

1942

Present: Keuneman and Cannon JJ.

WARNASURIYA v. WICKREMESINGHE

118—D. C. Tangalla, 4,513.

Constructive trust—Sale of property in execution of mortgage decree—Purchase by nominee of judgment-creditor—No sanction of Court—Action for declaration of trust—Civil Procedure Code, s. 272.

Where the plaintiff in a mortgage action, in execution of his decree, bought the mortgaged premises through a nominee at a price less than the appraised value in order to circumvent the requirements of section 272 of the Civil Procedure Code,—

Held, that he was not entitled to a declaration that the property was bought in trust for him.

A PPEAL from a judgment of the District Judge of Tangalla.

H. V. Perera, K.C. (with him L. A. Rajapakse and S. W. Jayasuriya), for defendant, appellant.

N. E. Weerasooria, K.C. (with him Cyril E. S. Perera), for plaintiff, respondent.

Cur. adv. vult.

May 27, 1942. KEUNEMAN J.—

In this case the plaintiff claimed that the defendant, the legal owner of the lands, in question, was holding them for him under a constructive trust.

The plaintiff was the mortgagee of these premises, and sued under his mortgage and obtained mortgage decree. The premises in question were sold under the decree by the Fiscal, and defendant purchased and obtained Fiscal's Transfers. The plaintiff contends that, in making the purchase, the defendant was merely his nominee, and that the purchase price was provided by the plaintiff. These facts have been accepted by the District Judge, and no reason has been shown to us why that finding should be reversed.

As plaintiff unfolded his story it was clear that he did not apply for or obtain an order to bid under section 272 of the Civil Procedure Code. It was contended for the plaintiff that he was not aware of any ban on his purchase of the property. But I do not read the evidence in that way. In answer to Court the plaintiff said, "I got no sanction from Court to bid at the sales. I did not know such a thing was possible." I think this means that the plaintiff thought that he could not buy the property under any circumstance, and that not even the Court could sanction such a proceeding. There is no evidence by the plaintiff that he did not know he was debarred by any rule of law from purchasing the property. Plaintiff admits that one of the reasons why he got the defendant to buy the lands was because he wanted to purchase them at less than the appraised value.

The relevant portion of section 272 runs as follows:—

"A holder of a decree in execution of which property is sold may, with the previous sanction of and subject to such terms as to credit being given him by the Fiscal and otherwise as may be imposed by the Court, bid for or purchase the property."

It is clear from this section that the condition, which entitles a purchaser to bid for and purchase the property in execution, is the obtaining of "previous sanction" by the Court. No other section has been cited, nor have I found any other section which empowers a decree-holder to purchase. In the present case, it is clear that the plaintiff had not obtained such sanction, but, in spite of that, the plaintiff proceeded to attain this object by an indirect method. In view of this, the defendant argues that the plaintiff is not entitled to obtain the equitable relief which he now claims.

In my opinion, the present case falls within the *ratio decidendi* of *Ramanathan Chettiar v. Clementi Fernando and another*¹, and also of *Emee Nona v. Winson*². Certain earlier cases have been cited to us, viz., *Silva v. Siyadoris*³; *Weeraman v. Silva*⁴; and *Samaranayake v. Dissanayake*⁵, but these cases have been fully considered in the judgment of Macdonell C.J. in *Ramanathan Chettiar v. Clementi Fernando (supra)*, and for the reasons given by him I do not think these cases are of authority to-day.

An attempt was made by the respondent to differentiate all these cases on the ground that in them the decree-holder had applied for and obtained the sanction of the Court to bid, and had subsequently acted in contravention of the terms of that sanction. I do not think this alters the position. A complete disregard of the authority of the Court is as serious a matter as a partial recognition of the authority of the Court, and a subsequent disregard of its expressed order. The plaintiff in this case, who was debarred by law from bidding for and purchasing the property, has endeavoured to attain this object through the medium of another person. The question, therefore, is whether the Court ought to give its assistance to the plaintiff to achieve this purpose. I am of the opinion that the Court should refuse to do so.

It has also been contended that the issues do not cover this aspect of the case. I think the answer to this has been already given by Macdonell C.J.—

"The issues framed at the trial did not raise the question of fraud and illegality, on which this appeal was argued to us, but that question arises clearly from the pleadings and evidence and requires answer. It is this. Granted that the second defendant bought the land on plaintiff's instructions to buy for him and with plaintiff's money, and that the second defendant is, therefore, a constructive trustee of the land for plaintiff, is the trust one which this Court ought to enforce."

In addition to this, I am of opinion that issue/3 framed in this case, whether in the event of defendant being held to be a trustee, the plaintiff is entitled to a transfer of the lands sufficiently raises this question.

It is also contended that there is no evidence of fraud in this case on the part of the plaintiff, who merely acted in ignorance of the law. At the least in this case there was a wilful endeavour to evade by indirect methods the prohibition against the plaintiff's purchase of the property.

¹ 14 C. L. Rec. 170.

² 35 N. L. R. 221.

³ 1 C. W. R. 225.

⁴ 22 N. L. R. 107.

⁵ 23 N. L. R. 383.

In *Ramanathan Chettiar's* case, Macdonell C.J. put the matter in this way. "Apart from whether the judgment-debtor had been defrauded, there still remained the question whether the Court ought to give its assistance to the plaintiff to enforce a bargain directly contravening an order made by the Court itself." I have already pointed out that the fact that it was not an order of the Court, which was contravened, does not affect the issue. This is a deliberate attempt to obtain an advantage which the law does not permit.

There is, however, evidence in this case that the judgment-debtor has been defrauded. The property was sold by the Fiscal for a small amount and thereafter the plaintiff proceeded to seize a sum of Rs. 261.50 due to the judgment-debtor in a Matara case, and still had a debt against the judgment-debtor of over Rs. 1,000. Further, what I can only call the sham bidding at the Fiscal's sale by the plaintiff's Proctor and his nominee at the instance of the plaintiff throws some light on the dishonesty of this transaction.

There is no necessity to deal with other arguments addressed to us by the respondent's Counsel. They have all been answered in the judgment in *Ramanathan Chettiar's* case. The District Judge thought that the authority of the decision in *Ramanathan Chettiar's* case has been affected by the Full Court decision in *Wijewardene v. Podisingho*¹. No argument has been addressed to us on this point, and on a reading of that case I hold that this opinion of the District Judge is wrong.

The judgment of the District Judge is set aside and the appeal is allowed with costs and the plaintiff's action is dismissed with costs.

CANNON J.—I agree.

Appeal allowed.
