

1930

Present : Dalton S.P.J. and Lyall Grant J.GOONETILEKE v. JAYASEKERE *et al.*103—*D. C. (Inty) Kalutara*, 1,396.

Writ—Death of judgment-debtor—Property under attachment—Making legal representative a party—Civil Procedure Code, s. 341.

Section 341 of the Civil Procedure Code has no application where at the death of the judgment-debtor the property is under seizure.

A sale in pursuance of such a seizure is good without the legal representative of the judgment-debtor being made a party to the proceedings.

A PPEAL from a judgment of the District Judge of Kalutara.

De Zoysa, K.C. (with him *Weerasooria*), for plaintiffs, appellants.

Soertsz (with him *R. C. Fonseka* and *Silva*), for eleventh to sixteenth defendants, respondents.

September 15, 1930. DALTON S.P.J.—

This appeal arises in a partition action, the dispute, so far as the appeal is concerned, being between the plaintiffs and the tenth to sixteenth defendants. The plaintiffs purchased a half share of the land in question at a fiscal's sale and obtained fiscal's transfer (P8 of April 22, 1926). The judgment-debtor in case No. 9,849 whose property was seized and sold was one Ranso Fernando, a widow. She died on April 5, 1925. It was contended for the above defendants at the trial that the seizure was made after the death of the judgment-debtor, that no legal representative of the deceased was made a respondent to the application for the writ, and that the sale was, under section 341 of the Civil Procedure Code, a nullity. The argument advanced in the lower Court on behalf of the plaintiffs was that one of the plaintiffs in the case No. 9,849 was Ranso

Fernando's executor, he was a party to the proceedings therefore, and that he could not say he had no notice of the proceedings.

It is not necessary however for this Court to decide the questions raised in the argument on appeal. The facts have not all been correctly stated so far as I have now been able to ascertain them. The property in question was not seized after the death of Ranso Fernando, but during her lifetime. Exhibit P9 produced in the lower Court is neither a complete nor a correct copy of the proceedings in case No. 9,849 that are material to the questions that arose in this action. As counsel for appellants pointed out that possibility in the argument before us, I obtained the original and have examined it. The result of my examination of the original of exhibit P9 is as follows :—The writ of execution against Ranso Fernando to recover the sum of Rs. 17,125 and Rs. 1,125 per annum from January 18, 1917, to January 18, 1924, is dated January 21, 1924. It was made returnable on June 25. On October 31, 1924, the writ was returned unexecuted as no advertisement charges had been deposited. On November 15, 1924, application was made to re-issue the writ, and on November 19 the Court re-issued the writ, returnable on July 30, 1925. Although it is difficult from the District Court records of case No. 9,849 to find out what exactly was done by the fiscal, it is clear from a memorandum by him of July 5, 1924, that he had seized certain property under the writ when it first came into his hands before that date, and he asked to have the writ, which had been sent back to the Court in connection presumably with the non-payment of advertisement charges, returned to him adding a request that the writ be re-issued "to enable me to sell the property mentioned above". The writ was re-issued, as set out above, on November 19, 1924. The property seized was then put up for sale, and the fiscal reported on July 29, 1925, that the sale was stayed

for want of bidders. He at the same time returned the writ. Meanwhile the property still remained under seizure. On September 2, 1925, the Court was moved again to re-issue the writ, and an order was made on September 3 that the writ do re-issue returnable November 30, 1926. The property was thereupon sold and the fiscal so reported to Court on December 21, 1925. The trouble it seems to me has arisen from the fact that an incorrect and incomplete copy of the material proceedings in case No. 9,849 was put in as exhibit P9 in this case. The copy put in incorrectly shows that the writ was issued on the application of September 2, 1925, whereas it was re-issued on that date. The property also was not seized on September 25, 1925, but some time before July, 1924. When the sale report of December 14, 1925, states the property was seized on September 25, 1925, it is incorrect just as the fiscal's transfer that followed on the sale is incorrect when it states the writ of execution was issued on September 3, 1925. The writ was issued, as I have stated, on January 21, 1924. There is no other writ in the case.

The property having been seized in the lifetime of Ranso Fernando, the judgment-debtor, the authority, *Omer v. Fernando*¹, is no authority to support the nullity of the sale. It can be relied upon however by the appellants, for it points out that it has been held that the Indian section corresponding to section 341 only applies where, at the death of the judgment-debtor, the property was not under attachment.

Upon this issue, upon the facts as now ascertained, the learned Judge was wrong in holding that the fiscal's transfer to the plaintiffs was a nullity. His order in that respect must be set aside and the appeal allowed. The case must therefore go back for the shares given by the interlocutory decree to be reallocated in accordance with this conclusion. As I

think the plaintiffs must bear part of the blame in not having the facts fully elucidated in the lower Court, I would not make any order in respect of the costs of the appeal.

LYALL GRANT J.—I agree.

Appeal allow



¹ 16 N. L. R. 135.