Present: Dalton J. and Jayewardene A.J. 1926.

SUPPRAMANIAM CHETTY *v.* MOHAMADU BHAI *et al.*

193—D. C. (Inty.) Kandy, 33,020.

Concurrence—Seizure of money in hands of a public officer—Payment into Court—Seizure under another writ—Claim to concurrence—Realization of assets—Civil Procedure Code, ss. 350 and 352.

A sum of money in the hands of a public officer was seized in execution of a writ on August 5, 1925, and a notice was issued to him on August 17 to show cause why he should not pay the money into Court.

On August 31 he was ordered to pay the money into Court, and the money was deposited to the credit of the case on October 10.

The appellants, who had applied for execution against the same judgment-debtor in another Court, obtained writ and seized the said sum of money on August 27, and made a claim for concurrence on October 2.

Held, that the appellants were entitled to claim concurrence.

APPEAL from an order of the District Judge of Kandy. The plaintiff in the action, who had obtained judgment for a sum of Rs. 500, seized on August 5, 1925, a sum of money, which had been deposited by the judgment-debtor with the Government Agent, Central Province. Notice was issued on the Government Agent on August 17 to show cause why he should not pay into Court the sum seized. On August 31 order was made requiring the Government Agent to deposit the money in Court, which he did on October 10. The appellants, who are judgment-creditors of the same judgment-debtor in C. R., Kandy, Nos. 3,642 and 3,643, also seized the money under their writs on August 27, 1925, and claimed concurrence on October 2. The learned District Judge held that the appellants were not entitled to concurrence.

H. V. Perera, for appellants.

Keuneman, for respondent.

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This appeal raises a question with regard to the appellants' right to claim concurrence in a sum of money brought to the credit of the action. A sum of money had been deposited with the Government Agent, Central Province, by the judgment-debtor. The plaintiff in the action, who had obtained judgment for a sum of Rs. 500, had the property seized under section 232 of the Civil

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Procedure Code, and it was subsequently, on the orders of the Court, deposited to the credit of the case. The appellants, who are judgment-creditors of the same judgment-debtor in two cases, C. R., Kandy, Nos. 3,642 and 3,643, also had this money seized under their writs. Later they preferred a claim for concurrence in this action. The respondent disputes their right to concurrence, and the question for decision is whether the claim can be sustained under the code.

The facts on which the contest between the parties arises are as follows :—

July 29, 1925.—Respondent's writ issued for the seizure and sale of the defendant's property.

August 5.—Seizure of money in the hands of the Government Agent, Central Province.

August 19.—Notice issued on the Government Agent, Central Province, to show cause why he should not pay into Court the sum seized under writ.

August 24.—Letter from Government Agent, Central Province, informing the Court that there is a sum of Rs. 407 due to the judgment-debtor and that Government makes no claim.

August 31.—Order on the Government Agent, Central Province, to deposit the money in Court.

October 10.—Money deposited to the credit of the case.

The appellants had issued writ and seized the sum of money in the hands of the Government Agent, Central Province, on August 27, and on October 2 made their claim for concurrence. On these facts the learned District Judge has held that the assets must be considered as realized under section 352 of the Civil Procedure Code on August 24, when the Government Agent, Central Province, informed the Court that he had no claim on the fund which was in his hands, and that as the seizure by the appellants was subsequent to such realization, they were not entitled to claim concurrence. On appeal it is contended that the assets were not realized within the meaning of section 352 until the money was deposited in Court on October 10, or at earliest till August 31, when the Court directed the Government Agent, Central Province, to pay the money into Court, and that as the appellants had seized the money on August 27 they are entitled to concurrence. In the lower Court the argument proceeded on the basis that section 352 governed the decision of the question. But it has been pointed out to us by learned Counsel for the respondent that section 352 can have no application to this case as the parties are not applying for the execution of decrees of

the same Court. That seems to be correct. See *Mendis v. Peris*[1] and *Meyappa Chetty v. Weerasooriya*,[2] both of which are Full Bench decisions, and over-ruled *Mirando v. Kiduru Mohamadu*[3] and followed *Konamalai v. Sivakulanthu*.[4] In the first-mentioned case (*supra*) Shaw J. referring to section 352 said :—

> " . . . . the only reasonable interpretation that I think can be given to it is to confine the section only to the persons who can under the law make application under it for execution—namely, decree-holders of the same Court—leaving to decree-holders of other Courts the rights that appear to have been given to them by the earlier sections, to participate in the seizure and sale, and then to apply for their share of the proceeds under section 350. This right seems to have been recognized by Burnside C.J. in *Konamalai v. Sivakulanthu* (*supra*), when he said in refusing the claimant's right to participate, 'he had no execution in the hands of the Fiscal so as to make the seizure a joint seizure under his as well as the plaintiff's writ.' "

The rights of the parties here must, therefore, be decided under section 350, and it was held in the two Full Bench cases referred to, that under section 350 the right to share in the assets realized must be restricted to creditors who had writs in the hands of the Fiscal at the date of realization. In the present case, therefore, the appellants are entitled to claim concurrence only if they had their writs in the hands of the Fiscal at the date the assets were realized. When can assets be said to be realized under section 232 of the Code ? Learned Counsel for the respondent contends that under that section assets are realized as soon as a notice is served on a public officer requesting him to hold property in his custody or deposited with him subject to the further orders of the Court. I am unable to agree with his contention. That section indicates the mode of seizure when the property is in the hands of a public servant. The seizure must be by a notice, a form of which is given in the schedule (see Form 47 of Schedule II.), requesting the public officer to hold the property subject to the further orders of the Court, and section 233 enacts that " the notice necessary to effect seizure under sections 229 and 232 may be signed and served by the Fiscal under the authority of the writ of execution alone." The notice, in my opinion, is in effect a prohibitory notice and is similar to the one issued under section 229. Mr. Keuneman drew attention to the difference in the wording of the two sections and in the forms of notice under them. No doubt in the case of a person other than a public servant or a Court the notice prohibits

[1] *(1915) 18 N. L. R. 310.*
[2] *(1916) 19 N. L. R. 79.*
[3] *(1904) 7 N. L. R. 280.*
[4] *(1891) 9 S. C. C. 203.*

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and restrains until the further order of the Court, but in the case of a public servant or a Court no such injunction was necessary, and more polite language is used. I may point out that under the Indian Code a notice under section 272, now Order 21, rule 52, which corresponds to section 232 of our Code, is entitled a "Prohibitory Order" (see Form No. 142 of the old Code and Form No. 21 of Appendix E of the first Schedule of the Code of 1908). In the local cases, *Thiakarajapillai v. Ranjanather*[1] and *Girigoris v. The Locomotive Superintendent*,[2] notices under section 232 are called prohibitory notices. In *Katum Sahiba v. Hajee Badsha Sahib*,[3] which has been over-ruled on another point by the case reported in *44 Madras* and referred to later, the Court, after referring to the effect of an attachment under section 64 of the present Code, said :—

> "Much less can it be contended that an order of the Court under rule 52 (Order 21) confers any priority upon the person at whose instance the order was passed, since it amounts at most to an injunction restraining any dealing with the fund (see Form No. 21, Appendix E of the first schedule of the Code), and merely renders any payment to the judgment-debtor, contrary to the attachment thereby effected. void as against all claims enforceable under the attachment, including claims for the rateable distribution of assets (section 64)."

The notice under section 232, in my opinion, amounts to a seizure by prohibitory notice and has the same effect as a notice under section 229, which is expressly prohibitory. The distinction sought to be drawn by learned Counsel for the respondent between a notice under section 229 (*a*) and one under section 232 does not exist, and the decisions on section 229 cited by the learned Counsel for the appellant therefore apply. In *Soyza v. Weerakoon*,[4] it was held that the seizure by the Fiscal of money due to a judgment-debtor, in the hands of a third party (Government Agent of Ratnapura), is not realization of the asset, and it was open for other creditors who have applied at that stage for execution of money decrees against the same judgment-debtor to claim in concurrence. It does not appear clearly whether the money in this case was seized under section 229 or section 232, probably it was under the former, as reference is made in the judgment to section 230. This judgment is, therefore, an authority for the contention that the issue or receipt of a prohibitory notice does not amount to realization. See also the earlier case of *Konamalai v. Sivakulanthu* (*supra*), in which the same view appears to be taken. In India a like interpretation has been adopted, and it has been held that money due to the debtor attached in the hands of the third party by a prohibitory notice was realized within the meaning of section 295

[1] (*1908*) *3 A. C. R. 123.*
[2] (*1912*) *15 N. L. R. 113.*
[3] (*1913*) *38 Mad. 221.*
[4] (*1893*) *2 C. L. R. 178.*

of the old Code, which corresponds to section 352 of our Code, when paid into Court, and was liable to rateable distribution among those who applied before payment into Court, *Sirinivasa Ayyangan v. Seetharamayyan.*[1] Section 73 of the present Code, which has taken the place of section 295, and substitutes the words " before the receipt " of the assets for the words " prior to realization," has been similarly construed. Thus, in *Visvanadhan Chetty v. Arunachalam Chetty,*[2] which is a Full Bench decision, Wallis C.J. in the course of his judgment said :—

> ". . . . . the order of attachment does not of itself effect a transfer to the credit of the suit in which the attachment is made so as to constitute a receipt of assets within the meaning of section 73. The money may not be available as being already subject to another attachment, possibly in another Court, and it is only when the Court comes to the conclusion that there is no objection and orders the money, or so much as it thinks necessary to satisfy the decree-holders who have applied to it for execution, to be transferred to the credit of the first attaching creditors' suit which it is engaged in execution, that there can be said to be receipt of assets within the meaning of section 73, and that a rateable distribution can be made."

Further, section 232 uses the term " property," which would include not only money but all movables. If, therefore, the property seized under this section is movable property, there can be no realization by the mere issue of a notice, but the property would have to be sold in the usual way before assets could be realized. In my opinion, therefore, both seizure and realization are not effected by the single act of the Court or of the Fiscal in issuing a notice under section 232, but there must be a further act by the Court directing the money to be brought to the credit of a case before there can be realization where the property is money.

For these reasons I hold that the order of the learned District Judge is erroneous, and that the appellants are entitled to share in the distribution of the assets brought into this case by the order of the Court of August 31. The appeal is allowed, with costs.

DALTON J.—I agree.

Appeal allowed.

[1] *(1895) 19 Mad. 72.*

[2] *(1920) 44 Mad. 100.*