*Present:* Dalton and Lyall Grant JJ. 1929

MOHAMADU *v.* MARIKAR *et al.*

*143—D. C. (Inty.) Puttalam, 4,033.*

*Sequestration before judgment—Sale of property sequestered—Seizure of money by another writ holder—Decree obtained before sequestration—Prohibitory notice—Proctor's lien—Civil Procedure Code, ss. 75, 212, 660.*

Where property sequestered before judgment was sold by the Fiscal, who had, at the time of sale, received a writ issued in execution of a decree obtained against the same defendant in another action,—

*Held*, that the decree holder, whose writ was in the hands of the Fiscal at the time of sale, was entitled to have his decree satisfied out of the proceeds of sale.

*Held further*, that the Proctor of the party who obtained the order for sequestration had no lien on the proceeds of sale until his clients' claim had been reduced to a decree.

APPEAL from an order of the District Judge of Puttalam. The facts appear from the judgment.

*Amarasekera*, for appellant.

*Soertsz* (with him *R. C. Fonseka*), for respondent.

December 20, 1929. DALTON J.—

The appellant is plaintiff in action No. 4,033. In that action he sought to recover from one S. Mohammadu Saibu, whom I will hereafter call the defendant, and another the sum of Rs. 833.75 due on a promissory note. Plaint was filed on January 4, 1929, judgment given for the amount claimed on January 15, and writ issued on January 18.

S. M. Mohamadu Saibu, the defendant, was also sued in action No. 4,032 by another person who is the first respondent in this appeal to recover a sum of Rs. 1,700, also on a promissory note. Plaint was filed in that case on December 20, 1928, and an order of sequestration was asked for and granted at the same time directing the Fiscal to seize and sequester property of the defendant to the value of Rs. 2,000. Certain property, including shop goods, coconuts, two bulls, and some goats, were seized under this order on December 22. The sale report shows they were sold by the Deputy Fiscal on January 24, and the sum of Rs. 357.24 paid into the Kachcheri as the proceeds of the sale after deduction of expenses on January 29. He reported to the Court on February 1 that he had deposited this sum to the credit of case No. 4,032. The property had been sold by the Fiscal under section 227 of the Code as being perishable or subject to decay. Meanwhile plaintiff in case

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No. 4,032 obtained a decree *nisi* on January 24, the decree being made absolute on February 22, and a writ of execution was issued on March 3.

Meanwhile in case No. 4,033 the Deputy Fiscal had received from plaintiff in that case an application dated January 18 for the execution of his decree. It does not appear what was pointed out for seizure, but it would appear that the Deputy Fiscal seized the sum of Rs. 357.24 sequestered and deposited to the credit of case No. 4,032, for on February 8 he sent a prohibitory notice to the Court under the provisions of section 232 of the Civil Procedure Code seizing the amount for the benefit of plaintiff in case No. 4,033.

On February 15 plaintiff moved the Court by motion dated February 14 that this amount so depicted be transferred to the credit of case No. 4,033 and for a further order that the money so transferred "be brought to the separate account of the plaintiff in this case." What exactly in practice that means is not clear to me, but no doubt what plaintiff wanted was payment of the amount to him on his writ, which presumably would follow when the sum had been credited to his account. The Court accepted the motion and directed notice to issue.

To whom notice was to issue the order did not state, but plaintiff in case No. 4,032 appeared to resist it after notice was served on him. The notice describes S. M. Mohamadu Saibu in the caption as defendant in cases Nos. 4,032 and 4,033, and the return of service shows it was served on him also.

The motion above referred to was heard on March 18, the trial Judge apparently being unable to fix an earlier date. The Fiscal's Marshal was called and he made it clear that under the writ in case No. 4,033 he had seized all the property sequestered in case No. 4,032. At the time of that seizure there was only one writ of execution in his hands. The learned Judge after hearing the motion dismissed it with costs.

He first of all holds that there is no proof that the defendant in case No. 4,032 was the same person as the defendant in case No. 4,033. Mr. Soertsz states he is unable to uphold that conclusion since both parties in the lower Court seem to have taken it for granted and so required no proof of it, and it was not questioned.

The learned Judge then goes on to discuss and decide the question whether plaintiff in case No. 4,033 was entitled to preference over plaintiff in case No. 4,032. It seems to me that on the facts here no question of any preference arises. An application was made by plaintiff in case No. 4,033 to have his writ executed. It is provided by section 660 of the Code that an order of sequestration does not bar any person holding a decree from applying for the sale of the property under sequestration in execution of the decree. The property was so attached, as the evidence shows, and it was sold.

It is immaterial whether the decree was obtained before or after the attachment under the order of sequestration. It is true that under section 661 it would not have been necessary for plaintiff in case No. 4,032 to again seize the property attached under the order of sequestration obtained by him after he had obtained a decree in his favour although he would still have to make the usual application for execution. (Code of Civil Procedure (India) by *Mulla*, p. 702.) Plaintiff in case No. 4,032 however did not obtain his decree until February 24, applying for execution in the usual form on March 1, whereas what had to be decided here was the rights of plaintiff in case No. 4,033 on January 18. There was only one writ in the hands of the Fiscal at that date and no question of concurrence therefore arises (*Mendis v. Peris* [1]).

The case of *Bisheshar Das v. Ambika Prasad* [2] deals with a similar question arising under the equivalent Indian rules. Those rules are practically the same as ours. Upon the facts in the case before us, it seems to me, that plaintiff in case No. 4,033 was entitled to have his decree satisfied out of the money belonging to defendant deposited in Court. No suggestion has been made that his conduct has been anything but honest.

With regard to the argument that the sum paid to the credit of case No. 4,032 was subject to a lien for the costs of the Proctor of the plaintiff in that case, it is clear from the decisions in *Perera v. Perera* [3] and *Appu Sinno v. De Silva* [4] and also from the terms of sections 75 and 212 of the Code that the lien, if any, attaches to "the amount decreed." There was no sum decreed in case No. 4,032 even at the time plaintiff in case No. 4,033 made his motion, nor was there any certainty, when the writ of plaintiff in case No. 4,033 was in the Fiscal's hands, that plaintiff in case No. 4,032 would be successful in his action. Until judgment be obtained it seems to me it is impossible to say that in such a case as this the property has been recovered or preserved for the plaintiff by the Proctor's professional exertions. If that is so, no lien in favour of his Proctor could therefore exist on this sum in case No. 4,032. In the course of the judgment in *Wijesuriya v. Kalu Appu* [5] it is stated in general terms that a Proctor's lien attaches to a fund brought into Court through his professional exertions, but the facts of the case are not set out in the report. It is clear however that the only question arising there was whether a Proctor's lien for costs extended to disbursements made as part of his professional duty or whether it is confined to payment for his professional services. The point arising before us did not arise for decision there. The learned Judge was in my opinion wrong in holding that the Proctor in case No. 4,032 had any lien on this sum for his costs.

[1] *18 N. L. R. 310.*
[2] *(1915) 37 Allahabad 575.*
[3] *11 N. L. R. 1.*
[4] *15 N. L. R. 51.*
[5] *8 C. W. R. 41.*

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Lastly it was urged that appellant had no right of appeal, but that on the dismissal of his motion he should have brought an action under section 247. This however is no claim to property seized coming within the provisions of section 241 of the Code. By the terms of section 658 claims to property that has been sequestered would be investigated in the manner provided by section 241 and the subsequent sections, but plaintiff in case No. 4,033 is making no claim to property sequestered; he is seeking to have his writ executed against defendant's property.

For the above reasons the plaintiff in case No. 4,033 was in my opinion entitled to the order sought on his motion. The order of the trial Judge must be set aside, and the motion allowed with costs thereof. Plaintiff is also entitled to the costs of this appeal.

LYALL GRANT J.—I agree.

*Appeal allowed.*