1913.

Present: Pereira J.

PATHERUPPILLAI *v.* KANDAPPEN *et al.*

114—C. R. Batticaloa, 15,605.

Re-issue of writ—Fresh seizure necessary.

A seizure of land under a writ of execution cannot be availed of for the purposes of a sale of the same land when, since the seizure, the writ has been returned to Court and re-issued.

There must be a fresh seizure for such sale. There is no provision in the Civil Procedure Code for the re-isssue of process. Each time execution for satisfaction of a decree is desired, application should be made under section 224 and a writ issued. A writ if re-issued on payment of the proper stamp duty, however, will have the same effect as a writ freshly issued.

IN this case writ was issued on June 1, 1911, returnable on December 1, 1911. The properties in question were seized under the writ in July, 1911. The first defendant died in October, 1911. The writ was issued for a second time in January, 1912, without notice to the heirs of the deceased and without making them substituted defendants. The lands were sold in June, 1912, and purchased by one Sathasivam, who deposited one-fourth of the price. The purchaser made default in paying the three-fourths.

The writ was issued for a third time in August, 1912, again without notice to the heirs of the deceased. The properties were re-sold in October, 1912. The Fiscal reported that the sale was founded on a seizure made on July 29, 1912. There was no seizure under the writ issued in August, 1912.

The appellant (second defendant) moved that the sale be set aside.

The learned District Judge (T. W. Roberts, Esq.) made the following order:—

The property now sold was seized in July, 1911, before the first defendant died. It was advertised for sale under that seizure, and sold to one Sathasivam, the son of the first and second defendants, for Rs. 355. He paid only one-fourth of the purchase amount. It then became the duty of the Fiscal, after the writ re-issued, to sell the property without delay under the old seizure. He has in fact made a second unnecessary seizure, and sold the property for Rs. 285. The valuation is Rs. 260. It appears to me that the present sale is in reality a sale under the first seizure. The Code stringently enacts the procedure on default, and the second seizure may rightly be struck out of consideration. This being so, under the Indian decisions quoted in *Balasingham's Civil Procedure Code* it was unnecessary to implead

anyone to represent the deceased first defendant, because the seizure was previous to his death. This disposes of Mr. Nagapper's first argument.

The second is that there was no seizure made at any date when a writ was out. This would only apply to the second seizure of July 29, 1912, which I consider deserves no attention. It is irrelevant to the earlier seizure, at the date of which it is not disputed that writ was out.

Finally, no substantial loss is proved; the property has fetched its value. The application is dismissed with costs.

The second defendant appealed.

Balasingham, for the appellant.—The sale is bad, as the issue of the writ in August, 1912, was illegal. The first defendant was dead at the time, and his heirs should have been substituted as defendants in his place before the writ was re-issued. The provisions of section 341 of the Civil Procedure Code are very clear; it enacts that the legal representative of the judgment-debtor should be made a party on the record before writ is issued. See *Omer v. Fernando*,[1] *Sheo Brasad v. Hira Lal*.[2]

It has no doubt been held in India that where the property was under seizure at the time of the death of the debtor, the subsequent sale after debtor's death is not invalid by reason of the fact that no substitution was made. But that is no authority for holding that after the time allowed for the return of the writ had expired the writ could be issued again without making the legal representative a party on the record. In such a case section 341 would apply.

A sale held under a writ which was illegally issued is bad.

The seizure under the first issue of writ could not support the sale under the second issue of writ and under the third issue of writ. There should have been a new seizure every time the writ was issued.

No appearance for the respondent.

Cur. adv. vult.

May 9, 1913. PEREIRA J.—

In this case application was made by the appellant to cancel a sale in execution of her property, not on the ground, as the District Judge appears to have understood, of irregularity in the conducting of the sale, but on the ground of illegality in the procedure adopted. The application, I take it, was made under section 344 of the Civil Procedure Code. The question involved is whether a seizure of land on a writ of execution can be availed of for the purposes of the sale of the same land on the same writ when, since the seizure, it has been re-issued after return to the Court. Now, it is clear that our Civil Procedure Code makes no provision whatever for the re-issue of a writ, or, indeed, of any other process. Application for

[1] *(1913) 16 N. L. R. 135.*

[2] *I. L. R. 12 All. 441.*

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execution is made under section 224, and in making this application it is provided that the applicant should state the result of previous applications, if any, made for execution, and the amount of previous levies, if any, clearly indicating that the application for execution is to be made as provided for by section 224, not only where a writ is applied for in the first instance, but when a writ has once been issued and the amount of the judgment partially recovered. But, where the application under section 224 is allowed, there is no provision for the re-issue of an old writ, but the provision is for the issue of a writ in form No. 43 (see section 225, paragraph 3). The Legislature, without proper appreciation, apparently, of the fact that there is no provision in the Code for the re-issue of writs, and that therefore each time that execution is allowed the necessary stamp duty should be paid by the applicant by duly stamping each writ taken out, and that there was hence no necessity for safeguarding the revenue in the matter of the re-issue of the writs, provided in the Stamp Ordinance of 1890 that no writ should be re-issued without, as the provision has been construed by Wendt J. in the case of *Palaniappa Chetty v. Samsadeen*,[1] payment afresh of the stamp duty required for a new writ. The same mistake has unfortunately been repeated in the Stamp Ordinance of 1909; and while Layard C.J. was of opinion in the case already cited (*Palaniappa Chetty v. Samsadeen* [1]) that a writ once returned to Court could not be re-issued except in the circumstances mentioned in the Stamp Ordinance, I take it that in the case of *Muttappa Chetty v. Fernando* [2] the Judges constituting the Court were of opinion that a writ might in other circumstances as well be re-issued provided the stamp duty was paid afresh; but I understand them to mean that the re-issue of a writ was in any case to have the same effect as the issue of a fresh writ. In view of the provisions of the Civil Procedure Code, which allow no re-issue of writs, there can be no doubt that that must be so. The only extension of those provisions resulting from those judgments in the case of *Muttappa Chetty v. Fernando* [2] is that the process may differ in form. But its effect is left untouched. That being so, there must be a fresh seizure in the case of the re-issue of a writ to justify a sale thereunder. In view, therefore, of section 341 of the Civil Procedure Code and the judgment of this Court in *Omer v. Fernando* [3] I allow the appeal with costs.

Appeal allowed.

[1] *(1905) 8 N. L. R. 325.* [2] *(1907) 10 N. L. R. 180.*
[3] *(1913) 16 N. L. R. 135.*