

1962

Present : Weerasooriya, S.P.J.

NAMB UWASAN, Appellant, and DEONIS APPU et al., Respondents

S. C. 109/1960—C. R. Matara, 6446

Sale of land—Condition for retransfer within a fixed period on payment of a certain sum—Action by vendor for retransfer—Lis pendens not registered—Rights of bona fide purchaser for value—Registration of Documents Ordinance (Cap. 117), ss. 11 (1), 11 (3)—Deed of sale—Presumption of passing of valuable consideration.

On 17th May 1957 A sold to B a land subject to A's right to ask for retransfer within one month upon payment of a certain sum. On 7th June 1957 A conveyed to C his rights to obtain the retransfer. Within the stipulated period of one month C brought into Court the required sum and sued B for the retransfer. C, however, did not register the *lis pendens*. Pending the action, and after the stipulated period, B sold the land outright to D, who bought it bona fide and for valuable consideration and duly registered the deed of sale.

Held, that D acquired a good title to the land as against C. C was therefore not entitled to obtain a retransfer from B.

Held further, that where a transaction embodied in a deed is on the face of it a sale, the deed itself constitutes *prima facie* evidence of passing of valuable consideration. (*Diyes Singho v. Eerath*, 64 N. L. R. 492, referred to.)

APPEAL from a judgment of the Court of Requests, Matara.

H. W. Jayewardene, Q.C., with D. S. Wijewardene, for plaintiff-appellant.

A. F. Wijemanne, for 2nd and 3rd defendants-respondents.

Cur. adv. vult.

August 31, 1962. WEERASOORIYA, S.P.J.—

This is an action by the plaintiff-appellant for an order on the 1st defendant-respondent to convey to him a half-share of the land described in the schedule to the plaint. In the alternative he prayed that such conveyance be executed by Court. The land in question had been sold by H. G. Gunadasa and H. G. Charles Appuhamy on deed P3 of the 17th May, 1957, to the 1st defendant for Rs. 200 subject to the right of the vendors to ask for a re-transfer within one month on payment of the purchase price together with interest at 15 per cent. Gunadasa by his deed P2 of the 7th June, 1957, conveyed to the plaintiff his rights to obtain a re-transfer on P3. The plaintiff averred that by virtue of P2 he was entitled to obtain from the 1st defendant a re-conveyance of a half-share of the land, and that on the 13th June, 1957, he through his proctor tendered a sum of Rs. 102.50 (which represented one half of the purchase price and interest thereon as at that date) to the 1st defendant and called upon him to accept the same and execute a conveyance of the half-share of the land, which he failed to do. The sum of Rs. 102.50 the plaintiff brought into Court when filing his plaint.

In the original plaint, filed on the 15th June, 1957, only the 1st defendant was sued. The Court issued summons on him returnable on the 2nd September, 1957. There is nothing to show that summons was served on the 1st defendant. Apparently the process-server had reported that the "defendant" refused to accept the summons saying that the name was incorrect. It is not clear whether the "defendant" referred to was the 1st defendant or some other person on whom service of summons was attempted. However, the 1st defendant appeared in Court on the summons returnable date and was given time till the 21st October, 1957, to file answer. In the answer, which was eventually filed by him on the 17th February, 1958, he stated that after the lapse of one month from the date of the execution of P3 he, as the owner of the land, sold it to a third party whose name he did not disclose. As it transpired later, that party is the 2nd defendant, the deed by which the transfer was effected is 3D1 of the 19th June, 1957, and the 2nd defendant himself, by deed 3D2 of the 12th January, 1958, had transferred the land to the 3rd defendant. 3D1, on the face of it, is an outright sale of the land for Rs. 800 of which, according to the notary's attestation, Rs. 500 was paid on execution of the deed and the balance acknowledged by the vendor to have been previously received. 3D2 purports to be a sale for a consideration of Rs. 200 subject to the right of the vendor to obtain a retransfer within one year on payment of the purchase price with interest at 12 per cent. The notary has attested that the full consideration of Rs. 200 passed in his presence.

The 2nd and 3rd defendants were thereafter joined as parties to the action on an amended plaint filed on the 3rd November, 1958, but no relief was claimed as against them. Paragraphs 6 and 7 of that plaint contain allegations that deed 3D1 had been executed by the 1st defendant acting fraudulently and in collusion with the 2nd defendant, and that the latter was not a bona fide purchaser. Paragraphs 8 and 9 allege fraud and collusion between the 1st, 2nd and 3rd defendants in regard to the execution of 3D2, and that the 3rd defendant was not a bona fide purchaser.

Deeds P2, P3, 3D1 and 3D2 have been duly registered. In the remarks column of the folio in which P3 is registered appears the statement "Subject to a re-transfer within one month from date of deed." The present action, which was filed prior to the execution of 3D1 (19th June, 1957) and 3D2 (12th January, 1958), was not registered as a *lis pendens* until the 8th November, 1958. One of the questions for decision in this case is whether in the circumstances the *lis pendens* is binding on the 2nd and 3rd defendants, the transferees on 3D1 and 3D2 respectively. Section 11 (1) of the Registration of Documents Ordinance (Cap. 117) provides that no *lis pendens* affecting or relating to land shall bind a purchaser unless it is duly registered. Section 11 (3) defines a "purchaser" as any person (including a mortgagee or lessee) who for valuable consideration takes any interest in or charge on land. In view of these provisions Mr. Jayewardene for the plaintiff conceded that if 3D1 and 3D2 were, as they purport to be, for valuable consideration, the 2nd and 3rd defendants would not be bound by the *lis pendens* and the plaintiff's action must fail.

The trial Judge has held that the 2nd and 3rd defendants are bona fide purchasers for value without notice and that the 3rd defendant, therefore, acquired a good title on 3D2. Mr. Jayewardene submitted that there is no evidence to support the finding that the transfers 3D1 and 3D2 were for valuable consideration. Relying on a recent judgment of this Court in *Diyes Singho v. Herath*¹, learned counsel contended that the notary's statement in the attestation of those deeds regarding the passing of consideration is by itself insufficient to prove that 3D1 and 3D2 were for valuable consideration. In that case no evidence was called by either side at the trial, and my brother T. S. Fernando held, in regard to a deed purporting to be a sale which had been marked in evidence, that the notary's statement in the attestation that consideration passed was insufficient to establish the truth of the payment of such consideration, and that there was no proof, therefore, that the deed was for valuable consideration. If I may say so with respect, the question whether, apart from the statement of the notary regarding the passing of consideration, the deed itself did not constitute *prima facie* evidence of what it purported to be, namely a deed of sale, does not appear to have been considered in that case. No doubt, where a transaction embodied in a deed is on the face of it a sale, and notwithstanding a statement in the attestation that consideration passed, it is open to a Court to hold that the surrounding

¹ (1962) 64 N. L. R. 492.

circumstances negative a genuine sale and point to the transaction being merely a colourable one. In the present case, deeds 3D1 and 3D2 are, on the face of them, deeds of sale for valuable consideration, even if the statement in the attestation that consideration passed be disregarded. There is, in addition, the evidence of the 3rd defendant who said that the land in question had been sold to him by the 2nd defendant on 3D2. There was no cross-examination on the 3rd defendant's evidence that the transaction between him and the 2nd defendant was one of sale. The 3rd defendant also stated that at the time of his purchase he got his notary to examine the encumbrances relating to the land. Even though the search would have disclosed that deed P 3 was executed subject to the right of the vendors to obtain a re-transfer, the period during which a re-transfer could have been obtained had already elapsed when 3D1 and 3D2 were executed. The allegations against the 2nd and 3rd defendants in the amended plaint that they acted fraudulently and collusively with the 1st defendant were not proceeded with by the plaintiff at the trial and no issues regarding them were framed. It seems to me, therefore, that the trial Judge had ample grounds for his finding that the 3rd defendant was a bona fide purchaser for value without any notice and that he acquired a good title to the land on 3D2, and I see no reason to disturb it.

On this finding alone the appeal must be dismissed. Even on the question whether in terms of P 3 the 1st defendant was under any obligation to re-transfer only a half-share of the land, the trial Judge has held against the plaintiff. The correctness of this finding was also canvassed by Mr. Jayewardene on the strength of several authorities which he cited. I do not think it necessary, however, to decide this question.

This appeal is dismissed with costs.

Appeal dismissed.
