

1944

Present: Howard C.J. and de Kretser J.

WIJEYESURIYA, Appellant, and SAMARASURIYA,  
Respondent.

250—D. C. Tangalla, 4,783.

*Estoppel—Fiscal's sale—Presence of party at sale and remaining silent—  
No evidence of intention to create a false impression.*

Mere presence at a sale of property, without claiming it, is not sufficient to create an estoppel against a person. There must be evidence that the person sought to be estopped by reason of his silence intended to create a false impression on the person who sets up the estoppel and induced him to buy.

**A** PPEAL from a judgment of the District Judge of Tangalla. The facts appear from the argument.

*N. E. Weerasooria, K.C.* (with him *E. B. Wikremanayake*), for the plaintiff, appellant.—This is a case of competition between two deeds of title derived from the same source. The plaintiff claims the property in question under a deed of February 26, 1941, and the defendant claims it by virtue of a Fiscal's transfer of June 19, 1941, made in pursuance of a sale which was held in execution against the plaintiff's vendors on February 27, 1941. It is clear on the evidence that the plaintiff, although he was present at the Fiscal's sale, did not bid. The question is whether his mere presence and silence at the sale can create an estoppel. To establish an estoppel the person who is sought to be estopped by silence must be proved to have intended to create a false impression on the person who sets up the estoppel. The *onus* in the present case was on the defendant to prove by affirmative evidence that the plaintiff's presence and silence at the sale misled him and induced him to buy. He has not, however, gone into the witness-box and given such evidence. The recent case of *Tissahamy v. Perera*<sup>1</sup> contains a review of all the relevant decisions. See particularly *Rodrigo et al. v. Karunaratna et al.*<sup>2</sup> and *Ukku Banda v. Karupai et al.*<sup>3</sup>.

*N. Nadarajah, K.C.* (with him *S. W. Jayasuriya*), for the defendant, respondent.—It was not necessary for the defendant to have given evidence personally. The plaintiff was present at the sale but did not raise any objections to the sale. He stood by without claiming the property as his. The trial Judge has also found that he bid at the sale. Even assuming that this finding is incorrect, the mere fact that the plaintiff stood by without protesting is sufficient to create an estoppel. The guiding principle is that if I see a man acting in derogation of my rights without knowing that I have any, I am bound to tell him of them—*Caruppen Chetty v. Wijesinghe*<sup>4</sup>; *Gunasekera v. Dissanayake*<sup>5</sup>; *Saparamadu v. Saparamadu*<sup>6</sup>; *Rodrigo et al. v. Karunaratna et al.* (*supra*).

*N. E. Weerasooria, K. C.*, replied.

*Cur. adv. vult.*

<sup>1</sup> (1942) 43 N. L. R. 405.

<sup>2</sup> (1920) 21 N. L. R. 360.

<sup>3</sup> (1923) 25 N. L. R. 204.

<sup>4</sup> (1910) 14 N. L. R. 152.

<sup>5</sup> (1912) 16 N. L. R. 123.

<sup>6</sup> (1918) 20 N. L. R. 369.

October 25, 1944. HOWARD C.J.—

The defendant in this case claims the property in dispute by virtue of a Fiscal's transfer No. 6,115 of June 19, 1941. The defendant became the purchaser of the said property at a sale held in execution against two persons, Andirishamy and Ensohamy, on February 27, 1941, for the recovery of costs in a partition case. On February 26, 1941, by deed No. 1,454, Ensohamy and Andirishamy sold the said property to the plaintiff. On the same day the transfer of the property was registered in the Land Registry. The defendant is in forcible possession of the property and the plaintiff has brought this action praying that he be declared entitled to the said land, that the defendant be ejected therefrom and that he be placed in possession thereof. The plaintiff also claims damages at Rs. 120 and a further Rs. 15 per month from the date of action until placed in possession. The defendant pleaded that the plaintiff's deed executed a day before the sale in execution by the Fiscal was a fraudulent deed. Further, that the plaintiff was present at the sale in execution and allowed the interests of the grantors to be sold without any protest, and thus as a matter of law was estopped from denying the validity of the defendant's purchase. The learned Judge has accepted the evidence of certain witnesses, who gave evidence on behalf of the defendant, that the plaintiff was present at the Fiscal's sale and got a certain person called Abeywickrama, also a witness, to bid for him. He has also held that, although the plaintiff gave consideration for the land, he had concealed his title in circumstances amounting to fraud. He was, therefore, estopped from setting up title to the said property and his deed was null and void.

In coming to the conclusions he did, the learned Judge seems to have been very much influenced by the fact that two of the witnesses who testified on behalf of the defendant were Proctors. Mr. Jayewickreme was the Proctor for the plaintiff in the partition proceedings and had seized the property in execution for costs due to him and the defendant's Proctor in such action. In giving evidence he stated that the plaintiff came to him a few days after the sale and told him he had bid at the sale but his (Mr. Jayewickreme's) clients would not allow him to buy. The Fiscal's officer also gave evidence on behalf of the defendant and stated he was present at the sale and the bids were recorded. This witness also stated that the plaintiff put in bids. In cross-examination this witness admitted that he did not write plaintiff's name among the bidders, but the latter had asked Abeywickrama to bid. The plaintiff denied that he bid at the sale or was present or that he instructed Abeywickrama to bid on his behalf. Abeywickrama also gave evidence and stated he was present at the sale and purchased another lot in his own behalf. This witness denied that he bid or was instructed to do so on the plaintiff's behalf. In view of the fact that the plaintiff's name does not appear in the list of bidders, it is not proved that he bid at the sale. Mr. Jayewickreme stated that he did bid, whilst the Fiscal's officer on the other hand stated that Abeywickrama bid on his behalf. In view of this conflict of evidence. I think that the learned Judge was wrong in holding that a bid was made on his behalf by Abeywickrama. Mere presence at a

sale and remaining silent is not sufficient in law to create an estoppel. The principles relating to estoppel were formulated by Brett J. in *Carr v. The London and North Western Railway Company*<sup>1</sup>, in the following passage:—

“ One such proposition is, if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

The present case cannot be brought within that proposition, because it is not pretended that there was any statement or conduct false to the knowledge of the defendants or any of their servants.

Another recognized proposition seems to be that if a man either in express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.”

In *Rodrigo v. Karunaratna*<sup>2</sup> it was held that to establish an estoppel, it must be proved that the action taken by the party seeking to establish the estoppel was directly connected with the false impression caused by the representation or conduct of the party sought to be estopped. The representation producing the impression must be, in effect, an invitation to the person affected by it to do a particular act. *Rodrigo v. Karunaratna* was followed in *Ukku Banda v. Karupai*<sup>3</sup> when it was held that to establish an estoppel by conduct by silence, the person who is sought to be estopped by reason of his silence must be proved to have intended to create a false impression on the person who sets up the estoppel, and that he caused him thereby to do a particular act. This principle was also cited with approval in my judgment in *Tissahamy v. Perera*<sup>4</sup> and in a recent case, S. C. No. 303—D. C. (F) Matara No. 14,491, decided on May 10, 1944. In the present case the defendant did not go into the witness-box and give evidence. There is, therefore, an entire absence of evidence as to whether the plaintiff's presence at the sale, and silence, induced him to buy. Neither the conduct of the plaintiff nor the general situation leads to any such inference. In my opinion the judgment of the District Judge is erroneous. I allow the appeal and order that judgment be entered for the plaintiff as claimed with costs in both Courts.

DE KRETZER, J.—I agree.

*Appeal allowed.*

<sup>1</sup> (1875) 10 G. P. Cases, at pp. 307.

<sup>2</sup> 21 N. L. R. 360.

<sup>3</sup> 25 N. L. R. 204.

<sup>4</sup> 43 N. L. R. 405.