

JAMES & Co. v. NATCHIAPPEN.

D. C., Kandy, 10,856.

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Claim to property seized in execution—Rejection of claim—Duty of unsuccessful claimant—Stay of sale—Action under s. 247 after sale—Action for damages.

If an unsuccessful claimant to movables seized in execution does not apply for a postponement of the sale under section 242 of the Civil Procedure Code, and if the sale is carried out and the goods are sold and dispersed, the question of their liability to be sold is concluded between the parties, and an action under section 247 is inappropriate.

Semble per WITHERS, J.—That the unsuccessful claimant, in the above circumstances, has not even an action for damages outside the scope of section 247.

IN this case the defendant, on a writ of execution obtained by him against one W. J. Perera in case No. 9,665 of the District Court of Kandy, seized as his property certain articles, such as coriander seed, chilly, poonac, &c., in a boutique at Dikoya. The plaintiffs, averring to be the owners of the boutique, claimed the articles seized as their stock-in-trade. The claim was inquired into by the District Judge and disallowed on the 16th July, 1896. The articles were thereupon sold by the Fiscal on the 24th July and the proceeds deposited in Court, but were not drawn by either party. On the 29th July the plaintiff instituted the present action under section 247 of the Civil Procedure Code, and prayed

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that they be declared the owners of the goods when seized, and that the defendant be condemned in damages, Rs. 1,000. Two issues were framed at the trial: (1) whether the plaintiffs were on the 19th June, 1896, the owners of the property described in the schedule to the plaint; and (2) whether the defendant is liable to pay the plaintiffs Rs. 1,000 or any part thereof as damages. The District Judge decided both the issues in the plaintiffs' favour, and condemned the defendant to pay Rs. 500 as damages.

The defendant appealed.

Dornhorst, for appellant.

W. Pereira (*H. Jayewardene* with him), for respondent.

Cur. adv. vult.

4th April, 1898. LAWRIE, J.—

Under writ against the brother of the first plaintiff the stock-in-trade in a boutique in the Dikoya bazaar was seized.

The plaintiffs claimed the goods. After inquiry the District Judge disallowed the claim. The goods were sold by the Fiscal on the 24th July, 1896.

On the 29th July (five days after the sale) the plaintiffs brought this action against the judgment-creditor.

It purports to be an action under section 247. They prayed that they might be declared the owners of the goods, and that these were not liable to be seized and sold in execution.

They prayed for Rs. 1,000 damages for having been prevented from carrying on their business and for having suffered in their credit by the illegal seizure.

In my opinion, if an unsuccessful claimant to movables does not apply for a postponement of the sale under section 242, and if the sale is carried out, if the goods are sold and dispersed, the question of their liability to be sold is concluded between the parties and an action under section 247 is inappropriate.

I am also of the opinion that an action for damages does not lie in the circumstances of this case.

It is not averred that the defendant acted maliciously or without probable cause in pointing out the goods for seizure; the plaintiffs had the opportunity of establishing their claim.

They failed to satisfy the judge that the goods belonged to them, or even that they were in their possession; if at the claim inquiry they had led the same evidence as they led in this case, the District Judge says they would have succeeded.

I would set aside and dismiss with costs.

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This raises a new point and one of considerable importance in the construction of those difficult sections of the Code under the heading "Claims to Property Seized."

Can a claimant to movables seized in execution, and whose claim has been disallowed, institute an action within fourteen days of the order to establish the right which he claims, after the goods have been sold, and to recover damages from the execution-creditor, who was benefited by the sale of the goods levied under his writ ?

And, supposing he can bring an action to have it declared that the property seized and sold was his at the time of seizure, can he recover anything from the execution-creditor because the goods were sold in execution of the execution-creditor's writ ?

This chapter of the Code is concerned with claims to property seized and with objections to the seizure or sale of the property (section 241). No one can come forward to prefer a claim or lodge an objection unless the claimant or objector can show that at the date of the seizure he had some interest in or was possessed of the property seized (section 243).

If the Court is satisfied that for the reasons stated in the claim or objection (*i.e.*, imagine the reason of being interested in or possessed of the property), such property was not when seized in the possession of the judgment-debtor or of some person in trust for him, &c., the Court shall release the property wholly or to such extent as it thinks fit from seizure, &c. (section 244).

If the Court is satisfied that the property was in possession of the judgment-debtor as his own property, &c., it shall disallow the claim (section 245).

It appears as if other cases were left to the discretion of the Court.

No doubt the cardinal point for determination in these inquiries is—Was the judgment-debtor or not in possession of the property on his own account, or was some one else in possession for him at the time of seizure ?

The disallowance of the claim implies, it would seem of necessity, the non-release of the property seized.

Obviously then the claimant in such a case, if he is in earnest in his claim or objection, would apply to the Court for an order staying the sale until his contemplated action to determine his right was decided.

If he undertook to bring the action within fourteen days on such terms, if any, as might be reasonably required, the Court, I should imagine, would make the order as a matter of course.

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It appears to me that such a course would be the claimant's duty to take. The paramount object of the claimant is to have the sale stayed at any (legitimate) cost pending the determination of the right which he claims.

But supposing he brings his action after the sale of the goods, and it is found that the goods belonged to the claimant at the time of seizure, what *jus in personam* has he against the execution-creditor for compensation if the Fiscal choose to seize and sell the goods? None that I can see.

But supposing that the execution-creditor took upon himself to point out the goods for seizure and made the Fiscal his agent to seize and sell goods which did not belong to his execution-debtor?

The owner of the property under the latter circumstances used to be considered to have a good cause of action against the execution-creditor for damages.

But has an owner that right now, when he has made a claim which has been disallowed, and when he has taken no steps to have the sale stayed pending the determination of his right in an action under section 247? I doubt it, for the sale has taken place through his own default.

In my opinion, though I confess the point is not free from difficulty, a claimant has no right of action either under section 247 or for damages, when the sale has been held before his right of action commenced.

I would therefore set this judgment aside and dismiss the plaintiff's claim with costs.

