

1898.

August 30.

FERNANDO v. PERERA.

D. C., Negombo, 2,795.

Sale of land in execution by in 1887—Deed of conveyance by Fiscal in 1895, without express order of Court—Ordinance No. 4 of 1867, s. 58—Order confirming the sale—Civil Procedure Code, ss. 283 and 286—Validity of conveyance.

An execution-creditor having bought a property at a sale in execution held in 1887, the Fiscal reported the sale to the District Court in terms of section 58 of the Ordinance No. 4 of 1867.

In 1895 the purchaser obtained from the District Court, in terms of section 283 of the Civil Procedure Code, an order confirming the sale.

Thereupon the Fiscal granted a conveyance to the purchaser, without obtaining an express order of Court as provided in section 58 of the Ordinance No. 4 of 1867.

Held, that the order of confirmation of the sale—which recited that the property was put up for sale in 1887, that thirty days had elapsed since the Fiscal had reported the sale, and that no application was made to set aside the sale—was in effect a direction to the Fiscal to convey the property, and that therefore the conveyance was good in law.

ACTION for ejectment and declaration of title to a land which at one time belonged to one Pieris and Podi Naide. On a writ of execution sued out in case No. 91,619, D. C., Kurunegala, the land was seized and sold by the Fiscal on the 18th February, 1887, to one Karunaratna, but the conveyance in his favour was not made by the Fiscal until the 5th March, 1895. Karunaratna sold the land on the 16th November, 1896, to the plaintiff.

The defendant disputed the validity of plaintiff's title, alleging that the Fiscal's deed to Karunaratna dated 5th March, 1895, was invalid for want of an express order of Court, in terms of section 58 of the Ordinance No. 4 of 1867.

The only issues framed by the Court below were as follows:—Is the Fiscal's transfer in favour of Karunaratna of no force or avail in law, and did no title pass thereunder by reason of the absence of an express order of Court?

The District Judge (Mr. J. P. Lewis) was of opinion, that though the Civil Procedure Code came into operation in 1890, the point raised should be disposed of in terms of the old procedure. His ruling was as follows:—

“ The sale had been held before the Code came into operation, or, in other words, the action had been continued ‘ up to final judgment and execution’, and was not therefore pending at the time that Code came into operation. Under section 58 of Ordinance

1898. " No. 4 of 1867 no conveyance can be executed by the Fiscal in
 August 30. " favour of a judgment-creditor who has become purchaser, except
 " by express order of the Court, and a Fiscal has to follow the
 " form J in the schedule of the Ordinance. In this form it is
 " recited that a purchaser ' has produced the order of Court, copy
 " ' whereof is annexed.' In the Fiscal's transfer relied upon by the
 " plaintiff the form prescribed by the Code has been followed, and
 " the words just quoted have been omitted. It is not con-
 " tended that there was any order of Court beyond the confirma-
 " tion of the sale. The conveyance is bad. The plaintiff's action
 " is dismissed."

Plaintiff appealed.

Walter Pereira, for appellant.

Dornhorst, for respondent.

30th August, 1898. BONSER, C.J.—

By this action the plaintiff, relying on his title, sought to recover from the defendant a piece of land. A Fiscal's conveyance of the 5th March, 1895, was one of the links in his chain of title. The defendant took objection to the validity of this conveyance, which objection the District Judge upheld. It was this. The property was sold in 1887 under a writ of execution issued by the plaintiff's predecessor in title; at that sale the plaintiff's predecessor in title, who had issued the writ, became the purchaser, but he did not obtain a conveyance. At that date sales in execution were governed by the provisions of Ordinance No. 4 of 1867. Section 58 of that Ordinance provides that when a party in whose favour execution is issued becomes the purchaser of the property sold thereunder, the purchase money should be allowed in reduction of his claim but that " no conveyance of the property in any such case shall be made to such purchaser but " under express order of the Court." In 1889 the Civil Procedure Code was passed, which took away from the execution-creditors the right of purchasing at sales, and provided that, if they wished to purchase, they must get previous sanction for that purpose from the Court.

In 1895 the purchaser wished to obtain a conveyance from the Fiscal of the property which he had bought in 1887. He, thereupon, applied to the Court for an order confirming the sale, and an order was accordingly made by the District Court reciting that the property was put up for sale in 1887; that thirty days had elapsed since the Fiscal had reported the sale; and that no

application had been made to set aside the sale, and an order was thereupon made that the sale be confirmed. It appeared on the face of the order that the purchaser was the execution-creditor.

1898.

August 30.

BONSER, C.J.

It was objected that this order confirming the sale was not an express order of the Court such as section 58 of Ordinance No. 4 of 1867 required. But it seems to me that it had all the requirements of such an order. The fact was before the Court that the execution-creditor was the purchaser, and yet the Court confirmed the sale. What was that but in effect directing the Fiscal to convey the property? I think, therefore, that the objection ought not to have been upheld. The case must go back, to enable the plaintiff to proceed with proof of this title.

WITHERS, J.—

It seems to me that the order confirming this sale was, in the circumstances, of equal effect to an order of sale under section 58 of Ordinance No. 4 of 1867. The facts of which the Court had to satisfy itself in the present case were just what the Court would have had to consider under the repealed Ordinance.

An order for sale was tantamount to a declaration that the purchaser was entitled to a conveyance from the Fiscal. The present order confirming the sale implies a similar declaration.

