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Present: Pereira J. and De Sampayo A.J.

YAPAHAMINE *et al. v.* WEERASURIYA.

458—D. C. Matara, 5,832

Seizure of property in execution—Removal of seizure does not validate an alienation void under s. 238, Civil Procedure Code—Is fresh seizure necessary when writ is re-issued ?—Extension of time for execution applied for by Fiscal—Is application under s. 224 necessary ?

The removal of the seizure of any property once seized in the execution of a writ does not validate an alienation of the property which was originally void by operation of section 238 of the Civil Procedure Code.

Per PEREIRA J. (DE SAMPAYO A.J. *dissentiente*).—That in the case of a writ issued on an order on an application expressly made under section 224 of the Code, it is necessary that in terms of section 226 there should be a proper seizure of the property of the judgment-debtor on the particular writ so issued. A seizure on a prior writ cannot be availed of for the purpose of the sale of the property.

When a Fiscal having seized property under a writ sends it to the Court for an extension of the time allowed for execution, an application under section 224 is not necessary. All that the Court has to do is to make an order extending the time and return the writ to the Fiscal to continue execution.

THE facts are set out in the judgments.

A. St. V. Jayewardene, for plaintiffs, appellants.

Allan Drieberg, with him *Canekeratne*, for first defendant, respondent.

Cur. adv. vult.

March 12, 1914. PEREIRA J.—

The subject-matter in dispute in this case is a 239/896th share of the two parcels of land described in the plaint. For the purposes of the contention in this case Charles William may be taken to have been the original owner of the share in claim. On a writ against Charles William the share was seized on August 9, 1911, and eventually sold to the first defendant on March 12, 1912. The seizure was duly registered, but between the seizure and the sale by the Fiscal, that is to say, on February 22, 1912, Charles William conveyed the land to the plaintiffs. It has been said that the conveyance in favour of the plaintiffs was not a " private alienation, " and it was therefore not affected by the provision of section 238 of the Civil Procedure Code. It is not necessary that I should enter into the facts upon which this contention is based. They are set forth in the judgment of the Court below, and I need only say that I am in

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entire agreement with the learned District Judge in thinking that the conveyance was a " private alienation," and I have no hesitation in endorsing the reasons given by him.

It has also been said that the conveyance is saved from the operation of section 238, because it is a conveyance in pursuance of an agreement prior to the seizure; but, as to this, it is clear that there was no agreement valid and enforceable in law for the conveyance to the plaintiffs of the share of land in claim.

The point that was most seriously pressed and debated at length at the bar was that the writ (a writ issued in case No. 5,154 of the District Court of Matara) on which the property was seized was not the writ on which the property was eventually sold to the first defendant. I have looked into the record of case No. 5,154 and I have found it difficult to discover what really has happened to the writ on which the property was seized. It is pretty certain that a fresh writ was applied for under section 224 of the Civil Procedure Code on January 23, 1912, for the recovery, " by seizure and sale of the property of the defendant," of Rs. 1,473.90, and in terms of the order on that application a fresh writ was issued on February 2, 1912. The amount of this writ included the amount that was recoverable on the old writ. There was no seizure of the property on the new writ, but apparently the Fiscal sold the property in claim on the footing of the seizure on the old writ. It was argued that that could not be done, and I have no hesitation in saying that the procedure was grossly irregular. In the case of *Patheruppillai v. Kandappen* [1] I held that the Civil Procedure Code made no provision for the re-issue of a writ, and that when a fresh application for execution was made under section 224, the proper course was to issue a fresh writ, and in such a case there should, under section 226, be a seizure of property under the new writ. If on an order allowing an application under section 224 an old writ, as a matter of convenience, is (though irregularly) re-issued on fresh stamps, the proceeding is simply tantamount to the issue of a new writ, and on the re-issued writ the same steps should be taken anew as those on the old writ. That ruling is in accordance with what the Privy Council has laid down in the case of *Puddomonee v. Roy Muthooranath*.[2] There it was held that where a party prosecuting a decree was compelled to take out another execution, " his title should be presumed to date from the second attachment." The ruling I find is also supported by the decision in the case of *Ihooboo Sahoo v. Ram Churn Roy*,[3] where it was held that if the judgment-creditor subsequently applied of his own accord for a second attachment treating the first as non-existent, then the first must be deemed to have been abandoned. In the present instance, the execution-creditor in case No. 5,154 by making a fresh application for execution under

[1] *(1913) 16 N. L. R. 298 ; 3 C. A. C. 23.*

[2] *20 W. R. 133.*

[3] *11 W. R. 517.*

section 224 of the Civil Procedure Code, " by seizure and sale of the property of the defendant," applied, in effect, as shown above, for a fresh attachment. In the case of *Carpen Chetty v. Sekappa Chetty*[1] cited by the appellants' counsel it does not appear from the report that the re-issue of the old writ was based on an order on a formal application for execution under section 224. I think it is clear that on a writ issued on the footing of such an order there must be a fresh seizure, and that a seizure on an older writ cannot be availed of. It has been said that in the view that I have expressed the return of a writ to Court for an extension of the time allowed to the Fiscal for the deposit in Court of a recovery made on it would necessitate a fresh seizure. I fail to see how a return of a writ for the purpose mentioned can have that effect. In such a case no application under section 224 of the Civil Procedure Code is necessary. All that the Court has to do is to extend the time and return the writ to the Fiscal without any further stamps being affixed to it to continue the proceedings in execution on it. I think that the appellants' counsel is entitled to succeed on his contention that there has been irregularity in the sale by the Fiscal of the property in claim to the first defendant. But the plaintiffs cannot succeed in this appeal for another reason. A private alienation of property after it is seized in execution and the seizure is registered is, under section 238 of the Civil Procedure Code, void as against all claims enforceable under the seizure. The claim of the execution-creditor in case No. 5,154 was a claim that was enforceable under the seizure in question. As has been held in *Mahtah Chand v. Surno Moyee*,[2] and the other cases cited by O'Kinealy in his commentary on the Indian Code of Civil Procedure (p. 448), the removal of an attachment does not render an alienation made whilst the attachment was subsisting a valid one. If the Fiscal's conveyance in favour of the first defendant is valid, that conveyance took the place of the first defendant's claim, as against which the alienation in favour of the plaintiffs was void. If the Fiscal's conveyance is invalid owing to irregularity in the procedure observed, then the first defendant's claim still subsists, and the alienation in the plaintiff's favour is therefore still invalid and the plaintiffs cannot succeed, especially in a suit under the Partition Ordinance, where title as against the world has to be established. In the case of *Mahtah Chand v. Surno Moyee* cited above it was laid down, " If the Kut-ko-balah (that is, the instrument by which the private alienation was effected in that case) was a document which could have not been legally given by the judgment-debtor at the time it was given because the judgment-debtor had then no power to alienate, it was not afterwards made valid by the fact of the property being released from attachment."

For the reasons given above, I would dismiss the appeal with costs.

[1] *(1910) 2 Cur. L. R. 162.*

[2] *15 W. R. 222.*

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DE SAMPAYO A.J.—

The question in this appeal is whether the plaintiffs are entitled as against the first defendant to an undivided 239/896th share of the land in litigation, and it arises under the following circumstances. The land was the subject of a partition action No. 4,220 of the District Court of Matara, to which one Don Samel Wickremeratne and one Don Cornelis were parties. The land was ordered to be sold, and was purchased by Don Samel. The purchaser did not pay the full purchase money, but produced to Court a receipt for Rs. 469.75, being the equivalent of 239/896th share to which Don Cornelis had been declared entitled. It appears that, as a matter of fact, Don Cornelis did not receive this money, but that Don Samel by an informal writing agreed with Don Cornelis that he would, on obtaining from the Court the certificate of sale, transfer to Don Cornelis the above share of land. Don Cornelis in June, 1909, brought an action No. 4,673 to enforce the agreement, but the action was dismissed, as it was brought before the certificate of sale was issued to Don Samel, who thereafter gifted the land to his son Charles William Wickremaratne. In the meantime Don Cornelis died, and in August, 1911, the plaintiffs, who are the widow and children of Don Cornelis, applied to the Court in the partition action No. 4,220 praying that Don Samel and his son Charles William be ordered to execute a deed in their favour for the share of land in question, and in the alternative they be ordered to pay them the said sum of Rs. 469.75. Charles William appeared by proctor and consented to execute a deed for the share subject to certain conditions, and accordingly on February 22, 1912, he executed a deed in favour of the plaintiffs. In the meantime Charles William became indebted to some third party, and a judgment was entered against him in action No. 5,154 on August 7, 1911, for a sum of Rs. 1,000 and costs of action. A writ of execution having issued, the said share of land was seized by the Fiscal on August 9, 1911, and the seizure was duly registered on August 17, 1911. In pursuance of this seizure a sale took place on March 12, 1912, when the first defendant became purchaser, and in February 8, 1913, a Fiscal's transfer was issued to him.

In the above state of facts, the question is whether the deed of February 22, 1912, in favour of the plaintiffs, which was executed after the registered seizure, was obnoxious to the provisions of section 238 of the Civil Procedure Code and was void against the first defendant, who was the purchaser at the execution sale.

On behalf of the plaintiffs it is argued, in the first place, that the deed was executed in pursuance of an order of Court, and that therefore it did not constitute a private alienation within the meaning of section 238. It may be noted that the application made by the plaintiffs in the partition case was wholly unauthorized, and the Court would have no jurisdiction to make any order thereon;

and the proceedings are distinguishable from the various Indian decisions cited on this point. Even if any such order were binding upon the parties to the proceedings, it would not, in my opinion, prejudice the rights of the execution-creditor or the claims enforceable under the seizure in question, and would not have the effect of taking the alienation out of the operation of section 238. However this may be, it is sufficient to say that the Court, as a matter of fact, made no order on the plaintiffs' application in the partition case; it merely recorded the consent of Charles William to execute a deed, and the deed of February 22, 1912, was executed voluntarily, and not in obedience to any order of Court.

In the next place, it is argued that there was no subsisting seizure at the date of the above deed. This argument is based on the fact that the seizure was effected under the writ issued on August 8, 1911, but returned to Court in December, 1911, with report of the sale of certain plumbago, and that the sale of this share of land took place after writ had been issued afresh on February 2, 1912, the contention being that, when the writ was returned to Court and a new application for execution was made, the old seizure lapsed, and that there should have been a fresh seizure under the new writ before any sale could have taken place. I may say that the Court appears to have intended the writ issued on February 2, 1911, to be a mere extension of the old writ, for I find that the old writ was sent back to the Fiscal with the extension endorsed thereon as follows: " 2/2/12. Writ extended and re-issued on fresh stamps." From the further endorsements on it I find also that this was the writ, extended and re-issued from time to time, upon which the Fiscal acted all along right up to September, 1913. On the other hand, the document of February 2, 1912, contained no endorsements whatever as, under section 370 of the Civil Procedure Code, it should, if that was the sole writ which was acted on by the Fiscal after that date. The explanation of the fact of a new document having been drawn up on February 2 appears to me to be that on the original application for writ the plaintiffs' proctor had asked for leave to add to the writ the amount of costs when taxed, and by February, 1912, these costs had been taxed, and so, instead of the amount being added on the face of the old writ, the full claim was inserted in the new document, and both the documents together were treated as constituting the writ in the execution proceedings. This may not be quite regular, but I am not prepared to say that the old writ must necessarily be said to have had no operation, notwithstanding its being extended and re-issued. I regret I am unable to agree with the opinion expressed in *Patheruppillai v. Kandappen* [1] that under the Code a writ cannot be re-issued, and with deference I should say that the expression " re-issue " is intentionally used in the Stamp Ordinance as a convenient way of conveying the idea that the writ is sent back

[1] *(1913) 16 N. L. R. 298.*

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to the Fiscal for further execution, subject to its being re-stamped if it has been returned unexecuted for the reasons given in the Stamp Ordinance. The point, however, is whether upon such re-issue a fresh seizure must be effected in order to make a valid sale of the property previously seized. The case *Periar Carpen Chetty v. Sekappa Chetty* [1] decided that there was no such necessity; and the same case is an authority for the further proposition that a fresh seizure, even if effected, does not operate against the continued validity of the first seizure. This decision is not only binding upon me, but expresses a view on the point under consideration with which, if I may say so, I entirely agree. I do not see any logical necessity for holding that if the currency of the writ is ended, a seizure made while it was alive becomes *ipso facto* dead and inoperative, or that a valid sale can be effected only under the same writ as the seizure. Reference has been made to section 226 of the Civil Procedure Code, but that merely describes the general duties of a Fiscal in connection with the execution of writs, and is, I think, no authority for saying that the Fiscal must seize property over again every time a writ is put into his hands. For these reasons, I should be prepared, if necessary, to hold that the Fiscal's sale of this share of land proceeded upon a subsisting valid seizure and was consequently itself valid, and that first defendant has good title. The real question in this case, however, is not whether the first defendant has good title, but whether the conveyance in favour of the plaintiffs is valid. Section 238 enacts that a private alienation after a seizure of the property and before the removal of the same shall be void as against all claims enforceable under the seizure. Now, in this case, whether the subsequent Fiscal's sale was good or not, the seizure itself was never removed. Section 239 points out the causes for removing the seizure and the manner of doing so. There may be other analogous causes, such as abandonment, for considering the seizure as having been tacitly withdrawn without an express order of Court, but I think that the mere issue of a new writ is not one of them. The seizure in this case was thus subsisting at the time of the private alienation, and the deed in favour of the plaintiff is therefore void by operation of section 238. I think the Indian cases cited from *20 W. R. 133* and *11 W. R. 517* are distinguishable. In the first of these cases the execution proceedings had been struck off, and the circumstances of the case led to the presumption that they had been abandoned and a new attachment was considered necessary, and the sale took place under the new attachment. Similarly, in the second of the above cases, the execution proceedings had been struck off, and the Court held that if that was done with the consent of the judgment-creditor, or if he subsequently applied for a second attachment considering the first attachment was non-existent, the first attachment would be deemed to have been

[1] *(1910) 2 Cur. L. R. 162.*

abandoned, and the Court remanded the case for further investigation as to the circumstances under which the execution proceedings were struck off. The Court there further broadly laid down that, if property be once attached, the attachment would subsist, if not expressly abandoned by the execution-creditor, until an order should be issued for its withdrawal. In the present case, not only was there no order withdrawing the first seizure, but there were no circumstances of abandonment; on the contrary, both the Court and the execution-creditor considered the seizure to be still subsisting and operative.

This appeal fails, and should be dismissed with costs.

Appeal dismissed.