

1915.

President : Ennis J. and De Sampayo J.

ANDRISHAMY v. SILVA *et al.*

324—D. C. Matara, 6,739.

*Sale by auction by executor, by order of Court—No conveyance granted—  
Subsequent sale to a third party by executor without order of Court.*

On the application of an executor the Court ordered the sale of certain immovable property, and issued a commission to the Secretary to conduct the sale, and the property was purchased by B. Thereafter, and before the confirmation of the said sale, the executor conveyed the property to C. The executor died, and his successor executed a deed of transfer in favour of B. In an action by B for a declaration of title against C, *held*, that B was entitled to succeed, in spite of the fact that his deed was later in date.

DE SAMPAYO J.—When the Court exercised its jurisdiction and took upon itself the sale of the property, the executor had no longer any authority to dispose of the property, except upon further orders of Court, and cannot be allowed to defeat the acts of the Court in regard to the sale; for that would be not only directly to defy the Court, whose jurisdiction had been exercised at his own instance, but to set himself above the Court.

**T**HE facts are set out in the judgment.

*Drieberg* (with him *J. S. Jayewardene*), for plaintiff, appellant.

*Bawa, K.C.* (with him *Weeraratne*), for defendants, respondents.

*Cur. adv. vult.*

October 20, 1915. DE SAMPAYO J.—

This appeal raises an important question as to the effect of a sale of immovable property by order of Court. Don Adrian de Silva died, leaving a will, of which Charles de Silva was executor. The will was proved and probate obtained by the executor in testamentary suit No. 8,931 of the District Court of Galle. On June 18, 1913, the executor submitted to Court a list showing shares of five lands as belonging to the estate, and applied for an order to sell the said property, and moved that for that purpose a commission be issued to the Secretary of the Court. The Court desired to be satisfied as to the propriety of the sale, and asked for certain further information, and the required information being subsequently furnished, the Court, on August 7, 1913, made an order for the sale of the property, and issued a commission to the Secretary to carry out the sale. The Secretary having appointed an auctioneer, the conditions of sale and notice of sale were submitted to Court

1915.

DE SAMPAIO  
J.  
—  
Andriehang  
v. Silva

and approved on August 14. The auction took place on August 28, 1913, and the plaintiff in this action became the purchaser of three of the lands, and paid down the purchase money and the auctioneer's charges according to the conditions of sale. The sale was duly reported to Court, and on September 30, 1913, a formal order confirming the sale was entered of record. It appears that at this stage the executor fell ill and died, and the execution of a conveyance in favour of the plaintiff was consequently delayed. Ultimately the Court appointed an administrator *de bonis non*, who, under the authority of Court, by deed dated December 21, 1914, conveyed the property to the plaintiff. The title thus acquired by the plaintiff is so far unexceptionable. But when he went to take possession of the lands he was confronted by a claim made by the defendants under the deceased executor Charles de Silva. It appears that, notwithstanding the order of Court made at his own instance, and the sale effected thereunder by the Secretary acting under the commission issued to him, the executor, by a private conveyance dated September 29, 1913, purported to sell the property purchased by the plaintiff, together with shares of two other lands, to the defendants. The plaintiff has brought this action, alleging that the deed in favour of the defendants was fraudulently and collusively executed, and praying that that deed be declared void as regards the lands purchased by himself and that he be declared entitled to the same as against the defendants, and also praying for ejectment and for damages.

The District Judge held on the evidence that the defendants were fully aware of the order of Court and the other circumstances above recited, and actively endeavoured to prevent the sale by the Secretary in the hope of securing the property themselves, and that having discovered that the conditions of sale had not been notarially executed, they stole a march on the plaintiff by inducing the executor to sell the property to them. There is no question as to the reprehensible and collusive action of the defendants and the executor. But the district Judge considered that here was no binding agreement for purchase and sale between the plaintiff and the executor in the absence of notarial conditions of sale, and that therefore there was no objection to the defendants purchasing from the executor before the conveyance in favour of the plaintiff was executed, and he accordingly held that the plaintiff had no title as against the defendants, and dismissed the action.

If it were a mere question of competing deeds the correctness of the District Judge's view might be conceded. But in my opinion the question in this case is not so clear as that. The title does not depend on the priority in date of the defendants' deed alone. I think that the effect of the order of Court on the transaction must be taken into account. An executor, of course, does not ordinarily require the authority of Court to sell immovable property in due course

1915.  
 DE SAMPAYO  
 J.  
 Andriahamy  
 v. Silva

of administration, though his conduct may be impeached by the parties interested and any improper sale set aside. But that does not mean that the Court has no power to interpose its authority between the executor and those interested, or that because it is voluntarily invoked it is any the less paramount. There is no doubt as to the jurisdiction of the Court to control the proceedings of executors, and in proper cases to prohibit sales, or to order sales and carry them out through its offices or through commissioners specially appointed. It is true that in such a case, when a sale is completed, the conveyance to the purchaser is granted by the executor, but that, too, is done by the authority and under the direction of the Court. The reason for the executor's application to Court in this case is not very clear: It is probably due to the fact that the testator had purported to make a gift of the lands to some illegitimate children, including the executor, and that the deed was subsequently set aside at the instance of the legitimate children, and it was thought, as the District Judge believes, that a sale by Court would remove all doubts as to the title, and induce confidence on the part of the purchasers. Whatever the reason was, the Court exercised its power and ordered the sale. It will be noticed in this connection that the order was not a mere formality. The Court called for particulars and applied its judgment before making the order, and in this respect it followed the directions laid down in *D. C. Galle, 1,954*,<sup>1</sup> and in many subsequent cases. Nor was the order a mere authority to the executor to sell. The Court appointed its own commissioner to carry out the sale, and regulated its course at every stage up to the confirmation and the granting of the conveyance to the plaintiff. I do not think that all this can be ignored in considering whether the sale to the defendants prevails over the sale to the plaintiff. In my opinion, when the Court exercised its jurisdiction and took upon itself the sale of the property, the executor had no longer any authority to dispose of the property, except upon further orders of Court, and cannot be allowed to defeat the acts of the Court in regard to the sale. For that would be not only directly to defy the Court, whose jurisdiction had been exercised at his own instance, but to set himself above the Court. Apart from that, I think that the principles applied by the English Courts of Equity in regard to sales by the Court should guide us in this matter. Under that law, when the sale is reported to Court and the result is certified, the purchaser is at once protected. The auctioneer and the persons having the conduct of the sale in the first instance certify the result, which is confirmed by the certificate of a master. When the certificate thus becomes absolute, the purchaser becomes owner of the property, and the gain or loss thereafter accrues to him. *See Dart's Vendor and Purchaser, vol. II. (7th ed.), pp. 1166-1169.* The execution of the conveyance by

<sup>1</sup> (1877) *Vanderst. Rep.* 48.

the proper party, which is also a matter for the Court to direct, will vest the legal title to the property in the purchaser. There is no room for saying that in the meantime those in whom the legal title is can go behind the Court and validly pass title to a party other than the purchaser at the sale by the Court. In this case the essential features of the procedure in the event of a sale by the English Court exist. The sale was duly carried out by the commissioner appointed by the Court, and was reported by him, and upon that report or certificate the Court itself confirmed the sale by a formal order. It is true that the sale to the defendants by the executor was just a day before the order of confirmation, but that does not affect the principle which governs the matter. Nor is it correct to say that there was no binding contract of purchase and sale which the plaintiff can rely on, by reason of the absence of notarial execution of the conditions of sale. A sale by Court is not within the Statute of Frauds—*Attorney-General v. Day*.<sup>1</sup> Similarly our Ordinance No. 7 of 1840 would not be in the way of the plaintiff in enforcing the purchase, and I think that if a conveyance had not been granted to him by the administrator *de bonis non*, and if, as appears upon the facts found by the District Judge, the defendants were not *bona fide* purchasers, he would have been able to compel specific performance, and obtain a re-transfer from the defendants. When the property is sold in accordance with the order, the Court will protect the purchaser against the parties to the order (*Dart, vol II., p. 1185*), and necessarily against those who claim under them but are affected with notice. In my opinion the Court should extend such protection to the plaintiff in this case, and hold that the executor's sale to the defendants is inoperative as against him.

I would allow the appeal, and order that judgment be entered for the plaintiff as claimed, with costs in both Courts.

ENNIS J.—I agree.

*Appeal allowed.*

1915.

D. SAMPAY

J.

*Andrishamy  
v. Silva*

<sup>1</sup> (1784) 1 Ves. Sen. 221.