

1926.

*Present: Jayewardene, A.J.*GUNAWARDENE *v.* FERNANDO *et al.*464—*P. C. Chilaw, 19,787.**Resistance to a Public Officer—Execution of writ—Delivery of boat—Claim of right—Penal Code, s. 183.*

The complainant, a Fiscal's officer, was entrusted with the execution of a writ for the delivery of a boat which was not in the possession of the judgment-debtor. In attempting to seize and deliver the boat to the judgment-creditor, the complainant was resisted by the accused, who claimed the boat as their property.

*Held*, that the accused were not guilty of obstructing a public servant in the discharge of his public functions.

*Canthapillai Odaiar v. Murugesu*<sup>1</sup> followed.

*Goonetilleke v. Attapattu*<sup>2</sup> not followed.

*J. S. Jayewardene*, for the accused, appellants.

September 27, 1926. JAYEWARDENE A.J.—

The appellants in this case has been convicted under section 183 of the Penal Code of resisting a public servant in the discharge of his duties and sentenced to pay a fine of Rs. 7.50 each. They appeal on certain points of law.

It would appear that one Laus Fernando obtained judgment against one Anthony Fernando, son of the 2nd accused, brother of the 1st accused and brother-in-law of the 3rd accused, in C. R. Chilaw, No. 22,256, for the delivery of a fishing boat or in the alternative for the payment of its value, Rs. 120. On decree entered in the case the plaintiff obtained a writ for the delivery of the boat to him. The writ was entrusted to the complainant, who is a Fiscal's officer, for execution. On his attempting to seize and deliver the boat to the judgment-creditor, he was resisted by the accused who claimed the boat as their property. Hence this prosecution.

I have called for the case in which the writ issued, and the proceedings there show that the action was originally instituted against Anthony Fernando and these accused; and that the 2nd accused claimed the boat by right of purchase and the other defendants disclaimed title and denied that they own or possess any boat. At the trial, judgment was entered of consent against 1st defendant alone. Nothing was said with regard to the 2nd defendant's claim to the boat. It was not waived.

<sup>1</sup>(1891) 1 *Ceylon Law Reports* 90.

<sup>2</sup>(1924) 6 *Ceylon Law Recorder* 63.

1926.

JAYEWAR  
DENE A.J*Gunawardene v.  
Fernando*

The question for decision is whether the accused who claim the boat as their property were guilty of an offence when they resisted the Fiscal's officer who attempted to deliver the boat to the judgment creditor. In the lower Court the proctor for the accused took several objections in law, and the learned Police Magistrate, although he viewed them sympathetically, felt bound to over-rule them. These objections have been pressed before me.

It seems to me, in the first place, that the fishing boat claimed by the plaintiff in the civil case was insufficiently described in the writ. In fact, it was not described at all except as a fishing boat. No mark, number, or size was given to distinguish it from any other fishing boat, and the evidence shows that the Fiscal's officer had to make inquiries at the spot to find out which boat it was he was directed to seize and deliver to the writ holder. He got no information from the judgment-debtor who was not there. The boat was not in the actual possession of the judgment-debtor. It was at a ferry. In India it has been held that the section of the Indian Civil Procedure Code corresponding to section 321 of our Code has no application to cases in which the movable property directed to be delivered is not in the possession of the judgment-debtor. (*Pudmanund Singh v. Dat Jha.*<sup>1</sup>) That principle seems to me to be a sound one, especially in a case like the present where there is nothing to distinguish the movable property referred to in the writ from other movable property of the same kind. If the property is found in the possession of the debtor and he surrenders it to the Fiscal's officer, then there would be no doubt or difficulty; but if the Fiscal has to go to the spot and identify the property by inquiries set on foot by him, he might be misled and there might be trouble. In this case, when the Fiscal's officer failed to obtain delivery of the boat for the judgment-creditor he should have followed the procedure laid down in section 321 of the Code and reported such failure to court, and the judgment-creditor, if so advised, might have taken the steps laid down in that section. A criminal prosecution, in the first instance, appears to me to have been entirely ill-advised in the circumstances of this case.

The main question, however, is whether the resistance or obstruction offered by the accused in the circumstances above set forth makes them guilty of an offence under section 183 of the Penal Code. If I had to decide the question apart from authority, I would unhesitatingly say that they are guilty of an offence under that section as I did in *Goonetilleke v. Attapattu (supra)*. At the argument of that case my attention was not drawn to a decision of the Full Bench of this Court in *Canthapillai Odaiar v. Murugesu (supra)* which has decided the question in a different way. In that case the complainant, a Fiscal's officer, in executing a writ against property

<sup>1</sup> (1896) 1 *Calcutta Weekly Notes* 170.

1926.

JAYEWAR-  
DENE A.J.*Gunawar-  
dene v.  
Fernando*

attempted to seize as the property of the execution-debtor certain cloths lying in the accused's shop and claimed by the accused. The accused resisted the seizure, taking the goods out of the hands of the officer and replacing them in an almirah from which the officer had taken them. The Full Bench held that the property sought to be seized not being proved to be other than accused's the obstruction, not amounting to an assault or personal injury, was a lawful act in the exercise of the right of private defence of property, notwithstanding the provisions of section 92 (2) of the Penal Code, and did not constitute the offence contemplated by section 183 of the Code ; and Clarence J. thought that if the accused had done anything amounting to an assault upon the officer it might be that by the operation of section 92 the accused would have been open to conviction if charged with the assault. In the present case the accused was not charged with attempting to assault the Fiscal's officer.

This case was followed in *the Deputy Fiscal of Kalutara v. Babahamy*.<sup>1</sup> Whatever my own opinion may be, the Full Bench decision binds me, and I cannot decide the case according to my own view of the law.

In the circumstances the appeal must be allowed and the accused acquitted.

*Set aside.*

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<sup>1</sup> (1902) 3 Br. 90 (92).