

Present : Schneider A.J.

1921.

VELUPILLAI v. MARIMUTTU *et al.*

203—C. R. Batticaloa, 1,475.

*Seizure not registered—Sale by judgment-debtor after Fiscal's sale—  
Registration of deed before Fiscal's conveyance was obtained—  
Civil Procedure Code, ss. 238 and 289.*

Under a writ of execution issued against C the land in question was sold in 1917. Fiscal's transfer D 1 was obtained in May, 1920, and was registered in May. C in July, 1919, transferred the land to plaintiff, and this deed was registered in February, 1920. The seizure under which the sale in execution took place was not registered under section 238 of the Civil Procedure Code.

*Held*, that plaintiff had superior title.

THE facts appear from the judgment.

*Croos-Dabrera*, for appellants.—The Fiscal's conveyance has a retrospective effect and reverts back to the date of sale. The respondent's deed, though registered earlier, cannot prevail over the subsequent Fiscal's conveyance. *Aserappa v. Weeratunga*;<sup>1</sup> *Juan Appu v. Weerasena*;<sup>2</sup> and *Noordeen v. Ukkahamy*.<sup>3</sup> There is no question of registration here. The deed on which the appellant relies was subsequent in execution as well as registration, but by the operation of section 289 the appellants became vested with title as from the date of the Fiscal's sale, which was prior to the date of the sale to the respondent. A Fiscal's sale will be rendered abortive if between the date of the seizure and the registration the judgment-debtor transfers the property to a third party.

<sup>1</sup> (1911) 14 N. L. R. 417.

<sup>2</sup> (1917) 20 N. L. R. 30.

<sup>3</sup> (1918) 5 C. W. R. 93.

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*J. Joseph*, for respondent.—This case is on all fours with *Hendrick v. Deen*,<sup>1</sup> and is concluded by that authority. The case of *Aserappa v. Weeratunga*<sup>2</sup> has no application here. Here there is no competition between two Fiscal's conveyances. The question here is whether by reason of the failure of the registration of the Fiscal's seizure the duly registered private alienation which took place after the Fiscal's sale but before the Fiscal's conveyance prevails over the latter. It is submitted that the private alienation prevails. The object of the registration required by sections 237 and 238 is to give notice to an intending purchaser by private treaty of the fact of the Fiscal's seizure. The words of section 238 are "any private alienation of the property seized . . . after the seizure and before . . . the sale of conveyance of the property seized." Here the private alienation took place between the Fiscal's sale and conveyance. A Fiscal's sale is not rendered abortive by a private alienation taking place between the date of the seizure and the registration, provided the registration takes place within two weeks as provided by section 237. *Fernando v. Fernando*.<sup>3</sup>

*Cur. adv. vult.*

February 16, 1921. SCHNEIDER A.J.—

The fact as now ascertained are as follows. The owner of the land was Chellappah. Under a writ issued against him the land was sold in October, 1917. The Fiscal's transfer (D 1) is dated May, 1920, and was registered on the same day. The defendants claim title through this sale in execution. The plaintiff claims under a deed executed by Chellappah in July, 1919 (P 1), and registered in February, 1920. It is admitted that the seizure under which the sale in execution took place was not registered under section 238 of the Civil Procedure Code. The question is, Which conveyed the superior title, the Fiscal's transfer (D 1) or the deed (P 1)? The facts in this case are not distinguishable from those in the case of *Hendrick v. Deen*.<sup>1</sup> It was not disputed by counsel for the appellants (defendants) that if the decision in that case is to be followed, the judgment of the learned Commissioner of Requests is correct, and the appeal fails. But he contended that the principle upon which *Hendrick v. Deen*<sup>1</sup> was decided had been over-ruled by the decision of the cases of *Aserappa v. Weeratunga*<sup>2</sup> decided by a Full Bench of this Court; *Juan Appu v. Weerasena*<sup>4</sup> decided by Wood Renton C.J. and Shaw J.; and *Noordeen v. Ukkuhamy*<sup>5</sup> decided also by a Full Bench. I am unable to agree with his contention.

What was decided in *Hendrick v. Deen*<sup>1</sup> was that an alienation by a judgment-debtor subsequent to a sale in execution but prior to a conveyance by the Fiscal operated to convey a title superior to that

<sup>1</sup> (1916) 3 C. W. R. 205.

<sup>3</sup> (1909) 9 N. L. R. 1.

<sup>2</sup> (1911) 14 N. L. R. 417.

<sup>4</sup> (1917) 20 N. L. R. 30.

<sup>5</sup> (1918) 5 C. W. R. 93.

purported to be conveyed by the Fiscal, provided there had been no registration of the seizure, the reason for this being that in the absence of other considerations the title deed prior in date should prevail, without hindrance by the fiction created by section 289 of the Procedure Code, that upon the execution of the Fiscal's conveyance the legal estate shall be deemed to have been vested as from the date of the sale. The point decided by the Full Bench in *Aserappa v. Weeratunga*<sup>1</sup> was quite different, and did not touch the point involved in this case. It was there held that in the case of two conveyances by the Fiscal competing for priority on the ground of registration under the Registration of Deeds Ordinance, the dates of the execution of the conveyances should alone be taken into consideration without regard to the dates of the sales themselves. Both the sales in that case followed upon seizures which had been registered. That decision, therefore, does not apply. In *Juan Appu v. Weerasena*<sup>2</sup> the Judges were of opinion that it was absolutely concluded by the Full Bench decision in *Aserappa v. Weeratunga*.<sup>1</sup> They were invited to consider the effect of the decision in *Hendrick v. Deen*,<sup>3</sup> but declined to do so, regarding it as an attempt to raise an objection which came too late. In *Noordeen v. Ukkahamy*<sup>4</sup> the point or decision was a question concerned with prescriptive possession. Incidentally, a competition between a conveyance by a judgment-debtor subsequent in date of execution but prior in date of registration to a Fiscal's conveyance, and that Fiscal's conveyance had to be considered, and it was held that the private conveyance prevailed. That decision, therefore, does not help the appellants. I am content to follow the decision in *Hendrick v. Deen*,<sup>3</sup> and to hold that the plaintiff has the better title, inasmuch as his deed is prior in date of execution to the Fiscal's transfer relied upon by the defendants, the seizure not having been registered. If I may say so, I agree with all the reasons given by my brother De Sampayo in that case. His view that the registration required by sections 237 and 238 was intended to serve the same purpose as the registration of a deed under the Land Registration Ordinance was that which had been taken by Wendt J. in the case of *Fernando v. Fernando*.<sup>5</sup> In that case Lascelles C.J. expressed the opinion that the purchaser at a Fiscal's sale should be deemed as coming under the designation of a person having a claim enforceable under the seizure. The provision for the registration of the seizure was, therefore, intended for the protection not only of the purchaser at the Fiscal's sale, but also of a purchaser from the judgment-debtor.

Having regard to the provisions and the language of sections 236, 237, and 238 of the Civil Procedure Code, it seems to me that it was intended by them to declare within what limits a private alienation

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*Marimuttu*<sup>1</sup> (1911) 14 N. L. R. 417.<sup>3</sup> (1916) 3 C. W. R. 205.<sup>2</sup> (1917) 20 N. L. R. 30.<sup>4</sup> (1918) 5 C. W. R. 93.<sup>5</sup> (1909) 9 N. L. R. 1.

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of property after a seizure was forbidden by the law. If that be the correct view, it necessarily follows that private alienation, except as so forbidden, is permitted. It should also be noticed that sections 236 and 238 do not declare the private alienation absolutely void, but only "void as against all claims enforceable under the seizure." If that is the limited effect of an alienation, even where the seizure has been registered, it is hard to believe that it is the law that any private sale subsequent to a sale by the Fiscal is absolutely void. The learned Commissioner of Requests has reasoned out his conclusion on the law in a judgment which does him great credit.

I would for the reasons given by me dismiss the appeal, with costs.

*Appeal dismissed.*

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