

Present: Mr. Justice Wood Renton and Mr. Justice Grenier.

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July 6.

PONNAMMA v. WEERASURIYA *et al.*

D.C., Tangalla, 836.

Rei vindicatio—Absence of title at the commencement of the action—
Subsequent acquisition of title—Insufficiency—Fiscal's transfer.

Where the plaintiff sought to vindicate title to property conveyed to her by a person who had purchased it at a Fiscal's sale, but who at the date of action had not obtained a Fiscal's transfer, but obtained it nine days after the institution of the action—

Held (Grenier A.J. *dubitante*), that the plaintiff's title (apart from prescription) must fail, as her vendor had no title at the date of action in the absence of a Fiscal's transfer.

*Silva v. Hendrick Appu*¹ followed.

A PPEAL from a judgment of the District Judge of Tangalla (W. T. Southorn, Esq.). The facts material to the report appear in the judgments.

H. Jayewardene, for the substituted defendants, appellants.

Van Langenberg, for the first defendant, respondent.

Cur. adv. vult.

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The original owner of the land in dispute in this case was Don Bastian Samarasekere. On May 15, 1880, he mortgaged it. The bond was put in suit, and the land was seized and sold in execution against Don Bastian in 1889 to the second defendant, who is now dead. The first defendant-respondent and the second defendants were Don Bastian's Sons. The fourth, fifth and sixth defendants appellants are the second defendant's minor heirs, and the third defendant-appellant is their guardian *ad litem*. The Fiscal's sale to the second defendant was confirmed on April 11, 1901, but the Fiscal's conveyance did not issue till July 14, 1906, nine days after the institution of the present action by the plaintiff-respondent, to whom the second defendant had sold the land in dispute by deed of January 27, 1905, and who alleged ouster by the first defendant-respondent in February, 1906, called on the second defendant to warrant title or refund the purchase money, and claimed a declaration of title and ejectment as against the first defendant-respondent.

¹ (1896) 1 N. L. R. 13.

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The first defendant-respondent denied that the plaintiff-respondent's vendor had any right to convey; while the second defendant warranted title on the two-fold ground of (a) purchase at the Fiscal's sale confirmed by the subsequent conveyance and (b) prescription. The learned District Judge held that the warranty of title failed as to (a), because, in the absence of a Fiscal's conveyance, at the date of the institution of the present action, neither the second defendant nor, through him, the plaintiff-respondent had acquired the ownership of the land in question; and as to (b), because so long as the sale remained incomplete the second defendant could not prescribe against his co-heirs. He, therefore, dismissed the plaintiff-respondent's action with costs as against the first defendant-respondent, but gave him judgment as against the second defendant's heirs, the substituted defendant-appellants, with costs. Against the decree the present appeal is brought. The plaintiff-respondent was not represented on the hearing of the appeal. I think that the learned District Judge was right on the first point, but wrong on the second.

The cases of *Abubakker v. Kalu Ettena*¹ and *Selohamy v. Raphael*,² in which it was held that a Fiscal's conveyance of land sold in execution has relation back to the date of the execution sale, and therefore enures to the benefit of a party to whom the execution purchaser had conveyed before obtaining the Fiscal's conveyance, are clearly distinguishable. In these cases the Fiscal's conveyance was obtained before action brought. Here it was obtained after that date; and *Silva v. Nona Hamine*³, a decision the scope of which we have no right to limit on this point, as Mr. Jayewardene invited us to do, to actions under section 247 of the Civil Procedure Code, and *Silva v. Hendrick Appu*⁴ oblige us to hold that it then came too late to confer title for the purpose of the present proceedings. The facts that the second defendant-respondent had obtained the Fiscal's transfer at the date when he filed answer, and that the plaintiff-respondent sued not on the Fiscal's sale, but on his own transfer from the second defendant, are, I think, immaterial. The latter point is exactly covered by *Silva v. Hendrick Appu (ubi sup.)*, in which the action was brought by the assignee of the purchaser at the Fiscal's sale. But the Fiscal's sale, though imperfect in the absence of a conveyance, clearly formed a legal starting point for a title by prescription, and I would, therefore, set aside the decree appealed against, and send the case back for trial and adjudication on that issue.

As our judgment involves the entire setting aside of the decree appealed against, I think that the respondents should pay the costs of this appeal, but that the other costs should abide the event.

¹ (1889) 9 S. C. C. 32.

² (1892) 1 S. C. R. 73.

³ (1906) 10 N. L. R. 44.

⁴ (1896) 1 N. L. R. 13.

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The following issues were agreed to by the parties on October 2, 1906:—

- (1) Did the Fiscal's conveyance mentioned in the plaint convey title to the second defendant?
- (2) Had the second defendant at the time of sale the right to convey the land to plaintiff?
- (3) Had the second defendant prescriptive possession of the land?

The first issue is meaningless, because the Fiscal's conveyance to second defendant is dated July 4, 1906, and this action was instituted on July 5, 1906. I am inclined to think that the issue really intended was—Did the conveyance by second defendant to plaintiff, dated January 27, 1905, convey title?—because that is the only conveyance that is mentioned in the plaint. The second issue would then logically follow this issue—Had the second defendant at the time of sale the right to convey the land to plaintiff? In other words, what was meant was—the second defendant had no Fiscal's conveyance at the time he sold to plaintiff, but he has one now, and as his Fiscal's conveyance related back to the date of sale, the question submitted by this second issue was whether it enured to the benefit of the plaintiff. It must be remembered that the second defendant obtained his Fiscal's conveyance long before he filed answer—the conveyance is dated July 14, 1906, and his answer was filed on September 14, 1906. The second defendant died after the issues had been framed, so that the Fiscal's conveyance had already enured to the benefit of the plaintiff before the case actually came on for trial. The question to my mind seems to be whether the mere fact of the plaintiff having instituted her action before her vendor, the second defendant, had obtained a Fiscal's conveyance operated as a bar to the conveyance enuring to her benefit. No doubt the cases cited at the argument, and which are referred to by my brother, are distinguishable from the present case, in that in the former, the Fiscal's conveyance was obtained before action brought. But what is the difference in principle, considering that, when the issues were settled, as well as on the date of trial, both parties were agreed that the second defendant had duly obtained a Fiscal's conveyance, why should not that conveyance have, as in ordinary circumstances it would have done, enured to the benefit of the plaintiff, the admitted grantee of the second defendant? Plaintiff's title, which at first was imperfect, was long before the date of trial rendered a good and valid title by his grantor having obtained a conveyance from the Fiscal. And as this was an action *rei vindicatio*, the Court might have examined the parties as to their sources of title and then framed issues in order to determine the

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question of title once and for all. There was nothing to prevent the plaintiff from producing the Fiscal's conveyance in favour of second defendant and relying upon it for his title. I find that Mr. Justice Browne took very much the same view that I am now taking in the case of *Silva v. Hendrick Appu*.¹

If the plaintiff has no title as derived from second defendant by virtue of the Fiscal's conveyance, then in whom is the title? It cannot be in second defendant's heirs (the third, fourth, fifth, and sixth defendants), because the second defendant has in his answer admitted the title to be in plaintiff and does not his admission bind his privies in estate? The case has presented itself to my mind in the way I have stated above, but I cannot resist the weight of the Full Court Judgment in the case of *Silva v. Hendrick Appu*,¹ although one of the Judges dissented from the views of the rest of the Court. The ruling in that case has been subsequently followed, and whilst following it myself, I have thought it right to express my own opinion on the question. I agree to the order proposed by my brother.

Appeal allowed; case remitted.

