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Present: De Sampayo and Schneider JJ.

SUPPRAMANIAM CHETTY *v.* JAYAWARDENE *et al.*

30 and 30A—D. C. Badulla, 3,169.

Mistaken view on the part of the Fiscal's officer as to the identity of the property seized—Is sale invalid ?—Inherent powers of the Court in respect of a party who obstructs the execution of its own orders—Civil Procedure Code, ss. 237 and 325.

A mistaken view on the part of a Fiscal's officer as to the identity of the property seized cannot invalidate the actual seizure or sale, though it may form the basis of an application under section 282 of the Civil Procedure Code to set aside the sale on the ground of irregularity, which has misled bidders and prejudiced the sale. The Code lays down the mode of seizure, and the fact of seizure must depend upon its observance, and not upon any particular belief of the Fiscal's officer.

THE facts are set out in the judgment.

S.C. 30.

Samarawickreme, for appellant.

Bawa, K.C. (with him *F. H. B. Koch*), for third and fourth respondents.

S.C. 30A.

Bawa, K.C. (with him *Koch*), for third and fourth respondents, appellant.

Samarawickreme, for petitioner, respondent.

July 4, 1922. DE SAMPAYO J.—

Appeal No. 30 is one taken by the plaintiff from an order of the District Judge dismissing an application to deal with the third and fourth respondents to the application for resisting a Fiscal's officer, who was entrusted with the execution of a writ, to put the plaintiff in possession of a certain land. It is necessary to state the facts in some detail for the purpose of deciding this appeal. This action was brought by the plaintiff on a mortgage bond bearing No. 308 executed by the first and second defendants, by which a number of lots of land constituting a tea estate known as Udawela estate was mortgaged to secure the payment of a certain sum of money. The third respondent to the application was joined in the action as the third defendant, as he was in possession of some of the lots of land on the basis of a Fiscal's sale in execution against the mortgagors subsequently to the mortgage. The fourth respondent

is an employee of the third respondent, and is made a respondent to the application, as he was one of the persons who obstructed the Fiscal's officer. The mortgaged lots were enumerated in the prayer of the plaint, and among them were the following, which were, as usual, described by boundaries :—

(1*a*) Udawelawalawalawwewatta, in extent 13 acres and 20 perches.

(1*b*) Two contiguous allotments of land called Wattebedde Kopiwatta and Gabbalawatta, in extent 14 acres and 3 roods.

(1*g*) Udawellawalawwewatta, in extent 22 acres 1 rood and 10 perches, " according to survey and plan of V. G. Potger, Licensed Surveyor. "

At the trial of the action the third defendant raised questions of title, and after evidence the District Judge found in favour of the plaintiff for the lots (1*a*), (1*b*), and other lots, but not for lot (1g), and accordingly a decree was entered for the sale of the lots (1*a*), (1*b*), and the other lots only. At the Fiscal's sale the plaintiff himself became purchaser, and duly obtained Fiscal s transfer. On plaintiff's application under section 287 of the Civil Procedure Code, the Court issued a writ to put him in possession, but the third and fourth respondents obstructed the Fiscal's officer in putting plaintiff in possession of the portion of the estate on which the factory stands, and which is said to be lot (1*g*) in the plaint. The fact appears to be, as rightly found by the District Judge on the evidence given at this inquiry, that the disputed lot is included in lots (1*a*) and (1*b*), for which the plaintiff obtained a mortgage decree, and that there is no separate land to be claimed as lot (1*g*). It appears to be a case of overlapping. The confusion probably arose from the circumstance that the mortgagors had deeds for lots (1*a*) and (1*b*). and there was only a survey for what was described as lot (1*g*). Hence the original finding of the Court in favour of the plaintiff for lots (1*a*) and (1*b*) only. The notary who attested the mortgage bond would appear to have put in the land appearing in the survey *quantum valeat*. Seeing that an estate comprising various lots of land was mortgaged, it would be strange if the most important portion, namely, that on which the factory stood, was excluded. As a matter of fact, the first and second defendants mortgaged not only the lots of land, but " all the buildings, bungalows, machinery, fixtures, furniture, stores, tools, implements, cattle, and other the live and dead stock on the said estate. " The third respondent himself gave evidence very fairly at the inquiry. The survey marked R1 is the survey referred to in the plaint in describing lot (1*g*), and it shows the factory. It is, in fact, the survey of what is called the " factory block " in the case. Now, the third respondent's evidence is this : " I have no doubt that the

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lot depicted in R 1 refers to the lot Udawellewalawwewatta of 22 acres in my Fiscal's transfer. Udawellewalawwewatta was transferred subject to mortgage No. 308, so that my title to the land shown in R 1 is subject to this mortgage, and liable for sale against me if the mortgage is good. " There is no mistake here, for the third respondent is possessed of great expert knowledge and knew what he was talking about. I think it must be held that since lots (1*a*) and (1*b*) cover lot (1*g*), the mortgage decree in effect ordered the sale of lot (1*g*).

A subsidiary question was raised as to whether the factory block was in fact seized and sold by the Fiscal under the plaintiff's writ. The Fiscal's officer, who had acted in the matter of the execution, pointed out to the surveyor, who went to survey the lands for the purpose of the transfers in favour of the plaintiff, the land excluding the factory block as the land which was seized, and in Court he gave evidence to the same effect. But I agree with Mr. Samarawickreme that a mistaken view on the part of the Fiscal's officer as to the identity of the property cannot invalidate the actual seizure, or the subsequent sale, though it may form the basis of an application under section 282 to set aside the sale on the ground of irregularity which has misled bidders and prejudiced the sale. The Code lays down the mode of seizure, and the fact of seizure must depend upon its observance, and not upon any particular belief of the Fiscal's officer. Section 237 of the Code provides that the seizure of immovable property shall be made by a written notice signed by the Fiscal, and that the notice shall specify, among other things, the name, situation, and boundaries of the land seized, and shall be proclaimed at some place on or adjacent to such property by beat of tom-tom or other customary mode, and a copy of the notice shall be affixed by the Fiscal to a conspicuous part of the property and of the Court-house and of the Fiscal's office. It is the Fiscal that effects the seizure by means of the notice, and I take it that the Fiscal's officer is only concerned with proclaiming the notice and affixing copies of it as directed. In this case the seizure was affected by a written notice which contained the required particulars of lots (1*a*) and (1*b*), and the other directions given by the above section were presumably followed. There was, therefore, a due seizure of the factory block now in dispute, though the Fiscal's officer may not have known it. Moreover, the very Fiscal's officer sent his " seizure report " showing that the property as described in the decree was seized. The notice of sale and the sale report of the Fiscal contained the same descriptions. All this puts it beyond doubt that lots (1*a*) and (1*b*) which, as stated above, include the factory block, were duly seized and sold under the plaintiff's writ. Consequently appeal No. 30A taken by the third and fourth respondents from the decision of the District Judge that those lots were seized and sold, and that the third and 4th respondents obstructed the Fiscal's officer in placing the plaintiff in possession thereof fails.

The District Judge decided all the questions of fact in favour of the plaintiff, but dismissed the application on a point of procedure. He considered that the provisions of section 325 of the Civil Procedure Code were not applicable to plaintiff as execution purchaser, and he would not exercise even the inherent powers of the Court in respect of a party who obstructed the execution of the Court's own orders, because the plaintiff had purported to apply for an order under section 325. This is taking a very narrow view of the Court's duty and power. I think the form of application is quite sufficient to enable the District Judge to exercise whatever power he has in regard to the matter. Moreover, the District Judge is mistaken in thinking that the provisions of section 325 and the following sections are not available. Though the penal part of these provisions may not be capable of being enforced, the Court is entitled thereunder to cause the party resisting the execution of the writ of possession to be removed and the writ-holder to be put in possession. His attention does not appear to have been drawn to the Full Bench decision in *Silva v. De Mel.* [1] I think the District Judge should have made order specifically directing the plaintiff to be put in possession of the "factory block," in respect of which the third and fourth respondents had resisted the Fiscal's officer. Now that the question of title has been decided against the third and fourth respondents, any further resistance would be offered by them at their proper risk.

In my opinion the order dismissing the plaintiff's application should be set aside, and the District Judge directed to make such an order as last above indicated, and the third and fourth respondent's appeal should be dismissed. The plaintiff should, I think, have the costs of the inquiry in the Court below and of this appeal.

SCHNEIDER J.—I agree.

Set aside.

[1] *(1915) 18 N. L. R. 161.*