

1909.
September 28.

Present: Mr. Justice Wendt and Mr. Justice Middleton.

PALANIAPPA CHETTY v. GOONEHAMY.

D. C., Galle, 7,413.

Sale in execution—Absence of judgment or decree—Nullity—Irregularity.

No valid writ can issue or a Fiscal's sale be held except on a decree founded on a judgment. A writ which is not founded on a decree is a nullity, and all proceedings thereunder are void *ab initio*.

*De Mel v. Dharmaratne*¹ referred to.

ACTION *rei vindicatio*. Appeal by the defendant from a judgment of the District Judge.

E. W. Jayewardene, for the defendant, appellant.

A. St. V. Jayewardene, for the plaintiff, respondent.

Cur. adv. vult.

September 28, 1909. MIDDLETON J.—

This was an action for declaration of title to a land called Welabodawatta. The defendant claimed the land by inheritance and prescriptive possession, but raised an issue as to whether the Fiscal's transfer, on which the plaintiff founded his title, was not void in law.

We have sent for the record in D. C., Galle, No. 6,418, in which action the sale to the original plaintiff by the Fiscal took place, and we find that the facts were as stated in the petition of appeal, and that the original plaintiff here being himself the judgment-creditor in that action purchased under a Fiscal's sale, subsequently confirmed by the Court, upon a writ, for which there was no authority either by decree or judgment.

The journal entry under date December 15, 1902, in action 6,418 shows divers alterations, which I hope were only mistakes resulting from confusion between a decree *nisi* in the action and an order *nisi* with regard to its restoration to the list.

The District Judge thought that, inasmuch as in the present action the plaintiff's title was not denied by the judgment-debtor in the former action, who, indeed, was no party to this action, the order confirming the sale to the original plaintiff cured all the previous irregularities, and held that the sale was a valid one, and supported his reasoning by *Karuppen Chetty v. Silva*.²

The contention for the appellant was that the sale was a nullity *ab initio*, and *De Mel v. Dharmaratne*¹ and *Malappa Aki v. Shivilingaya*³ were cited.

¹ (1903) 7 N. L. R. 274.

² 1 A. C. R. 113.

³ (1873). 1 L. R. 2 Bom. 540.

For the respondent it was argued that the original defendant, not having objected to the issue of the writ or the confirmation of the sale, must be taken to have waived any irregularity in the procedure and thereby ratified the sale, and the judgment of the District Judge was supported on the authority of *35 Calcutta 61* and *2 A. C. R. 67*.

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In the case reported in *35 Calcutta 61*, which follows the Privy Council ruling in *32 Calcutta 296*, the appellant, whose sale was held to be a nullity by the decision of the lower Court, which was reversed on appeal by the Full Bench, was a decree-holder, but held a mortgage on the land sold and obtained execution on the equity of redemption in contravention of section 99 of the transfer of Property Act.

In my opinion that case is clearly different from the present one. There it was an irregularity in procedure, while here it is a contravention of the substantive law that there must be a decree founded on a judgment to warrant the issue of a writ of execution (sections 184, 187, 188, 217, 224 of the Civil Procedure Code). If this were not so, it is conceivable that a complaisant debtor might admit a plaintiff's claim in his answer, and by consent writ might be issued without even judgment or decree; but this, in my opinion, would all be a direct contravention of the substantive law, which cannot be waived by a party.

Again, in the present case it seems possible that a writ might have been issued without the knowledge of the judgment-debtor in 6,418, although it is hardly possible for him not to have been aware of the sale which resulted in the writ, unless he was not in fact the owner of the property, which in the present action the defendant alleges to be the case.

In my opinion the writ was a nullity, as not being founded on a judgment and decree, and the proceedings thereunder are void *ab initio*. The order of the District Judge must be set aside, and the appeal allowed with costs. As this decision disposes of the title of the plaintiff, on which he solely relies, the action must also be dismissed with costs.

WENDT J.—

I have had the advantage of perusing my brother Middleton's judgment, and entirely agree with it. There was no legal foundation for the issue of any writ of execution against the defendant in case No. 6,418, and the sale held under the writ which issued *per incuriam* was null and void. Plaintiff here suing in ejectment can only succeed by the strength of his own title, and the defendant is entitled to take advantage of the objection which I have pointed out to that title.

The appeal must be allowed, and plaintiff's action dismissed with costs in both Courts.

Appeal allowed.