1939 *Present:* **Wijeyewardene J. and Jayetileke A.J.**

DE SILVA *v.* KANAKERATNE.

86—D. C. Galle, 35,558.

Sale in execution—Crown lease—Sale of leasehold in execution against lessee—No saleable interest—Right of purchaser to set aside sale—Caveat emptor—Civil Procedure Code, s. 284.

Where a person took on lease from the Crown property subject to the condition that in the event of the sale in execution of the leasehold interest against the lessee, the demise shall cease and the property shall return to the Crown,—

***Held,* that the lessee had no saleable interest in the property within the meaning of section 284 of the Civil Procedure Code and that a purchaser of the leasehold interest in execution was entitled to have the sale set aside under the section.**

Section 284 of the Civil Procedure Code furnishes a statutory exception to the principle of *caveat emptor*.

ON a decree against the defendant, the purchaser-appellant bought at a sale in execution a Crown lease held by the defendant. The relevant clauses of the lease are set out in the judgment. Later the purchaser discovered that he bought nothing as there was no saleable interest of his judgment-debtor in the land and moved the Court to set aside the sale. The learned District Judge following the judgment in *Jayawardene v. Jayawardene* [1], held that there was a saleable interest and dismissed the application. From this order of dismissal the purchaser appeals.

H. V. Perera, K.C. (with him *V. F. Gunaratne*), for the purchaser, appellant.—The Privy Council in appeal has reversed the judgment cited by the learned District Judge. The judgment is *Jayawardene v. Jayawardene* [2]. This is an application under section 284 of the Civil Procedure Code. Section 218 mentions the property which could be sold. Clause (*b*) of the lease creates a difficulty. A saleable interest is one which the judgment-creditor can sell, even though it may be claimed by someone else or may be avoided at the instance of someone; but if the sale is void, there is no saleable interest.

[JAYETILLEKE A.J.—What about the decision in *Wijemanne v. Schokman* ? [3]]

There the question arose between the purchaser and someone else. It was not to set aside the sale. The sale does pass rights if it is not set aside and if the alienation is not void. If the grant is made with a condition subsequent, then at the time of sale, there is a "saleable interest". If the judgment-debtor has any interest it could be sold. A clause with respect to forfeiture for failure to pay rent on a lease is on a different footing. There the forfeiture is due to the non-performance of the covenants but here there is a reversion on the happening of a certain

[1] *(1936) 39 N. L. R. 135.*

[2] *(1939) 14 C. L. W. 13.*

[3] *(1910) 13 N. L. R. 301.*

event. If the purchaser can show that the judgment-debtor cannot sell his interests voluntarily, he is entitled to ask the Court to set aside the sale under section 284 of the Civil Procedure Code.

J. E. M. Obeyesekere, for plaintiff, respondent.—Unless the Crown sets the sale aside, the sale is good. The Crown is in the same position as a private party. The purchaser gets the possession of the land after the Fiscal's sale. If the Crown wants to exercise its rights, it should sue the purchaser and the judgment-debtor to set aside the sale, and declare the lease to be forfeited, otherwise the Crown acts as the judge in its own case. The correspondence indicate that the purchaser had a preferential right to the lease. In that case he buys some interest even though it may be speculative. Though the judgment in *Jayawardene v. Jayawardene* (*supra*) was reversed by the Privy Council, the reasons given in the judgment are not questioned.

In *Perera v. Perera* [1], it was held that in a lease a clause of forfeiture would not operate automatically to terminate the lease. There must be an order of Court. See *Silva v. Dassanayake* [2].

The clause in the lease is not a total prohibition. The lessee has a qualified right of sale, which is a saleable interest under section 284. See *Sarkar (1928 ed.), vol. II., p. 1508; Durga Sundari Devi v. Govinda Chandra Addy* [3]. "No saleable interest" means no interest. The lease is only determined as a result of the sale. Saleable means the price which could be realized at the sale and does not mean the legal title to sell. Further the rule of *caveat emptor* would apply.

N. E. Weerasooria, K.C. (with him *L. A. Rajapakse* and *C. R. de Silva*) for the substituted defendants, respondents.—These defendants have no objection to the sale being set aside.

H. V. Perera, K.C., in reply.—Section 284 is applicable to a case like this. Section 218 permits the decree holder to sell the judgment-debtors' rights. The Court has a general supervision of the sale. If the purchaser finds that he did not obtain anything, he can move the Court to set aside the sale. An interest with a proviso against alienation cannot be sold in execution as held in *Diwali v. Apaji Ganesh* [4]. The case *Perera v. Perera* [5], cited by the Counsel for the plaintiff-respondent, holds that a forfeiture clause for non-payment of rent is intended as security for the due payment of rent. Where there is no title, *caveat emptor* will not apply.

Cur. adv. vult.

July 14, 1939. JAYETILEKE A.J.—

By an indenture of lease bearing No. 155 dated February 23, 1920, the Crown leased to the defendant an allotment of land called Uskekunagodakele, containing in extent 11 acres 3 roods and 30 perches in perpetuity subject to the following conditions:—

(a) The lessee and his heirs, executors, administrators and permitted assigns shall not sublet, sell, donate, mortgage or otherwise dispose of or deal with his interest in this lease, or any portion

[1] *(1907) 10 N. L. R. 230 at p. 231.*
[2] *(1899) 3 N. L. R. 248.*
[3] *(1882) 10 Cal. 368.*
[4] *(1884) 13 Bom. 342.*
[5] *(1907) 10 N. L. R. 230.*

thereof, without the written consent of the lessor, and every such sublease, sale, donation or mortgage without such consent shall be absolutely void.

(*b*) That if the interest of the lessee or his heirs, executors, administrators and permitted assigns be sold in execution of a decree against him or his aforewritten, then this demise and the privileges hereby reserved, together with these presents, shall forthwith cease and determine, and the lessor, his agent or agents, may thereupon enter into and upon the said land and premises, or any part thereof in the name of the whole, and the same have, re-possess, and enjoy as in his former estate, and the said land and premises shall forthwith revert to the Crown, without any claim on the part of the lessee or his aforewritten against the lessor for compensation on account of any improvements or otherwise howsoever.

The plaintiff sued the defendant in this action for the recovery of a sum of Rs. 2,000 and interest due upon a promissory note, and obtained judgment. A writ was issued to the Fiscal in pursuance of the decree and the right, title and interest of the defendant in the lease was seized. On or about November 4, 1937, the sale took place, and the appellant became the purchaser for the sum of Rs. 1,930. The appellant as purchaser paid one-fourth of the purchase price on the day of the sale and the balance three-fourths on November 27, 1937. On February 26, 1938, he made an application to Court that the sale be set aside on the ground that he discovered that the defendant had no saleable interest in the property. At the inquiry, he produced three letters, X 2, X 3, and X 6 which indicated that the Crown took up the position that no title passed to him. The District Judge dismissed the appellant's application on the ground that the defendant had a saleable interest in the property; and the appeal is from that order. The appellant bases his application on section 284 of the Civil Procedure Code. The section enables a purchaser to proceed by an application to set aside a sale on the ground that the person whose property purported to be sold had no saleable interest therein. The first point taken on behalf of the appellant was that the expression "saleable interest" means an interest which is capable of being sold by the judgment-debtor and not against him. I think this is too narrow a view to take of the meaning of this expression. I agree with the dictum of Straight J. in *Munna Singh v. Gajadhar Singh*[1] that the expression must be interpreted in the widest and most general sense, and as meaning in plain terms "nothing to sell". In the course of his judgment, Straight J. said : "I cannot suppose it was ever intended that a purchaser at an auction sale held under the authority of a Court, who buys a property as free from incumbrance, which subsequently turns out to be mortgaged up to its full value, can be said to have purchased what purported to be sold him, because it may be argued that he technically acquired the judgment-debtor's equity of redemption".

The alienation prohibited by condition (*a*) is restricted to voluntary alienations and not to necessary alienations. In *Wijemanne v. Schokman*[2]

[1] *I. L. R. 5. All. 577.*

[2] *13 N. L. R. 301.*

a condition somewhat similar to condition (*a*) was considered and it was held that the purchaser of the land at a sale in execution bought it subject to the condition as to inalienability. It follows from this judgment that if condition (*a*) stood alone, it could not be said that there was "nothing to sell". The next point taken on behalf of the appellant was that under condition (*b*) the property had to revert to the Crown the moment it was sold in execution, and that therefore it could not be said that the defendant had a saleable interest within the meaning of section 284. A stipulation is attached to the lease providing for the restitution of the property to the Crown if the interest of the defendant is sold in execution. Is that stipulation valid in law? The intention of the Crown in imposing that stipulation can be gathered from the terms of the indenture. An examination of the terms makes it clear that the Crown granted leases of this nature to persons who were able to clear and plant the land within a certain period and to pay the rent reserved in the indenture on the due dates. The object of the stipulation seems to be to prevent the property from passing into the hands of people who were not approved by the Crown. A stipulation of this nature must be regarded as one which adheres to the land and gives rise, not to a personal action, but to an *actio in rem*. Sande [1] says, "that there has been considerable controversy on the point whether, if the owner on the sale of his property makes a pact that the purchaser shall not alienate it, such a pact is so far effective as to prevent the dominium from passing if the new owner does alienate the property? The most common view among the Doctors is that it will not have that effect . . . . They are chiefly influenced by the rule that it is the nature of such agreements that they do not bind the property but the persons".

"From the different arguments that have been given on both sides, it appears that the more correct view is held by those who say that the passing of the dominium can be prevented by a pact, if only the owner imposes the pact at the time of the transfer of his property or makes a condition at the time of the alienation of the property, and not subsequently, as by the tradition the right can be acquired by another person . . . . ."

It must be noted that Sande was dealing with a case where there was merely an agreement not to alienate. In the present case there is in addition a provision for the transfer of the dominium if in breach of the agreement there is an alienation. The lease under consideration is one which may be termed *in longum tempus*. It is virtually an alienation. (See *Carron v. Fernando* [2].) The stipulation is, in my opinion, a valid one. The result is, that upon the sale in execution of the defendant's interests in the lease, the land reverted to the Crown.

Mr. Obeyesekere contended that the property cannot revert to the Crown until there is a declaration by Court to that effect. He relied on *Perera v. Perera* [3], in which it was held that a clause of forfeiture in a lease for non-payment of rent cannot be enforced, except by appropriate judicial proceedings, in the course of which it would be competent for the

[1] *Restraints on Alienations, pp. 306, 307, 314.*
[2] *35 N. L. R. at p. 358.*
[3] *(1907) 10 N. L. R. 230.*

lessee to set up against the lessor all equitable rights to compensation. Wood-Renton J. in the course of his judgment said:—

"The Court of Equity in England was from an early period accustomed to grant relief against the payment of the whole penalty on money bonds; and the *Statutes 4 & 5 Ann. c. 16, ss. 12 and 13; and 8 &9 Will. III c. 11* conferred a similar jurisdiction on the Courts of law. In the course of time this equitable jurisdiction was extended to forfeiture clauses for non-payment of rent. This extension proceeded on the theory that the forfeiture clause—like the penalty in the bond—was only a security for the recovery of money. *The Statute 4 Geo. 2 c. 28* recognized this jurisdiction, but limited (section 3) the time within which the lessee in default might claim relief. An attempt was at one time made to extend the jurisdiction in equity to relieve against forfeiture for non-payment of rent to breaches of other conditions in leases, *e.g.*, covenants to insure. But this was effectually checked by the decision of Lord Eldon in *Hill v. Barclay* [1] and *cf. Bowser v. Colby* [2] and *Barrow v. Isaacs* [3]. Later on the legislature interposed, and first the Court of Equity (*22 & 23 Vict. c. 35, ss. 4—9*) and afterwards Courts of Law (*23 & 24 Vict. c. 126*) were enabled to grant relief against breaches of covenants to insure if (*a*) no damage had resulted from the default, (*b*) the default was due to accident or mistake, or in any event not to gross negligence on the part of the lessee, and (*c*) there was an adequate insurance on foot at the time of the application to the Court".

The *ratio decidendi* of that case is that the forfeiture clause is only a security for the recovery of money. That case does not help the respondent. It shows that a lessee is not entitled to claim relief against every forfeiture clause in the lease. To my mind there is no analogy between that case and the present case. Condition (*b*) has nothing to do with the performance by the defendant of his duties as a lessee. It provides that on the happening of a certain event, the land shall revert to the Crown. As soon as the interest of the defendant in the lease is sold in execution the property reverts to the Crown as a consequence imposed by condition (*b*). I am, therefore, of opinion that the penalty takes effect at once and there is no necessity for the Crown to obtain a judgment declaring its rights.

Mr. Obeyesekere also contended that the doctrine of *caveat emptor* applies to this case. I cannot see how that doctrine can be applied to an application under section 284 of the Civil Procedure Code. That section furnishes a statutory exception to the doctrine of *caveat emptor.* (See *Ram Kumar v. Ram Gour* [4].) In my opinion, in view of condition (*b*) the defendant had no saleable interest in the property sold. I would therefore allow the appeal with costs in both Courts against the plaintiff.

WIJEYEWARDENE J.—I agree.

Appeal Allowed.

[1] *(1811) 18 Ves. 56*
[2] *(1841) 1 Hare 109.*
[3] *(1891) 1 Q. B. 417.*
[4] *I. L. R. 37. Calcutta 67.*