1940 *Present :* **Howard C.J. and Hearne J.**

KANDASAMY PILLAI *v.* SELVADURAI.

93—D. C. Jaffna, 38.

Wrongful seizure—Seizure of property by judgment-creditor after 247 action—Claim for damages—Proof of malice.

Where a judgment-creditor, who on the conclusion in his favour of an action instituted by him under section 247 of the Civil Procedure Code seized property, was sued for damages for wrongful seizure by the claimant who succeeded in his appeal in the 247 action,—

Held, that the plaintiff was bound to aver and prove malice.

Ramanathan Chetty v. Meera Saibo (*32 N. L. R. 193*) followed.

THIS was an action for damages for wrongful seizure of a schooner belonging to the plaintiff by the defendant in execution of a writ issued in D. C. Jaffna, No. 1,536. On August 22, 1934, the defendant obtained a writ and seized the schooner as the property of his judgment-debtors. The plaintiff claimed the schooner on a bill of sale executed in November, 1932, and his claim was upheld on September 25, 1934. The defendant then filed a 247 action against the plaintiff and was successful. Thereupon he obtained a reissue of the writ and the schooner was seized again on November 9, 1935. In appeal the judgment in the 247 action was set aside and the schooner was held not liable to seizure.

[1] *25 N. L. R. 185.*

[2] *2 Leader L. R., Part II., p. 11.*

Founding his claim for damages upon the seizures on August 22, 1934, and November 9, 1935, the plaintiff asked for judgment in the sum of Rs. 15,600. The District Judge awarded him Rs. 4,000.

N. Nadarajah (with him *H. W. Thambiah* and *M. Tiruchelvam*), for defendant, appellant.—The second seizure was effected by virtue of an order of Court. If goods are seized under a writ or warrant which authorise the seizure, the seizure is lawful, and no claim for damages will lie in respect of the seizure—*Ramanathan Chetty v. Meera Saibo Marikar* [1]. If the seizure is under judicial sanction no action for damages will lie without express allegation of malice and strict proof thereof. In the present case malice was not pleaded, and the action must fail. See *Hart v. Cohen* [2], *Beukes v. Steyn* [3], *Cohen, Goldschmidt & Co., v. Stanley and Tate* [4], *De Alwis v. Murugappa Chetty* [5], *Walker v. Olding et al* [6], *The Quartz Hill Consolidated Gold Mining Company v. Eyre* [7]. The question of malice was not raised even in the form of an issue and we had no opportunity to lead evidence on that question.

The claim for damages on the first seizure is clearly prescribed.

H. V. Perera, K.C. (with him *C. Thiagalingam* and *V. F. Guneratne*), for plaintiff, respondent.—The decree of the Supreme Court in case No. 6,926 is conclusive on the point that the plaintiff has legal title to the schooner, which was seized. In a claim proceeding, while an order under section 244, Civil Procedure Code, would affect possession only, an action under section 247 is conclusive as regards title. The question to be considered therefore is whether the seizure was the act of the Court or of the party. A bare declaration is the only advantage which one can obtain in a 247 action. All that the defendant obtained in the District Court was declaration and not an order to seize—*Haramanis v. Haramanis* [8]. On a mere declaratory decree no execution is possible—*Vengadasalem v. Chettiyar* [9]. The decree could not even operate as *res judicata* when an appeal was pending, and it did not confer any rights until final adjudication in appeal—*Annamalay Chetty v. Thornhill* [10].

It would be necessary to plead malice only if the seizure was made at the instance of Court. The cases cited on behalf of the appellant are not therefore applicable in the present case. Where there is a wrongful seizure made at the instance of a party damages are recoverable without proof of malice.—*Ramanathan Chetty v. Meera Saibo Marikar* [11].

Even if it is necessary to prove malice in this case, the question of malice was in fact agitated at the trial in the District Court. It was pleaded that the seizure was "wrongful". There was sufficient material placed before Court proving malice. It is the substance and not the form of the proceedings which should be considered—*Jayawickreme v. Amarasuriya* [12]. Malice does not mean ill-will; an intention to cause wrongful injury is sufficient—*Serajudeen v. Allagappa Chetty* [13].

[1] *(1930) 32 N. L. R. 193.*
[2] *16 S. C. (Cape) 363.*
[3] *(1877) Buchanan 22.*
[4] *2 K. 133.*
[5] *(1909) 12 N. L. R. 353.*
[6] *(1863) 7 L. T. 633.*
[7] *L. R. (1882–3) 11 Q. B. D. 674.*
[8] *(1907) 10 N. L. R. 332.*
[9] *(1928) 29 N. L. R. 446.*
[10] *(1931) 33 N. L. R. 41.*
[11] *(1930) 32 N. L. R. 193.*
[12] *(1918) 20 N. L. R. 289 at 297.*
[13] *(1919) 21 N. L. R. 428.*

In regard to prescription, until the date of the decree of the Supreme Court in the 247 action no cause of action arose—*Muttiah Chetty v. Mohamood Hadjiar* [1], *Tepanis Appu v. Appuhami* [2]. In the 247 action itself we could not have claimed damages—*Haramanis v. Haramanis* (*supra*). Further, section 10 of the Prescription Ordinance (Cap. 55) would be applicable.

N. Nadarajah in reply.—The prescriptive period is two years for damages for wrongful seizure—*Avichi Chetty v. Ibrahim Natchia* [3], *Bastianhamy et al v. Silva et al.* [4]

The contention that a 247 action is purely declaratory and that process cannot issue is not tenable. A 247 action is nothing more than an appeal from an order in the claim proceedings—*Adarahamy v. Abraham* [5], *Abdul Cader v. Annamalay* [6], *Mell v. Fernando et al.* [7] It is necessarily a part of the execution proceedings. It is an action within an action. See *Chitaley & Rao's Code of Civil Procedure, Vol. 2, p. 1891, Daulat v. Ramappa* [8], *Rajamier v. Subramaniam Chettiar* [9], *Srimati Bubi Kumari v. Misra* [10], *Mitchell v. Mathura Dass* [11], *Sardhari Lal v. Ambika Pershad et al.* [12] The argument therefore that the seizure was made without judicial sanction cannot be upheld.

The appeal to the Supreme Court in case No. 6,926 did not operate as a stay of proceedings pending the result of the appeal—*Arunasalem v. Somasunderam* [13], *Adamalay & Co. v. de Soysa* [14], *Barker v. Lavery* [15], *The Annot Lyle* [16]. Where malice is the basis of an action it must be specially averred—*Nathan's Common Law of South Africa, Vol. 3, p. 1701, Clissol v. Catchley* [17]. Mere general allegations such as that the act was done "wrongfully" or "improperly" will not render the pleading sufficient—*Day v. Brownrigg* [18], *Bullen & Leake's Precedents & Pleadings (8th ed.), p. 41.*

Cur. adv. vult.

September 26, 1940. HEARNE J.—

The defendant in the Court below was the successful plaintiff in case No. 1,536 of the District Court of Jaffna. On August 22, 1934, he obtained a writ and seized a schooner, the "Anandapoorany", as the property of his judgment-debtors. The plaintiff objected on the ground that the schooner had passed to his possession, as the owner, on a bill of sale executed in November, 1932, and, at the inquiry held on September 25, 1934, his objection was upheld. The defendant then filed a 247 action, No. 6,926, against the plaintiff and was successful. By decree dated October 22, 1935, the schooner was held "to be executable under the decree in 1,536 Jaffna". Thereupon the defendant obtained a reissue of the writ in that case and the "Anandapoorany" was seized once again on November 9, 1935. This Court, however, reversed the

[1] (1923) 25 N. L. R. 185.
[2] (1919) 6 C. W. R. 11.
[3] (1900) 5 N. L. R. 19.
[4] (1910) 2 Cur. L. R. 190.
[5] (1907) 2 A. C. R. 120.
[6] (1896) 2 N. L. R. 166.
[7] (1896) 2 N. L. R. 225.
[8] A. I. R. (1926) Nagpur 197 at 198.
[9] A. I. R. (1928) Mad. 1201 at 1207.
[10] (1907) 35 Indian Appeals 22.
[11] (1885) 12 Indian Appeals 150.
[12] (1888) 15 Indian Appeals 123.
[13] (1918) 20 N. L. R. 321 at 326.
[14] (1918) 5 C. W. R. 285.
[15] (1885) 14 Q. B. D. 769.
[16] (1886) 11 P. D. 114.
[17] L. R. (1910) 2 K. B. D. 244.
[18] L. R. (1878–9) 10 Ch. D. 294 at 302.

decree dated October 22, 1935, and held that the schooner was not liable to seizure. Founding his claim for damages upon the seizure on August 22, 1934, and November 9, 1935, the plaintiff asked for judgment in the sum of Rs. 15,600. He was found to be entitled to Rs. 4,000. The defendant has now appealed praying that the judgment of the lower Court be reversed, while the plaintiff has entered a cross-appeal in which he asks that the decree in his favour be varied so as to include the full amount of damages claimed by him.

In the 247 action the defendant sought to impugn the bill of sale on which the plaintiff based his title and, although he was successful, it was held on appeal that one of the necessary conditions on which the bill of sale could be avoided had not been established. For the purposes of this appeal, therefore it must be assumed that the plaintiff, at all relevant times, was the legal owner of the property seized.

In view of the finding by this Court in favour of the plaintiff, it has not been argued by Counsel for the defendant appellant that the first seizure was not wrongful. The writ which was issued did not specifically mention the schooner. The defendant pointed it out to the Fiscal's officer who was entrusted with the execution of the writ and he must accept full responsibility. The main argument addressed to us by his Counsel was that the claim to damages in respect of the seizure is prescribed. To this I shall return.

In regard to the second seizure, however, Counsel's argument was to the effect that, consequent upon its finding in the 247 action, the Court had ordered the seizure of the "Anandapoorany" and that the plaintiff could not succeed as he had not averred malice in his pleadings.

This is in accordance with decisions in South Africa where it is made clear that if the creditor acts under the sanction of judicial process, there must be an allegation and proof that he has *mala fide* set the law in motion. (*Beukes v. Steyn* [1], *Hart v. Cohen* [2], *Cohen, Goldschmidt & Co. v. Stanley and Tate* [3].) While in the case of *Ramanathan Chetty v. Meera Saibo Marikar* [4], it was held that "if the goods are seized under a writ or warrant which authorised the seizure, the seizure is lawful and no action will lie in respect of the seizure, unless the person complaining can establish a remedy by some such action as malicious prosecution".

The answer to this, on the part of Counsel for the plaintiff-respondent, is that the second seizure was also the act of the defendant and not that of the Court. In his argument case No. 6,926 was an independent, declaratory action the result of which prevented his client from objecting to the second seizure, but the defendant remained liable in damages if it was later found, as this Court eventually found, that his judgment-debtors had no property in what he had seized. With this statement of the law I am unable to agree.

If the matter were entirely free from authority, I would take the view that an action under section 247 is in essence a continuation of the execution proceedings, and that its object is to determine, for the purpose of those proceedings, the liability or the non-liability of the property seized to satisfy the decree under execution.

[1] *Buch. (1877) p. 22.*
[2] *16 S. C. 363.*
[3] *2 K. 133.*
[4] *(1930) 32 N. L. R. 193 at p. 195.*

I find, however, that the corresponding Indian section has been interpreted by the Courts in India in the same way. "The object of the suit", it was held in *12 Indian Appeals 150,* "is to establish the right which has been negatived by the claim order and is in substance to set it aside". "The claimant's remedy is to establish his title by a declaratory decree and to carry the decree to the Court by which the order of attachment was issued and such Court is bound to recognize the adjudication and govern itself accordingly". (*Chitaley Vol. 11, page 1896* in a quotation from *4 Mad. 131*). In *A. I R. (1918)* Madras *568* the Judge, after deciding in favour of the execution-creditor in a declaratory suit, concluded that on this finding "he had a *right* to attach the property". Several other Indian cases were brought to our notice. They are all of the same tenor.

It is of interest that as far back as 1862 it had been decided in England, in a case in which malice was not alleged, that an execution-creditor was not liable to the person whose goods had been wrongfully taken in execution for any damage sustained by him in consequence of their sale under an interpleader order (*Walker v. Olding and other*[1]). The *ratio decidendi* was quite simply that, after the interpleader order, the attachment was the consequence of the decision of the Court.

In my opinion the defendant, on the conclusion in his favour of the action instituted by him under section 247, was clearly acting under a writ which authorised the seizure of the schooner, and in the absence of an averment of malice the plaintiff's cause of action was incomplete.

Counsel for the plaintiff took another point. He referred to the fact that the plaintiff gave evidence of malice, was cross-examined on it, and that there is a finding of malice against the defendant. I do not think the cross-examination of the plaintiff by defendant's Counsel must be taken to mean that the question of malice was put in issue by him. There was no allegation of malice in the plaint, the defendant was not called upon to meet it, no issue was framed, and it would be manifestly unjust at this stage to turn an action of one kind into an action of a different kind. I would, however, add that if it were necessary to do so, I would hold that the plaintiff's evidence regarding *mala fides* is not borne out by a consideration of all the facts of the case.

Turning to the damages claimed in respect of the first seizure, Counsel for the defendant argued that as it took place on August 22, 1934, and continued till September 25, 1934, the action should have been brought within two years from the latter date under section 9 of the Prescription Ordinance. The submission by Counsel for the plaintiff that section 10 applies is not, I think, correct. There is authority to the contrary. But he also argued that if his client had filed an action before the determination of the 247 action on appeal it would have been premature. It would be more correct to say that he did not file his action while he was in doubt regarding the fate of his appeal. In either case the circumstances do not fall within the provisions of section 13 or 14 of the Prescription Ordinance. Again, the claim for damage to the schooner (Rs. 3,800) was in reality founded, not on the act of seizure which caused no injury, but on the alleged negligence of the defendant, subsequent

[1] *158 E. R. p. 1033.*

to the seizure, in moving the vessel from the anchorage selected by the plaintiff to shallow water closer to the shore; and this cause of action, as it appears to me, is independent of whether the seizure was right or wrong.

In conclusion I would refer to the pleadings of the plaintiff and the evidence he offered in regard to damages. The claim in respect of the first seizure was for Rs. 3,800 and the evidence was of a most meagre nature. Not a single receipt in support of alleged disbursements was produced. The original claim in respect of the second seizure was for loss of use (Rs. 6,500) and for deterioration (Rs. 1,500). An application to increase the latter to Rs. 5,000 was refused and later the Judge, in allowing it, in effect revised his own order. The plaintiff attempted to explain why he had increased his claim. At first he estimated that Rs. 1,500 would be sufficient for repairs. Later he was informed that another Rs. 1,500 would be required. So with a bold miscalculation, he claimed not Rs. 3,000 but Rs. 5,000. The tindal who was called thought Rs. 10,000 would be required and somewhere between the two extremes the Judge was invited to fix the amount. As the trial progressed it would appear that the claim for loss of use (Rs. 6,500) was reduced, for in the course of his evidence the plaintiff for the first time claimed a sum of Rs. 5,000 for pain of mind and loss of reputation, as being included in the claim for Rs. 6,500. Even if the plaintiff had a good cause of action, his vacillation, compromise and general vagueness were far from being a compliance with the accepted rule of practice that a claim for special damages should be clearly stated and strictly proved.

I would allow the appeal of the defendant with costs, dismiss the appeal of the plaintiff with costs, and order that the plaintiff's action be dismissed with costs.

HOWARD C.J.—I agree.

Appeal allowed.