

1914.

Present: De Sampayo A.J.

NAGAN *v.* RODRIGO.

60—C. R. Gampola, 1,270.

Jurisdiction—Action under s. 247, Civil Procedure Code—Land seized over Rs. 300—Writ for over Rs. 300—Payment of portion of debt after seizure—Debt reduced to Rs. 290—Return of plaint to plaintiff to be presented to proper Court.

Plaintiff, who was an execution creditor, brought this action under section 247 of the Civil Procedure Code against the successful claimant in the Court of Requests. The land seized was above Rs. 300 in value, and the writ was issued for Rs. 330.25, and the seizure was effected to realize that amount. Between seizure and date of action the debtor made a payment which reduced the amount of the debt to Rs. 290.

Held, that the Court of Requests had no jurisdiction.

The test of the jurisdiction is the amount for the recovery of which the seizure was made.

Plaint was ordered to be returned to the plaintiff to be presented to the proper Court.

THE facts are set out in the judgment.

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Bartholomeusz, for plaintiff, appellant.—The learned Commissioner follows the judgment in *Adarahamy v. Abraham*.¹ This case is based on the decision of *Silva v. Nona Hamine*.²

*Silva v. Nona Hamine*² only decides that the rights of parties in an action under section 247 must be decided according to the rights of the parties at the date of the institution of the action.

In *Adarahamy v. Abraham*¹ the Supreme Court did not consider *Mel v. Fernando*,³ in which it was held that the right which a judgment-creditor seeks to establish in an action under section 247 is the right to have the land sold to pay his debt, and that the value of that right must be measured by the amount he can recover. See also the judgment of Wendt J. in *Ponnambalam v. Paramanayagam*.⁴

A. St. V. Jayewardene (with him *J. S. Jayewardene*), for the defendant, respondent, relied on *Adarahamy v. Abraham*.¹

Cur. adv. vult.

March 19, 1914. DE SAMPAYO A.J.—

This is an action under section 247 of the Civil Procedure Code by the execution creditor against the successful claimant. The Commissioner has dismissed the action on the ground that the Court of Requests has no jurisdiction, and the plaintiff appeals. The subject-matter is a land which is admittedly above Rs. 300 in value, and the matter of jurisdiction turns upon the amount of the plaintiff's claim. The writ was for Rs. 330.25, and the seizure was effected to realize that amount. But between the seizure and the date of this action it appears that the debtor made a payment, and the plaintiff's claim is now reduced to Rs. 290. The question then is whether the jurisdiction of the Court should be determined by the amount of the writ or by the amount presently due. The action under section 247 is based, as it must be, on the wrongful claim in execution, and the purpose of the action is, in the words of the section, to have the property declared liable to be sold in execution of the plaintiff's decree. The sale, if the plaintiff succeeds, will take place in pursuance of the seizure already effected, and I have no doubt that the test of jurisdiction is the amount for the recovery of which the writ was issued and the seizure was made. This was the view taken in *Adarahamy v. Abraham*,¹ which discusses all the authorities, and with which I entirely agree. It is urged that in any case the Court should not have dismissed the action altogether. As the action under section 247 has to be brought within fourteen days of the date of the order on the claim, the dismissal of the action would deprive the plaintiff of all remedy whatever, and it is desirable,

¹ (1907) 2 A. C. R. 120.

² (1906) 10 N. L. R. 44.

³ (1896) 2 N. L. R. 225.

⁴ (1905) 9 N. L. R. 48.

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if possible, to avoid that result. In *Werthelis v. Daniel Appuhamy* Wendt J. considered, under similar circumstances, that the proper order was to allow the plaintiff to retrace his steps and to return the plaint to be presented to the proper Court under the provisions of section 47 of the Code. That course might justly be followed in this case, and I make an order in similar terms to those adopted in the above case. The plaintiff must pay to the defendant the costs in the Court of Requests and in this Court. On payment of these costs within one month of the receipt of the record in the Court below, the decree appealed from will be set aside, and the Commissioner will endorse on the plaint the date of its presentment and of its return, together with the reason for such return, and will return the plaint to the plaintiff to be presented to the proper Court. On plaintiff's failure to comply with the order as to costs, the decree will stand affirmed, with costs.

Varied.