64/76

SUPREME COURT OF VICTORIA

PEZZIMENTI v SCHULZ

Dunn J

29 April 1976

CIVIL PROCEEDINGS – WARRANT OF DISTRESS ISSUED – POLICE OFFICER CHARGED WITH EXECUTION OF WARRANT – VISIT MADE BY POLICE OFFICER TO JUDGMENT DEBTOR'S PLACE OF RESIDENCE – PROPERTY FOUND IN RESIDENCE – CLAIM BY PERSONS LIVING AT RESIDENCE THAT PROPERTY DID NOT BELONG TO JUDGMENT DEBTOR – WHETHER JUDGMENT DEBTOR IN POSSESSION OF GOODS – WARRANT RETURNED UNSATISFIED – CLAIM MADE AGAINST POLICE OFFICER – FINDING BY MAGISTRATE THAT POLICE OFFICER NOT LIABLE – WHETHER MAGISTRATE IN ERROR – CLAIM BY JUDGMENT CREDITOR FOR DAMAGES – VALUE OF THE GOODS SOUGHT TO BE SEIZED – ASSESSMENT OF DAMAGES FOR NON-EXECUTION – FINDING BY MAGISTRATE THAT NO ORDER MADE FOR DAMAGES – WHETHER MAGISTRATE IN ERROR.

A police officer who was charged with the execution of a warrant of distress returned the warrant unsatisfied because the persons at the house asserted that the property (including a piano) capable of being seized did not belong to the judgment debtor. The judgment creditor applied to the Magistrates' Court for an order against the police officer. The Magistrate declined to make the order and refused to make an order for damages. Upon Order Nisi to review—

HELD: Order nisi discharged.

1. In order to succeed before the Magistrate the complainant had to prove, amongst other things, (a) that there were goods of the judgment debtor out of which levy could be made and that the defendant had notice of them (b) that the defendant failed or refused to levy on these goods – and there was no difficulty about that because the defendant refused to levy on goods that were there, but the question was whether they were the judgment debtor's goods – and (c) the damages that he suffered.

2. One starts with the proposition that the warrant only authorized the seizure of the goods of the judgment debtor. The Constable in charge of the execution of the warrant was bound to satisfy himself that there were reasonable grounds for claiming that any goods seized were those of the judgment debtor.

3. The question of possession of the property was left in an equivocal state in this case, except possibly as to the piano, and the Magistrate was therefore entitled not to be satisfied that the judgment debtor was in possession. As to the piano, the evidence was uncertain as to whether the debtor's mother or the girl friend claimed it. It was not the kind of chattel that the debtor himself might be expected to own or to be in possession of, and in all the circumstances it was open to the Magistrate not to be satisfied as to whom the possession of the piano is properly to be attributed.

4. At best the evidence was of a negative kind, but it was available to confirm the view that the inference of sole possession in the judgment debtor should not have been drawn, and it was also available to the Magistrate for the purpose of considering whether he ought to have been satisfied on the balance of probabilities that the inference of ownership in the judgment debtor should have been drawn. There was no basis in this case upon which an inference of joint possession could have been drawn. They were not husband and wife and there was no evidence as to how long they had been living together, and no material upon which an inference of joint possession should be drawn rather than possession in one or other of them.

5. In relation to the question of damages to the judgment creditor, there had to be some evidence upon which the task of assessing damages could be undertaken, and in this case there was no attempt to lead any evidence as to what might be the value of these goods if they had been available to be seized. In those circumstances the Court was not obliged to attempt to make an assessment of the value of goods about which practically nothing was known, and that would have been a substantial hurdle for the complainant if the Court had otherwise come to a different conclusion.

DUNN J: ... Schulz, a police constable, was charged with execution of a warrant of distress in which Pezzimenti was complainant and one Peterson was the defendant. Schulz returned the warrant

unsatisfied indicating that the defendant, his girlfriend, and her mother asserted that none of the goods at the address were owned by Petersen. The relevant goods were a piano, a kitchen table and chairs, an old lounge suite and a motor cycle. The complainant sued for damages for failure to execute the warrant, and argued that as Schulz believed Petersen rented the premises that thus Petersen was *prima facie* in possession of the goods – that accordingly those goods should have been seized unless good title was shown to be in some other person – that in accepting the defendant's assertions, the constable had denied the complainant his right to have those claims tested.

In order to succeed before the Magistrate the complainant had to prove, amongst other things, (a) that there were goods of the judgment debtor out of which levy could be made and that the defendant had notice of them – see *Sullen & Leake's Precedents in Pleadings*, 3rd Ed. p397 – (b) that the defendant failed or refused to levy on these goods – and there is no difficulty about that because the defendant refused to levy on goods that were there, but the question is whether they were the judgment debtor's goods – and (c) the damages that he suffered.

In this case the defendant put in issue as to whether there were goods of the judgment debtor on which levy could be made.

One starts with the proposition that the warrant only authorizes the seizure of the goods of the judgment debtor. The Constable in charge of the execution of the warrant was bound to satisfy himself that there were reasonable grounds for claiming that any goods seized were those of the judgment debtor.

On review, the first step in this case is whether the Stipendiary Magistrate was bound to find that the goods were in the judgment debtor's possession. The reasons of the Stipendiary Magistrate as recorded are not very satisfactory, and probably the record is not a full account of what he said, but it is clear enough the Stipendiary Magistrate was not satisfied that the complainant had discharged the burden of proof that rested on him. He said, *inter alia*, 'There is some colourable evidence that the property was the defendant's. However, the defendant ... formed a reasonable belief that the goods on the premises were not owned by Petersen'. That must mean the Stipendiary Magistrate was not satisfied that the goods were the property of the judgment debtor because he had no more information about them than had the Constable.

There are two aspects that arise; was the Stipendiary Magistrate bound to find that the goods were in the possession of the judgment debtor at all? On the evidence I do not think that he was. There are a number of cases which are conveniently collected in *Koppel v Koppel* (1966) 2 All ER 187, also reported in (1966) 1 WLR 202. At pp190-1 of the All ER the cases of *Ramsay v Margrett* and *French v Gathing* and other cases are referred to, which make it plain that no inference can be drawn when more than one person is living in the premises that goods are in the possession of any particular one of them. The first two cases deal particularly with the question between husband and wife are living together that the goods are necessarily in the possession of either one of them, and in another case that is there referred to, it has also been held the same principle applies with parties who are not in fact married.

In this case the judgment debtor was living with his girl friend in the premises. The items that were there to be seized were very, in a sense, insignificant, apart from the piano, and there was nothing in the circumstances, in my opinion, from which an inference night reasonably have been drawn on the balance of probabilities that the possession of these goods was in the judgment debtor rather than in the girl friend who was also living in the premises.

The authorities to which I refer there, including the case of *Koppel*, make it clear that in such circumstances the question of such possession is in an equivocal state, and it was left in an equivocal state in this case, except possibly as to the piano, and the Stipendiary Magistrate was therefore entitled, in my opinion, not to be satisfied that the judgment debtor was in possession. As to the piano, the evidence is uncertain as to whether the debtor's mother or the girl friend claimed it. It is not the kind of chattel that the debtor himself might be expected to own or to be in possession of, and in all the circumstances it was open to the Magistrate not to be satisfied as to whom the possession of the piano is properly to be attributed.

In that state of the facts the defendant, who was at the premises – and he had the advantage of seeing the people concerned – was equally entitled to be uncertain as to where the possession of these goods belonged, and on that basis he would not have been justified in my opinion. The result of those considerations and the state of the evidence was such as to leave it open to the Magistrate to hold to be that notwithstanding the statements made in the report by the Constable as to the possession of goods, on a proper consideration of the material that was available to him, such a conclusion could not properly be reached on the balance of probabilities.

In the next place it has to be borne in mind that the complainant called the defendant as part of his case, and in the account of the evidence that is given in the affidavit of the solicitor for the defendant, who was present throughout the proceedings in the Magistrates' Court, there is no evidence given as to the tenancy of the flat or any directed as to the possession of the goods, and the evidence of the defendant became part of the complainant's case. It was therefore part of the complainant's case that the claims by the mother and girl friend to such chattels as were there were, in the opinion of the defendant, *bona fide* and that there were no goods of the judgment debtor on the premises available to be seized.

I agree that this evidence at best is of a negative kind, but it was available to confirm the view that the inference of sole possession in the judgment debtor should not be drawn, and it was also available to the Magistrate for the purpose of considering whether he ought to be satisfied on the balance of probabilities that the inference of ownership in the judgment debtor should be drawn. It was urged before me by Mr Shulkes that in any event the proper inference to draw, if not that the goods were in the sole possession of the judgment debtor, was that they were in the joint possession of the judgment debtor and his girl friend, and that the Constable should have seized the joint property and sold the interest of the judgment debtor in them. In my opinion there is no basis in this case upon which an inference of joint possession could be drawn. They were not husband and wife and there was no evidence as to how long they had been living together, and no material that I can see upon which an inference of joint possession should be drawn rather than possession in one or other of them.

The only other observation that I desire to make is that it would seem from the decision in *Scarlett v Hansen* (1893) 12 QB 213 that if an executing officer comes to the conclusion that it is proper for him to accept the claim of the people making a claim for goods of which the judgment debtor might otherwise be deemed to be in possession, he is entitled to do so, but, of course, he runs the risk of being proved to be wrong.

In this case, as I have already indicated at the commencement of my judgment, if I thought the evidence was sufficient to prove that the goods were those of the judgment debtor, then the result of this order nisi would be different.

For those reasons I think the grounds of the order nisi have not been established and that is sufficient to dispose of it. There does remain the further matter that was raised by Mr Uren on behalf of the defendant that in any event the state of the evidence was such that the Magistrate would not have been able to give a judgment in favour of the complainant because no evidence of damages was in fact called. In other words, no evidence as to the value of the goods which might have been seized was called from which the damage suffered by the claimant could be estimated.

I think there is much to be said for that point. The case of *Hobson v Thelluson* (1867) 2 QB 642 seems to me to be authority for the proposition that in this type of action nominal damages should not be awarded, and it is therefore incumbent on the complainant to give some evidence of the value of the goods that are available to be seized. I appreciate what Mr Shulkes says about this — I have had on more than occasion to act on it myself — that the difficulty in assessing damages is no excuse for not undertaking the task. However, there has to be some evidence upon which the task can be undertaken, and in this case there was no attempt to lead any evidence as to what might be the value of these goods if they had been available to be seized. I do not think in those circumstances the Court is obliged to attempt to make an assessment of the value of goods about which practically nothing is known, and that would have been, I think, a substantial hurdle for the complainant if I had otherwise come to a different conclusion.

The order nisi will be discharged with costs to be taxed not exceeding $200.