BASTIAN PILLAI *v.* ANAPILLAI.

1901.
February 26.

D.C., Batticaloa, 1,939.

Action by assignee of mortgage debt against the heirs of a deceased mortgagor and the vendee of the heirs—Estate under Rs. 1,000—Necessity for appointing a representative of the deceased mortgagor—Civil Procedure Code, s. 642—Irregular and imperfect seizure by Fiscal of the mortgage debt—Failure of plaintiff's title.

An action by the assignee of a mortgage debt against the heir of the deceased mortgagor and the vendee of the heirs is incomplete without a representative of the deceased mortgagee appointed under section 642 of the Civil Procedure Code, when the estate is under Rs. 1,000 in value.

In such a case the plaintiff might apply to the Court to appoint a representative, and so put his action in order.

Where a mortgage debt was assigned to A by the Fiscal by a conveyance which recited that the Fiscal caused to be seized the right and title of the mortgagee in the mortgage bond and that the same was duly sold, but it was proved that what was really seized was the property itself and not the mortgage bond, and that the seizure of the mortgage bond was not made in the manner prescribed by section 229 of the Civil Procedure Code,—

Held that, owing to such irregular seizure, the Fiscal had no power to sue the mortgage debt, nor the plaintiff any right to buy it.

A regular and perfect attachment is an essential preliminary in the sale in execution of simple decrees for money.

Where there has been no such attachment, any sale that may have taken place is not simply voidable, but *de facto* void.

THE facts of this case appear in the following judgment of the Chief Justice.

Sampayo, for appellant.

Wendt, for respondent.

26th February, 1901. BONSER, C.J.—

This was an action brought by a person who claimed to be the assignee of a mortgage debt against the heirs of the deceased mortgagor and a third person, to whom the right of the mortgagor had been sold and one of the properties included in the mortgage. The mortgagor died intestate, and it is said that his estate was under Rs. 1,000 in value. That being so, there was no necessity to have an administrator appointed. But it seems to me that it was

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necessary to have some representative of the mortgagor appointed under section 642 of the Civil Procedure Code, as I pointed out in recent case (*4 N. L. R. 42*), but no such representative was appointed. However, in a case like that the Court might give leave in the administration proceedings for that purpose, and the plaintiff might apply to the Court to appoint a representative and so put his action right. The defendant, however, who is the purchaser of one of the mortgage properties, raised the objection, which, if it be successful, would be fatal to the plaintiff's action as far as he is concerned; probably also it would be fatal as far as concerned the legal representative who has to be appointed. It appears the plaintiff's title is under a conveyance to him by the Fiscal of the mortgagee's interest in the mortgage bond granted by the mortgagor, and the conveyance recites that the Fiscal caused to be seized and taken the said right and title of the mortgagee in the mortgage bond, and that the same was duly sold.

The appellant has called attention to the seizure report made by the Fiscal, which is not consistent with this recital. The seizure report is dated 23rd July, 1897, and states that he went in July, on a date unnamed, to the house of the debtor, and the execution-creditor pointed out the property described in the hereunto annexed schedule for seizure, and that he accordingly seized it, and notice of such seizure, as described in the Fiscal's minutes, was given. Now, the schedule of the property seized contains two gardens, one of which had been purchased by Mr. Sampayo's client, and he was then in possession of it. He states that "prohibitory notices of seizure were fixed on the property; duplicates are sent herewith." That is returned to the village tribunal to show how he executed the writ, and seized and sold the debtor's property to satisfy the writ which had been issued by that Court.

Now, it will be noticed that what purports to be attached there is the property itself "with right of mortgage and other privileges", whatever that may mean. But it would appear that what the Fiscal seized was the property itself, for the notice of seizure affixed to the property is that prescribed by section 237 in the case of immovable property. But what ought to have been seized was the mortgage debt, and the mode of seizure in such a case is pointed out by section 229 of the Civil Procedure Code, a notice written and signed by the Fiscal prohibiting the creditor from recovering the debt and the debtor from paying. A copy of such notice shall be fixed in a conspicuous part of the court-house, and a copy is to be delivered or sent to the debtor. That is the mode of seizure prescribed in the case of a debt.

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Now, the appellant, Mr. Sampayo's client, objects that there has been no seizure of this debt in the manner prescribed by the notice, and that being so, that there was no power to sell, and therefore the plaintiff cannot make out title. His contention is in accordance with a decree of the Full Bench of the Allahabad Court in *I. L. R. 5, Allahabad, p. 86*, where it was held that a regular and perfect attachment is an essential preliminary in the sales in execution of simple decrees for money; and that where there has been no such attachment any sale that may have taken place is not simply voidable, but *de facto* void.

I am not aware of any decision of this Court which is in conflict with that decision, and I think that we should do well in that case to follow that decision, for although the words of our Ordinance differ in some slight particulars from the words in the Indian Code, and the practice also differs, in that in the Indian Code the sale is by the Court, and under our Code it is by the Fiscal, yet it seems to me that the principle of the decision is the same, being unaffected by the variations in the language, the principle being that the Fiscal is empowered to seize and sell the debtor's property; that Code prescribes what seizure means, and that he has no power to sell property that he has not seized, and that property as to which the provisions of the Code as to seizure have not been followed cannot be said to have been seized, and therefore cannot be property sold.

Mr. Wendt suggests that, if the case is referred back, he may be able to show that there was a regular seizure, and that therefore the sale was good, and he asks that the case should go back for that purpose. We will therefore allow the case to stand over for a week in order that he may make further inquiries, and if he should, when the case is called on again, show that he has reasonable hopes of supplying the deficiency, we will allow the case to go back for that purpose, and also for the further purpose in that case of applying to the Court to appoint a representative of the deceased mortgagor.

BROWNE, A.J.—Agreed.