1938 *Present :* **Poyser S.P.J. and Wijeyewardene J.**

CAROLIS APPUHAMY *et al.*, Appellants, *and* SILVA, Respondents

S.C. 120—D. C. Kalutara, 20,262.

Civil Procedure Code—Section 247—Action by unsuccessful claimant—Transfer of title prior to claim with agreement to recovery—Right to maintain action.

The second and third defendants in execution of a decree against the first defendant caused certain property to be seized on November 6, 1936. Plaintiff claimed this property on a deed of June 2, 1936. His claim was dismissed and he brought this action under section 247 of the Civil Procedure Code. In the course of the trial it transpired that the plaintiff had by a deed dated October 28, 1936, sold this property with an option to repurchase.

Held, that the plaintiff could not maintain the action.

[1] *(1940) 41 N. L. R. 512 ; 17 C. L. W. 81.*

APPEAL from a judgment of the District Judge of Kalutara.

N. E. Weerasooria, K.C. (with him *A. C. Z. Wijeratne* and *H. A. Wijemanne*), for the second and third defendants, appellants.

L. A. Rajapakse (with him *J. R. Jayewardene*), for the plaintiff, respondent.

Cur. adv. vult.

November 16, 1938. WIJEYEWARDENE J.—

This is an action under section 247 of the Civil Procedure Code, 1889. The second and third defendants obtained a mortgage decree against the first defendant in November, 1935, and on an order to sell issued in May, 1936, sold the mortgaged property and realised a part of the claim due to them. The second and third defendants thereafter obtained a writ for the recovery of the balance amount which was nearly Rs. 1,500 and caused certain undivided shares in five lands to be seized on November 6, 1936. The first defendant's son, the plaintiff in the present action, claimed the shares seized under the writ, his claim being based on deed P 1 of June 2, 1936, executed by the first defendant in his favour. The consideration for the transfer is shown in the deed to be Rs. 2,000 while the attestation clause states that Rs. 500 was paid by cheque in the presence of the Notary and the balance Rs. 1,000 was acknowledged by the vendor to have been received earlier. The claim was dismissed and thereupon the claimant filed the present action.

In the course of the trial the plaintiff admitted that by document D 2 of October 28, 1936, he transferred his interests under P 1 to one Goonewardene subject to an agreement by Goonewardene to reconvey the land on repayment within two years of the consideration together with interest at a specified rate. An issue was then framed raising the question whether the plaintiff could maintain this action in view of the execution of D 2.

It was elicited in cross-examination from the plaintiff that in spite of P 1, the first defendant was in occupation of one of the properties transferred and was getting the rubber trees on two of the remaining lands tapped. The plaintiff, however, led evidence with the intention of showing that the first defendant was possessed of other properties and that, therefore, the transfer P 1 did not render the first defendant insolvent. It is rather significant that the plaintiff did not call the first defendant to prove the possession by him of other properties available for seizure but contented himself with seeking to establish this fact through the evidence of others. The learned District Judge, however, has accepted this evidence and basing his judgment on the fact that the second and third defendants have not examined the first defendant under section 219 of the Civil Procedure Code held in favour of the plaintiff on the ground that there was no proof that the execution of the deed P 1 has rendered the first defendant insolvent.

It was urged in appeal for the second and third defendants that the plaintiff was not entitled to an order in his favour in view of D 2. It was contended that an unsuccessful claimant filing an action under section

247 should establish the right which he claimed to the property in dispute and the plaintiff in this action having formulated his claim in paragraph 2 of the plaint as the right of ownership under P 1 must necessarily fail as he had parted with his rights under P 1 even before the seizure. The appellant's Counsel relied in support of his argument on a number of decisions including *Wijewardene v. Maitland* [1], *Abdul Cader v. Annamalai* [2], *Silva v. Nona Hamine* [3] and *Vaithia Nathar Aiyar v. Sooriya Tamby Suppiah* [4] as establishing the principle that while the material issue at a claim inquiry was one possession the question that arose for adjudication in an action under section 247 of the Civil Procedure Code by an unsuccessful claimant was one of title.

The respondent's Counsel argued that all that section 247 required an unsuccessful claimant to do was "to establish the right which he claimed to the property in dispute" and that the right mentioned in this section was identically the right referred to in section 241 by virtue of which the claimant claims to have "some interest in" or "to be possessed of" the property seized. He relied stronglf on a recent decision of this Court in *Julius v. Podi Singho* [5]. That case does not appear to me to support to any appreciable extent the various propositions of law enumerated by the respondent's Counsel. In the course of his judgment in that case, Koch J. stated:—

> "I am, therefore, of opinion that if it came to a question of title all the plaintiff would have to establish is title superior to that of the judgment-debtor. The fact that a third party had a title *prima facie* superior to than of the plaintiffs is immaterial".

In the present case the plaintiff, on his own showing, had no title to the land after he conveyed his rights by D 2. The plaintiff who has not even a shadow of a title, as he has divested himself to whatever title he had, cannot possibly establish a title superior to that of the judgment-debtor. Morever, the only right which the claimant put forward at the claim inquiry was a right to possession under P 1. The order made at the claim inquiry was to the effect that he had no such right to possession. That order would be conclusive against him unless he gets it reversed in an action under section 247. He cannot in the present action expect to establish such a claim in view of his admission that before the date of seizure he had divested himself of all rights under P 1. I am of opinion that when the plaintiff made that admission it became unnecessary for the learned District Judge to consider whether P 1 was executed in fraud of creditors. It appears to me that if any other view is taken with regard to the effect of D 2, it will result in encouraging parties who have no interest whatever in a land seized under a decree of Court to come forward and initiate a claim proceedings and thus delay the due execution of writs.

The plaintiff made a certain specified claim at the claim inquiry, and has put forward the same claim in the present action. He cannot be allowed in the Appellate Court to put forward his claim to possession

[1] *(1893) 3 C. L. Reports 7.*
[2] *(1896) 2 N. L. R. 166.*
[3] *(1906) 10 N. L. R. 44.*
[4] *(1924) 6 C. L. Rec. 21.*
[5] *(1937) 39 N. L. R. 164.*

on some other ground as it would be distinctly prejudicial to the second and third defendants who are seeking the assistance of the Court to execute a decree thay have obtained legally.

I set aside the judgment of the District Judge and dismiss the plaintiff's action with costs. The second and third defendants are entitled to the costs of the appeal.

POYSER S.P.J.—I agree.

Appeal allowed.