1912.

Present : Lascelles C.J. and Wood Renton J.

HANIFFA *et al. v.* SILVA

39—D. C. Colombo, 29,611

*Registration—Priority—Land sold on writ against judgment-debtor by Fiscal—Subsequent sale by judgment-debtor after he was adjudicated insolvent—Compensation—*Bona fide *possessor—Discharge of mortgage debt—Adjudication of insolvency not registrable under the Registration Ordinance.*

A's property was purchased by B at a Fiscal's sale held under a writ issued against A. Subsequently A was adjudicated insolvent, and thereafter A sold the same premises to C. The purchase money paid by C was applied in discharge of a mortgage decree against A with respect to the same land.

Held, (1) that no question of priority by registration arose in this case, as the deed in favour of C was invalid, having been granted by A after A's estate had vested in the assignee; (2) that the adjudication of insolvency and the appointment of assignee were not registrable under "The Land Registration Ordinance, 1891"; (3) that C was entitled to a *jus retentionis* till the purchase amount was paid to him.

"It is true that the present case is somewhat different from that of a *bona fide* possessor who discharges an encumbrance after entering into possession, for here the mortgage was discharged by means of the purchase money which the defendant (C) paid in order to obtain the property. But as between the plaintiff (B) and the defendant (C) this difference is immaterial."

THE facts are stated in the judgment.

Bawa, K.C., for the defendant, appellant.—The Fiscal's transfer on which the plaintiff relies is registered in the wrong folio. The registration is therefore invalid. *Paaris v. Perera*, [1] *Mohammadu Ali v. Isa Natchia.* [2] The defendant's deed, therefore, though subsequently registered, is the only valid registration.

Moreover, the fact that the vendor to defendant was adjudicated an insolvent at the date of his transfer to the defendant does not affect this case, as neither the adjudication of insolvency nor the appointment of assignee was registered. The order appointing an assignee is an order affecting land, as in the case of probate, and has to be registered under sections 16 and 17 of the Registration Ordinance of 1891.

The property in question did not vest in the assignee, as the property was sold on writ against Don David before the adjudication. The competition is therefore between two deeds of Don David. The question of insolvency does not arise, as the property

[1] *(1912) 15 N. L. R. 148.* [2] *(1911) 15 N. L. R. 157.*

would in no case rest in the assignee. Counsel cited *Punchirala v. Appuhamy*.[1]

The defendant is entitled to a *jus retentionis*, as his purchase money was paid to discharge a mortgage debt of the insolvent in respect of this land.

Van Langenberg, K.C., for the plaintiffs, respondents.—The deed in favour of the defendant is bad, not because it is subsequent in point of time to the Fiscal's conveyance, on which the plaintiff relies, but because it was executed by Don David after his insolvency and after the appointment of an assignee. Whatever property Don David had at the date of the adjudication vested in the assignee. Don David had therefore no title to convey. The assignee is the only person who represents the insolvent as he stood at the date of the adjudication. See judgment of Bonser C.J. in *Punchirala v. Appuhamy*,[2] *Jansz v. Idroos Lebbe Marikar*.[3]

The order of adjudication of insolvency is never registered. The order of Court referred to in section 17 is an order directly affecting land. The defendant had not paid the mortgage debt, and is not entitled to a *jus retentionis*.

Bawa, K.C., in reply.

Cur. adv. vult.

June 27, 1912. LASCELLES C.J.—

This is an action with regard to certain house property at Maligakanda in Colombo. The plaintiffs and the defendant both derive title from one Don David. The plaintiffs derive title under a Fiscal's sale and conveyance in 1901, the premises being then subject to a lease for five years. The Fiscal's conveyance was registered on October 18, 1901, but the defendant contends that this registration, inasmuch as it was registered in the wrong book and in the wrong folio, was ineffective in law. After the date of the Fiscal's sale, namely, in 1902, Don David was adjudicated insolvent, and an assignee of his estate was appointed. Subsequently, in 1906, notwithstanding his insolvency, and without having obtained a certificate, Don David conveyed the premises to the defendant. This conveyance was effected by two deeds, dated respectively July 20, 1906, and August 26, 1906, the latter deed being registered on August 29 of the same year. The first question is whether the better title was conveyed by the plaintiffs' Fiscal's conveyance of 1901 or by Don David's transfer of August 26, 1906. The defendant puts his case in this way. The Fiscal's conveyance, he says, being wrongly registered, has no more validity than an unregistered deed. That being so, the case, according to the defendant's argument, is analogous to the common one of a double sale, where the owner, having already sold to A, sells to B, and B registers his deed and so

[1] *(1901) 7 N. L. R. 102.* [2] *(1901) 7 N. L. R. 106.*

[3] *(1891) 1 C. L. R. 63.*

1912.

LASCELLES C.J.

Haniffa v. Silva

secures priority under section 17 of the Land Registration Ordinance of 1891. Assuming for the purpose of argument that the registration of the plaintiffs' Fiscal's conveyance is ineffective, the defendant's argument is plainly fallacious. There is nothing in the Registration Ordinance of 1891 which can be construed so as to give validity to a deed granted by an insolvent after his estate has vested in the assignee, or to any other instrument which, apart from any question of priority, is *per se* invalid. The Ordinance deals with the question of the priority between competing deeds. It is true that its effect is sometimes to lend validity to a deed executed after the grantor has by a previous conveyance divested himself of the property comprised in that deed; but this is no more than the inevitable result of giving priority to the registered instrument. Where the grantor is subject to the personal disability of insolvency the case is essentially different. The deed executed by the grantor is bad, not because it is subsequent in date to another instrument, but by reason of the incapacity of the grantor to dispose of his property; in other words, because the right to deal with the property has by the operation of the Insolvency Ordinance been withdrawn from the insolvent and vested in the assignee. As was well pointed out by Mr. van Langenberg, if the defendant's argument on this point were accepted, the result would be that insolvents would be able to dispose of the property of the estate by deeds which could successfully compete with those of the assignee. I am, therefore, of opinion that whether or not the learned District Judge, in the first judgment, was right in holding that the Fiscal's transfer was duly registered (and on this I express no opinion), the defendant's deed, executed by Don David whilst he was insolvent, passed no title to the defendant. Then it was argued by Mr. Bawa that the defendant was protected by the fact that neither the insolvency of Don David nor the appointment of his assignee had been registered. But these are instruments which have never been regarded as registrable under the Land Registration Ordinance of 1891; and in view of the practice that has hitherto obtained, and of the terms of section 16 of the Ordinance, I am not prepared to hold that they are registrable. The defendant also contends that, inasmuch as the consideration for which he purchased the property was applied in discharge of a mortgage decree against Don David, he, the defendant, is entitled to this amount as *utiles impensa*. Issues were framed on this point (page 27 of the record); and in the first judgment (page 34) the learned District Judge found " that the money paid by the defendant was taken in and towards the payment of the amount due on mortgage No. 6,994, and the decree entered on the said mortgage in D.C. Colombo, No. 15,628. The payment has been certified in that case. I accept the evidence of Mr. Weerasooriya on this point. " Though the Judge has found on the issues of fact framed on May 30, 1910, he has left unanswered

the 9th issue, which raised the question of the defendant's right to claim the benefit of so much of the purchase money as was applied in discharge of the mortgage on the premises. On this finding the question arises whether we should not now deal with the defendant's claim for compensation, or whether it is necessary to protract this trial by further reference to the District Court. The plaintiff's objection on the point of compensation may be summarized as follows. No claim for compensation was formally made in reconvention in the issues suggested by the defendant on January 21, 1910; and in those agreed upon on May 27 the question of compensation was not raised, and the plaintiffs' counsel does not appear from the record to have pressed this point. It is, therefore, urged that the plaintiffs have not had an opportunity of attacking the mortgage. On the other hand, the question of compensation was distinctly raised in both paragraph 5 of the defendant's answer and in the additional issues No. 8 and No. 9 framed on May 30. In these circumstances, I think the plaintiffs have had full opportunity of meeting this claim, and that they will not be prejudiced by this question being now decided on the findings of the District Judge. The plaintiff indisputably was in the position of a *bona fide* possessor when he entered the premises; and it has been held that the money which a *bona fide* possessor of property pays in discharge of a mortgage which encumbered the property when it came into his hands may be treated as a *utiles impensa*. *De Silva v. Shaik Ali;*[1] *vide* also *Ukku Banda v. Bodia.*[2] It is true that the present case is somewhat different from that of a *bona fide* possessor who discharges an encumbrance after entering into possession, for here the mortgage was discharged by means of the purchase money which the defendant paid in order to obtain the property. But as between the plaintiffs and the defendant this difference is immaterial. It mattered not to the plaintiffs whether the mortgage was discharged out of the purchase money paid by the defendant or whether the mortgage was paid off by him at a later date. The plaintiffs have got the benefit of a payment which the defendant has made in the honest belief that the property was his own. For the above reasons I would confirm the judgment of the District Judge so far as it gives the plaintiffs judgment as prayed for, but I would add thereto a declaration that the defendant is entitled to retain possession of the properties until the sum of Rs. 4,050, being the amount certified to have been paid in satisfaction of the plaintiffs' claim in D. C. Colombo, No. 15,628, has been paid to him by the plaintiffs. With regard to the costs of the appeal, I think that each side should pay their own costs, as the appellant has succeeded in obtaining a substantial modification of the judgment.

WOOD RENTON J.—I entirely agree, and have nothing to add.

Varied.

[1] (1895) *1 N. L. R. 248.*

[2] *(1902) 6 N. L. R. 45.*