Present : Dalton and Drieberg JJ.

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SAMARANAYAKE *v.* MENDORIS *et al.*

336—D. C. Galle, 24,630.

Action under section 247 of the Code—Execution creditor against the claimant—Proof of judgment debtor's title—Requisites of plaint.

Where an action under section 247 of the Civil Procedure Code is brought by the execution creditor against the claimant, the plaint should set out the judgment-debtor's title, and the execution-creditor is bound to prove such title as fully as the debtor himself, if he were vindicating his title against the claimant.

THIS was an action under section 247 of the Civil Procedure Code brought by the plaintiff to have a certain share of a house seized by him declared liable to be sold in execution against first defendant. Second defendant, wife of the first defendant, claimed the house, and her claim was upheld. The learned District Judge gave judgment for the plaintiff.

N. E. Weerasooria, for defendant, appellant.

L. A. Rajapakse, for plaintiff, respondent.

December 21, 1928. DALTON J.—

This was an action brought under the provisions of section 247 of the Civil Procedure Code to have a house seized by the plaintiff declared liable to be sold in execution for the debt of the second defendant. The second defendant, wife of the first defendant, claimed the house as her property, and her claim was upheld. The trial Judge found the house belonged to the first defendant and gave judgment for plaintiff.

The property seized by plaintiff under the writ issued in execution of his decree against the first defendant was an undivided 10/16 of the land called Makadugodakurunduwatta and an undivided 15/16 part of the house on it. The property claimed by the second defendant to the Fiscal was 15/18 of the land and 15/18 of the house. The claim was upheld, and plaintiff did not take any steps by action under section 247 in respect of the land, but his plaint in this action sets out that first defendant is entitled to the whole of the house " by right of construction," and he accordingly asked that first defendant be declared entitled to the house, and therefore that it

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be liable to seizure and sale under his writ. It will be seen here there is very considerable scope for confusion in respect of the plaint as drawn.

Only two issues were framed :—

(1) Is first defendant entitled to the house ?

(2) Is it liable to be sold under plaintiff's writ ?

The evidence shows that the house in dispute is a stone masonry tiled house of 13 cubits. The trial Judge finds it was built by the first defendant, and he also finds that first defendant owned a share in the land on which it stands. This latter conclusion he based upon the documents produced in the case (P 1, P 2, D 3, D 4). I can certainly find nothing in the documents which satisfactorily supports this latter conclusion. It is clear that the claim to the interests in this particular land seized was upheld, and plaintiff has done nothing further in respect of that. It would seem that the trial Judge has overlooked the fact that other land was referred to in the documents in which first defendant may have had an interest, but there is nothing to show he had any interest in the soil of Makadugodakurunduwatta. The verbal evidence would certainly appear to support the contention that first defendant had no share in the soil of this land although plaintiff does say he was entitled to 1/18 of the soil. How he comes to that conclusion he does not say.

It is admitted that the second defendant was only entitled to 15/18 of the land, but that first defendant was entitled to any share in the remainder plaintiff has entirely failed to prove. As his plaint was framed I doubt if he or his advisers ever had any intention of entering upon such proof, although, as is now pointed out, it is not clear from the plaint if plaintiff wants only the materials comprised in the house, or the house as a whole with the land on which it stands seized and sold. From the nature of the building it is part and parcel of the soil, and if plaintiff contents to the contrary the onus is upon him to show it is movable property. It is admitted the house came into existence after 1882, in which year first defendant parted with 1/18 share in the land. There is no satisfactory evidence to show he had any other share but that. Therefore if he constructed the house, he constructed it upon land in which he had no interest. He did not marry the second defendant until 1906 but there is evidence to show that first and second defendants lived together long before that. It is not necessarily strange therefore that he, after 1882, either constructed a house, or helped to build a house, or improved an existing house (for the evidence of what he did is not very satisfactory) upon the land of the woman who was the mother of his children and who eventually became his wife.

In my opinion the first issue should have been answered in the negative, plaintiff having failed to show that the house was the property of the first defendant. In that result his action should have been dismissed.

A question has also been raised as to whether there is any " claim to compensation " belonging to the first defendant which can be seized and sold by the plaintiff. It will be seen from what I have stated that there is no evidence to show that first defendant is a co-owner who has effected improvements on the common property. Counsel further has failed to show that he is otherwise a person who has a *jus retentionis* whence any such right would flow. It is not therefore necessary to consider whether such a claim is seizable in execution, nor was the question ever raised in the pleadings or issues in the lower Court. The case before us has proceeded upon the basis that first defendant had an interest in the soil, and that position has not been sustained. The appeal must be allowed with costs, the decree entered being set aside and judgment entered for the defendants with costs.

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The respondent is the plaintiff in this action and was the judgment creditor in D. C. Galle, No. 18,553, the first defendant-appellant being the judgment-debtor. He seized certain property in execution which was successfully claimed by the second defendant-appellant, who is the wife of the first defendant, and he thereafter brought this action under section 247 of the Civil Procedure Code to have it declared that the first defendant is entitled to the " entirety of the 13 cubits tiled house standing on the land called Makandugoda-kurunduwatta," and therefore liable to be sold under his writ.

It is not clear from the plaint what was the exact nature of the interest in the house sought to be sold, that is to say, whether it was the house with the land on which it stood, or whether it was merely the materials of the house, or whether it was the right of a co-owner who builds on common land, namely, a right to compensation for the building, with the right of retaining possession of it until compensated.

This action has been brought without a proper regard to what took place in the claim proceedings, and the plaint is exceedingly unsatisfactory. When a section 247 action is brought by an execution-creditor against a successful claimant he has to prove as against the claimant his debtor's right to the property, and he must do so as fully as the debtor himself if the latter was seeking to vindicate his title against the claimant. It is necessary therefore that the plaint should properly set out the title alleged in the judgment-debtor. This has not been done in this case.

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The claim proceedings were not put in evidence at the trial, but they have been referred to, and the appellants submit a certified copy of them with their petition of appeal. Mr. Rajapakse objected to these being referred to for the purposes of the appeal. Ordinarily such an objection would be a good one. But in this case the Court has had resort to them and, especially in view of the fact that this action has not been framed with a proper regard to the claim order and proceedings, it is impossible to deal satisfactorily with this appeal without considering them.

It is agreed that this 13 cubits house was built by the first defendant after he had transferred in 1882 an undivided 1/18 share which he owned of these lands to the second defendant. He was then living with the second defendant and he registered marriage with her after he had built this house. It is necessary to decide under what circumstances and with what intent he built this house.

If at the time he built it he had no interest in the land he cannot possibly be owner of the house in any sense. The authorities on this point will be found set out and examined at length in *Walter Pereira's Laws of Ceylon, p. 345 et seq.*, and in *The Right of Compensation*, by the same author, on pages 10 and 11. The following passage from *The Digest, XLVI., 1, 12 (Monroe's Translation)*, places the matter very clearly for the purposes of this case : " Where a man builds on another man's ground with his own materials, the building becomes the property of the person who owns the soil itself, and, if the former knew that the ground was another's, he is regarded as having lost the ownership of the materials of his own free will; consequently, even if the building should be demolished, he has no good right of action to recover the materials."

A question may arise according to some commentators regarding the builder's right to claim the value of the materials from the owner of the land if the intention of the parties was that the owner of the land should pay for them, but this proceeds upon the ground of an implied agreement.

After the purchase of a 1/18 share from the first defendant the second defendant bought two other undivided shares in 1895 and 1897, and if the first defendant had no interest in the land after the sale of a 1/18 share in 1882 he must be regarded as having built on the land of another without any compact or agreement as to compensation to be paid him by the owner, for there is no evidence of any such compact or agreement.

If when he built this house the first defendant was a co-owner of the land, different considerations arise. If he built it in the exercise of his rights of a co-owner he would have the right of retention until compensation was paid him, and it would become necessary to decide two points which have been argued by Counsel before us, one

is whether the form of seizure adopted in this case is sufficient for a sale of such an interest as I have described, and the other is whether such an interest is one which can be seized and sold in execution against a builder. In view of the conclusion I have come to it is not necessary to express an opinion on these two points.

What the respondent seized was " an undivided 10/16 part of the soil and trees with an undivided 15/16 of the tiled house of 13 cubits of the land called Makandugodakurunduwatta."

The second defendant claimed " an undivided ½ plus ⅓ plus 1/12 plus 5/288 plus 1/16 or 15/18 parts of the land called the lots Nos. 1585 and 1586 of the land Makandugodakurunduwatta." At the claim inquiry the second defendant stated definitely that the first defendant in 1882 transferred to her a 1/18, which was all the interest he had in the land, and that he also sold to her the 7 cubits house which then stood on the land. The second defendant referred to previous actions where she said the whole question of title was gone into and she put in evidence six deeds which had also been tendered in those actions.

The Proctor for the claimant said that the shares were undivided and that they did not clash, by which I understood him to have meant that the shares claimed by the claimant and the respondent did not amount to unity, and that he could prove that the debtor was entitled to 1/63 of the land and at least to 15/16 of the house. As regards the first part of his statement he was right, so far as the arithmetic is concerned, for a successful claim by the second defendant to 15/18, which is 120/144, would still leave a residue within which the debtor's interests might be located, but the important point is that there is nothing to contradict specifically the assertion of the second defendant that the first defendant owned only the 1/18 he gave her.

In bringing this section 247 action the respondent seems to have recognized that the claim had succeeded in respect to the entirety of the shares in the land seized, for no share of the land is brought into this action, nor is it suggested that any of the shares of the land have since been seized.

At the trial the only evidence led was that of the respondent and the second defendant. The learned Judge has found that the first defendant continued to own what he refers to as small shares of the land after the sale of his 1/18. The only express evidence of the respondent on which this is based is the following statement made by him : " I know the owners of this land. The first defendant is entitled to about 1/18 of the soil." What his source of ownership was and when he acquired the interest are not stated. I have already referred to the requirements of a section 247 action and the

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necessity for proving title in the judgment-debtor to the share on which it is sought to levy execution. I need hardly say that this does not amount to such proof.

The judgment, however, is also based on an inference which is drawn from two mortgage bonds, P 1 and P 2. By P 1, which is a bond of 1907, two lands are mortgaged. In the early part of the deed the first and second defendants stated that they mortgaged properties held and possessed by the second defendant upon several deeds mentioned therein—these are the deeds on which the second defendant is entitled to 15/18 of the land in question—and by the first defendant by right of paternal inheritance. The interests in the two lands are there described, the first being 15/18 of the land in question with the tiled house, and the second being another land as to the ownership of which no inquiry has been made and which, if it is the property of the first defendant, would make the deed quite consistent. I cannot regard this mortgage P 1 as necessary implying a declaration of ownership by the first defendant in this land, that is to say, in so much of it as was mortgaged, for the 15/18 mortgaged is indicated by the deeds recited to be the property of the second defendant, and the description of the house as built by the first defendant may have been given merely for the purposes of identification. In any case I cannot understand this as implying that the 13 cubits house was the property of the first defendant, for if it was so the deed would have said so.

The same observations apply to the deed P 2. Mr. Rajapakse contended that the mortgage bonds D 3 and D 4 showed that the first defendant owned a share in the land after 1882. I cannot agree with this contention, for what is really the same reason as in the case of the other deeds. The first defendant undoubtedly joined in the mortgage and declared his rights as by paternal inheritance, but what was mortgaged is specifically described as the 15/18 which the second defendant owned upon three deeds. In this 15/18 the first defendant has no interest and the deed in no way suggests that he had interests outside it. The recitals on this deed are what are often found in deeds of this nature executed before notaries in the country. The interest of a wife is mortgaged and from some vague idea of security the husband is made to join in it, not merely as a party assisting his wife but as a mortgagor.

If this action had been tried as one for title to the land, as between the first and second defendants, it was bound to fail. I therefore hold that the respondent has not proved that the first defendant, when he built this house, was a co-owner of the land. In the circumstances his possession is that of a person who builds on the land of another, he having no title to the land. The issue on which this trial proceeded was: "Is the first defendant entitled to the

house described in the plaint ? " Having built it under the circumstances stated by me, he is not the owner of the house, and this issue has to be answered in the negative.

The appeal is allowed. Judgment will be entered dismissing plaintiff's action with costs of this appeal. The respondent will pay the appellants their costs in the lower Court.

Appeal allowed.