JAYASINGHE
v.
MERCANTILE CREDIT LTD.

COURT OF APPEAL
SOZA, J., AND K.C.E. DE ALWIS, J.
C.A. NO. 427/81.
M.C. WARIYAPOLA NO. B 242/79.
M.C. COLOMBO NO. 84436 H P.
NOVEMBER 17 AND 18 AND DECEMBER 11, 1981

Civil Procedure – Civil Procedure Code, sections 72, 187 and 232 – Judgment – Execution of decree – Jurisdiction to determine title or priority of claim by Magistrate's Court having custody of property sought to be seized in execution issued by District Court.

Criminal Procedure – Code of Criminal Procedure Act, No. 15 of 1979, sections 29 and 431 – Disposal of productions in criminal case.

When there is an admission under Section 72 of the Civil Procedure Code the Court is empowered to enter judgment on the basis of the admission without compliance with the requirements of section 187 in regard to what a judgment should contain. Even if in the decree there are errors or omissions the decree is still operative as it stands. If there is any error or omission in the decree the party concerned should move the Court that entered it and have it corrected.

A Magistrate's Court having custody of property sought to be seized in execution of a decree entered by a District Court has jurisdiction to determine questions of title to the property seized or of priority of the claims to it which arise between the judgment-creditor and any other person not being the judgment-debtor claiming such property by virtue of any assignment, attachment or otherwise. This is so even if the custody of the property seized is in a Magistrate's Court which has no civil jurisdiction. It is the duty of the Fiscal to issue notice of seizure to the custody Court and when he does he cannot be regarded as acting in derogation of the authority of the Magistrate's Court.

Cases referred to:

1. *Marjan v Burah (1948) 51 N.L.R. 34, 40, 41*
2. *Khotramohan Navak v Sri Sinha Kamal Nayana Ramanuj Das (1956) A.I.R. Orissa 206*
3. *Fakurdeen & Co v Suppramaniam Chetty (1907) 1 A.C.R. 159.*

APPLICATION in Revision from the order of the Magistrate's Court of Wariyapola.

Chula de Silva for petitioner

H.M.P. Herath for 2nd and 3rd respondents

Cur. adv. vult.

January 20, 1982

SOZA, J.

This is an application for revision of the order made in this case on 27.2.1981 by the learned Magistrate of Wariyapola. The facts that have given rise to the present application may be briefly stated as follows:-

The petitioner is the registered owner of Massey Ferguson tractor bearing registration No.25 Sri 9766 – see extract from the Register of Motor Vehicles marked P1. About the 3rd January 1978 the petitioner entered to a hire-purchase agreement with the 1st respondent one Somawathie Jayamanne as hirer and her father David Jayamanne along with C. Vanderporten and L.B. Navinna & Sons Ltd. of Kurunegala as guarantors. A copy of the agreement is before us marked P2. The 1st respondent fell into arrears of monthly rentals and accordingly the petitioner terminated the hiring of the tractor by a notice dated 13th September 1978 and demanded the return of the vehicle. As a result of the petitioner trying to get back possession of this vehicle the Police had occasion to take over the tractor and produce it in the Magistrate's Court of Wariyapola with a report which was registered under No.B/242/79 of that Court. It was however found

that no offence was disclosed. The question then arose as to the disposal of the tractor. The sections of the Code of Criminal Procedure Act No. 15 of 1979 that became applicable were sections 29 and 431.

Under section 29 the Police were empowered to produce before the Court any articles which there was reason to believe were the instruments or the fruits or other evidence of the crime. Once the investigations reveal that there was no evidence upon which a charge could be made out, then the question of the disposal of the articles arises and the Magistrate could act under Section 431 of the Code Criminal Procedure Act. Under this section when there is a seizure by any Police Officer of property taken under section 29 the Magistrate must make such order as he thinks fit respecting the delivery of the property to the person entitled to the possession thereof. If the person entitled to the possession thereof cannot be ascertained the Magistrate must make an order respecting the custody and production of such property. If the person entitled to possession of the property is known the Magistrate may order the property to be delivered to him on such conditions as he thinks fit to impose. If such person is unknown the Magistrate will take such steps as are spelt out in subsections (2) and (3) of section 431.

The case before us was one where the person entitled to the possession of the property was known or could be ascertained. The registered owner of the vehicle, that is, the present petitioner appeared in Court and participated in the proceedings connected with the disposal of the property. The learned Judge however after holding the inquiry contemplated in section 431 directed that the property should be handed over to the person from whose possession it was taken, namely, the driver of the tractor who happens to be the 3rd respondent. It should be observed that the driver of the tractor did not claim he was entitled to possession of the vehicle. Indeed he was not. In my view the learned Magistrate was in error in directing the vehicle to be handed back to the driver because this was not a case where he was entitled to possession. The best documentary evidence in regard to entitlement to possession of the vehicle, namely, the extract from the Register of Motor Vehicles was available to the learned Magistrate but he seems to have ignored it.

However that may be, the learned Magistrate having made the order that the tractor be handed back to the present 3rd respondent directed that his order should not be given effect to until the lapse of the appealable period. In the meantime on 15th October 1980

the present petitioner had filed case No.84426/HP in the District Court of Colombo against the hirer Miss Jayamanne who is the present 1st respondent and the three guarantors seeking possession of the vehicle and the payment of arrears and damages. Summons could not be served on the 3rd defendant, C.Vanderporten, who was one of the guarantors. However, the 1st, 2nd and 4th defendants consented to judgment and judgment and decree were entered by the learned District Judge on the basis of the admission of the defendants. Once decree was entered the plaintiff who is the present petitioner moved for execution of decree. As the vehicle was in the custody of the Magistrate's Court of Wariyapola the petitioner sought execution by seizure under section 232 of the Civil Procedure Code. It is the order on the preliminary question of jurisdiction made by the learned Magistrate in the proceedings purported to be held under section 232 of the Civil Procedure Code that the petitioner seeks to have revised in the present proceedings before us.

Learned Counsel for the 2nd and 3rd respondents contended that there was really no judgment in the District Court Case No.84426/HP. Even if there was, it was one obtained by fraud and collusion.

Section 72 of the Civil Procedure Code provides that if the defendant admits the claim of the plaintiff the court shall give judgment according to the admission so made. The judgment which the District Judge purported to enter reads as follows:-

"In accordance with the consent motion I enter judgment." The complaint that this is not a judgment is without substance. No doubt section 187 of the Civil Procedure Code stipulates that the judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. When judgment is entered on the basis of an admission, there is neither the need nor the occasion for compliance with section 187 of the Civil Procedure Code. Section 72 of the Civil Procedure Code directs the judge to give judgment against the defendants according to the admission and therefore it is not possible, for instance, to set out points for determination and the decision on them with reasons. The judgment entered by the learned District Judge was in compliance with section 72 of the Civil Procedure Code and is unexceptionable.

Referring to the decree learned Counsel for the 2nd and 3rd respondents submitted that there were certain discrepancies in that all the terms of the consent motion have not been incorporated in the decree. What has been incorporated in the decree is the admision

so far as it relates to the plaintiff's claim and there is no deviation from the requirements of section 72 of the Civil Procedure Code. If there is any error or omission in the decree then the parties concerned should first move the District Court that entered it to have the error corrected or the omission supplied. Until this is done the decree stands and is valid and operative.

Now to the question of fraud and collusion. No question of fraud or collusion in regard to the obtaining of the decree in the District Court was raised before the learned Magistrate. All the facts pleaded before us by the 2nd and 3rd respondents upon which fraud and collusion are sought to be founded were well known to them even during the proceedings held before the Magistrate. We have no findings before us by the learned Magistrate on fraud and collusion. Hence I would reject the plea of fraud and collusion as an afterthought.

No doubt a party to a suit or other proceedings can show that any judgment, decree or order sought to be proved against him has been obtained by fraud and collusion. A person like the 2nd or 3rd respondent who was not a party to the proceedings where a judgment, decree or order was entered can always attack it collaterally when such judgment, decree or order is sought to be proved against him – see section 44 of the Evidence Ordinance and the case of *Marjan v. Burah* (1). But even on the facts the plea of fraud and collusion in the instant case cannot be sustained.

The facts on which the plea of fraud and collusion is being advanced are:

1. The 1st respondent admitted the claim of the petitioner very readily and speedily.
2. The petitioner filed the case in the District Court without disclosing the order of the Magistrate in connection with the custody of the tractor.
3. The 2nd respondent should have been made a party to the proceedings in the District Court.

The suit No. 84436/HP in the District Court of Colombo was filed on a written contract to which the 1st respondent was a party. If she advised herself that she was bound by the agreement and accordingly consented to judgment without loss of time she cannot be blamed. With no defence to offer in the action she did the next best thing by consenting to judgment and so cutting her costs. The petitioner got no more than its entitlement on the agreement put in suit. No fact relevant to the suit was suppressed and there was no taint of deception at any stage of the proceedings in the District Court.

Learned Counsel for the 2nd and 3rd respondents also contended that the 2nd respondent should have been made a party to the action in the District Court. If the petitioner joined the 2nd respondent there would have been grave risk of the suit being defeated by a plea of misjoinder. Further it must be remembered that the steps under section 232 of the Civil Procedure Code are steps in execution. The provisions of this section do not postulate any assumption that the party claiming title or priority against the judgment – creditor should be a person bound by the decree. Indeed it is because such claimant is not bound by the decree that the judge of the custody Court is vested with jurisdiction to determine the question of title to the property sought to be seized and the question of priority of claims. Hence the petitioner was quite right in not joining the 2nd respondent to the proceedings in the District Court.

In the circumstances the plea of fraud and collusion must be rejected not only as belated but also groundless and unsupportable.

The 2nd and 3rd respondents have at a very late stage of the hearing tendered a document 2D3 purported to have been signed in favour of the 2nd respondent by L.B. Navinna & Sons Ltd. alleged to be an agent of the petitioner. Apart from the fact that the document is inadmissible at this stage, there is the fact that the proceedings now being taken are in execution. Further the document itself is signed by a party who was a defendant in the District Court case. Even if the document was signed by an agent of the petitioner it passes no title. It creates no assignment of title. In any event it does not confer any rights on the 2nd respondent superior to those of the petitioner. In the circumstances the only possible conclusion is that the petitioner has indefeasible title to the vehicle.

I will now turn to the question of the jurisdiction of the Magistrate's Court to hold the inquiry into title contemplated by section 232(1) of the Civil Procedure Code. Under the provisions of this section the property must be held by such court "subject to the further orders of the Court from which the writ of execution authorising the seizure" issued. The proviso provides that where the property is deposited in or is in the custody of a Court "any question of title or priority arising between the judgment-creditor and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment, or otherwise, shall be determined by such Court."

It will be seen that the proviso contemplates two Courts, one the Court from which the writ of execution authorizing the seizure issues and the other the Court having custody of the property sought to be seized in execution. According to the words of the section it is the court having custody of the property sought to be seized in execution that must determine any question of title or priority that arises between the judgment-creditor and any other person (who is not the judgment-debtor) who claims to be interested in such property by virtue of any assignment, attachment or otherwise.

If the Court that has custody of the property sought to be seized is a Magistrate's Court vested with no civil jurisdiction, can the question of title or priority be determined by such Court?

Our Civil Procedure Code originally passed as Ordinance No.2 of 1889 (operative from 1st August 1890) is modelled on the Indian Code of Civil Procedure of 1882 (Act No.XIV of 1882). Our section 232 is substantially the same as section 272 of that Indian Code. When the Indian Code was replaced in 1908 by the Indian Code of Civil Procedure (Act V of 1908) section 272 was reproduced as Order No.XXI Rule 52. Order No.XXI Rule 52 bears a striking similarity to section 232(1) of our Civil Procedure as it stands today. In India it was held in the case of *Khetramohan Navak v Sri Sinha Kamal Nayana Ramanuj Das* (2) that the Court vested with jurisdiction to determine the question of title or priority arising between the decree-holder and any other person not being the judgment-debtor is only a civil court such as is empowered to operate the provisions of the Indian Civil Procedure Code. But the same interpretation of the expression "such court" appearing in the proviso to subsection (1) of section 232 of our Civil Procedure Code is not warranted by the definition given to the term "court" and "judge" in section 5 of our Code. The word "court" means a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body when such Judge or body of Judges is acting judicially. The word "Judge" means the presiding officer of a court and includes Judges of the Supreme Court, High Court Judges, District Court Judges and Magistrates. It will be seen that on the basis of these definitions if the custody court is a Magistrate's Court, the Magistrate has jurisdiction to determine the question of title or priority arising between the judgment-creditor and any other person not the judgment-debtor. In the case of *Fakurdeen & Co. v. Suppramaniam Chetty* (3) Wood-Renton, J. relying on the definitions of the words "court" and "judge" as found in section 5 of our Civil

Procedure Code, held that the word "court" as used in the proviso to section 232 extended to Police Courts as the Magistrate's Courts of today exercising an identical jurisdiction more or less were then called. In fact in 1907 when the case under reference was decided the word "judge" was defined in our Civil Procedure Code slightly differently from now as follows:-

> " 'Judge' means the presiding officer of a court, and includes Judges of the Supreme Court, District Judges and Commissioners of Requests."

Magistrates were not mentioned in the definition but Wood-Renton, J. held that the word 'includes' as used in the definition should receive an extensive meaning and therefore Police Magistrates being judges empowered by law to act judicially alone had jurisdiction to determine the question of title or priority as provided for in the proviso to section 232.

Incidentally it may be mentioned here that in the Civil Procedure Code as it stood when originally enacted section 232 was not divided into two subsections as now. Subsections (1) and (2) as they stand today together formed section 232.

Before I leave this point, I should refer to the language of the long title to our Civil Procedure Code. It reads as follows:-

> "An Ordinance to consolidate and amend the Law relating to the Procedure of the Civil Courts."

The expression "civil court" is defined in our Civil Procedure Code as meaning "a court in which civil actions may be brought." It is a well known canon of interpretation that the long title cannot be used to modify the clear and express language of a statute. It is part of the Act but it can only be looked at as an aid to interpretation to resolve doubt or ambiguity or to ascertain the scope and intent of the Act. Wood-Renton, J. did not refer to the long title possibly because the meaning of section 232 was clear and unambiguous when read with the definitions in section 5 of our Civil Procedure Code. The interpretation of Wood-Renton, J. could be adopted with all the more confidence today because the word "Judge" as defined in our amended Civil Procedure Code includes Magistrates thus leaving no room for doubt or debate.

The difference in the interpretation of the language of section 232 as found in Order XXI Rule 52 of the Indian Code of Civil Procedure is easily explainable. The Code of Civil Procedure of India carries

no definition of the word "court". However when a section of the Code provides that a particular matter shall be determined by a Court, the judge presiding over such Court must be deemed to be empowered to exercise that jurisdiction – see *Chitaley & Rao: A.I.R. Commentaries on The Code of Civil Procedure (V of 1908) 7th (1963) Edition Vol.1 p.87.* The word "Judge", it must be noted, is defined in section 2(8) of the Indian Code as meaning "the presiding officer of a *civil* court" (emphasis mine). Therefore in the Indian case of *Nayak v. Ramanuj Das* (2) the term "court" was rightly interpreted as meaning "civil Court". On the other hand in view of the definitions of the words "Judge" and "court" in our Civil Procedure Code, the interpretation given in the Indian case cannot be accepted in Sri Lanka.

Therefore in this case the learned Magistrate had jurisdiction to act under the proviso to section (1) of section 232 of the Civil Procedure Code. If he did, he would have had no difficulty in holding that the petitioner had title to the vehicle. Indeed the 3rd respondent Tillekeratne who was only the driver of the vehicle was not claiming title to the vehicle. The claim of his master the 2nd respondent is nebulous. I did not understand it as a claim to title. In his evidence in the early Magistrate's Court proceedings a copy of which has been produced before us, the 2nd respondent conceded that the petitioner was the owner of the vehicle and that the vehicle was held on a hire-purchase agreement by the 1st respondent. In this state of the facts no question of title or priority must be held to have arisen calling for a determination by the Magistrate under section 232(1) of the Civil Procedure Code. Further it must be remembered that the Civil Procedure Code section 233 enjoins on the Fiscal the duty of issuing the notice of seizure on the custody court. The form No.47 provided in the Civil Procedure Code for this notice also indicates that it is the Fiscal who has to issue this notice. In fact all seizures in execution of a decree are required by the Civil Procedure Code to be made by the Fiscal on the authority, of course, of the orders of the Court that entered the decree. The Fiscal was therefore only acting in compliance with the statute when he issued the notice of seizure on the custody court and it is a misconception to regard the act of the Fiscal as an act in derogation of the authority of the custody Court. I would also like to add that the order of the learned Magistrate requiring the petitioner to furnish security although the vehicle was not handed over to it seems unjustified.

I must say that I do appreciate the care which the learned Magistrate bestowed on this case but I regret to have to say that the orders he made both under the Code of Criminal Procedure Act and the Civil Procedure Code are wrong and cannot be allowed to stand. Acting in revision, I set aside the orders of the Magistrate made on 13.10.1980 and 27.2.1981 and make order directing that the tractor bearing No.25 Sri 9766 be forthwith delivered to the petitioner. The 2nd and 3rd respondents will pay the petitioner the costs of the proceedings before us and of the proceedings in the Magistrate's Court after the Fiscal served notice of seizure, that is, from 5.11.1980.

K.C.E. DE ALWIS, J. — I agree.

Orders of the Magistrate set aside.

N.B. An application (Sp. L/A 11/82) for special leave to appeal from the above judgment to the Supreme Court was refused on 31.1.1982