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Present: Pereira J. and Ennis J.

GURUSAMY PULLE *v.* MEERA LEBBE *et al.*

81—D. C. (Inty.) Chilaw, 3,888.

Fiscal's sale—Sale in execution—A seizure under an old time-expired writ cannot be availed of for sale in execution under a new writ—Fiscal or execution-creditor to move for extension of time if sale cannot be carried out within time allowed—Inherent power of Court to extend time.

In the case of every writ issued on an order made on an application under section 224 of the Civil Procedure Code there should be a seizure. A seizure under an older time-expired writ cannot be availed of for the purposes of execution.

When a writ cannot be executed within the time allowed for execution by the Court, the proper course is for the Fiscal or the execution-creditor to move for and obtain an extension of time rather than for the Fiscal to return the writ to Court and to secure a re-issue thereof.

The Court has an inherent power to extend the time fixed for the execution of its own process.

APPEAL from a judgment of the District Judge of Chilaw (W. R. B. Carbery, Esq.).

In this case one Sina Wana Panjawarana Pulle sued the present petitioners, (1) Kawenna Segu Meera Lebbe and his wife (2) Pathumma Natchia, upon a promissory note. Decree absolute was entered against them with costs on April 3, 1908. On April 14, 1908, the plaintiff moved for and got out writ. On June 9, 1908, writ was returned to Court, with the report that no property was pointed out.

On July 21, 1908, the plaintiff moved for a re-issue of the writ, which was allowed on fresh stamps. Nothing further appears to have been done until September 20, 1911, when Mr. Panditteseker a filed his proxy as proctor for S. W. Gurusamy Pulle, the present (respondent) appellant, his petition, and affidavit, together with a deed of assignment No. 1,386, and moved for an interlocutory order, in terms of section 377 (*b*) of the Code, on the petitioners to show cause why Gurusamy Pulle should not be substituted plaintiff in place of the original plaintiff Panjawarana Pulle.

This order *nisi* appears to have been issued and re-issued several times with negative results, until on April 24, 1913, Mr. Panditte-sekere filed an affidavit from R. M. M. V. Venaithilan Chetty, the attorney of Gurusamy Pulle, and moved that the order *nisi* be affixed to the last known place of residence of the two judgment-debtors (present petitioners-respondents). This was allowed. On

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May 21, 1913, the order *nisi* was reported served on them by substituted service—they were absent—and the order *nisi* was made absolute.

On May 29, 1913, the first petitioner filed an affidavit, and moved that decree may not be executed until an inquiry is held into the matter referred to in the affidavit. On this the Court made order: "Affidavit insufficiently stamped." That was the only order made. On July 17, 1913, the substituted plaintiff (now respondent) filed his bill payable by the judgment-debtors, and issued notice of taxation for September 19, 1913. Notice of taxation was served on both.

On December 5, 1913, Mr. Panditteseker a, for the substituted plaintiff, applied for writ, and moved that substituted plaintiff's taxed costs be added to the amount of the writ. This was allowed on fresh stamps.

Writ issued on January 17, 1914, and under this writ the Deputy Fiscal sold certain lands belonging to the judgment-debtor, the sale realizing Rs. 2,140. On April 1, 1914, Mr. Storer filed proxy from the judgment-debtors and their petition and affidavit, and moved for an order *nisi* against the substituted plaintiff-respondent as prayed for in the petition, in terms of section 344 and section 377 of the Civil Procedure Code.

The prayer of the petitioners in their petition was for an order *nisi* on the respondent to show cause why the writ issued in this case should not be recalled and all proceedings in execution thereunder (including the sale) be set aside and declared void, and why further proceedings in execution against the petitioners should not be disallowed.

The learned District Judge made order recalling the writ of December 5, 1913, and setting aside all proceedings in execution thereunder, including the sale, and further refused the application of December 5, 1913, to execute the decree on the ground that the plaintiff had not exercised due diligence on the previous issue of the writ.

The substituted plaintiff appealed.

Bawa, K.C., for the substituted plaintiff, appellant.—The District Judge was wrong in holding that a new seizure was necessary under the writ issued on January 17, 1914. The properties were already under seizure when the writ was issued, and it was not necessary to seize the properties over again. The properties were seized under section 237 of the Civil Procedure Code.

The notice of prohibition issued on the judgment-debtor is in form No. 50 in the schedule to the Civil Procedure Code. The Fiscal gives notice in these terms: "That you, the defendant, are hereby prohibited and restrained until the further order of the Court from which execution in the said action issued from in any way transferring the property . . . . . ".

The seizure so effected continues till the seizure is removed in the manner indicated by section 239. It is not therefore necessary to seize the properties every time the writ is re-issued, unless in the meantime the seizure is removed in the manner indicated by section 239.

It was held in *Letchimanen Chetty v. Muttusamypillai*[1] that where once a property is sequestered under a mandate of sequestration, and where pending the sequestration another judgment-creditor of the same debtor had placed in the hands of the Fiscal a writ against the same debtor's property with a request to seize the said goods, that the placing of the writ of execution in the hands of the Fiscal *ipso facto* amounted to a valid seizure. In other words, it was held that once the property is under seizure, it was not necessary for the Fiscal to go through the formality of seizing the property under every subsequent writ in the manner indicated in section 226.

The authority on which the District Judge relies was questioned by De Sampayo A.J. in *Yapahamine v. Weerasuriya.*[2] It will cause great inconvenience if a Fiscal has to go through all the formalities every time a writ is re-issued. If, for instance, a person is arrested under a warrant for a civil debt on the last day on which the writ is returnable, and the Fiscal is unable to take the debtor to Court on that day itself, it will be a curious state of things if the Fiscal has to release the debtor. It will lead to great hardship if the ruling in *Patheruppillai v. Kandappen*[3] is to be followed. The provisions of section 226 apply only when a writ is issued for the first time.

The respondent should have brought a separate action to have the sales set aside. He cannot proceed under section 344.

Balasingham, for the petitioners (defendants), respondents.—Every time a writ is issued it is the duty of the Fiscal to make a demand from the debtor as directed by section 226. The debt may have been greatly reduced between the first issue of the writ and the second issue. The law could not have intended that where a property is seized for Rs. 1,000 under a writ issued for the first time, it should be sold without a further demand from the debtor on a second writ, say, for Rs. 5, the balance having been paid up in the interval. If, then, a demand is necessary every time a writ is issued, it cannot be contended that the other provision of section 226 can be ignored, with the provision that it is the duty of the Fiscal to seize the property of the debtor.

Section 237 nowhere says that the judgment-debtor is not to transfer the property " until the further order of the Court. " These words occur only in the form No. 50 given in the schedule to the Code. Section 239 only provides for the removal of the seizure before the expiry of the writ.

[1] *(1908) 11 N. L. R. 83.* [2] *(1914) 17 N. L. R. 183.*

[3] *(1913) 16 N. L. R. 298.*

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Section 239 is not exhaustive of the ways in which a seizure may be terminated. Abandonment is mentioned by De Sampayo A.J. in *Yapahamine v. Weerasuriya* [1] as one of the ways in which a seizure may be terminated. The words in form 50 can be reconciled with the words in section 237 only if we take the words of the notice to refer to a prohibition against alienation during the life of the writ.

Section 661 of the Civil Procedure Code enacts that where property is sequestered before judgment and decree is given for the plaintiff it shall not be necessary to seize the property as a preliminary to sale. This special enactment is unnecessary if the law is that once the property is seized it need not be seized against under a re-issued writ.

It was held by the Full Court in *Wijewardene v. Schubert* [2] that where a writ is recalled a seizure made under it comes to an end.

Section 319 would appear to make special provision for the case where a judgment-debtor is arrested on the last day on which the warrant expires. See *The Attorney-General v. Ponniah.* [3]

Counsel cited *Puddomonee v. Roy Muthroonath,* [4] *Thooboo Lahoo v. Ram Churn Roy.* [5]

Bawa, K.C., in reply.—The abandonment to amount to a removal of seizure should be express (*17 Mad. 180*). *Wijewardene v. Schubert* [2] may be distinguished from the present case. There the Court itself recalled the writ. It does not follow from the fact that a demand is necessary every time a writ is issued, that a new seizure is also necessary.

Counsel cited *15 W. R. 222, 7 Taunton 56, 7 M. & G. 240, 247.*

Cur. adv. vult.

September 30, 1914. PEREIRA J.—

In this case the principal question argued in appeal was whether in the execution of a writ duly issued on an order allowing an application under section 224 of the Civil Procedure Code a seizure of property on an older time-expired writ could be availed of. I have so fully gone into the point in my judgments in the cases of *Yapahamine v. Weerasuriya* [1] and *Patheruppillai v. Kandappen,* [6] that it is not necessary that I should give my reasons at length here. Having heard fuller argument, I see no reason whatever to doubt the correctness of my decisions in those two cases, and I am further convinced that the two Indian cases of *Puddomonee v. Roy Muthroonath* [4] (judgment of the Privy Council) and *Thooboo Lahoo v. Ram Churn Roy* [5] are in point on the question above referred to. Of course, there is a difference between execution proceedings under the Indian Code of Civil Procedure and those under our Civil Procedure

[1] *(1914) 17 N. L. R. 183.*
[2] *(1906) 10 N. L. R. 90.*
[3] *(1908) 11 N. L. R. 245.*
[4] *20 W. R. 133.*
[5] *11 W. R. 517.*
[6] *(1913) 16 N. L. R. 298.*

Code. In India it is the Court that executes its own decrees. With us the work is largely delegated to the Fiscal. In India an attachment of the debtor's property is first moved for by the creditor and allowed by the Court, and then, similarly, an order for sale of the attached property is moved for and obtained by the execution-creditor. The principle underlying the Indian cases cited above is that when a judgment-creditor moves for and obtains an attachment of his debtor's property, and subsequently of his own accord moves for and obtains a second attachment, treating the first as non-existent, then the first must be presumed to have been abandoned. The present is, indeed, a clearer case of abandonment. The plaintiff on the first writ taken out by him had certain property of the debtor seized. Nothing was done on that seizure for over five years. There was no applications to the Court for an extension of the time allowed for the execution of the writ. The time given for execution expired, and the writ was returned to Court, and more than five years after, a fresh writ was moved for and obtained. This action of the plaintiff clearly amounted to an abandonment of the old writ, and even in the absence of express legislation on the subject, it was necessary that there should be a fresh seizure on the new writ. But apart from the question of abandonment, there is express legislation on the subject under consideration. The second writ was moved for and obtained under section 224 of the Code. On the allowance of an application under that section the Code provides in paragraph 3 of section 225 that a writ of execution in form No. 43 in the schedule should issue, and what the Fiscal has to do on a writ so issued is laid down in section 226. He (or his officer) should repair to the dwelling-house of the debtor, and require him to pay him the amount of the writ ; and, secondly, he should, in default proceed to seize and sell property of the judgment-debtor. The mandate to the Fiscal contained in the writ itself is to " levy of the property of the debtor by seizure and sale, " &c. The appellants' counsel in the course of his argument conceded that on receiving the new writ the Fiscal or his officer was bound to repair to the debtor's residence and demand payment. If he was bound to do that, it seems to me to be illogical to say that he was not bound to follow the direction as to seizure immediately following in the same section.

It has been suggested that my ruling in the cases cited above may lead to inconvenience where the execution of a writ cannot be completed within the time fixed therein. I see no reason for any inconvenience at all, because in such a case the plain remedy is for the Fiscal or the execution-creditor's proctor, before the expiration of the time already allowed for the execution of the writ, to apply to the Court and obtain from it an extention of the time, and proceed with the further execution of the writ. Every Court has the inherent power to extend the time for the execution of its own

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process. Real inconvenience and hardship would result from a seizure being deemed to continue to exist for an indefinite period of time after the process to which it owed its existence has become effete and ineffectual.

It has also been argued by the appellants' counsel that the Court has no power to cancel the sale in execution, or rather to declare it void in a proceeding under section 344 of the Code, but that a fresh regular action was necessary for that purpose. This contention is fully met by the decision of this Court in the case of *Perera v. Abeyratna*.[1] Of course, this Court has more than once held that a Fiscal's sale without a proper seizure is not simply voidable, but is *de facto* void (see *Bastian Pulle v. Anapillai*[2]).

Execution appears to have been allowed by the Court by an order *inter partes* dated the 21st May, 1913. I would, therefore, do no more than affirm the District Judge's order declaring the sale under the second writ null and void, and give the appellant an opportunity of applying for a fresh writ on notice to the respondents.

As the respondents succeed on the main question in issue, I think they should have their costs in both Courts.

ENNIS J.—

I agree. The main question in this case is whether on a second application under section 224 of the Civil Procedure Code a new seizure of the property is necessary.

Section 225 provides for the issue of a writ for seizure and sale in execution of a decree, and section 238 provides that any private alienation of immovable property after it has been seized, and the seizure registered, shall be void as against claims enforceable under the seizure until the seizure is removed. Section 239 prescribes a procedure for the withdrawal of the seizure on satisfaction of the decree.

It was argued that a seizure once made under section 224 remains effective until withdrawn under section 239. In my opinion the matter should be approached from another point of view, viz., that a withdrawal under section 239 is only possible where the seizure is of full force and effect, and the question is whether the seizure can be terminated otherwise than by withdrawal.

The case of *Wijewardene v. Schubert*[3] is a Full Court decision, that the recall of the writ issued under section 224 terminates the seizure, and the Indian case *Maharajah Dheeraj Mahahbat Chund Bahadoor v. Surno Moyee Dossee*[4] and the Privy Council case *Puddomonee Dossee v. Roy Muthooranath Chowdry*[5] are authority for the proposition that a seizure may terminate by abandonment.

[1] *(1912) 15 N. L. R. 414; 2 C. A. C. 55.*
[2] *(1901) 5 N. L. R. 165.*
[3] *(1906) 10 N. L. R. 90.*
[4] *15 W. R. 222.*
[5] *20 W. R. 133.*

The authority under which the Fiscal holds the property seized under section 224 is the writ. When the writ has been returned to Court after seizure, but before the sale, the Fiscal's authority to hold the property terminates. Section 661 has been cited against this proposition, but it does not seem to me to be in point, as the writ to the Fiscal in a sequestration before judgment is a writ to seize and sequester, a writ which is fully complied with by the Fiscal by seizing and holding the property under the writ.

The writ under section 224 is to seize and sell, and where the property is not realized by sale before the time or extended time within which the Fiscal is directed to bring the proceeds into Court, cannot be enforced under that seizure. It seems to me that the return of the writ to the Court, when the claim can be no longer enforced, is equivalent, in the circumstances, to a recall of the writ by the Court and terminates the seizure.

Affirmed.