1923

Present : Jayewardene A.J.

CAREEM *v.* APPUHAMY *et al.*

154—C. R. Anuradhapura, 11,771.

Sequestration before judgment—Claim—Inquiry is not as to possession but as to title—Civil Procedure Code, ss. 658 and 659.

Where property is sequestered before judgment, and a claim is made and an investigation is held under sections 658 or 659 of the Civil Procedure Code, the question of possession is not decisive.

The Court has to be satisfied, before releasing the property from seizure, that the property was not the property of the defendant.

The Court should not exercise its discretion in favour of allowing an application for sequestration before judgment, unless the applicant has strictly complied with the requirements of section 653.

THE facts appear from the judgment.

E. W. Jayewardene, K.C. (with him *H. V. Perera*), for claimant, appellant.

J. Joseph, for plaintiffs, respondents.

July 30, 1923. JAYEWARDENE A.J.—

This is an appeal from an order of the Commissioner of Requests of Anuradhapura disallowing the appellant's claim to certain timber seized under a mandate of sequestration issued under section 653 of the Civil Procedure Code. The plaintiff instituted this action on a promissory note against two defendants on March

14, 1923. The note itself is dated May 23, 1922. On the same day his proctor moved for a mandate of sequestration on the ground that the plaintiff had no security to meet the amount of his claim, and that he was credibly informed, and verily believed, that the respondents were fraudulently alienating their property with the intention of defrauding him. A mandate of sequestration signed by the chief clerk of the Court issued on this motion, and timber worth Rs. 1,500 was seized by the Fiscal as the property of the second defendant. The seizure was on March 23, and the appellant made his claim on March 26. His claim was based on a notarial deed of sale No. 4,402 of March 30, 1923. The claim was investigated under section 658, and the Court rejected the claim on the ground that the property seized was still in the possession of the judgment-debtor even though he had sold it to the plaintiff. Now, the learned Commissioner does not say that the sale to the claimant was a fraudulent alienation, and that, notwithstanding the sale, the judgment-debtor still remained owner of the property. He rejects the claim because the property was in the possession of the judgment-debtor. Such an order might have been possible, under sections 244 and 245 of the Civil Procedure Code, in the case of property seized in execution of a decree, but under section 659, where the Court upon investigation " is satisfied that the property sequestered was not the property of the defendant, it shall pass an order releasing such property from seizure, and shall decree the plaintiff to pay such costs and damages by reason of such sequestration, as the Court shall deem meet." In this case the Commissioner has, I take it, found that the timber was not the property of the defendant at the time it was sequestered. In fact, the plaintiff himself in his affidavit which he swore in support of his application for sequestration said that the defendant had negotiated for the sale of this timber to the claimant, and that part of the timber had already been removed. It is contended for the plaintiff-respondent, that under section 659 it is sufficient for the plaintiff to satisfy the Court that the property sequestered was in the possession of the defendant, and that sections 244 and 245 applied to the results of investigations under section 658. I do not think so. I think under section 659 the Court has to be satisfied, before releasing the property from seizure, that the property was not the property of the defendant, and the Court should disallow the claim when the property is the property of the defendant. The question of possession is not decisive in an investigation under section 658 or section 659. The question the Court has to decide is, Who has the title to the property seized ? and its decision must be guided by the conclusion it comes to upon the question of ownership. This view is supported to some extent by the judgment of Wendt J. in the case of *Carimjee Jafferjee v. Andrew Pavin.*[1]

[1] *(1906) 3 Bal. R. 69.*

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I might also invite attention to the cases of *Caruppen v. Ussanar* [1] and *Saibo Marikar v. Anthony Fernando.*[2] In the circumstances, I think the order made by the Commissioner is wrong, and should be set aside. The appellant is entitled to his costs here and in the Court below.

There is one other matter I wish to point out. The record does not show that the application for sequestration was ever allowed by the Court. There is no entry on the motion paper. There is a minute in the journal which merely shows that the plaintiff moved for a mandate of sequestration, but there is nothing to show that it was either allowed or disallowed. The issue of a mandate of sequestration before judgment is not an ordinary step in the proceedings, and such a mandate should not be issued by the Court unless and until it is satisfied on the two grounds referred to in section 653, and these two grounds require the serious attention of the Court, and the Court should not exercise its discretion in favour of allowing the application for sequestration unless the applicant has strictly complied with the requirements of that section. In this case, as I have said, there is nothing to show that the Court had allowed or disallowed the application, and on this ground alone I would have had to set aside all the proceedings relative to the sequestration, if the objection had been taken by the appellant.

I therefore direct that the claim be upheld, and that the property be released from seizure.

Set aside.

[1] *(1901) 4 N. L. R. 379.*

[2] *(1899) 1 Tambyah 63.*