1915.

[FULL BENCH.]

Present: Wood Renton C.J., Shaw J., and De Sampayo A.J.

MENDIS *v.* PERIS.

52—D. C. Kalutara, 5,402.

Concurrence—Civil Procedure Code, ss. 350, 351, and 352.

Before the sale in execution under writ issued in this case the Fiscal had in his hands two writs in Nos. 297 and 537—C. R. Gampola against the same judgment-debtor issued at the instance of the appellant. The property was seized under all three writs before sale. After the proceeds of the sale were deposited in the Kachcheri, the appellant procured another writ, D. C. Kandy, 21,256, to issue to the Fiscal against the same judgment-debtor. Before money was paid out of Court the Fiscal gave three notices to the (Kalutara) Court, under section 282, with respect to the two Gampola writs and the Kandy writ.

Held (*per* WOOD RENTON C.J. and SHAW J.), that the appellant was entitled to concurrence in respect of the two Gampola writs only.

Held (*per* DE SAMPAYO A.J.), that the appellant was entitled to concurrence in respect of his three writs.

Per WOOD RENTON C.J. and SHAW J.—The Civil Procedure Code has superseded the Roman-Dutch law on the subject of concurrent claims of creditors upon the execution proceeds of a common debtor's property.

SHAW J.—"The only reasonable interpretation that I think can be given to section 352 is to confine the section only to the persons who can under the law make application under it for execution—namely, decree-holders of the same Court—leaving to decree-holders of other Courts the rights that appear to have been given to them by the earlier sections to participate in the seizure and sale, and then to apply for their share of the proceeds under section 350."

THE facts are stated by Shaw J. as follows:—

The plaintiff having obtained judgment against the defendant, caused a writ of execution to issue to the Fiscal of the Western Province for seizure and sale in satisfaction of his judgment.

The Fiscal seized property of the judgment-debtor on July 11, 1914, but the sale was postponed until September 29 at the instance of the plaintiff. In the meantime two writs of execution in cases Nos. 297 and 537—C. R. Gampola were issued to the Fiscal at the instance of the applicant, the present appellant, and the

Fiscal in his sale report to the Kalutara Court dated October 8 reported that he had seized under these writs as well as under the Kalutara writ.

The proceeds of the sale were deposited by the Fiscal in the Kalutara kachcheri on September 30 and October 23.

Subsequently the applicant procured another writ to issue to the Fiscal in another action, No. 21,256—D. C. Kandy, in which he had also obtained judgment against the same judgment-debtor.

On November 11 the Fiscal, on behalf of the applicant, gave three notices to the Kalutara Court, under section 232 of the Civil Procedure Code, with respect to the amounts due under the two Gampola and the Kandy writs.

The plaintiff then moved the Kalutara Court that the proceeds of the execution should be paid out to him in satisfaction of his judgment in No. 5,402—Kalutara, and the District Judge, having heard the proctors for the parties interested, allowed the plaintiff's application, on the ground that the judgment-creditor in the two Gampola and the Kandy cases had not applied to the Kalutara Court for the execution of the decrees prior to the realization of the assets under section 352 of the Civil Procedure Code, and from his order the present appeal is brought.

Bawa, K.C., Acting S.-G., and *C. H. Z. Fernando*, for appellant.

E. T. de Silva, for respondent.

Cur. adv. vult.

July 5, 1915. WOOD RENTON C.J.—

The facts have been fully stated by my brother Shaw, and I propose merely to deal with the important legal question which is involved in the appeal. After full consideration, I adhere to the view expressed by Ennis J. and myself in 60—D. C. F. Negombo, No. 1,420,[1] that the Full Court must be taken to have held in *Konamalai v. Sivakulanthu*[2] that the Civil Procedure Code has superseded the Roman-Dutch law regulating the concurrent claims of creditors upon the execution proceeds of a common debtor's property. This proposition is affirmed by Burnside C.J. and Clarence J. in express terms, and results by necessary implication from the language used by Dias J. It forms, indeed, the *ratio decidendi* of the case. In *Raheem v. Yoosoof Lebbe*[3] Layard C.J., with whose judgment Moncreiff J. agreed, said that with reference to claims in concurrence the decision in *Konamalai v. Sivakulanthu*[2] had "always been followed for the last nineteen years," and declined to reserve it for a Full Court. The cases of *Meera Saibo v. Muttuchetty*[4] and *Velaiappa Chetty v. Pitcha Maula*[5] are distinguishable. (See also *Muttiah Chetty v. Don Martines*.[6]) The Courts

[1] *S. C. Min., May 21, 1915.*
[2] *(1891) 9 S. C. C. 203.*
[3] *(1902) 6 N. L. R. 169.*
[4] *(1893) 3 C. L. R. 37.*
[5] *(1899) 4 N. L. R. 311.*
[6] *(1904) 2 Bal. 182.*

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were dealing there, not with claims to concurrence by unsecured creditors, but with the rights of special mortgagees of movables—rights which, it was held, had been impliedly preserved by section 232 of the Civil Procedure Code. I do not think that we are at liberty to hold, as was done in *Mirando v. Kiduru Mohamadu*,[1] that recourse may still be had to the Roman-Dutch law in regard to claims to concurrence by unsecured creditors. *Konamalai v. Sivakulanthu*[2] is an authority, binding upon us, to the contrary. Applying the principle affirmed in *Warren v. McMillan & Co.*,[3] and more recently in 67—D. C. I. Colombo, No. 40,320,[4] I would allow the appellant a right of concurrence in Nos. 297 and 537—C. R. Gampola, in which the Fiscal had in his hands at the date of sale in execution the appellant's writs, as well as the writ of the plaintiff, but not in D. C. Kandy, No. 21,256, in which he had no writ in the Fiscal's hands at the date of sale.

The appellant should have the costs of the appeal.

Shaw J.—

The case raises a somewhat difficult and important question as to the rights of judgment-creditors to participate in the proceeds of an execution against the common judgment-debtor.

[His Lordship stated the facts and continued]:—

In my opinion the rights of judgment-creditors as to seizure and sale of the judgment-debtor's property and their rights to participate in an execution on his property are now governed by the provisions of the Civil Procedure Code, which has superseded the Roman-Dutch law on the subject. This was, in my view, clearly decided by the Full Court so long ago as 1891 in *Konamalai v. Sivakulanthu*.[2] This decision is binding upon us, and it has been followed in numerous cases. In *Raheem v. Yoosoof Lebbe*[5] the Court was asked to reserve the case for the consideration of the Full Court in order that the decision in *Konamalai v. Sivakulanthu*[2] might be reconsidered, but it refused to do so, saying that *Konamalai v. Sivakulanthu*[2] had always been followed for the last nineteen years; so late also as the present year, in S. C. 60—D. C. Negombo (Supreme Court Minutes of May 21), the case referred to was recognized as a binding authority for the proposition that the Roman-Dutch law regarding concurrence is now superseded by the Civil Procedure Code.

I am unable to assent to the argument based on the case of *Mirando v. Kiduru Mohamadu*[1] that, notwithstanding the provisions of the Code, the Roman-Dutch law regarding concurrence is still in force. I do not think the decision in that case goes to

[1] *(1904) 7 N. L. R. 280.*

[2] *(1891) 9 S. C. C. 203.*

[3] *(1892) 1 S. C. R. 86.*

[4] *(1916) S. C. Min., June 2, 1915.*

[5] *(1902) 6 N. L. R. 169.*

that length, but if it does, it is in conflict with the Full Court decision, and with what appears to me to be the clear intention of the Legislature.

When, however, we come to look at the actual provisions of the Code many difficulties of construction arise, and I am by no means sure that any such sweeping change to the common law has been made by it as it seems to have been in some cases assumed. By section 218 a judgment-creditor has power to seize and sell, or realize in money, by the hands of the Fiscal, any property belonging to the judgment-debtor, with certain specified exceptions. This would seem to include property already seized by the Fiscal. Countenance for this is to be found in section 351, which refers to property seized in execution of decrees of more Courts than one. When the Fiscal sells, he has, by section 255, to specify in the notice of sale the action in which, and the amount of money for the levy of which, the writ issued. In the case, therefore, of a seizure under more decrees than one, he would have to mention the various actions and amounts.

The sale having been effected under all the writs, the amount realized has, by section 351, to be received by the Court of highest grade from which one of the writs issued, or, where there is no difference in grade between such Courts, by the Court under whose decree the property is first seized.

The property has thus been sold at the instance of, and on behalf of, the various creditors whose writs were in the hands of the Fiscal, and I do not see anything in the Code which prevents such creditor from giving notice, under section 350, to the Court holding the money, of their claim to the proceeds, to which they appear to be entitled equally with the judgment-creditor of that Court, the property having been sold under all the writs.

A difficulty undoubtedly arises with regard to section 352. It is obviously impossible for anyone, in the case of an execution by the hands of the Fiscal, to apply to the Court " by which such assets are held " for execution of a decree for money against the same judgment-debtor " prior to the realization," for until the sale takes place the assets are not held by the Court; and if we read the words to mean " by which such assets will eventually be held," it will still be impossible for any decree-holders of other Courts to participate, because they can only apply to the Court in which they have got judgment for writs of execution, and it is obvious from section 351 that the Code intends to provide for seizure in execution of decrees of more Courts than one. Even if this difficulty could be got over, I fail to see how anyone could know what Court to apply to, for in the case of seizures in execution of decrees of more Courts than one, the Court to hold the money is the Court of highest grade, and what Court that will be cannot well be ascertained until the seizure and sale has been completed.

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The section seems to be urgently in need of amendment, and the only reasonable interpretation that I think can be given to it is to confine the section only to the persons who can under the law make application under it for execution—namely, decree-holders of the same Court—leaving to decree-holders of other Courts the rights that appear to have been given to them by the earlier sections, to participate in the seizure and sale and then to apply for their share of the proceeds under section 350. This right seems to have been recognized by Burnside C.J. in *Konamalai v. Sivakulanthu*,[1] when he said, in refusing the claimant's right to participate, " he had no execution in the hands of the Fiscal so as to make the seizure a joint seizure under his as well as the plaintiff's writ."

In the present case I think the applicant ought to be permitted, under section 350, to participate in the proceeds of the execution in respect of the two Gampola writs, under which the Fiscal sold at the same time as he sold under the plaintiff's writ, but that in respect of the Kandy case he should not participate, he having had no writ of execution in that case in the hands of the Fiscal at the date of the sale.

I would set aside the order appealed from and send the case back to the District Judge, with directions that the appellant is entitled to participate in the money in Court with respect to the amount for which he issued execution in cases Nos. 297 and 537—C. R. Gampola. I would give the appellant the costs of this appeal.

DE SAMPAYO A.J.—

In my judgment in *Mirando v. Kiduru Mohamadu*[2] I ventured to express my views as to the construction of section 352 of the Civil Procedure Code, and nothing that has been urged in the argument of the present case has assisted me to form a different opinion. I should, however, refer to one point which undoubtedly presents a difficulty in the application of section 352. The section speaks of persons who have applied to Court " prior to the realization " of the assets. This was emphasized in *Robson v. Fernando*,[3] and if the words quoted are intended to lay down an absolute condition that the claimant should apply before the execution sale, then I do not see why resort should not to be had to the provisions of section 350. It was said in *Robson v. Fernando*[3] that section 350 and section 352 should be read together, and that even a person who is entitled to apply under section 350 must observe the time-limit provided in section 352. With the greatest respect to the learned Chief Justice who decided that case, I am unable to agree to that view. Section 350 is complete in itself, and prescribes its own time-limit. It only requires that the claim should be notified

[1] *(1891) 9 S. C. C. 203.*

[2] *(1904) 7 N. L. R. 280.*

[3] *(1912) 15 N. L. R. 295.*

to Court "before the proceeds of execution have been paid to the party in whose favour the execution issued." The appellant in this case has fulfilled that condition. Then it is contended that the appellant cannot be said to have notified his claim to Court at all, inasmuch as the only notice to Court is that given by the Fiscal who seized the fund in Court under section 232 of the Civil Procedure Code at the instance of the appellant, and reference is made to *Letchimanen Chetty v. Abdul Raheman.*[1] But that decision does not support the argument, for there the claimant had merely put his writ in the hands of the Fiscal, and no prohibitory notice had been given to the Court, as in this case, under section 232. Nor do I read section 350 as absolutely requiring that the notice should be given by the claimant personally. As was suggested by my Lord the Chief Justice at the argument of this appeal, the words "by any person or persons" may refer to "claim" and not to "notice." However that may be, I do not see why in such circumstances as these the notice should not be given through the Fiscal, and a prohibitory notice is as strong a notice of claim as possible. Moreover, in this particular case the appellant's status as a claimant was recognized by the Court, and notice was issued to him when the respondent moved to draw the proceeds, and I am not disposed to give effect to any objection to the form of notice or the mode of giving it.

In my opinion the appeal as a whole should be allowed with costs.

Set aside.

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[1] *(1909) 12 N. L. R. 254.*