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Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and Mr. Justice Wendt.

1906.
March 19.

FERNANDO *v.* FERNANDO.

D. C., Colombo (Interlocutory), 21,125.

Seizure—Non-registration—Mortgage pending seizure—Invalidity—Civil Procedure Code, sections 237 *and* 238.

In September, 1902, the defendant executed in favour of the plaintiff a primary mortgage over one of his lands. On the 14th of July, 1904, the property was seized under a simple money decree, and the seizure was registered on July 18, 1904. Under this seizure the property was sold by the Fiscal and was purchased by W on the 8th of July, 1905. Pending the seizure, to wit, on the 16th July, 1904, the defendant executed a secondary mortgage in favour of C, who put the bond in suit and obtained judgment thereon. The property was sold under the primary mortgage, and there was a sum of money in deposit in court after satisfying the primary mortgagee's debt. W and C both claimed this amount.

Held, that W was entitled to the amount, C's mortgage being void in that it was executed pending the seizure.

WENDT J.—Given a seizure duly effected, made known and registered, any dealing with the property subsequent to the seizure is void. There are three elements in the condition precedent, viz., seizure, publication, and registration. The crucial date in the avoidance of an alienation is the date of the first element, the seizure.

APPEAL from an order of the District Judge of Colombo. The facts and arguments sufficiently appear in the judgments.

Walter Pereira, K.C. (*Schneider* with him), for appellant.

Dornhorst, K.C. (*Sampayo, K.C.*, with him), for respondent.

Cur. adv. vult.

1906. March 19.

19th March, 1906. LASCELLES A.C.J.—

This appeal raises the question of the validity of a mortgage effected after seizure but before registration of the seizure.

Property subject to a mortgage debt was seized in execution of a simple money decree against the defendant.

The seizure was made on 14th July, 1904, and registered on the 18th July. The property was bought by the appellant, who subsequently obtained and registered a Fiscal's conveyance.

On the 16th July, that is, between the date of seizure and the registration of the seizure, the defendant executed a secondary mortgage in favour of the respondent.

Upon the sale of the property in satisfaction of the primary mortgage a sum of Rs. 16,911.03 remained on deposit after satisfying the mortgage decree. The dispute is with regard to this sum. The first claimant, who is the respondent, put his secondary mortgage bond in suit, and having obtained a decree against the defendant for Rs. 11,874.50 now claims the money in court.

The appellant, the second claimant, contends that under section 238 of the Civil Procedure Code the secondary mortgage is null and void against him, inasmuch as it was effected after seizure.

It was contended for the respondent that the words " after seizure " in section 238 should be construed as meaning after seizure has been completed by registration. In my opinion the section cannot be so constructed. A perusal of the preceding section (237) shows that in the language of the Code the seizure of the property and the registration of a seizure are different and distinct processes. Section 237 describes how the seizure is made, how the seizure is to be proclaimed, and thus provides that " the Fiscal shall forthwith transmit a copy of the notice of seizure to the registrar of lands. " who shall within two weeks of the date of the seizure " register the particulars of the seizure. Here it is clear that seizure is effected before registration.

There is no reason for attributing to the word " seizure " in section 238 a meaning different from that which it obviously bears in the preceding section. When it is provided by section 238 that a private alienation after seizure shall be void I am of opinion that the word " seizure " is used in the sense in which it is employed in the preceding section, and that the point of time from which alienations are declared to be void is the date of seizure and not the date of the registration of the seizure. To hold otherwise would be to deprive execution creditors of protection during the interval between seizure and registration. The section further provides that an alienation after seizure shall be void as against all claims enforceable under the seizure. The respondent on the strength of these

words argued that it was only the interests of the execution-creditor which were protected by the section, and that it was not open to the appellant, the purchaser at the Fiscal's sale, to claim that the secondary mortgage bond was void as against him.

Apart from authority, I should have thought it clear that the claim of the appellant was one "enforceable under the seizure." The title of the claimant is derived directly from the seizure. If it proves bad, the execution-creditor may be compelled under section 285 to refund the purchase money.

The Indian authorities with reference to the corresponding section of the Indian Code show that a wide construction has been placed upon the words "all claims enforceable under the attachment." Alienations after attachment have been held to be void as against all persons who may acquire title under or through the seizure.

I think the appellant who, at a fiscal's sale, bought the property seized, must be regarded as having a claim enforceable under the seizure. The District Judge made no order upon the rival claims, but expressed an opinion that the present issue and others which might arise should be decided by an hypothecary action between the respondent and the appellant. I see no reason why he should not have disposed of the claim at once. I think that this appeal succeeds, and that the claim of the appellant should be allowed with costs.

WENDT J.—

This appeal raises an important point upon the construction of section 238 of the Civil Procedure Code. The facts are these:—

The defendant in September, 1902, executed in favour of the plaintiff a primary mortgage of certain land in the Negombo District to secure a debt of Rs. 35,000 and interest. On 14th July, 1904, the holder of a simple money decree caused the Fiscal to seize the land in execution, and this seizure was registered on 18th July, 1904. In pursuance of this seizure the land was sold by the Fiscal on 8th July, 1905, and purchased by the appellant, who in due course obtained a conveyance from the Fiscal. Pending the seizure, viz., on 16th July, 1904, the defendant executed in favour of the respondent a secondary mortgage of the land to secure a sum of Rs. 16,000, The respondent sued the defendant upon this mortgage and holds decree dated 10th August, 1905, for Rs. 18,874.50. The present plaintiff obtained a decree against defendant on his primary mortgage in the action now before us, and in execution of that decree the land was on July 17, 1905, sold to some third party for the sum of Rs. 60,000. The plaintiff having been satisfied out of that sum

1906. *March* 19. WENDT J.

there remains in court a balance of Rs. 16,911.03, which is claimed both by appellant and respondent—by appellant on the ground that it was her land that was sold; by respondent on the strength of this secondary mortgage. The appellant attacks this mortgage as void because it was effected pending the seizure under which she purchased, and that is the question which we have to determine.

The learned District Judge declined to decide between the parties. He says: "It was stated at the bar that probably other questions might arise to effect the seizure and purchase of Mrs. Weerasuriya, the appellant, and the secondary mortgage to the Chetty. I think that all the issues that might arise, including the issues placed before the court, should be decided in a properly constituted action between the Chetty and Mrs. Weerasuriya, that is to say, in an hypothecary action by the Chetty against her." I must say that I fail to see any good reason for putting the parties to the expense and delay of a separate regular action. It is true a large sum of money is involved, but the facts are very simple and are not in dispute, and in the affidavits which have been filed on either side no complicated issue whatever is raised. I think therefore that the District Judge ought to have proceeded to determine the matter in the present proceeding, and I shall now do so myself.

Respondent's counsel at the outset objected to the status of the appellant in the case, on the ground that she had not produced or proved her conveyance from the Fiscal, but I think the proceedings in the District Court show that she was not required to produce or prove it. She swore in her affidavit that she had such a conveyance and that statement was not traversed, either in a counter-affidavit or by any statement at the bar. In fact, the argument appears to have proceeded on the footing that the conveyance had been made.

No question of registration under Ordinance No. 14 of 1891 arises, the instruments in question having all been registered in the order of their dates.

To come then to the consideration of the provisions of the Code which are involved. Section 237 enacts that the seizure of immovable property in execution shall be made by a notice signed by the Fiscal prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift or otherwise. It next provides for the publication of the notice, and then proceeds as follows:

"Upon payment to the Fiscal by the decree-holder of a fee of fifty cents the Fiscal shall forthwith transmit a copy of such notice to the registrar of lands of the district in which such land is situate,

and such registrar shall, within two weeks of the date of seizure, register the particulars contained in such notice in a book to be by him kept for that purpose. In case the seizure is removed or the property seized is sold, and the fiscal grants a conveyance thereof to the purchaser under section 286, the fiscal shall, upon payment of a fee of fifty cents by any person at whose instance or for whose benefit such removal is made, or by the person in whose favour such conveyance is granted, certify such removal or sale to the registrar, who shall forthwith register such removal or sale in the same book, which shall be open to the inspection (upon written application in that behalf) of any person upon payment of a fee of twenty-five cents."

With the exception of the provision for registration (which is new to the law of Ceylon), this section is an adaptation of section 274 of the Indian Civil Procedure Code as section 238 is of the Indian section 276. The object of the registration is clear: it is the same as that which the Legislature had in view in the Ordinances relating to the registration of deeds affecting land, viz., the making of a record of seizures, which would be open to the inspection of persons desirous of acquiring any interest in the land. Had the Code merely enacted that seizures might be registered and dealt with on the same footing as the instruments provided for in those Ordinances, the respondent's mortgage would have taken priority over the seizure which would have been regarded as void in competition with the earlier registered mortgage; but the Code has in section 238 made express provision upon this point in the following terms:—

"When a seizure of immovable property has been effected and made known and registered as in the last preceding section provided, any private alienation of the property seized, whether by sale, gift, mortgage, lease, or otherwise after the seizure and before the removal of the same, or the sale and conveyance of the property by the fiscal shall be void as against all claims enforceable under the seizure."

The contention of the respondent is that, in view of the opening sentence of this section, the words, "after the seizure" must be construed as "after the seizure and publication and registration thereof," that "the seizure" contemplated in the fifth line is what is compounded of "a seizure" mentioned in the first line together with the ingredients of publication and registration. I think this contention cannot be sustained. Had the words even been "such seizure" they might have lent some colour to the construction suggested by respondent. If the Legislature had intended to void only alienations effected after the registration, nothing could have been simpler than to have made that clear. To my mind, the mention of seizure, publication, and registration followed almost

1906.
March 19.

WENDT J.

immediately by the mention of seizure alone, tends only to throw the latter into greater relief. The words of the enactment are perfectly clear and its effect is this: given a seizure duly effected, made known, and registered, any dealing with the property subsequent to the seizure is void. There are three elements in the condition precedent, viz., seizure, publication, and registration. The crucial date in the avoidance of an alienation is the date of the first element, the seizure.

The words being clear, there is no need to speculate as to the intention of the Legislature. But we have another example of a fixed term being allowed for registration in the Ordinance No. 8 of 1871, which, as amended by Ordinance No. 21 of 1871, requires instruments disposing of movable property to be registered within 14 days. If such an instrument is not so registered, it is invalid. Similarly, if a seizure is not registered within two weeks it is useless for the purpose of avoiding the debtor's disposition of his property; but when registered it renders void any such disposition effected subsequent to the seizure itself, which it must be remembered connotes a notice prohibiting the debtor from dealing with the property seized. If respondent's reading of section 238 were accepted, a case like the following might arise. The judgment-debtor would transfer his land immediately after the seizure and before its registration, to A; B, intending to buy at the Fiscal's sale, would examine the register and finding the seizure only registered would purchase the land, upon which A would register his conveyance before the Fiscal had even transferred to B. B, consequently, would get nothing by his purchase.

Respondent next argued that the appellant's claim could not be said to be a "claim enforceable under the seizure." He admitted that the claim of the decree-holders who effected the seizure was such a claim. But he contended that the decree holder having been fully paid and satisfied (albeit with appellant's money) the law was not equally concerned with protecting the purchaser. I suggested to respondent's counsel that the interest of the judgment-creditor and of the purchaser in this matter were the same, because in a case like that I have put above the judgment-debtor would have no saleable interest in the land and the purchaser would, therefore, under sections 284 and 285, be entitled to have the sale set aside and the purchase money refunded by the creditor. It is undeniably to the interest of the judgment-creditor that the purchaser under his execution should acquire a good title to the property sold, and it is therefore only reasonable to construe section 238 as including the purchaser under its protection. That is the view which has been adopted by the Indian Courts in construing the corresponding

provisions of the Indian Code. See the cases of *Anundolall Doss v. Radkamohun Shaw* (1); *Baiaji Ranchandra v. Gajanan Babaji* (2). I quote these cases from Normanby's Digest not having access to the reports at large. In *Anund Loll Doss v. Jullodhurt Shaw* (3) the question arose under the Act of 1856, which had not the words " as against all claims enforceable under the seizure " which were introduced at a later date by amendment, and in that case the property had not been sold by the sheriff under the attachment, but, so far as it goes, the judgment of the Privy Council supports this view which I have put forward.

1906. *March* 19 WENDT J.

I think the appeal should be allowed and the appellant permitted to draw the sum of money in court. The respondents will pay the costs in both courts.