1923. *Present :* De Sampayo A.C.J. and Porter J.

SAIBO *v.* SAIBO *et al.*

38—D. C. Colombo, 46,722.

Civil Procedure Code, s. 234—Seizure of decree in favour of debtor—Is notice to judgment-debtor's debtor necessary ?—Payment to judgment-debtor by his debtor after seizure—Is mortgage decree "decree for money."

Where a person seizes under section 234 of the Civil Procedure Code a decree in favour of his judgment-debtor, notice of the seizure need not be given to the judgment-debtor's debtor. Payment to the judgment-debtor by his debtor after that seizure is null and void as against the creditor who seized the decree.

A mortgage decree is a "decree for money," and is seizable under section 234.

THE facts are set out in the judgment.

Hayley (with him *Tisseveresinghe*), for appellant.

Samarawickreme, for respondents.

Cur adv. vult.

June 1, 1923. DE SAMPAYO A.C.J.—

A question of civil procedure arises for decision from the following state of facts. The plaintiff sued the defendants on a mortgage bond and obtained judgment on November 2, 1917, for Rs. 18,093·75, with interest on Rs. 15,000 at 13½ per cent. from December 12, 1916, till November 2, 1917, and thereafter with interest on the aggregate amount of principal and interest at 9 per cent. till payment in full and costs of action. Though writ appears to have been issued, the decree was not executed by sale. On December 12, 1919, the appellant, who had obtained decrees in two other cases against the plaintiff for the aggregate sum of Rs. 2,608·75, caused the decree in this case to be seized in execution in pursuance of the provisions of section 234 of the Civil Procedure Code, and a record was made of this seizure in the general entries of the case. The plaintiff's proctor appears to have been present, and it was by consent ordered that the decree was not to be executed till January 16, 1920. Notwithstanding this seizure, it is surprising to find that the plaintiff's proctor on January 24, 1921, without any notice to the seizing creditor, moved that full satisfaction of the decree be certified and entered of record, and the Court made a record accordingly. The implication is that the judgment-debtor, the defendant in the case, had paid out of Court or otherwise settled with the plaintiff. On November 1, 1921, the irregularity of the certification being pointed out, the Court cancelled the

order, and allowed execution to issue at the instance of the seizing creditor. After some delay due to the difficulty of serving certain notices, some property belonging to the first defendant was seized and advertised for sale by the Fiscal. Thereupon on December 13, 1922, the first defendant appearing by a proctor moved that the sale be stayed and the property released from seizure. The grounds for this motion were : (1) That the seizure of the decree in this case was bad, because no notice had been given to the judgment-debtors, the defendants ; and (2) that the first defendant had paid to the plaintiff the full amount of the judgment on January 19, 1921. The District Judge decided both these points in favour of the first defendant, and allowed the motion. The seizing creditor has appealed.

Section 234 does not provide for any notice to be given to the judgment-debtor, nor does the practice of the Court require any. This section corresponds to section 273 of the old Indian Code which is similarly silent as to notice. But Order 21, rule 53 (6), of the new Indian Code for the first time provided for such notice, impliedly emphasizing the fact that under the old Code no notice was necessary. It appears to me that the reason of the thing obviates the necessity of giving notice to the judgment-debtor, and, it is probable, that the rule under the new Code provided for the notice out of abundance of consideration for the judgment-debtor. For, the party who is affected by the seizure is the decree holder, and the seizure does not directly concern the judgment-debtor who must, in any event, pay, whether to the decree holder or to the seizing creditor. The District Judge relies on section 236 of the Civil Procedure Code which declares—

> " When a seizure of any negotiable instrument, debt, share, money, decree, or any other movable property has been effected and made known in manner hereinbefore provided, any private alienation of the property seized . . . . shall be void as against all claims enforceable under the seizure."

The District Judge emphasizes the words " made known in manner hereinbefore provided," and thinks they refer back to section 229 under which the judgment-debtor was to receive notice. That section, however, deals with the mode of seizure of debts, shares, and other movable property, and not with the mode of seizure of decrees, which is specially dealt with by the later sections 234 and 235, and as these two sections do not provide for any notice to the judgment-debtor, it is obvious that the words " made known in manner hereinbefore provided " cannot refer to the seizure of decrees. As section 236 is a general provision and refers to seizures of various kinds of property, the above words must, I think, be limited to cases to which they in terms are applicable.

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If there has been a proper seizure of the decree, then the alleged payment to the plaintiff after that event is null and void. The judgment-debtor is also precluded from proving the payment in the manner he sought to do. He was allowed to give oral evidence on that subject, notwithstanding the seizing creditor's objection. The provision of section 349 makes the record and certification by the Court the only admissible evidence. The judgment-debtor, however, relies on the order made on January 24, 1921, at the instance of the plaintiff, but as already stated that order was subsequently cancelled by order of the Court on November 1, 1921. In this connection it is contended that this order of cancellation is inoperative as against the judgment-debtor, because he had no notice of the application to cancel the previous order. It may be —though as at present advised I cannot say so—that he ought to have got such notice, but the absence of notice does not make the order null and void, as though it had never been made. The order stands, and must be recognized until it is itself vacated. I am the more inclined to apply this view of the rule of procedure, because I feel considerable doubt on the question of fact. The judgment-debtor swears that he paid the full amount of the decree to the plaintiff on January 24, 1921, and that the money was the proceeds sale of a land on deed dated January 19, 1921. But I find that the consideration for that deed was Rs. 11,500 only, and I cannot understand how with that money he paid the full amount of the decree, which was for Rs. 18,093·75, with further interests and costs of action. This circumstance, coupled with the fact that the plaintiff had moved for and got a record made of the full satisfaction of the decree, is calculated to raise a suspicion as to the *bona fides* of both the plaintiff and the defendant.

I may here notice a minor point taken on behalf of the defendant, namely, that a mortgage decree is not "a decree for money," and is therefore not seizable under section 234 of the Code. Reliance is placed on Indian decisions on the subject. In India, however, the form of mortgage is quite different from ours, and it would seem that a mortgage decree there is likewise different. In any case, with us a decree in a mortgage action is a decree for money, with a further order for the realization of the mortgage security. See *Don Jacovis v. Perera*.[1]

In my opinion this appeal should be allowed, with costs in both Courts, and the appellant permitted to execute the decree for his own benefit.

PORTER J.—I agree.

Appeal allowed.

[1] *(1906) 9 N. L. R. 166.*