

SILVA v. HENDRICK APPU.

*D. C., Galle, 2,540.*

*Action for declaration of title by purchaser at a sale in execution, without conveyance from Fiscal—Validity of such action—Civil Procedure Code, s. 289—"Right and title"—"Legal estate."*

Where a purchaser at an execution sale came into court praying for declaration of title, without having a Fiscal's conveyance in his favour at the time of the institution of the action, and undertook to procure and produce such conveyance at the trial of the case :—

*Held, per LAWRIE, A.C.J., and WITHERS, J. (dissentiente BROWNE, J.), that the action was not maintainable.*

WITHERS, J.—Under the Code, the right and title of the judgment-debtor to immovable property sold by virtue of an execution writ is not divested by the sale until the confirmation of the sale by the Court and the execution by the Fiscal's conveyance.

The expressions "right and title" and "legal estate" used in section 289 are synonymous.

THE facts of the case appear sufficiently in the judgments delivered by their Lordships.

The plaintiff appealed against the dismissal of his action.

*Pieris and Jayawardana, for appellants.*

*Wendt and Blazé, for respondents.*

*Cur. adv. vult.*

19th March, 1895. BROWNE, J.—

One Harmanis, having recovered judgment and issued writ against his debtors, was declared purchaser of the trees of a land at an execution sale held on 7th June, 1893. Before he obtained the Fiscal's conveyance, he on the next day assigned to plaintiff all his rights in the action and land, and empowered plaintiff to obtain the Fiscal's conveyance. In further execution of the writ plaintiff himself on the 11th July purchased the soil of the land.

Ere thirty days from the time that reports of the Fiscal to the Court could well have been made and orders confirmatory of sales and conveyances themselves thereafter could have been obtained, and in fact before these preliminaries were completed, the Fiscal on the 13th September seized for resale the same debtor's interest in the same land, and plaintiff thereupon claimed the land. His claim was rejected on the 21st December, and he instituted this action stating these facts in full, and thereby showing his title to the trees and soil was still imperfect, but expressly undertaking to perfect his titles ere trial and then to produce the Fiscal's transfers in his favour.

Defendant, in answer, objected to the sufficiency of the declaration, in that the sale of the trees to plaintiff "is null and void, "plaintiff's vendor not having any title in them to convey, he not "having taken out Fiscal's transfers for the same." And at the trial a preliminary issue of law was stated apparently by the Court : "Is the sale of 8th June, 1893, to plaintiff good, in absence of Fiscal's transfer?" Defendant further answered that plaintiff had not acquired title to the soil, in that he had not been substituted plaintiff on the original record, nor obtained the sanction of the Court to bid, and the Court framed another "preliminary issue of law and fact" thereon: "Did plaintiff's purchase of 11th July, 1893, pass title to plaintiff?" But defendant did not offer the proofs necessary to sustain such plea, and it is unnecessary to consider it.

Apparently plaintiff had obtained his transfers ere the trial and was ready to produce them, but the learned District Judge held that, as under section 289 the right and title of the judgment-debtor to property sold is not divested by the sale until the confirmation of the sale by the Court and execution of the plaintiff's conveyance, plaintiff had no title to the land when he filed his plaint, and so had no right to institute his action, which he accordingly dismissed with costs.

Now, as regards actual title to the land, this Court has, in accordance with the subsequent provision in section 289 that on subsequent execution of the Fiscal's conveyance the grantee is deemed to be vested with the legal estate from time of sale, frequently upheld as good a title originally imperfect for want of intermediate Fiscal's conveyance, but subsequently perfected by its having been obtained (*9 S. C. C. 32* and *92*, *1 S. C. R. 73*, *2 C. L. R. 192*), and I see no reason whatever why a plaintiff may not, before so perfecting a title, *i.e.*, when he has, not no title at all to land, but an imperfect title, capable of being easily perfected, institute an action to enforce his rights under that title against a disputant.

The action 11,092, District Court of Negombo (*S. C. M., 15 June, 1888*), was remitted by this Court with liberty to plaintiff to *obtain and* produce the Fiscal's conveyance necessary to complete her title, and apparently the plaintiff in 16,716, District Court of Negombo (*9 S. C. C. 92*), on being ousted in January, 1889, instituted that action ere he obtained his Fiscal's conveyance on 19th March, 1889. Such an action is of course instituted at the risk of the title being still imperfect at trial, and of its dismissal by reason thereof.

I would set aside the decree, with costs, and remit the action for trial.

WITHERS, J.—

I understand the facts to be briefly as follows.

In the execution of a judgment against one Podi Sinho and one Avis de Silva, the execution-creditor, Harmanis Appu, caused to be seized and sold some thirty-two trees growing in a garden known as Maginagewatta, and himself became the purchaser at the Fiscal's auction. The sale under the writ took place on 7th June, 1893.

Before obtaining a Fiscal's certificate of transfer the buyer assigned his interest in the said thirty-two trees to the plaintiff. Indeed, his assignment was made on the 8th of June, the very next day.

Harmanis, the said execution-creditor, on the same day assigned the unsatisfied balance of his judgment against the said Podi Sinho and the said Avis de Silva to the plaintiff. In the following month, *i.e.*, the 11th July, 1893, the soil of the said Maginagewatta was sold in execution of a writ of the said Harmanis and purchased by the plaintiff.

The plaint is so carelessly drawn up, as not to say in execution against whom—Podi Sinho or Avis de Silva—or to whom the trees first and then the land were judicially sold as described.

I imagine it to be Podi Sinho's, as the cause of action is the seizure by the defendant on the 13th of September, 1893, of this very land in execution of a judgment he had recovered against the said Podi Sinho.

The plaintiff confesses that, when he instituted this action, he had not procured a transfer from the Fiscal either of the said thirty-two trees of the land Maginagewatta or of the soil of the said garden sold under his vendor's writs.

If the Fiscal had already sold this land in July, 1893, as Podi Sinho's property, how he came to seize it again in September under a writ against that person I find it difficult to understand, as I do his conduct in selling growing timber one day and the next the soil on which the timber grows; but in that district houses and growing trees are not regarded apparently as being attached to the soil.

However, as a matter of fact, the Fiscal did on the 13th September, 1893, seize this garden and advertise it for sale at the instance of the defendant. Nine days after the seizure plaintiff objected to the Fiscal selling this land. He claimed it as his, though I cannot find the terms of his claim or of the Fiscal's reference of it to the Court. He says that after inquiry his claim so referred to the Court was dismissed. Within fourteen days, under the 247th clause of the Code, he comes forward to establish

his claim ; but what was his claim ? I suppose to the land as his own absolutely, but I have to guess at this fact. I shall assume that he did claim the land as one who had purchased it at a sale in execution, but had not obtained a Fiscal's transfer.

It appears that at some stage of the proceedings in this action the plaintiff procured from the Fiscal a transfer of the thirty-two trees and a transfer of the soil which had been judicially sold in June and July as above stated, but on the 16th of July, 1894, certain preliminary issues of law and of fact were discussed between the parties to this action, with the result that the District Judge dismissed the action with costs, on the ground that, when the plaintiff instituted the action, he had no cause of action, having no title in the land which defendant had seized, and the seizure of which was opposed by the plaintiff.

The Acting Chief Justice supports this ruling, but my brother BROWNE would allow the case to be remitted for plaintiff to prove his Fiscal's transfers to the said land and the said thirty-two trees, relying, as regards this course, on a judgment of this Court in appeal from a dismissal of a plaintiff's action in ejectment, on the ground that she had no proprietary title in the absence of a Fiscal's transfer, when the Court of appeal set aside the judgment and remitted the case, with liberty to the plaintiff to produce and prove her Fiscal's transfers, which in point of fact seem not to have been made out for a long time afterwards. This was an unreported case from Negombo in 1882 (*Perera v. Julihami*). My brother BROWNE also relied on those judgments of this Court which give effect to a Fiscal's transfer, so as to make it speak from the date of the sale under the writ.

There were no reasons given for the judgment in the Negombo case of 1882, and as that was before the Civil Procedure Code, I do not think it can help us. We have to consider the 289th section of the Civil Procedure Code, which enacts, "the right "and title of the judgment-debtor, or of any person holding under "him, or deriving title through him to immovable property sold by "virtue of an execution, is not divested by the sale until the "confirmation of the sale by the Court and the execution of "the Fiscal's conveyance. But if the sale is confirmed by the "Court and the conveyance is executed in pursuance of the sale, "the grantee in the conveyance is deemed to have been vested "with the legal estate from the time of the sale." What is meant by the words "legal estate," which are foreign to the Roman-Dutch law ? This section must be construed in reference to those which follow it, which limits the mode of user to the person in possession, be he the execution-debtor or the Fiscal as the purchaser's agent.

The right and title of the judgment-debtor to immovable property sold by virtue of an execution is not divested by the sale until the confirmation of the sale by the Court and the execution of the Fiscal's conveyance.

The "right and title" is used as synonymous with the "legal estate," a term well known in the English law, which it seems to me must be our guide in interpreting this part of the Code. We must go back to the "statute of uses," and the judgment-debtor must be regarded as a trustee who has the fee simple in legal estate, while the purchaser in execution must be considered as having an equitable interest or estate. The title is in the trustee of a judgment-debtor, and the right to use the property for limited purposes is in him or the person in possession.

This right and title, such as it is, belongs to the trustee against all the world.

The purchaser, when thirty days have elapsed, must have the sale confirmed and procure a conveyance from the Fiscal. Having done that, the legal and the equitable estates unite, and he can force the trustee, *i.e.*, judgment-debtor or other person in possession of the immovable property, to surrender the land to him with an account of the profits.

That "right and title" or "legal estate" is a right of property which can be seized and sold in execution. It can pass by devise. It could be sold by private transfer, and the purchaser could in the course of time, if he remained in possession without acknowledging the purchaser's equitable title, and using the property as his own for ten consecutive years, perhaps regain a prescriptive title to the detriment of the purchaser. Two conditions are required by the purchaser before he can acquire absolute *dominium*—he must procure the Court's confirmation and the Fiscal's conveyance. It is admitted that the plaintiff had not done so when he instituted this action.

The difficulty that confronts us is the position of the purchaser, who, having made a claim similar to the plaintiff's, has to establish his claim within fourteen days of the order upholding the seizure under the provisions of the 247th section of the Civil Procedure Code. We have repeatedly held that, unless a claimant who has been defeated fails to come forward within fourteen days and establish his claim, the adverse order will be for ever conclusive against him.

Mr. Wendt argues here that the order which drives the present plaintiff to establish his claim will not do him a permanent injury. As soon as he procures the necessary confirmation of sale and Fiscal's conveyances he will be able to get possession of the land

and enjoy it as the absolute owner. That may or may not be so. My brother BROWNE would save him from the possible consequences of an affirmance of the judgment he appeals from, by allowing him for his protection to put in evidence the orders of confirmations and the conveyances which it seems he has acquired in the course of the cause. I would co-operate with my brother if I thought the law of the procedure admitted it.

But I know of no provision which allows a plaintiff who has no title (*i.e.*, here a legal estate) when he institutes a suit, and who gains one in the course of a cause to make use of that acquisition in support of his claim, which is dependent on the particular title acquired. In *re Tottenham Local Board*, 2 *Times Reports*, 410, it was considered doubtful whether *matter not in existence at the date of issue of writ* can be introduced by amendment, but this is not an application for leave to amend.

The only satisfactory reason I can assign for the order in appeal in the Negombo case relied on is that, under Ordinance No. 4 of 1867, a purchaser, after thirty days from the Fiscal's sale, who had fulfilled all his conditions of sale, became the absolute owner of the land purchased under the contract of purchase and sale, and that the conveyance from the Fiscal was only evidence of the contract which it was indulgently permitted him to secure.

No doubt the grantee of the conveyance is vested with the legal estate from the time of the sale, but not for the purpose of saving a plaintiff who makes a claim before a Fiscal and institutes an action to establish that claim, without that which gives him a good cause of action.

The judgment must be affirmed, with costs.

LAWRIE, A.C.J.—

When a plaintiff comes into Court praying for a declaration of title, he must possess at that time the title which he asks the Court to decree to be his. When this plaintiff brought this action he had not got a conveyance : he was not entitled to possession, he was not the owner of the land.

The action must necessarily be dismissed, with costs.

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