BASTIAN PILLAI *v.* ANAPILLAI.

1901.

February 26, May 17, and July 8.

D. C., Batticaloa, 1,939.

Fiscal's seizure and sale—Civil Procedure Code, ss. 229, 237—Seizure of one thing and sale of another—Intestacy of mortgagor—Estate under Rs. 1,000—Necessity for appointment of a person to represent the estate of deceased mortgagor.

A regular and perfect seizure by the Fiscal is an essential preliminary in the case of sales in execution. Where there has been no such seizure, any sale that may have taken place is not simply voidable, but *de facto* void.

Where the assignee of a mortgage debt brought an action and recovered judgment against the heirs of the deceased mortgagor, whose estate was under Rs. 1,000 in value, without having applied to the Court, in terms of section 642 of the Civil Procedure Code, to appoint a person to represent such estate,—

Held, per BONSER, C.J.—That in the circumstances of the case leave might be granted to the plaintiff to appoint a representative so as to put his action right.

ONE Kanapathi Pillai mortgaged certain lands to one Sangara Pillai on the 26th April, 1888, as security for the payment of Rs. 500 received by him. Under a writ of execution issued in case No. 24,915 of the Village Tribunal of Batticaloa North on

1901.
February 26, May 17, and July 8.

the 18th September, 1895, against the property of Sangara Pillai, the Fiscal seized on the 25th July, 1897, the land called "Karon-culaddyvalavu; bounded ....., in extent, &c. ....., "with right of mortgage and every privilege," and sold the same by auction to the plaintiff. The transfer in his favour dated 4th February, 1898, was as to the right, title, and interest of Sangara Pillai in the said bond. Kanapathi Pillai having died, the plaintiff brought the present action against the first and second defendants as the heirs of the deceased, and the third defendant as the person in possession of the land, to recover the amount due on the mortgage bond and to have the property mortgaged executable for the debt. The first and second defendants did not appear to defend the suit, but the third defendant claimed the land as his own.

The District Judge gave judgment for plaintiff.

The third defendant appealed.

Sampayo, for appellant.—Only one issue was by agreement between the parties tried and decided, viz., whether the assignment made by the Fiscal passed the mortgagor's right to the plaintiff. All other questions were waived. [BONSER, C.J.—The estate of the deceased is under Rs. 1,000. No administration was taken, but section 640 *et seq.* of the Civil Procedure Code necessitates the appointment of a legal representative to represent the mortagagor.] True, but all such objections were waived. If it is pressed now, the case must be sent back for the fulfilment of that formality. But the points I make are fatal to the action. According to the return made by the Fiscal to the writ issued by the Village Tribunal in September, 1895, the land itself was seized instead of the right of the judgment-debtor in the mortgage bond of Kanapathi Pillai, as provided in section 229 (*a*) of the Procedure Code. But the assignment of the Fiscal to the purchaser transferred to him that which was never seized, viz., the right, title, and interest in the bond. [BONSER, C.J.—The Fiscal seized something which the mortgagee did not own, and the sale to the plaintiff was bad *in toto*. *Dubey v. Dichit*, *5 Allahabad, 86.*] The other point is that the writ issued by the Village Tribunal was not in operation at the time of the seizure. It was sued out in September, 1895, but the seizure was made in July, 1897, and the sale in January, 1898. The writ does not mention the date on which it should be returned, though the Code requires such date to be fixed. [BONSER, C.J.—The Indian Courts have held that the notification of sale must be full and explicit, or the sale is void.]

1901.

February 26, May 17, and July 8.

Wendt, for respondent.—The sale was not impeached within thirty days. [BONSER, C.J.—But you must prove your title. Is the assignment in our favour a good one?] I have produced the assignment, and it is for the other side to attack it. [BONSER, C.J.—It has been shown that something was sold which was never seized.] But no such objection was taken.

26th February, 1901. BONSER, C.J.—

This was an action brought by a person who claimed to be the assignee of a mortgage debt against the heirs of the deceased mortgagor and a third person, to whom the right of the mortgagor in one of the properties included in the mortgage had been sold. The mortgagor died intestate, and it is said that his estate was under Rs. 1.000 in value. That being so, there was no necessity to have an administrator appointed. But it seems to me that it was necessary to have some representative of the mortgagor appointed under section 642 of the Civil Procedure Code, as I pointed out in a recent case, *Punchi Kira v. Sangu*, *4 N. L. R. 42*, but no such representative was appointed. However, in a case like this, this Court might give the plaintiff leave to apply to the District Court to appoint a representative and so put his action right.

The defendant, however, who is the purchaser of one of the hypothecated properties, raised the objection, which, if it be successful, would be fatal to the plaintiff's action as far as he is concerned; probably also it would be fatal as far as concerned the legal representative who has to be appointed.

It appears that the plaintiff's title is under a Fiscal's conveyance, whereby the Fiscal conveyed to him the mortgagee's interest in the mortgage bond granted by the mortgagor, and the conveyance recites that the Fiscal caused to be seized and taken the said right and title of the mortgagee in the mortgage bond, and that the same was duly sold. The appellant has called attention to the seizure report made by the Fiscal, which is not consistent with this recital. The seizure report is dated 23rd July, 1897, and states that he went in July, on a date unnamed, to the house of the debtor, and that the execution-creditor pointed out the property described in the schedule annexed thereto for seizure and that he accordingly seized it, and that notice of such seizure was given. Now, the schedule of the property seized contains two gardens, one of which had been purchased by Mr. Sampayo's client, and the respondent states that he was then in possession of it. It further states that "prohibitory notices of seizure were

1901. *February 26, May 17, and July 8.*

fixed on the property; duplicates are sent herewith." That is the return of the Fiscal to the court to show how he executed the writ.

BONSER, C.J.

Now, it will be noticed that what purports to be seized is the property itself, "with right of mortgage and other privileges," whatever that may mean. It would appear that what the Fiscal seized was the property itself, for the notice of seizure affixed to the property is that prescribed by section 237 in the case of immovable property. But what ought to have been seized was the mortgage debt, and the mode of seizure in such a case is pointed out by section 229 of the Civil Procedure Code. A notice is to be written and signed by the Fiscal prohibiting the creditor from recovering the debt and the debtor from paying it. A copy of that notice is to be fixed in a conspicuous part of the court-house, and another copy is to be delivered or sent to the debtor. That is the mode of seizure prescribed in the case of a debt. Now, the appellant, Mr. Sampayo's client, objects that there has been no seizure of this debt in the manner prescribed by the notice, and that being so, that there was no power to sell, and therefore plaintiff cannot make out title. His contention is in accordance with a decree of the Full Bench of the Allahabad Court in *Mahadeo Dubey v. Bhola Nath Dichit* (*I. L. R. 5 Allahabad, p. 86*), where it was held that a regular and perfect attachment is an essential preliminary in the case of sales in execution of simple decrees for money. Where there has been no such attachment any sale that may have taken place is not simply voidable, but *de facto* void. I am not aware of any decision of this Court which is in conflict with that decision, and I think that we should do well in that case to follow that decision, for although the words of our Ordinance differ in some slight particulars from the words of the Indian Code, and the practice also differs, in that in the Indian Code the sale is by the Court, and under our Code it is by the Fiscal, yet it seems to me that the principle of the decision is unaffected by the variations in the language—the principle being that what the Fiscal is empowered to do is to seize and sell the debtor's property; that the Code prescribes how the seizure is to be effected; that he has no power to sell property that he has not seized; and that property as to which the provisions of the Code as to seizure have not been followed cannot be said to have been seized, and therefore cannot be properly sold.

Mr. Wendt suggests that if the case is referred back that he may be able to show that there was a regular seizure, and that therefore the sale was good, and he asks that the case should go back for that purpose. We will therefore allow the case to stand

1901.
February 26, May 17, and July 8.
BONSER, C.J.

over for a week in order that he may make further inquiries, and if he is able, when the case is called on again, to state that he has reasonable hopes of supplying the deficiency, we will allow the case to go back for that purpose, and also for the further purpose of applying to the court to appoint a representative of the deceased mortgagor.

BROWNE, A.J.—I agree.

On the 17th May, 1901, the case was called on before MONCREIFF, J., and BROWNE, A.J.—

Wendt, for plaintiff, respondent, submitted that the procedure for seizure of a debt and of immovable property, as laid down in sections 229 and 237 of the Code, was nothing different in substance. They both charge the debtor with the duty of not parting with the property. In the case of debt, the word " pay " is used and two persons are named, but not " all persons," because the relation of creditor and debtor can be between two persons only. Section 279 applies the certificate of sale to both classes of instruments. The question is, What should the Fiscal seize in the case of a mortgage debt? He has seized, in the present case, the land mortgaged and the " right of mortgage and every privilege " connected with it. This is a seizure of the debt, though it was to some extent irregularly carried out, but such irregularity cannot invalidate the seizure, and no objection was taken to the seizure. As the mortgage bond is an interest in land, such interest may be seized exactly as land may be. *Sami v. Krishnasami, 10 I. L. R. Madras 171; Appasami v. Scott, 9 I. L. R. Madras 5.*

Sampayo, for third defendant, appellant.—The arguments urged now are out of place. The case was put on the list only to enable the respondent to produce material showing a regular seizure. The judgment of the Chief Justice cannot be set aside by the Court as now constituted, and the points of law disposed of on the 26th February last cannot be re-opened. There was no proper seizure of the debt in terms of section 229 of the Code. The Indian cases cited do not apply to the present case.

Cur. adv. vult.

8th July, 1901. BROWNE, A.J.—

Mr. Wendt has failed to show that there had been (as Bonser, C.J., held there should have been) any seizure of the mortgage debt under section 229; but he desired to submit for our consideration whether a seizure under section 237 of a bond

1901.
February 26, May 17, and July 8.

BROWNE, A.J.

secured by mortgage of land should not be allowed to be as efficacious as a seizure under section 229, possibly indeed that it should be held to be the proper way to proceed to realize the debt.

I think that there was reason in Mr. Sampayo's objection that to entertain such a contention now would in effect be to revise the order of the 26th February, and (in the absence of Bonser C.J.) by a Court properly constituted, which could be properly done only in revision for the purposes of appeal to a higher tribunal; and that we ought not so to proceed unless at least it was made plain that the views then held by Bonser, C.J., were absolutely incorrect, as that, *e.g.*, they, when delivered *vivâ voce* at the end of the argument, were based upon a decision which had been in fact over-ruled, though such a later decision had not been cited at the Bar or remembered by the judges. This, however, does not appear to me to have been the case. Indeed, it will be seen from the report in *I. L. R. 9 Madras*, at page 8, that while the Indian, as the Ceylon, Code of Civil Procedure does not define "immovable property," the decisions in India, treating as such "a benefit to arise out of land," have been made necessary by such a General Clauses Act as is now only about to be (as I believe) introduced into Ceylon. It was in view of a bond with mortgage of land being immovable property that therein and in 11 *ibid*, p. 169, it was held that the proper seizure thereof was of immovable property under section 274 (Ceylon Code § 237), and not of the debt under section 268 (Ceylon Code, § 229).

And it seems to me there may be another matter for consideration, viz., whether the right or duty of a mortgagee under section 67 of the Indian Transfer of Property Act, 4 of 1882 (Stokes' Anglo-Indian Codes, vol. I., p. 780), to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold, is the same right or duty which belongs to or affects a mortgage in Ceylon. Possibly the effect of such statutory provisions there simplifies the procedure as against the mortgagor for any one who shall have acquired the mortgagee's rights in such a manner that a seizure of the mortgage itself was made. With, however, the four-fold distinction of mortgages into simple mortgage, mortgage with conditional sale, usufructuary mortgage, and English mortgage, I am not so certain that the first might be styled a Ceylon mortgage, or that the procedure as to realization of the mortgage would be the same there as here.

For the reasons expressed by Bonser, C.J., on the 26th February, I consider that the action should be dismissed with costs.

1901.

February 26, May 17, and July 8.

MONCREIFF, J.—

I am of the same opinion. This appeal was referred back by the Chief Justice and my brother Dodwell Browne to enable Mr. Wendt, for the respondent, to show a regular seizure and good sale if he could.

Mr. Wendt now says that, at the worst, the Fiscal has only been guilty of an irregularity. I cannot agree with him. I presume that different sections are provided for the seizure of debts and the seizure of land for some good reason. Seizure of a debt under section 229 involves a prohibitory notice signed by the Fiscal, prohibiting the creditor from recovering the debt, and the debtor from making payment thereof until the further order of the Court. The Fiscal's notice under section 237 prohibits the judgment-debtor from transferring or charging the immovable property affected and all persons from receiving it from him. There is a clear difference, and I can imagine that, after seizure under section 237, a debtor might feel himself bound to refrain from dealing with his immovable property, but still free, so far as seizure goes, to discharge his debt to his original creditor. The difference is of substance and not a mere matter or regularity.

In this case the Fiscal, having obtained possession of the mortgage bond under the plaintiff's decree against Sangara Pillai, seized the land which had been affected by it. The bond, which was his authority, gave him no right to do this. A mortgagee may have an action "to enforce a right of sale under a mortgage," as it is put in section 201 of the Code, but the right does not become definite until the debtor has, after judgment passed against him, made default of payment within the date assigned in the decree. His right, therefore, is in the first place to obtain payment of his debt, to bring an action—as it is expressed in section 640—"for the realization of moneys secured to him upon mortgage:" and it is not until the debtor has made default of payment within the assigned time that the Fiscal has a right to seize the land. Until that moment arrives the Fiscal has no authority to put his hand upon the mortgaged land; and when it does arrive, he can only seize it for sale. The seizure means, not that the ownership of the land belongs or passes to the creditor, but that the land is to be used for the payment of his debt; and the debt is not to be paid out of the land, but out of the price of the land.

The Fiscal has seized what he had no right or authority to seize; he has seized the wrong thing. He has seized the land, but he has not seized the debt, which he was authorized to seize, because it could only be seized under section 229.

1901.

February 26, May 17, and July 8.

MONCREIFF, J.

But Mr. Wendt also contends that the mortgage bond is an interest in land, and may be seized as land. The proper mode of seizing it, therefore, is to seize the land. In support of his proposition he referred to sundry decisions under the Indian Code.

In *Sami v. Krishnasami* (*10 I. L. R. Madras 171*) it was held that the seizure of a hypothecary debt, under section 274 of the Code, was not void because it was not made under section 268, which relates to the seizure of movable property. But it was so held on the authority of *Appasami v. Scott* (*9 I. L. R. Madras 5*), which went upon the consideration that immovable property, as defined in the General Clauses Act, included "benefits to arise out of land," and that a debt secured by a mortgage bond upon immovable property was a benefit to arise out of lands. We have no such construction of immovable property in Ceylon. The cases cited by Mr. Wendt do not apply, and do not lessen the effect of the principle which the Chief Justice deduced from the case reported in *I. L. R. 5 Allahabad, p. 86.*

I think that the appeal should be allowed and the action dismissed with costs. And I may add my impression that, when this matter was before the Chief Justice and my brother Dodwell Browne, and was referred back to enable Mr. Wendt to show that there was a regular seizure as well as a good sale, it was not meant that he should do so simply by argument.