

1927

Present : Fisher C.J. and Schneider S.P.J.

FERNANDO v. ISMAIL *et al.*

4—D. C. Colombo, 13,809.

Res judicata—Property seized in execution—Claim upheld—Failure of judgment-creditor to bring 247 action—Action for damages for wrongful seizure—Defence that the transfer is in fraud of creditors.

Where, in execution proceedings, a claim is upheld, the failure on the part of the execution-creditor to bring an action under section 247 of the Civil Procedure Code does not debar him from proving, in an action to recover damages for wrongful seizure, that the transfer in favour of the claimant was in fraud of creditors.

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

Balasingham (with him *Retnam*) for defendant, appellant.
Keuneman, for plaintiffs, respondent.

February 21, 1927. FISHER C.J.—

We have been urged to say that by reason of the defendants not having taken steps under section 247 of the Civil Procedure Code to establish their right to seize and sell in execution the property in question, they can now in an action for damages for wrongful seizure be prevented from proving that the transfer in favour of the claimant was in fraud of creditors. The reason why we are asked to say this by counsel is because of the words at the end of section 247, that the order in a claim inquiry shall be conclusive. Now, if the section is carefully studied, it will be found that the word "conclusive" does not mean, as my brother pointed out, conclusive for all purposes but conclusive as to the judgment-creditor's right to seize and sell the property. The defendants in this case do not seek to establish a right to seize and sell the property in question but they say that they have been the victims of fraud on the part of the plaintiff and another man. It seems to me that if such a fraud is proved it is a good answer to an action for wrongful seizure. To hold otherwise will be to open the door to a curious state of things. The judgment-debtor and another man might conspire and mislead the judgment-creditor and so induce him not to proceed to execution. There is nothing in section 247 which obliges us to hold that the defendants are precluded from establishing fraud as between the plaintiff and a third person. In this case the failure to take action under section 247 is not conclusive against the defendants. We therefore think the learned District Judge was wrong in his decision, and the action must be remitted to him for trial.

The defendants are entitled to the costs of the appeal.

SCHNEIDER S.P.J.—I agree.

Sent back.