

1916.*Present: Wood Renton C.J. and De Sampayo J.*

PERERA v. LEBBE.

411—D. C. Kandy, 24,464.

Purchase of property sold under order of Court—Is purchaser bound to inquire into the regularity of the order?

A property, the sale of which the owner had prohibited by his last will, and which was subject to a trust, was sold under the authority of the Court, and was purchased by defendant from one of the executors.

The plaintiff, who is the sole surviving executor and trustee under the last will, brought this action for declaration of title.

Held, defendant could not be deprived of the property on the ground of any irregularities in the order for sale, or in the procedure by which that order was obtained, if he purchased the property *bona fide* for value and without notice of the trust.

THE facts are set out in the judgment.

Bawa, K.C. (with him *J. W. de Silva*), for defendant, appellant.

A. St. V. Jayawardene (with him *E. W. Jayawardene*), for plaintiff, respondent.

December 5, 1916. WOOD RENTON C.J.—

This case raises a short but important point of law. The defendant purchased house No. 310, Trincomalee street, Kandy, from Mr. R. Estrop, one of the executors and trustees of the will of the late E. T. Gerlitsz of Badulla. The sale was carried out under the authority of an order of the Badulla District Court. But Mr. Gerlitsz in his will had prohibited the sale of his immovable property in Kandy; and, moreover the property itself was subject to a trust in favour of the destitute poor of the Burgher community. The plaintiff, who is the sole surviving executor and trustee of the will, brings this action for a declaration of title to the property conveyed by Mr. Estrop to the defendant, and for the ejection of the defendant therefrom, on the ground that the sale was fraudulent and in contravention of the terms of the will. Although fraud is mentioned in the pleadings, no issue on the point was raised at the trial. The learned District Judge held that the District Court of Badulla had no power to authorize the sale of this property in view of the terms of the will; that the trust in favour of the Burgher community was a public charitable trust; and that, if an application for the sale of it

was to be made at all, it should have been made under section 639 of the Civil Procedure Code. The learned Judge, therefore, gave judgment in the plaintiff's favour. The defendant appeals.

1916.
 WOOD
 RENTON C.J.

Perera
 v. Lebbe

I agree with the learned District Judge that the trust in favour of the Burgher community in Mr. Gerlitz's will was a public charitable trust, and that the proper procedure, if any portion of the real estate in Kandy was to be sold, was an application under section 639 of the Civil Procedure Code. But, on the other hand, it would be contrary to the principle laid down by the Privy Council in *Rewa Mahton v. Ram Kaisheen Singh*¹—that, if the Court ordering a sale in execution of a decree has jurisdiction, the purchaser of the property sold is not bound to inquire into the correctness of the order for execution any more than into the correctness of the judgment upon which the execution issues—if we were to decide that the defendant, assuming him to be a *bona fide* purchaser for value without notice of the trust, under the authority of an order of the District Court, can be deprived of the property purchased on the ground of any irregularities in the order for sale, or in the procedure by which that order was obtained. Section 64 of the Courts Ordinance confers on the District Court jurisdiction over the estates of *cestuis que trust*. Section 639 of the Civil Procedure Code merely prescribes the manner in which in the cases with which it deals that jurisdiction is to be exercised. The proposition that where a will contains a prohibition against the sale of a particular property a Court of competent jurisdiction has no power to order any part of that property to be sold is one that we cannot accept without qualification. It is clear that such sales may be ordered wherever and in so far as they may be necessary for the salvage of the estate.

But there is no need to consider that point further. The defendant is, in my opinion, entitled to shelter himself under the authority of the order of the District Court of Badulla if he can show—for as to this the burden of proof is on him—that he made the purchase in good faith for valuable consideration and without notice of the trust. I would set aside the decree of the District Court and send the case back for the framing and trial of an issue on that point. If the defendant should succeed upon that issue, the plaintiff's action should be dismissed with costs. If he should fail upon it, the plaintiff is entitled to the benefit of the judgment which he obtained at the original trial. The defendant must have the costs of this appeal in any event. All other costs should be costs in the cause.

DE SAMPAYO J.—I agree.

Sent back.

¹ (1866) I. L. R. 14 Cal. 18.