1947 *Present :* **Dias J.**

MARY FERNANDO, Appellant, *and* FRANCIS FERNANDO, Respondent.

S. C. 56—C. R. Negombo, 46,285.

Execution—Right to re-transfer—Sale in execution—Seizure irregular—Sale invalid—Civil Procedure Code, s. 229 (c).

A regular and perfect seizure by the Fiscal is an essential preliminary in the case of sales in execution. Where there has been no such seizure any sale that may have taken place is not merely voidable but void.

Bastian Pillai v. Anapillai (1901) 5 N. L. R. 165, followed.

APPEAL from a judgment of the Commissioner of Requests, Negombo.

H. W. Jayewardene, for the plaintiff, appellant.

C. E. S. Perera (with him *S. A. Marikar*), for the petitioner, respondent.

Cur. adv. vult.

July 8, 1947. DIAS J.—

The material facts are as follows: The plaintiff by deed No. 532 of September 22, 1943, sold and transferred a certain land to the defendant for a consideration of Rs. 300. The plaintiff, however, was only paid a sum of Rs. 163 by the defendant. In this action the plaintiff on October 5, 1945, sued the defendant to recover the balance purchase price, and obtained decree in her favour. The defendant, however, on October 9, 1945, that is to say, four days after plaintiff's action was filed, by deed 968 transferred the land to the petitioner with an agreement by the latter to reconvey the land to the defendant. Therefore, at the date of the decree in plaintiff's favour, the defendant had no legal title to the land. All he had was the right to claim a re-transfer of the land from the petitioner at some future date.

On March 28, 1946, the Fiscal on the plaintiff's instructions seized *the land in question*—see XA. By his letter dated April 24, 1946—XC, the proctor for the plaintiff requested the Fiscal to sell *the defendant's right to claim a reconveyance of the land* as well as the land. XB is the Fiscal's sale report. From this it appears that on May 24, 1946, the Fiscal purported to sell the land as well as the right of the defendant to

claim a re-transfer on deed No. 961. The defendant's right to claim a re-transfer was created by deed No. 968. Be that as it may, the right of the defendant to claim the re-transfer was never seized by the Fiscal before he proceeded to sell it. Such a right of a re-transfer is movable property—*Dias v. Alahakoon*[1] *Vallipuram v. Manikam*[2]. The right to claim a re-transfer being intangible and incapable of manual seizure, it should have been seized in terms of section 229 (c) of the Civil Procedure Code—*Arnolis Appuhamy v. Haramanis Kalotuwa*[3]. Admittedly, this was not done. Curiously enough, the petitioner purchased her own land as well as her obligation to retransfer the land to the defendant.

The position then is that in regard to the land, at the date of the seizure, the defendant judgment debtor had no title to it, the title being already in the petitioner under deed 968. Therefore, at the sale to the petitioner no title passed to her for she was already the owner. In regard to the right of the judgment-debtor to claim a re-conveyance of the property, it had not been seized by the Fiscal under section 229 (c).

The petitioner thereafter moved to set aside the sale. She alleged that she was induced to purchase the property by fraud. Fraud has not been proved by the petitioner, and nothing further need be said on this aspect of the case. The other grounds put forward were that the judgment-debtor had no saleable interest in the land which was sold, and that the sale of the right to re-transfer having taken place without a valid seizure there existed an illegality which vitiates the sale. On both these grounds the Commissioner of Requests held in favour of the petitioner and the plaintiff judgment-creditor now appeals.

With regard to the sale of the land, it is submitted that where the Fiscal seizes the land of a person other than the judgment-debtor, it is the duty of the owner to come forward and prefer a claim. The petitioner failed to do so. That may be so, but section 284 which deals with sales of immovable property provides that the purchaser of land at Fiscal's sale may apply to the Court to set the sale aside on the ground the judgment-debtor had no saleable interest therein. On such application the Court can make such order as it thinks fit, provided both the judgment-debtor and judgment-creditor have been made respondents to the petition. That has been done in this case. I do not think the fact that the petitioner knew or should have known that the judgment-debtor had no saleable interest, and in fact was the owner herself, will not, I think, necessarily debar her from applying for relief, although it may have an effect on the order which the Judge may ultimately make, and the order for costs which will follow the adjudication.

With regard to the right to claim a re-conveyance, the appellant concedes that there was no proper seizure. The judgment-debtor undoubtedly had a saleable interest in it. Does the fact that the Fiscal failed to seize that right under section 229 (c) make the subsequent sale invalid? *Bastian Pillai v. Anapillai*[4] is in point. It was held by Bonser C.J. and Browne J. that a regular and perfect seizure by the Fiscal is an essential preliminary in the case of sales of execution. Where

[1] *(1938) 40 N. L. R. 153 at p. 157.*
[2] *(1931) 34 N. L. R. 137.*
[3] *(1926) 8 C. L. Rec. at p. 111.*
[4] *(1901) 5 N. L. R. 165 and also at p. 31.*

there has been no such seizure, any sale that may have taken place is not simply voidable but *de facto* void. In that case, as here, it was the purchaser who was moving to set aside the sale. At the first argument of that case, counsel for the respondent stated that if the case was sent back he would be able to show that there had been a regular seizure. The Supreme Court acceded to this request. When the case came back it was re-argued before Moncreiff and Browne JJ. who held that the respondent having failed to prove a valid seizure, the earlier judgment of this Court should be affirmed. We have, therefore, in effect three learned Judges concurring in that decision. Counsel for the appellant, however, argues that *Bastian Pillai v. Anapillai* (*supra*) followed the Indian case of *Mahadeo Dubey v. Bhola Nath Dichit* [1] which has been doubted by the Privy Council in *Tasadd-uk v. Ahmad Husain* [2] and that subsequent Indian cases have taken the view that *Mahadeo Dubey v. Bhola Nath Dichit* (*supra*) is no longer law, *e.g.*, see *Sheodhyan v. Bholanath* [3], &c. He, therefore, submits that *Bastian Pillai v. Anapillai* (*supra*) can no longer be regarded as a binding authority and that a sale which follows an irregular seizure is not *ipso facto* rendered void.

The case of *Bastian Pillai v. Anapillai* (*supra*), however, has been referred to and the principles laid down have been accepted as good law up to 1939 in no less than four subsequent decisions including a Divisional Bench and a five Judge decision.

In *Thambaiyar v. Paramusamy Aiyer* [4], which is the decision of a Divisional Court, *Bastian Pillai v. Anapillai* (*supra*) was cited and referred to as good law. In *Silva v. Selohamy* [5] it was held that an irregularity in publishing and conducting the sale of movable property vitiates the sale provided substantial damage has been thereby caused to the person impeaching the sale. Schneider J. said "If he means by this that he had not received the notice required by section 229 to be given by the Fiscal, it would appear that the sale cannot stand as pointed out by this Court in *Bastian Pillai v. Anapillai* (*supra*)." In *Arnolis Appuhamy v. Haramanis Kalotuwa* (*supra*) the case was definitely followed. In *Wijeywardene v. Podisingho* [6], *Bastian Pillai v. Anapillai* (*supra*) was distinguished, but not doubted. In that case the Allahabad case was also referred to. This was a decision of a bench of five Judges, and neither of the counsel who argued that case took the point that the local case was no longer law. In these circumstances, it is impossible to hold that *Bastian Pillai v. Anapillai* (*supra*) is not an authority. It is in point and shows that the sale without a valid seizure is a nullity.

I agree that no substantial damage has been caused to the petitioner, who is to a great extent responsible for the predicament in which she finds herself. When there is an illegality in the sale it may be set aside even if no loss or damage was sustained—*Dias v. Alahakoon* [7].

I affirm the order of the learned Commissioner of Requests, but direct that the costs both here and below shall be borne by each party.

Appeal dismissed.

[1] *5 Allahabad 86.*
[2] *(1893) 21 Cal. 66.*
[3] *(1899) 21 Allahabad 311.*
[4] *(1917) 19 N. L. R. 385.*
[5] *(1923) 25 N. L. R. 113.*
[6] *(1939) 40 N. L. R. 217.*
[7] *(1938) 40 N. L. R. at p. 155.*