

Present: Fisher C.J. and Schneider J.

LEELAWATHIE v. DINGIRI BANDA.

108—D. C. (Inty.) Kegalla, 4,845.

Fiscal's conveyance—Death of purchaser—Application by purchaser from purchaser—Civil Procedure Code, ss. 282-295.

Where property is sold by a Fiscal under the provisions of the Civil Procedure Code, a person, who has bought the property from the purchaser at the Fiscal's sale, is not entitled to ask for a conveyance.

A PPEAL from an order refusing the application of the appellant that a Fiscal's conveyance be executed in her favour of lands sold in execution of a decree upon a mortgage bond entered against the defendant-respondent. The purchaser, Kirihamy, paid the full purchase money, and the sale was confirmed on January, 1919. The applicant stated that Kirihamy sold his rights in the land by deed to one Maulana, that the latter died leaving certain heirs; that those heirs entered into possession and sold their interests in September, 1926, to the appellant. The learned District Judge refused the application.

H. V. Perera, for appellant.

Keuneman, for respondent.

September 6, 1927. SCHNEIDER J.—

Under a decree upon a mortgage bond an undivided $\frac{1}{2}$ share of two allotments of land mortgaged by the defendant in this action were sold by the Fiscal in November, 1918. The purchaser, Kirihamy, paid the full purchase money, and the sale was confirmed in January, 1919, upon the application of the decree holder, the plaintiff (not the purchaser.) No conveyance by the Fiscal was obtained by the purchaser. In November, 1926, the appellant made an application by way of summary procedure by petition and affidavit praying "that an order be issued to the Fiscal" to execute a conveyance in her favour of the lands which were sold. The only respondent named in the petition was the defendant. The petition states baldly that Kirihamy was the purchaser and sold "his rights in the lands" by a deed to one Maulana; that the latter died leaving certain heirs; and that these heirs "entered into possession" and sold "their interests" in September, 1926, to the appellant.

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Summary procedure was the correct procedure to have followed. See *Jaldin v. Nurma*.¹ But the petition and its supporting affidavit are deficient in several essential particulars. The lands are not described by their boundaries. It is not alleged that the purchaser or Maulana or the appellant has had possession, or that the purchase money was paid or the sale confirmed. The dates of the sale by the Fiscal and by the purchaser are not given, nor is it disclosed by what right the heirs of Maulana became entitled to the land. The facts recited by me in the earlier part of this judgment I gathered from the record. The respondent being served with a notice to show cause, stated by affidavit that he had sold and transferred the lands by a certain deed on November 27, 1922, to the second respondent to this appeal. The second respondent, being noticed, stated, also by affidavit, that he had purchased the lands in good faith and without knowledge of the sale by the Fiscal, and that he was placed in possession by the vendor, and his possession was disputed in September, 1926, by the appellant, whereupon he instituted an action which was then pending. No evidence was produced by any of the parties. The District Judge dismissed the application on the ground that there was no evidence of possession by the purchaser or his successors, and also that "adverse interests" had been created by the execution of the deed of sale in favour of the second respondent. He followed the case of *Fernando v. Nagappa Chetty*.² The reasons given by the District Judge are sufficient to sustain his order, but it was asserted at the argument that no deeds were produced or other evidence led as the respondent's Counsel submitted the necessary facts. The record does not bear out this assertion. But it is not necessary to consider the reasons given by the District Judge, for I would uphold his order for a different reason. I think the application fails because the appellant had no status to make the application. The group of sections in the Civil Procedure Code under the head of "Sales of immovable property" (sections 282-295) clearly indicate that it is only the purchaser at a sale by the Fiscal who is entitled to ask for a conveyance. To him, besides the decree holder, is given the right to apply for the confirmation of the sale after the expiration of the period of thirty days (section 283). In his favour it is directed in section 286 the conveyance is to be executed, and to him should be delivered the original of the conveyance. He alone is mentioned as having the right to obtain an order for the delivery of possession in the circumstances contemplated in section 287, although in section 292 the word used is "grantee in the conveyance" in regard to the delivery of possession by the Fiscal. And for the purposes of obtaining an order to prevent the commission of waste, section 293 enacts that the purchaser, or his agent or attorney, may make the application. It would appear

¹ (1892) 1 S. C. R. 187.² (1914) 18 N. L. R. 29.

accordingly that those sections contemplate no other person than the purchaser at the Fiscal's sales "or his agent or attorney." But from the earliest days of the Code, which came into operation in August, 1890, this Court had recognized in several cases the right of the heirs or other legal representative of a deceased purchaser to ask for a conveyance. Of these cases I need mention only one, namely, the case of *Bastian v. Andris and another*,¹ which is a decision of a full bench of this Court. It is also held in that case, and also in other cases before it, that a conveyance to a purchaser who was dead did not operate to pass title according to the ordinary general principles of law, and in the absence of any express legislation giving effect to the passing of title by a conveyance in that form no title passed under such a conveyance. No case was cited to us, nor have I been able to discover any case in which the question had been considered and decided, whether a purchaser from a purchaser at a Fiscal's sale, or his assignee, was entitled to a conveyance in his favour or not. In the case of *Jaldin v. Nurma (supra)* already mentioned, Lawrie J. in the course of his judgment expressed the opinion that a purchaser from the purchaser at a Fiscal's sale would have the right to get a conveyance. But it is mere obiter, as the only question for his decision was whether the heirs of the original purchaser were following the correct procedure for obtaining a conveyance. He does not give any reasons for his opinion, nor does he discuss the question at all. But Mr. Perera cited an anonymous case decided by me and Loos A.P.J. in 1919 and quoted in *6 Ceylon Weekly Reporter*, p. 208. The facts are not fully set out in my judgment, and the report itself is only a print of the judgment. But there are certain passages in my judgment which suggest that the application in that case was made by one of the purchasers from one of the heirs of the deceased purchaser from the Fiscal. But in that case too the question was not raised nor considered whether the applicant had the status to make the application. In view of the opinion expressed by us at the argument, that the conveyance in this case should be in the name of the original purchaser at the Fiscal's sale, Mr. Perera argued that section 286 does not expressly require that the application for the conveyance should be made by the purchaser, and that therefore the appellant was entitled to make the application for a conveyance in favour of the original purchaser, and that we should regard her application as having been made for a conveyance in that form and allow the application. When the conveyance is executed he argued that the benefit of the transfer would enure to the appellant. He probably had in mind the case of *Abraham v. Nonno*² or other decisions to the same effect. It seems to me that there are several good reasons why this argument should not be entertained. If it be entertained, the order of the lower Court

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would have to be reversed upon an issue not raised or tried before it, namely, whether the appellant is entitled to claim a conveyance in the name of the original purchaser at the Fiscal's sale. That purchaser is not a party to these proceedings. It would not be equitable to make an order by which he might be affected behind his back. Nor is it at present clear to my mind that the benefit of such a conveyance will enure to the appellant, who is a remote purchaser. I find difficulty in accepting the statement that the appellant has a right to make the application for a conveyance. I am unable to see what right the appellant has to ask the Court for an order on the Fiscal to execute a conveyance in her favour. It does not seem to me to be a sound argument to contend that because the legal representative of a deceased person has been recognized as entitled to ask for a conveyance therefore a purchaser from a deceased purchaser at a Fiscal's sale should also be regarded as entitled to that right. The same reasoning is not applicable to both cases. A legal representative succeeds to all the rights of a deceased person if a heir or administrator by operation of law, if an executor by virtue of the will of the deceased. It would not be equitable to deny to him the exercise of a right which has so devolved on him and which, had the deceased been alive, he would himself have been entitled to exercise. The position of a purchaser is altogether different. He has purchased a title from a person who had no title to sell or right to transfer. The deed in his favour, therefore, is ineffectual to convey the title to him, and if the form of the deed be simply a conveyance of title, in pursuance of a contract of sale, the instrument cannot be regarded as an assignment of the deceased vendor's right to claim a conveyance from the Fiscal. In the absence of some such assignment I fail to understand by what right such a purchaser can claim to be placed in the position of a deceased purchaser at a Fiscal's sale for the purpose of obtaining a conveyance from the Fiscal in his own favour. As the deed does not operate to pass any interest in the land, he cannot rightly contend that the Court should intervene to help him to perfect his title, because by the instrument he has acquired some interest in the property. Even if the deed in his favour contains the usual clause of assurance of title and a covenant on the part of his vendor that he would execute or procure such other deeds or instruments as may be necessary for the better manifestation of the vendee's title, even then the purchaser would not be entitled to demand a conveyance from the Fiscal on the strength of that covenant. The position of such a purchaser, it seems to me, is identically the same as that of a purchaser from a person who, at the time of the execution of the deed of sale, is not vested with the title to the property but has only a right to demand from some third person a conveyance of the title. The purchaser in those circumstances would not be entitled to

demand a conveyance of title from that third person unless there was some express agreement that he should have that right on the part of the third person. The principle underlying the provisions for levying execution on the property of a judgment-debtor would appear to be that the law vests in the Court for that purpose the right to convey the title of the judgment-debtor and appoints the Fiscal the agent of the Court for the execution of the conveyance. A sale by the Fiscal is usually conducted upon conditions of sale which are proclaimed before the sale takes place. Those conditions usually embody the provisions in the Civil Procedure Code that the sale is subject to confirmation by the Court, and that the purchaser, upon payment of the full purchase money, would be granted a conveyance of the property by the Fiscal. I do not think, nor is it likely, that there would be an agreement in those conditions to grant a conveyance to any person other than the immediate purchaser. A sale by the Fiscal is a sale by the Court. It is a contract between the Court on the one side and the purchaser on the other. Upon the fulfilment of the conditions of sale the purchaser would be entitled to have a conveyance granted in his favour. It is a right assignable by contract and also enforceable by appropriate action. A simple transfer of the title to the property by a purchaser will not have the effect of an assignment of that right. But although the right is assignable by contract I think it will always be within the discretion of the Court to refuse to recognize an assignment of the right, and in most instances the Court will act wisely in so refusing. If the purchaser from the Fiscal is not dead, it seems to me that the Court will always be entitled to point to the provisions of the Code and to say that it would recognize no one but the actual purchaser as the person entitled to ask for a conveyance.

The position of the appellant is weaker than even that of an immediate purchaser from the purchaser at a Fiscal's sale. There is apparently no privity of contract between the appellant and Kirihamy, the purchaser from the Fiscal, which would enable the appellant to maintain an application in the name of Kirihamy for a Fiscal's conveyance. Even if the appellant had an assignment from Kirihamy of Kirihamy's right to ask for a conveyance it would still be within the discretion of the Court to refuse to recognize that right and to insist upon Kirihamy making the application himself unless facts were disclosed which would make it inequitable to do so. It seems to me that the sections of the Code connected with the conveyance of title by a Fiscal clearly contemplate a conveyance to the immediate purchaser, and that it would not be wise to recognize a purchaser from the original purchaser as being also entitled to ask for such a conveyance. It has been held in several cases that the mere lapse of time would not debar a person entitled to ask from asking for a conveyance from the Fiscal. It is easy to conceive of

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a case where a dozen or more persons might be claiming title to a land through a chain of deeds originating from a deed by which the original purchaser purported to convey title. If a purchaser from the original purchaser should be recognized as having a right to ask for a conveyance from the Fiscal, any one of these persons at any distance of time from the original sale by the Fiscal might claim the right to ask for an order on the Fiscal for a conveyance in his favour. I do not think that the provisions in the Code were intended for cases of that kind.

In my opinion the appellant has no right to ask the Court for an order that the Fiscal should convey the property to her. That is the only application with which we are now concerned. The District Judge's order is right, and should be affirmed. I would dismiss the appeal, with costs.

FISHER C.J.—I agree.

Appeal dismissed.

