

1894.
Oct. 2.

MURUGAPPA CHETTY *v.* SAMARASEKARA *et al.*
PAVISTINAHAMI, Claimant.

D. C., Negombo, 1,178.

Civil Procedure Code, s. 241—Claim to property seized in execution—Life-interest of claimant.

Where a seizure in execution had been made of certain lands under a decree which declared them to be specially bound and executable, subject to the life-interest of one D. P. in them, and D. P. applied to the District Court that her claim to have the seizure released and the property declared not liable to be seized and sold in execution be investigated under section 241 of the Civil Procedure Code :

Held, that it was not competent to the District Court to refer the claimant to a separate action, but that her claim was one to be investigated and determined under sections 241 and 242.

THIS was an appeal from an order of the District Judge of Negombo upon a claim made by one Pavistinahami before the Fiscal to certain lands seized in execution of a decree entered in this case against the defendants, declaring that the said lands were "specially bound and executable for the said decree, subject "to a life-interest of K. D. Pavistinahami in the first ten mentioned "lands."

The claimant, who was admitted to be in possession of the lands at the time of the seizure, submitted to the Court that the mortgage

and seizure of the lands were not justifiable under a deed which she brought into Court. She prayed for a release of the seizure, and that the lands be declared not liable to be seized or sold in execution during her lifetime.

The District Judge, relying upon the analogy of section 278 of the Indian Civil Procedure Code and the case of *Deesholts v. Peters*, reported in *14 Ind. L. R., Calcutta Series, 641*, held that the question of the extent and nature of the power to deal with the property conferred on the grantees of the deed produced by the claimant, and the effect of the life-interest reserved to her, were not questions "responsive to the only tests which the Court is "empowered by sections 244 and 245 to apply in such an inquiry, "namely, the tests of possession, and that it is out of place to "attempt to determine such questions by such tests The "remedy is by separate action." He discharged the application for inquiry into the claim, with costs.

The claimant appealed.

Dornhorst, for claimant appellant.

Wendt, for respondent (creditor).

Aserappa, for defendant respondent.

Cur. adv. vult.

2nd October, 1894. LAWRIE, A.C.J.—

I am unable to share in the doubts or to appreciate the difficulties of the learned Judge.

The plaintiff got judgment and applied for and got writ against the defendants' property, lands were seized by the Fiscal, then a man came forward to claim the lands under seizure as his own, denying that they were executable for the debt of the judgment-debtor.

The learned Judge, on the analogy or supposed authority of Indian decisions, refused to investigate the claim. The Indian Code is, in this matter of seizure in execution, quite different from ours, and the decisions quoted by the District Judge seem to me to have no value to regulate our procedure of seizure and sale by a Fiscal.

It may be that, if a Court directs a sale under section 201, and if the person especially nominated by the Court were in course of carrying out the Court's special order, there would be no room for a claim by a third party; indeed, the person nominated by the Court would have no jurisdiction to try and determine the rights of claimants. I look on this as a case of an ordinary seizure: the

1894. plaintiff himself so treated it. The Code gives a right to those who object to a sale in execution to be heard and to have their claims adjudicated on.

The order should be set aside, and the case sent back for investigation of the claim. The appellant is entitled to the costs of the discussion in the District Court and in appeal.

WITHERS, J.—

It was argued in the first instance that the order before us is not an appealable order, but inasmuch as it discharges the application for inquiry into the claim with costs, it finally disposes of the matter, and is therefore obnoxious to an appeal.

As the judgment-creditor took out the ordinary writ against property in execution of a decree he must take the consequences.

By section 241 of the Civil Procedure Code the Court is required, in the event of the Fiscal reporting a claim preferred to property or an objection offered to the seizure or sale of property which has been seized in execution of a decree, to proceed in a summary manner to investigate such claim or objection. Into the nature of his claim or objection I do not propose to inquire. What a claimant must prove to induce the Court to remove the seizure or to stay the sale is indicated in the sections following the one above referred to.

I would remit the case for the investigation and determination of the claim.
