

IN THE COURT OF APPEAL
OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Mohamed Zainudeen Mohamed Saleem
181/1, Old Road, Beruwala
Defendant – Appellant (Deceased)

Mohamed Saleem Misriya
No.181/1, Old Road, Beruwela
Substituted Defendant - Appellant

C. A. Appeal No.534/95(F)

D.C. KALUTARA CASE NO.3368/L

VS

1. Abdul Hameed Marikkar Mohamed
Ismail Marikkar
2. Mohamed Ismail Ummu Katheeja
185, Old Road, Beruwela

1st & 2nd Plaintiff – Respondents (Deceased)

Mohamed Ismail Mohamed and others
185, Sheik Jamaldeen Road, Beruwela
Substituted Plaintiff - Respondents

BEFORE : **K.T.CHITRASIRI, J**

COUNSEL : Kamran Aziz for the Appellants
N.R.M.Daluwatta P.C. with Gaitri De Silva
for the Respondents

ARGUED ON : 02.08.2013

WRITTEN SUBMISSIONS :
FILED ON 21st August 2013 by the Substituted-
Defendant-Appellant

DECIDED ON : 28.01.2014

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 29th September 1995 of the learned District Judge of Kalutara. In the petition of appeal, the defendant-appellant (hereinafter referred to as the defendant) also sought to have the action of the plaintiff dismissed. Basically, the plaintiff-respondents' (hereinafter referred to as the plaintiffs) action was to have a judgment, declaring that they are entitled to the land described as Lot G in Plan No.4344 dated 06.04.1934 drawn by Arthur A Perera L.S. and to have the defendant evicted therefrom. Learned District Judge having allowed the said claim of the plaintiffs has decided the case in their favour.

The case of the plaintiffs had been filed on the basis of the Certificate of Sale issued in the case bearing No.15312 filed in the District Court of Kalutara which was marked as P5 in evidence. In the amended plaint dated 13th June 1990, plaintiffs have stated that they became entitled to the land they claim by virtue of the deed bearing No.4932 which right they alleged to have derived from the aforesaid Certificate of Sale issued in terms of the Interlocutory Decree entered in the case 15312 referred to above. (paragraphs 4 and 5 of the said amended plaint) It had been the position of the plaintiffs right throughout having stated so in evidence as well. (vide proceedings at page 95 in the appeal brief) Hence, the action of the plaintiffs entirely depended upon the validity of the aforesaid certificate of sale.

Learned Counsel for the respondent referring to Section 289 of the Civil Procedure Code argued that the plaintiffs are not entitled to claim clear title from a certificate of sale unless and until a fiscal's conveyance is executed upon the issuance of such a certificate. Section 289 of the Civil Procedure Code reads thus:

“The right and title of the judgment-debtor or of any person holding under him or deriving title through him to immovable property sold by virtue of an execution is not divested by the sale until the confirmation of the sale by the court and the execution of the Fiscal’s conveyance. But if the sale is confirmed by the court and the conveyance is executed in pursuance of the sale, the grantee in the conveyance is deemed to have been vested with the legal estate from the time of the sale”.

The Law referred to in the aforesaid Section 289 of the Civil Procedure Code had been defined and applied in numerous occasions by the Appellate Courts in this country. In the case of **Muttu Caruppen et al Vs. Rankira et al [13 N.L.R. 326]**, it was mentioned that:

“the purchaser at a Fiscal’s sale when the sale is confirmed by Court after the lapse of thirty days, must procure his conveyance forthwith”.

Also, in the case of **Hendrick Singho Vs. Kalanis Appu et al [23 N.L.R. 80]**, it was held that:

“Section 289 of the Civil Procedure Code does not override the provisions of Section 238; the title of the purchaser at the Fiscal’s sale does not, on the issue of the Fiscal’s Conveyance, prevail over any intermediate alienation by the execution-debtor, unless the Fiscal’s seizure was registered.”

“If the seizure is not registered, the necessary implication of Section 238 is that a bona fide private alienee is statim secures. Section 289, as regards relation back, must be read in the light of section 328, and its operation should not be extended to a case where the seizure has not been registered.”

In the case of **M.M.Belin Nona vs. K.Rosalin Nona and others, [C.A.Minutes dated 9th June 1992 in C.A. 254/83 (F), D.C.Gampaha Case No.11923/P]**, it was held that:

“Section 289 of the Civil Procedure Code makes it clear that in the absence of a Fiscal’s Conveyance the title to the property sold in execution of a decree remains vested in the judgment-debtor and further it has also been so decided in several decisions of the Supreme Court.

It has been held by the Supreme Court that although property has been seized and sold in execution of a decree of Court, in the absence of a Fiscal’s Conveyance in favour of the purchaser since title to the property remains vested in the judgment-debtor it is therefore a seizable interest which is liable to seizure for the satisfaction of other decree vide 8 Ceylon Law Records 204”.

Accordingly, it is seen that the rights of a judgment-debtor shall remain vested in him/her until the sale is confirmed and a Fiscal’s Conveyance is executed upon issuance of a Certificate of Sale, in an action where he/she was declared a judgment-debtor. Admittedly, no Fiscal’s Conveyance had been executed in the case 15312 filed in the District Court of Kalutara in which the plaintiffs’ rights and title alleged to have derived through the Certificate of Sale issued in that action. Hence, the judgment-creditor in case 15312 and his successors namely the plaintiffs cannot claim title against the judgment-

debtors in that case or even against the persons holding under them, merely on the basis of the certificate of sale marked P5.

In terms of the Interlocutory Decree marked P4 issued in the case 15312, A.L.M.Seinudeen was the 17th defendant in that case. Meera Lebbe Marikkar Abdul Majeed Marikkar was the 13th defendant and Majeedu Beebee was the 30th defendant. Plaintiff in his evidence had admitted that the aforesaid Seinudeen, who was the 17th defendant in that case was the father of the defendant (vide proceedings at page 97 in the appeal brief). In the submissions filed in the District Court by the defendant, it is also stated that Meera Lebbe Marikkar Abdul Majeed Marikkar and Majeedu Beebee, who were the defendants in the case 15312, was the grandmother and the mother of the defendant in this case respectively (vide proceedings at page 183 in the appeal brief).

Accordingly, it is clear that the predecessors-in-title of the defendant had been the judgment-debtors in the case 15312. Therefore, the defendant in this case, he being a person holding under them should be able to claim protection in terms of Section 289 of the Civil Procedure Code when no Fiscal's Conveyance had been executed in the name of the person in whose favour the certificate of sale had been issued.

Accordingly, in terms of Section 289 of the Civil Procedure Code, the plaintiffs cannot claim title against the defendant in this case, to the land referred to in the plaint on the basis of the Certificate of Sale marked P5 since

no Fiscal's Conveyance had been executed pursuant to the issuing of the said Certificate of Sale in the case bearing No.15312. Therefore, it is clear that the plaintiffs have failed to prove title to the land they claim rights in this instance as far as the defendant is concerned. In the circumstances, it is my opinion that the learned District Judge has misdirected herself when she decided the case in favour of the plaintiffs.

In the circumstances, the plaintiffs are not entitled to have a judgment as prayed for in the amended plaint. For the aforesaid reasons, the impugned judgment dated 29th September 1995 is set aside. The action of the plaintiffs also is dismissed. The appellants are entitled to the costs of this appeal as well.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL