

GABRIEL APPUHAMY v. PELIS PERERA  
APPUHAMY *et al.*

*D. C., Negombo, 1,355.*

*Fiscal's conveyance to purchaser in execution sale—Ordinance No. 4 of 1867, ss. 54, 56, and 58—And Civil Procedure Code, ss. 283 and 286—Confirmation by Court—Proper time for conveyance.*

Upon a sale in execution duly held in 1871 under Ordinance No. 4 of 1867, and no objection having been taken thereto within thirty days of the sale—

*Held, per WITHERS and BROWNE, JJ. (LAWRIE, A.C.J., dissentiente), that it was competent to the Fiscal to pass a conveyance to the purchaser in 1893, and that such conveyance was valid. Such purchaser not being execution-creditor, an express order of court to convey is not necessary.*

*Held further, per WITHERS, J., that it was only sales of property held after the Civil Procedure Code came into operation that required an order of confirmation as a condition precedent to a Fiscal's conveyance.*

THE land in dispute, in this case of ejectment, belonged to one Martelis Perera Appuhamy, who by deed No. 474, dated 16th May, 1870, leased it to one Domingo Fernando Rendrala for a

term of twenty years, and put him in possession thereof. On the 31st August, 1871, the Fiscal of Negombo, in pursuance of a writ of execution issued against Martelis Perera, seized the land and sold it by public auction to the plaintiff, who bought it subject to the lease in favour of Domingo Fernando. On the death of the lessee, his legal representatives, by deed dated 11th August, 1874, assigned to the plaintiff the unexpired term of the lease and put him in possession of the land. He continued to hold it till the expiry of the lease, and thereafter on the 11th May, 1893, obtained from the Fiscal a conveyance of the premises in his favour, as purchaser in execution. The plaintiff averred in his plaint (filed on the 5th September, 1893) that the defendants, on the 28th February, 1892, entered upon the land, and, having ousted the plaintiff's lessee, were in unlawful possession thereof; and he prayed for declaration of title and for ejectment of defendants.

The second defendant only appeared, and in his answer he averred that the Court, by its order dated 7th February, 1893, had refused to confirm the sale in question, which was therefore no sale. He also pleaded that the Fiscal's conveyance was obtained by fraud; and denying the ouster and unlawful possession complained of, he claimed the land as his own by right of purchase from Martelis Perera (from whom the plaintiff also professed to derive his title) by deed dated 11th March, 1892, and duly registered on the 12th March, 1892. He prayed for declaration of title and for dismissal of the plaintiff's action.

The Court framed the following issues :—

- (1) Is the Fiscal's conveyance in plaintiff's favour void by reason of there being no authority of Court for its issue ?
- (2) If valid, what is the effect of its registration ?
- (3) If the conveyance be void, does the plaintiff's possession enure to his benefit ?

Upon argument, the plaintiff's action was dismissed with costs, and judgment was entered for the second defendant, declaring him owner of the land.

The plaintiff appealed.

The appeal was argued first on the 12th March, 1895, before LAWRIE, A.C.J., and WITHERS, J. And their Lordships not being able to agree to a judgment, it was argued again on the 5th April, 1895, before LAWRIE, A.C.J., and WITHERS and BROWNE, JJ.

*Wendt and Dornhorst*, for appellant.

*Bawa*, for respondents.

*Cur. adv. vult.*

17th April, 1895. LAWRIE, A.C.J.—

The plaintiff averred that on the 31st August, 1871, he purchased the land in question at a Fiscal's sale held in execution of a writ against Martelis Perera.

The defendants in the present action said that they could not admit the fact of the sale in execution, and they put the plaintiff to the proof of it.

The only evidence of the sale adduced at the trial was a conveyance by the Fiscal dated in 1893 (twenty-two years after the alleged sale).

I shall, however, for the purposes of this judgment, assume that it has been proved that the sale in execution in 1871 was in all respects regular, and that the plaintiff, as purchaser at that sale, had a right then to get a conveyance from the Fiscal if he paid the price, supplied the stamps and survey fees, &c., required by the Ordinance No. 4 of 1876.

The plaintiff did not apply for or get a conveyance.

He was in possession of the land as lessee under a lease for twenty years, which expired in 1892; the former owner of the land transferred the land to the defendant in this action, who registered the transfer.

The plaintiff made two attempts to get the Court to authorize the Fiscal to grant a conveyance, and he failed. In one of these attempts the order of the District Judge was brought to this Court in appeal, and the order was affirmed.

Burnside, C.J., observed that in his opinion "no right exists to call on a Fiscal to execute a conveyance . . . outside the action in which the property has been sold," and he added he "knew of no law by which the Fiscal becomes liable to the whole world to make a conveyance."

These observations were *obiter*, but they are valuable as having been expressed in regard to the right of this very plaintiff to get the conveyance on which he now founds his case.

Notwithstanding the refusal of the Court to compel the Fiscal to grant him a conveyance, the plaintiff went to the Fiscal, who (either ignorant of the proceedings already taken, or thinking that he was bound to grant a conveyance, or that he was entitled to do so) granted the conveyance of the 10th May, 1893, which recites that the sale was held on the 31st of August, 1871.

The learned District Judge framed this issue :—

"Is the Fiscal's conveyance in the plaintiff's favour void by reason of there being no authority of Court for its issue?"

The learned Judge decided in the affirmative. I think he was right. Fiscals have no common law rights, and are under no

common law obligations to grant conveyances; they can do so only in strict conformity with the Civil Procedure Code. The older provisions of the Ordinance No. 4 of 1867 have been repealed.

By the present law a Fiscal cannot grant a conveyance unless he has before him a confirmation of the sale by the Court.

I can find nothing in the Code which gives a Fiscal an exceptional right to convey, without confirmation, if the sale was held before the Code came into operation.

There is a difference in the form of conveyance used under the Code and that used under the Ordinance No. 4 of 1867. There is also, I believe, some difference in the amount of stamp duty now exigible. I do not think it could be contended that a Fiscal now has right to issue a conveyance in the old form, or with the old amount of stamps (in this case it is the new form of conveyance which has been signed).

It seems to me that a Fiscal is so completely the creature of what remains of the Ordinance No. 4 of 1867 and of the Code that he has no right to attempt to transfer property except in strict conformity with these laws.

It is true that Fiscals holding office prior to August, 1890, had more discretion given to them in the matter of giving transfers than their successors since 1890 have had, but the Fiscal who gave the conveyance in 1893 had the lesser rights and powers, and the Fiscal gave (in that year) a conveyance without the confirmation of the Court. I venture to dissent from my brothers, and to express the opinion that he acted in excess of his powers, and that the conveyance is void.

Even under the old law, a Fiscal would, in my opinion, have exceeded his duty if after the lapse of ten years he had given a conveyance. Here twenty-two years had passed and new interests had been created.

WITHERS, J.—

I regret that I am unable to concur with my Lord. Under the Ordinance No. 4 of 1867 it was enacted in the 54th section that no sale should be held “bad on the ground of irregularity or informality, objection to which was not made within thirty days of the sale.” If within that time no application was made under section 53 of the Ordinance to set aside the sale, on the ground of a material irregularity in the publishing or conducting it whereby the applicant sustained substantial injury, the sale was good, and could not be impeached. (See *Sillery's case* in 52 L. J., P. C. 7.) In section 56 of the Ordinance it is enacted as follows: “If the Court shall not have disallowed the sale, and the purchaser shall

“ have paid the full amount of the purchase-money according to the conditions of sale, and shall have supplied the Fiscal or Deputy Fiscal with stamped paper of the proper amount required by law for the conveyance of the land sold to him (which stamped paper he shall be bound to supply when he pays the purchase-money in full), the Fiscal or Deputy Fiscal shall make out and execute a conveyance of the property according to the form hereunto annexed, and marked J, in duplicate.”

On the 10th May, 1893, the Fiscal assigned and delivered to the appellant the conveyance of property which had been judicially sold on the 31st August, 1871, the property being a reversion of the interest in the land on the expiry of a lease for a long term of years. It was the duty of the Fiscal to grant the conveyance and a privilege of the purchaser to compel the performance of that duty.

This is not a case under the 58th section of that Ordinance, in which an express order of the Court was required before the Fiscal could deliver a conveyance to the purchaser.

The Ordinance No. 2 of 1889, in section 2, expressly declares that the repeal of the Ordinance in the third column thereof (including, therefore, No. 4 of 1867) should not affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment hereby repealed. The right to call for the Fiscal's conveyance of the property sold in 1870 had accrued to the plaintiff before the Ordinance No. 2 of 1889 had come into operation.

In my opinion it is only sales of property held after the Civil Procedure Code came into operation that require an order of confirmation as a condition precedent to a Fiscal's conveyance, all other necessary conditions being fulfilled. To hold otherwise would be to give a retrospective effect to the Civil Procedure Code.

I would answer the District Judge's issue in the negative, and therefore in favour of the plaintiff, who is entitled to succeed.

[The foregoing judgment having been read, WITHERS, J., continued as follows :—]

I venture to adhere to the foregoing opinion which I first formed on the question submitted to us for decision, and that is, to quote the words of the District Judge, “ Is the Fiscal's conveyance in plaintiff's favour void by reason of there being no authority of Court for its issue ? ” I would therefore, for the reasons advanced in my former opinion, answer this question in the negative, and send the case back for all other questions properly raised in the pleadings or settled, as the case may be, to be decided in the Court below.

The appellant is entitled to his costs in appeal.

I wish to add that I am quite unable to understand how the action in which the premises were bought and sold in execution of the judgment can be considered a pending one, so as to be affected by the provisions of section 3 of the Civil Procedure Code. Execution happened more than twenty years ago.

BROWNE, J.—

On 16th May, 1870, Martelis leased the land for twenty years. On 31st August, 1871, under a writ against him in the action 4,567, D. C., Negombo, plaintiff, not as execution-creditor, but as an outsider, bought the lessor's reversionary interest, but did not cause the Fiscal to execute a conveyance in his favour. On the 11th August, 1874, the plaintiff purchased the unexpired term of the lease and entered into possession, and possessed by himself or his lessee for the rest of the period of the original lease, *i.e.*, to 16th May, 1890, and thereafter until 28th February, 1892, when he was evicted by defendant. Martelis, eleven days subsequently to this eviction (11th March, 1892), professed to sell to defendant the land by a deed which defendant registered on the following day, the 12th. On the 10th May, 1893, plaintiff obtained his Fiscal's conveyance, and sued on the 5th September, 1893, for declaration of his title and ejection of defendant.

Question has been raised whether the Fiscal, after the passing of the Civil Procedure Code, could legally have executed this conveyance without the sale having been confirmed by the Court under the provisions of section 283.

For the defendant it is submitted that the granting of the conveyance was a step in the procedure of the action, and that, as under section 3 of the Civil Procedure Code every action pending in any court on the 1st August, 1890, should be proceeded with to final judgment and execution, under the provisions of the Code confirmation of the sale was necessary, since the Code had repealed the provisions of part 9, sections 47-58, of the Fiscals' Ordinance, No. 4 of 1867.

For the plaintiff it is contended that the right or privilege of the plaintiff to obtain this conveyance, and the liability of the Fiscal to execute and grant it, was saved from repeal in his favour by section 2 of the Code.

I hold that the latter contention must prevail. It is not shown that the action 4,567 was still pending on the 1st August, 1890. The last entry in its journal is of date 12th December, 1871, and apparently shows that the creditor then received payment in satisfaction of his decree.

The plaintiff-purchaser, after the expiry of the thirty days for objections, was in the same position as a purchaser who has arrived at the stage provided for in section 286 of Civil Procedure Code, and if in either case the result of the sale (and, under the Code, its confirmation) has been the entire satisfaction of the claim, the action is no longer "pending" and within the provisions of section 3. This procedure to execution terminated under No. 4 of 1867 on the expiry of the thirtieth day, when the sale was not challenged, and did not continue thereafter, viz., till confirmation of sale as under the Code, section 283. Consequently there was not any procedure to final execution necessary which section 3 should regulate and carry through.

Moreover, the right of the purchaser and the liability of the Fiscal, whose authority is still derived under part I. of No. 4 of 1867, still continued when this conveyance was executed. It has not been shown that the purchaser failed to pay according to the conditions and complete his purchase—rather the contrary; and the right and corresponding obligation under section 56 are clear, and are saved in plaintiff's favour by section 2 of the Code. It is however submitted that the plaintiff did not supply stamped paper for the conveyance in his favour when he paid the purchase-money in full; but it is not shown that the Ordinance in such a contingency and for such omission nullified the sale or gave the Fiscal right of parate execution—section 51 did not so provide, nor did the Ordinance prescribe what would result upon such default other than what we may suppose possible,—that the Fiscal might either decline to execute the conveyance till the stamps were supplied, or supply them, and tendering delivery of the executed deed require payment of their value, if necessary, by action for that purpose.

The judgment should therefore be set aside, and the first issue decided in favour of plaintiff.

