Present : Lascelles A.C.J. and Grenier J. *April 10, 1911*

FERNANDO *et al v.* FERNANDO *et al.*

79—D. C. Negombo, 8,152.

Estoppel—Co-owner standing by and permitting a co-owner to lease the whole land.

The plaintiffs who were entitled to three-fourths share of a land, not knowing that they were so entitled, stood by when the third defendant, who was entitled to only one-fourth of the land, executed two successive leases in favour of the first and second defendants, in which he dealt with the whole land.

¶In an action brought by the plaintiffs to vindicate their title against the defendants, *held* that they were not estopped from setting up their title.

LASCELLES A.C.J.—It is essential, in order to create an estoppel by acquiescence, to show that the plaintiffs, knowing that a violation of their rights was in progress, stood by and so misled the first and second defendants.

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THE facts appear sufficiently from the headnote.

H. A. Jayewardene, for the plaintiffs, appellants.—The District Judge finds that the plaintiffs did not know that they were owners of three-fourths share at the time the third defendant leased the land to the other defendants. The plaintiffs could not therefore be said to be estopped. Even if the plaintiffs knew that the third defendant was dealing with their shares, the plaintiffs would not be estopped under the circumstances of this case. The plaintiffs were not present at the execution of the lease ; they did not induce the first and second defendants to take the land on lease.

Mere silence cannot amount to estoppel ; there must be a duty on the person sought to be estopped to speak. Silence amounts to a fraud for which a Court will grant relief, only when it is the non-disclosure of facts and circumstances which one is legally bound to communicate to the other. *Banerjee v. Chatterjee* ;[1] *Amir Ali and Woodroffe, Law of Evidence, p.* 653, *4th ed.*

F. M. de Saram, for the respondents.—The plaintiffs allowed the third defendant to be in sole possession of the land and to execute a lease for the whole land. The District Judge finds that the plaintiffs were aware of the execution of the lease and of their rights. The plaintiffs are estopped by their acquiescence.

Counsel cited *Sadris Appu v. Cornelis Appu*,[2] *Leeds v. Amherst*,[3] *Caruppen Chetty v. Wijesinghe*,[4] *Wilmot v. Barber*.[5]

H. A. Jayewardene, in reply.

Cur. adv. vult.

April 10, 1911. LASCELLES A.C.J.—

It is admitted that the plaintiffs are lawfully entitled to three-fourths and the third defendant to one-fourth of the land in dispute. The third defendant, although entitled to deal only with one-fourth, in 1903 leased the whole of the land to the first and second defendants. In 1909 the first and second defendants were ousted by the plaintiffs ; the first and second defendants thereupon brought a possessory action, and were restored to possession. The plaintiffs now bring this action to vindicate their legal title.

The first and second defendants have not persisted in their plea that their lessor has acquired prescriptive title against his co-owner ; but they contend that the plaintiffs by acquiescence in this lease, and in a similar previous lease, have led the first and second defendants to believe that the third defendant owned the entirety of the

[1] *(1904) 32 Cal. 357.*
[2] *(1905) 8 N. L. R. 380 ; 2 Bal. 104.*
[3] *(1846) 2 Philips 117, at page 122.*
[4] *(1910) 14 N. L. R. 152*
[5] *(1880) 93 L. T. 95 at page 98.*

land, and that the plaintiffs cannot now be allowed to dispute the title of the third defendant.

Where an estoppel of this kind is set up, I am of opinion that it is necessary that the facts on which the estoppel depends should be proved strictly and beyond reasonable doubt. Leases and deeds are commonly given by persons who have no legal interest in the subject-matter of the deed, and it would be a grave injustice to the legal owners if the grantees under such instruments were given title, except on the clearest and most conclusive proof of acquiescence on the part of the legal owners.

In the present case I am of opinion that the evidence fails on at least two crucial points. It is essential, in order to create an estoppel by acquiescence, to show that the plaintiffs, knowing that a violation of their rights was in progress, stood by and so misled the first and second defendants.

The District Judge disbelieves the evidence of the third defendant, that the whole land was included in the leases owing to a mistake on the part of the notary, and he proceeds as follows : " I think further, that the plaintiffs believed him (*i.e.*, the third defendant) to be the owner, and to have been in possession through his previous lessees for many years as owner." This, of course, is not the plaintiffs' version, but it is probable enough. But if the plaintiff did in fact believe the third defendant to be the owner of the whole land, the defence of acquiescence falls to the ground, as acquiescence is founded on conduct with knowledge of one's rights. If the plaintiffs were not aware of their rights there can be no acquiescence. *Meeson v. Clarkson.*[1]

It is true that in a later portion of the judgment, which I cannot reconcile with the passage which I have cited, the learned District Judge finds that the plaintiffs did know their rights at the time of the lease, but no explanation of the plaintiffs' attitude is offered which will square with the proved facts of the case.

Again, assuming that the plaintiffs were aware of their rights, I cannot find in the record any proof of silence or inaction on their part on any occasion when it was their duty to assert their rights. The inference which the learned District Judge draws that the first plaintiff was aware at the time of the lease that the third defendant was leasing the whole of the land appears to me to be little more than surmise. In my opinion there is in this case no satisfactory proof of the facts which are requisite to set up an estoppel against the plaintiffs.

I would add that the evidence, in my opinion, does not bring the present case within the rule which prevents a person who stands by with the knowledge that another is spending money on his land under a mistaken belief in his own rights, from afterwards asserting his title without making compensation for the money so expended.

[1] 4 Hare 97.

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I would set aside the judgment of the District Judge with costs here and in the Court below, and enter judgment for the plaintiffs in terms of paragraphs 6 (1) and (2) of the plaint, but I would not award any damages.

GRENIER J.—

I agree that the plea of estoppel fails for want of distinct and sufficient proof in support of it. The case for the first and second defendants was that the plaintiffs, by permitting Caranis Fernando and third defendant to be in possession of the entirety of the land, and thereafter by allowing them to remain in such possession from March 3, 1905, till April 5, 1909, caused the first and second defendants to believe that Caranis Fernando and third defendant had title to the entirety of the land, and thereby induced the first and second defendants to take the same on lease from the third defendant. Mere knowledge of a certain state of things does not necessarily involve acquiescence. There is, besides no distinct proof that, by reason of anything actively done or passively assented to by the plaintiffs, the first and second defendants were induced to take the lease from the third defendant. The case would be different if the plaintiffs stood by and allowed the third defendant to execute the lease without objection, and thus induced the first and second defendants to believe that the third defendant was the owner and they were not. I think the ground of acquiescence put forward by the first and second defendants as mainly constituting the estoppel is considerably weakened, if not effectually, removed, by the action of the plaintiffs, in ousting the appellants on April 5, 1909, for, if there had been acquiescence, it is difficult to understand why there should have been any ouster at all, although the first and second defendants were afterwards restored to possession.

The case may be a hard one for defendants, but the doctrine of estoppel, which is founded on equitable principles, should not be applied in such a way as to work manifest injustice to the plaintiffs, especially when there is an absence of clear proof of any acquiescence on their part.

Set aside.