

1944

Present: **Soertsz and Jayetileke JJ.**KANDAVANAM, Appellant, and CHELLIAH *et al.*, Respondents.

11—D. C. Point Pedro, 1,478.

Fiscal's conveyance—Property sold under two writs—Seizure unregistered—Two competing Fiscals' conveyances—Priority—Civil Procedure Code, s. 289.

Where the same property is seized and sold under two writs and neither seizure is registered, the purchaser under the writ upon which the property was first sold is entitled to priority by reason of the retroactive effect given to his Fiscal's conveyance under the provisions of section 289 of the Civil Procedure Code.

A PPEAL from a judgment of the District Judge of Point Pedro. The facts appear from the argument.

N. Nadarajah, K.C. (with him *H. W. Thambiah*) for the second defendant, appellant.—There is a competition in this case between two Fiscals' conveyances of a land which belonged to one Kumarasamy. Deed P2 which is the transfer in favour of the plaintiff is dated February 14, 1940, and 2 D 2 which is the transfer in favour of the appellant is dated March 5, 1940. The Fiscal's sales, however, to the plaintiff and the appellant took place on August 12, 1939, and November 17, 1938, respectively. The seizures which preceded the two sales were, neither of them, registered. On the authority of *Aserappa v. Weeratunga et al.*¹, *Tikiri Banda v. Loku Banda et al.*² and *Juan Appu v. Weerasena*³ 2 D 2 is entitled to prevail over P 2.

¹ (1911) 14 N. L. R. 417.² (1911) 15 N. L. R. 63.³ (1917) 20 N. L. R. 30.

S. J. V. Chelvanayagam, for the plaintiff, respondent.—P 2 is the earlier document and is entitled to prevail over 2 D 2. Sections 238 and 289 of the Civil Procedure Code (Cap. 86) have to be read together. The rule of relation back will apply only if the seizure had been registered. In the present case both the seizures were not registered. The material date, therefore, is the date of the Fiscal's conveyance. See *Hendrick Singho v. Kalanis Appu et al.*¹; *Velupillai v. Marimuttu et al.*²; *Hendrick v. Deen et al.*³. Section 238 of the Civil Procedure Code, in its present amended form, would apply not merely to private alienations but also to Fiscals' sales.

N. Nadarajah, K.C., in reply.—The rule of relation back does not depend on the date of seizure. Under section 289 of the Civil Procedure Code the grantee in a Fiscal's conveyance is deemed to have been vested with the legal estate from the time of the sale, and not from the time of the seizure.

Cur. adv. vult.

September 7, 1944. SOERTSZ J.—

The relevant facts for the consideration of this appeal are these. One Kumarasamy admittedly owned two-thirds of the land in question in the case. He was allowed to appear and defend Claim 541 P (D. C. Jaffna) on condition that he gave security in a sum of Rs. 450. For this purpose he hypothecated with the Secretary of the Court half of his two-third share. The bond was *not* registered. His defence in that case failed and the plaintiff in that case, who is also the plaintiff now before us, in execution of his decree in that case seized this share. This seizure was *not* registered. The share was sold by the Fiscal on August 12, 1939. The sale was confirmed on December 3, 1939, and the Fiscal's conveyance was made in his favour on February 14, 1940.

The appellant himself had sued Kumarasamy in another case and in execution of the decree he obtained in that case, he seized the entire two-third share of Kumarasamy. This seizure too was *not* registered. The share was sold on November 17, 1938. The sale was confirmed and Fiscal's transfer to him in respect thereof was made on March 5, 1940. A conflict has thus arisen between the plaintiff-respondent and the appellant in respect of a one-third share and the question is who has the better title to that share?

As already observed neither seizure was registered. It follows therefore, that section 238 of the Civil Procedure Code has no application, for that section renders void "any sale, conveyance, mortgage, lease or disposition of the property seized, *made after the seizure and registration of the notice of seizure and while such registration remains in force*". Here, there was no registration of the seizure and, consequently, the course was clear, so to speak, for the debtor to dispose of the property in any way he chose, to the extent to which he had a disposing power over it, or for the Fiscal to sell, in execution, the debtor's title such as it was. The title of the purchaser in either event would be just that of the debtor.

¹ (1921) 23 N. L. R. 80.

² (1921) 22 N. L. R. 281.

³ (1916) 3 C. W. R. 205.

In the Divisional Bench case of *Aserappa v. Weeratunga*¹, Wood-Renton J. observed as follows:—“ By virtue of that section (289) Sophia Ratnayake was divested of her life-interest in the property as from June 10, 1907, and the appellant could derive no right to it through his purchase in execution against her on February 5, 1908 ”.

In this case also the competing titles are derived from the same source and in the same way, that is through Fiscals' conveyances. The plaintiff's conveyance is earlier in date than the appellant's but in view of the retroactive effect given, in a case like this where neither seizure was registered, by section 289 of the Civil Procedure Code, the appellant's title dates back to November 17, 1938, as against the plaintiff's title which goes back to August 12, 1939. There is no question here of priority by registration of the Fiscal's transfer and the appellant must succeed. I would allow the appeal with costs.

JAYETILEKE J.—I agree.

Appeal allowed.

