

JAYAWARDANE v. NIKULAS *et al.**D. C., Galle, 2,479.*

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*Competing claims to land under same owner—Rights of purchaser at Fiscal's sale and of purchaser at private sale—Delay of purchaser at Fiscal's sale in getting conveyance and possession—Preferential right of subsequent purchaser, on equitable grounds.*

A, being owner of a land, mortgaged it to O in 1882, in ignorance of which K bought the land at a Fiscal's sale in 1889, but failed to obtain conveyance or possession until 1893. In the meanwhile, in August, 1890, O assigned A's mortgage to D who, having obtained judgment thereon, assigned it to S in December, 1890. S then bought the land from A, had both the deed of assignment and deed of sale in his favour registered in December, 1890, and leased the land to N in October, 1892. K obtained a conveyance from the Fiscal in March, 1893, had it registered in the same month and year, and thereafter sold the land to J.

*Held*, in an action brought by J against S and N, that as J's vendor (K) neglected to obtain conveyance or possession from the Fiscal in due time, but allowed the owner A to remain in possession till 1893, and as S had paid off a subsisting mortgage and became purchaser for value without notice of K's claims, S was entitled, on equitable grounds, to keep what he had purchased.

**A**CTION in ejectment and for declaration of title in favour of plaintiff in respect of a field.

Abeyagunawardane was its original owner. Periya Karuppan Chetty obtained judgment against him and caused the field to be sold in execution on March 18, 1889. He bought it, but did not obtain a conveyance from the Fiscal till 2nd March, 1893. The deed in his favour was registered on 20th March, 1893. Between March, 1889, and 5th September, 1893, Abeyagunawardane continued to be in possession, and on the latter date Periya Karuppan was put in possession by order of Court. On 10th October, 1893, Periya Karuppan sold it to the plaintiff, and this deed of sale was registered on 16th October, 1893. Plaintiff alleged forcible possession on the part of the defendants and prayed for ejectment and possession.

Defendants claimed the field, also under Abeyagunawardane. They alleged that he mortgaged it to the Oriental Bank Corporation by deed dated 26th July, 1882; that the mortgage was assigned to Dias by deed dated 28th April, 1890; that Dias obtained judgment against Abeyagunawardane in case No. 55,872 on 11th August, 1890; that Dias ceded and assigned to the second defendant the said action and judgment by deed dated 16th December, 1890; that on the same day Abeyagunawardane, with the consent of Dias, sold the field to the second defendant for Rs. 2,500 "in full discharge and redemption of the said judgment;" that both

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these deeds of even date were registered on 17th December, 1890 ; and that second defendant leased the field to the first defendant by deed of 3rd October, 1892.

The issues settled were, (1) Did Periya Karuppan purchase the field on 18th March, 1889 ? (2) Was the execution-debtor Abeyagunawardane then seized and possessed of it ? (3) Is the plaintiff entitled to it under Periya Karuppan's deed of 10th October, 1883 ?

The District Judge found the issues in favour of defendants and dismissed plaintiff's case.

On appeal *Jayawardene* (with *De Saram*), for appellant.

*Wendt*, for respondent.

*Cur. adv. vult.*

18th October, 1894. LAWRIE, A.C.J.—

The right, title, and interest of Abeyagunawardane's in the field was sold by the Fiscal on 18th March, 1889, and was purchased by the execution-creditor, Periya Karuppan Chetty. Notwithstanding the sale, Abeyagunawardane remained in possession, and on 16th December, 1890, he executed a conveyance. The purchaser was Sendo (second defendant), who had paid off a mortgage on the land and held an assignment of a mortgage decree. The transfer to Sendo was registered on 17th December, 1890. Four years after the sale in execution Periya Karuppan Chetty got credit for the price and got a conveyance from the Fiscal dated 2nd March, 1893, which he registered on 20th March, 1893.

It was argued in appeal that the conveyance by the Fiscal related back to the date of the sale. I do not see how that could do Periya Karuppan Chetty any good. The transfer might by a legal fiction relate back, but what fiction could make the registration bear any other than its real date, the 20th March 1893 ? The result of the relating back the conveyance to the date of the sale, 18th March, 1889, would be that the deed would be void by the prior registration of a subsequent deed, viz., that of the defendant's predecessor Sendo, whose transfer, although later than the relating back date of Periya Karuppan Chetty's purchase, was registered earlier.

The doctrine or fiction of relation back may be applied when it does no one any harm, but when interests have been created or have arisen in the interval from the time to which relation back is desired, these interests cannot be hurt by a legal fiction.

The question whether Abeyagunawardane had any right or title left on him after the seizure and sale by the Fiscal of his right, title, and interest,—whether he had anything which he could

validly convey to Sendo,—whether, in other words, Sendo got anything by the transfer,—is a question of difficulty.

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I think it may be safely said that, prior to the passing of the Registration Ordinance in 1863, a Fiscal's sale, when confirmed by the Court, and when the full price has been paid, entirely divested the debtor of all right, and that a conveyance thereafter by him was a conveyance of nothing, because made by a man who had nothing to convey. This invalidity of the execution-debtor's conveyance did not necessarily involve the proposition that the purchaser had a title to the land from the moment that the hammer fell and he was declared the purchaser. My opinion is that, as the Fiscal could transfer a debtor's property only if he strictly conformed to the provision of the Ordinance No. 4 of 1867, the purchaser got, because the Fiscal could give, nothing except by written conveyance in the terms laid down in the schedule to the Ordinance.

Since the passing of the Registration Ordinance many, very many, decisions have been pronounced, which imply, nay decide, that a sale by a Fiscal does not divest a debtor of his right; that he is divested only and when, and not until, the Fiscal's conveyance is registered. Until then, the debtor may lease, he may mortgage, he may sell; and if the lessee, the mortgagee, or the purchaser gets his deed registered before the Fiscal's conveyance is registered, then the prior registration makes the prior deed void.

But the difficulty here is that no question arises under the Registration Ordinance. The registration of Sendo's deed did not make any other deed void, because there was then no other deed in existence. The registration of Sendo's transfer cannot make the Fiscal's sale void. At least, the Ordinance does not say so, and we may not stretch the 39th section beyond its plain words. If registration cannot avail the defendant, what has he to oppose to the sale of all Abeyagunawardane's right before the transferred to the defendant's predecessor, Sendo?

I feel great difficulty. I only support this judgment, which dismisses the action, on the ground that the plaintiff is estopped from disputing Abeyagunawardane's right to sell to Sendo in consequence of Periya Karuppan Chetty having acted in such a manner as to induce in the minds of all that he claimed no right by virtue of anything which had taken place at the Fiscal's sale.

He left the debtor in possession; he did not ask for nor get an order of credit; the sale was treated as a ceremony by which a right to demand a transfer had been gained; but perhaps because the property was encumbered, perhaps from some other unknown

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cause, the purchaser for a time so acted as to induce the belief that he waived the right to get a transfer or to get possession. He is estopped from changing his mind after other interests have been created, on the footing that he had withdrawn any claim he had.

I am not completely satisfied with this ground of judgment. It is just in this particular case. But hard cases make bad law, and I confess it is with some hesitation that I give effect to a transfer by a debtor after a sale in execution of his interest, where no advantage can be claimed under the Registration Ordinance.

WITHERS, J.—

I concur in affirming the judgment of the Court below, though very sensible of the difficulties in the case. The cases in *9 S. C. C.* 32 and 92, so much pressed on us by Mr. Jayawardane, are to my mind destructive of his claim. The Fiscal's transfer and the Registrar's certificate of registration are two very different things. If the former relates back to the judicial auction, it cannot carry the date of registration back with it. Priority is from the date of registration. But between Periya Karuppan Chetty's purchase and the Fiscal's deed Sendo came in and registered his act of conveyance of what, from decisions of this Court, might be regarded as an adverse title. Sendo's prior registration would render the Fiscal's transfer to Periya Karuppan Chetty void. The plaintiff allowed his judgment-debtor to remain in occupation and enjoyment, and to deal with it as if it were his own. Sendo was a purchaser for value without notice of the premises, a subsisting mortgage on which he paid off at the time of purchase. He is entitled on equitable grounds to keep what he has so purchased, and what he has been in legal possession of since his purchase.