

Present: Lascelles C.J.

1913.

SILVA v. SILVA.

450—C. R. Colombo, 26,729.

Purchase under a simple money decree by plaintiff during the pendency of a mortgage action—Subsequent purchase under the mortgage decree—Action for declaration of title by plaintiff against purchaser under mortgage decree—No Fiscal's conveyance in favour of defendant at date of action.

The added defendant purchased under a mortgage decree the life interest, which is the subject of this action, but did not obtain a Fiscal's transfer till after the institution of this action. During the pendency of the mortgage proceedings the plaintiff purchased the life interest at a sale in execution under a simple money decree and obtained Fiscal's transfer. In an action by the plaintiff against the added defendant for declaration of title the Commissioner held in favour of the plaintiff, on the ground that at the date of the institution of this action the added defendant had not obtained a Fiscal's transfer.

Held, on appeal, reversing the judgment of the Commissioner, that the plaintiff was not entitled to judgment, as he had bought the life interest during the pendency of the mortgage proceedings.

IN this case the following admissions were recorded:—

In 1892 (October 3) the mortgage bond was executed in favour of added defendant by the defendant. The bond was registered on September 23, 1908. The bond was put in suit in C. R. Colombo, 11,578, on October 9, 1908. Decree was entered on October 20, 1908. Decree was not registered. A money decree was obtained against (the mortgagor) the defendant on September 6, 1908. Writ was issued under this decree, and the life interest of the defendant was put up for sale and purchased by the plaintiff's vendor on January 29, 1909.

Fiscal's transfer was executed on July-15, 1909, and registered in August, 1909. Sale under the mortgage decree was held in April, 1909, and purchased by the added defendant, who obtained a Fiscal's conveyance in May, 1912 (unregistered). The sale under both decrees was the life interest only of the defendant.

The Acting Commissioner of Requests (K. Balasingham, Esq.) delivered the following judgment:—

The life interest sold was admittedly the property of the defendant. Under a money decree it was sold on January 29, 1909, and a Fiscal's transfer was obtained on July 15, 1909, which was duly registered in August. The purchaser at the Fiscal's sale sold it to the plaintiff on October 4, 1909. The defendant's interest was sold under the mortgage

1913.

Silva v. Silva

decree in April, 1909, and purchased by the added defendant. The added defendant obtained a Fiscal's transfer in May, 1912, which is still unregistered. The present action was instituted on February 22, 1912. At the date of the institution of this action the added defendant had no title, as he had not obtained a Fiscal's conveyance at that date (10 N. L. R. 44).

Plaintiff is therefore entitled to succeed in this action. It is not necessary to decide the question whether the added defendant has a good title on the assumption that he had obtained a conveyance before the institution of this action.

I enter judgment for the plaintiff as prayed for with costs. The decree in this case will not bar the added defendant from instituting another action if he is so advised.

The defendants appealed.

E. W. Jayewardene, for the defendants, appellants.—The plaintiff bought the property under a money decree during the pendency of the mortgage action brought by the defendant. The added defendant bought the property under the mortgage decree. The defendant's action must be considered to be pending till judgment was satisfied. The added defendant's title is therefore superior to plaintiff's title.

The case relied on by the Commissioner decides that a plaintiff who has no title deed at the date of his action cannot succeed. The case of a defendant is different.

The defendant may produce his Fiscal's conveyance at any time before trial. Counsel cited *Samiappu v. Dissanayake*,¹ *Carolus v. Perera*,² *Sanmugam Chetty v. Khan*,³ *Salt v. Cooper*,⁴ *Jayewardene on Mortgage 112 et seq.*, *Hukm Chand on Res Judicata 275*.

Samarawickrame, for plaintiff, respondent.—The rights of parties must be considered as of the date of action (*Silva v. Nona Hammine* ⁵). *Carolus v. Perera* ² is a partition action to which different principles would apply.

January 23, 1913. LASCELLES C.J.—

This case, No. 450, raises a question of law of some little difficulty. The added defendant purchased the life interest, which is the subject of the action, under a mortgage decree. During the pendency of the mortgage proceedings a writ had been issued for the sale of the life interest in execution of a money decree. At the execution sale the life interest was purchased by the plaintiff, who completed his title by obtaining a Fiscal's transfer. Having obtained his Fiscal's transfer, and before the added defendant had completed his title by a Fiscal's transfer, the plaintiff sued the defendant and the added

¹ (1902) 3 Br. 82.

² (1911) 14 N. L. R. 219.

³ (1907) 2 A. C. R. 19.

⁴ 16 Ch. D. 544.

⁵ (1909) 10 N. L. R. 44.

1913.

LASCHLES
C.J.*Sileo v. Sileo*

defendant for a declaration of title. The Commissioner has given judgment in favour of the plaintiff. He lays stress on the fact that the added defendant did not obtain his Fiscal's transfer until after the institution of the present action, and he therefore entered judgment for the plaintiff, observing that the judgment will not bar the added defendant from instituting another action if he is so advised. Now, the result of this action is, in my opinion, almost absurd. Judgment has been given for the plaintiff, and it is admitted that all the added defendant has to do, now that he has obtained his Fiscal's transfer, is to bring another action and obtain a reversal of those proceedings. I cannot believe that our system of procedure contemplates a position which is so manifestly unreasonable. It was contended that it was open to the added defendant to prove the Fiscal's transfer obtained by him after the institution of the action, and that having done this, he was in the same position as if he had obtained a transfer before action brought. In support of this argument I was referred to the case of *Carolis v. Perera*.¹ But I am of opinion that this decision does not support the argument of the respondent. The action in that case was a partition action; and in the judgment of Mr. Justice Grenier a distinction was drawn between an action for declaration of title and an action for partition. The judgment is carefully limited to partition actions, and it was held that, in actions of that description, a party was entitled to rely on a Fiscal's transfer obtained after action brought, on the ground that if he was not allowed to do so he would never have another opportunity of asserting title. The true answer to the difficulty in the present case is, I think, to be found in the position of the plaintiff who bought during the pendency of the mortgage proceedings. The right which he obtained was subject to the result of the mortgage action, and subject to the decree therein. The right which he obtained was, therefore, only a qualified right, and he was not entitled as against the purchaser in the mortgage decree to a declaration of title and an order of ejectment. In my opinion the judgment is erroneous, and the plaintiff's action must be dismissed against both the defendants with costs, as regards the added defendant here—and in the Court below, and as regards defendant in the Court below.

Set aside.

¹ (1911) 14 N. L. R. 219.