KARUPPAN *v.* USSANAR.

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D, C., Anuradhapura, 119.

Sequestration of goods under s. 653 of the Civil Procedure Code—Claim to property sequestered—Disallowance of claim under s. 659—Action for dissolution of sequestration—Plea of res judicata.

Per LAWRIE, A.C.J., and WITHERS, J. (*dissentiente* BROWNE, A.J.). —The disallowance of a claim to property sequestered under section 653 of the Civil Procedure Code is no bar to the claimant instituting an action under section 247 to establish his right to the property seized.

IN this case, which was instituted on the 17th April, 1893, the plaintiff alleged that one Wattuhamy and Simon had sold him certain goods; that when he was in possession of them the defendant had them seized as the property of the plaintiff's vendors; that he claimed them on the 15th March, 1893; and that his claim was disallowed on the 6th April. He now prayed for a dissolution of the sequestration and for delivery of posession, and in case of failure to deliver for the value thereof and damages.

The defendant admitted the seizure and impugned the alleged sale by his execution-debtors to the plaintiff; and he pleaded that as the plaintiff had made his claim under section 658 of the Civil Procedure Code and it was disallowed, such order was *res judicata* and the present action could not be maintained; that, if the present action was conceived under section 247, it was not instituted within fourteen days from the date of the order disallowing the claim.

The District Judge ruled as follows:—

"Plaintiff has proceeded under sections 658 and 659, and has the rights conferred by section 247 in regard to order made under sections 245, 246.

"The action taken on 17th April, 1893, is sufficiently disclosed to be under section 247."

On the merits, after hearing evidence, the District Judge believed that plaintiff was the owner by virtue of a purchase accompanied by possession, ostensible and effectual, and that the action was brought within fourteen days of the date of the order disallowing his claim. He entered judgment for the plaintiff.

Defendant appealed.

Dornhorst (with him *Walter Pereira*), for appellant.

Wendt (with him *Senathi Raja*), for respondent.

Cur. adv. vult.

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5th February, 1895. LAWRIE, A.C.J.—

In an action on a promissory note the plaintiff succeeded in getting certain movable property sequestrated under the 653rd section of the Code. A claimant appeared and preferred a claim to the property sequestered; the claim was investigated in the manner provided for the investigation of claims to property seized in execution of a decree for money. The Court disallowed the claim.

The claimant did not appeal. Within fourteen days of the disallowance of the claim, the claimant brought the present action, in which he prayed that the sequestration be dissolved; that the property be ordered to be delivered to him; for its value on failure to deliver and for damages. The learned District Judge, on the evidence, found that the property belonged to the plaintiff, and he has given judgment for the amount which the property fetched at the sale in execution in the promissory note action.

I am of the opinion that the plaintiff could have appealed against the disallowance of his claim in the other action; but, as there is no provision that the order disallowing such a claim is final, I am of opinion that it does not determine the question of the right of property; it does no more than reject a claim on the materials then before the Court. It certainly settles these points: (1) that the goods were rightly sequestered,, (2) that they may be sold in execution if judgment goes for the plaintiff; but the disallowance of a claim does not profess to adjudge the property to be in one or in another, and I am not disposed to give it a larger meaning than its own terms bear.

This proceeding, under chapter 47, is not regulated by the provisions of the 247th section. If the claimant has a right to sue for his property wrongly sequestered, he is not trammelled by the necessity to bring his action within fourteen days. The present action was, in fact, brought within that time, but that seems to me of no consequence.

On the merits, it is I think proved that the defendants in the other action, Wattuhami and another, traded in Anuradhapura, and in March, 1893, they were in pecuniary difficulties. They executed a notarial deed of sale of the stock in trade in their shop in favour of the present plaintiff on the 11th March, 1893. Immediately on hearing of the deed of sale the holders of a promissory note brought action, and founding on the alienation of the shop goods as proving a fraud, he obtained a sequestration of the same stock in trade. The question is, Was the holder of the note in time? Was the property still vested in the common debtors, or had it legally passed from them to the present plaintiffs?

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In my opinion there is no proof of fraud by any one concerned. It was a race for payment; there may have been other creditors of Wattuhami and his partner: these are not before us. There were two creditors whom we know of: the one, the present plaintiff, insisted on his debtors selling to him and giving him credit for the debt due to him; he says (and the District Judge believes him) that he paid a part of the price, and that he got instant delivery of the goods—not that they were removed, but that he put a man of his into the shop; on the other hand, the other creditor says that he was just in time, that the deed of sale had not been registered (that is so), that possession had not yet been delivered, that the story of a payment of the price is most improbable. There was certainly very little time between the execution of the deed and the sequestration; it is not easy to take complete possession on the very day of a purchase; it was not easy, perhaps, for the vendors to find another place to live in; and the fact that one of the vendors was seen at the shop on the day of the sequestration (two days after the alleged sale) does not satisfy me that he was still in possession. I am disposed to affirm the learned judge's verdict on the evidence. I recommend that the judgment be affirmed. The property thus goes to the creditor who was first in the field.

WITHERS, J.—

After giving my best consideration of this matter I am inclined to concur with the judgment of the Acting Chief Justice. Though the judge may not sustain the sequestration against the claim of one who is no party to this action, unless he is satisfied that what has been sequestrated is not the property of the claimant, I do not think that his decision settles the question of title once and for all.

Clause 660 especially conserves the rights of third parties before sequestrations, and this being so, why should not a third party be allowed to establish his title by an action instituted for that purpose? Of course he cannot recover in that action any damages or costs given against him in the claim inquiry.

On the merits I also agree with the Chief Justice.

BROWNE, J.—

I confess I do not regret that the construction of the sections of chapter 47, Civil Procedure Code, under consideration, has been overruled by the rest of the Court, so that title to property will still have to be decided in a proper action therefor. If I still hold and express those views, it is chiefly for the purpose of showing

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that they have been raised and discussed so that the procedure may be more affirmatively settled.

On the question of procedure, whether a claimant can, afer trial and disallowance of his claim under section 653, institute an action to assert and have decided in ordinary procedure his right to the property he claimed, I would hold it is not permissible for him to do so.

I admit there is much reason why that right should be given to him. When the Indian Civil Procedure Code, section 487 (our section 658) required that a claim on sequestration should be investigated in the same manner as a claim to property attached in execution, it was not directing an investigation in a summary manner " or limiting at all any right of action thereafter, more especially in that such action should be instituted within fourteen days."

But, when our Civil Procedure Code, section 658, gives a like direction, that refers one back to sections 241 and 247, we find the former contains the provision of an investigation in a summary manner, which is not in the Indian section 278, and the latter, the limitation of fourteen days' time, which is not in the Indian section 283, and thus a question of title to property might fall to be decided without pleadings in a manner which possibly might work an injustice.

As against this, however, it must be noted that the Indian Civil Procedure Code contains no such provision as section 659 in our Code, and it, read in conjunction with section 207, to my mind, decides that the decree, which disallows with costs and damages a claim on sequestration, shall be final unless reversed by appeal.

Nor need this always work hardship, for, in the first place, no claimant is obliged to try his title by the process of mere claim. On sequestration made of his property he may at once sue, and, if necessary, have the further proceeding enjoined till decision of his claim. While, if he only claims, it will be always in the power of the Court, and of the claimant and sequestrator, to have without any pleading save the statement of claim issues stated to develop full adjudication upon the questions of title necessary to be raised.

I would further hold that, even if action after disallowance of claim were permissible, the plaint as at first filed here was defective for want of averment of the claim and disallowance thereof (*per Withers, J., 3 C. L. R. 242; 2 S. C. R. 119*); and as the amendment, though allowed on the 19th April, was not made till the 20th July, no action was properly instituted within the fourteen days. The amendments to the answer thereon allowed have never,

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in fact, been made, and it is to be regretted that the record has been so compiled that neither the order of the 19th April is to be found in the journal, nor the amendments to the answer are, and in any close proximity to it, but one has to search the motion papers to discover them.

As I desired to sustain the 1st and 4th grounds mentioned in defendant's amended answer and dismiss plaintiff's action, I do not deem it necessary to discuss the other questions.

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