July 15, 1910

Present : Hutchinson C.J. and Middleton J.

APPUHAMY *v.* APPUHAMY.

WILLIAM PERERA APPUHAMY, Third Defendant, Appellant,

Vs.

WILLIAM DE SILVA, Secretary, District Court, Kalutara, Substituted Plaintiff, Respondent ;

WEERASINGHE APPUHAMY, Purchaser, Respondent.

72, *D. C.* (*Inty.*), *Kalutara*, 2,679.

Application to set aside sale—Writ re-issued without fresh stamps—Action rei vindicatio*—Alternative decree for delivery of movables or payment of money—Civil Procedure Code, ss. 191, 282, 320–322, 344.*

On August 30, 1909, a writ was issued against the first defendant only, to recover Rs. 2,132.85 and costs. On September 10, 1909, the Fiscal returned it into Court at the request of the plaintiff, and on the next day it was re-issued, having been altered by striking out the name of the first defendant and substituting the names of the second and third defendants, by altering the sum to be levied to Rs. 882.42, and by substituting October 25 for September 28 for the date of the return.

Held, that this was not a re-issue of a writ, but the issue of a new writ, and had to be stamped accordingly.

A Court has power to set aside a sale for reasons other than those specified in section 282, if the application is made before the confirmation of the sale.

Per MIDDLETON J.—In an action *rei vindicatio* for the recovery of specific movable property an alternative decree for payment of its value is not bad.

Section 191 of the Civil Procedure Code is consistent with sections 320–322.

Sithamparapillai v. Vinasitamby et al.[1] and *Sheik Ali v. Carimjee Jafferjee*[2] questioned.

THE facts are fully set out in the judgment of Middleton J.

A. St. V. Jayewardene, for third defendant, appellant.

De Sampayo, K.C., for respondent.

Cur. adv. vult.

[1] *(1895) 1 N. L. R. 114.*

[2] *(1895) 1 N. L. R. 117.*

July 15, 1910. HUTCHINSON C.J.—

I agree with my brother Middleton that the writ of execution under which the sale took place was not duly issued and stamped. In pursuance of the order of August 26, 1909, a writ was issued on August 30, 1909, against the first defendant only to recover Rs. 2,132.85 and costs. On September 10, 1909, the Fiscal returned it into Court at the request of the plaintiff, and on the next day it was re-issued, having been altered by striking out the name of the first defendant and substituting the names of the second and third defendants, by altering the sum to be levied to Rs. 882.42 and by substituting October 25, for September 28 for the date of return. That was not the re-issue of a writ, but the issue of a new writ, and it was not stamped as a new writ. I agree to the order proposed by my brother Middleton.

MIDDLETON J.—

This was an appeal from an order refusing to set aside a sale. The grounds on which the sale was sought to be set aside were, (1) that there was no decree upon which writ of execution ought to have issued, and (2) that the writ upon which the sale took place was not duly issued and stamped.

The facts were that two judgments had been obtained against the three defendants in a Testamentary Case No. 26,792, D. C., Kalutara, by the administrator of their father's estate for the delivering up of certain movable property. Decree *nisi* against the first and second defendants on June 10, 1903, was made absolute, and a decree (page 88) against the third defendant was drawn up on June 10, 1903. Neither of these decrees stated in conformity with section 191 of the Civil Procedure Code the amount of money to be paid as an alternative, if delivery could not be had of the movables in question.

On appeal these decrees were set aside on terms by two judgments of the Supreme Court, dated respectively August 20, 1903, and September 9, 1903, and new trials ordered. A new trial appears to have taken place in respect to the first and second defendants, and decree was entered in the District Court on March 30, 1904, and upon appeal affirmed on February 9, 1905. It appears from the Record (p. 31) that the third defendant took no steps in accordance with the conditional order he obtained from the Supreme Court on August 20, 1903, and it must be taken that the decree of June 10, 1903, is still in force as against him. The decree of March 13, 1904, is also not in conformity with section 191 of the Civil Procedure Code. On March 18, 1904, application was made for the issue of a writ, pending a new trial against the first and second defendants, for the recovery of the furniture mentioned in the schedule annexed to the decree and costs Rs. 184.12½ by seizure

July 15, 1910

MIDDLETON J.

Appuhamy v. Appuhamy

and sale of third defendant's property. This writ was issued on March 31, 1904, and returned into Court on May 16, 1904, for an extension of time to enable the Fiscal to advertise the property for sale which had been seized according to the seizure report thereto annexed. On May 20, 1904, it was extended and re-issued for execution, returnable on August 14, 1904. On May 27, 1904, it was returned unexecuted at the request of the proctor for the judgment-creditor. On October 24, 1905, the plaintiff applied for the execution of the decree by the re-issue of the writ against the property of the third defendant for the recovery of Rs. 184.12½, which was allowed on fresh stamps being affixed, the writ being returnable on January 22, 1906. This writ has a further endorsement on the back of it, that it was returned on January 22, and a note " to seize the property and report who is in possession ". It is noticeable that both this writ itself and the application just recited only empower the levying of a sum due for costs, and not any sum due for the articles which the third defendant had been ordered to deliver. On January 23, 1906, the plaintiff having failed to advance *Gazette* advertising charges, the Deputy Fiscal returned the writ to Court unexecuted. On April 9, 1904, plaintiff's proctor applied for a writ of delivery of possession of the property decreed in the case, which was allowed, and on April 21, 1904, a writ of possession was issued. I presume this means for delivery of possession. The writ was directed only to the first and second defendants, and was returned into Court on February 21, 1905, with a settlement by the Fiscal that the property described in a certain list had been delivered to the plaintiff, but that the rest of the property mentioned in the schedule to the writ was not forthcoming. Nothing seems to have been done until October 20, 1908, when an order *nisi* was made and issued substituting the Secretary of the Court as official administrator for the original decree-holder in terms of section 339 of the Civil Procedure Code. On November 13, 1908, a note appears in the diary that the order *nisi* was served on the first and second respondents-defendants, the third respondent-defendant being said to be in Rakwana. On the same day the order appears from the diary to have been re-issued for service on the third defendant-respondent. On December 3, 1908, in the presence of the proposed substituted plaintiff and first defendant as first respondent, the second being absent and the third being said to be in Malawana, the order *nisi* was again re-issued on the third defendant-respondent, returnable on December 17, 1908.

On December 17, 1908, in the presence of the third defendant, an application was made by the first defendant's proctor agreeing to pay one-third of the amount due by his client, and also the remaining two-thirds in the event of the second and third defendants failing to pay their share, which was allowed. On March 3, 1909, an application by the substituted plaintiff to re-issue writ against

the defendants to recover the articles as appearing in the schedule annexed to the writ and Rs. 184.12½ costs was allowed. And on March 8, 1909, the order, meaning, I suppose, writ, was issued. The application recites that the decree on which it is founded is dated June 10, 1903, which is the date of the decree against the third defendant only. It also recites that part of the property had been recovered, and that it was to be enforced against all the defendants to recover the articles appearing in the schedule annexed to the writ. On April 6, 1909, the Deputy Fiscal returned the writ, reporting that on demand from the first and second defendants of the property they stated that it was not in their possession, and he (the Fiscal) could not find it.

On May 28, 1909, the substituted plaintiff filed an affidavit and obtained an order *nisi*, issued returnable on June 10, 1909, directing the defendants to pay the sum of Rs. 2,979, or in default to show cause why writ of execution should not be issued against them. It appeared impossible to find the second and third defendants, but on July 1, 1909, the second and third defendants were reported as evading summons, and substituted service of the order *nisi* was allowed to be affixed to their last known place of abode, and the case adjourned to July 15. On July 15 the first and third defendants-respondents were present, when the case was adjourned to August 12, on which date only the first defendant was present. On August 19, 1909, a proctor, according to the journal entries, appeared for all the defendants and filed an affidavit, and on August 26, 1909, an inquiry was held in the presence of proctors for the parties, according to the journal entries, and the writ was ordered to issue, but apparently it did not issue.

On reference to the Record, it appears on August 26, 1909, the proctor only represented the first defendant, but I think it is clear from the journal entry of July 15 that the third defendant must be held affected with notice of what took place upon the inquiry on August 26 and subsequently. The order was, I think, rightly made against all the defendants, certainly as against the third defendant. On August 30, 1909, writ was allowed to issue against the first defendant only, returnable on September 28, 1909, for the sum of Rs. 2,132.18. On September 10, 1909, an arrangement was come to with the first defendant by which he agreed to pay into Court Rs. 511.24, being one-third of the judgment against him, and to point out for seizure and sale the property of the second and third defendants for the recovery of the balance as per decree. On the same day the writ shows from the endorsement of the Fiscal that it was returned into Court at the request of the plaintiff for an amendment, and on September 11, 1909, it was altered by striking out the name of the first defendant and inserting the names of the second and third defendants, and by altering the sum to be recovered to Rs. 882·42. The writ purported to issue in virtue of a judgment

July 15, 1910

MIDDLETON J.

Appuhamy v. Appuhamy

dated August 26, 1909. This was struck out but re-inserted, and the writ made returnable on October 25, 1909. Upon the re-issue of the writ as amended the third defendant's property was sold, as he alleges, for far less than its value, and upon an order made refusing to set aside this sale the present appeal was preferred.

I have thought it necessary to abstract the journal entries from almost the inception of the action in order to arrive at a right understanding of the facts. No objection has been taken in the petition of appeal that the amount ordered by the amended writ to be levied was incorrect, and I think it must be taken that it is correct.

The original decrees of June 10, 1903, and March 13, 1904, were not in conformity with section 191, as not stating an alternative amount, but Bonser C.J. and Browne A.J., in *Sithamparapillai v. Vinasitamby et al.*[1] and *Sheik Ali v. Carimjee Jafferjee*,[2] held in judgments which, although they have been questioned, have not, so far as I am aware, been over-ruled, that section 191 must be disregarded as inconsistent with sections 320–322 of the Civil Procedure Code.

As regards the judgments of Bonser C.J. and Browne A.J. in the cases above mentioned, as to section 191 and sections 320–322, my own opinion is that section 191, as I believe I have said before, is consistent with sections 320–322.

A judgment in the form contemplated in section 191 may be executed according to the procedure laid down in sections 320–322. A writ would issue for delivery of possession in terms of No. 62 in the second schedule. In default of delivery the procedure laid down in section 321 would be adopted and the Court having already estimated the judgment-creditor's loss by not receiving the goods in the decree, it will not be necessary to do so again unless any further loss has occurred by non-delivery. The original application for execution might also be made in the alternative. It seems to me also in the case of an alternative decree the judgment-creditor could himself demand delivery from the judgment-debtor, and if refused he could on his application for execution as a money decree embody in an affidavit proof of the demand and refusal, when the Court might issue a writ for the recovery of the money at once. In any case it seems to me that if a judgment-debtor is ordered by decree to deliver up movable property, demand ought to be made by the Fiscal under the writ issued to him for the delivery of the goods before seizure of other property to be sold to satisfy the value of them. It is not alleged, however, that no demand was made upon them for delivery, but that the decree of 1903, I understand, did not state the alternative amount to be paid in default of delivery upon which a money writ could issue. An attempt was made to cure this by the application of May 25, 1909, and the question is

[1] *(1895) 1 N. L. R. 114.*
[2] *(1895) 1 N. L. R. 117.*

whether the third defendant had not waived his right to dispute the amount ordered by the Court to be paid by omitting to appear and show cause upon the hearing of that application. This judgment has been in force against him since 1903. He took an appeal against it, and did not fulfil the conditions imposed upon him by the Supreme Court so as to enable him to obtain a new trial. He must have been well aware of what the decree ordered him to do, but he has succeeded in evading his obligation under the judgment against him for some six years. He is a brother of the original plaintiff and of his co-defendants, and upon the original trial against him admitted that the property in question belonged to his deceased father, but declined, when called upon to do so, to take up the burden of proving that it had been gifted to him as he alleged. His conduct clearly shows that he did not intend to deliver up the articles in question, and if he did not do so he was clearly liable for their value. He had an opportunity of disputing the value put on them by the plaintiff, and he failed to appear and do so, and in my opinion he is now debarred from doing so. I would treat the application of May 28, 1909, and the consequent order thereon on August 26, 1909, as an amendment of the decree in conformity with section 191. It is not alleged that any irregularity took place in the sale itself or its preliminaries, merely that the amount for which the property was sold was far less than its value.

This brings us to the question of the re-issue of the writ without due stamping. The terms of the schedule of the Stamp Ordinance, 1890, are very stringent. The case if *Oorloff et al. v. Grebe et al.*,[1] confirmed in review by the Full Court, as reported at page 183 of 10 *N. L. R.*, is much in point. The writ here was returned into Court under circumstance which are not excepted by the schedule. It was not perhaps returned into Court in the sense contemplated in the schedule, which assumes regularity of procedure, but it was irregularly returned, owing to the fact, probably, that the plaintiff was himself an officer of the Court. It was amended and sent back to the Fiscal without the affixing of further stamps as upon a re-issue, and I must hold, considering the stringency of the schedule, for the future prevention of similar irregularities, that it was in fact and in form re-issued and bad on the face of it, as having been returned and re-issued without the stamp duty having been duly paid. (*Palaniappa Chetty v. Samsadeen.*[2]) I think the schedule is directed, not only to the protection of revenue, but partly to the prevention of irregularities like this by agreement between the persons directly responsible for the preparation and issue of writs and those entrusted with the immediate duty of executing them, which mightl ead to fraud and injustice. The writ originally might have issued under the order of August 26, 1909, against all three defendants, and I think might have been executed

[1] *(1906) 9 N. L. R. 150.* [2] *(1905) 8 N. L. R. 325.*

July 15, 1910

MIDDLETON J.

Appuhamy v. Appuhamy

against any one of them, but the plaintiff chose to apply for it only against the first defendant. The date of his application for writ (Record, p. 37) and the date of the copy of the order ordering the execution (Record, p. 44) have both been altered, which shows to my mind, taken with the alteration of the writ itself, that the Secretary of the Court takes an extremely irregular view of the responsibilities imposed on him by his office. Another point was that no application was made to the Court by petition under section 224 for execution as against the third defendant, so that the Court had made no order for execution as against the third defendant upon the order made by it on August 26, 1909. As this order may be made *ex parte*, the third defendant is able to say he was not aware of it, and so was unable to seek a stay of the sale before. I think, therefore, that there was no proper re-issue of the writ as against the third defendant, and if there had been, that the sale is bad, as having been carried out upon a writ of execution issued without the due authority of the Court. It is objected that the purchaser-respondent to these proceedings ought not to have been made a party, and that as these proceedings were not taken under section 282 there was no section of the Code providing for this. It seems to me that section 344 of the Civil Procedure Code provides for such a matter as this, and that under it the purchaser may be, and ought to be, joined as a party, both on the grounds of convenience, expense, and avoiding of a multiplicity of actions. The Indian Code recognizes this under section 244 of the 1882 Civil Procedure Code.[1] In *Wickremesinghe v. Jewath Hamy*[2] this Court recognized that the Court had power to set aside a sale for reasons other than those specified in section 282, if the application was made before the confirmation of the sale, as it is here. I think, therefore, that the appeal should be allowed and the sale set aside, the parties being relegated to the position occupied by them upon the order of August 26,1909. I think the third defendant should pay his own costs of the appeal and that the plaintiff-respondent should pay the costs of the purchaser-respondent.

Appeal allowed.

---

[1] *(1896) 19 Cal. 662.*

[2] *(1900) 2 A. C. R. 160.*