

1945

Present: Soertsz A.C.J.

LEANAGUNAWARDENE, Appellant, and BALAHAMY *et al.*,
Respondents.

53—*C. R. Matara, 224.*

Fiscal's sale—Seizure not registered—Private alienation by execution-debtor between date of Fiscal's sale and date of Fiscal's conveyance—Superiority of title—Civil Procedure Code, s. 289.

On a deed of July 4, 1940, registered on July 12, 1940, the plaintiff purchased a land from P and H. The same land had been sold by the Fiscal to the third defendant on May 29, 1940, on a writ against P and H. The seizure, however, was not registered, and the Fiscal's transfer which was issued on July 10, 1941, was registered on August 1, 1941:—

Held, that the plaintiff had better title than the third defendant. The title of the purchaser at a Fiscal's sale does not, on the issue of the Fiscal's transfer, prevail over any intermediate alienation by the execution-debtor, unless the Fiscal's seizure had been registered.

A PPEAL from an order of the Commissioner of Requests, Matara.

Ivor Misso, for the plaintiff, appellant.

H. W. Jayewardene (with him *Vernon Wijetunge*), for the defendants, respondents.

Cur. adv. vult.

July 31, 1945. SOERTSZ A.C.J.—

Lot 2 in the plan No. 1312 filed of record is the land involved in this case. By final decree in partition case No. 7,865, D. C., Matara, it was allotted to Balahamy, Podisingho and Hinnihamy in the proportion of 12/37, 19/37 and 6/37, respectively. On a deed of July 4, 1940, registered on July 12, 1940, the plaintiff purchased from Podisingho and Hinnihamy a $\frac{1}{3}$ share. On a writ issued for costs this lot of land had been sold by the Fiscal on May 29, 1940, but the Fiscal's transfer in respect of this sale was not issued till July 10, 1941, to the third defendant. The transfer was registered on August 1, 1941. The question is who has the better title, the plaintiff or the third defendant, to the $\frac{1}{3}$ share thus brought into competition? The plaintiff's deed is prior both in point of execution and of registration (see *Aserappa v. Wijeytunge*¹), but the third defendant submits that as the date of sale under the writ was May 29, 1940, the vendors to the plaintiff had no title to convey on July 4, 1940, inasmuch as—so he contends—by operation of section 289 of the Civil Procedure Code, when the Fiscal's transfer was issued on July 10, 1941, the plaintiff's vendors must be deemed to have had no title as from the date of the sale. The answer surely is that that submission overlooks that part of the section 289 which provides that the right, title or interest of the judgment-debtor is not divested by reason of the sale till the sale is confirmed and Fiscal's transfer is issued. The effect of that provision is that the plaintiff's vendors had not been divested of their title at the time of the

sale, July 4, 1940. As was pointed out in the Divisional Bench case of *Hendrick Singho v. Kalanis Appu*¹, the title of the purchaser at the Fiscal's sale does not, on the issue of the Fiscal's transfer, prevail over any intermediate alienation by the execution debtor, unless the Fiscal's seizure is registered. There is no evidence of any such registration here. I would set aside the order of the Commissioner and remit the case for disposal on the basis that the plaintiff is entitled to the $\frac{1}{3}$ share that was in dispute between him and the third defendant. Appellant will have costs of the appeal.

Order set aside.
