[FULL BENCH.] June 28, 1910

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

SEKADY PULLE *v.* THE FISCAL, CENTRAL PROVINCE.

65, D.C., Kandy, 19,093.

Application to set aside Fiscal's sale—Fiscal cannot be made a party to proceedings without his consent—Fiscal not a necessary party—Civil Procedure Code, s. 282.

The Fiscal is not a necessary party to an application under section 282, Civil Procedure Code, for the annulment of a Fiscal's sale on the ground of material irregularity, and he cannot be made a party to such applications against his will.

THE facts are fully stated in the judgments.

Hayley, for the appellant.—Section 282 of the Civil Procedure Code does not make the Fiscal respondent to these proceedings.

Section 362 requires a month's notice of an intended action to be given to the Fiscal. Section 362 has deliberately altered the law as it was contained under sections 20 and 21 of the Fiscal's Ordinance, No. 4 of 1867. This is an " action " within section 6 of the Civil Procedure Code; it is a summary proceeding (*Muttukumara Swamy v. Nannitamby* [1]).

Only persons against whom there is a prayer for relief can be made parties to an action. See section 14 of the Civil Procedure Code. No relief is prayed for against the Fiscal; the only reason that can be put forward for making the Fiscal a party to these proceedings against his will is that costs can be recovered from him.

An agent—the Fiscal is merely a statutory agent—cannot be joined as a party to an action solely to make him liable for costs. See *Barnes v. Addy*,[2] *Burstall v. Beyfus*,[3] *Ferguson v. The Government et al.*[4]

The Fiscal though an agent is bound to undertake the agency, and should be given the full benefit of the special exemption which the Statute has given him. Clearly, if any sum had been claimed as damages here, he would have been entitled to plead the provisions of section 362; how then can he be deprived of the benefit of that section merely by omitting the claim for damages? Further, if a regular action is also instituted against him, he may have to pay costs twice over. The suggestion in the judgment appealed from, that unless the Fiscal were joined in these proceedings the party injured might be met in any subsequent action by a plea of prescription, has no substance in it, for the cause of action arises immediately the irregular sale takes place (*Muttappa Chetty v. Conolly*,[5] *Karolis v. Woutersz* [6]).

[1] *(1904) 4 Tam. 3, 4.*
[2] *L. R. 9 ch. 244.*
[3] *26 Ch. D. 35.*
[4] *9 W. R. 158.*
[5] *(1882) Wendt 232.*
[6] *(1888) 8 S. C. C. 153.*

June 28, 1910

Sekady Pulle v. The Fiscal, Central Province

The claim, if any, against the Fiscal is not in respect of the same cause of action.

Bartholomeusz, for the respondent.—It has been the practice of most Courts to make the Fiscal a party to applications under section 282.

An application under section 282 is not an action.

The cause of action is the same; the same grounds of irregularity are urged against both the respondents to this proceeding.

If the Fiscal has a right to intervene in such proceedings, it is but just that he should be liable to be made a party respondent whenever necessary—every right has a correlating duty.

Hayley, in reply.—The practice of Courts has not been uniform.

Cur. adv. vult.

June 28, 1910. HUTCHINSON C.J.—

In this case the defendant, the execution-debtor, applied to set aside a sale which took place under a writ of execution against her (as administratrix of the deceased debtor). The grounds for the application were certain alleged material irregularities in the publishing and conducting of the sale, in consequence of which the applicant suffered substantial loss. The sale was of certain shares in land; the purchaser was the plaintiff (the execution-creditor); and he and the Fiscal were made respondents to the application. The Fiscal objected that he was improperly made respondent; the District Judge held that he was a necessary party to such an application; and this is the Fiscal's appeal against that ruling.

The appeal was first argued before Wood Renton J. and Grenier J., who referred it to a Court of three Judges, and in the meantime caused inquiries to be made from the District Courts as to whether it has been the practice to make the Fiscal a respondent to such applications, and if so, whether costs have ever been awarded against him, and whether, if he is not made a respondent, it has been usual to give him notice of the application. It appears from the replies that the practice has not been uniform: in Galle, Kandy, Kurunegala, and Matara the practice has been to make the Fiscal a respondent, and costs have been awarded against him; in Colombo he has in most cases been made respondent, but it is not the invariable practice, and there have been no cases, so far as the Judge can ascertain, in which costs have been awarded against him; in Kegalla "it has been the practice in several instances" to make him a respondent, and in two instances costs have been awarded against him; in Badulla and Jaffna it has not been the practice to make him a respondent or to give him notice.

Section 282 requires that the purchaser shall be made respondent to the application, but says nothing about the Fiscal. Section 362 enacts that he shall be protected from civil liability for loss or damage caused by, or in the course of, or immediately consequential upon, the

execution of the process by him or his officers, except when it is attributable to any fraud, gross negligence, or gross irregularity of proceeding, or gross want of ordinary diligence, or abuse of authority on the part of the person executing the process; and that no action shall be maintainable against him in respect to his execution of the process, unless a month's previous notice in writing is given to him; and the action must be brought within nine months after the cause of action has arisen. I think that it is contrary to the spirit and intention of section 362 to order the Fiscal to pay the costs of such an application as this; for it is intended that he shall incur no liability, except for the fraud or other misconduct mentioned in that section, and that he must have a month's notice before action. And I see no other object in making him a respondent, except that he may be ordered to pay the costs of the application if it is successful. I think that he ought not to be made respondent; it may be convenient to give him notice of the application, but I do not think it is essential.

It is, of course, hard on the purchaser to make him pay the costs of the application if he was quite innocent in the matter of the irregularity, and I do not think that he ought to be ordered to pay them; but that is a question which does not arise now, and I prefer not to decide it. But I am clearly of opinion that the Fiscal cannot be ordered to pay them.

I think that the appeal should be allowed with costs.

MIDDLETON J.—

This is an appeal against a decision that the Fiscal is a necessary party to an application under section 282 for the annulment of a Fiscal's sale on the ground of a material irregularity in the publishing and conducting of it. It was argued by Mr. Hayley, on behalf of the appellant, that the present application claimed no relief as against the Fiscal for damage, and upon the assumption that it was a proceeding in an action, and that no person could be made a party to an action against whom no right to any relief was claimed, the Court had no power to make the Fiscal a party. It was also argued that the terms of section 282 exclude the power to name the Fiscal as respondent. Under section 362 the Fiscal is only made liable for fraud, gross negligence, or gross irregularity of proceeding, or gross want of ordinary diligence, or abuse of authority on the part of the person executing the process; and no action shall be maintainable against him in respect to his execution of the process unless a month's previous notice in writing is given to him; and the action must be brought within nine months after the cause of action has arisen. He may also tender amends, and plead such tender. It seems to me, therefore, that section 362 limits the liability of the Fiscal in accordance with the provision. He is clearly not entitled to be made a plaintiff in such an application as the present, and I think he cannot be made a defendant except under section 14.

June 28, 1910

MIDDLETON J.

Sekady Pulle v. The Fiscal, Central Province

I think that even under section 18 the Court would only have power to add a person as defendant against whom the right to any relief is said to exist. I do not think that it is contended that in such an application as this a claim for damages could be maintained against the Fiscal, but the object is to make him pay the costs, if it appears the irregularity charged was his agent's. As in my opinion he is only liable under section 362, I do not think he ought to be made a party in such an application. The practice of the different District Courts in the matter seems to have varied, but I do not think there is any right to do more than give him notice on the hearing, and certainly no right to make him pay costs under those circumstances.

I would allow the appeal with costs.

WOOD RENTON J.—

The question raised in this appeal is whether the Fiscal is liable to be made a party to proceedings under section 282 of the Civil Procedure Code, with a view to setting aside a sale on the ground of material irregularity. The sale here in question was effected by, or under the directions of, the Fiscal for the Central Province in the execution of a decree obtained by the first respondent against the petitioner-respondent, who is the widow and administratrix of one Ibrahim Saibo Eruwady. The first respondent, the execution-creditor, was purchaser at the sale. The irregularities alleged by the petitioner-respondent were that notices of the sale were not posted in some conspicuous part of the village where the lands were situated or on the land themselves, and also that publicity was not given to the impending sale, by tom-tom beating, either at the time of or before the sale, as required by section 255 of the Civil Procedure Code. On August 9, 1909, the then Acting District Judge of Kandy made an order fixing the 3rd of the following September for the hearing of the case, and also that the Fiscal of the Central Province, as well as the first respondent, should then be heard if they appeared in Court before that date. The first respondent filed an affidavit traversing the allegations in the petition. The Fiscal also filed an affidavit, in which he stated that he was advised that he had been improperly joined as second respondent to the petition. The case apparently did not come up for argument till February 24, 1910, on which day the learned District Judge of Kandy held that the Fiscal was a necessary party to the proceedings, and that, therefore, he had been rightly made a respondent to the petition. The case was fully argued before Mr. Justice Grenier and myself on June 7. We thought it advisable, before deciding the important point of practice involved in it, that we should obtain information from the leading District Courts in the Colony as to what the *cursus curiæ* had been in the matter, and we accordingly directed the Registrar to forward to the District Courts of Colombo, Galle, Kandy, Kegalla,

Kurunegala, Jaffna, Badulla, and Matara the following series of questions, the replies to which are filed of record:—

" (1) Has it been the practice in your Court to make the Fiscal a respondent to petitions under section 282 of the Civil Procedure Code for the setting aside of sales on the ground of material irregularity ?

" (2) If so, for how long has such practice been in force ?

"(3) If it has been the practice to make the Fiscal a party to such petitions, have costs been awarded in any cases to your knowledge against the Fiscal on a sale being set aside ?

" (4) If it has not been the practice to make the Fiscal a party under section 282, has it been usual to give him notice of proceedings under that section ? "

The replies show that, except in Jaffna and Badulla, it has been the practice since the present Code of Civil Procedure came into force, and in some cases prior to that date, to make the Fiscal a party to applications with a view to setting aside sales in execution on the ground of material irregularity. There did not appear, however, to be any direct authority of a decisive character on the point. The case of *Aberan v. Jayewardena*,[1] which is reported as having decided that it is not misjoinder, in a suit to set aside a Fiscal's sale, to join the execution-creditor, the Fiscal's officer, and the purchaser, is of prior date to the Fiscal's Ordinance, No. 4 of 1867. Moreover, although the arguments in that case were fully reported, it is not easy to ascertain what was the exact *ratio decidendi*. Four grounds of demurrer are assigned, the first of which does not involve the question whether the cause of action had arisen against the Fiscal's officer, and although the Court over-ruled the demurrer, it is impossible to tell from the report on which of the grounds set out in the demurrer they acted in doing so. The case of *The Fiscal, Central Province, v. Appuhamy*,[2] which the learned District Judge of Kandy has referred to in his answers to our questions, is no authority on the point now before us. That case was decided by my brother Grenier and myself, and our decision was expressly based on the ground that the Fiscal had taken the objection that he was not liable to be joined under section 282 at too late a stage of the proceedings.

In view of the absence of judicial authority on the point, and of the provisions of sections 282 and 362 of the Civil Procedure Code, Mr. Justice Grenier and I referred the case to a Bench of three Judges, in order that the question might be settled once and for all. We have had the advantage of full and able arguments on both sides, and, speaking for myself, I have come to the conclusion that the Fiscal's appeal should be allowed. In arriving at this result I have not felt myself able to adopt one of the main arguments put before us by Mr. Hayley on behalf of the appellant. I do not think that an application to make a Fiscal a party to a proceeding under

[1] *(1859) 3 Lorenz 189.*

[2] *S. C. Min., July 6. 1910.*

June 28, 1910

WOOD RENTON J.

Sekady Pulle v. The Fiscal, Central Province

section 282 of the Code is an action. It follows, therefore, that the case before us cannot be regarded as in substance an action brought against the Fiscal without the notice prescribed by section 362. Moreover, I think that the provisos to section 362 of the Civil Procedure Code must be construed with reference to the right of action under that section. It seems to me, however, that both the spirit of section 362 and the express reference contained in it to the protection of persons charged with the duty of executing civil process from " civil liability for loss or damage caused by, or in the course of, or immediately consequential upon, the execution of such process " show that it was the intention of the Legislature to protect the Fiscal—I will take only the case now before us—from all civil liability for acts or omissions done or made in the execution of process, and having a legitimate foundation of authority (see *Cassim v. Liesching*,[1] *Miganchiga v. Elapata Appuhami*,[2] and *Brooks v. Welton*[3]), except in the cases distinctly indicated in the section itself. There can be no doubt but that the action of the Fiscal here in question had a legitimate foundation of authority. If, as the result of the proceedings, he should be mulcted in costs, there will be imposed upon him that " civil liability " which section 362 prohibits, save in the cases that it directly contemplates. I do not agree with the learned District Judge that he had any power under section 18 of the Civil Procedure Code to make the Fiscal a party to an application under section 282, inasmuch as his presence is not " necessary, " even although, in a certain aspect of the case, it might be convenient, for its determination. It was held by the Supreme Court, in the case of *Sinnetampi v. Kandapodi*,[4] that the Fiscal's liability to the execution-creditor and debtor in an action for damages sustained in consequence of a sale irregularly conducted was such a substantial injury within the meaning of the analogous provisions of section 53 of Ordinance No. 4 of 1867 as would give him a right to object to the confirmation of an execution sale on the ground of such irregularity; and there is old authority (see *Marshall 171*) to the effect that a Fiscal is entitled to notice of proceedings of this kind. But there is, in my opinion, no judicial authority which compels or entitles us to hold that he can be made a party to applications under section 282 of the Code against his will, and I think that we ought to decline to do so. Inasmuch as the right to an action under section 362 arises, provided that the conditions required by that section exist, whenever an irregular sale has been carried out (see *Muttappa Chetty v. Conolly*[5] and *Karolis v. Wouterse*[6]), the prescribed statutory notice of such an action may be given, if the party aggrieved is so advised, simultaneously with the proceedings under section 282. I would allow the Fiscal's appeal with costs against the petitioner-respondent here and in the District Court.

Appeal allowed.

[1] *(1887) 2 S. C. C. 6.*
[2] *(1881) 5 S. C. C. 27.*
[3] *(1886) 8 S. C. C. 23.*
[4] *(1889) 9 S. C. C. 29.*
[5] *(1882) Wendt 232.*
[6] *(1883) 3 S. C. C. 153.*