1955 *Present :* Swan, J., and K. D. de Silva, J.

E. S. WIMALASEKERA, Appellant, *and* PARAKRAMA SAMUDRA CO-OPERATIVE AGRICULTURAL PRODUCTION AND SALES SOCIETY, LTD., Respondent

S. C. 77—D. C. Anuradhapura, 3,452

Execution—Writ issued without jurisdiction—Seizure of goods thereunder—Liability for damages—Proof of malice—Quantum of damages—Civil Procedure Code, s. 763.

A seizure of goods on a writ issued without jurisdiction renders the party, at whose instance the seizure was effected, liable in damages without proof of malice.

Under the provisions of section 763 of the Civil Procedure Code it is imperative that, in an application for execution of a decree which has been appealed against, the judgment-debtor should be made respondent. A writ which fails to comply with this requirement of section 763 falls into the category of a writ issued without jurisdiction.

It is the duty of a party who is entitled to claim damages to take all reasonable steps to minimise the damages.

APPEAL from a judgment of the District Court, Anuradhapura.

N. Kumarasingham, for the defendant appellant.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy,* for the plaintiff respondent.

Cur. adv. vult.

September 14, 1955. K. D. DE SILVA, J.—

This is an appeal from a judgment of the District Judge, Anuradhapura, awarding the plaintiff a sum of Rs. 12,276 with legal interest thereon as damages for illegal seizure of the goods belonging to the plaintiff.

The plaintiff is a Co-operative Society duly registered under the provisions of the Co-operative Societies Ordinance (Cap. 107) which carries on the business, *inter alia*, of the purchase and sale of paddy. The defendant on 9th August, 1951, obtained judgment against the plaintiff in Case No. 3122 D. C. Anuradhapura in a sum of Rs. 41,892·50. On the same day that judgment was entered in that action the present plaintiff who was the defendant in that case filed a petition of appeal. The same day the Proctor for the plaintiff in that action filed an application for execution and obtained a writ for the recovery of the amount due on the decree. This writ was issued to the Fiscal returnable on 1.12.'51. On 15.8.'51 the Proctor for the defendant in that case filed a petition stating, *inter alia*, that the application for writ had been made after the appeal had been taken against the judgment but that the judgment-debtor had not been made a respondent to the writ application as required by Section 763 of the Civil Procedure Code. Therefore he moved that the application for execution be refused and the writ be recalled. On the previous day, that is to say on 14th August, the Fiscal had seized on this writ 3908 bushels of paddy and lorry bearing No. C. L. 5148 belonging to the judgment-debtor. These goods were pointed out to the Fiscal by the judgment-creditor for seizure. On 16.8.'51 the Counsel for the judgment-debtor supported the application for recall of writ and the learned District Judge made order recalling the writ and directed the judgment-debtor to pay the Fiscal's charges, if any. He further directed that notice of the application for recall of writ be issued on the judgment-creditor. On the same day the Fiscal on receipt of the order recalling the writ reported to Court that 3908 bushels of paddy and lorry No. C. L. 5148 had already been seized and asked for instructions as to what should be done regarding the seizure, and the learned District Judge on the same day made the following order :—

" The property seized to be released on giving security." No security however was tendered by the judgment-debtor and the property continued to remain under seizure.

The matter of the application for recall of writ came up for inquiry on 11.9.'51 and the learned District Judge made his order on 18.9.'51 that the order of 9.8.'51 to issue writ had been made *per incuriam* and directing the Fiscal to release the property from seizure on payment on the Fiscal's charges. The point which came up for consideration at that inquiry was, which was filed earlier, the petition of appeal or the application for writ. The case for the judgment-creditor was that when the application for writ was tendered to the Secretary of the Court no appeal had yet been filed and the Secretary supported the judgment creditor on this point. On the other hand, it was contended on behalf of the judgment-debtor, that the petition of appeal was tendered first

and it was minuted in the journal earlier than the application for writ. The learned District Judge held that the journal entries represented the correct sequence of events and made order recalling the writ. There was no appeal from that order which is now binding on the parties.

In the present action the claim for damages was based on two grounds namely (1) that the seizure was illegal on the ground that the judgment-debtor was not made respondent to the writ application and (2) that the present defendant acted maliciously and unlawfully and without reasonable or probable cause in obtaining the seizure. The learned District Judge held that the plaintiff had failed to establish malice and that therefore damages could not be claimed on that ground. That finding is supported by the evidence and was not canvassed in appeal. The learned District Judge, however, held that the defendant in having got the property seized on a writ that was void *ab initio* was liable in damages without proof of any malice on his part. It is contended on behalf of the appellant that the learned District Judge erred on the law in holding that the defendant became liable in damages in the absence of proof of malice on his part. That in an application for execution for a decree which is appealed against it is imperative that the judgment-debtor should be made respondent is admitted. The provisions of Section 763 C. P. C. are clear on that point. In the earlier action when the application for execution was made on 9.8.51 the judgment-debtor was not made respondent to that application, although an appeal had already been taken by him against the judgment. The writ obtained on that application, it is contended on behalf of the plaintiff, was not merely irregularly issued but issued without jurisdiction. It is argued on behalf of the plaintiff that the judgment of the Privy Council in *Ramanathan Chetty v. Meera Sahibo Marikar* [1] is authority for the proposition that a seizure on a writ issued without jurisdiction renders the party, at whose instance this seizure is effected, liable in damages without proof of malice. In that case Their Lordships of the Privy Council stated,

> "A distinction must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorized the seizure, the seizure is lawful, and no action will lie in respect of the seizure unless the person complaining can establish a remedy by some such action as for malicious prosecution. If, however, the writ or warrant did not authorize the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure without proof of malice."

Mr. Kumarasingham who appeared for the defendant appellant contended that this judgment of the Privy Council supported him. According to him, the writ in question is not one issued without judicial sanction but a writ which was improperly obtained. Therefore he submitted that proof of malice was essential for the plaintiff to succeed. On this point the observations of Soertsz A.C.J. in *Edward v. de Silva* [2] are very

[1] *(1930) 32 N. L. R. 193.*

[2] *(1945) 46 N. L. R. 342.*

illuminating. In that case he was dealing with a writ similar to the one under review. Dealing with the rules of procedure relating to the issue of writs he said,

"Some of these rules are so vital, being of the spirit of the law, of the very essence of judicial action, that a failure to comply with them would result in a failure of jurisdiction or power to act, and that would render anything done or any order made thereafter devoid of legal consequence. The failure to observe other rules, less fundamental, as pertaining to the letter of the law and to matters of form would not prevent the acquisition of jurisdiction or power to act, but would involve exercise of it in irregularity." He held that a writ which failed to comply with the requirements of section 763 fell into the category of a writ issued without jurisdiction. In coming to that view he relied on two Indian cases decided by the Privy Council—*Rajunath Das v. Sundra Das Khelci* [1] and *Makar Jun v. Nahari* [2]. In *Rajunath Das v. Sundra Das* section 248 of the Indian Code of Civil Procedure came up for consideration. The provisions of that section required that a certain party should have been served with a notice calling upon him to show cause why the decree should not be executed against him, before obtaining execution against him. The judgment-debtor had failed to do this. Lord Parker in that case observed, "A notice under Section 248 is necessary in order that Court should obtain jurisdiction." If I may say so, with respect, I agree with the view expressed by Soertsz A.C.J. in *Edward v. de Silva* [3]. The resulting position therefore is that the plaintiff's goods were seized on 14.8.'51 on a writ which the Court had no jurisdiction to issue. A writ issued without jurisdiction cannot be invested with judicial sanction. Seizure effected on that writ was illegal and the plaintiff is entitled to recover damages without proof of malice on the part of the defendant.

I would now proceed to consider the question of damages. The sum of Rs. 12,726 awarded as damages to the plaintiff was made up as follows :—

	Rs.
(1) Expenses incurred in getting the seizure released ..	300
(2) Shrinkage of paddy during 39 days at Rs. 25 per day ..	975
(3) Loss caused by non user of lorry for 39 days ..	1,251
(4) Loss of trade and prospective gain from 14.8.'51 to 21.9.'51 at Rs. 250 per day	9,750

The plaintiff gave evidence stating that he incurred the expenses and sustained the losses referred to above. No evidence was led on behalf of the defendant to contradict the testimony of the plaintiff on this point. The learned District Judge held that the damages claimed were not excessive and allowed the plaintiff's claim.

[1] *A. I. R. 1914 P. C. 129.* [2] *I. L. R. 25 Bombay 338.*
[3] *(1945) 46 N. L. R. 342.*

The learned District Judge however overlooked the fact that on 16.8.'51 he had ordered the seizure to be released on the present plaintiff giving security. The security I take it would be the amount due under the decree namely Rs. 42,892·50 with legal interest thereon from 5.4.'50. Although this order was made, the present plaintiff failed to furnish the security and obtain the release of the property. The President of the plaintiff Society has stated that security was not given because the Society between 16.8.'51 and 21.9.'51 did not have the sum of Rs. 41,000 to be utilized as security. He however admitted that there was a sum of Rs. 15,000 on 16.8.'51 in the bank to the credit of the Society. This sum of Rs. 15,000 could not be drawn without a resolution of the Committee. In fact it would appear that security has to be sanctioned by the Committee and approved by the Registrar. There is no evidence whether or not a resolution was passed by the Committee authorizing the furnishing of security. The President has merely stated that the Registrar did not approve of giving security in Rs. 14,000. It is the duty of the plaintiff to take all reasonable steps to minimise the damages. In this case the plaintiff Society does not appear to have taken sufficient action to furnish the security. It is reasonable to hold that if adequate steps were taken to obtain the necessary money for the purpose of giving security the plaintiff could have got the property released within two weeks. The value of the paddy alone which was seized was over Rs. 30,000. To the credit of the Society there was a sum of Rs. 15,000 in the bank. Therefore if the Society so desired it would not have been impossible for it to have obtained the necessary money to give the security. Accordingly it would be fair in my view to restrict the damages claimed under items 2, 3 and 4 for a period of 14 days only. I would therefore fix the damages that the plaintiff is entitled to recover as follows :—

		Rs.
Item 1	..	300
Item 2	..	350
Item 3	..	448
Item 4	..	2,500
	Total ..	3,598

To this sum of Rs. 3,598 I would add a further amount of Rs. 402 on account of the expenses in raising the required security and perfecting the same. Let judgment be entered for the plaintiff in the sum of Rs. 5,000 with costs in that class. The plaintiff would pay half the costs of this appeal to the defendant appellant. Subject to this variation the appeal is dismissed.

SWAN, J.—I agree.

Decree varied.