

1926.

Present: Garvin and Lyall Grant JJ.

ABUBACKAR v. TIKIRI BANDA.

295—D. C. Kurunegala, 10,915.

Action under section 247 of the Civil Procedure Code—Property bought at Fiscal's sale—No conveyance—Claim by purchaser—Seizable interest—Action rei vindicatio.

Where the purchaser of property at a Fiscal's sale, who had not obtained a Fiscal's conveyance, claimed the property when it was seized in execution of another writ,—

Held, that in the absence of a Fiscal's transfer, the judgment-debtor had a seizable interest in the property at the date of the seizure and that the seizure was regular.

Held, further, as the purchaser without a Fiscal's conveyance had no title, the seizure of the property as that of the judgment-debtor in whom the title was at that date vested was a lawful act which could give the purchaser no cause for an action *rei vindicatio*.

A PPEAL from a judgment of the District Judge of Kurunegala. The facts are stated in the argument.

Hayley, for plaintiff, appellant.

This is an action under section 247, and the learned District Judge purporting to act on the authority of *Silva v. Nono Hamine*¹ has dismissed plaintiff's action on the legal issue "has plaintiff a cause of action against the defendant?"

Plaintiff was the purchaser in execution under writ issued in C. R. 1,033, Kurunegala. Sale took place on January 31, 1925, but no Fiscal's transfer was issued till June 20, 1925. In the meantime the present defendant who had a decree against some of the same judgment-debtors in D. C., Kurunegala, 9,931, seized the same property on April 30, 1925, and sold it on June 5, 1925.

Present plaintiff then claimed on the footing of his sale but the claim was dismissed on July 21, 1925, and thereafter he brought this action.

The case referred to by the learned District Judge is in the first place the converse of the present case. There the plaintiff was the creditor and he certainly must be referred to the date of seizure. With reference to the dictum that "the rights of a creditor as well as of the claimant must be considered as at the date of seizure," this must be considered to be mere *obiter* in view of the fact that that action might well have been decided on other grounds.

¹ (1906) 10 N. L. R. 44.

In a section 247 action it is title that is investigated, and if the title has, since action brought, been perfected, no advantage is gained by dismissing the present action and referring the plaintiff to a *rei vindicatio* action. There is the prayer for title and this action might be converted into a *rei vindicatio* action. There is precedent for this procedure *Ibrahim v. Bawa Sahib*.¹

Even if the law be as stated in *Silva v. Nono Hamine (supra)*, there is clear authority for the proposition that the earlier Fiscal's transfer prevails (*Aserappa v. Weeratunga*²) and, therefore, *prima facie* plaintiff has better title. This is, therefore, a deserving case in which it would be in the interests of all parties to convert this action into a *rei vindicatio* action.

H. V. Perera, for defendant, respondent.—The crucial question at either the claim inquiry or in a section 247 action is, had the judgment-debtor an interest in the property at the date of seizure.

It is hardly necessary to argue that if the judgment-debtor had some interest then a creditor was fully entitled to seize it for what it was worth.

That being so, no distinction can be drawn between the cases where a creditor comes into Court as plaintiff and where a claimant is plaintiff.

A similar case was dealt with by Wendt J. in *Baba Singho v. Don Salmon*,³ and in this case *Silva v. Nono Hamine (supra)* was followed, and the dismissal of plaintiff's action was affirmed.

Hayley, in reply.—In *Baba Singho v. Don Salmon (supra)* there was no Fiscal's transfer even at date of section 247 action. In the present case our Fiscal's transfer was long prior to action brought.

July 7, 1926. GARVIN J.—

The parties are agreed that the land in respect of which this action was brought belonged in common to five persons Dingiri Banda, Dingiri Amma, Tikiri Menika, Ukku Banda, and Bandara Menika.

In pursuance of a writ issued in case No. 1,033 of the Court of Requests of Kurunegala against these five persons the land was seized and sold in execution and purchased by the plaintiff on January 31, 1925. The sale was confirmed on April 2, 1925, but no Fiscal's conveyance was executed till June 20, 1925.

In District Court case No. 9,931 the defendant who sued on two mortgage bonds executed by Dingiri Banda and Ran Menika obtained judgment against two persons referred to as the legal

¹ 26 N. L. R. 71.

³ 4 A. C. R. 75.

² 14 N. L. R. 417.

1926.

 GARVIN J.

Abubackar
v. Tikiri
Banda

representatives of their estates and presumably after exhausting the property mortgaged obtained writ and caused their interests in this land to be seized on April 30, 1925.

The present plaintiff claimed the land but his claim was disallowed on the ground that he had not then obtained a Fiscal's conveyance and was not therefore in a position to establish an interest in the land.

In this action he is seeking to establish his right to the land and seeks a declaration of that right, and also that the land is not liable to seizure and sale under the defendant's writ.

His action was dismissed on the ground that at the date of seizure the interests in dispute were still vested in the judgment-debtors inasmuch as they had not been divested of those interests till the Fiscal's conveyance was executed on June 20, 1925.

The circumstances which gave rise to this action, the form of the pleading and of the prayer and the fact that it was brought within 14 days of the disallowance of the claim clearly identify it as an action brought for the special purpose of releasing this land from seizure and sale in execution of a writ. It comes within the category of cases referred to in our reports as actions under section 247. In such cases the defendant if he is the seizing judgment-creditor asserts no title of his own. He is there to justify his seizure and retain the benefits of it on the ground that at the date of the seizure his judgment-debtor had a seizable interest. It is contended therefore that the rights of parties to a proceeding under section 247 must be determined as at the date of seizure, and if at that date the judgment-debtor had a seizable interest the seizure is in order and may not be set aside. If this submission is sound the plaintiff must fail, as it is admitted that the Fiscal's conveyance under which he claims to have derived title was not executed until a date long subsequent to the seizure. In *Silva v. Nono Hamine*¹ a Bench of three Judges of this Court had under consideration the converse case of an action by the creditor against the successful claimant. The title set up was a title which accrued to the judgment-debtor subsequent to the seizure. The Court held that the question which arose in an action under section 247, was whether or not the debtor had an interest at the date of seizure. That case might have been disposed of on the ground that the title of the judgment-debtor accrued after the filing of the action, but it was not. The decision was based on a consideration of the sections of the Code relating to claims to property under seizure which it was thought rendered it impossible "to avoid the conclusion that the rights of the creditor as well as of the claimant must be considered as at the date of seizure."

¹ (1906) 10 N. L. R. 44.

The case of *Baba Singho v. Don Salmon*¹ is the case of an action under section 247 by an unsuccessful claimant whose claim was disallowed on the ground that he had not obtained a Fiscal's conveyance and was not therefore vested with title at the date of the seizure under which he claimed. Wendt J. followed the ruling in *Silva v. Nono Hamine (supra)* and affirmed the dismissal of the action.

1926.
GARVIN J.
Abubackar
v. Tikiri
Banda

Again in *Ibrahim v. Bawa Sahib*,² Ennis J. acted on the law as settled in *Silva v. Nono Hamine (supra)*.

It was contended, however, that this is an action *rei vindicatio* which the plaintiff has a right to maintain. To this I cannot assent. Inasmuch as the plaintiff had no title the act of the defendant in causing the property to be seized as that of his debtor in whom the title was at that date vested was a lawful act which could give him no cause of action. Since the plaintiff obtained his conveyance the defendant did no act which gave him a cause of action.

In *Baba Singho v. Don. Salmon (supra)* Wendt J. declined to treat such an action as this as an action *rei vindicatio* even as an indulgence. And in *Ibrahim v. Bawa Sahib (supra)* it was only as an indulgence the claimant was permitted to prosecute the action as an ordinary action *rei vindicatio*.

In view of the statement in the answer that the premises under seizure had been sold and purchased by the defendant I was disposed to consider whether a similar indulgence might be granted in this case. But upon a perusal of the record of the case in which the seizure was made I can find no report of such a sale and no trace of its confirmation.

The plaintiff must, I think, be left, if so advised, to vindicate his rights (if any) in other proceedings.

The appeal is dismissed with costs.

LYALL GRANT J.—I agree.

Appeal dismissed.

¹ 4 A. C. R. 75.

² (1924) 26 N. L. R. 71.