

*Present* : Lascelles C.J.

1911.

TIKIRI BANDA *v.* LOKU BANDA *et al.*

295—C. R. Kandy, 5,183.

*Fiscal's sale—Subsequent sale by judgment-debtor—Prior registration of subsequent deed—Priority.*

The land in dispute originally belonged to one Ran Menika, whose interest was sold at a Fiscal's sale to the plaintiff in 1891, but no Fiscal's transfer was obtained until 1910. By a deed of 1908, which was registered in 1906, Ran Menika sold the land to defendant.

*Held*, plaintiff's title was superior.

THE facts appear in the judgment.

*Bartholomeusz*, for the plaintiff, appellant, relied on *Aserappa v. Weeratunga et al.*<sup>1</sup>

*H. A. Jayewardene*, for the defendant, respondent.—The plaintiff is estopped by his conduct from disputing defendant's title. *Jayewardene v. Nikulas.*<sup>2</sup>

*Bartholomeusz*, in reply.

*Cur. adv. vult.*

September 5, 1911.—LASCELLES C.J.

This is a type of case with which the Courts of Ceylon are only too familiar. A landowner's property is sold in execution at a Fiscal's

<sup>1</sup> (1911) 14 N. L. R. 417.

<sup>2</sup> (1894) 3 N. L. R. 341.

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sale; he then proceeds to sell the land as if nothing had happened, and ultimately, years after the Fiscal's sale, a dispute between the purchaser at the Fiscal's sale and the purchaser at the private sale, or between their respective successors in title, brings the parties into Court.

In the present case the one-third share which is now in dispute originally belonged to Ran Menika, whose interest was sold at a Fiscal's sale to the plaintiff in 1891, but no Fiscal's transfer was obtained until 1910. Meanwhile, Ran Menika, by deed dated February 24, 1908, registered October 12, 1908, had sold to the defendant.

The case is thus on all fours with the case of *Aserappa v. Weeratinga et al.*<sup>1</sup> On the defendant's side we have a deed which is prior, both as regards date of execution and date of registration, to the plaintiff's Fiscal's transfer, but the plaintiff, by virtue of section 289 of the Civil Procedure Code, is deemed to be vested with the legal estate from the date of sale, which is anterior to the date of the defendant's deed.

At the argument it was conceded that the present case was concluded by the ruling of the Full Court in *Aserappa v. Weeratinga et al.*;<sup>1</sup> and that the decision of the Commissioner of Requests that the paper title was in the defendant cannot be supported. But it was contended by the respondent's counsel, relying on *Jayewardene v. Nikulas*,<sup>2</sup> that the plaintiff is estopped from disputing the defendant's title by acting in such a manner as to induce in the minds of all that he claimed no rights under the Fiscal's sale, and I was invited to hold on the evidence in the record that the plaintiff was so estopped. Mr. Bartholomeusz, however, contended—and I think with good ground—that the question of estoppel was not in issue at the trial, and that it would be inequitable to decide the case adversely to the plaintiff on a plea of which he had no notice and consequently no opportunity of meeting.

Having regard to the circumstance that some nineteen years intervened between the Fiscal's sale and the issue of a Fiscal's transfer, I think that it would not be proper to decide the case in favour of the plaintiff on the strength of his superior paper title, and without giving the defendant an opportunity of proving that the plaintiff had so acted as to induce the defendant to believe that he did not claim any right to the land under the Fiscal's sale.

I set aside the judgment of the Court below, and remit the case for trial of an issue whether the plaintiff is estopped by conduct from disputing the defendant's title, either party being at liberty to adduce further evidence. The appellant is entitled to the costs of the appeal, and the costs in the Court below will abide the result of the action.

*Sent back.*<sup>1</sup> (1911) 14 N. L. R. 417.<sup>2</sup> (1894) 3 N. L. R. 341