1939 *Present :* **Abrahams C.J., Poyser S.P.J., Hearne, Keuneman, and Nihill JJ.**

WIJEYEWARDENE *v.* PODISINGHO *et al.*

84—D. C. Kalutara, 19,086.

Fiscal's sale—Failure on part of Fiscal to demand payment of money—Sale not an absolute nullity—Sale may be set aside on application of judgment. debtor—Civil Procedure Code, ss. 226 and 344.

Failure on the part of the Fiscal to demand payment of the amount of the writ in accordance with section 226 of the Civil Procedure Code does not render a Fiscal's sale a nullity so as to enable a person, who is not a party to the execution proceedings, to attack the sale on that ground.

It is open to the judgment-debtor in such a case to make an application to set aside the sale under section 344 of the Civil Procedure Code, but mere proof of non-compliance with section 226 is not sufficient to avoid the sale.

***Hadjiar et al. v. Kuddoos et al.* (37 *N. L. R. 376*) overruled.**

THE plaintiff-respondent brought this action for declaration of title to a property called Maharawilakumbura which belonged to one R. Jayewardene. The plaintiff had obtained a mortgage decree in D. C. Kalutara, 15,805, against R. Jayewardene in respect of another land which was sold and a balance sum was due. In the meantime Jayewardene died and his administrator, the second defendant, was substituted. On December 5, 1932, the plaintiff obtained writ to recover the balance. It was issued to the Fiscal on December 16. The property was seized and the seizure was registered on December 19. The sale took place on January 7, 1933, and the plaintiff obtained on January 12, 1934, the Fiscal's transfer which was registered on January 30.

Pending these proceedings Jayewardene's estate was administered in D. C. Kalutara (testy.) 2,332 by the second defendant. On January 14, 1933, he sold this property with the permission of Court by public auction and it was purchased by the first defendant-appellant, who on April 7, 1933, obtained a transfer which was registered on April 11, 1933.

The learned District Judge entered judgment for the plaintiff and the first defendant appealed. The appeal was listed before Maartensz and Hearne JJ., who had doubts as to the correctness of the decision in *Hadjiar et al. v. Kuddoos et al.*[1] and referred the case to a Bench of five Judges.

H. V. Perera, K.C. (with him *J. R. Jayawardana*), for first defendant, appellant.—The transfer in favour of first defendant and its registration are earlier than those of the plaintiff.

The Fiscal's sale and transfer are void because the Fiscal has not complied with the provision contained in section 226 of the Civil Procedure Code in that the Fiscal did not demand payment of the amount in the writ. The only decision in favour of the appellant is *Hadjiar et al. v. Kuddoos et al.*[1], which is exactly in point. The Fiscal must comply with all the provisions. The demand is an essential step and not merely incidental. It may have arrested the rest of the proceedings.

[1] *(1935) 37 N. L. R. 376.*

Under section 218 of the Civil Procedure Code power is given to the judgment-creditor to sell the property of the debtor, but section 223 provides how the seizure is to be effected through the Fiscal. An opportunity must be given even at the last moment for an effort to prevent the sale. It had been held in *Bastian Pillai v. Anapillai*[1] that a sale without seizure was void.

Under section 256 the law requires an advertisement of the sale. If there was no advertisement the sale would be void under section 282. These two sections should be read together. See *Ukku Amma v. Punchi Ukku*[2]. It was held in *Keel and Others v. Asirawatham and another*[3], that the provisions of section 763 were imperative. Section 347 of the Code corresponds to Order 21, rule 22 of the Indian Code. In *Rajagopala Ayyar v. Ramaniyachariar*[4], it was held that a sale without notice to the judgment-debtor was a nullity. Section 289 deals with the date on which the transfer takes place and it must be considered with section 238. Under that section a private alienation is prohibited—see *Gunasekera v. Rodrigo et al.*[5], and *Hendrick Singho v. Kalanis Appu*[6].

The administrator is not the debtor. He is an officer of the Court who has the right to sell the deceased's property to pay his debts. See *Andrishamy v. Silva et al.*[7]. It is a sale by Court and not a private alienation. The debtor lost his title between the date of the Fiscal's sale and transfer and therefore there can be no relation back to the date of the sale.

N. E. Weerasooria, K.C. (with him *A. E. R. Corea* and *H. A. Chandrasena*), for plaintiff respondent.—*Gunasekera v. Rodrigo et al.*[8] is an authority against the contention of the appellant, because it was held that section 289 of the Civil Procedure Code does affect the judgment-debtor and of persons claiming through him. The appellant claims title through the judgment-debtor although the sale had taken place under the authority of Court. *Hendrick Singho v. Kalanis Appu*[9] refers to a case where the seizure was not registered. In this case it was registered. It was held in *The King v. Migel Kangany and others*[10] that the provisions of section 226 are directory only. The purpose of the demand is to give the debtor an opportunity to pay up. Now the mortgage decree is notice to pay it up. There has been no irregularity in this case. Further a mere irregularity is not sufficient to set aside a sale.

Counsel cited *Deputy Fiscal, Kegalla v. Tikiri Banda*[11]; *Kannangara v. Peries*[12]; and *Saibo v. Mohamadu*[13].

H. V. Perera, K.C. in reply.—*The King v. Migel Kangany and others* (*supra*) is a criminal case. Even in a money decree the debtor knows that a balance is due, but that is not a demand or notice. This is a case where the writ is issued for the first time. The irregularity is on the part of the judgment-creditor who acts through the Fiscal. *Cur. adv. vult.*

[1] (1901) 5 *N. L. R. 165.*
[2] (1929) 30 *N. L. R. 305.*
[3] (1935) 4 *C. L. W. 128.*
[4] (1923) *I. L. R. 47 Mad. 288.*
[5] (1929) 30 *N. L. R. 468 at 472.*
[6] (1921) 23 *N. L. R. 80.*
[7] (1915) 18 *N. R. R. 454.*
[8] (1929) 30 *N. L. R. 468 at page 472.*
[9] (1921) 23 *N. L. R. 80.*
[10] (1917) 4 *C. W. R. 127 at 129.*
[11] (1928) 29 *N. L. R. 443.*
[12] (1928) 30 *N. L. R. 78 at 80.*
[13] (1937) 39 *N. L. R. 522 at 524.*

January 31, 1939. KEUNEMAN J.—

This is an action for declaration of title to a property called Maharawila-kumbura. The property belonged to Mr. R. Jayewardene who died in 1932. The second defendant was appointed administrator of his estate.

In execution of writ in case No. 15,805, D. C. Kalutara, against the second defendant administrator, the Fiscal seized the property in question on December 16, 1932, and the seizure was registered on December 19, 1932. The land was sold in execution on January 7, 1933, and purchased by the plaintiff, but the Fiscal's transfer was not issued till January 12, 1934, and was registered on January 30, 1934.

On January 14, 1933, seven days after the Fiscal's sale, the second defendant administrator had the same property sold by public auction, and it was purchased by the first defendant, who obtained a notarial conveyance of the property. This sale was with the sanction of the Court, and under conditions of sale approved by the Court in testamentary case No. 2,332 D. C. Kalutara, and no fraud has been proved in respect of this sale.

The learned District Judge entered judgment for the plaintiff, and the first defendant appealed. At the appeal before Maartensz and Hearne JJ. as at the trial in the District Court, the appellant contended that the sale by the Fiscal was null and void, as the officer entrusted with the execution of the writ did not require the judgment debtor to pay the amount of the writ under section 226 of the Civil Procedure Code before proceeding to seize and sell the property. The learned Judges in appeal had doubts as to the correctness of an earlier decision in the case of *Hadjiar et al. v. Kuddoos et al.*[1], and have referred the determination of the question to the Full Bench.

Subject to an argument that I shall deal with at the end of this judgment, the Fiscal's transfer related back to January 7, 1933, the date of the Fiscal's sale, and therefore took precedence over the later deed by the administrator. Counsel for the first defendant argued, however, that the Fiscal's seizure, sale and transfer were null and void owing to the failure of the Fiscal's Officer to make demand under section 226 of the Civil Procedure Code which runs as follows:—

> "Upon receiving the writ, the Fiscal or his deputy or other officer shall within forty-eight hours after delivery to him of the same . . . repair to his (the debtor's) dwelling-house or place of residence and there require him, if present, to pay the amount of the writ."

In *Hadjiar et al. v. Kuddoos et al.* (*supra*) which was decided by two Judges, Koch J. emphasized the use of the word "shall" in the section, and thought that the intention of the Legislature was to regard a demand by the Fiscal as essential. He continued: "If therefore the Fiscal has failed in this duty and this has been established to the satisfaction of the Court, I am of opinion that the sale held under the writ is null and void". He further stated that "the default of the Fiscal amounted to more than a mere irregularity for it rendered the sale null and void".

It is necessary to point out that this case is not exactly parallel to the present case. In the case decided by Koch J. an application to set aside

[1] *(1935) 37 N. L. R. 376.*

the sale was made in the same action in which execution issued, and Koch J. expressly held that such an application could be made under section 344 of the Civil Procedure Code. It is clear therefore that these were proceedings between parties to the action, including the purchaser at the Fiscal's sale in that category. The decision therefore does not deal with the question whether the sale was "null and void" for all purposes.

Moreover the authority of this case is weakened in view of two other cases which have been cited to us. In *The King v. Migel Kangany and others*[1], which was a criminal proceeding for unlawful assembly and rioting, it was argued that the accused was engaged in a lawful enterprise, viz., resisting the Fiscal's Officer in enforcing execution, in that the Fiscal's Officer had not complied with the provisions of section 226 of the Civil Procedure Code. Shaw J. said, "section 226 in my opinion does not render an execution invalid, if it is executed beyond the time specified after delivery of the writ to the Fiscal. That section in my opinion, is merely an instruction to the Fiscal as to the manner in which he should proceed when levying execution. It is intended to be directory only and it is not, in my opinion, compulsory to the effect that the writ would become invalid if not executed within forty-eight hours of delivery to the Fiscal". Koch J. in *Hadjiar et al. v. Kuddoos et al.* (*supra*) accepted this dictum of Shaw J. but held that although the time limit was not compulsory, the necessity for the demand itself goes to the root of the interests of the judgment-debtor. I find some difficulty in following this distinction.

Again in a later case *Saibo v. Mohamadu*[2], Abrahams C.J. held that the case decided by Koch J. was "no authority for saying that the seizure was invalid when no demand was made, if the defendant was aware of the seizure . . . . The defendant cannot claim the benefit of section 226, when he is not injured by mere non-compliance with it".

Under section 226 there can be no doubt that a duty is placed on the Fiscal to repair to the dwelling-house or place of residence of the debtor. If the debtor is present the Fiscal has to make demand, but if the debtor is absent no further duty is imposed on the Fiscal in this connection.

If the Fiscal fails in the performance of the duty imposed, I think it is equally clear that it is open to the defendant to make an application to set aside the sale under section 344 of the Civil Procedure Code. I may add that I am of opinion that mere proof of non-compliance with section 226 without more is not sufficient to enable the defendant to succeed.

In my opinion, however, it is not correct to say that where there has been a failure on the part of the Fiscal to comply with the duty imposed on him under section 226 of the Civil Procedure Code, the subsequent proceedings in execution are null and void for all purposes. No doubt under the section a peremptory direction is given to the Fiscal, but no section of the Code invalidates all subsequent proceedings, where the Fiscal fails in his duty. In this connection there is an interesting judgment by Drieberg A.J. in a criminal case where the accused was charged with resisting a Fiscal's Officer in executing a writ of possession issued under a partition decree. In that case section 347 of the Civil Procedure Code was in question. That section provides that where more than one

[1] *4 C. W. R. 127.*

[2] *(1937) 39 N. L. R. 522.*

year has elapsed between the date of the decree and the application for its execution, the Court shall cause the petition to be served on the judgment-debtor, and it was argued that writ issued without such notice was void for want of jurisdiction and an illegal process, which the appellant was justified in resisting. But Drieberg A.J. rejected this argument, saying, "Notice is required in the interests of the parties against whom execution is sought, and the absence of notice makes the execution proceedings void as against them and not merely voidable, but I do not think they can be regarded as void against persons not parties to the action and who are not entitled to notice".

With deference I think myself that the use of the words "void" and "voidable" in this connection is misleading. It is possible that in a proceeding under section 344 of the Code the Court may regard a failure to comply with the requirements of any section relating to execution as of such fundamental importance that mere proof of that fact is sufficient to entitle a party to have all the proceedings set aside, and I think that where the word "void" is used, it is used in this sense, and that the word "voidable" implies that it is incumbent on the party seeking to set aside the sale, to establish other matters in addition to the fact of non-compliance with any section relating to execution.

As regards parties to the action in which a decree is passed, it is the policy of the law that all questions relating to the execution of the decree shall be determined by order of the Court executing the decree and not by separate action, *vide* section 344 of the Code. Has the Legislature reserved to persons not parties to the action the right to raise such questions in separate actions? In my opinion it is not possible to come to such a conclusion. It is certainly the policy of the Code to provide a number of safeguards to the judgment-debtor, and he is the person who may be damnified by non-compliance with the terms of the various sections, and where the judgment-debtor does not or cannot claim a right to raise such questions, I do not think we should extend this right to third parties who are not parties to the action.

Several authorities on other sections relating to execution were cited before us and it is necessary to consider them in this connection. In *Keel and others v. Asirwatham and another* [1], Soertsz A.J. considered the effect of failure to comply with the terms of section 763, which provides that in the case of an application for execution of a decree which is appealed against, the judgment-debtor shall be made respondent. It is to be noted that the question arose in an appeal from an order setting aside a sale in the action in which execution issued. Soertsz A.J. quoted *Stroud's Judicial Dictionary* in connection with the word "shall" as follows: "Whenever a statute declares that a thing shall be done, the natural and proper meaning is that a peremptory mandate is enjoined", and held that the failure to give notice vitiated the sale. The decision in this case was based partly on the case of *Omer v. Fernando et al.* [2], which in its turn purports to follow the Privy Council decision in *Malkarjun v. Narhari and another* [3], in which the meaning of the word "nullity" was discussed.

[1] *4 C. L. W. 128.*

[2] *16 N. L. R. 135.*

[3] *I. L. R. 25 Bom. 337.*

Lord Hobhouse there said :—

"Other decisions are cited in which proper notices have not been served after decree, but on examining them they all appear to be cases in which proceedings have been taken either under section 311 of the Code or by independent suit, within the year allowed for setting aside a sale. In such cases the necessity for distinguishing between irregularity and nullity does not arise, and general assertions of the invalidity of such sales, quite appropriate to the case in which and the purpose for which they are used, are only misleading when separated from their context and applied to a case in which the distinction between irregularity and nullity is the cardinal point."

"It is then necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage. There can be no question that omission to serve notice on the legal representative is a serious irregularity, sufficient by itself to entitle the plaintiff to vacate the sale. But there may be defences to such a proceeding, and justice cannot be done unless those defences are examined by legal methods. It may be that the plaintiff could unite a suit to set aside with one to redeem, and that the defendant's anticipatory plea of misjoinder would if tried have been overruled. But that need not be discussed, because their Lordships think it is beyond reasonable doubt that this is not a suit to set aside the sale."

I may add however that the question whether property sold after a vesting order had been made under the Insolvent Debtor's Act of 1848, without notice to the official assignee was good, has subsequently been decided by the Privy Council in *Raghunath Das v. Sundara Das*[1]. For resons given their Lordships decided that notice under Order 21 rule 22 was necessary in order that the Court should obtain jurisdiction to sell the property. "In the first place the property having passed to the official assignee, it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place no proper steps had been taken to bring the official assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title, or interest which could be sold or vested in the purchaser and consequently the respondents acquired no title to the property". The case in *I. L. R. 25 Bom.* was distinguished, as there a notice had been served on the wrong party, but the Court had held in the same proceedings that it was the correct party.

A similar principle has been applied in India to the case where property attached is sold after the death of the judgment-debtor—vide *Rajogopala Aiyar v. Ramunugachariya*[2]. But it is clear that special considerations apply to that case, in particular the necessity of joining new parties on whom the title of the judgment-debtor has devolved by operation of law.

[1] *I. L. R. 42-Cal. 72.*

[2] *I. L. R. 47 Mad. 288.*

It may be pointed out that the decision of the Privy Council does not rest on the ground merely of the failure to comply with the terms of the section, but is based on the other considerations I have mentioned.

We have also been referred to the case of *Bastianpillai v. Anapillai* [1], where the right of a plaintiff whose title arose under at Fiscal's conveyance was successfully disputed, on the ground that what was sold by the Fiscal was not what had been seized by him. Bonser C.J. followed the judgment in *Mahadeo Dubey v. Bhola Nath Dichit* [2], where it was held that a regularly perfected attachment is an essential preliminary to sales in execution ot simple decrees for money, and where there has been no such attachment any sale which may have taken place is not simply voidable but *de facto* void. It may be noted that the Indian decision was given in a proceeding for setting aside the sale, and not in a separate action. But Bonser C.J. rests his judgment on the fact that "the Fiscal is empowered to seize and sell the debtor's property, the Code prescribes what seizure means, and that he has no power to sell property that he has not seized, and that property as to which the provisions of the Code as to seizure have not been followed cannot be said to have been seized". In this case what was seized was the property itself, and not the mortgage debt upon it which was subsequently sold.

I think however it is possible to distinguish this case from the present one. Bonser C.J. appears to lay emphasis on section 255 of the Code, which may be regarded as limiting the power of the Fiscal to selling only property which he has seized, and it is possible to argue that the sale of property which has not been seized, is no sale under the Code, and that an act done by the Fiscal which the Code did not empower him to do, is a nullity. I do not think that the same argument is applicable to an omission on the part of the Fiscal to do something which the Code enjoins.

On a consideration of all these authorities, I am of opinion that the fact that no demand was made by the Fiscal under section 226 of the Code does not deprive the Court of jurisdiction and render the seizure and sale thereafter a nullity, and that it is not open to any person to seek to attack the seizure and sale on that ground in a separate action.

One other matter was argued before us, which was not referred to us, viz., that the doctrine of relation back under section 289 of the Civil Procedure Code cannot have effect where the judgment debtor has between the date of the Fiscal's sale and the Fiscal's transfer been deprived of his title by a sale which is not a private alienation. In my opinion such an interpretation would render section 289 entirely nugatory, and I agree with two decisions to the contrary, viz., *Juan Appu v. Weerasena* [3] and *Aserappa v. Weeratunga et al.* [4], decided by a Bench of three Judges. I hold against the appellant on this point.

The appeal is dismissed with costs.

ABRAHAMS C.J.—I agree.

POYSER S.P.J.—I agree.

HEARNE J.—I agree.

NIHILL J.— I agree.

Appeal dismissed.

[1] *5 N. L. R. 31.*
[2] *I. L. R. 5 All. 86.*
[3] *20 N. L. R. 30.*
[4] *14 N. L. R. 417.*