

FERNANDO v. PERERA.

D. C., Negombo, 2,795.

1898.

August 30.

Sale in execution—Purchase by execution-creditor—Order for conveyance—Ordinance No. 4 of 1867, s. 58—Order confirming sale—Civil Procedure Code, s. 286—Possessory action—Possession by predecessor in title—Treating action rei vindicatio as a possessory action.

In 1887, A, an execution-creditor, purchased a parcel of land at the sale in execution, but obtained no order for a conveyance under section 58 of Ordinance No. 4 of 1867. In 1895 he obtained an order, under section 286 of the Civil Procedure Code, confirming the sale, and a conveyance was thereupon executed in his favour by the Fiscal :

Held, that the order confirming the sale had all the requirements of an order under section 58 of Ordinance No. 4 of 1867, and that it was in effect an order directing the Fiscal to convey the property to A, and the conveyance was therefore valid.

Where, in an action *rei vindicatio*, the plaintiff moved to be allowed to treat it as a possessory action and to prove possession for a year and a day and ouster within a year of action brought, the District Judge disallowed the motion on the ground that the plaintiff had not been in personal possession for the requisite period :

Held, that in reckoning the period of a year and a day the possession of a predecessor in title may be taken into account, and the plaintiff's motion should not have been disallowed.

IN this case of *rei vindicatio* it appeared that the property which formed the subject of dispute was sold under a writ of execution and purchased by the execution-creditor. He did not get an order for a conveyance under section 58 of the Ordinance No.4 of 1867, but in 1895 he applied to the Court for an order of confirmation of the sale, as also a conveyance from the Fiscal. The District Judge was of opinion that the order confirming the sale had been improperly allowed and dismissed plaintiff's case, even though plaintiff moved that the action should proceed as a possessory suit, and that he should be allowed to prove possession for a year and a day and ouster within a year of action brought.

Plaintiff appealed.

W. Pereira, for appellant.

Wendt, for respondent.

BONSER, C.J.—

By this action plaintiff, relying on his title, sought to recover from the defendant a piece of land. A Fiscal's conveyance of the 5th March, 1895, was one of the links in his chain of title. The defendant took objection to the validity of this conveyance, which objection the District Judge upheld. It was this: the property was sold in 1887 under a writ of execution issued by the plaintiff's predecessor in title, and at that date the plaintiff's predecessor in title who had issued the writ became the purchaser,

1898.
August 30.
 BONSER, C.J.

but he did not obtain a conveyance. At that date sales in execution were governed by the provisions of Ordinance No. 4 of 1867. Section 58 of that Ordinance provides that, when a party in whose favour execution is issued becomes the purchaser of the property sold thereunder, the purchase money should be allowed in reduction of his claim, but that no conveyance in such a case is to be made to the purchaser, "but under express order of the Court." In 1889 the Civil Procedure Code was passed, which took away from the execution-creditors the right of purchasing at sales, and provided that if they wished to purchase they must get previous sanction for that purpose from the Court.

In 1895 the purchaser wished to obtain a conveyance from the Fiscal of the property which he had bought in 1887. He thereupon applied to the Court for an order confirming the sale, and an order was accordingly made by the District Court reciting that the property was put up for sale in 1887; that thirty days had elapsed since the Fiscal had reported the sale, and that no application had been made to set aside the sale; and an order was thereupon made that the sale be confirmed. It appeared on the face of the order that the purchaser was the execution-creditor. It was objected that this order confirming the sale was not an express order of the Court such as section 58 of Ordinance No. 4 of 1867 required but it seems to me that it had all the requirements of such an order. The fact was before the Court that the execution-creditor was the purchaser, and yet the Court confirmed the sale. What was that but in effect directing the Fiscal to convey the property. I think, therefore, that the objection ought not to have been upheld. The case must go back to enable the plaintiff to proceed with proof of his title.

Then, at the trial, when the plaintiff saw that the judge was against him on this question of title, he asked the judge to be allowed to treat this action as a possessory action and to prove possession for a year and a day and ouster within a year of action brought. The District Judge refused the application on the ground that the plaintiff had not been in personal possession for the requisite period. He seems to have held that the possession of a predecessor in title could not be taken into account. In this, I think, he was wrong. Mr. Wendt referred us to a case, in which it had been expressly held that the possession of a predecessor may be taken into account (*Nona Umma v. Ibrahim Ismail*, 4 S. C. C. 75). In my opinion that case was rightly decided, and the District Judge ought not to have refused the application.

The case must be sent back for trial.

WITHERS, J., agreed.