1923.

Present : De Sampayo A.C.J. and Garvin A.J.

UKKU BANDA *v.* KARUPAI *et al.*

404—D. C. Kurunegala, 8,301.

Estoppel by conduct—Puisne incumbrancer not bound by decree against mortgagor present at execution sale—Is he estopped from asserting his title ?

To establish an estoppel by conduct by silence, the person who is sought to be estopped by reason of his silence must be proved to have intended to create a false impression on the person who sets up the estoppel, and that he caused him thereby to do a particular act.

Where a puisne incumbrancer who was not bound by a mortgage decree (he not having been made a party to the action or noticed) was present at the execution sale and was silent ; *held* in the circumstances of the case he was not estopped from asserting his title.

THE facts are set out in the judgment.

H. V. Perera (with him *Weerasinghe*), for first defendant, appellant.

Soertz, for plaintiff, respondent.

July 2, 1923. DE SAMPAYO A.C.J.—

This appeal raises a question of estoppel by conduct. The second defendant was the owner of one-third share of Galwalagawahena. By bond dated August 2, 1911, he mortgaged this share and two other lands to the plaintiff. On August 22, 1917, the plaintiff sued the second defendant on this bond and on another mortgage bond of November 7, 1911, and on a promissory note. It would seem that the plaintiff obtained judgment for the aggregate sum due on all three causes of action and a decree declaring the mortgaged lands bound and executable for that sum. I cannot see how the mortgaged property could have been specially bound in respect of the amount due on the promissory note. But this curious procedure may for the purposes of this appeal be overlooked. After this decree was entered, one Martin Perera, an auctioneer, was appointed to carry out the sale of the mortgaged property, and accordingly two of the lands, including the one-third share of Galwalagawahena now in question, were sold on August 3, 1918, and were purchased by the decree holder, the present plaintiff, to whom the auctioneer conveyed the lands by deed dated March 14, 1919.

The first defendant claims the one-third share of Galwalagawahena on a deed of sale dated March 13, 1917, executed by the second defendant in her favour and registered on March 17, 1917. The plaintiff as mortgagee had not registered an address and had not followed any of the provisions in sections 343 and 344 of the Civil Procedure Code, nor had he made the first defendant a party to the mortgage action, or given her any kind of notice. So far as these facts are concerned, the first defendant was not bound by the mortgage decree, and the present case being a contest for title between the plaintiff and the first defendant, the title of the first defendant must prevail. We have, however, to consider certain other facts which are said to affect her title. The consideration for the transfer by the second defendant to the first defendant was the sum of Rs. 1,500, of which Rs. 35 was paid in the presence of the notary, Rs. 400 was set off against a debt due by the second defendant on a promissory note, and the balance, Rs. 1,065, was retained by the first defendant to pay to the plaintiff the interest due on the mortgage. The District Judge calls this "a bogus deed," which conveys no meaning to me, except, perhaps, that the District Judge does not like it. The interest was not paid by the first defendant, and the second defendant, who is her son-in-law, was allowed to live on the land with his family. Even if the deed is "bogus," the title thereby passed to the first defendant, and the plaintiff was not excused from the necessity of binding her with a decree. The District Judge also thinks that the deed was executed "to defraud creditors," meaning by "creditors," no doubt, the mortgagee. This is an extraordinary idea, because the sale was on the face of the deed expressly made subject to the mortgage. Moreover, the sale to first defendant was only one of the three mortgaged lands. The fact appears to be that a suspicious atmosphere having once been created, various adverse inferences of the impossible kind have been drawn. These, however, were preliminary matters, which, so far as I can see, do not form the basis of the judgment. The real point of the judgment is that the first defendant is estopped from setting up title against the plaintiff. The first defendant is said to have been "present at the sale" under the mortgage decree. What this means is not very clear. The sale took place on the land, and I have no reason to doubt that at that time she was on the land. The evidence of the arachchi is that both defendants were living on the land, and that being so, her presence on this occasion cannot be pressed very far. Even assuming that she was among the circle of people who were attracted to the spot by the sale, it is quite certain that she was not there as a bidder, nor did she say or do anything to indicate to any person that she had no objection to the sale. She was in fact only silent, and it is contended on behalf of the plaintiff that she should have made her claim to the land publicly. Now, this class of estoppel

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by conduct is generally very difficult to apply. From all the decisions on the subject, two clear propositions emerge: (1) that the person who is sought to be estopped by silence must be proved to have intended to create a false impression on the person who sets up the estoppel, and (2) that he caused him thereby to do a particular act. I need only refer to *Rodrigo v. Karunaratne*[1] and *Nanduwa v. Bhai*,[2] which collate all the previous decided cases. What are the facts in this case? The first defendant's deed was registered within a few days of its execution. The register was open to inspection by the plaintiff or by any one. The deed, therefore, was not a secret document. It is impossible to say that the first defendant intended by her silence to mislead the plaintiff as to the existence of the deed and to induce him to buy the land. Moreover, the first defendant is a Tamil woman, and probably with the ordinary degree of ignorance in regard to legal or business matters. Did she know that her not being made a party to the mortgage decree gave her an advantage over the plaintiff? Unless this knowledge is attributed to her, there is no real significance in her silence on the occasion of the sale. In my opinion she cannot reasonably be supposed to have had such knowledge, and intended by her silence to mislead the plaintiff. As regards the second of the above propositions, there is an entire absence of evidence. The plaintiff, who gave evidence on his own behalf, does not say a word to the effect that he was induced to buy, by the conduct of the first defendant or rather by her silence, nor does the general situation lead to any such inference. We may well believe the plaintiff thought that the second defendant was still owner of the land, but that was because the plaintiff shut his eyes to sources of knowledge available to him, and not because he was misled by the first defendant.

In my opinion the judgment of the District Judge in favour of the plaintiff is erroneous, and I would allow the appeal and dismiss the action, with costs in both Courts.

GARVIN A.J.—I agree.

Set aside.

[1] *(1920) 21 N. L. R. 360.*

[2] *(1922) 23 N. L. R. 449.*