

1945

Present: Keuneman S.P.J. and Rose J.

DE SILVA, Appellant, and WIJERATNE, Respondent.

23—D. C. Galle, 680.

Res judicata—Fiscal's sale—Claim by purchaser, under Civil Procedure Code, s. 243, before Fiscal's transfer was made—Claim disallowed—Separate action, after obtaining Fiscal's transfer, for declaration of title—Plea of res judicata raised by seizing creditor—Validity of—Superfluity of seizing same property twice—Civil Procedure Code, ss. 243, 247, 289.

Although a purchaser of property at a Fiscal's sale is not competent, before he obtains the Fiscal's conveyance, to make a claim under section 243 of the Civil Procedure Code the order disallowing his claim, if he makes any, is only *res judicata* with regard to his interest at the date of the seizure, and is no bar to any assertion of title by him, or his successor in title, under the Fiscal's transfer obtained after the date of seizure.

Where on the issue of a writ property is seized the seizure remains in force, and a second seizure made in view of a transfer of the property by the claimant is superfluous and not necessary. The rights of the creditor as well as of the transferee must be considered as at the date of the original seizure.

**A** PPEAL from a judgment of the District Judge of Galle.

H. V. Perera, K.C. (with him L. A. Rajapakse, K.C., and K. A. P. Rajakaruna), for the defendant, appellant.

N. E. Weerasooria, K.C. (with him S. R. Wijayatilake), for the plaintiff, respondent.

Cur. adv. vult.

November 28, 1945. KEUNEMAN S.P.J.—

In this case the plaintiff sued the defendant for a declaration of title to certain premises. At the trial the issues relating to a plea of *res judicata* were taken up for decision.

The original owner of the premises was Davith Silva. As regards a half share of the premises, admittedly the defendant had succeeded to the title. As regards the other half share, plaintiff sued Davith Silva's administratrix in a mortgage action and caused his half share to be seized on October 23, 1936. The property was sold under writ on February 28, 1938, and Fiscal's Transfer P 7 of February 23, 1942, was obtained by the plaintiff.

There were two matters relating to *res judicata*—(1) Selliah, defendant's predecessor in title, had seized the half share in question and had the property sold on March 19, 1936, and obtained Fiscal's Transfer D 4 of December 17, 1936. On October 28, 1936, before he had obtained D 4, Selliah claimed the property as against plaintiff's seizure of October 23, 1936—see P 3—but on December 18, 1936, one day after he had obtained D 4, Selliah withdrew his claim, which was disallowed with costs. Selliah brought no action under section 247 of the Civil Procedure Code.

(2) Plaintiff appears to have caused the same half share to be seized again on August 13, 1937, whereupon the present defendant—who had received a transfer from Selliah, D 3 of March 10, 1937—claimed the property in question, see P 6/D 7.

At the claim inquiry it was held that the second seizure was superfluous, and that the original seizure of October 23, 1936, remained in force, and that the claimant (defendant) could not succeed as his title had accrued after that date. His claim was dismissed with costs.

Plaintiff contended that each of these dismissals of claims operated as *res judicata* and that the plaintiff was entitled to judgment in this case. The District Judge agreed with this contention and entered judgment for plaintiff as prayed for with costs.

Defendant's counsel did not dispute the fact that these dismissals were "conclusive" under section 247, but he argued that they were only conclusive as to the fact that the claimant in each case had no interest in and was not possessed of the property seized *at the date of the seizure*, viz., October 23, 1936 (see section 243), and that it was not conclusive with regard to any title which the claimant may have obtained after that date. It will be convenient to discuss each of these claims separately.

(1) *Selliah's Claim*: The important point was that Selliah had claimed the property before he had obtained his Fiscal's Transfer. It was contended for the defendant that title was not vested in Selliah at the time of the seizure, viz., October 23, 1936, and that the title at that date was vested in the judgment-debtor and accordingly was seizable. Selliah's claim was therefore misconceived and had to be abandoned. It was argued, however, that the matter was not conclusive as regards the title which Selliah later obtained (D 4).

The point is covered by authority; see Garvin J. in *Aboubackir v. Tikiri Banda*<sup>1</sup>. This was an action under section 247 of the Code which

<sup>1</sup> 29 N. L. R. 132.

was dismissed on the ground that at the date of the seizure the interests in dispute were still vested in the judgment-debtor as he had not been divested of those interests till the Fiscal's conveyance was executed at a later date. In appeal, an argument was advanced that an action under section 247 was to be differentiated from a claim under section 243, and that it was to be regarded as a *rei vindicatio*-action. This was not accepted and it was held that even in an action under section 247 the claimant was not entitled to set up a title which accrued after the date of the seizure, *e.g.*, the Fiscal's transfer.

It is true that no specific mention is made in this case of the doctrine of "relation back" under section 289, but it is clear that the section was considered.

Garvin J. depended for his decision on the case of *Silva v. Nona Haminc*<sup>1</sup> decided by three Judges. This also was an action under section 247. In this case there was the further fact present that the plaintiff had not obtained his Fiscal's transfer at the date of the action. But the *ratio decidendi* was not based on this ground. It was in fact based on the ground that the purchaser had not obtained his Fiscal's transfer at the time of the seizure, and that the title remained vested in the judgment-debtor at that time.

Hutchinson C.J. said in this connection—"It was argued that on the execution of the Fiscal's transfer the purchaser's title related back to the date of the purchase. For some purposes that may be so, but I doubt whether it would affect the rights of third parties who may have intervened in consequence of the purchaser's delay in perfecting his title, and in any case it cannot affect the question in this case, whether Weera-koon had a good title at the date of the seizure."

Wendt J. said—"He (appellant) conceded that the right which the claimant, plaintiff, has to make out is the same as that which he set up at the claim inquiry, which again was required by section 243 to be a right at the date of the seizure . . . . The sequence of the enactments which culminate in the action under section 247 renders it impossible to avoid the conclusion that the rights of the creditor as well as of the claimant must be considered as at the date of the seizure."

Middleton J. said—"I think therefore the action must be decided on the judgment-debtor's rights at the date of seizure, and as he had no title then the Commissioner of Requests was right in dismissing this action."

The case of *Ibrahim v. Bawa Sahib*<sup>2</sup> is interesting. Here Ennis J. held that the *ratio decidendi* in the Divisional Court case was that "under section 247 no action can succeed, and in fact no claim could succeed, unless the claimant were a person who had an interest in the property seized. Holding that to be the true meaning of this case, one must go further and say that in a case where a person cannot be a claimant, because he has no interest in the property, he cannot be bound by the last paragraph of section 247 which would make an order rejecting his claim *res judicata* against him."

See also *Baba Singho v. Don Salmon*<sup>3</sup>. In the present case I hold that, as Selliah had no Fiscal's transfer at the date of the seizure, it was not

<sup>1</sup> 10 N. L. R. 44.<sup>2</sup> 26 N. L. R. 71.<sup>3</sup> 4 A. C. R. 75.

competent for him to make a claim under section 243 and that his claim was rightly withdrawn and disallowed. The order disallowing his claim however was only *res judicata* with regard to his interest at the date of the seizure, and was no bar to his assertion of title under the Fiscal's transfer obtained after the date of seizure.

(2) *Defendant's Claim*: The same considerations apply to defendant's claim. His title accrued only on March 10, 1937 (D 3), and he obviously had no interest on October 23, 1936, the date of the original seizure. The only further point in this case was whether the original seizure was good or whether the second seizure of August 13, 1937, was to be regarded as operative. In *Ponnasamy v. Peduru John*<sup>1</sup> Schneider J. reviewed the authorities and came to the conclusion that "It is now well settled law that the second seizure was not necessary to enable the Fiscal to sell the property. It was a superfluous proceeding. He could and should have sold under the earlier seizure from which the property had not been released". No argument has been addressed to us as against this view and I think it is correct. In the claim inquiry (P 6/D 7) the Judge accepted this view as correct and decided the claim accordingly. Here again I think the dismissal of the claim was only conclusive of the fact that the defendant had no title at the date of the original seizure, and that there is no bar to his asserting a title acquired after the date of the original seizure.

The issues relating to *res judicata* must accordingly be answered in favour of the defendant. The judgment of the District Judge is set aside and the case remitted to the District Judge for trial of the remaining issues. The appellant is entitled to the costs of appeal and of the trial of the issues relating to *res judicata* in the court below. All other costs will be costs in the cause.

Rose J.—I agree.

*Appeal allowed.*

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