Present: De Sampayo J. and Schneider A.J. 1920.

SUPPIAH PILLAI *v.* RAMANATHAN.

16—D. C. Colombo, 51,813.

Action for specific performance, or in the alternative for damages—Property sold by the Fiscal—Defendant adjudicated insolvent after seizure—Must assignee be the substituted defendant?

The defendant, who was in wrongful possession of a car which rightly belonged to plaintiff, fraudulently sold it to a third party.

Held, that in the circumstances the plaintiff may maintain an action in the alternative to obtain specific delivery or for damages.

Where a judgment-debtor is adjudicated insolvent after the property was seized by the Fiscal, the sale is valid even if the assignee is not substituted in place of the judgment-debtor on the record.

THE facts are set out in the judgment of the District Judge (W. Wadsworth, Esq.) :—

One Cooray, an employee of the defendant, was the owner of a motor car, No. 1,942. At the instance of defendant, plaintiff lent some money to Cooray, and at defendant's request took a mortgage of Cooray's car as security. The bond was executed in June, 1917.

The plaintiff put the bond in suit in case No. 49,292 of this Court and obtained judgment. In execution of his decree he seized the car at Dr. Saravanamuttu's premises. The defendant claimed the car and took possession of it. The car was, however, sold in execution, and plaintiff himself bought it. The plaintiff now claims delivery of the car, or in the alternative claims its value and damages.

The defendant states that he *bona fide* purchased the car, and some time afterwards sold it. He also relies on a point of law that the sale in execution of plaintiff's mortgage decree on August 23, 1918, is void, as the defendant in case No. 49,292 was adjudicated an insolvent on August 20, 1918.

Before going into the questions of law raised, I find on the facts that the alleged sale of the car by Cooray to defendant is a fictitious one. I accept plaintiff's evidence as to the circumstances of the mortgage, and that defendant was fully aware of all the circumstances. Cooray was the confidential clerk of defendant himself, and it was at defendant's instance plaintiff took the mortgage of the car. The car was used both by Cooray and defendant.

I accept the letter written by Cooray marked P 1 dated November 28, 1917, as setting out the true state of things as to how the car came into the physical possession of defendant. It was not transferred to defendant. No price was agreed upon, and defendant took the car to effect the necessary repairs, pay defendant's claim, or rather redeem the mortgage, and then to take the car to himself as his own. Till then the car was Cooray's; it was in the physical occupation of defendant for Cooray. Defendant appears to have given a cheque to Cooray on

1920.

Suppiah Pillai v. Ramanathan

November 8, 1917, for Rs. 1,500. Defendant has not given evidence, and I am not prepared to accept Cooray's evidence that this sum of Rs. 1,500 was given for the car, or that he gave the sum after cashing it to plaintiff. The counterfoil of the cheque is not produced, and it is strange, if Cooray gave the whole proceeds of the cheque to plaintiff, why he did not endorse it over to him. I reject this part of Cooray's evidence altogether. Wherever the proceeds of the cheque went, it certainly never went to plaintiff.

Cooray wanted the Court to believe that the letter (P 1 of November 28, 1917) was written after the insolvency proceedings, and at the request or suggestion of plaintiff. I reject his evidence altogether. I find the letter was written on the date shown thereon, namely, on November 28, 1917. Cooray appeared to be deliberately perjuring himself in the witness box as to this. When pressed, however, he was forced to admit that there was no sale.

I find that at the time of the execution of the mortgage decree Cooray was the owner of the car, and defendant knowing all the circumstances had been acting unfairly towards plaintiff in this matter.

As regards the value of the car, I have no hesitation in accepting its value at Rs. 4,500, as stated in Cooray's letter. It is insured for Rs. 4,000. The defendant in his answer states it was worth Rs. 2,000. It is a fact that Dr. Ratnam bought it for Rs. 2,000. The defendant does not say why he sold it for this price. Sometimes a person is not unwilling to sell a car very cheap to a medical man, who is often of service when he falls ill. The price paid by a doctor is no test of the real price.

The question of law raised by counsel is that the sale in execution was after the adjudication of insolvency by Cooray. The adjudication, as I stated above, was on August 20, and the sale in execution was on August 23.

Sections 56, 65, and 111 of the Insolvency Ordinance were relied on by counsel for the defendant.

In the first place, this is not a claim as between the insolvent and any creditor. Defendant does not seek to impeach the sale as a creditor of the insolvent, nor does he take the objection on behalf of any creditor or assignee. Defendant has no interest whatsoever in the property.

The property was the insolvent's. It was secured to a creditor by the insolvent long before the insolvency. The creditor sought to execute his mortgage relief, and defendant put it out of the power of plaintiff to obtain possession of the mortgaged property, fully knowing the existence of the mortgage, and has appropriated the mortgaged property to himself. He is now repelling plaintiff's legitimate claim by saying that three days before the car was actually sold in execution, Cooray, his own servant, had gone to the Insolvency Court. However clever or ingenious the defendant's attitude in the matter, he cannot be allowed to defeat justice, and there cannot be any law which will permit him to do so.

A simple and grammatical reading of the sections quoted will show that plaintiff's claim on the property cannot be brought under any of these sections. An analysis of the different sections in their purely grammatical and simple form will show that the sections do not apply to the present case. I do not propose to analyse or to give the grammatical position of the words used. There is no doubt in my mind that the simple construction of the sections gives no room for defendant's counsel's objections.

I find that the sale in execution is a valid one, and plaintiff was entitled to the car. Defendant has made it impossible for plaintiff to reach the car. He has sold it. *Mobilia habent non sequelam* applies. The defendant must pay its value.

As regards damages, there is no proof, and I award none. Enter judgment for Rs. 4,500 and costs of suit. Plaintiff admitted defendant paid him Rs. 500, but defendant has not asked for a set-off.

A. St. V. Jayawardene (with him *Canakeratne*), for defendant, appellant.

H. J. C. Pereira (with him *E. W. Jayawardene*), for plaintiff, respondent.

Cur. adv. vult.

October 12, 1920. DE SAMPAYO J.—

The facts from which this action has arisen may be shortly stated as follows. One Cooray was the owner of a motor car, and on a writing dated June 5, 1917, duly registered, he hypothecated it to plaintiff to secure a certain sum of money. The plaintiff on December 13, 1917, brought an action against Cooray to realize his security, and obtained a decree on December 14, 1917. In execution of that decree the motor car was seized on January 12, 1918, and was sold on August 23, 1918, and purchased by the plaintiff. There is no doubt that the plaintiff became the lawful owner of the motor car. The defendant's case is that he purchased the car from Cooray on November 8, 1917, and that he sold it in his turn to Dr. Ratnam in September, 1918. The District Judge has recorded a strong finding, the correctness of which I have no reason to doubt, that in connection with these transactions there was fraud on the part of the defendant, that he paid no consideration to Cooray for the alleged purchase, and, in fact, there was no sale to him of the car, and that the car happened to be in defendant's possession, not upon a sale, but on behalf of Cooray while certain repairs were being effected. The main contention in appeal on behalf of the defendant is that at the date of action he was not in possession of the car, and that plaintiff's remedy was against Dr. Ratnam, who was then in possession of the car. The District Judge's judgment, however, amounts to a finding that the defendant fraudulently got rid of the car which he knew rightly belonged to the plaintiff. In such circumstances the law allows an action to the true owner against the wrongdoer for damages, although he may not be able to obtain specific delivery. This is the nature of the present action, and I think the learned District Judge has rightly decided it.

The appeal should be dismissed, with costs.

SCHNEIDER A.J.—

The following may be taken as admitted facts. One Cooray being the owner of a motor car duly mortgaged it to the plaintiff by a writing dated June 6, 1917. The plaintiff sued upon the said bond

1920.

SCHNEIDER A.J.

Suppiah Pillai v. Ramanathan

and obtained a decree in his favour on December 14, 1917, in action No. 49,292. The car was seized on January 12, 1918, and sold by the Fiscal to the plaintiff on August 23, 1918. The Fiscal issued a certificate of sale dated September 25, 1918, after the confirmation of the sale by the Court. Cooray was adjudicated an insolvent on August 20, 1918. The defendant, alleging that Cooray had sold the car to him on November 8, 1917, sold and delivered it to Dr. Ratnam at the end of September, 1918, for Rs. 2,000.

The plaintiff instituted this action on November 25, 1918, alleging that the defendant, acting in collusion with Cooray, who was the defendant's clerk, and falsely pretending to have purchased it from Cooray, had obtained possession of the car, and had refused to deliver it to the plaintiff on demand on October 24, 1918. The plaintiff claimed the delivery of the car, or in the alternative its value, Rs. 4,500.

The defendant's answer to this claim is not straightforward. It states that the defendant *bona fide* purchased the car from Cooray and sold it some time afterwards ; and that the plaint discloses no cause of action.

Three issues were framed and tried :—

" (1) Can plaintiff maintain this action against the defendant, inasmuch as at the date of the purchase of the car by the plaintiff the defendant in No. 49,292 was an adjudicated insolvent ?

" (2) Was the sale by Cooray to the defendant a fraudulent one ?

" (3) Is the sale to plaintiff of the motor car valid ? "

The learned District Judge held on all these issues in favour of the plaintiff, and gave him judgment for the sum of Rs. 4,500.

On appeal on behalf of the defendant (appellant) Mr. Jayawardene pressed two contentions. One of them, which was not taken in the lower Court, nor raised even in the petition of appeal, was this : The District Judge having held that there was no sale of the car by Cooray to the defendant, the sale by the defendant to Dr. Ratnam was ineffectual to convey title to Dr. Ratnam. The plaintiff's action should, therefore, be against Dr. Ratnam. If by this contention it is contended to imply that the action is not rightly constituted, I am unable to uphold it. The form of the action—to recover the car or in failure its value from the person who was in possession and refused to restore before action brought—is one familiar to our Courts so far as my experience goes for the last twenty-five years. It is a form of action quite consistent with the provisions of our Civil Procedure Code, and it has the advantage of convenience on its side. Our Code defines an action " as a proceeding for the prevention or redress of a wrong," and cause of action " as the wrong for the prevention or redress of which an action may be

brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury."

The cause of action alleged here is that the defendant wrongfully refused to restore the car to the plaintiff after the plaintiff became the owner of it. Even under the Roman-Dutch law in the *actio rei vindicatio* the possessor who had ceased to possess could be sued. (*Voet 6, 1, 22, 32.*)

I, therefore, hold against this contention.

It was next contended that as Cooray was adjudicated an insolvent on August 20, and the sale by the Fiscal was on August 23, the sale conveyed no title, as the assignee was not substituted as defendant in the action. This contention is not sound. It has been laid down that by a seizure the property comes into the hands of the law, that the seizure does not abate by the death of the judgment-debtor, and that, therefore, for the purpose of selling property which had been seized in the lifetime of the judgment-debtor, it is not necessary to implead any one as a legal representative. This principle clearly applies in this case. The judgment-debtor became civilly dead by his being adjudicated an insolvent only after the seizure had been effected. Sections 56, 65, and 111 of the Insolvent Ordinance (No. 7 of 1853) do not seem to have any application.

Lastly, it was contended that no more than Rs. 2,000 should have been awarded as damages, if any, as that was the price for which the defendant sold to Dr. Ratnam. This contention, too, I am unable to uphold. The defendant appears to have sold the car to Dr. Ratnam in an endeavour to put it beyond the plaintiff's reach. In doing so he has acted fraudulently. The evidence shows that the car in Cooray's own valuation was worth Rs. 4,500. The District Judge, therefore, was justified in assessing the damages at Rs. 4,500.

I, therefore, dismiss the appeal, with costs.

Appeal dismissed.