

## PALANIAPPA CHETTY v. SAMSADEEN.

1905.  
December 1.

D. C., Colombo, 18,064.

*Writ of execution, reissue of—Stamp duty—Sale of property—Confirmation of sale—Irregularity—Ordinance, No. 8 of 1890, part II., schedule.*

A writ of execution issued by the Court was returned by the Fiscal, who, in his return, stated that the sale of the property had been stayed at the request of the plaintiff's proctor. The Secretary of the Court on the plaintiff's application reissued the same writ with the following endorsement:— "This writ is extended and reissued to recover the amount of this writ minus the sum of Rs. 4,740, returnable on or before the 29th December, 1905. The stamp duty was not paid afresh. The Fiscal having seized and sold certain property in execution of the said writ, the Court confirmed the sale.

*Held*, that the seizure and sale by the Fiscal were invalid, and that the sale should not have been confirmed.

*Per* LAYARD, C.J.—No writ issued out of the District Court and returned by the Fiscal should be reissued, unless such writ has been returned unexecuted by reason that the party could not be found, or had left the jurisdiction of the Court, or by reason that no property of the debtor or none to satisfy the exigency of the writ could be found.

*Per* WENDT, J.—If the stamp duty had been paid afresh, the writ would be good.

THE facts appear sufficiently from the judgment of the Chief Justice.

*Wadsworth* (with him *Akbar*), for appellant.

*De Sampayo, K.C.*, for respondent.

1st December, 1905. LAYARD, C.J.—

The defendant is the appellant before us. A writ of execution was issued in this action and certain premises were sold on the 22nd May, 1905. The appellant alleges that the properties sold were worth Rs. 20,000, and that the Fiscal sold them for Rs. 1,700, the purchaser being the execution-creditor himself. He further alleges that there were material irregularities in the seizure of the property as well as in the publishing and conduct of the sale, by which the appellant has sustained substantial injury, the property not fetching on-tenth of their value, and he applied to the District Judge to have the sale set aside. The District Judge on the 21st August, disallowed the appellant's application, because the appellant was not ready to proceed with his application on that day. The District Judge seems very properly to have thought that the appellant was not entitled to any indulgence. Subsequently the District Judge

1905. made an order confirming the sale. The appellant has appealed  
 December 1. against both these orders. I think that the District Judge exercised  
 LAYARD, C.J. a very wise discretion in refusing to allow a postponement of the  
 matter when it came before him. The appellant has been very  
 dilatory in the Court below, and is entitled to no indulgence either  
 in the District Court or in this Court. The appellant's counsel, how-  
 ever, has pointed out to us what appears to be a material irregular-  
 ity, in fact one which goes to the root of the authority of the Fiscal  
 to seize and sell these properties. It appears that the writ, which  
 originally issued on the 29th September, 1903, was returned to the  
 Court unexecuted, the Fiscal in his return stating that the sale of the  
 property described in the mortgage decree was stayed at the request  
 of the plaintiff's proctor. I am informed that this request was  
 made by the plaintiff's proctor as an indulgence to the defendant.  
 The material irregularity which seems to vitiate the Fiscal's sale of  
 the property is that the plaintiff's proctor, instead of taking out a  
 new writ, obtained from the Secretary of the District Court the old  
 writ of execution which had been returned unexecuted in 1904, and  
 the Secretary appears at his request to have endorsed the old writ  
 as follows:—"This writ is extended and re-issued to recover the  
 amount of this writ, minus the sum of Rs. 4,740 paid as follows: on  
 the 18th November, 1903, Rs. 240, and on the 3rd December, 1904,  
 Rs. 4,500. Returnable on or before the 29th December, 1905."

The appellant's counsel points out that no writ of execution which  
 has once been issued out of the District Court and returned by the  
 Fiscal can, on any pretext whatever, be re-issued, unless such writ  
 has been returned not executed by reason that the party could not  
 be found or had left the jurisdiction of the Court, or by reason that  
 no property of the debtor or none sufficient to satisfy the exigency  
 of the writ could be found. This provision will be found in the  
 schedule to the Ordinance No. 3, of 1890, part II. The Legislature  
 has distinctly laid down there under what circumstances a writ can be  
 re-issued. In the present case it is clear that this writ, in view of  
 the provision contained in the schedule to that Ordinance, could  
 not be re-issued. Such being the case, the document in the hands of  
 of the Fiscal on the face of it is null and void, and can give no  
 authority to such officer to seize and sell the property of the execu-  
 tion-debtor. I go even further and say that it is no authority for  
 him to seize and sell the property mortgaged. The Fiscal purported  
 by virtue of this writ, which was void on the face of it, to seize and  
 sell property, and the sale by the Fiscal has been confirmed by the  
 District Court. In my opinion, following the previous decisions of  
 this Court, the Fiscal having no authority to seize and sell there

was no sale which could be confirmed by the District Court. I think, therefore, the order of confirmation of the sale must be set aside and the sale must be declared void. The District Judge is not to blame for making the order confirming the sale, for his attention was not invited to the gross irregularity which I have above pointed out.

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LAYARD, C.J.

The appellant's counsel pointed out that the procedure with regard to the issue of the writ was irregular. I need not dwell on the points raised by him, but simply refer to my judgment in which Mr. Justice Wood Renton concurred (*Balasingham's Reports, vol II., p. 61*).

The appellant, as I said before, is entitled to no indulgence, as he did not draw the attention of the District Judge to the inability of the Court.

He must pay all the costs of this appeal and of the proceedings in the District Court with regard to the re-issue of the writ. The order, however, confirming the sale, as I said before, is set aside, and in lieu thereof it is ordered that a fresh writ do issue for the amount of the balance due on the judgment.

The respondent's proctor must be careful to see that the writ issued by the District Court does not contain a claim for more than the amount now actually due.

WENDT, J.—

In my opinion the writ was improperly re-issued. I do not read the provision in schedule II. of the Stamp Ordinance as forbidding the use of the very paper upon which the writ was written, to make a second levy on the defendant's property, but rather the second use of that paper without paying afresh the stamp duty required for a new writ. If therefore the stamp duty had been paid afresh, I should have been prepared to hold that the writ was good. As it is, the writ was void in law, and could form no legal basis for sale of defendant's property.

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