

1939

*Present : Keuneman and Wijeyewardene JJ.*HENDRICK *v.* HABBAKKALA.

221—D. C. Colombo, 868.

*Seizure—Undivided share of property and divided lot as well—Partition action pending—Final decree entered—Validity of seizure—Action under section 247 of the Civil Procedure Code.*

Plaintiff in execution of a decree against the second defendant seized on February 24, 1937, an undivided  $\frac{1}{2}$  share of a land as well as a divided lot of the same land. On May 10, 1937, first defendant claimed the said property by deed dated February 2, 1937, and his claim was upheld. Plaintiff thereupon brought the present 247 action. Prior to February, 1937, a partition action had been instituted in respect of that land. Preliminary decree had been entered and a date fixed for confirmation of the scheme of partition, viz., February 17, 1937, when the scheme was confirmed. Final decree was entered and filed on February 25, 1937.

*Held*, that the final decree having been entered on February 25, 1937, the seizure of an undivided share was not valid, because as a result of the final decree the second defendant's title to an undivided share was extinguished. Nor was the seizure of the divided lot valid as at the date of seizure the divided lot had not come into existence.

**A** PPEAL from a judgment of the District Judge of Colombo.

*N. E. Weerasooria, K.C.* (with him *J. R. Jayawardana*), for first and second defendants, appellants.

*L. A. Rajapakse*, for plaintiff, respondent.

*Cur. adv. vult.*

March 10, 1939. KEUNEMAN J.—

This is an action under section 247 of the Civil Procedure Code. The present plaintiff has brought action and obtained a decree for money in D. C. Colombo, 1,523, against the present second defendant. On February 24, 1937, the Fiscal seized under the decree the right, title, and interest of the present second defendant in the following property, to wit:—

An undivided  $\frac{1}{2}$  share of the property called Millagahawatta.

All that divided portion marked letter "A" of the property Millagahawatta.

On May 10, 1937, the first defendant claimed the said property under deed P 3, No. 1,213, dated February 2, 1937, and his claim was upheld on June 11, 1937. The plaintiff thereupon instituted the present action.

Long prior to February, 1937, a partition action (D. C. Colombo, 18,325) had been instituted in respect of the property Millagahawatta, and was pending in that month. Preliminary decree for partition had already been entered, and the date fixed for the consideration of the scheme of partition and the objections thereto. The journal entry of that date reads as follows:—

"17.2.37 case called, consideration of scheme; proctor for 33, 34 and 36th added defendants accept the scheme. Confirm scheme.

Final decree 21.4.37".

Immediately after that appears the following:—

"Final decree entered and filed".

Copy of motion filed with Final Decree.

Motion.

"I tender herewith final decree in the above case duly drawn up by me and signature of the Court and move that the same be thereafter filed of record.

Colombo, February 25, 1937".

The final decree has been produced (document D5) and bears the date February 17, 1937. But the learned District Judge has held, I think rightly, that though it bears that date, it could not have been signed by the Judge prior to February 25, 1937.

It seems clear that on February 17, 1937, the only order made by the District Judge was for confirmation of the scheme. No order for the



allotment of the divided share to the various parties was made until the signing of the final decree, which did not take place until February 25 at the earliest.

I think therefore that we must follow the case of *Gunawardena v. Seneviratne*<sup>1</sup> and hold that the final judgment was entered on February 25 at the earliest.

Under the final decree, the present second defendant who was the plaintiff in the partition action was allotted the divided portion marked lot "A" out of Millagahawatta.

Several points both of fact and law, some of considerable complexity, were argued before us. *Inter alia*, it was contended by the respondent that the deed P3 which purported to convey to the first defendant the share that would be allotted to his vendor (the present second defendant) in the partition action, was a mere agreement to convey such share, or in the alternative that the deed P3 was rendered void by the entering of the final decree in the partition action thereafter by virtue of the Partition Ordinance. The appellant on the other hand contested the finding of the District Judge that the deed P 3 was executed in fraud of creditors. I think, however, in the view I take of the case, that there is no necessity for me to decide any of those matters.

It was incumbent on the plaintiff in this action to establish first of all that he had a valid seizure. His seizure was on February 24, 1937, and on February 25 or at some later date the final decree in the Partition case was entered. What effect did this have upon the plaintiff's seizure which was of an earlier date?

The seizure (*vide* document P2) was of the right, title, and interest of the defendant in (1) an undivided one-eighth share of the property Millagahawatta and (2) the divided portion marked lot "A" out of Millagahawatta. On February 24, 1937, the date of the seizure, the partition action was still pending. It was certainly open to the present plaintiff to seize the undivided one-eighth share of Millagahawatta, but at that time the divided lot "A" had not come into existence as an entity, and I cannot regard the seizure of lot "A" as being a valid seizure on the date in question.

As regards the seizure of the undivided one-eighth share of Millagahawatta, on February 25 the final decree in the partition action was entered. As a result of that decree, the present second defendant's title to an undivided one-eighth share of the whole corpus of Millagahawatta was extinguished, and an entirely new title vested in him in respect of lot "A". I think it results from this that the seizure of such right and title to an undivided share of Millagahawatta was not valid thereafter.

If we look at the matter from another angle, on February 25, when the partition decree was entered, the present second defendant had under section 9 of the Partition Ordinance a title to the divided lot "A", which was "good and conclusive against all persons whatsoever, whatever right or title they have or claim to have in the said property". Did the present plaintiff have before that date a right or claim of right



in the property? I think he did have such a right in virtue of his seizure, and that as a result of the operation of section 9 of the Ordinance, his right was extinguished.

I may add that where the Legislature desired that any right already existing should be continued in existence, and imposed upon the share in severalty allotted to the party, it expressed its meaning in clear words, *vide* section 12 which related to the mortgage of undivided shares. Such mortgage was preserved and imposed upon the share in severalty given to the party under the partition decree.

The difficulties of this question have been discussed in *Jayewardene on Partition*, p. 299. No final opinion on the matter was given there. I am certainly in agreement with the learned author as to the desirability of simplifying the procedure so as to cause the least possible inconvenience to a *bona fide* judgment-creditor, but I find it difficult to see that some of his suggestions have the sanction of law at the present time, and the learned author has not discussed the difficulty created by section 9 of the Ordinance.

It is to be noted that in the present case the contest is not between the judgment-creditor and the judgment-debtor, but between the judgment-creditor and a third party who claims to have acquired the interest of the judgment-debtor. Even if we were to hold the seizure to be still valid, it is difficult to hold that it can be executed against anything else but an undivided one-eighth share of lot "A".

I may add that I can see nothing that prevents a judgment-creditor, who has seized an undivided share of a property which has subsequently been the subject of a partition action, from making a fresh seizure of the divided share allotted to his judgment-debtor after the final decree has been entered.

I think I must hold that the plaintiff has failed to prove that his seizure is valid at law, and that his action accordingly fails.

I accordingly allow the appeal and set aside the judgment appealed from and dismiss the plaintiff's action. To remove any doubts which may exist, I reserve to the plaintiff the right to raise any objections he may have as against the deed P3, in the event of a new seizure being effected of lot "A" at his instance.

As regards costs, the position is not easy. Certainly the point now taken was not raised in any pleading or issue, and while I think that as a point of law it was open to the appellant to take it in appeal, it was possible that had the point been taken earlier, the respondent may have preferred to withdraw his action, and make a new seizure. In all the circumstances I order the respondent to pay to the appellant the costs of appeal, and one-third of the costs of the proceedings in the Court below.

WIJEYWARDENE J.—I agree.

*Appeal allowed.*