

1930

Present : Jayewardene A.J.

EMINONA v. MOHIDEEN *et al.*

24—C. R. Galle, 8,547.

*Registration—Notice of seizure registered—
Previous conveyance not registered—
Priority—Registration of Documents
Ordinance, No. 23 of 1927, s. 9 (1).*

The registration, under section 9 of the Registration Ordinance, No. 23 of 1927, of a notice of seizure effected under section 237 of the Civil Procedure Code gives such seizure priority over a deed which is anterior in date but which has not been duly registered.

APPEAL from a judgment of the Commissioner of Requests, Galle.

The second defendant by deed No. 756 sold the property in dispute to the plaintiff on September 29, 1927. The plaintiff registered this deed, but in the wrong folio, on September 30, 1927. Thereafter the first defendant, who was the judgment-creditor in D. C. Galle, No. 26,054, in which the second defendant was judgment-debtor, seized the property in dispute on December 8, 1928. This seizure was registered on December 11, 1928. The plaintiff claimed the property when it was seized, but his claim was dismissed. The plaintiff thereupon brought the present action under section 247 of the Civil Procedure Code to have it declared that the property was not liable to be seized and sold under writ in favour of the first defendant, and that the plaintiff be declared entitled to the property. The learned Commissioner of Requests entered judgment for the plaintiff with costs. The first defendant appealed.

N. E. Weerasooria, for first defendant, appellant.—The deed in favour of the plaintiff has been registered in the wrong folio and is in effect unregistered. It is therefore defeated by the subsequent registration of the notice of seizure of the same property by the first defendant. Under section 9 (1) of the Registration

Ordinance, No. 23 of 1927, a notice of seizure is a registrable instrument, and by section 7 (1) of the Ordinance its registration defeats a prior unregistered deed.

Soertsz (with him *E. F. N. Gratiaen*), for plaintiff, respondent.—Under section 9 (3) of the Ordinance the registration of a notice of seizure remains in force only for six months, so that on the trial date, November 22, 1929, the first defendant, not having re-registered his seizure, had no effectual instrument to rely on. In any event section 9 (6), which amended section 238 of the Civil Procedure Code, expressly states that a notice of seizure, if duly registered under the Ordinance, can defeat only alienations made after the seizure and registration of the notice of seizure (*Thambapillai v. Sellappah*).¹ The provisions of section 7 (1) cannot apply to a registered notice of seizure, inasmuch as no title is created by the mere seizure of property.

N. E. Weerasooria (in reply).—The first defendant's failure to re-register his notice of seizure does not matter. The original registration was in force at the time of institution of this action, and the rights of the parties must be determined as they existed at the date of institution (*Silva v. Fernando*,² *Silva v. Nona Hamine*³). The cases cited by Counsel for the respondent regarding the effect of registration of a notice of seizure relate to the law which existed before the Registration Ordinance, No. 23 of 1927, came into force.

July 15, 1930. JAYEWARDENE A.J.—

The second defendant in this case was the owner of three-allotments of land called Ela-addarawatta. By deed No. 756 dated September 29, 1927, registered on September 30, 1927, he sold them to the plaintiff. The first defendant, who is the present appellant,

¹ (1908) 2 Weerakone 2 ; 13 N. L. R. 70.

² 15 N. L. R. 499.

³ 10 N. L. R. 44.

under a writ issued in D. C. Galle, No. 26,054, seized the property on December 8, 1928. The plaintiff claimed the property when it was seized, but his claim was dismissed and he has brought this action to have it declared that the property was not liable to be seized, and sold under the defendant's writ, that the plaintiff be declared entitled to the property and that the seizure be released. The first defendant pleaded that the deed in favour of the plaintiff was executed fraudulently and in collusion, the second defendant rendering himself insolvent by the transfer. The first defendant also pleaded that the plaintiff's deed was not entitled to prevail over the first defendant's seizure which had been duly registered.

The second defendant, Babahamy, is the sister of the plaintiff's husband, who is now dead, and was the first defendant in the partition action case No. 21,905, D.C. Galle. The present plaintiff, Eminona, was also the plaintiff in the partition case. Pending the partition case the second defendant and seven others transferred their undivided shares of the land sought to be partitioned, second defendant's share being half, to the first defendant by deed No. 950 dated September 2, 1924. First defendant, who is a Moorman, paid Rs. 1,000 on his purchase in the presence of the notary. The plaintiff and second defendant are Sinhalese and are sisters-in-law and according to the first defendant live in the same house.

This deed No. 950 was held to be invalid by the Court having been executed during the pendency of the partition suit, and the first defendant instituted case No. 26,054 against second defendant for the consideration paid by him and obtained judgment, and in execution seized this property. On the question whether the deed in favour of the plaintiff is liable to be set aside as a fraudulent transaction, the learned District Judge while holding that the second defendant rendered her insolvent by the execution

of the deed, also found that the plaintiff has paid full value to the second defendant. I am not inclined to interfere with this finding of fact, although I have grave suspicions in my mind as to whether this was not a mere colourable transaction between the two sisters-in-law to defeat the first defendant.

The plaintiff's deed is registered in Division A, Vol. 174, folio 9, as appears in encumbrance sheet 103D. The seizure is registered in Division A, Vol. 179, folio 173, and there is an endorsement "for entire land, see 176/88—" as shown in encumbrance sheet 1D4. On a reference to A 176/88 one finds all the necessary cross-references, including A 179/173, but no reference is made to A 174/9, where the plaintiff's deed is registered. Under section 15 of Ordinance No. 23 of 1927, every instrument presented for registration shall be registered in the book allotted to the division in which the land affected by the instrument is situated, and in, or in continuation of, the folio, in which the first registered instrument affecting the same land is registered and an instrument, whether registered before or after the commencement of the Ordinance, is not to be deemed to be registered unless it is so registered, and under section 16 registration of an instrument is effected by entering the prescribed particulars in the proper folio. I would hold that the plaintiff's deed is not registered in the proper folio. The competition is between the first defendant's registered seizure and plaintiff's deed which is wrongly registered, or in effect is unregistered.

Under section 9 (1) a notice under section 237 of the Civil Procedure Code of a seizure of land effected after the commencement of the Registration Ordinance, that is after January 1, 1928, is an instrument affecting the land seized and may be registered under the Ordinance. The first defendant registered his notice of seizure on December 11, 1928, in the proper folio commencing

A 176/88 as required by law. By section 7 (1) an instrument unless it is duly registered is void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered. A notice of seizure is declared to be an instrument under the Ordinance and it creates an interest adverse to a previous transfer for valuable consideration. By a seizure a creditor gains an advantage and the judgment-debtor suffers a disadvantage.

It is contended that the only effect of the registration of the notice of seizure is to make any sale or disposition of the property after seizure void as against a purchase from the Fiscal selling under the registered seizure and his successors in title under section 238 of the Code as amended by section 9 (6) of the Registration Ordinance. That was undoubtedly the law under the Code, and in *Thambapillai v. Sellappah*¹ it was held that a conveyance anterior in date to the registration of a seizure was a good conveyance, unless it was fraudulent. The registration Ordinance, section 9 (1) declaring a notice of seizure to be an instrument affecting the land seized has, in my opinion altered the law, otherwise that provision would be of no effect and be unnecessary. In my view section 9 (1) was specially enacted to meet a case of this kind and to place a notice of seizure on the same footing as any other instrument or deed affecting land, and to make section 7 (1) apply to registered seizures, and to give registered seizures priority over previous deeds which are unregistered. I would therefore hold that the first defendant's duly registered seizure is entitled to priority over plaintiff's deed which is not registered in the proper folio.

Under section 9 (3) of the Registration Ordinance, registration of a notice of seizure remains in force for six months

only from the date of registration, but it may be re-registered as often as it may be necessary. I was somewhat attracted by the argument that six months has expired after the seizure was registered, and, there being no re-registration, the registration was of no effect. The point was not taken or considered at the trial, which took place on November 22, 1929, more than six months after the registration in December, 1928, and all the necessary facts as to re-registration may not be before me, to enable me to come to a correct conclusion. If the point had been taken, the first defendant may have re-registered his seizure and his rights may have revived. The point is not without difficulty. Further, the rights of the parties to a suit have to be determined as at the date of the commencement of action, and that is the point of time at which their rights are to be ascertained, as held by the Privy Council in *Silva v. Fernando*¹. In the Full Bench case, *Silva v. Nona Hamine*², it was held that in an action under section 247 of the Code the plaintiff is not exempt from the fundamental rule that an action has to be determined according to the rights of parties as existing at the date of its institution, and Wendt J. observed that no exception to that rule is recognized by the Code, which contains no provision for the pleading or determination of matters which alter the rights of parties pending action. On the contrary the sequence and trend of the sections which culminate in the action under section 247 lead to the conclusion that the rights of parties at the date of the action must be considered. On this principle it was held in *Abubacker v. Kalu Ettana*³ and *Selohamy v. Rapiel*⁴ that the assignee of the purchaser at a Fiscal's sale who had not obtained a Fiscal's transfer at the time of his assignment was entitled to succeed because he obtained his Fiscal's conveyance before

¹ (1908) 2 *Weer.* 22.

² (1889) 9 *S. C. C.* 3,
³ (1906) 10 *N. L. R.* 44. ⁴ (1892) 1 *S. C. R.* 73.

action was brought, but in *Ponnamma v. Weerasooriya*¹ where the Fiscal's transfer was obtained nine days after the action was instituted, it was held that the plaintiff had no title at the date of action and that his action must fail on the question of title apart from prescription.

The right which the plaintiff claims to the property in dispute under section 247 is the right which he claimed in the execution proceedings, that is the right to have the property released from seizure (*Abdul Cader v. Annamalay*²). But as I have held, the first defendant's registered seizure was entitled to prevail over the plaintiff's deed, and the plaintiff is not entitled to such a declaration. His action which was filed in February, 1929, within three months of the registration of the first defendant's seizure, fails.

I would therefore set aside the judgment and dismiss the plaintiff's action with costs in both Courts.

Appeal allowed.