

Present: Jayewardene A.J.

1923.

SOMETHARA UNNANSE v. SAMALIYA

180—C. R. Kurunegala 2,524.

Application for confirmation of sale and issue of Fiscal's conveyance after thirty years—Dispute between judgment-debtor and purchaser—Prescription—Order of Commissioner of Requests confirming sale and ordering issue of Fiscal's conveyance—Appeal lies—Final order.

Where a purchaser at an execution sale applied for confirmation of sale and a Fiscal's conveyance after thirty years, the Court refused the application in view of a dispute as to the title to the land between the judgment-debtor and the purchaser.

"In view of this dispute between the parties, I think it would not be safe to arm the purchaser with a Fiscal's conveyance, which would place him in a position of great advantage."

An appeal lies from an order of a Commissioner of Requests confirming a sale and directing the issue of a Fiscal's conveyance as it is a final judgment on the matters in issue.

THE facts are set out in the judgment.

H. V. Perera, for defendant, appellant.

Samarakoon, for purchaser, respondent.

September 18, 1923. JAYEWARDENE A.J.—

In this case the defendant appeals against an order, made at the instance of a purchaser of property sold in execution, confirming the sale of the property, which took place, or is alleged to have taken place, in the year 1894—about thirty years ago. The learned Commissioner has allowed the purchaser's application for a confirmation of the sale, and has also strongly indicated his opinion that it would be useless for the appellant to show cause at the subsequent application for a Fiscal's conveyance in favour of the purchaser, as the purchaser appears to be entitled to a conveyance. The defendant appeals against this order, and submits that in the circumstances of the case the order of confirmation ought not to have been made, and that, even if the order be made, the purchaser should not be granted a Fiscal's certificate. He contends that the order of the learned Commissioner practically concludes any opposition by him to the issue of a Fiscal's conveyance to the purchaser. Mr. Samarakoon, on behalf of the respondent has taken several objections: that there is no appeal against the judgment in this case, as the judgment is not a final one. He has referred me

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to the case of *Arnolis Fernando v. Selestinu Fernando*,¹ but that case dealt with an application under section 325 of the Civil Procedure Code, and it was held that the order there made was not a final order so as to entitle the aggrieved party to appeal against it but I do not think the same considerations apply to an order of this kind where the order is one confirming the sale and directing the issue of a Fiscal's conveyance, an order which, I think, must be considered as amounting to a final judgment on the matters in issue. He also contends that this being a case in which no interest in land was involved, but is one founded upon a promissory note, there can be no appeal without the leave of the Court. But even if there is no right of appeal, I am prepared, in the circumstances of the case, to deal with the question by way of revision. The purchaser says he purchased the property on behalf of one Hetuhamy *alias* Paulu Appuhamy, who was at the time holding a usufructuary mortgage over the property from the judgment-debtor who was the mortgagor. The case book has been destroyed, and except for the sale report, a copy of which has been put in evidence, there is nothing to show what happened in the case after the sale in 1894. The purchaser says he has had no possession. He says that the possession has been by Paulu Appuhamy, and Paulu Appuhamy produced a bond and lease to show that he had acted as the purchaser at the execution sale. On these facts the proper person to apply for a Fiscal's conveyance would have been Paulu Appuhamy, but, of course, Paulu Appuhamy was faced with the difficulty that the mortgage bond in his favour had not been discharged. A very serious question arises in the circumstances as to whether Paulu Appuhamy's possession for thirty years was as purchaser in execution or under the mortgage by the defendant in his favour. In view of this dispute between the parties, I think it would not be safe to arm the purchaser with a Fiscal's conveyance, which would place him in a position of great advantage. The considerations which apply to ordinary cases of purchasers applying for a conveyance in their favour after they have been in possession for a length of time cannot apply to the facts of this case. I think the parties should be allowed to remain as they are, and it is not advisable to confer any advantage on one side as against the other, and if the purchaser thinks that he or Paulu Appuhamy has acquired a title by prescription, let the matter be decided in a Court of law, each party occupying the position which they have occupied for the last thirty years.

I therefore come to the conclusion that the learned Commissioner's order confirming the sale and practically directing the issue of a Fiscal's conveyance is wrong and should be set aside.

The appellants will be entitled to their costs in both Courts.

Set aside.