

1912.

Present: Lascelles C.J. and Wood RentonABRAHAM *v.* NONNO.

29—D. C. Galle, 10,577.

Fiscal's sale—Conveyance by purchaser before obtaining a Fiscal's transfer—Subsequent Fiscal's transfer—New conveyance not necessary to pass title—Civil Procedure Code, ss. 289 and 291.

When a purchaser at a Fiscal's sale conveys before he has himself obtained a Fiscal's transfer and then subsequently obtains a transfer, the benefit of the transfer enures to the purchaser.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for the added defendant, appellant.—There is no material to support the finding of the District Judge that the deed in favour of the appellant was not intended to be acted on. Until the deed be set aside by a Court on the ground of fraud, the deed is valid and confers title on the appellant.

Bawa, K.C., for the plaintiff, respondent.—Even if the deed was intended to be acted on, the appellant cannot succeed. The appellant bases his title on the conveyance in his favour from Nicholas, who bought it at a Fiscal's sale. At the date of the conveyance to appellant Nicholas had not obtained a Fiscal's conveyance. The fact that Nicholas obtained a Fiscal's conveyance after the execution of the deed in favour of appellant does not enure to the benefit of the appellant.

Section 289 of the Civil Procedure Code vests the legal estate in the purchaser from the time of the sale only for the purposes set out in section 291.

In *Silva v. Nonahamine*¹ the Full Court refused to apply the doctrine of relation back in the case of an action brought before the Fiscal's conveyance was obtained. It was held that the fact that the conveyance was obtained after the institution of the action did not enure to the benefit of the plaintiff.

Counsel referred to *Don Carolis v. Jamis*,² *Ammal v. Kangany*,³ *Kadiravelupillai v. Pinna*,⁴ *Alwis v. Fernando*,⁵ *Guruhamy v. Subaseris*.⁶

A. St. V. Jayewardene, in reply.—*Silva v. Nonahamine*¹ is a case in my favour. The decision in that case proceeds on the assumption that if the Fiscal's conveyance was obtained before the institution of the action, the intermediate conveyances would have been valid.

¹ (1906) 10 N. L. R. 44.

² (1909) 1 Cur. L. R. 224.

³ (1910) 13 N. L. R. 65.

⁴ (1889) 9 S. C. C. 36.

⁵ (1911) 14 N. L. R. 90.

⁶ (1910) 13 N. L. R. 112.

This is the case of a Fiscal's conveyance, which under our law expressly relates back to the date of the sale. *Don Carolis v. Jamis*¹ does not, therefore, apply to the facts of this case. *Alwis v. Fernando*² is a case of mortgage. General mortgages are abolished by our Ordinance. That case does not apply to the facts of the present case.

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April 3, 1912. LASCELLES C.J.—

This is an appeal from the judgment of the District Judge of Galle in a partition action in which he rejected the claim of the added defendant to a one-fourth of the land in question. The appellant's claim was based on a deed from one Nicholas dated April 21, 1879. The learned District Judge has come to the conclusion that this deed was not intended to be acted on, and therefore conveyed no title to the appellant. It was not seriously contended by Mr. Bawa, who argued the case for the respondent, that the finding of the District Judge in this respect could be supported. There is, in fact, no evidence on which the deed in question can be declared invalid, whether on the ground of fraud or otherwise. Mr. Bawa based his appeal on another ground. The added defendant's deed was, as I have said, dated on April 21, 1879. At that date Nicholas, the vendor, had purchased the property at a Fiscal's sale, but it was not until August 8, 1879, that he obtained a Fiscal's transfer. He subsequently mortgaged the whole of the land, which was sold under a writ and bought by the plaintiff. The priority of the added defendant's deed depends upon her title relating back, by virtue of section 289 of the Civil Procedure Code, to the date of the Fiscal's sale. Mr. Bawa, for the respondent, has contended that section 289 of the Civil Procedure Code does not operate in this way, and that when Nicholas conveyed to the added defendant on April 21, 1879, he had nothing to convey, and that the added defendant took no title. Mr. Bawa's contention is that section 289 has been misunderstood, and that, reading it in connection with the two following sections, it must be understood merely to vest the legal estate in the purchaser from the time of the sale for the purposes set out in section 291.

Now, whatever may be the merits of this argument, I am of opinion that it is now too late to question the proposition that when a purchaser at a Fiscal's sale conveys before he has himself obtained a Fiscal's transfer and then subsequently obtains a transfer, the benefit of the transfer enures to the purchaser. This was clearly understood to be the law before the passing of the present Code, as shown by the following authorities: *Selohamy v. Raphael*³ and *Silva v. Tissera*.⁴

¹ (1909) 1 *Cur. L. R.* 224.² (1911) 14 *N. L. R.* 90.³ (1889) 1 *S. C. R.* 73.⁴ (1890) 9 *S. C. C.* 92.

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No doubt, in the case of ordinary conveyances as opposed to Fiscals transfers, a purchaser of immovable property from a vendor, who has no title at the time of sale, does not acquire a title without a new conveyance, when his vendor subsequently acquires a title. *Don Carolis v. Jamis*,¹ also *Ammal v. Kangany*.² But with regard to a Fiscal's sale, the rule appears to be well established that transfers relate back to the date of the sale, the reason being that the purchaser, do what he may, cannot prevent delay in issuing the formal Fiscal's transfer.

In *Aserappa v. Weeratunga*³ the effect of section 289 of the Civil Procedure Code was considered in connection with section 17 of the Registration Ordinance, No. 14 of 1891, but I do not understand anything in that judgment as questioning the hitherto accepted doctrine that for the purpose of title a Fiscal's transfer relates back to the date of the Fiscal's sale.

For these reasons I do not think it is possible to support the judgment on the ground suggested by Mr. Bawa. In my opinion the appeal must be allowed and the judgment set aside and the case remitted to the District Judge to effect a partition on the footing that the appellants are entitled to a one-fourth share of the land in question.

The appellants are entitled to the costs of the appeal.

WOOD RENTON J.—

I agree that the appeal should be allowed on the terms stated by my Lord the Chief Justice.

Appeal allowed.

¹ (1909) 1 Cur. L. R. 224.

² (1910) 13 N. L. R. 65.

³ (1911) 14 N. L. R. 417.