[FULL BENCH.] 1916.

Present: Wood Renton C.J. and Ennis and De Sampayo JJ.

ANDRIS APPU *v.* KOLANDE ASARI *et al.*

347—C. R. Badulla, 242.

Re-issue of writ—Stamp duty—Is fresh seizure necessary?—May writ be extended and re-issued on the application of the Fiscal after the period fixed for return of writ expired.

There is nothing in the Civil Procedure Code to prevent the re-issue of a writ in the sense of its being issued again for execution or further execution.

[ENNIS J.—A writ cannot be re-issued, but there is no objection to the term " re-issue " to describe a second or subsequent writ.]

A second or subsequent writ is not liable to duty if it comes within the exemption indicated in Schedule 2 of the Stamp Ordinance.

Where the Fiscal applied to Court one day after the date fixed for the return of the writ for extension of time to enable him to advertise the sale of the property seized and the Court extended the time,—

Held, that a new seizure was not necessary.

Gurusamy Pulle v. Meera Lebbe et al.[1] over-ruled.

WRIT in this case was issued on October 27, 1915, and was made returnable on December 31, 1915. The Fiscal on December 29, 1915, returned the writ to Court unexecuted, as he had been unable to find any property of the defendants. On the application of the plaintiff the writ was re-issued on February 2, 1916, returnable on March 15, 1916. On the re-issued writ the property in question was seized, but on March 16 the Fiscal returned the writ and applied for extension of time to enable him to advertise the sale of the property seized. The Court extended the time to May 15, 1916, and the sale of the property then took place. The writ was not stamped afresh on either of the occasions when it was re-issued or extended, but the Court made relevant endorsements on the back of it. The defendants applied to Court to set aside the sale of certain immovable property under the decree, on the grounds that the writ was improperly re-issued and the sale was in any case bad, as there had been no fresh seizure when the writ was extended on the last occasion. The Commissioner of Requests upheld the objections. The plaintiff appealed.

[1] *(1914) 17 N. L. R. 467.*

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J. W. de Silva, for the plaintiff, appellant.—The Stamp Ordinance, Schedule B, Part I., provides that a writ may be re-issued without fresh stamps when the writ is returned to Court with a report that no property of the judgment-debtor was found. It is clear, therefore, that the law contemplates a re-issue of a writ. In this case the writ was returned to Court unexecuted, for the reason that no property of the debtor could be found. The writ could have, therefore, been re-issued without stamps (see *Palaniappa Chetty v. Samsadeen*[1], *Mutappa Chetty v. Fernando*[2], *Mutappa Chetty v. Fernando*[3]).

The Court may extend and re-issue a writ, even after the period fixed for its return had expired, at the instance of the Fiscal (*Attorney-General v. Ponniah*[4]).

When seizure is once made it continues in spite of the return of the writ to Court, and a second seizure on a re-issued writ is not necessary (see *Periar Carpen Chetty v. Sekappa Chetty*[5], *Yapahamine v. Weerasuriya*[6]). Counsel also referred to *Jhoboo Sahoo v. Roy*[7], *Carpen Chetty v. Silva*[8].

Bartholomeusz, for defendants, respondents.—The provisions of the Stamp Ordinance do not enact laws of procedure, but only provide for payment of stamp duty. The Stamp Ordinance merely refers to the practice of re-issue of writs, and that reference does not appear in the body of the Ordinance, but in the schedule. It cannot be argued from this casual reference that the law provides for the re-issue of a writ. The re-issue of a writ practically means the re-issue of a new writ (see *Mutappa Chetty v. Fernando*[2]).

When a writ is issued a second time, the Fiscal must seize over again, and cannot rely on the seizure under the first writ. In the case of movables, for instance, the seizure is manual, and cannot be said to continue after the period mentioned in the writ had expired. There should clearly be a fresh seizure before sale of movables under a second writ. In principle the same rule should apply as to seizure of immovables (see *Gurusamy Pulle v. Meera Lebbe et al*[9], *Wijewardene v. Schubert*[10]).

[De Sampayo J.—There will be a great deal of inconvenience to the public, if with the expiry of the period mentioned in the writ all previous seizures and other acts are to be held to be null and void.]

The inconvenience will be avoided by the Fiscal or the execution-creditor applying for extension of time before the period mentioned in the writ has expired (see *17 N. L. R. 471*).

J. W. de Silva, in reply.

Cur. adv. vult.

[1] *(1905) 8 N. L. R. 325.*
[2] *(1906) 9 N. L. R. 150.*
[3] *(1907) 10 N. L. R. 180.*
[4] *(1908) 11 N. L. R. 245.*
[5] *(1910) 2 Cur. L. R. 162.*
[6] *(1914) 17 N. L. R. 183.*
[7] *(1869) 11 W. R. 517.*
[8] *(1906) 1 A. C. R. 112.*
[9] *(1914) 17 N. L. R. 467.*
[10] *(1906) 10 N. L. R. 90.*

November 15, 1916, WOOD RENTON C.J.—

The facts in this case have been fully stated by my brothers, and I do not propose to repeat what they have said. To the first of the points submitted to us, namely, whether a writ in execution can in any circumstances be re-issued, I would return an answer in the affirmative. There is nothing in the Civil Procedure Code to prevent the re-issue of a writ in the sense of its being issued again for execution or further execution, and Schedule B, Part I., of the Stamp Ordinance, 1909,[1] distinctly recognizes that this may in certain cases be done.

The second question is, whether, if a writ can in any circumstances be re-issued, it may be so issued without stamps. On this point I agree with the view first stated by Wendt J. in *Palaniappa Chetty v. Samsadeen*[2] and adopted by Lascelles A.C.J., and in review[3] by the Full Court in *Mutappa Chetty v. Fernando*[4], that the provisions of the Stamp Ordinance with regard to the re-issue of writs have a purely fiscal purpose, and cannot be read as an enactment that a writ if re-issued after having been returned into Court is a nullity, whether stamped or not.

The third question submitted to us is, "whether a seizure effected under one writ can be availed of for the purpose of another writ, or a re-issued writ, or a writ for the execution of which the time has been extended, or is a fresh seizure necessary in any or all of such cases." This question is one of great difficulty. But I have, with considerable hesitation, come to the conclusion that the answer to it should be that a fresh seizure is not necessary in all cases. In the circumstances before us, the writ was not recalled or withdrawn in the ordinary sense of either of these terms, and there can be no ground for saying that it was abandoned. It was held by this Court in *Periar Carpen Chetty v. Sekappa Chetty*[5]—an authority to which the attention of the Judges who decided the cases of *Patheruppillai v. Kandappen*[6] and *Gurusamy Pulle v. Meera Lebbe et al.*[7] does not seem to have been specifically directed—that an order for the re-issue of a writ is not a withdrawal of a seizure previously effected, and that even a fresh seizure under a re-issued writ does not operate against the continued validity of the first seizure. I was inclined at the argument to think that the decision of the Full Court in *Wijewardene v. Schubert*[8] was decisive of the question in the respondents' favour. But a closer examination of the report of that case shows that the *ratio decidendi* was that the recall of the writ on the full satisfaction of the plaintiff's claim was in effect a removal of the seizure itself. There is undoubted force in the observations

[1] *No. 22 of 1909.*
[2] *(1905) 8 N. L. R. 325.*
[3] *(1907) 10 N. L. R. 180.*
[4] *(1906) 9 N. L. R. 150; at page 156.*
[5] *(1910) 2 Cur. L. R. 162.*
[6] *(1913) 16 N. L. R. 298.*
[7] *(1914) 17 N. L. R. 467.*
[8] *(1906) 10 N. L. R. 90.*

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of Pereira J. in *Patheruppillai v. Kandappen*[1] and *Gurusamypulle v. Meera Lebbe et al.*,[2] that in many cases a timely application for an extension of the writ, while it was still in force, would obviate any hardship resulting from a declaration of the law in the sense indicated in the two cases last mentioned. But, as my brother De Sampayo has shown, there is an argument *ab inconvenienti* on the other side. The Fiscal might not always be able to seize the property until the writ was due to expire, and the success of the execution might often be interrupted by claims in concurrence on the part of creditors who had obtained judgments, while the claim proceedings were still in progress. Moreover, I cannot think that it could have been the intention of the Legislature that, on the re-issue of a writ, the Fiscal should proceed to take afresh all the steps incidental to the original execution. The remedy against the indefinite subsistence of a writ, the ordinary period for the execution of which has expired, is in the hands of the aggrieved party himself. It is open to him to apply to the Court for a removal of the seizure.

On these grounds I would set aside the order appealed from with costs.

ENNIS J.—

This is an appeal from an order setting aside a sale in execution on the ground that the sale was invalid, as the writ under which the property was seized was re-issued unstamped.

The following points have been referred for the decision of the Full Court:—

(1) Whether a writ in execution can in any circumstances be re-issued?

(2) If so, can it be re-issued without stamps?

(3) Whether a seizure effected under one writ can be availed of for the purpose of another writ (or re-issued writ), or a writ for the execution of which the time has been extended?

The first two points can be dealt with conveniently together. The Civil Procedure Code contains no procedure for the re-issue of writs, but the re-issue of writs is referred to in Schedule 2 of the Stamp Ordinance, No. 22 of 1909, in connection with the liability of such documents to stamp duty. The meaning of the term "re-issue" in the Stamp Ordinance has been fully considered by Wendt J. in the case of *Mutappa Chetty v. Fernando*. "I cannot help thinking that in substance the objection involves a mere question of names. If, after writ has once issued, the judgment-creditor makes another application for execution, he is no doubt

[1] *(1913) 16 N. L. R. 298.* [2] *(1914) 17 N. L. R. 467.*
[3] *(1906) 9 N. L. R. 150.*

entitled to issue an altogether new writ. If he takes the old writ and alters it to the present balance of debt, returnable date, &c., and stamps it as a new writ and issues it that is called a " re-issue," although in substance, in all but the bare paper, it is a new writ, and not properly a 're-issue.' The Stamp Ordinance of 1890 (re-enacting a provision which appears in the Stamp Ordinances from No. 2 of 1848 downwards) provides that no writ whatever which has once been issued shall on any pretext whatever be re-issued except in certain cases.....It seems clearly implied that in these excepted cases the writ may be re-issued without paying any further duty in stamps."

With these observations I am in entire accord. A re-issued writ is not *ipso facto* void; it may in substance be a new writ and is liable to duty, unless issued in circumstances in which under the Stamp Ordinance it is exempted. The present case falls within the exemption, and the writ (or re-issued writ) need not be stamped. I would accordingly answer the first two questions as follows:—(1) A writ cannot be re-issued, but there is no objection to the use of the term " re-issue " to describe a second or subsequent writ; (2) a second or subsequent writ is not liable to duty, if it comes within the exemption indicated in Schedule 2 of the Stamp Ordinance.

The third point is more difficult. I have already expressed an opinion on it in the case of *Gurusamy Pulle v. Meera Lebbe et al.*,[1] and after hearing further argument, I am still of opinion that the conclusion I then arrived at is right. The facts of the case are, however, not quite similar. In the present case a writ in execution was issued on October 29, 1915. It was duly returned by the Fiscal on December 29, 1915, with a report to the effect that no property of the debtor could be found. On February 2, on the application of the judgment-creditor, the writ was re-issued returnable on March 15. This " re-issue " was in effect a new writ, and as the previous one had been returned unexecuted, because no goods of the debtor could be found, it was properly issued (or re-issued) unstamped. Under this writ the Fiscal seized certain property, but the returnable date of the writ arrived before the Fiscal could sell it. The day after the returnable date the Fiscal returned the writ to the Court with a request for an extension of time to advertise the sale of the property seized. The Court thereupon extended the time to May 15, 1916. The sale set aside was effected within the extended time. The Court has an inherent power to extend the time for the execution of its own process, and had the order of extension in this case been made on or before the returnable date, March 15, 1916, there is no doubt in my mind that the sale would have been perfectly valid. The writ, however, was not sent to the Court, nor was the order made till March 15, and the question arises whether the Court could extend a time-expired writ, and if so, if the extension of the writ be regarded

[1] *(1914) 17 N. L. R. 467.*

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as the issue of a new writ, whether the seizure under the time-expired writ could be availed of without any necessity for a new seizure. In the case of *Gurusamy Pulle v. Meera Lebbe et al.*[1] a period of five years elapsed before the time-expired writ was re-issued. In the present case the period is not more than one day, and, further, the failure of the Court to make the order within the time of the writ was due to the Fiscal having failed to have the mandate in Court on the returnable date; it was not due to any fault of the execution-creditor.

The question is whether a seizure can terminate other than by a withdrawal of the seizure by an order under section 239 of the Civil Procedure Code. In India, where attachments are made by the Court, it is clear that a seizure is made by the Fiscal, whose authority to hold the property is the writ of the Court, and in the case of *Wijewardene v. Schubert*,[2] it was held that a recall of the writ terminated the seizure, because it terminated the Fiscal's authority to hold. Where a writ is returned on the returnable date and no order for extension is made, the authority of the Fiscal to hold has ceased and the seizure terminates. This is the finding in *Gurusamy Pulle v. Meera Lebbe al.*[1]

In certain circumstances it may be shown that the Court had no intention of withdrawing the Fiscal's authority when it omitted to make an order of extension on the due date. In Ceylon floods and other causes may prevent a Court from sitting. In the present case it is clear that the delay in making the order was caused by the writ not having been returned on the due date.

By ancient practice (*Turner v. London S. W. Rly. Coy.*[3]) Courts have power to enter orders *nunc pro tunc*, to prevent an unjust prejudice to a suitor by a delay unavoidably arising from an act of the Court. In the present case the Fiscal by a failure to bring the writ to the Court on the proper date prevented the Court from making the order for extension within the period of the writ. I see no reason why the order of March 16 should not be entered as from March 15, especially as no third party has been shown to be prejudiced thereby, and the parties in the case have not been shown to have been misled or prejudiced by the order extending the operation of the writ. In this case the validity of the extension was not questioned till the appeal was heard.

I would allow the appeal with costs, and direct the order of March 16 to be entered as from March 15.

DE SAMPAYO J.—

The appeal in this case came before me sitting alone, and in view of several important points of practice which were involved in the case, and upon which there appeared to be conflicting decisions, I

[1] *(1914) 17 N. L. R. 467.* [2] *(1906) 10 N. L. R. 90.*

[3] *17 Eq. Cases 561.*

referred the case to a Bench of three Judges. The defendants, against whom a money decree had been entered, applied to have set aside a sale of certain immovable property in execution of the decree. The writ was first issued on October 27, 1915, and was made returnable on December 31, 1915. The Fiscal on December 29, 1915, returned the writ to Court unexecuted, as he had been unable to find any property of the defendants for seizure and sale. On the application of the plaintiff the writ was re-issued on February 2, 1916, returnable on March 15, 1916. On this re-issued writ the property in question was seized, but on March 16, 1916, the Fiscal returned the writ and applied for an extension of time to enable him to advertise the sale of the property seized. The Court accordingly extended the time to May 15, 1916, and the sale of the property then took place. It should be stated that the writ was not stamped afresh on either of the occasions when it was re-issued or extended, but the Court made relevant endorsements on the back of it. The defendants objected to the sale of the property, on the grounds that the writ was improperly re-issued, and that the sale was in any case bad, because there had been no fresh seizure when the writ was extended on the last occasion.

The word " re-issue " is commonly used to express the fact that the same writ is issued again for execution or for further execution. It is used in this sense in the Schedule B, Part I., of the Stamp Ordinance, No. 22 of 1909, which enacts as follows:—" No summons, warrant of arrest or in execution, nor any other citation or writ whatsoever, which has once been issued out of the Court and returned by the officer to whom it has been directed, shall, on any pretext whatever, be re-issued, unless any such process has been returned not served or executed, by reason that the party could not be found, or had left the jurisdiction of the Court, or by reason that no property of the debtor or none sufficient to satisfy the exigency of the writ of execution could be found, or that the process has been returned on the order of the Court. Provided further, that in respect of any summons to a witness the same may be re-issued at the discretion of the Court."

It is clear from this that a writ of execution may be re-issued under certain circumstances. In the present case, as the writ was returned by the Fiscal unexecuted for the reason that no property of the debtor could be found, the writ did not require fresh stamps on its re-issue. It is true that the Civil Procedure Code does not expressly speak of the re-issue of a writ, but in my opinion there is nothing there which prevents such re-issue. Moreover, the provision in the schedule to the Stamp Ordinance is a substantive enactment, and if there be no inherent power in the Court for this purpose, as I think there is, that provision by necessary implication allows a re-issue, even without stamps in the exceptional cases therein mentioned, and only requires fresh stamping in all other cases. This

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view is supported by a series of decisions. The first of them is *Palaniappa Chetty v. Samsadeen.* [1] *In Mutappa Chetty v. Fernando* [2] the Court, while holding that the re-issue of writ is not illegal in itself, emphasizes the fact that the provision in the Stamp Ordinance has a fiscal purpose only. This decision was affirmed in review by a Bench of three Judges, Hutchinson C.J. observing that the Court has power to re-issue a writ which has been, as in that case, returned by the Fiscal because the sale was stayed at the request of the execution-creditor, and that the enactment in the schedule to the Stamp Ordinance means that the writ shall not be re-issued without paying stamp duty (see *Mutappa Chetty v. Fernando* [3]). This collective decision, which is binding upon us, appears to me to conclude the matter. I therefore think that the objection as regards the re-issue of writ on February 2, 1916, must be overruled.

The second objection, to the effect that there ought to have been a fresh seizure when the writ was extended on March 16, 1916, is much more serious. I may here deal with a point which has been incidentally raised in connection with this objection. It is contended that the Court, though it may extend the currency of a writ if application is made for that purpose before its returnable date, has no power to do so after the period originally fixed for its return has expired. But I entirely agree with the ruling to the contrary in *Attorney-General v. Ponniah.* [4] Both the learned Judges who decided that case emphasized the fact that there was no authority, statutory or judicial, to support the objection, and Wood Renton J. pointed out that, on the contrary, section 319, which required the Fiscal, "if the latest day specified in the warrant for the return thereof has been exceeded, to endorse upon the warrant the cause of the delay," was inconsistent with the view that the warrant *ipso facto* expired when that date had been exceeded. That case was concerned with a warrant of arrest, but the principle applies to all processes. That being so, the seizure in this case cannot be said to have been effected under one writ, and the sale under another writ. The Fiscal asked for an extension of time for complete execution of the writ by sale of the property already seized thereunder, and the Court granted the extension. *Attorney-General v. Ponniah* (*supra*) is an authority for saying that a Judge has power to extend the time for the execution of a writ, and re-issue it even without any application from the execution-creditor. This is what happened in the present case, and I think that the sale must be held to have taken place under one and the same writ and in pursuance of a subsisting seizure. A seizure once effected remains operative until its removal or withdrawal by order of Court, or, as I ventured to say in my judgment in *Yapahamine v.*

[1] *(1905) 8 N. L. R. 325.*
[2] *(1906) 9 N. L. R. 150.*
[3] *(1907) 10 N. L. R. 180.*
[4] *(1908) 11 N. L. R. 245.*

Weerasuriya,[1] by circumstances of abandonment. With regard to the Indian authorities on the subject of tacit withdrawal of this kind, it was said at the argument of this appeal that they did not apply to us, because in India it is the Court that attaches property and otherwise executes its own decrees. I am unable to see how any difference in principle arises from this circumstance, but it is unnecessary to decide that particular point in this case. Nor need the question, whether a seizure can subsist for an indefinite period of time, be considered, because it is always open to a party interested to obtain an order removing the seizure. As regards the main objection, *Periar Carpen Chetty v. Sekappa Chetty*[2] is a direct authority for the proposition that an order for re-issue of a writ is not a withdrawal of a seizure previously effected, and that even a fresh seizure under the re-issued writ does not operate against the continued validity of the first seizure. In *Patheruppillai v. Kandappen*,[3] in which Pereira J. expressed a different view, *Periar Carpen Chetty v. Sekappa Chetty* (*supra*), which is a decision of two Judges, does not appear to have been cited or considered. The authority of *Periar Carpen Chetty v. Sekappa Chetty* is not affected by the earlier case of *Wijewardene v. Schubert*,[4] because there an order had been made by consent that "the plaintiff's claim be and the same is hereby declared satisfied in full, and that the writ issued in this case be recalled." The recall of the writ in these circumstances undoubtedly amounted to a removal of the seizure which had been effected thereunder. This is one of the very cases contemplated by section 239 of the Civil Procedure Code, which imposes on the Court the duty to withdraw the seizure when the decree has been satisfied. In this state of authorities, and on consideration of the principles applicable to this branch of practice, I think, with great respect to the learned Judges who decided the case of *Gurusamy Pulle v. Meera Lebbe*,[5] that the ruling in that case is erroneous. As I have already dealt with the point there decided, I need only here refer to the reasoning founded on certain provisions of the Civil Procedure Code. Since section 224 requires an application for writ and section 225 provides for its issue, and since section 226 lays down the duties of the Fiscal when he receives the writ, including the seizure of property, it is said that here there is legislative provision requiring the seizure of property every time a writ is issued or re-issued. But, as I had occasion to say in *Yapahamine v. Weerasuriya*, section 226 seems to me intended to describe the general duties of the Fiscal, and not to require that he should repeat them all on every occasion. For instance, I cannot conceive that it is necessary for the Fiscal at each time to repair to the dwelling house of the judgment-debtor and

[1] *(1914) 17 N. L. R. 183.*
[2] *(1910) 2 Cur. L. R. 162.*
[3] *(1913) 16 N. L. R. 298.*
[4] *(1906) 10 N. L. R. 90.*
[5] *(1914) 17 N. L. R. 467.*

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there require him to pay the amount of the writ as a preliminary to execution of the writ by seizure of property. In my opinion the Fiscal on the re-issue of a writ need only do such acts as are under the circumstances of each case necessary for further execution of the decree. Moreover, section 224 itself provides for the judgment-creditor stating in his application the mode in which the assistance of the Court is required, " whether (for instance) by the attachment of property or otherwise." Surely the last words " or otherwise " authorizes the judgment-creditor, who has already seized property, to say that he requires the assistance of the Court by re-issue of the writ for the sale of the property so seized. Dispensation from seizure on the issue of a writ may be illustrated by another instance. Chapter XLVII of the Code provides for sequestration of property before judgment, and section 661 enacts that where a decree is ultimately given in favour of the plaintiff, it shall not be necessary to seize the property again in execution of such decree. And yet, if the construction sought to be given to section 226 is right, the Fiscal must nevertheless, seize the property again. I also think that practical considerations justify the conclusions at which I have arrived. In the case of a claim in execution the sale in most cases cannot take place during the currency of the writ. It was said, however, that the seizure may in such a case be saved by applying for extension of time before the time fixed has expired. This is not always possible, as, for instance, where the Fiscal has seized the property at the last moment. Moreover, the execution-creditor will be often prejudiced by claims in concurrence on the part of creditors who obtain judgment pending the claim proceedings.

For the reasons I have above given, I think that no second seizure was necessary in this case after the writ was extended by the Court on March 16, 1916, and the sale which took place on the basis of the seizure previously effected was valid.

I would set aside the order appealed from with costs.

Set aside.