ad factum* (to use the language of Voet), and the only action he had was one *in personam* based upon his contractual rights under P 1, and that this was the right which could be seized and sold under the decree.

The further question remains whether this right was in its nature movable or immovable. On this point there is the authority of *van der Keessel Select Theses, Book 2, chap. 1, sec. 14, para. 178-179.* The translation of this is to be found in *Lorensz's van der Keessel at p. 59.*

"178. By the law of Holland . . . . incorporal things, where the law or the will of the owner has given no direction to the contrary, are not comprehended under movables or immovables as in the case of legacies, agreements and mortgages.

"179. But when it becomes necessary to refer them to one or other of these classes, then praedial servitudes and actions *in rem* should be considered as immovables, and actions *in personam*, although for the recovery of immovable property, or though immovable property may have been mortgaged for the debt, should be reckoned as movables".

This passage has been incorporated by Walter Pereira in his *Laws of Ceylon (2nd ed.) p. 82.*

Maasdorp (*Institutes of South African Law, 5th ed., p. 5*) on the authority of this passage in *van der Keessel* and of *Voet 1.8.20* and *Schorer Note* 55 states:—

"A similar distinction also applies to actions, which are either personal actions, that is actions *in personam*, or real actions, that is, actions *in rem*. A personal action is regarded as a movable, even though it may aim at acquiring the ownership of a thing, and that whether the thing is movable or immovable, for the action is based not upon a *jus in rem* or real right to the thing itself, but upon a *jus in personam* or personal claim against the person sued. An action *in rem* on the other hand, being based upon the *jus in rem* or real right over or to a particular thing, will vary in its nature according as it aims at movable or immovable property, being movable in the former case and immovable in the latter".

[1] *8 Ceylon Law Rec. 110.*

I think the reference should be to *Voet 1.8.21* which runs as follows :—

" De actionibus quamvis multis placuerit, eas conditione rei ad quam tendunt aestimandas esse, atque adeo tendentes ad rem mobilem mobilibus ad rem vero immobilem immobilibus esse annumerandas . . . . Juris tamen rationibus convenientius arbitror, inter actionis in rem & in personam distinguendum esse. Si enim in personam actio sit, mobilem eam judicandum puto, sive ad rem mobilem sive ad immobilem ea tendat; sive ad impetrandum rerum mobilium immobiliumve dominium, sive ad usum earumdem aut simile quid obtinendum, comparata sit, veluti emti venditi, locati conducti, commodati, &."

I have already held that what the defendant had was an action *in personam* under the deed P 1. I further hold that this right was movable property. It follows that as the procedure adopted in this case was that relating to movable property, the seizure and sale in this case were correctly effected and there has been no irregularity or illegality. The learned District Judge rested his finding on a passage in *Chittaley's Civil Procedure Code* to the effect that an equity of redemption to a mortgage has been held in India to be immovable property and the learned District Judge considered that the present right was similar. A decision with reference to a right under a system of law which is different to the Roman-Dutch law can be of little assistance to us. The rule in India depends on the conception which the Indian law shares with the English law that an equity of redemption is regarded as an estate in the land, *vide Parashram Harlal v. Govind Ganesh Porgaumkar*[1]. In this case we are concerned with the Roman-Dutch law, and the English conception of estates in land has no place there.

I set aside the order appealed from of January 24, 1938, and confirm the sale of May 13, 1937. The appellant will have the costs of the inquiry and of the appeal.

MAARTENSZ J.—I agree.

Appeal allowed.