Present: Fisher C.J. and Maartensz A.J.

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STEWART *et al. v.* SENANAYAKE *et al.*

198—D. C. Avissawella, 165.

Last will—Direction to executor to sell property—Devise of proceeds of sale—Failure of executor to sell—Property dealt with by heirs—Vesting of title—Execution sale—Subsequent acquisition of title by judgment-debtor.

Where a last will directed the executor to sell property and then devised the proceeds of sale in the manner specified, and where the executor failed to carry out the directions and the devisees dealt with the property as owners,—

Held, that the devisees must be deemed to have elected to take the property in its original character.

The subsequent acquisition of title by a judgment-debtor does not ensure to the benefit of a purchaser at the execution sale.

THIS was an action for declaration of title to 2/5 share of an estate called Belangalla, which belonged to one John Stewart. He died in September, 1906, leaving a last will, by which he directed his executor to sell the estate after the death of his wife, to whom he left the life-interest. The last will then devised the proceeds of sale among his four children, in the proportion of a 1/5 share to each, and the remaining 1/5 among three grandchildren. The life-renter died in 1909. The executor died in 1920, without carrying out the directions of the will.

The main question argued in appeal was whether any title vested in the children and grandchildren of John Stewart, as it was contended that the dominium vested in the executor in terms of the last will.

H. V. Perera, for defendants, appellants.—The entire basis of the plaintiffs' claim is that the last will of John Theodore Stewart vested the title to the land in question in his children and grandchildren through whom the plaintiffs seek to derive their own title. It is clear the last will does nothing of the kind inasmuch as it creates a trust for sale, the proceeds of which had to be distributed among the children and the grandchildren. The executor having died, without carrying out the directions contained in the will, the legal title passed to his representatives, so that whatever weakness there may be in the defendants' title the plaintiffs cannot maintain this action.

Secondly, with regard to the 1/5 share of the first plaintiff claimed by the defendants the principle of the *exceptio rei venditae et traditae* applies. Assuming that at the time of the sale in execution

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in which the defendants bought this share the first plaintiff had no title since he had previously been adjudicated an insolvent, the subsequent acquisition of title by him after he had obtained his certificate enures to the benefit of the defendants.

Counsel referred to *Rajapakse v. Fernando* [1] and *Gunatilleke v. Fernando.*[2]

C. V. Ranawake, for plaintiffs, respondents.—The will creates no trust, the property is not vested in the executor, nor is it bequeathed to him. The defendants did not in the lower Court raise a specific issue on this point, possibly because they themselves at the execution sale bought the premises on the assumption that the children and the grandchildren of John Stewart were rightly owners. Even if there was a trust, the executor having omitted to carry out the testator's wishes, the heirs can be said to have elected to take the property in its original character. See section 58 of the Trusts Ordinance, No. 9 of 1917. Whatever may have been the testator's intentions, the heirs entered into possession on the footing they were owners, and there is nothing to show the executor did not acquiesce in this. See *Vansanden v. Mack.*[3]

The principle of the *exceptio rei venditae et traditae* does not apply in cases where a property is sold in execution. The estoppel raised against a vendor who has no title on the date of sale but subsequently acquires title is based on the actual contract of sale between vendor and vendee, the vendor holding out that he has title, and the vendee buying on that footing. But there is no such contract where a purchaser buys at an execution sale. Moreover, in the present case it cannot be said that at the time of the execution sales the first plaintiff had no title to the land ; he had title which could have been bought only in appropriate proceedings, viz., the sale by the assignee in the insolvency case. The defendants bought in proceedings which were void and irregular.

Counsel referred to *Suppiah Pillai v. Ramanathan* [4] and *Appuhamy v. Ramanathan.*[5]

November 15, 1929. FISHER C.J.—

Assuming that there was a trust for sale in this case, in my opinion section 58 of the Trusts Ordinance, No. 9 of 1917, would be applicable, but the case was argued in the District Court and the defendants-appellants' answer was drawn on the basis that the will gave the property to the beneficiaries. The questions therefore to be considered are—(1) What passed under D 2 ? (2) Are defendants entitled to the benefit of W. A. Stewart's subsequent acquisition ? and (3) Have the defendants acquired a prescriptive title to the share ?

[1] *(1920) 21 N. L. R. 495.*
[2] *(1919) 21 N. L. R. 257.*
[3] *(1895) 1 N. L. R. 311.*
[4] *22 N. L. R. 225.*
[5] *25 N. L. R. 430.*

With regard to (1), all that passed under D 2 were the interests to which C. F. Stewart, J. M. Stewart, and Alice R. Stewart were entitled, that is to say, 3/5. W. A. Stewart's interest was then vested in his assignee, and the remaining 1/5 was vested in the three grandchildren of the testator, who were then minors, and, moreover, were no parties to the action. As to (2), in the absence of any authority I do not think that the subsequent acquisition of property by a judgment-debtor enures for the benefit of the purchasers at the sale in execution of his property. All that they acquired is the existing right, title, and interest, and this cannot include property subsequently acquired by purchase by the judgment-debtor. As to (3), there is evidence on behalf of the plaintiff of possession by Alice on behalf of the persons entitled to the 2/5 share which did not pass on D 2 ; and further, there is evidence of a direct assertion of her possession in that capacity which must have been within the knowledge of the transferees in D 2. Only one witness is called for the defendants. It must be taken therefore that they were, and were treated as, co-owners and only possessed as such.

The appeal must be dismissed with costs.

MAARTENSZ A.J.—

This was an action for declaration of title to an undivided 2/5 share of an estate called Belangalla.

Belangalla estate belonged to John Theodore Stewart. He died on September 29, 1905, leaving a last will which was admitted to probate in case No. 2,497 of the District Court of Colombo.

The plaint avers that John Stewart by his last will—

> " devised and bequeathed all his property to his children, Alice Rebecca Stewart, William Alexander Stewart, John Marshall Stewart, and Charles Francis Stewart, in the proportion of 1/5 share each, and the remaining 1/5 share to his grandchildren, John Francis Theodore Stewart, Irene St. Clare Stewart, Gladys Amelia Cyril Stewart, jointly, subject, however, to a life-interest over immovable property in his wife, who died about the year 1909, whereupon the said children and grandchildren of John Theodore Stewart became the absolute owners of the said Belangalla estate hereinbefore described."

The three grandchildren John, Irene, and Gladys, by deed No. 135 dated February 16, 1920, sold their 1/5 share to William Alexander Stewart.

In execution of a mortgage decree entered in case No. 9,989 a 1/5 share was sold against William Stewart and purchased by the mortgagee, Daniel Ebert, upon deed No. 213 dated November 7, 1924, executed by the Secretary of the District Court of Colombo. Ebert by deed No. 344 dated September 18, 1926, sold this 1/5 share to William Stewart and R. A. Rabot.

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William Stewart was adjudicated an insolvent in proceedings No. 2,632 of the District Court of Colombo. The assignee sold the insolvent's 1/5 share of the estate with the leave of Court by public auction and it was purchased by A. L. Thiripadinayaker on April 12, 1916, and he obtained a transfer from the assignee No. 114 dated April 19, 1917. Thiripadinayaker by deed No. 152 dated June 9, 1920, sold this 1/5 share back to W. A. Stewart.

The plaintiff's claim to a 2/5 share is based on these deeds.

The fourth defendant filed answer in which he averred—

"that upon a writ issued in case No. 40,505 of the District Court of Colombo against C. F. Stewart, J. M. Stewart, Alice R. Stewart, and W. A. Stewart (the first plaintiff) the entirety of the land described in the plaint was sold against them on February 26, 1916, and was purchased by M. Marigida Perera Hamine and M. G. Perera; this defendant who obtained Fiscal's transfer No. 1,501 dated August 17, 1916, and the said M. Marigida Perera entered into possession of the said premises."

Marigida Perera is said to have gifted her interest to Donald Senanayake, who in turn transferred the half share to the first, second, and third defendants, who are minors; these defendants said they would abide by the answer filed by the fourth defendant.

The action was tried on the following issues:—

(1) Was Wm. Alexander Stewart (first plaintiff) originally entitled to an undivided 1/5 share of the land in question.

(2) Were John Francis, Irene, and Gladys Amelia Stewart entitled to an undivided 1/5 share jointly.

(3) Did the said Wm. Alexander become owner of a further 1/5 share by purchase from the said John Francis, Irene, and Gladys Amelia.

(4) Was a 1/5 share belonging to the said Wm. Alexander sold on writ in case No. 9,989 of the District Court of Colombo.

(5) If so, did the said share devolve again on the said Wm. Alexander and the second plaintiff as set out in paragraphs 5 and 6 of the plaint.

(6) Did the sale in case No. 40,505 of the District Court of Colombo of a 1/5 share belonging to the said Wm. Alexander convey good and valid title in view of the fact that the said Wm. Alexander had been earlier adjudicated insolvent in case No. 2,632 of the District Court of Colombo. Did the assignee acquiesce in and ratify this sale to the fourth defendant and predecessors in title?

(7) Was a 1/5 share belonging to the said Wm. Alexander sold in proceedings in the said case No. 2,632.

(8) If so, did deed No. 114 dated April 19, 1917, convey title superior to any claimed by the defendants upon Fiscal's trasfer No. 1,501 of August 17, 1916.

(9) Prescription.

(10) Damages.

(11) Is the first plaintiff estopped by his conduct in failing to disclose the fact of insolvency and thereby inducing the purchasers on Fiscal's transfer No. 1,501 to purchase?

(12) Did the subsequent acquisition of title by first plaintiff upon deeds Nos. 152 of June 9, 1920, and 135 of February 16, 1920, enure to the benefit of fourth defendant and co-vendees?

(13) Did the executor have the right of dominium over the property in terms of the last will? If so, have the defendants acquired title?

The learned District Judge held that the shares of the grandchildren of John Theodore Stewart were not affected by the sale in execution against his four children in case No. 40,505 of the District Court of Colombo and that the defendants had not acquired a prescriptive title to the 1/5 share of the grandchildren of John Stewart, as Alice Stewart continued to live on the estate on behalf of the grandchildren. He rejected the evidence for the defence that Alice Stewart was allowed to live on the estate as she had no other place in which to live.

As regards the shares of William Stewart (the first plaintiff), he held that nothing passed at the execution sale as he was an insolvent at the date of the sale, February 26, 1916.

It was contended in appeal (1) that Belangalla estate did not vest in John Stewart's children and grandchildren under the will executed by him, (2) that even if the first plaintiff's 1/5 share did not pass on the sale of execution of the decree in case No. 40,505 of the District Court of Colombo, the subsequent acquisition of title by him upon deed No. 152 of June 9, 1920, executed by the purchaser at the sale by the assignee enured to the benefit of the defendants, (3) that the learned District Judge was wrong in holding that Alice Stewart continued to live on the estate on behalf of John Stewart's grandchildren and Thiripadinayaker.

The last two contentions might conveniently be disposed of first.

The argument that the subsequent acquisition of title by the first plaintiff enured to the benefit of the defendants is based on the principle that when a person sells property to which he has no title and acquires title subsequent to the sale, the title by operation of law enures to the benefit of the vendee (*Rajapakse v. Fernando* [1]). This decision proceeds upon the ground that the vendor and his privies are estopped from denying the title of the vendee. Lord

[1] *(1920) 21 N. L. R. 495.*

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Moulton at page 497 says " their Lordships are of opinion that by the Roman-Dutch law as existing in Ceylon the English doctrine applies that where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the benefit of the earlier grantee, or, as it is usually expressed, ' feeds the estoppel. ' "

Bertram C.J., in the case of *Gunatilleke v. Fernando*,[1] held that the Roman-Dutch law is in accord with the English law on the subject that a person who sells property is estopped from disputing the title of his vendee.

We were not referred to, nor have I been able to find, any case in which the principle was applied to the case where property was sold in execution against a judgment-debtor who had no title, but who acquired title subsequent to the sale. I am of opinion that no authorities can be found because the theory of estoppel is inapplicable in the case of a sale in execution.

Another objection to the argument is that the sale against the plaintiff was null and void as at the time the property was seized he had been adjudicated an insolvent.

By section 71 of the Insolvency Ordinance, No. 7 of 1853, when any person shall have been adjudicated insolvent all his real estate vests absolutely in the assignee. An exception is made by section 56 in favour of executions and attachments against the lands of the insolvent *bona fide* executed by seizure and sale before the date of the filing of the petition for sequestration.

The exception does not apply in this case as the petition for sequestration was filed on February 15, 1915, and writ did not issue in case No. 40,505 till October 1, 1915.

The plaintiff should have moved under section 404 of the Civil Procedure Code to substitute the assignee as defendant in place of William Stewart or add him as a party defendant to the action to render the seizure effective.

As regards the issue of prescription, I see no reason to disagree with the finding of the trial Judge that Alice Stewart remained in possession on behalf of John Stewart's grandchildren and Thiripadinayaker. His finding is strongly supported by the letter P 14 dated November 24, 1916, addressed to the Deputy Fiscal, Avissawella, by Messrs. T. D. & E. L. Mack, Proctors, in which they asserted with reference to the order for possession issued in favour of the execution purchasers in the District Court of Colombo, case No. 40,505, that the purchasers were only entitled to 3/5 of the estate and that Mrs. Stewart, who, I take it, is Alice Stewart, is in possession on behalf of the minors, and Thiripadinayaker, none of whom are bound by the decree.

[1] *(1919) 21 N. L. R. 257.*

In any event the plea of prescription must fail as against John Stewart's grandchildren as the eldest attained the age of 21 on November 3, 1917, less than ten years before the action was filed.

The main question for decision, however, is whether any title vested in John Stewart's children or grandchildren under the will executed by him.

The testator appointed the late Mr. Richard de Saram executor of his will, and as regards Belangalla estate he directed as follows:—

> " I further direct that my said executor shall as soon after the death of the said Patiridumalge Nona Hami, as he shall think fit, sell either by public auction or private contract for such price or prices as he shall, in his absolute discretion, think proper my said Belangalla estate and the furniture in the house thereon. "

He devised the proceeds of sale of Belangalla estate and his other properties as follows :—

> " I give, devise, and bequeath the nett proceeds of all and every such sale and sales, calling in and conversion and of the investments to my children Alice, William, Alexander, John, and Charles, and to John Francis Theodore, Irene St. Clare, and Gladys Amelia Sybil, my grandchildren, the children of my late daughter Mary, in the proportions following, that is to say, an equal 5th share to my daughter Alice, an equal 5th share to my son William Alexander, an equal 5th share to my son John, one equal 5th share to my son Charles, an equal 5th share to my grandchildren, the said John Francis Theodore, Irene St. Clare, and Gladys Amelia Sybil, or the survivor or survivors of them, my said grandchildren, share and shares alike, and I direct that the share or shares to which any of my child or children or grandchild or grandchildren, who shall be minors or a minor shall be paid by my said executor to and deposited in bank for the use and benefit of such minors or minor, respectively, to be paid to him or his or her, respectively, attaining the age of 21 years. "

The life-renter died in 1909. The executor died in or about the year 1920 without carrying out the directions in the will.

The question whether the title vested in John Stewart's children and grandchildren was not raised in the issue or in the petition of appeal in the form in which it was presented to us at the argument in appeal.

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The issue in the District Court at all relevant to this question is the 13th issue, which runs as follows:—

"Did the executor have the right of dominium over the property in terms of the last will? If so, have the defendants acquired title?"

In the petition of appeal it was urged that—

"They (the appellants) are entitled to succeed in law on issue 13 inasmuch as the last will referred to in the proceedings, conferred 'the dominium' over the property in dispute to the executor and that therefore the possession by the defendants after their purchase at the Fiscal's sale became adverse to the rights of the rightful owner, namely, the executor, as from the date of such purchase."

I think it necessary to refer to the issue and the statement in the petition of appeal, because the District Judge in his judgment after stating shortly the terms of the will observed that the executor does not appear to have carried out the direction in the will that he should sell the property, and that "it is not questioned that the four children of J. T. Stewart severally and his grandchildren jointly shared a 5th of the property."

The argument in appeal was that the children and grandchildren of J. T. Stewart had acquired no title under the will, and that the action must fail whether the defendants had title or not.

On the other hand it was argued that the will did not create a trust and that the property was vested in the heirs as the executor had not carried out the testator's directions by selling the estate.

The will, in my opinion, does not create an express trust. The property is neither bequeathed to the executor nor vested in him in trust for sale. If there is a trust, it is an implied trust arising from the direction to the executor to sell the estate and distribute the proceeds of sale in the manner specified in the will.

The will is a very unsatisfactory document. No provision is made in it for the appointment of another executor to carry out the directions in the will in the case the executor named predeceased the life-renter. In the absence of any words vesting the title in the executor, I doubt very much whether it could be said that on his death the legal title passed to his legal representatives.

The title is left in a state of suspense which is intolerable.

The children and grandchildren have been looked upon as the owners of Belangalla estate from the time of the death of the testator.

They have dealt with it as owners and the defendants have purchased the shares of three of the children on the footing that they are the owners of the property.

It appears to me that if there was a trust for sale this is a case in which the heirs of John Theodore Stewart have elected to take the property in its original character.

The Trusts Ordinance, No. 9 of 1917, provides for such election. Section 53 enacts that—

> "The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest."
>
> "And where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract, and all of one mind, he or they may require the trustee to transfer the trust property to him or them, or to such person as he or they may direct."

Illustration C to that section appears to me to be exactly in point. It runs as follows:—

> "A transfers certain property to B and directs him to sell or invest it for the benefit of C, who is competent to contract. C may elect to take the property in its original character."

The only difficulty in the way of the plaintiffs is the absence of a deed from the executor to the heirs.

But where, as in this case, these heirs, first defendant, and Marigida Perera, from whom the second, third, and fourth defendants derive title, have for many years treated the property as vested in John Theodore Stewart's children and grandchildren, we ought not I think to disturb the construction they have placed on John Stewart's title. (*Vansanden et al v. Mack et al.*[1])

I would dismiss the appeal with costs.

Appeal dismissed.

[1] (*1895*) *1 N. L. R. 311.*