1937 *Present :* **Koch and Moseley JJ.**

SIYANERIS *v.* PEIRIS *et al.*

S. C. 46—D. C. (Inty.) Colombo, 52,738.

Writ—Seizure under writ—Writ not reissued on the returnable day—Property seized and sold under another writ—First writ reissued—Validity of seizure.

The failure to extend the period of execution in a writ on or before the returnable day does not render the seizure effected before that day abortive.

***Andris Appu v. Kolande Asari* (19 N. L. R. 225) followed.**

Cur. adv. vult.

APPEAL from an order of the District Judge of Colombo.

In this case writ issued from the District Court of Colombo and was made returnable on July 27, 1934. On that day it was duly returned but was not reissued till November 23, 1934. In the meantime the property was seized and sold under a writ issued in D. C. Ratnapura, case No. 5,858. The District Judge of Colombo ordered the fiscal to bring into the District Court of Colombo the proceeds realized by him at the sale. From this order the appellants appealed.

N. E. Weerasooria (with him *J. R. Jayawardene*), for appellant.—
If the writ is returned it is dead unless the time had been extended. The proctor can make the application on that very day. The whole day is open for them to get an extension of time.

[KOCH J.—If the application is made on the subsequent or later date then it is for a fresh writ.]

That is so. (*Wijewardene v. Schubert* [1].)

[KOCH J.—In that case the writ was recalled, but in this case the writ was returned.]

When it was recalled, it was returned. The parties wrongly thought that the judgment was satisfied and the writ was recalled. In the majority of cases where the Court thinks that it has been wrongfully issued, it was recalled. The result of a return of a writ as a result of a recall has the same effect as the return after the expiry of time.

[1] *(1906) 10 N. L. R. 90.*

Gurusamy Pulle v. Meera Lebbe[1] and *Andris Appu v. Kolande Asari*[2] show that a reissue cannot be asked for after the returnable day.

Section 337 deals with the application for a second issue. The Court can fix the time and it can extend the time.

[KOCH J.—*The Attorney-General v. Ponniah*[3] is against you.]

The plaintiff did not register the seizure.

L. A. Rajapakse (with him *G. P. J. Kurukulasuriya*), for respondent.—*Wijewardene v. Schubert* (*supra*) is distinguishable from this on the following two grounds. The writ was recalled on the consent of all the parties. Thereupon the writ being dead, a mortgage was executed. There was no seizure subsisting. He obtained a fresh issue of writ which culminated in a sale.

In *Gurusamy Pulle v. Meera Lebbe* (*supra*) there was a period of five years between the return. Hence the Court inferred that it was abandoned.

Patherupillai v. Kandappen[4] which supports the appellant's contention has been expressly overruled by the later judgment in *Andris Appu v. Kolande Asari* (*supra*).

periar Carpen Chetty v. Sekappa Chetty[5], *Perera v. Mudalali*[6], and *Punchi Appuhamy v. Dharmaratne*[7] support the view adopted by the learned District Judge.

Cur. adv. vult.

J. R. Jayawardene, in reply.

January 20, 1937. KOCH J.—

The point that arises in this appeal is interesting and of some importance. Are proceedings in execution held by the fiscal of no effect and unrecognizable in law, if on or before the returnable day of the writ to Court, the period appointed for execution in that writ is not extended ?

It is argued that the failure of the judgment-creditor before or on the returnable day to move for and obtain, or of the Court to direct, a reissue of the writ, is to render the writ dead and all acts done thereunder of no avail.

The relevant legal proceeding in this case is a seizure effected under a writ that issued in D. C. Colombo, case No. 52,738, for it is on the footing that the seizure was valid and existing that the learned District Judge of Colombo, acting under section 351 of the Civil Procedure Code, has directed the fiscal to bring into the District Court of Colombo the proceeds realized by him at a sale held in execution of a decree entered in D. C. Ratnapura, case No. 5,858, and pursuant to a subsequent seizure.

If the seizure in the Colombo case can be recognized in law, the order of the Judge is right.

[1] *(1914) 17 N. L. R. 467.*
[2] *(1916) 19 N. L. R 225.*
[3] *(1908) 11 N. L. R. 245.*
[4] *(1913) 16 N. L. R. 298.*
[5] *(1909) 2 Current L. R 162*
[6] *(1926) 27 N. L. R. 483.*
[7] *(1934) 36 N. L. R. 113.*

Now, the writ under which the seizure was effected was returnable on July 27, 1934. On that day, it was duly returned but was not reissued till November 23, 1934.

The question has arisen whether the failure to extend the period of execution in the writ on or before the returnable day renders the seizure effected before that day abortive. This will materially depend on what the effect is of returning a writ to Court on the returnable day.

Applications for writs in pursuance of decrees are made under section 224 of the Civil Procedure Code, but there is nothing in the section or in any other section which provides for the fixing of a returnable date. There however appears a provision in section 225 which authorizes a Court to direct a writ to issue in form No. 43 as appearing in the Second Schedule to this Ordinance. On reference to that form, it will be seen that the fiscal is directed to levy seizure and sell and have the money before the Court on an appointed day. Since the Code came into operation, this date has in practice been called the returnable date.

The fiscal's return to the writ on that day will disclose either that moneys have been realized by execution and sale, or that there has been no property of the judgment-debtor available for execution, or that only partial execution has taken place. In short, on that day the fiscal will inform the Court as to what steps, if any, have been taken on the writ. During this period the fiscal may have, from time to time, exercised his discretion in acting, *e.g.*, in adjourning a sale (*vide* section 342 of the Civil Procedure Code), and in doing so he will have "to report to Court in his return to the writ or sooner the cause for which the adjournment is made". The Court, *mero motu,* will then have the power to reissue the writ—*Attorney-General v. Ponniah* [1]—so as to permit the fiscal to complete his work. But this order can also be, and is often, made on the application of the judgment-creditor or at the instance of the fiscal himself.

Again, section 319 requires the fiscal, if the latest day specified in the warrant has on its return been exceeded, to endorse upon the warrant the reason of the delay and to return the warrant with such endorsement.

These provisions would rather suggest, and there is nothing in the Code to the contrary, that, even after such a return is made, the proceedings had by the fiscal up to that date will continue to be recognized as valid unless expressly nullified. Property seized under such a writ would be "*in custodia legis*"—*Letchiman Chetty v. Muthusamy Pillai* [2]—and this being so, there is no reason why the Court should be prevented *from* extending the period of execution *at its convenience* by ordering a reissue of the writ, and especially so as the fiscal in exercising the discretion allowed him by law may delay to conclude the execution proceedings entrusted to him before the day fixed in his mandate—a contingency for which the judgment-creditor cannot be held responsible.

Abuse by the judgment-creditor of his privilege to apply for a reissue of the writ after the returnable day can be prevented by the Court regarding an inordinate delay on his part to do so as an abandonment

[1] *11 N. L. R. 245.*

[2] *3 A. C. R. 103.*

of his right to proceed under the writ—*Gurusamy Pillai v. Meera Lebbe* [1] *Yappahamine v. Weerasuriya* [2], *Andris Appu v. Kolande Asari* [3].

Mr. Weerasooria has referred us to a number of decisions and has argued therefrom, to use the language of Ennis J., that "where a writ is returned on the returnable day and no order for extension is made, the authority of the fiscal to hold has ceased and the seizure terminates"—*Andris Appu v. Kolande Asari* (*supra*). The cases he has cited are: (1) *Wijewardene v. Schubert* [4], (2) *Attorney-General v. Ponniah* (*supra*), (3) *Yappahamine v. Weerasuriya* (*supra*), and (4) *Gurusamy Pillai v. Meera Lebbe* (*supra*).

It is true that *Wijewardene v. Schubert* is a decision of a Divisional Bench, but in that case there was a recall of the writ, and I quite agree with the words of Middleton J. that "the effect of recalling a writ is to nullify the seizure that has been made under it". I should like, however, to draw attention to the circumstance that Wendt J., one of the other Judges, emphasized, namely, that "nothing was done by the Court or the fiscal which purported to revive that seizure".

These decisions no doubt do assist Mr. Weerasooria in his contention and create difficulty and it was for that reason that Sampayo J. thought it as well that an analogous point should be referred to a Bench of three Judges. It was in that case—*Andris Appu v. Kolande Asari* (*supra*)—that Ennis J. expressed himself in the way in which he did, but the majority of the Bench, consisting of Wood Renton C.J. and Sampayo J., did not agree with him in that opinion. Wood Renton C.J. called attention to the fact that the ruling in *Periar Carpen Chetty v. Sekappa Chetty* [5] was not brought to the notice of the Judges who decided *Patheripillai v. Kandappen* [6] and *Gurusamy Pillai v. Meera Lebbe* (*supra*), and in doing so endorsed the opinion of Hutchinson C.J. in that case.

What Hutchinson C.J. held on the facts, which were that the writ was returned to Court on July 1907, and application for reissue was allowed on August 27, 1907, was that the writ was not recalled but allowed to reissue and the seizure made under it in November, 1905, still remained in force. Sampayo J. expressly disagreed with the contention that "the Court, though it may extend the currency of a writ if application is made for that purpose before its returnable date, has no power to do so after the period originally fixed for its return has expired".

I am, for the reasons I have previously given, in entire agreement with the views expressed by the majority of the Court in *Andris Appu v. Kolande Asari* (*supra*).

I therefore hold that the seizure effected in D. C. Colombo, case No. 52,738, was alive and valid at the date of the learned District Judge's order and that the learned District Judge is right in the order he made.

The appeal is dismissed with costs.

MOSELEY J.—I agree.

Appeal dismissed.

[1] *17 N. L. R. 467 at p. 471.*
[2] *17 N. L. R. 183 at p. 188.*
[3] *19 N. L. R. 225 at pp. 232, 233.*
[4] *10 N. L. R. 90.*
[5] *2 Current Law Reports 162.*
[6] *16 N. L. R. 298.*