

Present : Wood Renton J. and Grenier J.

June 1, 1911

CAROLIS v. PERERA *et al.*

61—D. C. Negombo, 8,184.

Partition action—Share sold by Fiscal to a party to the action—No Fiscal's conveyance to the purchaser at date of action—Purchaser may establish his claim in partition action—Acquisition of title by prescription by execution-debtor after Fiscal's sale.

A party to a partition action who claims a share through a purchaser at a Fiscal's sale may establish his claim, even though the Fiscal's conveyance in favour of the purchaser at the Fiscal's sale was executed after the institution of the action.

Even prior to the Civil Procedure Code the execution of the Fiscal's conveyance was an essential ingredient of the sale of land, and until such execution the judgment-debtor remained vested with the title.

The mere continuance in possession by a judgment-debtor of property sold in execution against him for a period exceeding ten years after the sale by the Fiscal, and before the issue of the Fiscal's conveyance, does not entitle him to set up a title by prescription ; a person cannot prescribe against himself.

THE facts are set out in the judgment of Grenier J.

A. St. V. Jayewardene, for defendants, appellants.—The finding of the learned District Judge on the question of prescription is wrong.

The sale was held under the Fiscal's Ordinance, No. 4 of 1867, which regulated execution sales before the Civil Procedure Code came into operation. Under Ordinance No. 4 of 1867 the judgment-debtor remained vested with the title until the Fiscal's conveyance was executed (see *Silva v. Nona Hamine*¹). So that in this case, although the sale took place in 1886, the plaintiff and his co-judgment-debtor were not divested of their title till the Fiscal's conveyance was issued in 1910, and they were entitled to be in possession of the property sold. The possession of a judgment-debtor of the property sold was in no way limited or restricted under Ordinance No. 4 of 1867 : he could exercise all the rights of an owner. It is different under the Civil Procedure Code. By section 291 the right to possess is strictly limited by the terms of that section, and the judgment-debtor cannot exercise rights of ownership. So that after the Code, if the judgment-debtor exercises rights beyond those

¹ (1908) 10 N. L. R. 44.

June 1, 1911

*Carolus v.
Perera*

given to him by section 291, he might acquire a title by prescription. Under the old law the judgment-debtor being allowed to possess *ut dominus* he could not acquire a title by prescription against himself.

Sansoni, for plaintiff, respondent.—The learned Judge's finding is correct. He has held that the plaintiff continued in possession notwithstanding the sale by the Fiscal. (1) Where a judgment-debtor remains in possession of property sold, and in respect of which no conveyance is issued for over ten years, he could clearly, acquire a title by prescription; (2) in this instance the Fiscal's conveyance was obtained after the institution of this action, and cannot be relied upon in this case (see *Silva v. Hendrick*¹ and *Ponnama v. Weerasuriya*²); (3) the question must be decided according to the Civil Procedure Code, as the conveyance was issued under the Code.

Jayewardene, in reply.—The principle laid down in *Silva v. Hendrick* and *Ponnama v. Weerasuriya* does not apply to the case of a defendant. Further, this is a partition suit, and persons who acquire title on a Fiscal's conveyance subsequent to the institution of the action can intervene in the action (*Perera v. Perera*³), otherwise their rights would be lost for ever.

Subsequent to the argument Mr. Sansoni submitted the case of *Muttu Carpen et al. v. Ran Kira*⁴ to their Lordships.

Cur. adv. vult.

June 1, 1911. GRENIER J.—

In this case the plaintiff sought a partition of a land called Ambagahawatta, claiming one-fifth share in it, and allotting to the defendants, who are the appellants, the remaining four-fifths. It was proved that plaintiff's one-fifth share was sold in execution on a writ issued in case No. 42,302, C. R. Negombo, against his mother, Bastiana, and himself, and purchased by one Carolus on September 8, 1886. Carolus subsequently by deed dated August 30, 1909, sold this one-fifth share, together with other shares, to the defendants. The Fiscal's conveyance, however, in favour of Carolus was not executed till December 16, 1910, about four months after the institution of the present action, but before the date of trial. The conveyance was produced and tendered in evidence, no objection being taken to its reception. The plaintiff's case is, that although his interest in the land was sold in execution against him, he never gave up possession, but has acquired a title by prescription to the one-fifth share. There is conflicting evidence on the question of

¹ (1895) 1 N. L. R. 13.

² (1908) 4 A. C. R. 57.

³ 9 N. L. R. 217.

⁴ (1910) 13 N. L. R. 326.

possession, but it is unnecessary to pronounce any opinion in regard to it, as there is nothing to show that plaintiff's possession, if he had any, was adverse to and independent of the execution purchaser. Whether we apply the provisions of Ordinance No. 4 of 1867, or those of the Civil Procedure Code, as to the retrospective effect of a conveyance by the Fiscal, it is clear that until the execution of such a conveyance the judgment-debtor remains vested with the title, and by the doctrine of relation back the execution-purchaser becomes vested with the title as from the date of seizure. We are bound by the judgment of the Full Court on this point, reported in 10 *N. L. R.* 44 *et seq.* This being so, the execution-debtor cannot set up a title by prescription, because then he would be seeking to prescribe against himself. I was referred by respondent's counsel to the case of *Muttu Carpen et al. v. Ran Kira*,¹ where it was held that there was nothing in sections 289 and 291 of the Civil Procedure Code which debars a judgment-debtor, who has been in possession of the land for ten years after the Fiscal's sale, and before the execution of a Fiscal's transfer, from claiming title to the land sold by prescription. There is no conflict between this judgment and the Full Court judgment I have referred to, because a judgment-debtor may prove exceptional facts and circumstances, as indicated in the judgment of Hutchinson C.J., to show that his possession was not such a possession as is authorized by section 291 of the Civil Procedure Code, but that it was an adverse possession as defined by Ordinance No. 22 of 1871.

Another point taken by respondent's counsel was that as appellants had no Fiscal's conveyance at the date of the institution of the action, they were not entitled to make use of it at the trial. We were referred to the case of *Silva v. Hendrick*,² where it was held by a Full Court, one of the Judges dissenting, that when a purchaser in execution came into Court praying for declaration of title, without having a Fiscal's conveyance in his favour at the time of the institution of the action, he could not maintain the action. This judgment was followed in the case of *Ponnama v. Weerasuriya*.³ But I would draw a distinction between an action for declaration of title to land and for ejectment, and an action for partition where the Court has to inquire into the title of the parties before decreeing a partition or sale. Before final decree is entered in a partition action, it is open for any person who has any interests in the land to come forward and establish his claim, and a *fortiori*, I think that a party who is already on the record, and who has acquired interests after the institution of the action, is at liberty to advance and support them when the title of the parties and the irrespective claims form the subject of inquiry and settlement as required by the Partition Ordinance. Besides, I find that no

June 1, 1911

GRENIER J.

*Carolus v.
Perera*¹ (1910) 13 *N. L. R.* 326.² (1895) 1 *N. L. R.* 13.³ (1908) 4 *A. C. R.* 57.

June 1, 1911

GRENIER J.

*Carolis v.
Perera*

objection was taken to the reception of the Fiscal's transfer in favour of Carolis at the trial, and I am not disposed to entertain any objection to it on this appeal.

In my opinion the plaintiff has not established a title by prescription to the one-fifth share claimed by him, and I would therefore set aside the judgment of the Court below and dismiss plaintiff's action with costs in both Courts.

WOOD RENTON J.—I agree.

Appeal allowed.

