GORDION APPUHAMY *v.* MARIA CULAS.

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D. C., Trincomalee, 8,702.

Seizure in execution—Claim to property seized—Sale notwithstanding claim and order of Court to stay sale—Order of Court to produce property claimed—Validity of unauthorized sale—Civil Procedure Code, ss. 218, 226, 241, 363.

The plaintiff, having obtained judgment against the defendant in the District Court of Mannar, seized certain movables in Trincomalee, when a claim was made.

Held, that the District Court of Trincomalee, which had power to investigate the claim, had also the right to order the production of the property claimed, even though the Fiscal had delivered it to a third party on the pretext of being the purchaser at an alleged sale held by the Fiscal.

A Fiscal who has received a claim which he has preferred to the Court has no right to proceed with the sale until it has been decided whether the seizure was legal or not.

A Fiscal's sale held without excuse or authority does not pass title to the purchaser, but is a nullity.

THE plaintiff obtained judgment against the defendant in the District Court of Mannar and seized in execution certain movables in Trincomalee said to belong to the defendant, and had them advertised for sale on 4th June, 1901. Of the articles seized one Savial Culas claimed *inter alia* a boat and one-half of a fishing

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net. The claim was fixed for inquiry in Trincomalee on 17th June, 1901. Pending the result of the inquiry the sale of the property was ordered by the District Court of Trincomalee to be stayed. Nevertheless the articles were sold on 4th June, 1901, and bought by the plaintiff and others, and the plaintiff was allowed to remove the things he had bought. The claimant then moved for a notice on the plaintiff to show cause why he should not produce them in Court to abide such orders as may be made in the claim inquiry.

After hearing the parties, the District Judge held that, in view of the order of Court that the sale fixed for the 4th June should be stayed, no sale could take place, and it directed the plaintiff to bring into Court the articles purchased by him.

The plaintiff appealed. The case was argued on 4th October, 1901.

Sampayo, for appellant.

H. Jayawardene, for claimant, respondent.

Cur. adv. vult.

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A boat and a *puthu paddu* net having been seized in execution and sold, the claimant moved in the District Court of Trincomalee that the sale should be set aside. The Judge held that there had been no sale, and that there was nothing to be set aside; but he ordered the execution-creditor to produce the property in Court to abide the result of the claim inquiry. From this order the execution-creditor appealed.

I understand that, as a matter of fact, the claim has, since the order for production, been sustained; but the property cannot be produced, because the purchaser at the Fiscal's sale at once sold it to another person.

It was urged that the decree in the action having been pronounced in the District Court of Mannar, and the articles in question having been seized within the jurisdiction of the District Court of Trincomalee, the application to set aside the sale should have been made to the District Court of Mannar. I need not enter into that question. The Judge, holding there was no sale to set aside, treated the application as one for the production of the property. Under section 241 of the Civil Procedure Code the Fiscal's report of claim was made to the Judge at Trincomalee. It was the same Judge's function to investigate the claim and make an " order thereon. " By section 244 he might, upon investigation, release the property from seizure, or by virtue of the following section he might disallow the claim. He has, therefore, power to do everything necessary to the making of his order, and I have no

doubt that he has the power, which even the Fiscal has, to postpone the sale, and also to order the production of the seized property in Court.

The goods were seized on the 18th May, 1901. Whether or when the sale was advertised, we are not told.

On the 29th May the claim was filed. On the 30th May it was reported, and a stay of the sale was allowed on payment of the Fiscal's fees. On the 31st May the claim inquiry was fixed for the 17th June. On the 4th June the property was sold. On the 5th June the motion to set aside the sale was made. On the 8th June the Deputy Fiscal of Trincomalee sent to the District Judge of Trincomalee the report of the Udaiyar of Kaddukkulam Pattu East touching the sale of the property, stating at the same time that the order to stay the sale was posted on the day previous to the sale (*i.e.*, the 23rd June), "the claimant having neglected to take the order to the Udaiyar from this office as directed."

Surely, the Deputy Fiscal was labouring under some misconception. Surely the judgment-creditor has mistaken the law. It is said that there was no effective stay of the sale, but what authority is there for saying that any stay was necessary. Section 242 of the Civil Procedure Code provides that, "if the property to which the claim or objection applies shall have been advertised for sale, the sale may (if it appears to the Court necessary) be postponed for the purpose of making the investigation mentioned in section 241." I do not find that the sale in this case was advertised when the claim was made. Where is the necessity to stay? I do not find that a stay of sale is necessary even when the sale has been advertised? The Fiscal was, I believe, also the District Judge, and I presume notice of the claim to him was notice to the Judge. But, suppose he were a different person? He knows that he has no right to sell property which does not belong to the judgment-debtor. What right has he to sell property which has been claimed, and which has been claimed "at the earliest opportunity," without the authority of the Court, or until the Court has adjudicated upon the claim? In my opinion there is no warrant for such proceedings. In a case reported in *5 N. L. R. 21* it appeared that, in spite of the reference to the Court of a claim to property seized in execution, the Fiscal proceeded to a sale. The Chief Justice upon that remarked: "I do not understand how it was the Fiscal proceeded with the sale, having received a claim which he had referred to the Court. It seems to me quite clear that his duty was to stay his hand until it had been decided by the Court whether the seizure was legal or not." That opinion is in agreement with common sense and

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justice as well as with law. From sections 218 and 226 of the Code, and the form of the writ of execution No. 43 in the second schedule thereof, it is clear the Fiscal can only sell the judgment-debtor's property. Section 363 of the Code, moreover, shows that the Fiscal has no right to sell property which does not belong to the judgment-debtor; and that if he does, he is not protected unless he did so in the *bonâ fide* belief that it does belong to the judgment-debtor. It may be for him to show how he could have had such a belief if he sold immediately after the receipt of a claim for the consideration of which he did not wait.

But the sale was stayed. It was stayed on the 30th May. The Fiscal knew on the 30th May that it was stayed, and although the goods were in his hands, he allowed his officer to sell them on the 4th June. He allowed four days to elapse without warning his officer not to sell. The Deputy Fiscal coolly says that the claimant "neglected to take the order to the Udaiyar." But I am not aware of any authority which obliges a claimant to step in and carry the Fiscal's instructions to his subordinates. The fact remains that the Fiscal had four days in which to do his duty and warn his officer not to sell, and he neglected to do so. He sold the goods, although he knew that the sale had been regularly stayed by order of the Court. His neglect is all the more inexcusable, because he himself had power, under section 342 of the Code, to adjourn the sale.

The question remains—the Fiscal having sold without excuse, without authority, and without a shadow of title, and sold to the decree-holder of all people, is it possible to pretend that what he did amounted to a sale, or was it a nullity? I think the law would be dangerous which allowed a decree-holder to point out to the Fiscal any property he fancied, buy it at the Fiscal's sale, and maintain afterwards that the sale was valid. Moreover, I do not quite understand the haste with which the decree-holder resold his purchase to a stranger.

According to section 25 of the Sale of Goods Ordinance (11 of 1896), the writ of execution did not prejudice the title to the goods of a claimant who acquired them in good faith and for valuable consideration. The writ, therefore, could not prejudice the claimant's title here.

If the buyer at the Fiscal's sale acquired even a voidable title, it is possible that a *bonâ fide* purchaser on the re-sale might have acquired a good title. But the buyer at the Fiscal's sale, in this case the decree-holder, acquired no better title than the seller. The seller was the Fiscal, who had no title to the goods, and sold without any statutory power or order of a competent Court. If

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no property passes, a contract of sale is void. The decree-holder, therefore, did not acquire even a voidable title to the goods. The Judge was right in considering that there was no sale to be set aside, and I think this appeal should be dismissed with costs.

WENDT, J.—

I agree. I had doubts whether a Court other than that from which the execution issued could entertain an application to set aside a sale on the ground of irregularity in the conducting of it, but this is not such an application. The order for the production of the property claimed for the purposes of the inquiry into the claim was within the competency of the Court which is empowered to investigate the claim, and so was the order for the stay of the sale.