

1956

Present : . Gunasekara, J., and Pulle, J.

D. A. GABRIEL PERERA, Appellant, and H. P. P. CHANDRASEKERA
et al., Respondents

S. C. 211—D. C. Gampaha, 864/P

Execution of decree—Seizure of immovable property—Failure to register notice of seizure—Private sale of seized property by judgment debtor—Validity as against subsequent conveyance by Fiscal to execution purchaser—Civil Procedure Code, ss. 238, 289, 291.

Where immovable property is seized in execution of a decree, failure to register the notice of seizure in terms of section 238 of the Civil Procedure Code will cause a subsequent private sale of that property by the judgment debtor to prevail against a conveyance executed later by the Fiscal in favour of the execution purchaser, even though, prior to the date of the Fiscal's conveyance, the purchaser at the execution sale had sold the same property to a third party and repurchased it from him and the sale to the third party and the repurchase were duly registered prior to the date of the private alienation by the judgment debtor. In such a case, the provisions of section 289 of the Civil Procedure Code cannot avail the execution purchaser to claim title to the property as against the private alienee.

APP^EAL from a judgment of the District Court, Gampaha.

H. W. Jayewardene, Q.C., with *J. M. Jayamanne*, for the 1st defendant-appellant.

L. G. Weeramantry, for the 2nd and 11th defendants-respondents.

Cur. adv. vult.

June 13, 1956. PULLE, J.—

The question which arises for determination in this appeal is whether a share (1/2 of 11/12ths) of the property sought to be partitioned, which once belonged to one Eusemia Pieris, has devolved on the plaintiff and the 2nd and 11th defendants as found by the learned District Judge or on the 1st defendant who is the appellant. The facts are not in dispute.

In execution of a decree in D. C. Chilaw Case No. 10,881 against Eusemia Pieris her right, title and interest in the property was sold by the Fiscal on 2nd June, 1939, and was purchased by one Jeramanu Perera. The sale was confirmed on 3rd November, 1939. In 1942 Jeramanu Perera, who had not then obtained a Fiscal's conveyance, by deed P18 purported to sell an undivided 1/2 of 11/12ths of the land and in 1943 the vendee on P18 reconveyed the share to Jeramanu Perera by deed P19. Jeramanu Perera died thereafter leaving as his heirs his widow the 2nd defendant and two children the plaintiff and the 11th defendant. The plaintiff, as the administrator of the estate of his father, applied to the court in which writ of execution was taken out against Eusemia Pieris for an order on the Fiscal to issue a conveyance to him in his capacity of administrator. On this application the Fiscal executed a conveyance in favour of the plaintiff by P20 of 1951.

The claim of the 1st defendant is based on a deed, 1 D5 of 1946, by which Eusenia Pieris's mother and a brother and sister, as her sole surviving heirs, sold 1/2 of 11/12ths of the land to the 1st defendant.

The dispute between the parties centres round the fact that the seizure of the share of Eusenia Pieris was not registered before the execution of 1 D5 of 1946 or at any time whatever. The submission on behalf of the 1st defendant is that the failure to register is decisive of the case in his favour. Learned Counsel for the respondents, the heirs of Jeramanu Perera, concedes that a Fiscal's conveyance of a property, the seizure of which had not been registered, would not generally prevail against a prior deed of sale of the property, but submits that, in view of the contents of the two deeds P18 and P19 referred to earlier by which Jeramanu Perera sold and re-purchased the interests of Eusenia Pieris and of the fact that they were duly registered, the deed 1 D5 was ineffective to pass title to the 1st defendant.

In the Divisional Bench case of *Hendrick Singho v. Kalanis Appu* ¹ De Sampayo, J., dealt with the failure to register a seizure and the connexion between sections 238 and 289 of the Civil Procedure Code as follows :

“ Registration of the seizure is a safeguard, on the one hand, on behalf of the execution creditor who may thus prevent the execution being rendered nugatory by a private alienation, and, on the other hand, on behalf of a person who may *bona fide* deal with the debtor in ignorance of any seizure. If the seizure is not registered, the necessary implication of section 238 is that a *bona fide* private alienance is *statim securus*. I think that section 289, as regards relation back, must be read in the light of section 238, and its operation should not be extended to a case where the seizure has not been registered. Section 289 is not intended to override the effect of section 238, but is a general provision connecting the conveyance with the sale and giving to the purchaser in an appropriate case the advantages of ownership as from the date of the sale. Having once declared that the title of the debtor was not divested by the sale until the confirmation of the sale and the execution of the Fiscal's conveyance, it had necessarily to state what would be the result if the sale was confirmed and the conveyance executed. ”

The Divisional Bench case and some of the earlier authorities and the later case of *Leanagunawardene v. Balahamy* ² were cited to the learned trial Judge who took the view that the failure to comply with section 238 by registering the seizure did not deprive the heirs of Jeramanu Perera the “ privileges conferred by the due registration ” and that they were entitled to rely on any link in the chain of title such as P18 or P19 which were obstacles to a claim based on 1 D5 of 1946. I am unable to see what privileges were conferred on Jeramanu Perera by reason of the deeds P18 and P19 being registered. Certainly the registration of P18 or P19 cannot be regarded as compliance with section 238 which contemplates the registration of a seizure and not the registration of deeds executed by those not having title at that time. Before P18 or P19 can be brought into the field of competition with 1 D5 they must be referable to a common

¹ (1921) 23 N. L. R. 80.

² (1945) 46 N. L. R. 463.

source of ownership, unless by reason of a Fiscal's conveyance it could be said that the grantee was deemed to be vested with the legal estate from the time of the sale. The crucial question then is whether the Fiscal's conveyance related back to the date of the sale. It is apparent that ultimately the competition is between I D5 the earlier deed in favour of the 1st defendant and the later Fiscal's conveyance P20. On this view of the matter it appears to me that the failure to register the seizure resulted in the title to the whole of Eusemia Perera's interests passing to the 1st defendant unaffected by the execution proceedings. In other words so long as I D5 was not void its effect was to derogate from any legal estate that could have passed to the purchaser or his representatives under the Fiscal's conveyance.

One of the submissions outlined in the argument in the court below but not dealt with in the judgment was pressed before us. It is based on a passage in the judgment of Bertram, C.J., in *Hendrick Singho v. Kalanis Appu*¹. In dealing with the history of section 289 of the Code the learned Chief Justice noted that even before its enactment the rule was that the effect of a Fiscal's conveyance was to vest title as from the date of sale. He then proceeded to state,

“Section 289, then, was intended to enact a legal principle already in force. Its object was not to qualify or neutralize the change of law effected by section 238. It had a principle of its own. The principle of section 289 appears to be that after sale and until conveyance the judgment debtor and any person holding under him and deriving title through him holds any legal title he may possess in trust for the purchaser till the sale, and although until that event he has only an ‘equitable’ estate, yet when once the conveyance is executed, the grantee is deemed, for the purpose of all rights and transactions that depend on his title, to have been vested with his legal estate from the date of the sale (see *Silva v. Hendrick Appu*²). Thus if the purchaser has made any conveyance in the interim, such a conveyance is deemed to have passed title, even though, at the date of the conveyance, title had not actually accrued.”

I think the word ‘sale’ which I have underlined above should read ‘conveyance’. The argument on behalf of Jeramanu Perera's heirs is somewhat on these lines. Although Jeramanu Perera had no legal title in 1942 he had an equitable title in the sense that being the purchaser at a Fiscal's sale he was entitled, upon the confirmation of the sale, to a conveyance that would relate back his title to 1939. The deed P18 by which Jeramanu Perera in 1942 purported to sell the share in question was not only registered but it contained a reference to the effect that the vendor held and possessed the property “by right of purchase upon the Fiscal's receipt bearing No. 94634 dated 2nd June, 1939, under decree in Case No. 10,881 of the District Court of Chilaw”. The judgment debtor, Eusemia Pieris, and those to whom her title was transmitted by inheritance held the property in trust for Jeramanu Perera. At the time:

¹ (1921) 23 N. L. R. 80.

² (1895) 1 N. L. R. 13.

of 1st defendant's purchase he had constructive notice of the Fiscal's sale by reason of the registration of P18 and even though he had paid full value he was bound to the same extent as the persons from whom he bought, namely, to hold what he purchased in trust for Jeramanu Perera's heirs. The execution of the Fiscal's conveyance, therefore, resulted in Jeramanu Perera's heirs obtaining a title superior to the 1st defendant's.

I do not think that when the learned Chief Justice stated that the judgment debtor or anyone deriving title through him holds "any legal title he may possess in trust for the purchaser" he intended to invest him with the character of a constructive trustee as contemplated by the Trusts Ordinance (Cap. 72). He was attempting to formulate a legal theory to explain the precarious nature of the judgment debtor's title in the interval between the sale and the execution of the conveyance, even before the Civil Procedure Code was enacted when there was no provision corresponding to section 289. With all respect I may state that there is no justification for regarding a judgment debtor as holding his title for the purchaser because section 289 expressly provides how, and the date from which, his title is extinguished, while the limits of his use and enjoyment of the property pending the execution of the conveyance are laid down in section 291. The statute operates and not a trust.

The rights of a vendee on a sale by a judgment debtor or his heirs before the execution of a Fiscal's conveyance are governed by section 238. If the sale was effected after the seizure and registration of the notice of seizure and while such registration remained in force it was void. If the seizure was not registered then on facts, not complicated by the registration of a document like P18 in the present case, it has been held that the sale prevails over a Fiscal's conveyance executed on a later date. Does the registration of P18 make a fundamental difference? I do not think so. If knowledge alone of a sale in execution on the part of a vendee would render his conveyance inoperative one would have expected the Legislature to have so provided for it. To contend otherwise would be to regard the registration of P18 as equivalent to the registration of the notice of seizure. One would not be justified in inventing grounds for avoiding the deed in favour of the 1st defendant where the purchaser at the sale in execution was not vigilant enough to register the seizure.

In the court below one of the grounds unsuccessfully urged by the 1st defendant was that the decree in *D. C. Chilaw, Case No. 10,881* was void. The same point has been taken in the petition of appeal but was not pressed.

In my opinion the appeal succeeds so that Eusenia Perera's share will be allotted to the 1st defendant. The 1st defendant will be entitled to half the costs of appeal. The order as to costs of the contest in favour of the heirs of Jeramanu Perera will be set aside. The costs of the contest in the District Court will be borne by each party.

GUNASEKARA, J.—I agree.

Appeal allowed.