1944 *Present:* **Howard C.J. and Wijeyewardene J.**

JAYAWARDENE, Appellant, *and* MALAKA, Respondent.

55—D. C. Badulla, 7,270.

Deed—Sale on a Fiscal's conveyance—Falsa demonstratio non nocet—*Application of maxim.*

Plaintiff claimed a small strip of land and the house standing thereon on a Fiscal's conveyance, which conveyed to him certain premises together with the buildings standing thereon, within certain well-defined boundaries, marked *lot 45* in the plan. The evidence disclosed that there were buildings on the land, which had come down but that the house claimed by plaintiff was outside lot 45.

***Held*, that the plaintiff was not entitled to claim the house and that the maxim *falsa demonstratio non nocet* did not apply to the facts of the case—**

" Where the description is made of more than one part and one part is true but the other false, then if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise; the characteristic of cases within the rule being that the description so far as it is false applies to no subject at all, and so far as it is true, applies to one only ".

APPEAL from a judgment of the District Judge of Badulla.

S. Nadesan, for defendants, appellants.

C. V. Ranawaka, for plaintiff, respondent.

Cur. adv. vult.

October 13, 1944. WIJEYEWARDENE J.—

This action was instituted to obtain a declaration of title to a small strip of land of the extent of 5.5 perches and the house standing on it. The District Judge held that the plaintiff was " not entitled to the land as it was the property of the Crown but was entitled to the house on it". The defendants appeal against that judgment.

Several years ago, one Appuhamy purchased a half share of 3 acres 2 roods 13 perches of Koloman Kandurutenne. Appuhamy sold a divided lot 200 feet by 100 feet and that lot has devolved on the plaintiff who is now in possession of lot 46 in plan X which is given in that plan as of the extent of 1 rood 33 perches. That would be the correct extent of a lot 200 feet by 100 feet. The remaining interests of Appuhamy devolved on Juan Naide who conveyed them to his wife, the first defendant, and Punchiappu, one of his sons. By bond P 11 of 1926 the first defendant and Punchiappu mortgaged with Barnis Silva two properties:—

(1) a portion of land called Galapitiyagodapatana, and

(2) a half share of " Koloman Kandurutenne in extent 3 acres 2 roods 13 perches (exclusive of portion of this land in extent 200 feet in length and 100 feet in breadth) bounded . . . . on the south by road reservation . . . . together with the buildings standing thereon ".

The bond was put in suit and at the sale held on September 16, 1939, in satisfaction of the mortgage decree, W. H. Perera purchased the first

property and the plaintiff, the second property. The plaintiff, thereafter, obtained his Fiscal's conveyance P 5 of 1939. The mortgage decree, the sale notice and the Fiscal's conveyance follow bond P 11 in describing the property purchased by the plaintiff.

The extent of the land conveyed to plaintiff by P 5 is found on computation to be 1 acre 3 roods 6.5 perches. That is the exact extent of lot 45 in plan X. The southern boundary of the land is given in P 5 and the connected documents as the road reservation, and the remaining boundaries given in these documents are the same as the Northern, Eastern and Western boundaries of lot 45 as shown in Plan X. These facts prove beyond doubt that the property mortgaged by the first defendant and Punchiappu and ultimately purchased by the plaintiff does not include the road reservation. It was also admitted by the plaintiff's Counsel at the trial that "lot 48 stands on Crown reservation". There can be no doubt that by lot 48 Counsel intended to refer and did, in fact, refer to the building in question. The plaint itself refers in paragraph 8 to the building as the building "shown as lot 48". It is, therefore, clear that the building in question is not claimed by the plaintiff as standing on the land purchased by him. The plaintiff's claim to the building is put forward on two grounds:—

(1) that the defendants are estopped by their conduct from questioning the plaintiff's right to the building;

(2) that by an application of the principle of *falsa demonstratio non nocet* the house in question may be taken as included among the "buildings" mentioned in P 5.

There is a conflict of oral evidence with regard to what happened at the sale. The plaintiff's witness, W. H. Perera, states that the defendants " did not say that the buildings had not been included in the mortgage ". In cross-examination he says, " The Fiscal's Officer asked the first defendant whether she had any objection to the sale but she did not reply ". This evidence cannot help the plaintiff. The defendants could not and would not object to a sale of the mortgaged property and the evidence of Perera does not show that the defendants were aware that the Deputy Fiscal was intending to include in his sale a building not standing on the mortgaged property. The plaintiff gives more definite evidence on the point. He states that the Deputy Fiscal told the defendants that he would sell the building in question and that the defendants kept quiet. The plaintiff's evidence has to be read, however, in the light of what happened afterwards. W. H. Perera and the plaintiff arranged to take possession of their lands on January 13, 1940. Perera went to his land with the Fiscal's Officer and took possession of Galapitiyagodapatana without any trouble. The plaintiff, however, brought with him a Sub-Inspector of Police and a Constable in his car to help the Fiscal to put him in possession of the land purchased by him. He has not explained why he thought it necessary to get the assistance of the Police, if the sale took place without any protest as deposed to by him. The Fiscal's process server gave evidence in chief supporting the plaintiff. He is clearly a partisan witness. He did not hesitate to say that the mortgage decree referred to a building with "a tagaram roof"

and thereby try to establish beyond all doubt that the plaintiff bought at the sale under mortgage decree the building in question which is admittedly a building with a " tagaram roof ". It was only on the production of the mortgage decree that he admitted that no building with " a tagaram roof " was mentioned in the decree. Moreover, in cross-examination he admitted that " the Deputy Fiscal did not speak to the defendants on the day of the sale". The first defendant who gave evidence said that the Deputy Fiscal did not tell her that he was selling the house. The most material witness for the plaintiff would have been the Deputy Fiscal who conducted the sale but he was not called to give evidence. It is impossible to say that the evidence led by the plaintiff shows that the defendants were aware at the time of the sale that the Deputy Fiscal was proceeding to sell a building which he had no authority to sell and that the defendants knowingly permitted the plaintiff to bid for and purchase the property. The conduct of the plaintiff after the sale supports on the other hand the suggestion of the defendant's Counsel that the plaintiff who was aware that he had not, in fact, bought the building at the sale, desired to take possession of the building and he naturally anticipated trouble and took the unusual step of going with the Police to obtain possession of the property. I hold against the plaintiff on the first point.

With regard to the second point it has to be noted that the bond P 11 and the conveyance P 5 describe the land mortgaged with great exactitude. The boundaries and the extent leave no doubt that the land conveyed to the plaintiff is lot 45 and does not include the road reservation. Does the reference to " buildings " help the plaintiff ? This would depend partly on the answer to the further question, " Were there any buildings on lot 45 at the time of the bond in 1926 ?" The first defendant's case is that there were two manna thatched buildings on lot 45 which came down later. The plaintiff and his witness undertake to say that there were no such buildings in 1926. The evidence does not show how they were so interested in the mortgaged property in 1926 as to have noticed the non-existence of thatched buildings at some distance from the road. Undoubtedly, the mortgagee Barnis Silva would have been interested in the property in 1926 as he was giving a loan but the plaintiff has not called Barnis Silva as a witness. Moreover, the case presented by the plaintiff is that there was only one building and that was the house in question. Confronted with the difficulty of explaining why in that case the bond P 5 referred to buildings one of the plaintiff's witnesses tried to meet it by saying that " buildings " were mentioned as the building in question consisted of four rooms. If there were two thatched buildings in 1926 as asserted by the defendants the reference to buildings in P 5 would be quite in order.

I do not think that this is a case to which the maxim of *falsa demonstratio* is applicable. That maxim when stated fully reads, *Falsa demonstratio non nocet cum de corpore constat.* The significance of this maxim is set out in *Broom's Legal Maxims* thus:—

> " Where the description is made up of more than one part, and one part is true, but the other false, then, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be

rejected and will not vitiate the devise; the characteristic of cases within the rule being, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only".

Now the description in this case refers merely to " buildings " on a certain land that could be identified clearly as lot 45. There is no further description given of the " buildings ". Clearly the house in question does not stand on lot 45. Moreover, according to the defence there were two thatched buildings on lot 45 at the time of the mortgage. Therefore, there is no part of the description " which is true " describing the house in dispute with any "legal certainty". I hold against the plaintiff on the second point also.

I set aside the judgment of the District Judge and direct decree to be entered dismissing the plaintiff's action with costs here and in the Court below.

HOWARD C.J.—I agree.

Appeal allowed.