

1922.

Present: De Sampayo J.

SAPAPATHIPILLAI *v.* ALAGARATNAM.

163—*P. C. Batticaloa, 10,844.*

Application for delivery of possession by purchaser at Fiscal's sale after he had transferred the property to a third party—Resistance to Fiscal's officer—Penal Code, ss. 183 and 186—Order ultra vires—Civil Procedure Code, s. 287.

C who purchased a property at an execution sale sold it to S. S moved for an order of delivery of possession, which was refused. Thereupon C moved for an order of delivery of possession to himself, and asked that as he was not able to be present, the Fiscal be directed to put S in possession on his behalf. The accused (judgment-debtor) prevented the Fiscal from putting S in possession, and was convicted under sections 183 and 186. Penal Code.

Held, that the conviction was bad. For a conviction under section 183, the order must be lawful. Resistance to an order which is *ultra vires* is justified. Only the execution-purchaser can move for order for delivery of possession; a private purchaser from the execution-purchaser is no party to the execution proceedings, and he cannot move for an order for delivery of possession. C himself was disqualified, because after the sale to S he was divested of his character as execution-purchaser, and could no longer ask the Court to continue the execution proceedings in his favour by putting him in possession of the land of which by his own acts he had ceased to be owner.

THE facts appear from the judgment.

Bartholomeusz, for accused, appellant.

Jansz, C.C., for the respondent.

May 18, 1922. DE SAMPAYO J.—

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This case in the guise of a criminal prosecution raises an important question on a point of civil procedure. The accused was judgment-debtor in case No. 839 of the Court of Requests of Batticaloa, and under writ of execution issued in that case a certain land belonging to the accused was sold by the Fiscal, and was purchased by the execution-creditor Chelliah, who obtained a Fiscal's transfer on March 31, 1921. Chelliah by deed dated September 17, 1921, sold the land to Subramaniam. On October 14, 1921, Subramaniam moved for an order of delivery of possession of the land to him. The Commissioner very rightly considered that Subramaniam as purchaser from Chelliah was not entitled to such an order, and said that the application should be made by Chelliah himself. This, as events have proved, was an unfortunate suggestion, for Chelliah next moved for an order of delivery of possession to himself, and asked further, that "as he was not able to be present," the Fiscal be directed to put Subramaniam in possession on his behalf in terms of section 287 of the Civil Procedure Code. This was an ingenious attempt at evasion of the previous ruling of the Court that the purchaser at the Fiscal's sale could apply for an order of delivery of possession. It is obvious that Subramaniam was not to be Chelliah's agent in taking delivery of possession, but was to act in his own interests. The Court, having cognizance of the true facts, should not have allowed itself to be misled into acceding to this application, but it did. When the Fiscal's officer went with the order to put Subramaniam in possession, the accused prevented him from doing so. The accused has accordingly been prosecuted under sections 183 and 186 of the Penal Code and convicted by the Police Magistrate. The principal question is, whether the order issued in the civil case was lawful, and whether the resistance to it constituted an offence. Mr. Jansz, for the respondent, has argued that under section 186 it does not matter whether the order was lawful. But I cannot quite understand that the Police Magistrate intended to convict the accused under that section. His whole judgment is taken up with the question of the lawfulness of the order and of settlement with Chelliah, which the accused had alleged. Although there was some evidence that the accused had threatened to cut the Fiscal's officer with a katty, the Police Magistrate does not find as a fact that he did so, and if I were to consider the evidence myself, I should say that the evidence was a gross exaggeration of what took place. Moreover, the reports made by the Fiscal's officer to the Fiscal have, without any translation, been produced, and, so far as I can make out, the Fiscal's officer did not report that he was threatened in this way. For this reason I need not discuss the question whether even under section 186 the functions of the public servant concerned must not be lawful functions. I shall deal

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with this appeal on the footing that the conviction was under section 183 of the Penal Code. I do not think there is any doubt, and Mr. Jansz concedes, that under that section the order must be lawful, and that resistance to an order which is *ultra vires* is justified. The Police Magistrate held that the order to deliver possession to Subramaniam on behalf of Chelliah was lawful under section 287 of the Civil Procedure Code, as in his view the fact that the land had been previously transferred by Chelliah to Subramaniam made no difference. In my opinion, however, that fact makes all the difference. As I said before, the application to put Subramaniam in possession on behalf of Chelliah was a mere subterfuge, the truth being that Subramaniam was intended to be put in possession on his own behalf as the then owner of the land. Section 287 and all the connected sections are provisions in aid of execution and are part of the execution proceedings. I think that only the execution-purchaser as such can move under them. A private purchaser from the execution-purchaser is no party to the execution proceedings, and to allow him to take advantage of the above provisions is to make an unauthorized and improper extension of them. On the other hand, Chelliah himself became disqualified, because after the sale to Subramaniam he was divested of his character as execution-purchaser, and could no longer ask the Court to continue the execution proceedings in his favour by putting him in possession of a land of which by his own act he had ceased to be owner. The order in question appears to me to be *ultra vires* in every respect, and, therefore, cannot form the basis of a criminal prosecution for resisting it.

The conviction is set aside.

Set aside.

