

Present: De Sampayo A.J. and Pereira J.

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SIDAMBARAM *v.* PUNCHI BANDA *et al.*

160—D. C. Kandy, 21,316.

Prescription—Possession by judgment-debtor after sale—Fiscal's sale before the passing of the Code—Retrospective effect of Fiscal's conveyance.

Where a purchaser in execution delays to obtain the necessary Fiscals's conveyance in respect of the property purchased, a transferee of the execution-debtor or the debtor himself may, by possessing the property sold during the prescriptive period acquire a title thereto by prescription as against the purchaser.

PEREIRA J.—There is no case here of a person "seeking to prescribe against himself" A person may have a good and valid paper title to land, but may at the same time claim to set up a title by prescriptive possession without exposing himself to the charge of "seeking to prescribe against himself."

Even by the law in force anterior to the Civil Procedure Code, a Fiscal's conveyance has the retrospective effect given to it by section 289 of the Code.

THE facts are stated in the judgment of De Sampayo A.J.

H. A. Jayewardene, for the plaintiff, appellant.

De Jong, for the defendants, respondents.

Cur. adv. vult.

July 15, 1912. DE SAMPAYO A.J.—

The land in claim was admittedly the property of one Appuhamy Arachchi who died intestate about twenty-five years ago, leaving his widow Ukku Menika and his daughter Ram Menika and granddaughter Tikiri Menika as his heirs. For a debt of the deceased Appuhamy Arachchi the land was seized in an action brought against his said heirs, and was sold by the Fiscal on January 21, 1889, when Medduma Banda became purchaser thereof. Before obtaining any Fiscal's conveyance, Medduma Banda by deed dated May 6, 1893, purported to sell the land to Muttu Carpie, through whom the plaintiff claims title upon certain mesne conveyances. On March 11, 1903, a Fiscal's conveyance was issued in the name of Medduma Banda, but no further conveyance was granted by Medduma Banda to the plaintiff. In the meantime, Ram Menika and Tikiri Menika by two deeds dated May 10, 1893, and January 29, 1900, sold the land to first and second defendants respectively. On this state of facts the questions which the District Judge had to decide were whether the plaintiff's documentary title prevailed over that of the defendants, and whether the defendants had acquired a title by prescription.

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As regards the first question, it was contended on behalf of the plaintiff that when Medduma Banda obtained a Fiscal's conveyance in 1908 his title related back to the date of sale and enured to the benefit of the plaintiff. The District Judge repelled this contention on the ground that as the Fiscal's sale took place under the provisions of the Fiscals Ordinance, No. 4 of 1867, the Fiscal's conveyance had no retrospective effect as it would have had if the sale had been governed by the Civil Procedure Code, which by section 289 gave such effect to sales thereunder. Here, I think, the learned District Judge was wrong. Section 289 of the Civil Procedure Code only reproduced in substance and effect the law as it prevailed even before the Code came into operation. *Abubaker v. Kalu Etana*,¹ *Weerasuriya v. Alles (ibid.)*; D. C. Galle, 10,577.² Apart from authority, this must necessarily be so, because otherwise no sale in execution would be safe against acts of alienation by the judgment-debtor pending the confirmation of the sale by the Court and the issue of the Fiscal's conveyance. In my opinion, the plaintiff in this case acquired the right of Ram Menika and Tikiri Menika to the land as at the date of the execution sale in 1889, and has therefore a better documentary title than the defendants.

On the question of prescription, however, I think the learned District Judge is right. He found on the evidence, and there is no reason to differ from his opinion, that the defendants have had adverse and exclusive possession of the land ever since their purchases, and that Medduma Banda, the purchaser at the Fiscal's sale, and those claiming under him, had no possession whatever. Accordingly he held that the defendants had a good prescriptive title against the plaintiff. It was argued in appeal, however, that the doctrine of relation back had the effect even of squeezing out the intermediate prescriptive possession of the defendants. I cannot agree that such a result is produced, especially in the case of a third party. It may be granted that (to employ the words of section 289 of the Code) the right and title of any person holding under the judgment-debtor, or deriving title through him, is divested on the confirmation of the sale and the execution of the Fiscal's conveyance, and consequently that in this case, as already observed, the defendants' documentary title is defeated by the issue of the Fiscal's conveyance to Medduma Banda. But the prescriptive title of the defendants was not one derived through the execution-debtors, but the title created by such possession is a new and independent title based on the statutory provision in that behalf. In my opinion this new title is unaffected by the issue of the Fiscal's conveyance to the execution-purchaser. In support of his argument, counsel for the plaintiff-appellant relied on the cases already referred to, and also *Aserappa v. Weeratunga*³ and *Tikiri Banda v. Loku Banda*.⁴ He

(1889) 9 S. C. C. 32.

³ (1911) 15 N. L. R. 63.

(S.C. Mins., April 2, 1912.

⁴ (1911) 14 N. L. R. 417.

admitted that none of these was a direct authority, but he argued that his proposition followed from them. I do not see that he receives any support from these decisions. On the other hand, I think the observations of Lawrie A.C.J. in *Jayewardene v. Nikulas*¹ points to the contrary proposition: "The doctrine or fiction of relation back may be applied when it does no one any harm, but where interests have been created or have arisen in the interval from the time to which relation back is desired these interests cannot be met by a legal fiction". Moreover, *Muttu Karupen v. Rankira*² is a direct authority for the proposition that even the judgment-debtor may possess adversely, and so acquire a new title by prescription against the execution-purchaser. I may add that both *Jayewardene v. Nikulas* and *Tikiri Banda v. Loku Banda* (*supra*) recognized an estoppel working in favour of a private purchaser from circumstances of delay to get a Fiscal's conveyance, and of neglect or failure to obtain possession on the part of the execution-purchaser. Such circumstances exist in this case, though in the absence of an express issue between the parties on that point I am not disposed to rely on it for my judgment.

In my opinion the defendants were entitled to succeed on the plea of prescription, and I would dismiss the plaintiff's appeal with costs.

PEREIRA J.—

The first question to be decided in this case is whether, by the law in force anterior to the enactment of the Civil Procedure Code, a Fiscal's conveyance had the effect given to it by section 289 of the Code. I think it had. The cases of *Abubaker v. Kalu Etana*³ and *Weerasuriya v. Alles*⁴ are in point. The next and more difficult question is whether the execution-debtor, or rather a transferee of the execution-debtor, may, by possessing the property sold during the prescriptive period, acquire a title thereto by prescription as against the purchaser at the Fiscal's sale before he obtains his Fiscal's conveyance. Section 291 of the Civil Procedure Code gives the right to an execution-debtor to "use and enjoy" the property sold until the execution of the Fiscal's conveyance in favour of the purchaser, subject to certain conditions, one of the conditions being that he is not to take for himself the crops and produce of the land. This section has no application to the present case, because the Fiscal's sale to the plaintiff's predecessor in title took place before the Code came into operation; but I may, in view of the authorities to be presently discussed, observe that the mere user and enjoyment permitted by this section can hardly be said to be the same as the possession necessary for the acquisition of prescriptive rights. The possession that we have to deal with in the present case was clearly such a possession as is defined by section 3

¹ (1894) 3 N. L. R. 341.

² (1910) 13 N. L. R. 326.

³ (1889) 9 S. C. C. 32.

⁴ *Ibid*—note.

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of Ordinance No. 22 of 1871; and in the case of such a possession by an execution-debtor of his property sold in execution, Hutchinson C.J. was clearly of opinion that the possessor might acquire prescriptive rights under the Ordinance. (See *Muttu Karupen v. Rankira* ¹). But Mr. Jayewardene cited to us the later case of *Carolis v. Perera*, and argued that, inasmuch as a person could not prescribed against himself, the execution-debtor could not acquire title by possession. In that case Grenier J., after observing that it was clear that until the execution of a conveyance by the Fiscal the judgment-debtor remained vested with the title, and by the doctrine of relation back the execution-purchaser became vested with the title as from the date of seizure, held as follows: "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 impressed with this argument at the time, and I informed Mr. Jayewardene that I thought that the reasoning would apply as well to the case of a transferee of the execution-debtor; but, on fuller consideration of the matter, I am inclined to think that whatever the facts of the case of *Carolis v. Perera* ² may indicate, there is no case here of a person "seeking to prescribe against himself". The execution-debtor has been (to use the words of the Ordinance) in the "undisturbed and uninterrupted possession of the land by a title adverse to and independent of that of the plaintiff"; that is to say, he has possessed the land in his own right. A person may have a good and valid paper title to land, but may, at the same time, claim to set up a title by prescriptive possession without exposing himself to the charge of "seeking to prescribe against himself". That happens in our Courts every day.

Mr. Jayewardene further argued that prescription could not run against his client, because he had no *locus standi in judicio* until he armed himself with the Fiscal's conveyance. The omission to obtain a Fiscal's conveyance was his own fault, and he can claim to be in no better position than one who having agreed to buy land had paid for it, but delayed getting the necessary notarial transfer. I would dismiss the plaintiff's appeal.

Appeal dismissed.

¹ (1910) 13 N. L. R. 326

² (1911) 14 N. L. R. 219.