

IN THE COURT OF APPEAL
APPELLATE JURISDICTION

CIVIL APPEAL No. 76 of 1997

BETWEEN:

MERLYN FRANCIS MARTIN

(Plaintiff) Appellant

-and-

IAN SKEFFERS

(First Defendant) Respondent
(The first-named Defendant
did not appear)

BEFORE:

HONOURABLE CHANCELLOR D.P. BERNARD

HONOURABLE MADAM JUSTICE C.M.C. SINGH

HONOURABLE MR. JUSTICE N. KISSOON

2001

June 19 & 20

October 17

Mr. O. Valz, S.C. for Appellant

Mr. K.S. Massiah^{S.C.} for Respondent

J U D G M E N T

BERNARD, C. delivered the judgment of the Court

On 25th March, 1967 the Appellant and Anthony George Wills, now deceased, were married, but the said marriage was dissolved in 1979. During the course of the marriage the parties acquired property situate at lot 13 Roxanne Burnham Gardens, Georgetown, held under transport No. 1491/1971 in equal shares.

Unhappy differences having arisen between the parties the Appellant in 1976 instituted proceedings against her husband for division of the property, and on 16th August, 1979, Fung-a-Fat, J. ordered Anthony George Wills (her husband) to pass transport to her of his undivided half interest in the said property and to give vacant possession of it to the Appellant on or before 18th November, 1979. The order also provided for the Registrar of Deeds to pass transport of the undivided half interest to the Appellant upon failure of Wills to do so within six weeks of the date of the order.

Wills never passed transport of his said undivided half interest in the property to the Appellant as ordered, and died intestate on 13th October, 1987. However, during his lifetime unknown to the Appellant, one Willard Duesbury on 15th February, 1984, had obtained judgment against Wills for the sum of \$5,612.00, and on 28th April, 1987 his half share in the matrimonial property was sold at execution to one Edwin Philip Foo at the instance of Duesbury in satisfaction of the judgment. During this time Wills was still in occupation of the property with the Appellant's consent and permission.

The Appellant did not take any steps to have the Registrar of Deeds pass title to her until December 1987, eight months after the execution sale. However, Foo who had bought at execution did not obtain transport until 10th May, 1989.

Another dimension of this matter is that in 1987 Wills had filed proceedings against Duesbury, Foo, the Registrar of the High Court and the

Attorney General, seeking a declaration that the sale at execution of his half interest in the matrimonial property was null and void. There is nothing on record which indicates the grounds on which the claim was based or whether the action was ever determined.

Meanwhile, Foo entered into an agreement of sale with the Respondent herein on 13th April, 1988 for the purchase of the undivided half share of the property in question which he had acquired under the sale at execution. The Respondent went into immediate possession pursuant to the agreement. Affidavits of vendor and purchaser were filed, and the sale was advertised in the Official Gazette of 15th October, 1988 (N. 40 Demerara).

All of this seems to have taken place unknown to the Appellant as she claimed that she had been residing out of Guyana for several years.

Upon her return in March 1993 the Appellant instituted proceedings against both Foo and the Respondent seeking, inter alia, declarations that the judicial sale transport passed to Foo on 16th May, 1989 was ineffectual in law, that her entitlement under the order of Fung-a-Fat, J. was at all material times and still is good as against the judicial sale transport, that at the time of such sale while she was residing abroad the decedent (her husband) was in occupation as her licensee; she also sought orders directing the Registrar of Deeds to pass title to her in keeping with the order of court, and directing the Respondent to yield up possession of the property to her.

At the hearing of the action the learned trial judge found that the Appellant had failed to satisfy the Court that she had a registered interest in the property, and that the Respondent was a bona fide purchaser for value without notice. The action was accordingly dismissed, and it is from this dismissal that the Appellant has appealed to this Court.

Counsel for the Appellant contended before us that the learned trial judge had failed to consider the statutory right of a co-owner under the Immovable Property (Sale of Interests) Act, Cap. 60:01, and made reference to the cases of D'Aguiar -v- Obermuller (1948), LRBG, 68 and Dennis Li -v- Lucy Walker (1968) GLR, 341. However, he indicated, and I agree,

that the most important aspect of the case centres around the judicial sale transport and interest acquired thereunder. He submitted that the seriousness of the order of Fung-a-Fat, J. was overlooked by the learned trial judge, and orders of court are sacrosanct. He relied on the case of Demerara Storage Co. Ltd. -v- Demerara Wharf & Storage Co. Ltd. (1942) LRBG, 306.

Since the genesis of the Appellant's legal problems is the judicial sale transport obtained by Foo as a result of the sale at execution of the undivided half interest of Anthony George Wills, deceased, it is apposite to consider the legal effect of such a transport on the rights of others.

Section 29 of the Deeds Registry Act, Cap. 5:01 provides as follows:

"A judicial sale transport passed ^{after}~~before~~ the 28th May, 1936, shall vest in the transferee the full and absolute title to the immovable property or the rights and interest therein subject only to such statutory claims, registered incumbrances, registered interests and registered leases as have not been extinguished by the sale in execution."

Section 28(c) of the said Act reflects the same provisions as Section 29 except that it makes reference specifically to the sale of property for the purpose of enforcing the payment of a judgment debt of a judgment-creditor other than the holder of a statutory claim or a registered incumbrance, and which is applicable to the judgment-creditor Foo in the present appeal.

As a consequence the judicial sale transport passed to Foo on 10th May, 1989 vested in him the full and absolute title to the undivided half interest in the property situate at lot 13 Roxanne Burnham Gardens, Georgetown, subject only to any statutory claims or registered incumbrances, interests or leases which were not extinguished by the execution sale.

The question therefore arises as to what is the status of the order of Fung-a-Fat, J. in relation to the title acquired by Foo under the judicial sale

transport. This leads inevitably to the question whether an order of court is required to be registered in order to be effective.

Under **Order 35 Rule 2(2)** of the Rules of the High Court an order of a court of competent jurisdiction is effective from the date it is made. Both parties in this appeal accept that Wills had been ordered to pass transport of his undivided half share in the property to the Appellant within six (6) weeks of 16th August, 1979 which was the date on which the order was made. Upon his failure to do so the Registrar of Deeds was ordered and empowered to pass transport of the said half interest to the Appellant. No time limit was placed on this, but it meant that he was ordered to do so at any time after the expiration of the six week period if Wills did not comply with the order. Of course, the Registrar of Deeds could not act unless the Court's order had been brought to his attention and he was requested by the Appellant to do so. This request was made in December 1987 when the Appellant filed the necessary documents with the Registrar of Deeds, and this was two months after the death of Wills in October 1987.

As mentioned earlier during the same year and maybe before the request by the Appellant to the Registrar of Deeds, Wills had filed Action No. 3514/1987 naming Duesbury, Foo, the Registrar of the High Court and the Attorney General as Defendants, and sought, inter alia, a declaration that the sale at execution of his undivided half share in the property was null and void.

It should also be noted that the Appellant's request was made to the Registrar of Deeds in accordance with the order of court, and the action brought by Wills was against the Registrar of the High Court, separate and distinct individuals with different functions, so the question of affixing the Registrar of Deeds with notice of the action does not arise.

At this stage it is important to draw attention to **Section 22(1)** of the **Deeds Registry Act, Cap. 5:01** which came into effect on 1st January, 1920, and which provides as follows:

“From and after the 1st January, 1920, every transport of immovable property other than a judicial sale transport shall vest in the transferee the full and absolute title to the immovable property or to the rights and interest therein described in that transport, subject to

- (a) statutory claims;
- (b) registered incumbrances;
- (c) registered interests registered before the date of the last advertisement of the transport in the Gazette;
- (d) registered leases registered before the date of the last advertisement of the transport in the Gazette;

Provided that any transport, whether passed before or after the 1st January, 1920, obtained by fraud shall be liable in the hands of all parties or privies to the fraud to be declared void by the Court in any action brought within twelve months after the discovery of the fraud, or from 1st October, 1925, whichever is the more recent.”

(Underscoring mine)

It was not until 28th May, 1936 by Act No. 4/1936 that **Section 29** was enacted and provided for the vesting of full and absolute title to immovable property under a judicial sale transport subject as aforesaid to certain registered statutory claims, leases, interests and incumbrances which were not extinguished by the sale at execution.

Therefore, the position after 28th May, 1936 was and is that the title vested in a transferee under a judicial sale transport stands in the same position as that vested in a transferee under any other transport. All transports now vest in the holder full and absolute title subject, of course, to certain registered incumbrances as aforesaid.

The proviso mentioned in **Section 22(1)** making a transport liable to be declared void for fraud does not appear in **Section 29**, but by analogy it will apply equally to a judicial sale transport.

It follows that the full and absolute title acquired under a transport whether obtained by judicial sale or otherwise can be impeached and declared void by a court on the ground of fraud if an action alleging such fraud is brought within twelve (12) months of the discovery of the fraud. The case of Coddett -v- Thomas (1957) LRBG, 181 seems to suggest that fraud is not the only ground for challenging the indefeasibility of a transport, and breach of the statutory procedures and errors or omissions may also be grounds for impeaching a transport. In Heeralall -v- Shivcharran (1958) LRBG, 132 the Federal Supreme Court held that a transport obtained at parate execution was impeachable due to an error in the description of the land, and Archer, J. in a concurring judgment made mention of the decision in Coddett -v- Thomas (supra).

In the present appeal the issue of fraud was never raised nor relied upon by the Appellant neither was any error or omission by anyone considered as a ground for impeaching the transport acquired by Foo. The Appellant relied solely on the validity and priority of the order of Fung-a-Fat, J.

I wish here to comment on the case of Demerara Storage Co. Ltd. -v- Demerara Wharf & Storage Co. Ltd. (supra) referred to by Counsel for the Appellant, and in which Verity, C.J. while hearing a summons to prevent a judgment creditor from proceeding with a levy on property over which a plaintiff had obtained an order for specific performance against a defendant company of which the judgment creditor was the chairman, held that to allow the levy to proceed would be to stultify the prior order for specific performance; from such a result the Court would protect itself and the party for whose benefit the order was made. Accordingly he set aside the levy as such a course was necessary to give effect to the Court's order.

The difference between that case and the present one is that the levy had not been executed, and no sale at execution had taken place. No third party rights were involved; no transport had been passed. The person who sought to levy on the property was the chairman of the same company which had been ordered to pass title to the plaintiff. In the present case a judgment had been obtained by a third party - Willard Duesbury - and transport had been passed to Foo, a bona fide purchaser for value without notice.

In deciding the key question whether an order of court needs to be registered, I wish to make an analogy with the Land Registry Act, Cap. 5:02, Sections 120 & 121. Section 120 is to this effect:

“The provisions of any Act or rule of court or of practice relating to the execution of writs shall apply mutatis mutandis to registered land, but no judgment or writ of execution shall bind or affect any registered land until a memorial thereof has been entered.”

Section 121 provides as follows:

“A judgment or execution creditor may lodge with the Registrar –

- (a) a copy of his judgment or writ of execution or a certificate signed by his solicitor giving full particulars of such judgment or writ;

(b)

.....

.....
and the Registrar shall thereupon enter a memorial of the judgment or writ and shall give notice thereof to the registered proprietor.”

These Sections in relation to lands falling under the Land Registry Act provide for judgments (and of necessity orders of court) to be registered by the entering of a memorial by the Registrar of Deeds. These provisions were adopted from the English Land Charges Act, and came into being in January 1960 when the system of land registration was introduced in Guyana. If a judgment is not registered it has no binding effect on registered land.

There is no such provision in relation to land not falling under the Land Registry Act. Therefore as stated earlier title to land acquired and held under a judicial sale transport is full and absolute except where it can be impeached for fraud or fundamental errors or omissions.

Counsel for the Respondent contended that the order of court ought to have been registered as provided for in Section 7(4) of the Deeds Registry Act (supra). However, this is debatable, and depends on the interpretation of the Section. Section 7 enumerates the duties of the Registrar, one of these under (4) being "to register, annotate, or record against any property registered in the registry, any lease, servitude, or incumbrance contained in any State title, or in a transport, or other duly recorded deed, or authorised by order of the Court". It is my view that the Registrar can register any interest which is specifically authorised to be registered by the order of a Court. It is not my understanding of the Section that any order of court concerning an interest in immovable property must be registered before it can be enforced. As far as can be ascertained the order made by Fung-a-Fat, J. contained no provision for it to be registered.

At this point it is important to analyse the conduct of the Registrar of Deeds in this whole affair. As mentioned earlier one cannot affix him with notice of the writ filed by Wills against Foo and the Registrar of the High Court. However, one of the duties of the Registrar of Deeds under the Deeds Registry Act is to "examine, certify and register conveyances or transports and leases of immovable property". No transport or conveyance can be passed without the authority of the Registrar of Deeds. As a consequence when a sale at execution of immovable property is concluded transport can be obtained only from the Registrar of Deeds. The procedure is that all documents pertaining to the sale are sent by the Marshals' Section of the Supreme Court Registry to the Registrar of Deeds for a judicial sale transport to be passed to the purchaser. There is nothing on record to indicate that this procedure was not followed; therefore the "omnia praesumuntur" rule will apply.

The sale at execution took place on 28th April, 1987 when the property was purchased by Edwin Foo. However, a judicial sale transport was not issued to him until 10th May, 1989. In the meantime the Appellant had applied to have title passed to her in December 1987 in accordance with the order of Fung-a-Fat, J. There is nothing on record to indicate when the application for the issue of the judicial sale transport was made to the Registrar of Deeds. Was it made before the Appellant's or after? We are left to

speculate on a most important aspect of this case. If the Registrar of Deeds had received the necessary documents for the issuance of the judicial sale transport shortly after the sale at execution and before the Appellant's application for transport the time-honoured maxim "qui prior est tempore, potior est jure" – he who is first has the strongest right – will have to be invoked. The priority of equitable interests is prima facie governed by the maxim where the legal estate is outstanding. In the present case the legal estate was outstanding as it had not as yet been passed to either the Appellant or Foo. Some evidence ought to have been led to clarify the position. If Foo's application preceded the Appellant's the Registrar of Deeds was under an obligation to act with despatch and to inform the Appellant that her application could not have priority. The same reasoning would apply if he had notice of the Appellant's application before being requested to issue a transport to Foo.

Counsel for the Respondent submitted that the Appellant was guilty of laches and acquiescence. In relation to laches he referred to the case of Rosaline –v- Babu Imrit Singh (1974) 22 WIR, 104, and enumerated instances of delay which ought to be a bar to the equitable relief which she seeks, e.g. she took no steps until December 1987 to have transport passed to her pursuant to the order of Fung-a-Fat, J.; she never opposed the sale at execution or sought to set it aside, and she did not seek to set aside the transport passed to Foo in May 1989 until August 1993.

It cannot be disputed that the Appellant has been extremely dilatory in enforcing her rights under the Order of Court and in keeping a watchful eye on her property over the years. She explains this inaction as being due to the fact that she resided overseas for several years until 1993. I do not find this an acceptable explanation as she could have briefed Counsel or appointed an attorney to look after her affairs. She took no steps to have the half-interest in the property awarded to her by the Court in 1979 transported into her name until 1987, and even then she did nothing thereafter until 1993 when she returned home. In the meantime the half-interest in the property was passed to Foo who then entered into an agreement with the Respondent for its sale and put him in occupation. He in turn expended sums of money on preserving and maintaining the property.

Overall the Appellant slept on her rights and allowed third parties to acquire interests in the property which she now seeks to have rescinded. As Crane, J. pointed out in Rosaline -v- Babu Imrit Singh (supra) at page 1184, "a court of equity in accordance with the maxim "vigilantibus et non dormientibus lex succurrit", refuses its aid to stale demands when a litigant has slept upon his rights."

If, however, Foo's application for the issuance of a judicial sale transport was placed before the Registrar of Deeds after the Appellant's application his claim would not take precedence over hers even though the sale at execution had taken place earlier. The reason for this is that the sale did not pass the legal title to him; only the issuance of a transport could do that. I am of the view that we cannot do justice to the claims of either the Appellant or the Respondent unless there is some evidence on the record (and there is none) as to the dates when the respective applications for issuance of a transport were made to the Registrar of Deeds.

With regard to the Appellant's claim for a partition if it is found that the judicial sale transport effectually conferred on Foo and therefore on the Respondent a right to ownership of the one-half interest in the property, Counsel made reference to Li -v- Walker (supra). In that case the Court of Appeal held that the High Court was possessed of jurisdiction to make an order for partition by virtue of the Civil Law of Guyana Ordinance, Cap.2.

The Appellant in the appeal before us sought in her Statement of Claim an order for partition of the property, but the learned trial judge declined to make such an order allegedly because as she stated "there was no evidence and no agreement upon which an intelligent decision in respect thereof could be made". A perusal of the record in fact indicates that no evidence or argument was advanced in relation to a partition except the Appellant's alternative plea in her Statement of Claim. The first time that it was seriously raised was before this Court. In my view there is need for some evidence concerning the Respondent's occupation of the property.

For all of the above reasons I would remit the matter to the High Court to be heard de novo.

Each party will bear his/her own costs.

Dated the 17th day of October, 2001.

D. P. Bernard
CHANCELLOR

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