

1937

*Present : Soertsz J. and Fernando A.J.*WICKREMANAYAKE *v.* JOHN APPUHAMY.166.—*D. C. Galle, 30,775*

Concurrence—Partition action—Decree for sale—Fiscal's sale of undivided interests of plaintiff in execution—Subsequent sale under partition decree—Proceeds of sale seized by another judgment-creditor of plaintiff—Concurrence—Civil Procedure Code, s. 289.

In a partition action a decree for sale was entered on May 26, 1933, declaring plaintiff's interests to be certain undivided shares in the land.

On March 28, 1934, a judgment-creditor of the plaintiff seized his undivided interests in the land and those interests were sold by the Fiscal on October 26, 1934, and purchased by the respondent to this appeal. On November 3, 1934, the sale under the decree took place and a certificate of sale was issued to the purchaser on December 11, 1934. The purchaser at the Fiscal's sale (the present respondent) obtained his Fiscal's transfer on August 6, 1935.

On December 14, 1934, another judgment-creditor of the plaintiff, the present appellant, seized the money lying to the credit of the plaintiff in the partition action in satisfaction of his own debt under section 232 of the Civil Procedure Code.

Held, that the respondent was entitled to the full proceeds of the sale and that the appellant was not entitled to concurrence.

The retrospective effect of section 289 of the Civil Procedure Code is to vest the respondent—the purchaser at the Fiscal sale—with the legal title of the plaintiff to the fund into which his estate in the land had by that date been converted as from November 3, 1934.

APPEAL from an order of the District Judge of Galle.

M. T. de S. Amarasekera, for respondent, appellant.

A. L. Jayasuriya, for petitioner, respondent.

Cur. adv. vult.

June 16, 1937. SOERTSZ J.—

The question that arises for decision on this appeal is not free from difficulty, but after careful consideration I have come to the conclusion that the appeal fails. The facts are as follows: One Kalid claiming to be entitled to an undivided 65/120th of a land called Warawatta sought to partition it among himself and nine others. Decree for sale was entered on May 29, 1933. It declared the plaintiff's interests to be 305/960th of the land. On March 28, 1934, a judgment-creditor of the plaintiff seized his undivided interests in this land and those interests were sold by the Fiscal on October 26, 1934, and were purchased by the petitioner who is the respondent to this appeal. Eight days later, that is on November 3, 1934, the sale under the decree in this case took place and a certificate of sale was issued to the purchaser on December 11, 1934. The purchaser at the Fiscal's sale obtained his Fiscal's transfer on August 6, 1935. Between the date of the certificate of sale and that of the Fiscal's transfer—to be precise, on December 14, 1935—another judgment-creditor of the plaintiff, namely, the present appellant, acting under section 232 of the Civil Procedure Code requested the District Judge to hold a sufficient

amount of money lying to the credit of the plaintiff, to satisfy his own judgment-debt. On February 4, 1936, the petitioner on the strength of his Fiscal's transfer sought to be substituted in place of the plaintiff, and he asked that he be allowed to draw the sum of Rs. 507.98 which was the amount the original plaintiff became entitled to in lieu of his interests, after a *pro rata* and other costs had been paid. The appellant opposed this application, but after inquiry the trial Judge allowed it. For the appellant it is contended that the application should have been refused, firstly, because the case is no longer pending, secondly, because the interests purchased by the petitioner were the plaintiff's undivided shares, and that the certificate of sale having wiped out those interests, the Fiscal's transfer which was issued after the certificate of sale conveyed nothing and that consequently the petitioner had no right upon which to found his application for substitution.

In regard to the first contention in the circumstances of this case the action must be considered to be pending so long as the amounts due to the different parties are lying in deposit to the credit of this case. In *Salt v. Cooper*¹, Jessel M.R. said that a cause is still pending although final judgment has been given so long as that judgment has not been satisfied.

In regard to the second objection, it is true that the certificate of sale wiped out the plaintiff's interests in the land by giving the purchaser named therein an absolute title to all those interests, but in place of these interests, the plaintiff obtained certain other interests, namely, the right to his share of the purchase price subject to payment of costs. The question is whether the petitioner can be said to have acquired those interests on the Fiscal's transfer which conveyed to him all those undivided 304/960 parts of the soil and trees and buildings on the land called lots Nos. 7 and 8 of Warawatta. There is no provision in the partition Ordinance dealing with this question, but perhaps the solution of it is to be found in section 289 of the Civil Procedure Code which provides *inter alia* that if the Fiscal's sale "is confirmed by the Court and the conveyance is executed in pursuance of the sale, the grantee in conveyance is deemed to have been vested with the legal estate from the time of the sale". In this instance, the sale was confirmed and the conveyance was executed in pursuance of the sale and in consequence the grantee must be deemed to have been vested with the legal estate from the date of sale, November 3, 1934. In other words, the position created by the operation of this part of section 289 of the Civil Procedure Code is that on November 3, 1934, the petitioner-respondent must be deemed to have been entitled to the undivided shares allotted in the decree of May 29, 1933, to the plaintiff. I say to the "undivided shares" because it has now been definitely settled by the full Bench in *Pieris v. Pieris*², that despite a decree for sale the land continues to be held in undivided shares until the issue of the certificate of sale. Mr. Amarasekera, however, urged that those undivided interests had ceased to exist at the date of the Fiscal's transfer for the certificate of sale had been given earlier. That is so; but certain other rights had come into being and by operation of section 289 the grantee on the Fiscal's transfer must be deemed to have been vested with the legal estate in those rights from the date of his sale. For if it

¹ 16 Ch. D. 551.

² 6 Law Recorder 1.

had been possible to confirm the sale and issue the transfer on the date of the sale itself the grantee would have been entitled there and then to have himself substituted in place of the party whose interests he had purchased. In that event, the grantee would clearly have been entitled, subject to any superior or concurrent claim, to draw any sum due to the original party. There does not appear to me to be any good reason for relegating a purchaser to a worse position because of a delay which the procedure the Court has to follow has occasioned. *Actus curiae neminem gravabit*. In my opinion, therefore, the petitioner was entitled to be substituted in place of the plaintiff.

The only other question is whether that means that the petitioner is entitled to draw the whole sum of Rs. 507.98 regardless of the seizure by the appellant of a sum sufficient to cover his claim. That question, I think, must be answered against the appellant. The date of the sale is November 3, 1934. The date of the appellants seizure is December 14, 1934. But the retrospective effect of section 289 of the Civil Procedure Code was to vest the petitioner with the legal title of the plaintiff, that is to the fund into which his estate in the land had, by that date, been converted, as from November 3, 1934. But, curiously, by operation again of section 289, the plaintiff had not been divested of that right and title till the sale to petitioner was confirmed and the transfer executed on August 6, 1935. This antinomy in section 289 can be reconciled only on the hypothesis that although the seizure on December 14, 1934, was good against the plaintiff inasmuch as he had not been divested of his right and title as matters stood on that date, it was only potentially good. It would have prevailed in the event of the sale to the petitioner not being confirmed, but it was liable to be frustrated if, as it happened in this case, the sale was confirmed and a transfer executed, and in consequence right and title came to be conferred on him as from November 3, 1934.

I, therefore, hold that the appeal fails and dismiss it with costs.

FERNANDO A.J.—I agree.

Appeal dismissed.

