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October 9.

*Present:* The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and  
Mr. Justice Middleton.

SUPRAMANIAN CHETTY *v.* SIRIWARDANA *et al.*

*D. C., Colombo, 14,570.*

*Seizure—Private sale after seizure—Subsequent judgment-creditors—  
Claims enforceable under the seizure—Concurrence—Civil  
Procedure Code, ss. 283 and 352.*

The plaintiff in this case having obtained judgment against the defendants on a promissory note in May, 1904, seized the life-interest of the second defendant in a certain property on 17th June, 1904, and registered the seizure on 20th June, 1904. On 28th June, 1904, the second defendant and her co-owners, with the sanction of the Court obtained under Ordinance No. 11 of 1876, sold their interests in the property to D. F. & Co., who claimed the interests of the second defendant when under seizure under plaintiff's writ; their claim having been upheld, the plaintiff instituted an action under section 247 of the Civil Procedure Code, and obtained judgment in February, 1905 (affirmed in appeal in July, 1905) declaring the interests of the second defendant executable under his writ.

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M. S. obtained judgment against the second defendant in this case in action No. 19,955 on a promissory note, in September, 1904, and issued writ in January, 1906.

The interest of the second defendant was sold by the Fiscal on the writ of the plaintiff in this case on 24th April, 1906, and was purchased by the plaintiff himself, who was allowed to set off his judgment debt against the purchase amount under section 272 of the Civil Procedure Code.

In an application by M. S. to have the purchase money brought into Court and for a rateable proportion thereof under section 352 of the Civil Procedure Code,—

*Held*, that he was so entitled, inasmuch as the sale to D. F. & Co., was void as against his claim under section 238 of the Civil Procedure Code, it being a claim enforceable under the seizure by the plaintiff in 14,570, by virtue of section 352 of the Code.

MIDDLETON J.—The claims of those execution creditors who, under section 295 of the Civil Procedure Code, are entitled to claim the benefit of a distribution of the fruits of a seizure ought to be treated as falling within the words "all claims enforceable under the seizure" in section 238.

*Sorabji v. Govind* (1) followed.

THE facts and arguments sufficiently appear in the judgments.

*H. Jayewardene* (with him *A. St. V. Jayewardene* and *Batuwantudawe*), for the appellant (plaintiff in 19,955).

*Schneider*, for the respondent (plaintiff in 14,570).

*Cur. adv. vult.*

9th October, 1906. MIDDLETON J.—

This was an appeal against an order disallowing an application by the appellant, who is plaintiff in action D. C., Colombo, 19,955, that the respondent, who is plaintiff in this case, should be called upon to bring into Court the sum of Rs. 1,400 realized by the sale of the property of their common debtor for rateable distribution under section 352 of the Civil Procedure Code.

The facts, which I mostly take from the judgment of the District Court, were that the respondent got judgment in the present action in May, 1904, seized the property in question on 17th June, 1904, the seizure being registered on the 20th June, 1904. On the 18th July, 1904, Messrs. Delmege, Forsyth & Co. claimed the land under a deed of transfer dated 28th June, 1904. The land was subject to a *fidei commissum* in favour of the second defendant here and others, the children of Norman Rajapakse, and in case No. 87 (special) the District Court had authorized the sale of the land to Delmege,

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Forsyth & Co. under the Entail and Settlement Ordinance of 1876. The claim of Delmege, Forsyth & Co. was upheld, but the respondent here instituted case No. 20,591 against them and obtained a decree in February, 1905, confirmed in appeal on 25th July, 1905, declaring the land liable to be seized and sold in execution of his decree.

The appellant got a decree in action No. 19,955 against the second defendant here on 17th September, 1904, and a writ was issued in January, 1906, and counsel for the appellant says seizure was made in April, 1906; the District Judge, however, says that the writ was in the hands of the Fiscal when the second defendant's property in question was put up for sale and purchased by the respondent on 24th April, 1906, for Rs. 1,400, who was allowed under section 272 to set off part of his judgment debt against the sale price.

The District Judge dismissed appellant's claim for concurrence on the ground that, when petitioner's writ went into the hands of the Fiscal, the property in question belonged at law to Delmege, Forsyth & Co. subject only to the respondent's right to have his debtor's interest in it sold in satisfaction of his decree.

The appellant now argues that this is a claim enforceable under the seizure by the respondent according to section 238, and applies for rateable distribution under section 352 of the Civil Procedure Code.

It may be prefaced here that section 352 of our Civil Procedure Code is practically the same as section 295 of the Indian Code, and section 238 of our Code the same as section 276 of the Indian Code.

Neither by section 352 nor any other section of our Civil Procedure Code does it appear to be necessary that a decree-holder seeking concurrence should have made a seizure or even have issued a writ. The conditions precedent to his right to share proportionately are that assets should have been realized in execution of a decree, that more persons than one of whom he is one have applied to the Court by which the assets are held prior to realization for execution, and that he has not obtained satisfaction.

If these conditions are fulfilled by any persons they become entitled to divide rateably the assets realized.

The existence of assets realized by sale or otherwise in execution presupposes a seizure under a writ of execution at the suit of one judgment-creditor at least.

I think, therefore, in the words of Lord Wensleydale in *Grey v. Pearson* (1), quoted in 16 Bombay, p. 100, that the claims of those execution-creditors who under section 295 are entitled to claim the benefit of a distribution of the fruits of the attachment ought to be treated as falling within the words "all claims enforceable under the

attachment," and substituting section 352 for section 295 and the word "seizure" for attachment renders the ruling entirely applicable here. This was the ruling of Telang J. in *Sorabji v. Govind* (1) under section 295 of the Indian Code.

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In the present case one other question arose, whether the assets were realized by sale or otherwise in execution of a decree.

The judgment-creditor, the respondent here, was permitted under section 272 to become the purchaser. According to that section the creditor may bid for and buy the property at the Fiscal's sale and set off against his debt the amount for which he buys the property.

The amount bid is realized by the sale in execution and is exigible from and payable by the purchaser unless he be acting under section 272, and, being property which may be used to satisfy debts or demands, is therefore an asset within the legal meaning of that word.

I cannot think that the fact that the amount bid is not converted into money makes it any less an asset of the debtor. See on this question *Sorabji v. Govind* (1), *Chunilal Maliji v. Rampratap* (2), *Tirthaswami v. Yusuf Sahib* (3). By many decisions of the Bombay Court quoted at page 102 of 16 Bombay, p. 91, it has been held that a creditor in the position of the respondent here cannot be allowed a set off as against execution-creditors who are entitled to come in under section 295 of the Indian Code for a share of the realization.

There is no pretension for saying that the sale of the property to Delmege, Forsyth & Co. was anything but a private sale between the parties to it carried out solely at their own initiative, though the assent of the Court was necessary under the Entail Ordinance.

Counsel for the respondent contends, however, that the property had become in law that of Delmege, Forsyth & Co., and was not the property of the judgment-debtor when appellant applied for execution.

The answer to that seems to be that that sale was void *ipso facto* under section 238 as being a private sale.

The respondent then contended that under his seizure the property became earmarked, and that by his judgment in the action under section 247 it became liable to be sold in execution for the decree in his favour only. The answer to that is that appellant has a claim enforceable under the seizure and is therefore entitled to come in under section 352.

With some reluctance, therefore, I feel that I must yield to the contention of counsel for the appellant, and hold that he is entitled under section 352 to share rateably, subject to the payment of his

(1) I. L. R. 16 Bom. 91.

(2) 6 Bom. Law Reporter 376.

(3) I. L. R. 28 Mad. 380.

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share of the costs of realization, in the amount realized under the sale to the respondent.

I would, therefore, allow the appeal in the terms of the petition and set aside the order of the learned District Judge with costs.

LASCELLES A.C.J.—

I have come to the same conclusion. The main question is whether the claims of subsequent execution-creditors under section 352 of the Civil Procedure Code to share rateably the proceeds of the sale are claims "enforceable under the seizure" within the meaning of section 238. The Indian decisions on the corresponding sections of the Indian Code are conflicting, but the case of *Sorabji v. Govind* (1), which was decided after a very full consideration of all the cases, supports the appellant's contention.

The reasoning on which this decision is based coupled with the natural meaning of section 238 in my opinion turns the scale in favour of the appellant.

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