Nov. 29, 1910

Present : Wood Renton J.

CARUPPEN CHETTY *v.* WIJESINGHE.

320—*C. R. Matara,* 5,884.

Estoppel—Fiscal's sale—Owner of land failing to notify his title to the purchasers—Registration of deed.

Under a decree obtained by the plaintiff against the respondent and others as executors of the last will of one W, the plaintiff seized the land in dispute as property of W and purchased it himself.

The defendant, who had a registered transfer in his favour, was present at the Fiscal's sale, but deliberately refrained from notifying his title to the purchaser.

Held, that the defendant was estopped from setting up his title as against the plaintiff, and that the fact of registration did not afford protection to the defendant, as he had fraudulently concealed his title.

A man who, having a charge or encumbrance upon a property, stands by and allows another to advance money on it, or, for that matter, to buy it under the impression that it is unencumbered, knowing that the latter is going to advance money, is estopped from setting up that interest against the title of the person whom he has deceived.

THE facts are set out in the judgment.

H. A. Jayewardene, for the appellant.

A. St. V. Jayewarddne, for the respondent.

November 29, 1910. WOOD RENTON J.—

This is an interesting case, and it was well argued on both sides. The plaintiff-appellant claims a declaration of title to an undivided seven-tenths share of a garden, which is described in the plaint. The property admittedly belonged to one Deonis Wijesinghe, who was indebted to the plaintiff-appellant in a sum of Rs. 526·25 on a promissory note. Wijesinghe died leaving a last will, which was admitted to probate in case No. 1,514 of the District Court of Matara. The respondent is a son of Wijesinghe, and is one of the executors of his will. The appellant sued the respondent and his co-executor for the debt due to him by Wijesinghe in case No. 4,326 of the District Court of Matara. He obtained judgment and issued writ, and a seven-tenths undivided share of the land was sold by the Fiscal in execution and purchased by the appellant, who obtained his Fiscal's certificate. The respondent was present at the sale, but made no claim to the land, and said nothing to indicate that he had any title to it. The Fiscal's transfer in favour of the appellant is dated May 3, 1909. At the date, however, of the Fiscal's sale to the appellant the respondent had himself acquired title to the land under a deed of transfer dated October 23, 1908, and registered on February 18, 1909. That deed was obtained under circumstances which are fully stated in the judgment of the Commissioner of Requests, but which I do not think it is necessary for me to set out in this judgment, inasmuch as the appeal was argued before me solely on the question as to whether or not the respondent was estopped from relying now on his title under the deed dated October 23, 1908, by his omission to give notice of his claim to the property to the appellant at the time of the Fiscal's sale. The learned Commissioner of Requests holds on the evidence and I am not prepared to say that his finding on this point is wrong—that the respondent's silence on the occasion of the sale to the appellant was due to a deliberate intention on his part to deceive the appellant for his own emolument. The Commissioner of Requests holds that, as the respondent in his personal capacity was not a party to case No. 4,326 of the District Court of Matara, and as, further, he merely stood by and permitted the appellant to purchase the property, he is not legally estopped now from setting up his own paper title, however dishonest his behaviour may have been. He has accordingly dismissed the appellant's action, but without costs, to mark, I suppose, his reprobation of the respondent's

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conduct. I am glad to be able to come to a different conclusion Section 115 of the Evidence Ordinance does not enact as law in Ceylon anything different from the law of England on the subject of estoppel (*Ameer Ali*, 4 *ed.*, *p.* 643). It is old and clear English Law that a man who, having a charge or encumbrance upon a property, stands by and allows another to advance money on it, or, for that matter, to buy it under the impression that it is unencumbered, knowing that the latter is going to advance money, is estopped from setting up that interest against the title of the person whom he has deceived (see *Troughton v. Gitley*,[1] *ex parte Ford*[2], *Ramsden v. Dyson*[3], and *C. P. Nundo Kumar Nasker v. Banomali Gayan*[4]). That principle has been applied even in the case of a stranger to the transaction. Here the respondent was something more than a stranger. As one of the executors of Wijesinghe's will, he was himself a party to the action in execution of the decree in which the property was sold to the appellant. The case of *Proctor v. Bennis*[5] does not help the respondent. The *ratio decidendi* there was that the defendants were aware of the existence of the plaintiff's patent, and that, therefore, there was no duty encumbent on him to warn them that articles which they were purchasing were an infringement of that patent. " If a purchaser," said Cotton L.J. (*S. C. at p.* 748) in the argument, and the same line is followed in the judgment, " knows of the existence of a patent, can you bring the case within the rules as to lying by ? Is not the principle this, that if I see a man acting in derogation of my rights without knowing that I have any, I am bound to tell him of them ; but if he knows I have rights, and puts an erroneous construction on them, is there any obligation on me to warn him ?"

Mr. A. St. V. Jayewardene, the respondent's counsel, argued that, even if the circumstances of the case were sufficient to form a basis for the doctrine of estoppel, the registration of the respondent's transfer excluded the application of that doctrine. The very cases cited by Mr. Jayewardene (see, for example, *Dhondo Bal Kristna Kanitkar v. Raoji*[6]) show, however, that registration affords no protection in cases of fraudulent concealment, the category to which the present case has been found by the Commissioner of Requests to belong. Mr. Jayewardene's last point was that there was nothing to show that the respondent's silence was the proximate cause of the appellant's purchase. One has merely, I think, to ask the question whether, if the respondent had disclosed his interest in the land, the appellant would have purchased it as if it were an unencumbered property, in order to see the untenable character of this contention. I set aside the decree under appeal, dismissing

[1] (*1766*) *Ambl. 633.*
[2] (*1876*) *1 Ch. D. 508*
[3] (*1866*) *L. R. I. Eng. and Ir. App. 129 and 140.*
[4] (*1902*) *I. L. R. 29 Cal. 871.*
[5] (*1887*) *36 Ch. D. 740*
[6] (*1895*) *I. L. R. 20 Bom. 29*

the appellant's action, and direct judgment to be entered in favour of the appellant, declaring him entitled to the share of the property claimed in the plaint, and ordering the ejectment of the respondent therefrom, with damages as agreed upon at Rs. 5 a year from May 19, 1910, the date of the filing of the plaint, till the appellant has been duly placed in possession of the property. The appellant is entitled to all the costs of the appeal and of the action. I will hear counsel on both sides further on the question, whether the respondent is entitled to any credit as regards his alleged debt against the estate.

I have now heard counsel on both sides on the question to which I referred at the close of my judgment on the main point in the case, as to whether the respondent is entitled to any credit as regards the alleged debt against the estate. As the evidence stands on the record before me there is no proof of that debt, and I think that the most equitable order to make on this point is to reserve the respondent's rights, whatever they may be, to prove that debt against the estate, or otherwise as he may be advised.

Set aside.