

MENDIS

v.

PFIZER

SUPREME COURT.

L. H. DE ALWIS, J., SENEVIRATNE, J. AND G. P. S. DE SILVA, J..

S.C. 21/86; C.A. 587/76 (F).

D.C. PANADURA 13670.

JANUARY 26 AND FEBRUARY 10, 1988.

Civil Procedure—Action for goods sold and delivered—Sequestration before judgment—Actual terms of mandate for sequestration different from the order of Court—Claim by person not defendant to property sequestered—Claim upheld and suit for damages for wrongful sequestration—s. 653 of the Civil Procedure Code—Forms in 1st Schedule of C.P.C.

In the course of an action for recovery of Rs. 39,000 due on account of goods sold and delivered against one Paulus carrying on business under the name, style and firm of Victory Pharmacy the plaintiff obtained a Mandate in Form 104 of the First Schedule CPC for sequestration before judgment against the said Paulus.

Although the Court ordered a Mandate to issue to the Fiscal to seize and sequester the business known as Victory Pharmacy and any other property movable or immovable to the value of not less than Rs. 44,000, the Mandate itself commanded the Fiscal to seize and sequester the house, lands, goods, money, securities for money and debts of the defendant to the value of Rs. 44,000. Although the Form 104 did not provide for this the Mandate had recitals referring to the suit against Paulus and his fraudulently alienating the Pharmacy and his assets and his imminent departure, being here on a Temporary Residence Permit.

On 28.10.71 at 11.55 a.m. the Deputy Fiscal went to the premises where Victory Pharmacy was run and seized and sequestered the movable property of the business. At 3.45 p.m. of the same day Mendis the appellant claimed the business as its legal owner. His claim was upheld in claim proceedings on 8.9.1972 and he then filed the present action to recover Rs. 50,000 as damages for the wrongful seizure and sequestration. This action was dismissed in the District Court. Mendis' appeal to the Court of Appeal was also dismissed.

Held—

(1) Forms in schedules are inserted merely as examples, and are only to be followed as far as the circumstances of each case may admit. The Mandate must be read as a whole. The Judge's Order specifically directed the Fiscal to seize and sequester the business known as Victory Pharmacy along with any other property of the defendant. These directions were embodied in the Mandate though as recitals. The Mandate covers the seizure of Victory Pharmacy and the Fiscal had authority to seize and sequester it. The petition, affidavit and order of Court can be relied on and show that the seizure and sequestration of Victory Pharmacy were authorized by the Mandate. The operative part must be read with the recitals and Order of Court.

(2) The seizure of the business authorized by the Mandate referred not only to the incorporeal right to carry on the business but also the goods of the business.

(3) The argument that the Fiscal had seized Victory Pharmacy belonging to Mendis when the order was against Paulus does not make the defendant liable to damages without proof of malice where the seizure and sequestration of the goods of the Pharmacy were under judicial sanction which cannot be said to have been obtained improperly or without reasonable and probable cause by the respondent: for the Pharmacy still belonged to the defendant Paulus a non-national on a Temporary Residence Permit and it was on the very day that the Mandate issued that Paulus conveyed the Pharmacy to Mendis on a deed for a consideration not fully settled on the date of its execution and with a condition permitting Paulus to remain on the premises. Further at the time of the seizure Paulus was still in occupation and his name still appeared on the business Register as proprietor.

Cases referred to:

- (1) *Attorney-General v. Lamplough* (1878) 3 Ex. D. 214, 229.
- (2) *Turquand v. Board of Trade* (1886) 11 A.C. 286.
- (3) *Ramanathan Chetty v. Meerasaibo Marikkar* 32 NLR 193.
- (4) *De Alwis v. Murugappa Chettiar* 12 NLR 383.
- (5) *Hert v. Cohen* 16 Buchanan 363.
- (6) *Hoye v. Bush* (1840) *Court of Common Pleas*, Vol. 1 pg. 784.

APPEAL from judgment of Court of Appeal.

Nimal Senanayake P.C. with *Miss S. M. Senaratne, Miss A. B. Dissanayake, Miss A. Adolphus, Miss Shiranthi de Saram* and *Jayantha Wewelwela* for appellant.

P. A. D. Samarasekera, P.C. with *A. C. B. Britto Muttunayagam* for respondent.

Cur. adv. vult.

March 30, 1988

L. H. DE ALWIS, J.

The respondent, Pfizer Ltd., instituted D.C. Colombo case No. 74222/M against one Paulus who was the proprietor of a business carried on by him under the name, style and firm of Victory Pharmacy at No. 384, Main Street, Panadura, for the recovery of a sum of Rs. 39,000 on account of goods sold and delivered to him.

During the pendency of the action the respondent made an application to the District Court under section 653 of the Civil Procedure Code to seize and sequester the said business of Victory Pharmacy and any other houses, lands and goods, security for money and debts etc., belonging to the said Paulus, on the footing that the latter was fraudulently alienating his property with intent to avoid payment of the said sum. The application was supported in court on 21.10.1971 and court made order (D9) on the same day directing that a mandate D10 in form No. 104 of the first schedule to the Civil Procedure Code be issued to the Fiscal, Western Province, "to seize and sequester the business called and known as the Victory Pharmacy, No. 384, Main Street, Panadura and any other property of the defendant whether movable or immovable to the value of not less than Rs. 44,000."

The Mandate, D10, however commanded the Fiscal "to seize and sequester the house, lands, goods, money, securities for money and debts of the said defendant to the value of Rs. 44,000."

On 28.10.1971 at 11.55 a.m. the Deputy Fiscal of Panadura went to the premises No. 384, Main Street, Panadura, and seized and sequestered the movable property of the said business of the Victory Pharmacy.

The appellant in this case arrived at the premises at 3.45 p.m. that day and made a claim to the said business as its legal owner. His claim was inquired into and upheld by the District Court in case No. 294/C of 8.9.1972.

The appellant subsequently instituted action No. 13620 in the District Court of Panadura against the respondent to recover a sum of Rs. 50,000 as damages alleged to have been caused as a result of the wrongful seizure and sequestration of the goods of the said business of Victory Pharmacy which belonged to him.

After trial the learned District Judge dismissed the action on the ground that the mandate authorised the Deputy Fiscal to seize and sequester the goods of the business of Victory Pharmacy; that the seizure and sequestration were not wrongful; that the defendant company, Pfizer Ltd., had reasonable ground to believe that the business belonged to Paulus; and that it acted in good faith and without malice.

The appellant appealed from the order of the learned District Judge to the Court of Appeal which dismissed the appeal and affirmed the Judgment of the District Court.

The appellant has now appealed to this court against the judgment of the Court of Appeal after obtaining leave to appeal from that court.

The contention of Mr. Senanayake for the appellant was that the mandate issued to the Fiscal did not authorise him to seize the business of Victory Pharmacy, although the order of court directed it, and that both the District Court and Court of Appeal were in error in holding that the Mandate did so. The seizure was therefore wrongful.

He also contended that the Mandate authorised the Fiscal to seize and sequester Victory Pharmacy belonging to the judgment-debtor, Paulus, and not to the appellant. Paulus had sold the Victory Pharmacy on 21.10.71 to the appellant who became the owner on Indenture

No. 1083(P5). The seizure and sequestration of the goods in the Pharmacy on 28.10.71 by the Fiscal, at the instance of the appellant it was submitted was wrongful and the respondent was liable for damages sustained by him without proof of any malice.

He submitted that the District Court had erred in holding that the respondent was not liable in damages inasmuch as it acted in good faith and without malice in causing the Fiscal to seize and sequester the goods in Victory Pharmacy.

In view of Mr. Senanayake's first contention, it is necessary to reproduce the entirety of the Mandate D10 issued by the District Court to the Fiscal. It reads as follows:

"To the Deputy Fiscal,
Panadura.

Whereas it appears that James Parathesy Paulus, the defendant in the above case and the proprietor of Victory Pharmacy carrying on business under the said name at No. 384, Main Street, Panadura, is fraudulently alienating his property and assets and negotiating the sale of the business carried on by him under the name, style and firm of Victory Pharmacy at No. 384, Main Street, Panadura and is winding up his business activities.

And whereas the defendant abovenamed is a non-national of Indian origin whose stay in Ceylon has been under and by virtue of a Temporary Resident Permit, which will expire shortly and the said defendant is scheduled to leave the Island at the end of October 1971.

And whereas no payment whatsoever has been received from the abovenamed defendant either in full settlement or in reduction of the Plaintiff's claim which is still justly due.

And whereas the said business belonging to the said defendant and carried on by him at the above address is the most valuable asset possessed by him and since endeavours are being made to sell the said business.

And whereas the abovenamed defendant is fraudulently alienating his property and is preparing to shortly leave the Island with intent to avoid payment of the plaintiff's claim and since the plaintiff has no security to meet the claim from the defendant and the plaintiff abovenamed has verified his demand to the satisfaction of this court.

You are therefore commanded to seize and sequester the houses, lands, goods, moneys, securities for money and debts of the said defendant, to the value of Rs. 44,000 wheresoever and in whose custody or possession soever the same may be within this District, and to retain and secure the same until the said defendant shall appear and abide by the order of this court or until you receive further directions from

this court herein and to give due notice in writing to all persons in whose possession or power the property whether movable or immovable shall be, of this sequestration, and requiring them to reserve and retain the same, and all issues, rents, profits and interest accruing therefrom to abide the order of this court. And you are further commanded on the day of 29.10.1972, next to inform this court what property you shall have so seized and sequestered with the true value of the same and in whose possession the same respectively was at the time of seizure and have you there this mandate.

sgd. Additional District Judge
Colombo

This 21st day of October, 1971."

Learned Counsel for the appellant vehemently submitted that the language of the mandate issued in terms of form No. 104 must be strictly construed especially as it authorised the seizure and sequestration of property prior to judgment, under section 653 of the Civil Procedure Code.

Form No. 104 in the First Schedule of the Civil Procedure Code is very brief and while providing for setting out the necessary averments, states that the Mandate commanding the Fiscal, should proceed as in Form No. 38, with the necessary modifications, namely, "You are therefore commanded to seize and sequester the houses, lands, goods, moneys, security for money and debts of the said ... to the value of"

According to learned Counsel the operative part of the Mandate is that contained in the last paragraph, and that commands the Fiscal to seize and sequester the property of the defendant, but makes no reference to the business of Victory Pharmacy carried on at No. 384, Main Street, Panadura. The earlier paragraphs of the Mandate, he submitted, contain merely a recital of certain matters but gave the Fiscal no authority to act upon their contents. Learned Counsel submitted that Form 104 does not provide for recitals. The seizure and sequestration of Victory Pharmacy were therefore not made under the Mandate and are wrongful.

I regret I am unable to agree with learned counsel's contention. "As a general rule, forms in schedules are inserted merely as examples, and are only to be followed implicitly so far as the circumstances of each case may admit." Per Brett, C.J., in *Attorney-General v. Lamplough* (1) referred to in Craies's *Statute Law*, 7th Ed. pg. 224 "An Act is to be read as a whole. It is an elementary rule that

construction is to be made of all the parts together, and not of one part only by itself." *Turquand v. Board of Trade*, (2) per Lord Blackburn and cited by *Maxwell on Interpretation of Statutes*, 12th Ed. pg. 58. In my view these principles of construction apply equally to the Mandate in question.

The Mandate must be read as a whole. The opening paragraph of the Mandate refers to James Parathesy Paulus, the defendant in the case, as the proprietor of the Victory Pharmacy business carried on at No. 384, Main Street, Panadura. Paragraph (4) recites that the said business belonging to the defendant is the most valuable asset possessed by him. The recital in the Mandate is a reproduction of certain statements in the petition D7 and affidavit D8 made in support of the application for seizure and sequestration of the property of Paulus and of the order D9 made by the court allowing the application. The learned Judge's order specifically directed the Fiscal to seize and sequester the business called and known as the Victory Pharmacy, along with any other property of the defendant, whether movable or immovable.

These directions have been embodied in the Mandate. No doubt they are in the form of recitals. But they specifically state, inter alia, that the Victory Pharmacy is the defendant's most valuable asset and suggest that it is the most suitable property for seizure and sequestration by the Fiscal.

In my view, the Mandate covers the seizure of Victory Pharmacy as property belonging to the defendant, Paulus. The Fiscal therefore had authority under the Mandate to make the seizure and sequestration of the said pharmacy. In this case, moreover, it is the respondent and not the Fiscal who is held responsible for the seizure, and it is the respondent who is sued for the alleged wrongful seizure. In order to ascertain whether the Mandate authorised the seizure of Victory Pharmacy, it is open to the respondent to rely on his petition D7, affidavit D8 and the order of court D9. These documents show without any doubt that the seizure and sequestration of Victory Pharmacy by him were authorised by the Mandate.

I agree with the view of the Court of Appeal that the construction of the Mandate depends not only on the terms of its operative part, but on the entirety of the Mandate including the recitals read in the light of the order directing its issue.

Learned Counsel next submitted that even if the Mandate authorised the seizure of the business of Victory Pharmacy it related only to an incorporeal right like the goodwill and right to carry on the business, but not to the goods in the pharmacy. I do not agree. The business that Paulus was carrying on and which the Plaintiff purchased on P5 was the Victory Pharmacy, No. 384, Main Street, Panadura. The business of a pharmacy necessarily involves the sale of medicinal drugs for profit and the stock-in-trade clearly forms part and parcel of the business. "The assets of a business firm includes not only the stock in trade and book debts, furniture, tools, machinery etc., but also an intangible but very often valuable property, called goodwill." *Underhill Law of Partnership*, 8th Ed. page 121: As a matter of fact what Paulus sold to the plaintiff on deed 1083 of 21.10.1971 (P5) was "the business carried on under the name, style and firm of Victory Pharmacy at No. 382, 384 and 386, Main Street, Panadura, together with the goodwill, stock-in-trade, furniture and fittings..." The goods therefore seized by the Fiscal on 28.10.71 are clearly part and parcel of the business of the pharmacy, which he was authorised to seize and sequester on the Mandate D10.

Learned Counsel next contended that the Mandate authorised the Fiscal to seize the goods of Victory Pharmacy belonging to Paulus, the defendant in that case, and not the goods of the appellant to whom Paulus had sold them. The seizure and sequestration of the goods of Victory Pharmacy by the respondent was therefore wrongful and he is liable for damages without proof of malice. The goods were seized by the Fiscal in Victory Pharmacy on their being pointed out by B. Sathurukulasinghe, a Director of the appellant Company-Vide Fiscal's Report D11.

Learned Counsel relied strongly on the judgment of the Privy Council in the case of *Ramanathan Chetty v. Meerasaibo Marikkar* (3), where it was held that when the defendant caused the Fiscal to seize the goods of the plaintiff under a writ, which directed the Fiscal to seize the goods of another person, the plaintiff can recover damages without proof of malice.

In *Ramanathan Chetty's* case Lord Russel of Killowen who delivered the judgment of the Privy Council referred to the local case of *De Alwis v. Murugappa Chettiar* (4), 12 N.L.R. 383 and to the South African case of *Hart v. Cohen* (5).

In *De Alwis v. Murugappa Chettiar* it was held that where in a judgment creditor procures the seizure of property belonging to a third party against who there is no writ or warrant, he is liable in damages, whether he acted maliciously or not. It is no defence that the judgment creditor acted under a mistake. The facts of that case are clearly distinguishable and indicate that the plaintiff-judgment-creditor was aware that the goods he caused to be seized did not belong to the judgment debtor. The judgment debtor was the father-in-law of the plaintiff in that case. Hutchinson, C.J., said "the goods were the furniture in the plaintiff's house, in which he and his wife lived, and the debtor did not live; the defendant had previously had the debtor examined by the court as to his means; the debtor had sworn on examination that he had no property, and the defendant had then prosecuted him for obtaining money from him on the false representation that he had property. The District Judge found that the seizure was wrongful, and that it was calculated to disgrace the plaintiff, (who was the Interpreter Mudaliyar of the Police Court of Kandy)... The defendant in this case is therefore liable for the wrongful seizure, whether he acted maliciously or not." Middleton, J., said: "In the present case the act of seizure was committed in effect without judicial process, as the process in the hands of the Fiscal's Officer was against the goods of the judgment-debtor and not against the goods of the plaintiff and as De Villiers, C.J., in the case above (of *Hart v. Cohen*) said "here is on the face of it an illegality for which the owner has his remedy without proof of malice.

Nathan in his treatise, *Common Law of South Africa*, Vol. III, (at page 1700, footnote) refers to the South African case of *Hart v. Cohen* (5), and quotes De Villiers C.J., in that case as follows: "Voet (47.10.7) enumerates among 'real injuries' execution against the goods of a person other than the debtor against whom judgment has been given. In his enumeration he does not, however, draw a sufficiently clear distinction between acts done in excess of or without judicial process and acts done under the sanction of judicial process improperly obtained. Where execution has been issued against the goods of a person other than the debtor against whom the writ had been obtained, there is, on the face of it, an illegality for which the owner has his remedy without proof of malice. But where the creditor acts under the sanction of judicial process something more is required than proof that the writ ought not to have been granted, for there must be proof of malice and want of reasonable and probable cause on the part of the creditor in obtaining the writ."

The Privy Council in *Ramanathan Chetty's* case said that, "A distinction must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If 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 for malicious prosecution. If however, the writ or warrant did not authorise the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure without proof of malice." The case of *Hoye v. Bush* (6), cited by learned Counsel for the appellant is distinguishable because the defendant arrested the plaintiff under a warrant describing him as John Hoye when his real name was Richard Hoye. Even though the party arrested was the person to whom the warrant was really intended to apply the misdescription of the person's name in the warrant was held not to have brought the plaintiff within the protection of the warrant.

In the present case the court order and the mandate read as a whole authorised the seizure of Victory Pharmacy carried on at No. 384, Main Street, Panadura, belonging to the defendant in that case, viz: Paulus. The seizure and sequestration of the goods of the Pharmacy by the Fiscal therefore, at the instance of the respondent, was an act done under judicial sanction. The question then arises whether the sanction of the court was obtained improperly or without reasonable and probable cause on the part of the respondent.

To ascertain that, it is necessary to examine the events preceding the application for the mandate, and even, in my view, the circumstances subsequent to it, which throw light on it.

The Respondent Company (Pfizer Ltd) which was the plaintiff in D.C. Colombo case No. 74222/M sued one Paulus as defendant, for the recovery of a sum of Rs. 39,000 for goods sold and delivered to him. After action was filed, it made an application by petition D7 and affidavit D8 on 19.10.71 seeking a mandate under section 653 of the Civil Procedure Code to seize and sequester the business called and known as Victory Pharmacy at No. 384, Main Street, Panadura and any other property belonging to the defendant. It was alleged that the defendant was a non-national of Indian Origin who was residing in Ceylon on a Temporary Resident Permit and that the Plaintiff verily believed that he was fraudulently negotiating to alienate his property

and leave the Island in order to avoid payment of the Plaintiff's claim. The Defendant had, in fact, advertised the Pharmacy for sale in the newspapers.

On the averments set out in the respondent's petition and affidavit the court was satisfied that the defendant was fraudulently alienating his property to avoid the payment of the debt to the respondent and allowed the respondent's application to seize and sequester the business called and known as Victory Pharmacy carried on at No. 384, Main Street, Panadura, and any other property of the defendant on 21.10.71.

The Fiscal executed the Mandate only on 28.10.71 by which date the Pharmacy had been sold by Paulus to the appellant. The appellant made a claim to the Pharmacy, and it was upheld by court. The order of court is therefore *res judicata* between the parties.

To get back to the question whether the sanction of the court was improperly obtained by the respondent on the basis that the pharmacy belonged to Paulus, it must be noted that on 19.10.71, when the application was made under section 653 of the Civil Procedure Code, the pharmacy did belong to Paulus. The application was allowed by court and the mandate issued on 21.10.71. On that very date Paulus conveyed the pharmacy to the appellant.

According to P5 the full consideration on the deed was not paid. There was still due a sum of Rs. 10,000 for the payment of which time was given till 31.10.71. One of the conditions of P5 was that Paulus was entitled to remain in the shop premises (residential quarters). This condition was evidently embodied in P5 by Paulus, to ensure the payment of the balance consideration by the appellant, before handing over possession of the business and premises to him.

The Fiscal executed the Mandate on 28.10.71 at 11.55 a.m. and seized the goods in the pharmacy at premises No. 384, Main Street, Panadura. At the time of the seizure Paulus was still in occupation. Any reasonable person would have concluded from that fact that Paulus was still the owner of the pharmacy. The plaintiff was not present in the shop at the time, as one would have expected him to have been, if he had actually taken possession of it. He came nearly four hours later at 3.45 p.m. with a lawyer and claimed the property by purchase on a

deed. The deed was not produced before the Fiscal. No change in the name board of the pharmacy had been made to indicate that the new owner was the appellant. On the date of the seizure by the Fiscal, namely 28.10.71, Paulus' name still appeared as owner of Victory Pharmacy in the Business Names Register which the respondent had taken pains to examine. The Registrar of Business Names was informed of the change of ownership only on 3.11.71 and the change was thereafter effected only on 12.11.71. Paulus was therefore in de facto possession and occupation of the business premises at the time of the Fiscal's arrival and the Fiscal has recorded that fact in his report to court, D11.

In the light of all these circumstances it cannot be said that the order of court and the mandate were obtained by the respondent improperly or without reasonable or probable cause.

I accordingly dismiss the appeal with costs and affirm the judgment of the Court of Appeal.

G. P. S. DE SILVA, J.

The plaintiff filed this action against the defendant (Pfizer Ltd.) for the recovery of a sum of Rs, 50,000 as damages for the wrongful seizure and sequestration of the goods of the business known as 'Victory Pharmacy' carried on at No. 384, Main Street, Panadura. In case No. 74222/M instituted in the District Court of Colombo, the defendant (in the instant case) had applied for and obtained a mandate of sequestration against one Paulus who owed a sum of Rs. 39,000 on account of goods sold and delivered. The petition and the affidavit in terms of section 653 of the Civil Procedure Code filed in the said case No. 74222/M have been produced as D7 and D8 respectively. The order of the District Court of Colombo allowing the application under section 653 of the Civil Procedure Code was marked in evidence as D9 and the Mandate of sequestration addressed to the Deputy Fiscal, Panadura, as D10. D10(a) is the report of the Deputy Fiscal wherein he states that on 28.10.71 he seized and sequestered the moveable property of Victory Pharmacy, 384, Main Street, Panadura. The property was pointed out by Saturukulasinghe, one of the Directors of the defendant-Company, as belonging to the said Paulus.

It is the evidence of the Fiscal that the plaintiff in the present action arrived at the premises at about 3.45 p.m. and preferred a claim to

the business (Victory Pharmacy) as being its lawful owner. The plaintiff's claim was upheld by the District Court on 8.9.72 in case No. 294/C and it is now agreed that this order is *res judicata* between the parties to the present action. The position therefore is that the plaintiff was on 28.10.71, the date of seizure and sequestration of the business, its owner, having purchased it from Paulus on 21.10.71 on the Indenture P5.

After trial, the District Judge held (a) that the seizure and sequestration of the goods of the business of Victory Pharmacy was not wrongful; (b) that the defendant had acted in good faith and without malice. The plaintiff's action was accordingly dismissed. The plaintiff appealed to the Court of Appeal against the judgment of the District Court. The Court of Appeal affirmed the judgment of the District Court. The plaintiff has now preferred this appeal against the judgment of the Court of Appeal, having obtained leave to appeal from the Court of Appeal.

The principal submission of Mr. Senanayake, Counsel for the plaintiff-appellant, was that the Fiscal derived his authority *solely* from the mandate of sequestration (D10). Counsel emphasized (a) that the only document in the hands of the Fiscal was D10; (b) that the law (s. 653 and Form No. 104 of the first Schedule to the Civil Procedure Code) requires the Fiscal to act in strict compliance with the mandate of sequestration; (c) that the 'Mandate' (i.e. the operative part of D10) nowhere authorizes the Fiscal to seize and sequester the business of Victory Pharmacy.

The first question that arises for decision on this appeal is whether the seizure and sequestration of the business known as Victory Pharmacy was without judicial sanction, as contended for on behalf of the plaintiff-appellant. It seems to me that this question cannot be answered by reference only to the 'operative part' of D10, as we were invited to do by Mr. Senanayake. It is a principle of construction of documents that a document must be fairly read as a whole, in order to ascertain its true intent and meaning. Moreover, I cannot agree that the matter in issue has to be decided solely on the basis of the formal mandate of sequestration, ignoring the other documentary evidence (D7, D8 and D9) placed before the Court. In my view, these documents are relevant to the question whether the seizure and sequestration of the property was with or without judicial sanction. A

narrow and restrictive approach to this question is not warranted, for the concept of "judicial sanction" in the present context must be viewed broadly. It is to be noted that the party sought to be made liable is the defendant and not the Fiscal.

The petition D7 and the affidavit D8 were filed in the District Court on 19th October 1971, well before the date of the sale of Victory Pharmacy to the plaintiff. Paragraphs 5, 6, 10 and 12 in D7 read thus:

- "(5) That the plaintiff-petitioner has been receiving information that the defendant-respondent is alienating his property and assets negotiating the sale of the business carried on by him under the name style and firm of "The Victory Pharmacy" at No. 384, Main Street, Panadura, and is winding up his business activities.
- (6) That the plaintiff-petitioner is reliably informed that the defendant-respondent is a non-national of Indian origin whose stay in Ceylon has been under and by virtue of a temporary resident permit.
- (10) That the business belonging to and carried on by the defendant-respondent at No. 384, Main Street, Panadura, under the name, style and firm of "The Victory Pharmacy" is the most valuable asset possessed by the defendant-respondent. The plaintiff-petitioner states that endeavours are being made to sell the said business.
- (12) By reason of the above premises it has become necessary for the plaintiff-petitioner to move court for an order of sequestration in respect of the said business known as "The Victory Pharmacy" and carried on by the defendant-respondent at No. 384, Main Street, Panadura, and any other houses, lands, goods, securities for moneys and debts whatsoever and in whose custody the same may be, to a value of not less than Rs. 44,000....."

Paragraph (a) in the prayer in D7 is in the following terms:

- "(a) that the court do order that a mandate be issued to the Fiscal, Panadura, under the provisions of ss. 653 & 654 of the Civil Procedure Code to seize and sequester the business called and known as the Victory Pharmacy at No. 384, Main Street, Panadura, and of any and all other houses, lands, goods, securities for monies and debts wheresoever and in whose

custody the same may be belonging to the defendant-respondent to the value of not less than Rs.44,000”.

After hearing counsel, the District Judge made his order D9 dated 21.10.71 on the basis of the averments in D7 and D8. It was not denied that these averments were factually correct as on the date the application was made to Court. The concluding paragraph of D9 reads thus:

“I allow the application of the plaintiff and I direct that a Mandate in form 104 of the first Schedule be issued to the Fiscal, Western Province, directing him to seize and sequester the business called and known as the ‘Victory Pharmacy’, No. 384, Main Street, Panadura, and any other property of the defendant whether movable or immovable to the value of not less than Rs. 44,000/-. The Mandate of sequestration to issue on the Plaintiff furnishing security in a sum of Rs. 3000/- (Rupees three thousand only) in cash.”

The next document is D10 signed by the District Judge and dated 21.10.71. The recitals in D10 include the following:—

“Whereas it appears that James Parathasy Paulus the defendant in the above case and the proprietor of the Victory Pharmacy carrying on business under the said name at No. 384, Main Street, Panadura, is fraudulently alienating his property and assets, negotiating the sale of the business carried on by him under the name style and firm of the Victory Pharmacy at No. 384, Main Street, Panadura, and is winding up his business activities”

And whereas the said business belonging to the said defendant and carried on by him at the above mentioned address is the most valuable asset possessed by him and since endeavours are being made to sell the said business.

And whereas the abovenamed defendant is fraudulently alienating his property and is preparing to shortly leave the Island with intent to avoid payment of the plaintiff’s claim and since the plaintiff has no security to meet the claim due from the defendant and the plaintiff above named has verified his demand to the satisfaction of this Court.”

The operative part of D 10 reads thus:

"You are therefore commanded to seize and sequester the houses, lands, goods, moneys, securities for money and debts of the said defendant to the value of Rs. 44,000 where soever and in whose custody or possession the same may be within this District".

It is true, as submitted by Mr. Senanayake, the operative part of D 10 makes no reference at all to the seizure and sequestration of the business of Victory Pharmacy. To that extent, D 10 is not in accord with D 9, the order of the District Court. D 9, however, is the "judicial order" made upon the application D 7 read with D 8. D 10 derives its sanction from D 9. It is manifest upon a reading of D 9 that there is a clear, explicit and unequivocal direction to seize and sequester the business called and known as "The Victory Pharmacy at No. 384, Main Street, Panadura". The true legal basis and foundation for the issue of the formal order of sequestration is contained in D 9. Therefore the Court of Appeal was, in my opinion, correct when it reasoned thus:

".... the question whether the seizure and sequestration by the Deputy Fiscal of the business are wrongful or not must, in my view, depend upon a construction not only of the terms of the operative part of the mandate but of the entirety of the mandate including the recitals read in the light of the order directing its issue".

The finding that the seizure and sequestration by the Fiscal was with judicial sanction is accordingly affirmed.

In support of his submission Mr. Senanayake relied strongly on the judgment of the Privy Council in *Ramanathan Chetty v. Meera Saibo Marikar*, (3) Counsel drew our attention in particular to the following statement of the law:

"A distinction must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorized 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 for malicious prosecution. If, however, the writ or warrant did not authorize the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure without proof of malice".

It is true, as stressed by Mr. Senanayake, that the above passage refers only to the "writ or warrant" and not to any other order made by court. But what is relevant and important for present purposes is that the Privy Council was not dealing with the situation that has arisen in the present appeal, namely, a situation where the formal order of sequestration (D10) is not in conformity with the clear and express terms of the order of the District Court (D9). A proposition of law enunciated in a judgment cannot be read in isolation, divorced from the facts and circumstances the court was concerned with; rather it should be read and understood in the context of the facts and circumstances of the case. Thus it seems to me that the decision of the Privy Council is not an authority for the proposition that the question whether the "acts done" were with or without "judicial sanction" has to be determined by reference only to "the writ or warrant".

The finding that the seizure and sequestration were "acts done" with judicial sanction does not absolve the defendant from liability if there is evidence to show that the conduct of the defendant in securing the seizure and sequestration was lacking in bona fides. The Court of Appeal has rightly addressed its mind to this aspect of the case and has given cogent reasons for its finding that there was "reasonable and probable cause for obtaining the order of seizure and sequestration". It is unnecessary to repeat those reasons here. I am in agreement with the conclusion.

Finally, Mr. Senanayake submitted that, in any event, D9 authorized the seizure and sequestration of only the business called and known as Victory Pharmacy, but not the goods in the premises. Mr. Senanayake contended that the seizure of the "business" means only the seizure of an "incorporal right", namely, the goodwill and the right to carry on the business. This contention does not commend itself to me. The opening words of the 2nd paragraph of D9 are "I allow the application of the plaintiff". The application is contained in D7 and D8. On a fair reading of D7 and D8 it seems to me quite unreal to take the view that what was sought to be seized and sequestered was not the goods but an incorporeal right.

In the result, the appeal fails and is dismissed with costs.

SENEVIRATNE, J.—I agree.

Appeal dismissed.