

~~C.L. 2~~

9, 1960

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IN THE PRIVY COUNCIL

No. 24 of 1957

ON APPEAL FROM THE SUPREME COURT OF CEYLON

B E T W E E N:

BEATRICE SUNEETHRA PERERA
(Plaintiff) Appellant

- and -

1. N.A. PERERA
2. MRS. FLORA PERERA
3. S.D. JUSTIN PERERA
4. S.D. AUSTIN PERERA
5. S.D. LIONEL PERERA
(Defendants) Respondents

UNIVERSITY OF LONDON
W.C.1.
- 7 FEB 1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

53384

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CASE FOR THE APPELLANT

Record

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1. This is an appeal from two Decrees of the Supreme Court of Ceylon, both dated the 21st February 1956, and respectively dismissing the appeal by the Appellant and allowing the appeal of the First and Second Respondents from the Decree of the District Court of Colombo, dated the 25th August 1953, whereby it was decreed and declared that the Appellant (the Plaintiff in the suit) was entitled to certain property and further that the Second Respondent was entitled to a sum of Rs. 12,304.79 from the Appellant as compensation for useful improvements and to a jus retentionis of the said property till the said compensation be paid and further that on payment of the said compensation the Appellant was entitled to possession of the said property against all the Respondents and further that the parties should bear their own costs. The said Decree of the Supreme Court allowing the appeal of the First and Second Respondents ordered that the Appellant's action be dismissed with costs in both Courts.

p.64-5

p.52

2. The property which is the subject of this litigation is a parcel of land measuring between one and two roods and containing a block of residential

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premises known as Nos. 23 (1, 18 and 19-25) Wall's Lane, Mutwal, within the Municipality and District of Colombo. It is hereinafter referred to as "the Property".

p.72, 1.10

3. Until 1950 the property belonged to B. Julius Perera, the husband of the Appellant, hereinafter referred to as "Julius". On the 15th June 1948 in District Court Colombo Case No. 9041/s, judgment was given against Julius for Rs.1,000 and interest and costs. On the 30th August 1949 in District Court Colombo Case No. 2447/MB, judgment was given against Julius under three Mortgage Bonds on the property for Rs.11,677.22 with interest and costs. On the 22nd December 1949 in District Court Colombo Case No. 11066/S, judgment was given against Julius for Rs. 981.39 with interest and costs. There was also a judgment against him in Case No. 11256/S.

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p.96, D.2

p.117, 1.15

4. On the 5th October 1949 the property was seized in execution of the judgment in Case No. 9041/S under a prohibitory notice pursuant to Section 237 of the Civil Procedure Code.

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p.77, P.3

Section 237(1) of the Civil Procedure Code is as follows:

"237(1). If the property is immovable, the seizure shall be made by a notice signed by the Fiscal prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise."

Section 238 of the Civil Procedure Code is as follows:

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"238. When a seizure of immovable property is effected under a writ of execution and made known as provided by section 237 and notice of the seizure is registered before the first day of January, nineteen hundred and twenty-eight, in the book formerly kept under section 237 or is registered on or after the first day of January, nineteen hundred and twenty-eight, under the Registration of Documents Ordinance, any sale, conveyance, mortgage, lease, or disposition of the property seized, made after the seizure and registration of the notice of seizure and while such registration remains in

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force is void as against a purchaser from the Fiscal selling under the writ of execution and as against all persons deriving title under or through the purchaser."

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The said prohibitory notice was duly registered on the 14th October 1949 and its registration was duly kept alive during all material times by fresh registrations on the 5th April 1950, 20th September 1950 and 20th February 1951 respectively.

p.107, 108

10 5. On the 17th April 1950 Julius by deed transferred the property to Lewis Perera Appuhamy, his uncle, hereinafter referred to as "Lewis", for a consideration of Rs.16,000 and subject to its transfer back to Lewis on the repayment of the consideration within five years. The consideration was in fact paid by Lewis in discharge of the debts of Julius as shown in the attestation to deed of transfer.

p.91, D.9

20 6. The sale of the property under the seizure referred to in Paragraph 4 above was stayed during 1949 and 1950 on the application of the Plaintiff in Case No. 9041/S. On the 6th February 1951 in accordance with an advertisement in the Ceylon Government Gazette the property was sold for Rs.250 at a public sale held under the authority of the Deputy Fiscal to one Thiagarajah, to whom it was transferred by a Fiscal's Conveyance dated the 28th May 1951 and registered on the 27th June 1951.

p.73
p.76, 1.40

30 7. On the 28th August 1950 Lewis died. Probate of his will was granted to his son-in-law, who is the First Respondent on this Appeal. By his said will Lewis devised the property to his daughter, who is the Second Respondent on this Appeal.

p.115, D.7

p.89, D.6

40 8. On the 8th June 1951 Thiagarajah by deed transferred the property for Rs.3000 to the Appellant. Pursuant to the transfers referred to in Paragraph 6 above and in this Paragraph certain endeavours were made to obtain possession of the property. These endeavours were resisted and on the 18th July 1951 the present suit was commenced.

p.100, P.1

9. In her Plaint the Appellant claimed a declaration of title to the property, ejection against all the Respondents, damages until ejection, costs and further or other relief. In the Answer filed on

p.11

p.13

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behalf of the Respondents, the Second Respondent claimed that she was entitled to the property for herself and that the other Respondents were in occupation under her rights. It was further claimed that the purchaser at the Fiscal's sale (Thiagarajah) was the agent of Julius, that the Appellant was the nominee of Julius and held the property on behalf of Julius, that Julius had represented to Lewis that the claim of the judgment creditor in Case No. 9041/S had been settled and that on the faith of this representation Lewis had paid the balance of the consideration of Rs. 16,000 to Julius, and that by reason of these facts the Appellant was estopped from denying that such claim had been settled. It was further claimed that in the circumstances the Appellant held the property in trust for the Second Respondent; alternatively, that the Fiscal's Sale was not advertised in accordance with Section 255 of the Civil Procedure Code and that the Second Respondent was therefore entitled to a decree setting it aside; alternatively that the said sale was procured by Julius through the Appellant as his nominee in collusion with Thiagarajah in fraud of the Second Respondent in order to deprive her of the property and that therefore the said sale was void. By a Claim in Reconvention the Second Respondent prayed for a declaration of title to the Property and other relief in accordance with her claims.

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10. At the trial before Additional District Judge L.B. de Silva, the evidence given for the Appellant may be shortly summarised as follows :-

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p.18 K. Rasanathan, who was the proctor acting for the Plaintiff in Case No. 9041/S, said that he had applied to stay the sale in 1949 and 1950 because the proctor for the Defendant told him that the judgment debt would be paid. This witness was present at the sale and Thiagarajah who bought the property through an agent, was his father-in-law. This witness, who was later instructed to act for the Appellant in this suit, said he was aware of the deed by which Julius had sold the property to Lewis, but that Thiagarajah sold it to the Appellant because she cried and said it was her property and her uncle Lewis had not paid the full consideration on the transfer. The witness also said that he knew the property was worth well over Rs.10,000 but that he did not know until later whether the mortgage decree had been paid off and he was under the

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impression that it was being sold subject to the mortgages. The Appellant paid the Rs. 3,000 out of a mortgage which she raised on the property.

Record
p.20, 1.24
p.23, 1.10

H.D. Deonis, Fiscal's Officer, and E. Samaranayake, clerk in the Fiscal's Office, gave evidence to prove that the seizure and sale of the Property had been properly carried out.

p.25
p.27

10 N. Thiagarajah, already mentioned, testified to the circumstances in which he bought the property. He said he saw it advertised in the Gazette and consulted his son-in-law about it. He was not prepared to pay more than Rs. 2,000 and would not have instructed his agent to bid for it if he had known there was a mortgage on it. He denied that he was the nominee of Julius, whom he did not know, and he said that he re-sold the property to the Appellant because he heard there was a mortgage on it and because she told him it was her ancestral property.

p.28
p.28, 1.26
p.28, 1.33
p.28, 1.41 to
p.29, 1.7
p.28, 11.9-11
p.30, 11.3,
10, 32.

20 11. The principal witnesses for the Respondents were the Second Respondent and C. De Saram, a proctor. The Second Respondent said she was present when Julius came to her father (Lewis) to ask him for money to pay his debts. At first Lewis was not interested but eventually after Julius had jotted down a list of his debts totalling Rs.16,000 Lewis agreed to advance that sum against a transfer of the property. After the transfer was executed the Appellant collected the rents for Lewis and after the death of Lewis the Second Respondent had taken possession of the property and since the 1st July 1951 had lived in part of it.

p.34
p.34, 1.40
(p.116, D.8)

30 De Saram verified that the consideration of Rs.16,000 for the conditional transfer was paid in discharge of the debts of Julius, including the amount due on the mortgage decrees. He said he could not remember if Julius told him there was any debt left outstanding, but he thought that if Julius had said that there was also a debt of Rs. 1000 Lewis would have paid it. He also said that before the transfer was executed he must have searched the encumbrances, because he would not have taken the risk of not searching them even if the client asked him not to; later he said that as the parties were uncle and nephew he could not say whether he did search the Land Registry and he might not have done so, if Lewis had asked him not to.

p.38
p.39, 1.14
p.39, 1.25, 33
p.40, 1.11

Record
p.40, 1.1

He admitted that if he had referred to the full encumbrances he would have seen the Prohibitory Notice registered under Case No. 9041/S.

Issues on pp.
17, 21, 27
Answers on p.51

12. The case was tried on certain specific issues numbered 1 to 20 which, so far as material, together with the answers given by the trial judge, were as follows:-

1. Is the Deed of 17th April 1950 void as against the Fiscal's Conveyance of 6th May 1951? - Yes. 10
2. If so, does Plaintiff (Appellant) get title to the Property on the Deed of 8th June 1951? - Yes.
4. Were the right, title and interest of Julius in the Property duly sold by Fiscal in Case No. 9041/S? - Yes.
10. Did Julius represent to Lewis that the claims of the creditor in Case No. 9041/S had been paid and settled? - No.
- 10(a). Did Lewis on the representation made by Julius that the claim in Case No. 9041/S had been paid and settled pay the balance consideration on the Deed of 17th April 1950 to him? - No. 20
11. Was the purchaser in the sale in execution in Case No. 9041/S an agent of Julius? - No.
12. Is the Plaintiff (Appellant) to whom the said purchaser transferred the Property a nominee of Julius? - Yes. 30
14. Does the Plaintiff (Appellant) hold the property in trust for the Second Defendant (Second Respondent)? - No.
15. Was the Fiscal's Sale in execution of the decree in Case No. 9041/S bad for the reason that it was not advertised in terms of Section 255 of the Civil Procedure Code? - No.
17. Was the said sale procured by Julius in

collusion with the purchaser in order to deprive the Second Defendant (Second Respondent) of the property? - No.

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20. Is the Second Defendant (Second Respondent) in any event entitled to a charge on the property to the extent of the amount paid in satisfaction of the mortgage decree in Case No. 2447/MB? - The Second Defendant is entitled to this amount from the Plaintiff as compensation for useful improvements and to a jus retentionis till such compensation is paid. She is not entitled to any other charge over the property for this amount.

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13. The Judgment of the trial judge contains the following passages:-

"I am satisfied that they (Appellant and Julius) are acting in collusion and that the Plaintiff (Appellant) is a nominee for Julius Perera. There is no proof of fraud in this case, though Plaintiff and Julius Perera may have obtained an unfair advantage over the Second Defendant as a result of this transaction.

p.45, 1.20

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Even if I hold....that Julius did not disclose the debt on the decree in 9041/S, I am unable to conclude that Julius omitted to disclose this debt with a view to defraud Lewis...

p.46, 1.14

If Lewis as any prudent purchaser had instructed his Notary to examine the Land Registry the registration of the seizure would have been discovered. There is no evidence to prove that Julius was aware that this seizure was registered - even if he was aware of this seizure.

p.46, 1.21

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If Lewis or his successors in title had been normally vigilant, they would have become aware of the intended sale in execution - which had taken place after proper publication and in due course of law. They could then have paid this claim and saved their property, before that sale was held. In any event, Julius could not have anticipated that he or

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his nominee would be able to purchase this property from the purchaser at the execution sale for a fairly nominal price.

I am not satisfied on the evidence that Julius failed or deliberately omitted to disclose the debt on the decree with any fraudulent intent. Probably Rs.16,000 was about the maximum that Lewis was prepared to pay for this property on a conditional transfer."

- p.47, 1.39 to
p.48, 1.33

p.49, 11.26-49

p.48, 1.34

p.49, 1.45

14. In addition to rejecting the allegations of fraud the trial judge also held that, so far as concerned the purchase of the property by the Appellant as the nominee of Julius, Julius was not in such a fiduciary relationship towards Lewis as to import the provisions of the Trusts Ordinance. The trial judge also held that Thiagarajah, although probably a nominee for his son-in-law Rasanathan, was not a nominee for Julius, and he summed up his findings on this aspect as follows: "Unless Thiagarajah's title could be attacked on some ground, he as the purchaser under the Fiscal's sale had a good and lawful title to the property. He was entitled to sell it to any person whom he wished and at any price. Lewis' rights to the property under D.9 were not disclosed to him by the Plaintiff". And further: "So long as Thiagarajah was not a nominee for Julius Perera, his title to the property cannot be attacked in this case."

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- p.51, 1.41

pp. 53, 58.

Judgment p.60

15. In accordance with these findings the trial judge held that the Appellant was entitled to the property but he also held that as the Appellant had been enriched at the expense of the Second Defendant's predecessor in title the Second Defendant was entitled to compensation and to retain possession of the property until such compensation was paid. Both sides appealed to the Supreme Court.

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- p.63, 1.21, 46

16. The Supreme Court accepted the finding of fact made by the trial judge (including the finding that there was no fraud on the part of Julius) but held that the Appellant was precluded from claiming the benefit of Section 238 of the Civil Procedure Code by reason of the equitable doctrine of the Roman-Dutch Law, Exceptio rei venditae et traditae. In the course of his judgment in the Supreme Court Gratiaen J. said that the conveyance by Julius to Lewis transferred "a defeasible title" which was

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- subsequently "confirmed" when Julius through the Appellant acquired a title free from the defect caused by the Prohibitory Notice. Gratiaen J. added that the trial judge's finding that the Appellant was the nominee of Julius sufficed by itself to preclude her from obtaining a decree which would not have been open to Julius himself. Gunasekara J. agreed with the Judgment of Gratiaen J.
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p.64, 1.18
p.64, 1.30
- 10 17. On the 20th June 1956 the Appellant was granted Final Leave to appeal to Her Majesty in Council pursuant to the provisions of the Privy Council Appeals Ordinance (Chapter 85) of the Legislative Enactments of Ceylon. p.69
- 20 18. The Appellant respectfully submits that this Appeal should be allowed and that the Judgment of the Supreme Court of Ceylon should be set aside and that the Decree of the District Court of Colombo so far as it declared the Appellant to be entitled to the property and to the ejection of the Respondents therefrom should be restored, alternatively that the whole of the said Decree should be restored, and that the Appellant should be granted the costs of these proceedings throughout, for the following, amongst other

R E A S O N S

1. BECAUSE by virtue of Section 238 of the Civil Procedure Code the transfer of the property to Lewis was void as against the purchaser from the Fiscal.
- 30 2. BECAUSE in the absence of fraud the Appellant acquired a good title to the property for all purposes.
3. BECAUSE the Roman-Dutch Law Doctrine of Exceptio rei venditae et traditae does not apply so as to override the effect of Section 238 of the Civil Procedure Code.
4. BECAUSE the judgment of the trial judge on the issue of the title to the property was right and ought to be restored.
- 40 5. BECAUSE, if the Appellant is entitled to the property, her right to possession is not dependent on the obligations of Julius to the

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Second Respondent under the void transfer to
Lewis.

JOSEPH DEAN.

No. 24 of 1957

IN THE PRIVY COUNCIL

ON APPEAL FROM
THE SUPREME COURT OF CEYLON

B E T W E E N:

BEATRICE SUNEETHRA PERERA
(Plaintiff) Appellant

- and -

N.A. PERERA and Others
(Defendants) Respondent

CASE FOR THE APPELLANT

T.L. WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.