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[FULL BENCH.]

Present : Bertram C.J. and Ennis and De Sampayo JJ.HENDRICK SINGHO *v.* KALANIS APPU *et al.*

56—D. C. Kalutara, 9,403.

Civil Procedure Code, ss. 237, 238, 289—Seizure not registered—Sale by judgment-debtor after Fiscal's sale and before issue of Fiscal's conveyance—Prior registration of conveyance in favour of private alienee—Does section 289 override the provisions of s. 238?—Relation back.

Section 289 of the Civil Procedure Code does not override the provisions of section 238; the title of the purchaser at the Fiscal's sale does not, on the issue of the Fiscal's conveyance, prevail over any intermediate alienation by the execution-debtor, unless the Fiscal's seizure was registered.

“If the seizure is not registered, the necessary implication of section 238 is that a *bona fide* private alienee is *statim securus*. Section 289, as regards relation back, must be read in the light of section 238, and its operation should not be extended to a case where the seizure has not been registered.”

THE plaintiff, respondent, instituted this action for declaration of title to lot 1 of a land called Imbalahena, which he claimed by virtue of a purchase from one Egoris. The conveyance in favour of plaintiff was executed in January, 1920, and registered in the same month.

The land was seized under a writ against Egoris in 1913, but the seizure was not registered. At a Fiscal's sale in 1913, the first defendant became purchaser, but he obtained no Fiscal's conveyance till October, 1920. The Fiscal's transfer was also registered in October, 1920.

The following issues were framed :—

- (1) The seizure not having been registered, does plaintiff's deed give priority over the Fiscal's transfer ?
- (2) Defendant having no Fiscal's transfer at date of institution of action, can he plead the benefit of it now ?

The District Judge entered judgment for the plaintiff, and defendants appealed.

E. W. Jayawardene (with him *Mahadeva*), for appellant. By virtue of section 289 of the Civil Procedure Code, Fiscal's conveyance divests the judgment-debtor of the title as from the date of the sale. *Aserappa v. Weratunga*.¹ If he be so divested of his title, he cannot

¹ (1911) 14 N. L. R. 417.

sell again to a third party. Under section 287 of the Code the Court is bound to order delivery of possession to the purchaser. Section 291 enacts that the person in possession shall not waste it. Then *a fortiori* he cannot sell it. Under the old law all sales after seizure were void. Section 236 makes alienation of movable property after seizure absolutely void. In the case of immovable property the mode of seizure is prescribed by section 237, i.e., by a prohibitory notice. This notice is not only to the judgment-debtor, but to all those receiving the property from him by purchase, gift, or otherwise. Notice is proclaimed by beat of tom-tom or other means. Further, it provides for registration on payment of a fee of fifty cents. The Registration Ordinance itself does not require seizures to be registered. The important point under section 237 is the publication of the prohibitory notice. Registration is left to the option of the decree-holder

[DE SAMPAYO J.—It is only registration that would give notice to an innocent purchaser.]

Registration is not compulsory.

[BERTRAM C.J.—According to you, the words “and registered” in section 238 have no effect.]

That would be introducing the Registration Ordinance into our Civil Procedure Code.

[DE SAMPAYO J.—Section 238 is taken from the Indian Code, where there is no necessity to register. So these words must have been intended to vary the law.]

Such intention, if any, has not been embodied in our Code in proper language. Till *Hendrick v. Deen*¹ no attention was paid to registration.

SCHNEIDER A.J. followed this case in *Velupillai v. Marimuttu*.² If registration is absolutely necessary, there is no necessity to declare it permissive. When the property is seized, it is in *custodia legis*, and the debtor cannot deal with it.

Counsel cited also Fiscals' Ordinance, No. 4 of 1867, section 42; *Jay Appu v. Weerasuriya*³ and *Tikiri Banda v. Loku Banda*.⁴

St. V. Jayawardene, K.C. (with him *M. W. H. de Silva*), for Respondent.—Before the Civil Procedure Code came into operation all private sales after seizure were void. Our Code departed from the old Fiscals' Ordinance and the Indian Civil Procedure Code in requiring registration of seizures. Under section 237 of the Civil Procedure Code seizure is in force until it is removed or the property sold and conveyed by the Fiscal. The words used in the old Fiscals' Ordinance are “during the continuance of the seizure.” Section 238 embodies the old law but the words used are different. Effect of section 238 is to make a private sale valid if seizure

¹ (1916) 3 C. W. R.

² (1917) 20 N.

³ (1921) 22 N. L. R.

⁴ 16 N. L. R. 53.

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been registered. Judgment-debtor is not divested of his title till a conveyance is executed by the Fiscal (section 289). Section 290 does not permit the judgment-creditor or purchaser to enter into possession. It is only the Fiscal that can do so. If the requirements of section 237 had not been complied with, these sections do not come into force at all. Sections 237 and 289 must be read together. *Aserappa v. Weratunga*¹ has no application. In *Saravanamuttu v. Marutappa*² and *Tikiri Banda v. Loku Banda*³ registration or non-registration of seizure was not in question. In *Juan Appu v. Weerasuriya*⁴ the Supreme Court held that the point should have been taken in the lower Court. *Hendrick v. Deen*⁵ and *Velupillai v. Marimuttu*⁶ are entirely in point.

E. W. Jayawardene, in reply.

Cur. adv. vult.

November 17, 1921. BERTRAM C.J.—

This case has been referred with a view to reconciling the apparent inconsistency of two sections of the Civil Procedure Code as to the effect of registration of seizures. Section 238 draws a distinction between a seizure which is registered and a seizure which is not. In the former case all private alienations up to a Fiscal's transfer are void as against all claims enforceable under the seizure; in the latter case by implication all such private alienations presumably have their natural effect. Under section 289, however, the relation back of the Fiscal's transfer and the consequent vesting of the property in the purchaser as from the date of the sale in all cases alike seems entirely to ignore that distinction. Under section 238 requiring the seizure to be registered, the Legislature apparently intended to protect *bona fide* purchasers from the judgment-debtor; to reward the execution-creditor if he registered his seizure and to penalize him if he did not. If such were the intention, and if section 289 is to be interpreted without qualification, that intention is in effect frustrated.

In the view of Mr. E. W. Jayawardene, who appeared for the appellant, this is one of those cases in which the benevolent intention of the Legislature is frustrated by the incompetence of those who have attempted to embody them in statutory form. The purchaser is indeed protected up to the Fiscal's sale, but, so far as alienations between sale and transfer are concerned, notwithstanding the express reference to the sale in section 238, registration of seizure makes no difference. All such alienations alike are obliterated by the relating back of the purchaser's title.

Mr. Jayawardene points to the Full Court decision in *Aserappa v. Weratunga*¹ as concluding the case in his favour, but properly understood that case settles nothing. It is a case of two competing Fiscal's transfers and two registered seizures. All that the case decided was

¹ (1911) 14 N. L. R. 417.

² (1889) 4 N. L. R. 27.

³ (1911) 15 N. L. R. 63.

⁴ (1917) 20 N. L. R. 36.

⁵ (1916) 3 C. W. R. 205.

⁶ (1921) 22 N. L. R. 281.

that the priority of the transfers was to be determined, not by the date of their registration, but by the date of the respective sales to which they sought to give effect. The cases in which the reasoning of that case was adopted and followed, namely, *Tikiri Banda v. Loku Banda*¹ and *Juan Appu v. Weerasuriya*² were not cases in which the difficulty of reconciling sections 238 and 289 came into consideration. All that we can gather from this case is that the solution of the difficulty is not to be sought in section 17 of the Land Registration Ordinance, No. 14 of 1891. In the nature of things the private alienation, if registered, will almost certainly be registered before the Fiscal's transfer. But priority of registration here does not avail, since priority in terms of section 17 only avails against an antecedent transfer, whereas the Fiscal's transfer, though antecedent in effect, is subsequent in date. All that the case shows, therefore, is that the private purchaser, if he seeks to secure protection for his purchase, must seek for it elsewhere than in the law of registration.

On the other hand, there are decisions of this Court—*Hendrick v. Deen*³ per De Sampayo J.; *Velupillai v. Marimuttu*⁴ per Schneider A.J. followed in *C. R. Avissawella*, 10,751,⁵ and *D. C. Jaffna*, 14,221,⁶ which have held that effect must be given to the apparent intention of the Legislature as disclosed in section 238, and that the title of a purchaser from the execution-debtor between the Fiscal's sale and the Fiscal's transfer, where the seizure was not registered, prevails against that of the Fiscal's transferee. The question for us is, whether, on fuller consideration, these decisions are to be upheld?

The crux of the problem is the difficulty of harmonizing the two sections. The explanation is, I think, to be sought by investigating the separate history of each. Let us begin with section 238. Before the Civil Procedure Code of 1889, the effect of seizures on subsequent private alienations was regulated by section 42 of the Fiscal's Ordinance, No. 4 of 1867, which is in the following terms:—

“After any property shall have been seized in execution, and in the case of a seizure by written order after it shall have been duly intimated and made known in manner aforesaid, any alienation or encumbrance of the property seized (excepting by the Fiscal or Deputy Fiscal or under their order as hereinafter provided) whether by sale, gift, mortgage, or otherwise, and any payment of the debt or debts, or dividends, or shares to the party condemned during the continuance of the seizure, shall be null and void.”

The terms of the section are thus very general. It is sufficient that the seizure is effected and made known in the prescribed manner. If this is done all private alienation “during the continuance of the

¹ (1911) 15 N. L. R. 63.

² (1917) 20 N. L. R. 35.

³ (1916) 3 C. W. R. 205.

⁴ (1921) 22 N. L. R. 231.

⁵ S. C. Min., March 8, 1921.

⁶ S. C. Min., June 15, 1921.

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seizure," that is, right up to the Fiscal's sale, are *ipso facto* void. Compare this section with section 238. The intention to effect a change in the law could not be more clearly indicated. By section 237 provision is made for a special register of seizures. It is only on registration being effected that the principle of section 42 of the Fiscals' Ordinance is now to operate. The requirement is express. "The Fiscal shall forthwith transmit a copy." It was clearly intended that only when this was done should a judgment-creditor be able to rely upon carrying out an effective sale; that the register of seizures was intended to be a definite statutory form of notification to persons who might otherwise deal with the property, and that, if the seizure was not registered, persons who acquired a title in the interval between seizure and transfer, whether under sale, gift, mortgage, lease, or otherwise, shall be protected. Why, if this were not the intention, was the register of seizures created? And why, if the period of protection was not to extend to the actual transfer, was an express reference to "conveyance" inserted in the section?

It might be argued that there are no express words protecting persons claiming under such alienations; that property once seized by the Fiscal is in *custodia legis*; and that no interests can be created in property so held to the prejudice of the judgment-creditor. But we are not concerned with the general principles of law governing property in *custodia legis*. Our Code is a complete Code. In declaring that certain transactions—certain transactions alone, namely, alienations after registration of seizure—shall be affected by the seizure, it in effect declares that other transactions shall be unaffected.

When, therefore, having thus changed the law, the Legislature proceeded to enact section 289, is it to be taken that it intended to derogate from the new principle, and that having expressly extended the implied protection accorded by section 238 right up to the Fiscal's transfer, it intended by the relating back of the transfer, as regards the period between sale and transfer, to annul the protection that it has bestowed? Again, the history of this section must be looked at. With what was section 289 really concerned?

In the Fiscals' Ordinance (1867) there is nothing to correspond to section 289. But it must not be supposed that the principle of that section was here introduced for the first time. There is the high authority of *Wendt J.* See *Silva v. Nona Hamine*¹ for the proposition that section 289 did not effect any change in the law. This appears to be the justification for the decision in *Selehamy v. Raphael*² decided before the Code took effect. See also *Abubaker v. Kalutana*.³ Section 289, then, was intended to enact a legal principle already in force. Its object was not to qualify or neutralise the change of law effected by section 238. It had a principle of its own. The principle

¹ (1906) 10 N. L. R. at p. 481.² (1889) 1 S. C. R. 73.³ (1889) 9 S. C. R. 32.

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of section 289 appears to be that after sale and until conveyance the judgment-debtor and any person holding under him and deriving title through him holds any legal title he may possess in trust for the purchaser, and that though what is called the "legal estate" does not vest in the purchaser till the sale, and although until that event he has only an "equitable" estate, yet when once the conveyance is executed, the grantee is deemed, for the purpose of all rights and transactions that depend on his title, to have been vested with his legal estate from the date of the sale. (See *Silva v. Hendrick Appu*.¹) Thus, if the purchaser has made any conveyance in the interim, such a conveyance is deemed to have passed the title, even, though at the date of the conveyance, title had not actually accrued. Similarly, the purchaser is entitled to all rents and profits, as though he were owner, and the debtor meanwhile is only entitled to such limited rights as are given him by section 231. But though the purchaser is thus vested with the debtor's legal estate from the date of the sale, this is always subject to any derogation from that legal estate that may have taken place in favour of any other parties, whose rights the Code elsewhere recognizes.

The principle which section 289 was intended to embody had, thus, nothing to do with the principle of section 238. It had no reference to the section. It was simply concerned with bridging over the inevitable gap between sale and transfer, and regulating the rights and the effect of the transactions of all persons concerned in the interim.

Mr. E. W. Jayawardene laid great stress upon the words in section 289 "or of any person holding under him or deriving title through him," and insisted that they indicated an intention that the rights of any persons claiming by virtue of a title derived from the judgment-debtor between sale and transfer should be extinguished by the relation back. As a matter of fact, however, after a careful consideration of the section, I do not believe that the words "person deriving title through him" were ever intended to include a purchaser from a judgment-debtor. The words no doubt seem wide enough to cover such a case, but I think that a fuller examination of the section will show that they were not intended to do so. As my brother Eganis suggested during the argument, the words "holding under him" refer to lessees, and the words "deriving title through him" are intended to comprise persons deriving title by inheritance or as executors or administrators. There is one consideration which seems to me conclusive. The only purchasers in question are purchasers since the sale. Mr. Jayawardene concedes that purchasers on private alienations after an unregistered seizure are protected, at any rate, up to the sale. What is the sense, then, of saying, as Mr. E. W. Jayawardene would make the section say, that "the right and title of purchasers from the judgment-debtor since

¹ (1899) 1 N. L. B. 12.

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the sale is not divested by the sale?" How could a right acquired after a sale be divested by it? Further, the words cannot refer to alienations between seizure and sale, as such alienations are not affected by the relation back. It appears clear, therefore, that the words do not refer to persons claiming under alienations at all, whether since the sale or since the seizure. If such persons had been in contemplation, I think they would have been described in the same formula as that used immediately before in section 287, that is, "persons claiming under a title created by the judgment-debtor."

I would, therefore, hold that the persons referred to in section 238 were not in the contemplation of section 289; that section 289 was enacted in connection with a wholly different principle; and that any reference to the "legal estate" of the debtor, which it may contain, must be read subject to any derogations from that "legal estate," which the law has elsewhere either expressly or by implication recognized. In other words, the relation back of the purchaser's title was not intended to override any competing title, but merely to secure that all rights and transactions which have arisen or taken place in the interval on the footing of a title which was "equitable" only should be deemed to have arisen or to have taken place upon the basis of a legal title.

For these reasons, therefore, I would uphold the previous decisions of this Court, affirm that of the learned District Judge, and dismiss the appeal, with costs.

ENNIS J.—I agree.

DE SAMPAYO J.—

I am unable to uphold either of the contentions on behalf of the appellant. It was, in the first place, argued that the provisions of section 289 of the Civil Procedure Code were absolutely operative in all cases; and that, on the confirmation of an execution sale and the issue of the Fiscal's conveyance, the title of the purchaser by relation back to the date of sale prevailed over any intermediate alienation by the execution-debtor. I think this is too large a proposition, for it takes no account of a case in which the seizure may not have been registered as provided in section 238 of the Code. It would involve our holding, as indeed Mr. E. W. Jayawardene boldly invited us to do, that there was no meaning or effect in the registration of seizures, and that section 289 would operate so as to squeeze out a private alienation whether the seizure was registered or not. This cannot be right. Section 238 of our Code is based upon section 276 of the old Indian Code, where, however, there is nothing corresponding to the provision for registration in our Code. This provision was deliberately added, and some meaning must be given to it. It appears clear that our Code intended registration of the seizure to be

a condition for making the subsequent sale effective against alienation by the execution-debtor, in whom section 289 itself declares the title remains vested until the confirmation of the sale and the execution of the conveyance in favour of the purchaser. Registration of the seizure is a safeguard, on the one hand, on behalf of the execution-creditor who may thus prevent the execution being rendered nugatory by a private alienation, and, on the other hand, on behalf of a person who may *bona fide* deal with the debtor in ignorance of any seizure. If the seizure is not registered, the necessary implication of section 238 is that a *bona fide* private alienee is *statim securus*. I think that section 289, as regards relation back, must be read in the light of section 238, and its operation should not be extended to a case where the seizure has not been registered. Section 289 is not intended to override the effect of section 238, but is a general provision connecting the conveyance with the sale and giving to the purchaser in an appropriate case the advantages of ownership as from the date of the sale. Having once declared that the title of the debtor was not divested by the sale until the confirmation of the sale and the execution of the Fiscal's conveyance, it had necessarily to state what would be the result if the sale was confirmed and the conveyance executed. I need not dwell on that point further, because I adhere to the opinion expressed by me in *Hendrick v. Deen*.¹

Mr. Jayawardene, in the second place, argued that, even if the registration of the seizure was an element of consideration, the private alienations, which would be protected in case of non-registration, were only those effected before the sale and not thereafter. This argument is equally untenable. It is in the teeth of section 238 which refers to alienations after the seizure and before the sale "and conveyance of the property by the Fiscal," and of section 289 which provides that if the sale is confirmed by the Court "and the conveyance is executed in pursuance of the sale" the grantee in the conveyance is deemed to have been vested with the legal estate from the time of the sale. It is thus clear that, in the case supposed, alienations made up to the date of the conveyance are protected. The present case is one of that kind.

In my opinion the appeal fails, and should be dismissed, with costs.

Appeal dismissed.

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¹ (1916) 3 C. W. R. 205.