

1907.  
March 28.

[IN REVIEW.]

Present : Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

MUTAPPA CHETTY v. FERNANDO.

D. U., Negombo, 4,750.

*Writ, re-issue of—Stamp duty—Stamp affixed to copy decree—Order for re-issue endorsed on copy decree—Stamp Ordinance, No. 3 of 1890.*

A Court has power to re-issue a writ of execution, returned by the Fiscal on the ground that the sale was stayed at the instance of the judgment-creditor, provided the stamp duty is paid afresh.

The judgment of Wendt J. in *Palaniappa v. Samsadeen* (1) approved.

Where it appeared that the stamps were affixed to the copy decree accompanying the writ, and that the order for re-issue was also endorsed on the said copy decree,—

*Held*, that the re-issue was valid.

**T**HIS was a hearing in review of the judgment of the Supreme Court reported in 9 N. L. R. 150 preparatory to an appeal to His Majesty in Council.

*Walter Pereira, K.C., S.-G.* (with him *Schneider*), for the defendant, appellants.

*H. Jayewardene*, for the purchaser, respondent.

*Wadsworth*, for the plaintiff, respondent.

*E. Jayewardene* and *G. E. Chitty*, for the Fiscal, respondent.

*Cur. adv. vult.*

28th March, 1907. HUTCHINSON C.J.—

This is a hearing in review on an appeal by the defendant against a decree of the Supreme Court made on the 20th June, 1906, which affirmed an order made by the District Court on the 26th March, 1906, dismissing an application by the defendant to set aside a sale under a writ of execution.

The plaintiff obtained judgment against the defendant for a sum of money, and thereupon issued a writ of execution on the 3rd April, 1903. The writ was returned by the Fiscal unexecuted, and was re-issued; this was done on several occasions; and finally on 1st August, 1905, it was re-issued to the Fiscal, with no endorsement on it, but with a note on the copy of the decree which

accompanied it: "Extended and re-issued for execution; returnable 5th February, 1906."

1907.  
March 28.  
—  
HUTCHINSON  
C.J.

The stamp was placed, not on the writ, but on the copy of the decree. The date "5th February, 1906," was written on an erasure of "1st December, 1905," the alteration having been made apparently by the Secretary.

The Fiscal, purporting to act under this writ, sold certain property. The defendant seeks to have the sale set aside on the ground that the writ was bad on the face of it; that it was bad (1) because there is no power to re-issue a writ under the circumstances in which this one was re-issued, and (2) because it was not stamped afresh, and (3) because the return day was altered from the 1st December, 1905, to the 5th February, 1906, without authority.

I agree with the judgment of the Supreme Court in this case, that the Court has power to re-issue a writ which has been, as in this case, returned by the Fiscal because the sale was stayed at the request of the execution-creditor, and that the enactment in the schedule of the Stamp Ordinance, No. 3 of 1890 (p. 37 of Vol. III. of the Ordinances), only means that it shall not be re-issued without paying stamp duty. On that point I agree with the opinion of Wendt J. in *Palaniappa Chetty v. Samsadeen* (1). In my opinion also the re-issued writ was not void because the endorsement as to the re-issue was made on the copy of the decree accompanying the writ, instead of on the writ itself.

The second objection made by the appellant is that the stamp was placed on the copy of the decree accompanying the writ, and that it ought to have been on the writ, and therefore the writ was null and void. The placing of the stamp on the copy of the decree may have been an irregularity. If so, the officer of the Court who issued the writ might be liable for a breach of his duty under section 10 of the Stamp Ordinance, but that would not make the writ null or void.

Lastly, the alteration of the date for the return of the writ seems to have been made before the writ was issued. The return day is fixed, not by the Judge, but by the Secretary; and no other was necessary to enable the Secretary to fix the date on this writ before he sent the writ out.

I think, therefore, that the appeal should be dismissed with costs.

WENDT J. —

I do not think it necessary to add anything to my judgment on the original appeal. Appellants have not shown that any of the grounds of our decision were wrong. I would, therefore, confirm the judgment under review with costs.

1907. MIDDLETON J.—

March 28.

The judgment under review in this case very fully sets out the facts and the reasons for the decision given, and I frankly acknowledge that I agree with every word of it. I do not think it, therefore, necessary to recapitulate fully either the facts or the reasons for the conclusion in which I entirely concur. The point taken is a highly technical one, and the appellant now seeks to set aside a sale at which he was present without demur, and to my mind without any merits in his case.

The learned Solicitor-General's case is that although the old writ was actually re-issued by the Fiscal and the new stamp duty paid, yet, inasmuch as the stamps and the endorsement as to the date of its return were put on the copy of the decree attached to the writ and not on the writ itself, that no writ in point of law existed authorizing the Fiscal to sell this land.

The practice appears to be that a copy of the decree is always attached to the writ and practically becomes part of it, and in this case, as my brother Wendt put it, this was done, although now for some unknown reason these two documents have been separated and placed apart in the record, and I cannot see that the writ is vitiated by putting the stamps or writing the endorsement of the date of its return on the copy of the decree, which in practice becomes part of the writ itself.

Reliance is placed on the terms of the provisions of the Stamp Ordinance, No. 3 of 1890, as to the re-issue of writs, and it is contended that the present is in fact a re-issue which would not be permitted by that Ordinance. In my opinion, however, that provision means there shall be no re-issue without payment of stamp duty, except in the cases mentioned. Here stamp duty has been paid, and the date of the return was properly endorsed by the Secretary, although he inadvertently omitted to enter the date finally fixed in the journal.

In my opinion the appeal in review should be dismissed with costs.

*Judgment in appeal confirmed.*

