

SILVA v. SILVA.

D. C., Negombo, 1,563.

Priority of registration—Purchase at execution sale followed by possession and subsequent Fiscal's conveyance and registration—Interim private conveyance and registration.

A mortgaged some lands to B in April, 1886, the mortgage bond being registered in August, 1887. B having put the mortgage bond in suit, obtained a mortgage decree, himself purchased the lands in February, 1890, at the execution sale, and entered into possession. He delayed obtaining the Fiscal's conveyances till 1893, and they were registered the same year. Meanwhile A sold the lands to C in 1892, who registered his deed in 1892.

In a contest between B and C as to title to the lands—
Held, that C's title was superior.

Silva v. Tissera (9 S. C. C. 92) considered and followed.

Sinniah Chetty v. Babanis Appu (Wendt, p. 213), and *Government Agent v. Hendrickhamy* (3 C. L. R. 86), distinguished.

THE lands which formed the subject of dispute in this case were mortgaged to plaintiff by one Sinnappu Silva in April, 1886, and the mortgage bond was registered in August, 1887. Under a mortgage decree obtained by plaintiff against his mortgagor, the

premises were sold by the Fiscal in February, 1890, and were purchased by plaintiff, who entered into possession soon afterwards. But the conveyances from Fiscal were obtained only on 21st March and 13th May, 1893, and were registered on 22nd May, 1893. Meanwhile, on the 12th December, 1892, the plaintiff's mortgagor sold the lands to the defendant, who registered his deed on the same day.

The plaintiff, averring ouster and dispossession by defendant, brought this action praying for declaration of his title and ejectment of defendant. Defendant denied the alleged ouster and set up title in himself under the deed of 12th December, 1892.

The District Judge dismissed the plaintiff's action, holding that the defendant's title must prevail.

The plaintiff appealed.

Wendt, for appellant.

Bawa, for respondent.

Cur. adv. vult.

17th April, 1895. WITHERS, J.—

The appeal, in my opinion, is entitled to succeed.

The case of *Sinniah Chetty v. Babanis Appu* (*Wendt*, p. 213) relied on by the District Judge is not in point: there, the land was sold before the mortgage decree, and the creditor could not procure a valid judgment against the land in which the purchasers in possession were not joined. Here, the land was sold after the mortgage decree, and could be levied in execution under that decree without any fresh action. But the decree was followed by a judicial sale of the premises affected by it, and so far as regards these premises it was an executed decree.

Mr. Bawa argued that the competition was between the mortgage decree and defendant's private conveyance, and that the circumstances of the mortgage decree differentiates this case from that of *Silva v. Tissera* (9 S. C. C. 92), which the District Judge felt to be in point, but tried to escape from its influence. But, as I have just said, the decree had been executed, and the competition is between the confirmed sale thereunder followed by possession and the private conveyance of the defendant. Mr. Bawa asked us to overlook the fact of plaintiff's possession following on the judicial sale, but we cannot do so, for I have no doubt of its occurrence. The present circumstances being then precisely similar to those in *Silva v. Tissera*, we are bound by that judgment. This case again differs from *Government Agent v. Hendrickhamy* (3 C. L. R. 86), for the land there was the subject of a judicial sale between the mortgage decree and execution thereof.

Set aside, and judgment for plaintiff, with costs.

BROWNE, J.—

Hamuddra Sinnappu, by his mortgage bond dated 6th April, 1886, and registered 4th April, 1887, mortgaged two lands to plaintiff, who upon his bond obtained a mortgage decree, which he did not register. At the Fiscal's sale held in execution of his writ on 7th February, 1890, he was declared the highest bidder, and the sale being confirmed by the Court he entered into possession.

While he was so in possession, Sinnappu, on the 12th December, 1892, conveyed the same lands to his son-in-law, defendant, who registered his conveyance on that date.

On the 15th January, 1893, defendant ousted the plaintiff from possession, and plaintiff having obtained his transfers from the Fiscal on the 21st March and 13th May, 1893, which he registered on the 22nd May, 1893, sued on the 13th March, 1894, for declaration of his title and ejection of defendant.

The learned District Judge has dismissed plaintiff's claim, holding that in place of suing on the strength of his Fiscal's transfers, he should have framed his action to enforce his mortgage rights against the defendant, as had been held in *Wendt, 213*, and that not having done so his defeat was certain, for that the only competition here was between the rival conveyances, plaintiff's mortgage being merged in his transfer, and the registration of his mortgage not enuring to the advantage in priority of the conveyance (*3 C. L. R. 72*), and that in such competition defendant must by priority of registration prevail. He admits that the decision in *9 S. C. C. 92* appears to be in point, but declines to follow it, as it was there held that registration had no bearing on the question at issue, but he cannot exclude it from consideration.

I do not see how it was possible for the decision in *Wendt, 213*, to be made applicable. There, the purchase from the mortgagor was (as I read the report, for no dates are given) anterior to the sale in execution under the mortgage decree, while here, the conveyance to defendant was two and a half years after plaintiff had been confirmed in his purchase, wherefrom, under section 289, Civil Procedure Code, he must now be regarded as having been vested with the legal estate so long before defendant professed to have acquired title from the mortgagor. An *actio hypothecaria* would therefore not lie against defendant.

As regards whether the Fiscal's conveyance should be held to relate back to the sale which Mr. Bawa contended should be decided in the negative, if this were a case purely under the operation of Ordinance No. 4 of 1867, the decisions in *9 S. C. C. 32* and *38* would be applicable; but here, though the sale in execution to the plaintiff was held in February, 1890, before the

operation of the Civil Procedure Code, and although application to the Court for its confirmation was as unnecessary as we hold it was in 1,355, D. C., Negombo, plaintiff did, after 1st August, 1890, viz., on 12th January, 1893, obtain confirmation of his purchase under the new procedure, and may possibly claim that section 389 operates in his favour.

The contest is therefore not between plaintiff's registered bond and defendant's conveyance, as Mr. Bawa has urged, but between plaintiff's deed as of date 7th February, 1890, registered on 22nd May, 1893, and the conveyance to defendant, both dated and registered the 12th December, 1892, with (superadded to the former) the fact of plaintiff's possession, which was not an element of consideration in *Wendt, 213*, and was in *9 S. C. C. 92*. This case differs from *3 C. L. R. 86*, in that there the purchaser under the mortgage decree not having obtained his conveyance on the date as on which the rights of parties had to be ascertained, the contest lay between the unregistered mortgage decree and the registered conveyance by the mortgagor granted thereafter.

The decision in *9 S. C. C. 92* therefore is clearly applicable. The equity of the plaintiff will here, as there, prevail, and there is the less reason to regret this, in that the defendant has not shown as in such a contest, and especially in regard to his relationship to his vendor, that his deed was for valuable consideration.

I would set aside the decree and enter judgment for plaintiff as prayed, with costs.
