April 5, 1911

Present : Middleton J. and Van Langenberg A.J.

RAMANATHAN CHETTY *v.* TAMBYAH *et al.*

31—*D. C. Jaffna* 7,310.

Writ of sequestration—Seizure of movables—Manual—Private sale after seizure—Purchaser buying without knowledge of seizure—Civil Procedure Code, ss. 227, 236, 653, 657, and 661.

The Fiscal, entrusted with a writ of sequestration, did not place the property sequestered—a brig—in the custody of one of his officers, and there was nothing to indicate that the brig was under seizure. The judgment-debtor sold the ship after the " seizure " to a person who had no knowledge of the seizure.

Held, that the provisions of section 236 of the Civil Procedure Code did not affect the purchaser's title.

MIDDLETON J.—The seizure of movable property under section 227 of the Civil Procedure Code must be manual, *i.e.*, there must be an actual and effective seizure sufficient to show to any person inspecting the ship for the purpose of purchase that the ship was in *custodia legis.*

THE facts are fully set out in the judgment of Middleton J.

Bawa, for the plaintiff, appellant.—There was no proper sequestration of the brig. Form No. 38 of the Civil Procedure Code (Schedule II.), which has to be read with Form No. 104, commands the Fiscal receiving a writ of sequestration to retain and secure the goods sequestered. The Fiscal did not do so. There was nothing in the brig to show that it was under seizure.

Under section 227 the seizure of movable property has to be manual ; there must be actual seizure, and the attaching officer must keep the property in his custody or in the custody of his officers. See *Pereira's Institutes of the Laws of Ceylon, vol. I., p.* 327.

The plaintiff bought the ship without any notice of the seizure. The maxim *mobilia non habent sequalam* applies. See *Ramen Chetty v. Campbell* [1].

Balasingham, for the first defendant, respondent.—Sequestration of movables has to be effected in manner provided by section 227 (see section 657).

Section 227 gives the Fiscal the liberty to do one of three things : (1) The Fiscal may keep the property in his own custody, if either the writ-holder or the debtor advances or secures the necessary expenses

[1] *(1896) 2 N. L. R. 94.*

therefor ; (2) the Fiscal may, if the owner or possessor or writ-holder give security, permit him to take charge of the property until sale ; or (3) the Fiscal may, if such expenses are not advanced or secured, or if the security is not given, make a special return thereof to the Court ; in such a case the Fiscal is not responsible for the due custody of the property.

It is clear, therefore, that for a seizure to be "manual" within the meaning of section 227 it is not necessary that the attaching officer should keep the property in his custody.

The Legislature has purposely modified the words of the corresponding section (269) of the Indian Code, which runs as follows : " The attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody." But even under the Indian Code it was held that actual seizure was not necessary. See *Toolsa v. The Bombay Tramway Co.*,[1] *Multan Chand v. Bank of Madras.*[2]

The word " retain " in Form 38 of the Civil Procedure Code cannot have the meaning of keeping in actual possession, for in the form the word " retain " refers to lands as well as goods. In the case of lands the Fiscal never remains in possession after seizure.

The maxim *mobilia non habent sequalam* does not affect to section 236 of the Civil Procedure Code.

Bawa, in reply.

Cur. adv. vult.

April 5, 1911. MIDDLETON, J.—

This was an action under section 247 of the Civil Procedure Code by a claimant against a judgment-debtor, seeking that he may be declared the owner of the brig No. 144 called " Santhanamaria Nayaki," and for damages at Rs. 75 per mensem from April 11, 1910, till restoration for the seizure.

In action No. 6,979, D. C., Jaffna, the first defendant obtained judgment against the second defendant, and under writ issued therein seized the brig as the property of the second defendant on April 11, 1910. The plaintiff claimed the brig by purchase from the second defendant.

The first defendant alleged that the sale to the plaintiff was fictitious, and made with a view to defraud the first defendant of the amount due on his judgment in No. 6,979, D. C., Jaffna, and claimed the dismissal of the plaintiff's action, and in reconvention that plaintiff be adjudged to pay to the first defendant the sum of 75 cents per diem for watching the said brig from April 16, 1910. The second defendant did not answer.

[1] *11 Bom. 448.* [2] *27 Mad. 346.*

The following admissions were made on the settlement of issues :—

(1) The boat was sequestered on an order of sequestration dated November 10, 1909. The sale to the plaintiff's vendor Chelliah by Gabriel was on February 14, 1910.
(2) On March 31, 1910, the plaintiff bought it from Chelliah.
(3) On April 11, 1910, it was seized for the decree-holder in 6,979.
(4) It was claimed by this plaintiff on April 19, 1910. The boat was registered at the Customs on January 12, 1910, in the name of Gabriel. The subsequent sale was duly entered in the Customs Register.
(5) It was further admitted that neither the judgment-creditor nor the debtor gave security to the Fiscal when the boat was sequestered, and also the defendant obtained judgment against Gabriel on February 10, 1910.

Issues :—

(1) Did the Fiscal take possession of the boat after sequestration, or did it remain in the possession of Gabriel after the sequestration ?
(2) In whose possession was the boat when it was sold by Gabriel to Chelliah on January 14 ?
(3) Is the sale by Gabriel to Chelliah or by Chelliah to plaintiff void ?

The District Judge held that the Fiscal in seizing the property under the order of sequestration and making a return to the Court had sufficiently complied with section 227 to render the seizure a valid one ; that the seizure was a continuing one ; that the judgment debtor knew of it, and having sold at his peril the sale was void under section 236.

In his judgment, however, the District Judge does not consider the position of the purchaser from the judgment-debtor or his vendee, the plaintiff in this case. It is not proved or admitted that the plaintiff or Chelliah, his vendor, knew of, or had reason to know of, the seizure under the sequestration.

In my opinion the seizure of movables to bind a third party must be an effective seizure, that is to say, there must be something done, or apparent, to show it, or proof of, or inference of, knowledge on the part of the third party that the property seized was in *custodia legis.*

In England the Sheriff leaves a man in possession, or in the case of an Admiralty seizure of a ship the warrant is nailed to the mast and a man put in possession. In the present case the Fiscal made the seizure of the ship on the writ of sequestration on November 10, 1910, and left the judgment-debtor in possession without security, and to indicate the acknowledged ineffectiveness of his act made a

fresh seizure on the writ of execution unde the judgment in D. C. Jaffna, 6,979, on April 11, 1910, after the sale by the judgment-debtor to the plaintiff's vendor Chelliah, and after the sale by Chelliah to the plaintiff. Sequestration under section 653 of the Code is by section 657 to be made in the manner provided for seizure of property preliminary to sale in execution of a decree for money, and by section 661 subsequent seizure of the property under the plaintiff's decree is unnecessary. The property is considered to remain in *custodia legis.*

Under section 227, which would be applicable in this case, the seizure must be manual. The case of a ship is not specifically provided for, but I should read the word " manual " to mean an actual and effective seizure by some manual act indicative of the seizure, and sufficient to show to any person inspecting the ship for the purpose of purchase that the ship was in *custodia legis.*

Section 236, in my opinion, formed on the context of the Code, applies both to seizure in execution and on sequestration under section 653, and makes sales pending seizure void if the seizure is effected and made known in manner " hereinbefore provided."

As regards the manual seizure under section 227, there is no manner provided for making known the seizure, but I think its actuality should be apparent. But even without this section, I think that any sale of property in *custodia legis* would be held void by a Court, if it was proved that the purchaser was aware that the property was in *custodia legis.*

The options given to the Fiscal under section 227 include impliedly the right to pay a person to take charge of the property seized, as such charges if not paid by the debtor are a first charge on the property seized.

The Fiscal here did nothing to indicate his seizure, but as I understand, made a special return to the Court, leaving the judgment-debtor in possession without security, and when he got the writ of execution made a fresh seizure. In doing so he showed that he did not consider the property in his custody, as section 651 obviates the necessity of a fresh seizure.

In my opinion the ship was not under seizure when sold by the judgment-debtor to Chelliah, or when sold by Chelliah to the plaintiff, and even if it were, the sale ought not to be held void under the circumstances present here, unless it is proved that the purchaser knew or had reason to know of the seizure.

In my opinion the judgment of the District Court must be set aside and the judgment entered for the plaintiff, declaring him the owner of the ship in question, with costs in both Courts but as the question of damages claimed in the plaint and by reconvention has not been considered in the Court below, I would send the case back for the trial of any issues on these questions that may be raised by the parties, if the parties desire it.

April 5, 1911

Ramanathan Chetty v. Tambyah

VAN LANGENBERG A.J.—

I am of the same opinion. Both Chelliah and the plaintiff were purchasers for value. The record does not show what the Fiscal's officer did when he purported to execute the writ of sequestration. It is clear, however, that when Chelliah and the plaintiff bought, the brig was not in the custody of the Fiscal or of one of his subordinates, and there was nothing to indicate that the ship was under seizure, nor has it been proved that either of them had knowledge of the seizure. In these circumstances, it seems to me that section 236 of the Code will not affect the plaintiff's title.

Sent back.