1948 *Present :* **Howard C.J. and Wijeyewardene S.P.J.**

SANGARAPILLAI, Appellant, *and* INDO-LANKA PROVIDENT INSURANCE CO., LTD., Respondent.

S. C. 387—D. C. Jaffna, 1,901.

Civil Procedure—Seizure of immovable property—Prohibitory notice—Wrong description of judgment-debtor—Sale by Fiscal—Is it a nullity ?—Civil Procedure Code, s. 237.

On a decree obtained against the plaintiff Company which was then known as the Continental Provident Insurance Society, Ltd., certain property belonging to the Company was seized by the Fiscal. The decree was entered against "the Continental Provident Insurance Company, Ltd., by its Managing Director S. K. Subramaniam of Vathiry, Jaffna". In the prohibitory notice issued by the Fiscal the name of the defendant was given as S. K. Subramaniam of Vathiry although all the other particulars were correctly given. The notice of sale gave all the particulars correctly including the name of the judgment-debtor. The Fiscal's conveyance to the defendant also gave the name of the judgment-debtor correctly. In an action by the plaintiff for declaration of title the District Judge held that the defendant did not get title owing to the error in the prohibitory notice regarding the name of the judgment-debtor.

Held, that in the circumstances the error was a misdescription which did not amount to an illegality and that the sale to a *bona fide* purchaser could not be impugned on that ground by the judgment-debtor.

APPEAL from a judgment of the District Judge, Point-Pedro.

H. V. Perera, K.C., with *C. Chellappah*, for the defendant, appellant—The failure in the prohibitory notice P8 issued under section 237, Civil Procedure Code, to set out the judgment-debtor's name correctly does not matter. The notices of sale, D2 and D3, issued under sections 255 and 256 of the Civil Procedure Code set out correctly all the necessary particulars, including the name of the judgment-debtor. So too the conditions of sale D1. It cannot be said that the judgment-debtor was, not aware that the property belonging to it was caught up by P8. Further section 237 does not say that the notice should be served on the judgment-debtor, unlike, *e.g.*, section 229. The object of seizure is to make it known (*vide* section 238), and it cannot be said that the judgment-debtor in this case did not know.

Attachment is a step in execution designed for the protection of the judgment-creditor and not for the benefit of the judgment-debtor [1]. Any defect or error in the mode of attachment is only an irregularity which does not render the sale *ipso facto* void—*Nana Kumar Roy v. Golam Chunder Dey* [2]. Non-compliance with section 290 of the old Indian Code which corresponds to our section 282 is only a material irregularity and not an illegality rendering the sale void *ab initio—Tasadduk Rasul Khan v. Ahamed Husain* [3].

[1] *(1934) A. I. R. Bomb. 241 at 243.* [2] *I. L. R. (1891) 18 Cal. 422 at 426.*
[3] *I. L. R. (1893) 21 Cal. 66 (P. C.)*

The learned trial Judge has based his decision on the case reported in *Bastian Pillai v. Anapillai*[1]. But this case purports to follow a case reported in *I. L. R. 5 Allahabad, 86* which has not been followed in *I. L. R. 18 Calcutta, 188 at 192* and *I. L. R. 21 Calcutta, 639.*

Sale without attachment is not a nullity[2]. The sale cannot be set aside at the instance of the judgment-debtor unless prejudice is caused—*Wijeyewardene v. Podisingho*[3].

The defendant-appellant was a *bona fide* purchaser and cannot suffer for the failure of the writ officer who was responsible for P8. Further, the sale was confirmed by Court; and therefore it is not a nullity merely by reason of defective attachment or even absence of attachment—*Kishory Mohun Roy v. Mohomed Mujaffar Hossein*[4]. A party who acquiesces in an execution sale cannot thereafter question it—*Arunachellam v. Arunachellam*[5].

N. E. Weerasooria, K C., with *H. W. Tambiah* and *S. Sharvananda*, for plaintiff, respondent. A regular and perfect attachment is an essential preliminary in the case of a sale in execution—*Bastian Pillai v. Anapillai*[6]. A wrong or irregular seizure is no siezure. *Bastian Pillai v. Anapillai* was followed in *Selo Hamy v. Weerasekere*[7] and *Fernando v. Fernando*[8]. The property sold was not the property of the respondent Company but the interest of S. K. Subramaniam of Vathiry in the land in question, and Subramaniam had no interest in the land. Therefore defendant-appellant had not bought any interest in the land in question. Attachment is a necessary pre-requisite—*Muttiah Chetty v. Palaniappa Chetty*[9].

H. V. Perera, K.C., in reply—*Bastian Pillai v. Anapillai* (*supra*) is distinguishable. There the identity of the property conveyed was in question and the purchaser was a stranger to the action in which the Fiscal's conveyance was issued. Further it was based upon the case reported in *5 Allahabad* which has not been subsequently followed in later Indian cases which follow the ruling laid down by the Privy Council.

Cur. adv. vult.

March 5, 1948. WIJEYEWARDENE S.P.J.—

This is an action *rei vindicatio* instituted by the Indo-Lanka Provident Insurance Company in respect of a property in Jaffna.

The plaintiff Company which was originally known as the Continental Provident Insurance Society, Limited, was incorporated in 1923. A decree was entered in November, 1936, for a sum of Rs. 875·95 and costs against " the Continental Provident Insurance Society, Limited, by its Managing Director, S. K. Subramaniam of Vathiry, Jaffna " in case No. 2,399 of the District Court of Jaffna. The plaintiff Company owned at the time the property which is the subject matter of this action. On the application of the decree holder, the Court issued a writ of execution to the Fiscal under section 225 of the Code, giving full and correct particulars of the decree, including the names of the parties. As the defendant.

[1] *(1901) 5 N. L. R. 165.*
[2] *(1947) A. I. R. (Mad.) 213.*
[3] *(1939) 40 N. L. R. 217 at 220.*
[4] *I. L. R. (1890) 18 Cal. 188 at 192.*
[5] *I. L. R. (1888) 12 Mad. 19 at 20.*
[6] *(1901) 5 N. L. R. 165.*
[7] *(1908) 11 N. L. R. 36.*
[8] *(1947) 48 N. L. R. 379.*
[9] *(1928) A. I. R. (P. C.) 139.*

failed to comply with the demand for payment made by the Fiscal under section 226, the Fiscal proceeded to seize the property in question under section 237. The Fiscal, however, failed to give the name of the judgment-debtor correctly in the prohibitory notice P8 issued by him. He gave the name of the judgment-debtor as "S. K. Subramaniam of Vathiry", and not as "the Continental Provident Insurance Society, Limited, by its Managing Director, S. K. Subramaniam of Vathiry, Jaffna", as he should have done. The prohibitory notice gave all the other particulars correctly—the name of the judgment-creditor, the amount of the decree, the date of judgment, and the name, situation, boundaries and extent of the land. It gave also the number of the case and the name of the Court. Those particulars are not referred to in section 237 as particulars which should be specified in a prohibitory notice, though they are mentioned in Form No. 50. The notices of sale, D3 and D2, under sections 255 and 256, and the conditions of sale D1 gave correctly all the necessary particulars including the name of the judgment-debtor. The sale was held on June 15, 1940, and the defendant became the purchaser at the sale. The defendant duly obtained in his favour Fiscal's conveyance D6 of June 10, 1941. That conveyance too gave the name of the judgment-debtor correctly. The defendant took possession of the land and effected a number of improvements in respect of which the District Judge held that the defendant was entitled to claim Rs. 3,800 as compensation. More than two years elapsed before the plaintiff company filed the present action attacking the title of the defendant.

The District Judge held that the defendant did not get any title to the land under D6 owing to the error in the prohibitory notice P8 regarding the name of the judgment-debtor. The present appeal is by the defendant against that decree.

The only point that was argued in appeal before us was whether that error in P8 had the effect of rendering the Fiscal's sale a nullity.

It is helpful to note that section 237 has been enacted in the interests of the decree holder, as a seizure under section 237 duly "effected" "made known" and "registered" enables him to get the property sold under his decree, unhampered by any private alienations made by the judgment-debtor after the registration of the seizure.

That section shows that the prohibitory "notice" should be a written document and should be "made known"—to use the words of section 238—"by beat of tom-tom or other customary modes" and by affixing a copy of the notice "to a conspicuous part of the property and of the Court House and of the Fiscal's Office". Section 237 does not require that the notice should be served on the judgment-debtor or any other person, unlike, for instance, section 229 which requires the notice under that section to be delivered by post to certain persons specified therein. No point, therefore, could be made by the plaintiff Company of the fact that by reason of the error with regard to the name of the judgment-debtor the prohibitory notice was not served on the judgment-debtor. It would not have been served on the judgment-debtor in any event. Is it, at all, likely that the judgment-debtor would have been misled by P8 once it was "made known" ? The judgment-debtor in

this case is a company. It acted through its Managing Director, S. K. Subramaniam. When S. K. Subramaniam saw this particular notice could he have for a moment thought that the notice referred to him personally and not to the company ? The number of the case, the amount of the decree and the name of the judgment-creditor would have indicated to him clearly that it was a notice in the action against the company. The land attached belonged to the company and he had no interest whatever personally in the land. It is, therfore, not strange to see that the plaintiff company was unable to show how it could have been misled by the erroneous description of the judgment-debtor in P8. Even if S. K. Subramaniam, the Managing Director of the plaintiff company, was a person disposed to entertain doubts on the flimsiest ground, those doubts would have been dispelled effectively by the sale notices D3 and D2 published under sections 255 and 256.

A third party could have been misled by that error and might have purchased by private treaty the interest of the plaintiff company in the land thinking that the prohibitory notice restrained only alienations by S. K. Subramaniam personally. But no such third party has acquired an interest in the property and we are here concerned only with the question whether the judgment-debtor should be allowed to impugn the legality of a Fiscal's sale to a *bona fide* purchaser other than the judgment cerditor merely because there was a misdescription of the judgment-debtor. I think an appropriate answer to that question is found in the following passage in the judgment of the Privy Council in *Arunachellam v. Arunachellam et al.* (1888) Indian Law Reprots, 12 Madras 20 :—

> " It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection ".

I may at this stage refer to an argument which was put forward somewhat tentatively by the plaintiff's Council. It was said that the property that was sold was the interest of S. K. Subramaniam in the land in question and not the interest of the plaintiff company in that land. This argument is clearly untenable. The writ D5 directed the Fiscal to seize and sell the property of the plaintiff company. The notices of sale D2 and D3 of May 18, 1940, announced that sale of the interest of the plaintiff company in the property. The conditions of sale D1 referred to the interest of the plaintiff company. The sale report D4 made by the Fiscal's Officer referred to that interest as the interest sold by him on June 15, 1940, and the Fiscal's conveyance D6 was in respect of that interest. These facts distinguish the case from *Thakur Barmha v. Jiban Ram Marwari*[1] which I shall consider later.

[1] *(1913) Indian Law Reports, 41 Calcutta 590.*

The Counsel for the plaintiff company sought to support the judgment on the authority of *Bastian Pillai v. Ana Pillai* [1] and relied strongly on *Mahadeo Dubey v. Bhola Nath Dichit* [2], *Thakur Barmha v. Jiban Ram Marwari* (*supra*) and *Muttiah Chetty v. Palaniappa Chetty* [3]. He also referred to *Selo Hamy v. Weerasekere* [4] and *Mary Fernando v. Francis Fernando* [5].

The judgment in *Mahadeo Dubey v. Bhola Nath Dichit* (*supra*) does not set out fully the facts in that case. According to the reporter's note this was a matter in which a judgment-debtor objected to the confirmation of a sale on the ground that the " property had not been attached according to law " under section 274 of the old Indian Code, corresponding to section 237 of our Code. This note does not make it clear whether there was no attachment at all or whether the attachment was merely irregular in some respect. The question that was referred to the Full Bench was, " is a regularly perfected attachment an essential preliminary to a sale in execution of decrees for money ? ". Straight J. who delivered the judgment of the Full Bench began his judgment, however, by saying,—

> " As was explained at the hearing of this reference, the question virtually asked is whether a sale in execution of a simple money decree is *de facto* void where there has been no attachment of the property ".

The judgment discusses only the question as propounded by the learned Judge but at the end says,—

> " We have no hesitation in answering this reference by saying that a regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money and that where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void ".

In 1893 the Privy Council allowed an appeal from the High Court of Calcutta in *Tasadduk Rasul Khan v. Ahmad Husain et al.* [6] and held that non-compliance with the requirement of section 290 of the old Indian Code that thirty days should elapse between proclamation and sale of immovable property in execution, was only a material irregularity and not an illegality making the sale void *ab initio*. That Privy Council decision and some other cases were considered by the Judges who decided *Sheodhyan et al. v. Bholanath et al.* [7] as undermining the authority of *Mahadeo Dubey v. Bhola Nath Dichit* (*supra*). In *Sheodhyan et. al v. Bholanath et al.* (*supra*) the Judges said,—

> " On the question of the effect which the striking off of an execution case has upon an attachment of property made in this case, there is a conflict of authority in the view which we take of this case we do not think it necessary to enter into a consideration of this question. In our opinion the absence of attachment, assuming in this case that the property was sold without a previous attachment which subsisted at the date of sale did not amount to anything more than a material irregularity in the publishing of the sale. An attachment is a step towards the sale of the judgment-debtor's property. "

[1] *(1901) 5 N. L. R. 31 and 165.*
[2] *(1882) 5 Allahabad 86.*
[3] *(1928) All India Reporter (Privy Council) 139.*
[4] *(1908) 11 N. L. R. 36.*
[5] *(1947) 48 N. L. R. 379.*
[6] *(1893) 21 Calcutta 66.*
[7] *(1899) 21 Allahabad 311.*

It was, while the law in India was in that state that this Court had to consider in 1901 the effect of section 237 of our Code in *Bastian Pillai v. Ana Pillai* (*supra*) Bonser C. J. who gave the principal judgment accepted the ruling in *Mahadeo Dubey v. Bhola Nath Dichit* (*supra*), that a regular and perfect attachment was an essential preliminary in the case of sales in execution. *Bastian Pillai v. Ana Pillai* (*supra*) could be distinguished from the present case, as that case was concerned with a question as to the identity of the property conveyed to the purchaser under a Fiscal's conveyance and the Court had also to consider the rights of such a purchaser as against a person who was a stranger to the action in which the Fiscal's conveyance issued. In *Bastian Pillai v. Ana Pillai* (*supra*) the plaintiff sued three defendants to recover the money due on a mortgage bond executed by A in favour of B. Under a writ in execution of a money claim in another case against B the mortgaged property had been seized under section 237 and sold to the plaintiff. The Fiscal's conveyance in favour of the plaintiff purported to convey the right title and interest of A in the bond. In the meantime A had sold the mortgaged property to the third defendant but it is not clear whether the sale was before or after the bond and, if it was after the bond, whether it was before or after the seizure. The third defendant disputed the plaintiff's claim while the first and second defendants, the heirs of A, refrained from doing so. It was held in those circumstances that the plaintiff did not become by virtue of the Fiscals conveyance the assignee of the rights of B in the mortgage bond which were not seized under section 229 and that the Fiscal had no right to convey property other than the mortgaged property that was seized under section 237.

In *Selo Hamy v. Weerasekere et al.* (*supra*) the Court had to consider which of the two persons, X and Y, had a right to the money due on a usufructuary mortgage bond executed by A in favour of B. The mortgaged land was seized in execution of a money decree against B under section 237 and purchased by X who obtained a Fiscal's conveyance for the land. A died leaving Y as his heir. It was held that X was not entitled to recover the mortgage debt. The decision however is not very helpful in elucidating the principles involved in this question, as Wendt J. who heard the case rested his decision on the authority of *Bastian Pillai v. Ana Pillai* (*supra*) and did not examine any of the Indian decisions cited to him, as he thought it was " not desirable that any uncertainty should exist " regarding the question of law decided in the earlier case. He seems to have been influenced to some extent by certain equitable considerations referred to in the penultimate paragraph of his judgment.

In *Thakur Barmha v. Jiban Ram Marwari* (*supra*) A owned 10/16 shares of a property subject to a mortgaged in favour of X created by him and the remaining 6/16 shares free from any mortgage. B obtained a money decree against A and applied for execution of the decree by attachment and sale of the property described in the schedule to the application as B's 6/16 shares *included* in the mortgage bond in favour of X. This description appeared also in the order for sale and the proclamation for sale. The purchaser at the sale obtained an order from the Subordinate Judge for a certificate of sale in respect of the unencumbered 6/16 shares

on the ground that the Schedule to B's application had by an error referred to the shares as " included " in the mortgage bond in favour of X, when it was intended to describe them as shares " not included " in the bond and that the error had been rectified by an advertisement in the *Gazette*. The Privy Council set aside the order of the Subordinate Judge. It is true that in the course of the judgment the Privy Council stated that a Court could not " validate a sale of property which was not the property to which the attachment related ". I think, however, that observation should be considered with reference to the facts of the case, for, in an earlier part of the judgment the Privy Council stated :—

> " That which is sold in a judicial sale of this kind can be nothing but the property attached and that property is conclusively described in and by the schedule to which the attachment refers. In the present case that property was six annas subject to an existing mortgage. The effect of the certificate of sale granted by the order of the Subordinate Judge is to make the sale that of a property not attached, namely, the six unencumbered annas,—a property which could not be sold in such proceedings inasmuch as it was not the property attached.
>
> An attempt was made to treat the matter as a case of misdescription, which could be treated as a mere irregularity. But in this case we have to deal with indentity and not description. A property fully indentified in the schedule may be in some respects misdescribed, but that is not the present case. Here we find an existing property accurately described in the schedule, and the order of the Subordinate Judge grants a sale certificate which states that another and a different property has been purchased at the judicial sale ".

It may be noted that this judgment has been considered in *Subramania Iyer v. Krishna Iyer* [1] and *Swaminatha Iyer et al. v. Krishnaswami Iyer et al.* [2]

In *Muttiah Chetty v. Palaniappa Chetty et al.* (*supra*) A made a claim for money against B and applied for attachment before judgment. The day after the application for attachment, B mortgaged some immovable property with X. On a later date the Court made the following order on A's application for attachment :—" Attachment and order made absolute ". In fact, no attachment was made. After obtaining a decree on his money claim, A applied for the execution of his decree by sale. X preferred a claim then on his mortgage bond and his claim was rejected in April, 1912, on the ground that the mortgage was " a sham transaction ". A bought the property at the sale in execution against B. In 1915 X sued A and B for the recovery of his mortgage and for a declaration against A that the property was liable to be sold under mortgage decree. The claim was resisted on the ground it was barred by limitation under Article 11, Schedule 1, Limitation Act, 1908, which enacted that an action should be brought within a year from the date of the order in a claim inquiry by a person dissatisfied with such order. The Privy

[1] (*1926*) *13 All India Reporter* (*Madras*) *211.*
[2] (*1947*) *34 All India Reporter* (*Madras*) *213.*

Council held that the Limitation Act would begin to operate only where the order had been made in a claim inquiry in respect of a property which had been attached *de facto* under Order 21, Rule 54 and said,—

> " Under the Civil Procedure Code in India the most anxious provisions are enacted in order to prevent a mere order of a Court from effecting attachment, and plainly indicating that the attachment itself is something separate from the mere order, and is something which is to be done and effected before attachment can be declared to have been accomplished ".

It will be observed that in this case there was no attachment at all, and that the purchaser in execution sought to establish that his title to the property was not subject to a mortgage debt created in favour of a third party by a bond not affected by any attachment.

In *Mary Fernando v. Francis Fernando* (*supra*) A obtained a decree against B on a money claim. Before the decre was entered but after the institution of the action, B conveyed a land to X by deed No. 968 subject to an agreement by X to re-transfer the land to B. In execution of the decree against B, the Fiscal seized the land under section 237 but the Fiscal purported to sell the land as well as the right of B to a reconveyance from X said to be created by a deed No. 961. X purchased the property sold at the Fiscal's sale. X, thereafter, moved to set aside the sale on the grounds (*a*) that B had no saleable interest in the land and (*b*) that there was a misdescription regarding the right of B for a re-transfer and that the right had not been seized under section 229. In refusing to confirm the sale this Court decided in favour of X on the second ground on the authority of *Bastian Pillai v. Ana Pillai* (*supra*). It will be noted that in this case that the only parties interested in the application were the judgment-creditor and the purchaser. There was undoubtedly a material irregularity with regard to the sale of B's right to a re-transfer and a Court could refuse to confirm a sale in certain circumstances where there is a material irregularity. I wish, however, to refer to the following passage in the judgment which is likely to be misunderstood :—

> " The case of *Bastian Pillai v. Ana Pillai* (*supra*) has been referred to and the principles laid down have been accepted as good law up to 1939 in no less than four subsequent decisions including a Divisional Bench and a Five Judge decision ".

The Divisional Bench case referred to is *Thambaiyar et al. v. Paramusamy Aiyar et al.* [1] and it referred to *Bastian Pillai v. Ana Pillai* (*supra*) not with regard to the question of law discussed by the learned Judge but with regard to the need to appoint some person to represent the estate of a deceased mortgagor where the property is below Rs. 1,000. The Five Judge decision is *Wijewardene v. Podi Singho* [2]. In that case the point the Court decided was that the failure on the part of the Fiscal to demand payment of the amount of the writ under section 226 did not render a Fiscal's sale a nullity. Keuneman J. who delivered the judgment of the Court referred to *Bastian Pillai v. Ana Pillai* (*supra*) and distinguished it from the case he was considering. The other two cases are *Silva v. Selo Hamy* [3] and *Arnolis Appuhamy v. Haramanis Kalotuwa* [4]. In the

[1] (*1917*) *19 New Law Reports 385.*
[2] (*1939*) *40 New Law Reports 217.*
[3] (*1923*) *25 New Law Reports 113.*
[4] (*1926*) *8 Ceylon Law Recorder 111.*

former case the judgment-debtor petitioned to have a sale of movable property by the Fiscal set aside on the ground that he did not receive a notice under section 229 and the Court held that the petition provided a *prima facie* case calling for investigation. In the latter case a person who had bought a land at a Fiscal's sale sought to claim the right to a re-transfer and obtain a conveyance which was vested in the judgement-debtor. The Court held that the purchaser could not claim that right.

For the reasons indicated by me in the course of this judgment I am of opinion that the error in P8 regarding the name of the judgment-debtor was in the circumstances of this case a misdescription which did not amount to an illegality and the sale of the property to a *bona fide* purchaser, confirmed and perfected by the issue of the Fiscal's conveyance, cannot now be impunged on that ground by the judgment-debtor.

I would allow the appeal and direct decree to be entered dismissing the plaintiff's action with cost here and in the Court below.

HOWARD C.J.—I agree.

Appeal allowed.