Present : Mr. Justice Middleton and Mr. Justice Grenier.

1909.
June 22.

MUTTURAMEN CHETTY *v.* SUPPRAMANIAN PULLE *et al.*

RAMASAMY, Claimant, Appellant.

D. C., Kurunegala, 3,482.

Concurrence—Money brought into Court to obtain release from arrest and placed to plaintiff's credit—Non-liability to seizure at the instance of other creditors—Civil Procedure Code, ss. 232, 350, 650, 652.

Where a person on being arrested in mesne process pays into Court the amount claimed by the plaintiff, and such amount is carried into the separate account of the plaintiff, with the consent of such person, by order of Court under section 350 of the Civil Procedure Code, no other creditor of the same person has a right to seize the said fund or to claim concurrence therein.

APPEAL from an order of the District Judge. The facts sufficiently appear in the judgment of Middleton J.

Bawa, for the claimant, appellant.

Sampayo, K.C., for the plaintiff, respondent.

Cur. adv. vult.

June 22, 1909. MIDDLETON J.—

The appellant in this case, who is the judgment-creditor of the second defendant in D. C., Colombo, 27,549, got judgment against him in that action on September 23, 1908, and on October 2 issued notice under section 232 of the Civil Procedure Code to the Kurunegala Court, by virtue of which the Fiscal, who was directed only to seize the sum of money deposited to the credit of case No. 3,482, issued a notice seizing in the hands of the Court the sum of Rs. 2,175 deposited to the credit of the plaintiff in that action.

It would seem that the plaintiff in this action filed plaint on August 17, 1908, and at the same time moved for, and on August 18 obtained, a mandate of sequestration and a warrant of arrest against the second defendant under sections 650 and 652.

The second defendant on August 24, 1908, tendered the sum of Rs. 2,175 into Court and obtained an order releasing him from arrest and withdrawing the mandate of sequestration. On September 17, 1908, the plaintiff moved under section 350 that the said sum of Rs. 2,175 should be carried to the separate account of the plaintiff, and this motion, by and with the consent of second defendant, was allowed.

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The plaintiff in this action obtained judgment against the second defendant on October 6, 1908, and on November 6, 1908, issued notice to the claimant-appellant to show cause why he should not draw out the said sum of Rs. 2,175 in satisfaction of this decree. The appellant opposed the motion, but on February 16, 1909, the District Judge held that the plaintiff was entitled to draw the money in question. The claimant appealed, and urged that he was entitled to preference on the sum in question until the plaintiff obtained an order of execution under section 352. For him it was argued (section 660) that sequestration gives no priority, that the money in question was paid in to free second defendant from a mandate of sequestration, and that by analogy the same principle would apply to it as to the property sequestrated. That sequestration is only intended to prevent fraud on the part of a debtor, not to give the diligent creditor a priority. That section 350 contains no provisions for making such an order, and, assuming a provision has been made elsewhere, must be read in conjunction with, and refers only to, chapter XXVII. of the Civil Procedure Code, sections 409 to 415, and is not intended to be applied as the plaintiff here has applied it. Counsel referred also to *Letchiman Chetty v. Abdul Rahiman;*[1] Rampini on the Indian Civil Procedure Code, section 489, page 737; *1 Allahabad H. C. 172* at page 185; *6 Madras H. C. 135* and Order 43, Rule 6, under the English Judicature Acts.

For the respondent it was contended that the money came into Court not owing to sequestration, but under section 650, as a deposit to free the second defendant from arrest; that the order under section 350 was by consent of the defendant; that section shows that such a deposit was intended as a hypothecation for a prospective judgment; that section 350 was not intended to apply to cases under chapter XXVII.; that *Letchiman Chetty v. Abdul Rahiman* did not apply here, as it refers to goods seized in sequestration; that under section 652 there is no provision for the deposit of money in lieu of a sequestration of goods; and that under section 650 the deposit is hypothecated for the payment of the defendant's debt, but by the order under section 350 it becomes the property of the plaintiff up to the amount of the judgment contemplated. These, I think, are the principal arguments addressed to us by counsel on both sides.

The case seems to me to depend on the question, to whom did the money belong at the date of the claimant-appellant's seizure? In *Letchiman Chetty v. Abdul Rahiman*[1] it was held that sequestration gave no priority to the diligent creditor, but was only intended to act as a preventive of fraud on the part of the debtor, and the goods sequestrated still remained vested in the debtor, subject to all his creditor's right therein.

[1] *(1908) 3 A. C. R. 143.*

The right of concurrence is a privilege peculiar to the Civil Law, and it was held by this Court in *Findlay v. Miller*,[1] that concurrence is not granted except in cases of execution against property, and could not be granted as against the proceeds of an execution against the person. In the present case the deposit in Court of Rs. 2,175 was no doubt in the main made with a view to free the person of the second defendant from arrest. The principle underlying the case of *Findlay v. Miller* (*ubi supra*) in which the learned Judges refer to authorities in support of their contention which they do not quote, must be that the diligent creditor, who has acted with such zeal in the matter of his debt as to secure the arrest of his debtor who has personally paid him to obtain his liberty, is not to be deprived of the full fruits of that diligence. In the present case the money was paid into Court to avoid arrest of the second defendant, and was ordered by the Court, with the consent of the second defendant, to be carried to the separate account of a specified person, viz., the plaintiff. It is not argued that this order is altogether *ultra vires*, but that section 350 only contemplates such orders as ancillary to chapter XXVII., but I cannot see why the Court is not justified in making such an order under the circumstances. There is no undue or fraudulent preference in giving a creditor money who is suing you for a debt you admit to be partly due. The effect of putting it in the name of the plaintiff was to appropriate it to his use, and enable him under section 350 to draw it out if he had chosen without notice to any one by an order of the Court. The money, to use a metaphor, is put into the plaintiff's box by consent of the defendant, while the Court holds the key, the intention being that the plaintiff should pay his debt in full out of the money in the box as soon as the Court has decided the exact amount due, and thereupon given him the key.

In my opinion, therefore, the learned Judge was right in holding that the money was vested in the plaintiff at the time of the seizure, and for that reason was not liable to seizure at the hands of the claimant. I think also that, inasmuch as the money in question was in effect the proceeds of a writ against person, on the authority of *Findlay v. Miller* [1] the claimant-appellant would not be entitled to concurrence therein, and *a fortiori* would be deprived of preference. It is unnecessary, however, to hold this in view of my ruling on the appropriation of the money to the plaintiff's use by the order of the Court under section 350, as there has been no argument on the point. The appeal, in my opinion, should be dismissed with costs.

GRENIER A.J.—I entirely agree.

Appeal dismissed.

[1] (*1863–1868*) *Ramanathan 124.*