Present: Lascelles C.J. and Wood Renton J. 1913.

OMER *v.* FERNANDO, *et al.*

196—D. C. Colombo, 31,171.

Seizure of judgment-debtor's property after death of debtor—Legal representative not made respondent to application for writ—Seizure and sale void—Civil Procedure Code, s. 341.

If a decree-holder wishes to execute his decree against property which belonged to a deceased judgment-debtor, he must apply to the Court to execute the decree against the legal representative under section 341 of the Civil Procedure Code.

Where at the date of the seizure the judgment-debtor was dead, and the legal representative was not made a respondent to the application for writ, the sale was held to be a nullity.

LASCELLES C.J.—The crucial question is whether the sale was a nullity—a sale which the Court had no jurisdiction to make, or whether, on the other hand, it was merely irregular, so that the provisions of the Code with regard to irregularities in sales are applicable. It would appear that if the failure to apply under section 341 is no more than an irregularity, the present order cannot stand in the absence of evidence of substantial injury to the execution-debtor's estate. If, however, the seizure amounted in law to a nullity, the property in question was never brought within the custody of the Court, and the subsequent sale was consequently void.

THE facts are set out in the judgment.

E. W. Jayewardene (with him *Zoysa*), for the plaintiff, appellant.—The respondents did not apply to the Court to have the sale set aside. The order is therefore bad.

[1] *S. C. Min., May 30, 1898.*

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The sale was confirmed without objection; it is too late to take steps in this case to have the sale set aside. Moreover, a mere irregularity is not a ground for setting aside a sale (*Silva v. Dias* [1]).

[Wood Renton J.—Section 282, Civil Procedure Code, deals only with irregularities in publishing and conducting the sale. There is no question of any irregularity here. The sale is a nullity.]

A separate action should be brought to get the sale set aside.

Once a Court has entered a decree, it is within the jurisdiction of the Court to execute the decree. Section 341 does not say that after the death of the judgment-debtor no writ can be executed against his estate. In this case the judgment-debtor died after the writ was issued. The death of a debtor after the issue of writ is not an irregularity which would vitiate the sale. Counsel cited *Malkarjun v. Narpari*,[2] *Sheo Brasad v. Hira Lal*.[3]

Bartholomeusz, for the substituted defendants, respondents.—The point whether the sale was bad was raised as an issue in the lower Court, and it is too late to object to that issue in this Court. A separate action for having the sale set aside would not lie (*Perera v. Abeyratna et al.*[4])

The Indian cases cited are no authority for holding that a seizure after the death of the judgment-debtor is valid. They only hold that the death of the judgment-debtor after the attachment does not vitiate the sale.

Cur. adv. vult.

February 6, 1913. LASCELLES C.J.—

This is an appeal from an order of the District Judge setting aside a judicial sale in the following circumstances. A writ was re-issued to recover the balance of the judgment debt, and on August 12, 1911, a land called Hitinawatta was seized, but before the date of the seizure, the judgment-debtor died. A sale was held on March 30, 1912, and confirmed on June 10, presumably in ignorance of the death of the execution-debtor. On June 21, on the motion of the plaintiff's proctor, the administratrix and administrator of the judgment-debtor's estate were substituted on the record as defendants.

On August 2 the judgment-creditor's proctor moved to draw from the money in Court the balance due to his client. The substituted defendants were noticed, and also the purchaser, and the former showed cause against the judgment-creditor's motion. The learned District Judge held that the seizure and sale were bad, inasmuch as they took place after the death of the defendant, and while there was no one on the record representing the estate of the deceased defendant. The sale was accordingly set aside, and the amount of the purchase money in Court directed to be returned to the purchaser.

[1] *(1910) 13 N. L. R. 125.*
[2] *I. L. R. 25 Bom. 837.*
[3] *I. L. R. 12 All. 441.*
[4] *(1912) 15 N. L. R. 414.*

On appeal it was contended that the order setting aside the sale was bad, inasmuch as it was not made on any application for that purpose, and also on the ground that a judicial sale cannot be set aside on the ground of irregularity, however material, unless it is shown that the applicant has sustained substantial injury.

With regard to the first point, it appears that when the substituted defendants appeared to show cause against the withdrawal of the money deposited in Court, they specifically raised the contention that the sale was bad, and in effect applied that it should be set aside. In view of the attitude of the substituted defendants, I am not disposed to attach much weight to the objection that the sale was set aside without formal application on that behalf. Neither do I think that it can be contended that the sale could not have been set aside without instituting an action for the purpose.

The question arising between the parties was for all practical purposes sufficiently formulated; it was a question "relating to the execution of the decree," and as such properly determinable under section 344 of the Civil Procedure Code by the Court executing the decree, and not by separate action.

The decision of the Privy Council in *Malkarjun v. Narpari* [1] throws much light on the principles which are applicable to difficulties of this nature. The crucial question is whether the sale was a nullity—a sale which the Court had no jurisdiction to make, or whether, on the other hand, it was merely irregular, so that the provisions of the Code with regard to irregularities in sales are applicable. It would appear that if the failure to apply under section 341 is no more than an irregularity, the present order cannot stand in the absence of evidence of substantial injury to the execution-debtor's estate. If, however, the seizure amounted in law to a nullity, the property in question was never brought within the custody of the Court, and the subsequent sale was consequently void.

The answer to this question appears to me to turn on the construction of section 341 of the Civil Procedure Code. The meaning of this section, as I understand it, is that if the decree holder wishes to execute his decree against property which belonged to his judgment-debtor in his lifetime, and which devolved on his representative at his death, he can do so only in the way indicated by the Code, namely, by applying to the Court to execute the decree against the legal representative. The principle appears to be clear. On the death of the judgment-debtor, the *dominium* vests in his legal representative. The legal representative cannot be bound by proceedings to which he is not a party.

It has been held in India (*vide Sheo Brasad v. Hira Lal* [2]) that the corresponding Indian section (section 234) applies only to cases where, at the death of the judgment-debtor, the property was not

[1] *I. L. R. 25 Bom. 337.*

[2] *I. L. R. 12 All. 441.*

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under attachment. It was considered that property under attachment must be considered as in the custody of the law, and that execution could issue against such property, notwithstanding the death of the judgment-debtor after attachment. But this decision is no authority for the proposition that a valid seizure can be effected after the death of the judgment-debtor, and at a time when no defendant is on the record, when the notice of seizure required by section 237 amounts to a notice of prohibition addressed to one who was no longer living.

I think it is clear that, where the property has not been seized before the death of the judgment-debtor, the legal representatives of the judgment-debtor are not bound by the sale. It is no answer that the sale in this case was confirmed by the Court, inasmuch as the property in question was never brought within the jurisdiction of the Court by means of a lawful seizure, and the order confirming the sale was made under the mistaken belief that the Court had jurisdiction, which it in fact had not, to confirm the sale. In my opinion the learned District Judge has come to a correct conclusion, and I would dismiss the appeal with costs.

WOOD RENTON J.—I entirely agree.

Appeal dismissed.