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1958 *Present :* **Basnayake, C.J., Pulle, J., and Sansoni, J.**

KANDIAH, Appellant, *and* VAIRAMUTTU and others, Respondents

S. C. 765—D. C. Jaffna, 11509

Execution of decrees—Decree to pay money—Issue of writ to Fiscal to sell judgment debtor's immovable property—Satisfaction of decree thereafter—Power of Fiscal to stay sale otherwise than upon order of Court—Right of judgment debtor to have Fiscal's sale set aside—Civil Procedure Code, ss. 225, 226, 237, 238, 239, 255, 256, 258, 259, 342, 343, 349.

Proctor and client—Proxy unrevoked—Power of client to act in person.

When writ is issued for the sale of immovable property in execution of a decree to pay money, the authority of the Fiscal does not automatically cease upon the money payable under the decree being paid or the decree being otherwise adjusted in whole to the satisfaction of the decree holder. The Fiscal has no power to stay the sale otherwise than upon an order of Court.

Accordingly, the judgment debtor is not entitled to have a Fiscal's sale set aside on the ground of satisfaction of the decree by payment prior to the date of sale, when there is no proof that the Court itself ordered stay of execution.

Once a proxy is given to a Proctor by a party, the party himself cannot without revoking the proxy perform in person any act in Court.

APPEAL from a judgment of the District Court, Jaffna.

C. Renganathan, with *M. Shanmugalingam*, for Purchaser-Appellant.

A. Nagendra, with *Neville Wijeratne*, for Defendants-Respondents.

Cur. adv. vult.

July 22, 1958. BASNAYAKE, C.J.—

The question that arises for decision on this appeal is whether the authority of the Fiscal, to whom a writ has issued for the execution of a decree by seizure and sale of the judgment-debtor's immovable

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property, automatically ceases upon the money payable under the decree being paid or the decree being otherwise adjusted in whole to the satisfaction of the decree holder.

Shortly the facts are as follows : On 23rd September 1954 the second plaintiff obtained judgment against the defendants in a sum of Rs. 1,104/40 together with interest on that sum at 5% per annum from 23rd September 1954 till payment in full. As the defendants failed to satisfy the judgment debt the plaintiffs applied for writ of execution for seizure and sale of the property of the defendants.

The writ dated 1st June 1955 authorised the Fiscal to seize and sell the lands, goods, debts and credits of the defendants for the recovery of the sum of Rs. 1,104/40 with interest thereon at 5% per annum from 23rd September 1954 till payment in full and costs of suit Rs. 179/92. The writ was executable on or before 1st June 1956 and the Fiscal was required to inform the Court for what sum or sums and to what person or persons he sold the property of the defendants.

It would appear from the sale reports and the evidence of the Additional Deputy Fiscal that on 31st August 1955 two lands were put up for sale but that there were no bidders for one of them. As the sale of land No. 2 did not realise the full amount of the decree the Fiscal on 8th February 1956 issued a fresh sale notice in respect of land No. 1 fixing the sale for 19th March 1956. The journal entry of 16th March 1956 shows that the plaintiffs in person submitted the following writing to the Court :—

> "We Kathiran Sinnavan and wife Manickam the plaintiffs in the case have this day received the full amount of the decree interest and costs due to us from the Defendants in this case and hereby beg that the Court be pleased to order the sale fixed for 19th March 1956 by the Fiscal, N. P., Jaffna be ordered to be stayed."

The learned District Judge ordered that they should move through the proctor who had been appointed to act for them in the case but they did not do so and the land was sold on 19th March 1956 for Rs. 775/-. The defendants were not present at the sale. A stranger informed the Fiscal that the money due on the decree had been paid, but as the Fiscal had no authority from the Court to stay the sale he proceeded with it and made his report to the Court on 23rd March 1956.

On 23rd April 1956 the defendants through their proctor moved the Court to have the sale held on 19th March 1956 set aside on the ground that "there is material irregularity in the conduct of the sale and there were other circumstances by which the sale was vitiated". The learned District Judge has allowed the application of the defendants to have the sale set aside. In his order he states :

> "It seems to my mind that on 16.3.56 when the Plaintiffs filed their motion in person that they had received the balance amount due on the decree, satisfaction should have been entered on that date and the Fiscal directed not to proceed with the sale. At any rate after that motion was filed on 16.3.56 there was no decree to be executed."

The first question that arises for decision is whether the plaintiffs were in law entitled to certify payment in person under section 349 of the Code when they had appointed a proctor to act for them. It is well established that once a proxy is given to a proctor the party himself cannot without revoking the proxy legally perform in person any act in Court. In the instant case the learned District Judge very correctly ordered the plaintiffs to move through the proctor whom they had appointed to act for them in these proceedings. They did not do so. The position then is that there had been no proper certification of payment as contemplated in section 349 of the Code.

In the instant case even if the proctor of the decree holder had certified payment there is nothing in section 349 or any other section of the Code which provides that upon such certification a writ of execution automatically ceases to be in force.

A judgment-creditor has the power (section 218 of the Civil Procedure Code) to seize and to sell or realise in money by the hands of the Fiscal subject to certain exceptions (section 218 C. P. C. proviso) all saleable property, movable or immovable, belonging to the judgment-debtor when a decree to pay money is unsatisfied. For the purpose of effecting the required seizure and sale the Fiscal must be put in motion by application to Court for execution of the decree (section 223 C. P. C.). The application must satisfy the requirements of section 224 of the Code and contain the particulars prescribed therein.

Upon an application for execution of decree being made, the Court must satisfy itself by reference, if necessary, to the record that the application is in conformity with section 224 and that the applicant is entitled to obtain execution of the decree (section 225 (1) C. P. C.). If it is so satisfied it must direct a writ of execution to issue to the Fiscal in the prescribed form (section 225 (3) C. P. C.). Upon receiving the writ the Fiscal must within the prescribed time proceed to the house of the debtor and request him, if he is present, to pay the amount of the writ. If the debtor does not comply with his demand the Fiscal is under a duty to forthwith seize and sell such property of the judgment-debtor as is specified in the writ or may be pointed out to him by the judgment-debtor or the judgment-creditor.

Where the property to be seized and sold is immovable property as in the instant case the seizure must be effected in the manner prescribed by section 237. A notice of seizure is an instrument that can be registered under the Registration of Documents Ordinance and section 238 provides that any sale after the registration of the notice of seizure is void as against a purchaser from the Fiscal in a sale under the writ of execution. The Fiscal is not free to withdraw a seizure except upon an order under section 239 of the Code. That section reads :

> " If the amount decreed with costs and all charges and expenses resulting from the seizure of any property is paid into Court, or if satisfaction of the decree is otherwise made through the Court, or if the decree is set aside or reversed, an order shall be issued, on the application of any person interested in the property, for the withdrawal of the seizure."

Before the sale of immovable property seized by the Fiscal he must give notice of the sale in the prescribed manner (section 255, II, C. P. C.) and must also advertise the sale when the property seized under one writ exceeds the value of one thousand rupees (section 256 C. P. C.).

It would appear from section 258 that a sale, notice of which has been given in the prescribed manner, can be postponed or stayed at the request or with the concurrence of the party suing out the writ. In such a case the Fiscal is entitled to recover half the prescribed fees from the party at whose instance the writ is stayed.

A sale once fixed can be postponed only in the manner prescribed in the Code. Section 259 empowers the Court to postpone a sale to enable the judgment-debtor to raise the amount of the judgment-debt by mortgage, lease or private sale of the property seized or any other property of his. The Court is also authorised by section 343 to stay execution proceedings at any stage of it and make an order for adjournment of a sale upon an application to it to stay proceedings to which all persons interested in the matter are made parties and after payment of all Fiscal's fees then due. The Fiscal is also given the discretion of adjourning a sale (section 342 C. P. C.). This provision when read with sections 239 and 343 cannot be regarded as conferring on the Fiscal a greater power than that of putting off the sale to another day owing to his inability to hold the sale on the day originally appointed either due to unforeseen circumstances or because of reasons beyond his control. In his return to execution he has to refer to any adjournment of the sale by him and specify the cause.

It would appear from the foregoing that the Code does not make provision for the automatic cessation of the Fiscal's authority upon the certificate of payment. Upon the certificate of payment the party interested in the staying of execution must make an application either under section 239 or under section 343. Without an order of Court directing the Fiscal to stay execution he has no authority to do so. In the instant case the parties interested did not obtain an order for the withdrawal of the seizure or stay of execution from the Court.

The view I have taken finds support in the decisions of this Court in the cases of *Saparamadu Appuhamy v. M. C. K. Appuhamy et al.*[1] and *Uparis v. Subasinghe et al.*[2]. In the earlier of these two cases Wendt J. observed :

> "If the appellant can shew that, upon his making his tender, the Fiscal was bound to stay the sale, I am disposed to think that the Fiscal's persisting in selling would be a material irregularity in conducting the sale. I do not, however, think that the Fiscal was so bound. Certainly no provision of the law to that effect was brought to our attention. No doubt it is usual for a Fiscal, upon being paid his charges, and requested by the writ-holder so to do, to stay an execution sale; but he is the officer of the Court, acting upon the mandate of the Court and although he may possibly be answerable in damages to the decree holder for refusing to comply with his request, I cannot see that the judgment debtor is entitled to insist that the

[1] *(1909) 2 Weerakoon 76, 2 Leader 151.* [2] *(1917) 19 N. L. R. 468.*

Fiscal shall stay the sale, or when the sale has been carried out according to the exigency of the writ, to ask that it be set aside, to the prejudice of the purchaser."

In the second case Wood Renton C.J. stated—

"The trend of judicial decisions in this Colony distinctly establishes the proposition which is supported by the language of sections 342 and 343 of the Civil Procedure Code, that a Fiscal has no legal power to stay a sale otherwise than upon an order of Court. He may adjourn the sale. It is no doubt customary for Fiscals or their officers to stay sales upon the application of parties to the proceedings, but they do so at their own risk. . . . . It would be highly inconvenient if the right of Fiscals or their officers to stay a sale of their own authority were recognised. Section 226 of the Civil Procedure Code shows that, if payment is not made to the Fiscal or his officer by the judgment-debtor on the original demand before execution of the writ is proceeded with, the seizure and sale must follow so far as the Fiscal or his officer is concerned."

In the case of *Perera v. Wickremaratne*[1] Dalton A.C.J. expressed the view that section 342 empowers the Fiscal to adjourn a sale when clear and undisputed evidence is produced to him before the sale that the plaintiff's claim has been satisfied and cash for his fees is tendered. I find myself unable to agree with that view. If the Fiscal has power to decide whether there is "clear and undisputed evidence" that the plaintiff's claim has been satisfied and not hold the sale on the ground that the plaintiff's claim has been satisfied it would be a hollow mockery to fix another date for a sale which is never to take place. Section 239 makes it abundantly clear that where satisfaction of the decree is made through the Court the proper course is for any person interested in the property to obtain an order for withdrawal of the seizure.

Section 343 provides for the case of stay of execution proceedings in cases where for reasons other than the satisfaction of the judgment debt a stay is asked for. In such a case the seizure remains, but the Court may make order for the adjournment of the sale. The view taken by Dalton A.C.J. places upon the Fiscal functions vested in the Court by section 239. He is not qualified to discharge such functions and it would appear from the provisions of the Code which regulate the Fiscal's powers and duties that it was never intended that he should be called upon to decide matters within the ambit of the Court's powers. I agree with the following observations of Wood Renton C.J. in *Uparis v. Subasinghe* (*supra*) :

"Section 226 of the Civil Procedure Code shows that, if payment is not made to the Fiscal or his officer by the judgment-debtor on the original demand before execution of the writ is proceeded with, the seizure and sale must follow so far as the Fiscal or his officer is concerned."

[1] (*1933*) *35 N. L. R. 183.*

Section 342 undoubtedly gives the Fiscal a discretion to adjourn a sale, for it reads :

"The Fiscal may in his discretion adjourn a sale :

Provided that the date to which the sale is adjourned is published in the same manner as was the original notice of sale ; and

Provided also that he report to the Court in his return to the writ of execution, or sooner, the cause for which the adjournment was made."

But the exercise of his discretion is confined to matters of which he alone is the best judge. It does not enable him to encroach on powers entrusted by the Code to the Court. It would be unwise to attempt to prepare an exhaustive list of the occasions on which his power of adjournment may be exercised, but it is sufficient to mention that the Fiscal exercised the discretion vested in him by the section when he adjourned the sale of one of the lands seized by him when there were no bidders on 31st August 1955.

The Fiscal is an officer of the Court charged with the duty of executing the writ issued by it. So long as the writ is in force he is bound to execute it unless he is ordered by the Court not to do so. His power of adjournment of a sale is not meant to be exercised for purposes for which it was not designed. Riot, civil commotion, floods, pestilence, sudden illness of the Fiscal himself, show of force preventing the sale being held, are some of the occasions which would call for the exercise of his discretion. I am unable to agree with the view expressed by Wendt J. in *Silva v. Ibrahim Rawter* [1] that the Fiscal's power to adjourn a sale is confined to a case in which he has commenced the sale. There is nothing in the meaning of the word adjourn or in the context in which it occurs that restricts it to a case in which the sale has commenced.

The Court's power to review the exercise of his discretion by the Fiscal would be regulated by the well settled rule that "if the discretion has been exercised *bona fide*, uninfluenced by irrelevant considerations, and not arbitrarily or illegally, no Court is entitled to interfere even if the Court, had the discretion been theirs, might have exercised it otherwise." (*Fraser's* case [2])

The learned District Judge is wrong in holding that the sale is of no effect and should not have set it aside. His order is therefore reversed.

The appellant is entitled to his costs both here and below.

PULLE, J.—I agree.

SANSONI, J.—I agree.

Appeal allowed.

[1] (*1906*) *10 N. L. R. 56.* [2] (*1948*) *4 D. L. R. 776*—(*1949*) *A. C. 24 at 36.*