

1956

Present: Gratiaen, J., and Gunasekara, J.

R. A. PERERA *et al.*, Appellants, and BEATRICE PERERA,
Respondent

S. C. 99-100—D. C. Colombo, 6,306L

Exceptio rei venditae et traditae—Seizure of immovable property and registration of notice of it—Sale by judgment-debtor pending the seizure—Subsequent purchase by his nominee from execution purchaser—Validity and effect of such purchase—Civil Procedure Code, ss. 237 (1), 238.

Where, during the pendency of a duly registered seizure of immovable property, the judgment-debtor sells the property by private alienation prior to the Fiscal's sale, the vendee is entitled to the benefit of the *exceptio rei venditae et traditae* if the judgment-debtor or his nominee buys the property subsequently from the person who purchases it at the Fiscal's sale. Although section 238 of the Civil Procedure Code declares *inter alia* that any sale during the pendency of the registration of a notice of seizure shall be "void" as against an execution purchaser and as against "all persons" deriving title under or through him, and although the words "all persons", being words of the utmost generality, are *ex facie* wide enough to include the judgment-debtor himself, it does not necessarily follow that the superior title acquired by the judgment-debtor by virtue of section 238 can be vindicated in violation of his subsisting personal obligations independently undertaken by contract or imposed on him under the general law.

APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q.C., with *T. B. Dissanayake* and *E. S. Amerasinghe*, for the defendants (appellants in S. C. 100 and respondents in S. C. 99).

H. W. Jayewardene, Q.C., with *V. Arulambalam* and *B. Senaratne*, for the plaintiff (respondent in S. C. 100 and appellant in S. C. 99).

Cur. adv. vult.

February 10, 1956. GRATIAEN, J.—

This is a *rei vindicatio* action. The plaintiff's husband, Julius Perera, owned the property until 17th April 1950. He was in serious financial difficulties towards the end of 1949, and a hypothecary decree for the sale of the property had been entered against him in action 2447 M. B. of the District Court of Colombo. In addition, it was under seizure in execution proceedings in certain other cases. One such decree (to which I shall later refer) was entered in D. C. Colombo 9041/S in favour of S. M. D. Deen for Rs. 1,000 and interest payable on a promissory note.

In April 1950, Julius' uncle, Don Lewis Perera Appuhamy (hereafter referred to as "Lewis"), reluctantly agreed to assist him to settle his debts so as to prevent the property, which was then worth about Rs. 30,000, from being sold in execution. He received from Julius a document (DS) indicating that Rs. 16,000 was required to meet his liabilities. An agreement was arrived at, and was implemented on 17th April 1950, whereby Julius sold the property to Lewis for this amount subject to the vendor's right to re-purchase it for a like amount within 5 years. The conveyance P9 contains the following warranties and assurances :

"And I the said vendor for myself and my heirs, executors, administrators and assigns do hereby covenant, promise and declare with and to the said vendor, his heirs, executors, administrators and assigns that the said premises hereby sold and conveyed are free from any encumbrance whatsoever and that I have not at any time heretofore made done or committed or been party or privy to any act, deed, matter or thing whatsoever whereby or by reason the said premises or any part thereof are, is, can, shall or may be impeached or encumbered in title, charge, estate or otherwise howsoever and that I and my afore-written shall and will at all times hereafter warrant and defend the same or any part thereof unto him and his afore-written against any person or persons whomsoever and further also shall and will at all times hereafter at the request of the said vendee or his afore-written do and execute or cause to be done and executed all such further and other acts, deeds, matters, assurances and things whatsoever for the further and more perfectly assuring the said premises hereby sold and conveyed and every part thereof, unto him or his afore-written as by him or his afore-written may be reasonably required."

The agreed consideration was paid by a series of cheques made in favour of the judgment-creditors whose names were disclosed by Julius for the purpose. At the same time Lewis was placed in possession of the property as owner, the plaintiff himself acting as his rent-collector in respect of the tenements occupied by Julius' former tenants who attorned to Lewis. Lewis died on 10th September 1950 and his interests in the property passed to his daughter who is the 2nd defendant. The plaintiff and Julius at that time acknowledged the 2nd defendant as the new owner.

I accept the findings of fact recorded by the learned trial Judge as to the further events which led to the present litigation. When Julius persuaded Lewis in April 1950 "to save the property from forced sales"; he had

(perhaps through inadvertence) omitted to mention that the property was still under seizure for the recovery of the undisclosed judgment-debt in D. C. Colombo 9041/S and that a notice had been served on him under section 237 (1) of the Civil Procedure Code prohibiting him from transferring or charging the property in any way. Notice of this seizure had been duly registered on 14th October 1949 and re-registered under section 9 of the Registration of Documents Ordinance on 5th April 1950. Lewis was unaware of the seizure when he purchased the property under D9 or at any time thereafter. He assumed, without further investigation, that Julius was no longer in debt.

Registration of the seizure was kept alive by the judgment-creditor's proctor Mr. Rasanathan (certain aspects of whose conduct as a member of the legal profession need not be discussed for the purposes of this appeal) and the property was eventually purchased at a Fiscal's sale on 6th February 1951 for Rs. 250 by a man called Thiagarajah (Rasanathan's nominee). The conveyance in favour of Thiagarajah was executed on 28th May 1951, and a few days later Thiagarajah conveyed it for a consideration of Rs. 3,000 (borrowed under a contemporaneous mortgage) to the plaintiff. She then instituted this action against the 2nd defendant claiming a decree for the ejection of the 2nd defendant from the property on the ground that she (the plaintiff) had acquired a superior title by right of purchase from Thiagarajah.

The action was instituted on the basis that the plaintiff had become the owner of the property in her own right, but the learned District Judge took the view that she was merely Julius' nominee. He ruled, however, that the title acquired under the conveyance P1 prevailed over that of the 2nd defendant by virtue of section 238 of the Civil Procedure Code which made the earlier sale to Lewis pending the registration of the notice of seizure "void as against the purchaser from the Fiscal selling under the writ of execution and as against all persons deriving title under or through the purchaser". At the same time the 2nd defendant was declared entitled to compensation as a *bona fide* improver (and to a *jus retentionis*) on the ground that Rs. 12,304.79 out of the consideration paid by Lewis on the "void" sale had been utilised in freeing the property from mortgage.

The plaintiff and the 2nd defendant have both appealed from the judgment of the lower Court. The former complains that the order for compensation and a *jus retentionis* is insupportable. The latter contends that the plaintiff is not entitled in the circumstances of this case to a declaration of title or to a writ of ejection against her. If the 2nd defendant's appeal succeeds, the correctness of the order for compensation need not be considered.

The main argument addressed to us on behalf of the 2nd defendant was that Julius had from the inception planned to defraud Lewis, and that the execution-purchaser Thiagarajah was also his nominee. I find myself unable to hold that the learned Judge was wrong in rejecting this argument on the evidence before him. It is far more likely that Proctor Rasanathan, having in the first instance procured the Fiscal's conveyance

in the name of Thiagarajah for his own personal benefit, was later attracted by the idea of selling it to Julius at a profit (although at a figure substantially less than its true value at the relevant date).

The 2nd defendant over-stated her defence on this part of the case. She was however entitled in law to resist a decree for ejection without proof of any express fraud on the part of Julius as alleged in the course of the argument before us. Having regard to the finding that the plaintiff was in truth a nominee of Julius, the obligations imposed on Julius as a vendor under the conveyance D9 dated 17th May 1950 precluded him from claiming either directly or indirectly the benefit of section 238 for the purpose of securing the eviction of his former purchaser's successor in title.

Section 238 declares *inter alia* that any sale during the pendency of the registration of a notice of seizure shall be "void" as against an execution purchaser and as against all persons deriving title under or through him. The intention is to "freeze" the judgment-debtor's title in the property under registered seizure so as to prevent him from placing it beyond the reach of a vigilant judgment-creditor. At the same time it protects a *bona fide* execution purchaser from the risk of the property having been alienated or encumbered during the interval between the registration and the judicial sale.

The draftsman could hardly have had in contemplation the possibility that a judgment-debtor would purchase his own property at the Fiscal's sale or even re-acquire title to it subsequently from the execution purchaser. Nevertheless, the words "all persons", being words of the utmost generality, are *ex facie* wide enough to include the judgment-debtor himself. But it does not necessarily follow that the superior title acquired by him by virtue of section 238 can be vindicated in violation of his subsisting personal obligations independently undertaken by contract or imposed on him under the general law.

For the purposes of the present contest as to title, Julius himself must be regarded as the person claiming (through a nominee) to avoid his own sale to Lewis under D9. The term "void" in section 238 must be read with some limitation. In a very similar context section 240 of the Indian Code declared any private alienation of property while under attachment to be "null and void". The Judicial Committee rejected the argument that the words "null and void" were to be taken in the widest possible sense as "null and void against all the world, including even the vendor", *Anund Lall Dass v. Shaw*¹. In my opinion the subsequent acquisition by Julius of superior title by virtue of section 238 did not have the additional effect of automatically destroying the rights and obligations of Lewis and Julius *inter se* under the earlier contract of sale.

Apart from the express undertakings and assurances contained in the contract of sale, an obligation is imposed upon a vendor by the Roman Dutch Law "not only to guarantee to his purchaser the peaceful possession of the thing sold, but also to give an implied guarantee against every

¹ (1872) 17 *Sutherland's W.R.* 313.

form of molestation *on the part of the vendor himself and of third parties.*" *Wessels on Contract* Vol. 2, sections 4593, 4603, and 4605. This is the foundation of the equitable doctrine *exceptio rei venditae et traditae* which was finally clarified by the Judicial Committee in *Gunatilleke v. Fernando*¹.

The registration of the prohibitory notice served on Julius had, at the time of the conveyance D9, merely reduced for the time being his powers of voluntary alienation, so that he had in truth only a defeasible title which he could pass to Lewis on 17th April 1950. Nevertheless, the *exceptio* became available to the 2nd defendant (as the heir of Lewis) as soon as Julius (through a nominee) re-acquired a title free from the earlier defect on 8th June, 1951.

"On the confirmation of the right of an alienor which had been defective at the time of the alienation, the original invalid title of his alienee becomes confirmed from the very moment that the first vendor acquired ownership." *Voet* 23 : 1 : 1. The law will not permit Julius to claim the benefit of section 238 in a situation where the proposed eviction of his vendee's successor in title would violate the obligation which the law had imposed on him by virtue of the earlier contract. "One acts dishonestly who tries to evict a thing sold by himself and to stultify his own act: equity dictating that a plaintiff should be all the more liable to be repelled by an equitable plea (*exceptio*) when he is himself liable to be sued on account of the eviction." *Voet* 23 : 1 : 2. The scope of the *exceptio* is not limited to cases where, at the time of the original sale, the vendor had no title at all that he could convey. It applies with equal force if the title conveyed had been defeasible though not void *ab initio* at the relevant date.

Section 238, construed in all its generality, certainly vested in Julius (as the real purchaser from Thiagarajah) a title superior to that which he had transferred to Lewis in disobedience of the forgotten prohibitory notice. Nevertheless, his obligations under the earlier contract of sale were not extinguished, so that the superior title which he later acquired served only to "confirm" the title of Lewis which had previously been defeasible. The *exceptio* precludes Julius from relying on his new title in order to evict his former purchaser whose continued possession he was under a special legal duty to protect. Mr. Berwick points out in a footnote to his translation of *Voet* 23 : 1 : 2 :—

"In point of equity, the last person to be allowed successfully to recover a thing which he has himself sold to his own defendant, is the very person who would be liable in damages to the defendant for its eviction from the latter; though law will allow him to sue, *equity* will allow the defendant to take and succeed upon this plea, if he prefers not to lose the thing rather than to have recourse to his right to damages."

The extent to which the *exceptio* can operate is indicated in *Wessels* (supra) sections 4600–4603. Let it be supposed that the vendee had purchased a title which was manifestly doubtful, and was in fact worthless. Let it also be supposed that in these circumstances the vendor had

¹ (1921) 22 N. L. R. 355.

expressly stipulated that he would not hold himself responsible for his vendee's eviction by the true owner. Even then, he could not, by subsequently acquiring a better title, evict the vendee *on his own account*.

The learned Judge's decision (under issue 12) that the plaintiff is the nominee of Julius suffices by itself to preclude her from obtaining a decree for eviction which would not have been open to Julius himself. The remedy cannot be granted to defeat the rights of the very person whose possession Julius was bound to guarantee against "any form of molestation" at his own hands. In this view of the matter, it is unnecessary to decide whether, and to what extent, the express assurances and covenants contained in the conveyance P1 afford additional grounds for rejecting the plaintiff's claim. I would allow the appeal and dismiss the plaintiff's action with costs in both Courts.

GUNASEKARA, J.—I agree.

Appeal in S. C. 100 allowed.

Appeal in S. C. 90 dismissed.
