

MOHAMMED HASSAN BASMA Plaintiff

Benka-Coker J.

v.

KISHINGHAND OLARAM GIDWANI Defendant

[C.C. 388/59]

Judgment debtor—Writ of fieri facias—Priority of writs—Whether debtor's landlord entitled to be paid first—Whether applicant should have proceeded by interpleader summons—Supreme Court Rules, Ord. 43, rr. 1, 2 (a) and 5; Ord. 50, r. 1—Effect of non-compliance with Rules—Waiver of objection.

On May 6, 1960, plaintiff (Basma) recovered judgment against his tenant (Gidwani), for the recovery of possession of a shop and for mesne profits, general damages and costs. On the same day, Basma issued a writ of fieri facias for, inter alia the sum of £1,701, the amount due on the judgment. He paid the necessary sheriff's fees in respect of the writ and obtained a Judicial Sub-Treasury receipt numbered 23304.

Dalamal & Sons Ltd. of Hong Kong and London (Dalamal) also recovered two judgments against Gidwani totalling £4,036 for the recovery of which two writs of fi.fa. were issued on which court fees were paid, as evidenced by receipts numbered 19690 and 19691.

All three writs were delivered to the sheriff's office on May 9. Execution was levied on the goods of Gidwani and £850 was realised. On June 22, the under-sheriff wrote a letter to Basma's solicitor in which he stated that Dalamal's writs had been received before that of Basma, and, therefore, that he intended to pay the £850 to Dalamal. Basma thereupon applied to the court by motion for an order that the sheriff pay the money to him.

At the hearing of this motion, there was a dispute as to whether Basma's writ was delivered to the sheriff's office before those of Dalamal, and, as to this, there were sworn affidavits by Basma, Basma's solicitor, Dalamal's solicitor's clerk and the sheriff. Basma argued that he should have priority as landlord of the judgment debtor. Dalamal argued that Basma should have proceeded by interpleader summons rather than motion.

Held, for the plaintiff (Basma) (1) The writ of fieri facias issued by Basma is entitled to priority over the writs issued by Dalamal.

(2) Order 43 of the Supreme Court Rules relating to interpleader does not apply to claims by rival judgment creditors who have issued simultaneous writs of fieri facias.

(3) Even if plaintiff should have proceeded by interpleader summons, his failure to do so did not render the proceedings void.

(4) Even if Dalamal's objection to the method of procedure were valid, he waived it by proceeding with the hearing of plaintiff's motion.

The court also said, obiter, that the landlord's priority is based on his right to distress and that, when once a landlord has elected to sue and has obtained judgment against his tenant in respect of arrears of rent, his remedy by distress is lost.

Note—This judgment was affirmed by the Sierra Leone and Gambia Court of Appeal on October 31, 1960 (Civil Appeal 39/60).

S. C.

1960

BASMA
v.
GIDWANI

Cases referred to: *In re Neil Mackenzie* [1899] 2 Q.B. 566; *Smith v. Baker* (1864) 2 H. & M. 498, 71 E.R. 557; *Boyle v. Sacker* (1888) 39 Ch.D. 249.

E. Livesey Luke for the plaintiff.

Edward J. McCormack for the claimant (Dalamal & Sons Ltd.).

BENKA-COKER J. This is an application by motion by Mohammed Basma for "an order that the Sheriff of Freetown do forthwith pay over to the said plaintiff—(Mohammed Hassan Basma) the money levied by him under the writ of fieri facias issued in this action or that the said Sheriff pay to the plaintiff any money he has in his possession as a result of execution levied against the defendants." This motion was supported by two affidavits—one by E. Livesey Luke and the other jointly by H. N. Basma, the plaintiff, and one A. K. Basma. The notice of motion and the affidavits were filed on June 28, 1960, and presumably were served on one A. E. Dobbs who was the solicitor both for the defendant Gidwani, and the claimants herein Dalamal and Sons Ltd.

On June 29, 1960, one Bernard Morissa Tommy, clerk to the said A. E. Dobbs, swore to and filed in opposition to the said motion an affidavit on behalf of the said Dalamal & Sons Ltd. of Hong Kong and London. Here it will be useful and convenient to state a short history.

On May 6, 1960, the plaintiff Basma recovered judgment against the defendant Gidwani in this court for the recovery of possession of land and a shop situate at 39 Kissy Street, Freetown (more particularly described in the writ of summons), and for mesne profits at the rate of £900 per annum to date of delivery of possession, together with general damages of 20s. and costs to be taxed. On May 6, 1960, the plaintiff issued a writ of possession and fieri facias for the recovery of possession of the said premises and for the sum of £1,701, the amount due on the judgment and for sheriff's costs. On May 8, 1960, according to the indorsement on the writ he paid the necessary sheriff's fees in respect of the writ and obtained a Judicial Sub-Treasury receipt numbered 23304 and dated May 9, 1960. It would appear from a slip written by the under-sheriff and contained in exhibit "B" sheriff's fees were first assessed by the under-sheriff Richards before payment of same was made to the Judicial Sub-Treasury which is a different and separate department from the sheriff's office. A warrant directed to N. S. Terry, C. B. Macrea, V. E. Williams and other bailiffs was issued by the under-sheriff Richards on May 9, 1960, for the levying of the sum of £1,701 due on the said judgment.

Against this same defendant Gidwani, two judgments were obtained from this court by the said claimants Dalamal & Sons Ltd. of Hong Kong and London for the sum of £2,328 8s. 11d. and £1,707 11s. 1d. totalling £4,036 for the recovery of which two writs of fi.fa. were issued out of this court on May 9, 1960, court fees on which were paid, on May 9, 1960, as endorsed on the receipts numbered 19690 and 19691 respectively and execution was levied on the goods of the defendant and the net sum of £850 realised—this sum is now in the hands of the sheriff. No return has been made to any of the writs of fi.fa. and there is no evidence either by the under-sheriff or any other person as to what writ the execution was in fact levied on—except that in a letter to the plaintiff's (Basma's) solicitor by the under-sheriff dated June 22, 1960 (exhibit B'B) the under-sheriff writes, inter alia, "I am still

keeping the proceeds of sale of the property of the judgment debtor as you expressed a desire to ask the court to declare how the amount realised should be paid. This is to request you to take out an action within forty-eight hours of receipt of this letter after which I shall be obliged to pay the amounts into the account of Dalamal & Sons Ltd. whose writ was received in this office before your client's." As a matter of fact there were two writs issued on behalf of Dalamal and from the evidence it is clear that the two writs of Dalamal were delivered together at the same time and it seems therefore that this motion was taken out in consequence of the letter of the under-sheriff to Basma's solicitor dated June 22, 1960, quoted above.

In support of this motion by Basma, E. Livesey Luke, Basma's solicitor, swore to and filed an affidavit on June 28, 1960, wherein he deposed inter alia as follows:

"4. That on Monday the 9th day of May, 1960, at about 9.45 a.m. I delivered the said writ to the under-sheriff at his office at the Law Courts Freetown.

"5. That at the time and date referred to in paragraph 4 and in the presence of the plaintiff one A. K. Basma and three or four bailiffs the said under-sheriff informed me that only one other writ of fi.fa. had been delivered to him to levy execution against the defendant herein and that that writ was issued in a case where U.A.C. Ltd. were plaintiffs."

In a joint affidavit sworn to and filed by the plaintiff and one A. K. Basma on June 28, 1960, the plaintiff deposed inter alia.

"5. That in my presence and in the presence of the other deponent herein my solicitor Eben Livesey Luke delivered the said writ of possession and fi.fa. to the under-sheriff of the Colony aforesaid at the under-sheriff's office, Law Courts Freetown aforesaid on Monday, 9th May, 1960, at about 9.45 in the forenoon.

"6. That in my presence and in the presence of the other deponent herein and three or four bailiffs and at the said time and place I heard the said under-sheriff inform my said solicitor that apart from one fi.fa. by U.A.C. Ltd. no other writ of fi.fa. had been delivered to him to levy execution against the defendant herein."

The other deponent Abdul Karim Basma deposed inter alia as follows:

"I was present on Monday the 9th May, 1960, at about 9.45 in the forenoon when Eben Livesey Luke solicitor delivered a writ of possession and fi.fa. herein to the under-sheriff aforesaid at his office at the Law Courts Freetown aforesaid that at the time and place aforesaid I heard the said under-sheriff inform Eben Livesey Luke in the presence of three or four bailiffs that only one writ of fi.fa. had been delivered to him to levy execution against the defendant herein and that the writ of fi.fa. had been issued by U.A.C. Ltd."

In opposition to this motion one Bernard Morissa Tommy, clerk to Dobbs, solicitor for claimants Dalamal & Sons on behalf of the claimants Dalamal & Sons, swore to and filed an affidavit on June 29, 1960. This Tommy deposed inter alia as follows:

"2. I did on the 9th day of May, 1960, on the instructions of Mr. A. E. Dobbs, issue two writs of fieri facias against Messrs. Gidwani Brothers (that is to say the above named defendant, trading as Gidwani Brothers)

S. C.

1960

BASMA
v.
GIDWANI

Benka-Coker J.

S. C.
1960

BASMA
v.
GIDWANI

Benka-Coker J.

and I paid for the same under General Receipts Nos. 19686, 19687, 19690 and 19691 respectively. The original of these receipts will be produced and shown to the court at the hearing of the motion herein.

"2. The said writs of fieri facias were in favour of Dalamal & Sons (Hong Kong) Ltd. and Dalamal & Sons (London) Ltd. respectively and the writs were both handed by me to the under-sheriff accordingly at his office at the Law Courts Building in the morning hours of the said 9th day of May, 1960.

"3. I have read the affidavit of Mohammed Hassan Basma and Abdul Karim Basma sworn the 28th day of June, 1960, and filed herein and say that the time of delivery of Basma's fi.fa. must be subsequent to the delivery of Dalamal & Sons, fi.fa., for the reason that Basma's fi.fa. was paid for and filed after I had paid for Dalamal's fi.fa., as can be evidenced from the numbers on Basma's receipts which are numbered 19698 and 23304 respectively of the 9th May, 1960."

By special leave of the court the motion then came before me for hearing on June 30, 1960. At the hearing E. Livesey Luke appeared for Basma, the plaintiff/applicant, and McCormack appeared for the claimants/respondents Dalamal & Sons. No preliminary objection was taken by either party. Mr. Livesey Luke on behalf of Basma, the plaintiff/applicant, submitted that his client Basma was entitled to be paid the net proceeds of the execution on two grounds:

"(1) that the plaintiff being the landlord of the judgment debtor Gidwani and the judgment for which the writ of fi.fa. had been issued, being in respect of arrears of rent, was entitled to be paid first out of the proceeds of any execution issued whether at his instance or not."

In support of this submission plaintiff cited and relied on *In re Neil Mackenzie* [1899] 2 Q.B. 566 referring in particular to the judgment of the Master of the Rolls at p. 575.

"(2) that according to the affidavits filed Basma's writs were delivered to the under-sheriff sometime prior to the delivery of Dalamal's writs."

Counsel referred to the paragraphs of the deponent's affidavits filed on behalf of the plaintiff Basma—which I have quoted above—laying emphasis on the information given him by the under-sheriff as to there being no other writ in his possession except U.A.C.'s. Counsel also commented on the vagueness of Tommy's affidavit filed on behalf of the claimants Dalamal and his failure to state definitely when Dalamal's writs were delivered.

In answer, Mr. McCormack on behalf of Dalamal & Sons submitted as to (1) that plaintiff Basma having elected to sue for his arrears of rent and having obtained judgment, loses his right of preferment to other creditors as to payment of arrears of rent. As to (2) he referred to and relied on paragraph 3 of Tommy's affidavit and laid stress that receipts for payment of court fees on Basma's writ to the Judicial Treasury were issued after the receipts for the payment of court fees on Dalamal's writs had been issued—Basma's receipts being numbered 19698 and 23304 respectively whilst Dalamal's were numbered 19686, 19687, 19690 and 19691. Counsel cited Mather on Sheriff Law (1894 ed.), p. 63, "Several Writs priority" and submitted that it was clear from that evidence that Dalamal's writs were delivered before Basma's and therefore Dalamal's should be given priority.

I then pointed out that the fact that Basma's receipts were issued and numbered subsequent to Dalamal's, is not conclusive evidence that Dalamal's writs were in fact delivered to the under-sheriff before Basma's, as the Judicial Treasury is a separate department from the sheriff's office and accommodated in a different part of the building and not on the same floor. I therefore expressed surprise, the issue being "what writ was delivered to the under-sheriff first?" that there was no affidavit by the under-sheriff as he was the person who should be in a position to give the best evidence, it being his duty to keep such records of date and time of delivery, etc. Mr. McCormack then applied for leave to get the under-sheriff to file an affidavit in support of his contention. Livesey Luke for the plaintiff Basma objected on the ground that the claimants Dalamal had had ample time and opportunity to get the sheriff to file such an affidavit if they really intended to rely on this ground.

Most reluctantly I allowed and gave leave to the claimants Dalamal to get the under-sheriff to swear to and file the necessary affidavits and serve same on the plaintiff Basma not later than 4 p.m. that same day, June 30, 1960. I then adjourned the further hearing of the motion till the next day. An affidavit was sworn on June 30 at 1.10 o'clock p.m. by the under-sheriff Richards and filed by the claimant's solicitor Mr. McCormack on the same date. The affidavit reads (court reads). The most relevant paragraphs in this affidavit are paragraphs 3, 4, 5 and 6:

"3. Two writs of fi.fa. were delivered in my office on the 9th day of May 1960 by Bernard Morissa Tommy, clerk to Mr. A. E. Dobbs, solicitor in favour of Dalamal & Sons Ltd. (Hong Kong) and Dalamal & Sons (London) Ltd. respectively. These writs were delivered in the morning of the said 9th day of May, 1960 to Mr. N. S. Terry a bailiff in my office and prior to the delivery of the writ of fi.fa., by Mr. Basma the plaintiff herein to me, on the same day.

"4. The said fi.fa., of the plaintiff herein was delivered to me at 11.25 a.m., on the said 9th day of May, 1960, and not at 9.45 a.m., as stated in the joint affidavit of Mohammed Hassan Basma and Abdul Karim Basma and also of Eben Livesey Luke above referred to.

"5. I admit making the statement to the effect that there was no other writ of fi.fa., except that of U.A.C. Ltd., against the defendant herein as I was not aware at the time that the two writs of the claimant Dalamal & Sons Ltd., had been handed to Mr. N. S. Terry, a bailiff in my office.

"6. The priority of writs of fi.fa., is determined by the date of payment and the number of the receipt because the writs of fi.fa., were paid for at the Judicial Treasury and left at the said Treasury, and are then forwarded by the said Treasury to me in due course for necessary action. There are instances however when these writs are brought to the office by the parties concerned to ensure that it reaches the office early."

When the matter came before me on July 1, 1960, the court was informed by E. Livesey Luke, solicitor for the plaintiff Basma, that he attempted to serve on the claimant's solicitor a notice of his intention to cross-examine the under-sheriff Richards on the affidavit sworn by him and filed herein the previous day by the claimant's solicitor McCormack but that Mr. McCormack had refused to accept service claiming that under the Rules he was entitled to at least seven days' notice. Mr. McCormack repeated his refusal before me. As it seemed to me quite absurd and ridiculous and not in the interests

S. C.

1960

BASMA
v.
GIDWANI

Benka-Coker J.

of justice that Mr. McCormack should insist on seven days' notice—when only the day before (after much pleading) he was granted special leave to file the affidavit of the under-sheriff and the hearing of the matter was to be continued the next day, I decided to examine Richards, the under-sheriff, myself on his affidavit and called Richards. In the witness box, Richards was a most pathetic sight; he showed absolute ignorance of the ordinary duties of the sheriff and he was most vague and uncertain and unreliable in his evidence even as to the facts alleged in his own affidavit. As to paragraph 3 of his affidavit in which he swore categorically—

“Two writs of fi.fa. were delivered in my office on the 9th day of May 1960 by Bernard Morissa Tommy, clerk to Mr. A. E. Dobbs, Solicitor in favour of Dalamal & Sons Ltd. (Hong Kong) and Dalamal & Sons (London) Ltd. respectively. These writs were delivered in the morning of the said 9th day of May, 1960 to Mr. N. S. Terry, a bailiff in my office, and prior to the delivery of the writ of fi.fa., by Mr. Basma, the plaintiff herein to me, on the same day.”

he revealed that he was not present in the office when the writs were delivered to Terry as alleged—that he was only told by Terry of the alleged delivery by the claimants after the writ of Basma, the plaintiff, had been delivered to him (Richards) and after he had delivered Basma's writ to Terry for preparation of the necessary warrant and after Terry had prepared the warrant. It is useful and convenient to read Richards' evidence (read in full). As Richard's evidence did not impress me and was not helpful, I decided to call Bernard Tommy, the clerk who had deposed that he had delivered the writs to the sheriff. This witness also was most unsatisfactory and had in fact perjured himself. At the end of his evidence counsel for the claimants thought it necessary to offer an apology for the incorrectness of his affidavit and his unsatisfactory evidence. In the affidavit sworn by Tommy and filed herein he swore definitely in paragraph 2 “the writs (claimant's) were both handed by me to the under-sheriff accordingly at his office at the Law Courts building in the morning hours of the said 9th May, 1960.” Though at the time he was swearing to this affidavit, he had himself seen and read the affidavits of Luke and Basma, categorically alleging that Basma's writs were delivered to the under-sheriff at about 9.45 a.m.; yet all Tommy could depose then was “in the morning hours” and in his paragraph 3 he suggests the reason for coming to the conclusion that claimant's writs were delivered earlier—the reason is

“3. I have read the affidavit of Mohammed Hassan Basma and Abdul Karim Basma sworn the 28th day of June, 1960 and filed herein and say that the time of delivery of Basma's fi.fa. must be subsequent to the delivery of Dalamal & Sons' fi.fa., for the reason that Basma's fi.fa. was paid for and filed after I had paid for Dalmaal's fi.fa., as can be evidenced from the numbers on Basma's receipts which are numbered 19698 and 23304 respectively of the 9th May, 1960.”

Nowhere does he attempt to state any time—yet strangely, before me, he deposed in this court,

“I know the under-sheriff—he is Mr. Richards who has just given evidence—(Richards identified)—Dobbs is solicitor for Dalamal & Sons, Hong Kong and London, Ltd—on the 9th May, 1960, I took two writs of fi.fa. at about 9.30 a.m. to Mr. Richards—he issued a paying-in slip for the

two writs of fi.fa. to be paid into the Judicial Sub-Treasury. I took them for payment to Sub-Treasury—on my return to his office, Mr. Richards was not in office and Mr. Terry told me to hand him the writ of fi.fa. and on Richards' return he will hand them to Richards. . . . I now say I am sure I delivered the writs before 9.45 a.m.—I carry watch. I forgot to tell the lawyer that it was 9.30 a.m. I went there and that I looked at my watch—even though I had read opponent's affidavits stating that their writ was delivered at 9.45 a.m.—I did not tell the lawyer about 9.45. . . . I can say I delivered Dalamal's writs before 9.45 a.m. on the 9th."

S. C.

1960

BASMA
v.
GIDWANI
Benka-Coker J.

I have the following observations to make:

(1) It is curious that no endorsement was made on Dalamal's writs as to time of delivery either by Richards or Terry. Terry is the second in command in the sheriff's office and knows that it is the duty to record the time of delivery.

(2) Terry never told Richards the time when Dalamal's writs were delivered.

(3) Terry did not tell Richards of the delivery of Dalamal's receipts even when he was handed Basma's receipts by Richards, for preparation of the necessary warrant, even though he had been present in the office and must have seen Luke deliver Basma's writ and heard Luke make inquiries and Richards give the information set out in paragraph 5 of Luke's affidavit.

(4) Why did Terry not submit the writs of Dalamal to Richards before preparation of the warrants?

(5) Why did Terry only give the information about delivery of Dalamal's writs when he was handing "the three warrants (Basma's and Dalamal's) and Dalamal's writs to Richards? Why did Terry wait until Richards asked him before he gave the information about Dalamal's writs?

(6) Richards admits (a) that he gave a slip to Terry and later, one to Luke for payment of sheriff's fees on the respective writs of fi.fa., on which he assessed the fees payable—how could he have forgotten so soon about Dalamal's writs, when he gave the "all clear" information to Luke set out in paragraph 5 of Luke's affidavit—one would have expected that it would have been so fresh in his mind as to cause him to make some inquiries before giving the information to Luke. Richards admits that Basma's writs were delivered to him before he saw or received Dalamal's writs or knew they had been delivered in the office as now alleged.

(7) Why has Terry (who, as is alleged, in fact received the writs of Dalamal) not sworn to an affidavit as to time of delivery? He is in the building and in office. Why has Richards, who in fact was not present when delivery was made, been made to swear to an affidavit based on "hearsay" and make it appear to the court that he knew of his own knowledge the time of delivery? Is paragraph 3 of his affidavit an attempt to deceive and mislead the court?

In the absence of any reliable record, it seems to me that the best evidence as to the time of delivery of the writs should come from Tommy and Terry—Tommy is clearly a liar—he states before me that he was wearing a watch at the time and looked at his watch and knew it was before 9.45 a.m. that he delivered Dalamal's writs and yet he did not tell this to the solicitor who prepared his affidavit but only deposed "in the morning hours." Terry on the other hand has not sworn to any affidavit.

I am satisfied that Dalamal's writs were not delivered to the sheriff or in the under-sheriff's office before Basma's writ.

S. C.

1960

BASMA
v.
GIDWANI

Benka-Coker J.

I shall now deal with the questions of law raised.

(1) Counsel for the plaintiff Basma contended that the plaintiff being the landlord of the judgment debtor and Basma's claim being for arrears of rent was entitled to be paid first out of the proceeds of any execution issued against the property of the judgment debtor. Counsel relies on the case of *In re Neil Mackenzie* [1899] 2 Q.B. 566, at p. 575.

It cannot be denied that Basma's writ of fi.fa. is for recovery of the amount due on a judgment obtained by Basma in respect of arrears of rent due from the judgment debtor Gidwani to Basma.

There is abundant legal authority that when once a landlord has elected to sue and has obtained judgment against his tenant in respect of arrears of rent, his remedy by distress is lost.

The case of *In re Neil Mackenzie* was based on the landlord's right to distress and the landlord had not sued or obtained judgment against the tenant for the arrears of rent. Hill and Redman's Law of Landlord and Tenant, 10th ed., p. 323—

“If the landlord recovers judgment for the rent, even though it is unsatisfied, the remedy by distress is lost, since the rent is merged in the judgment.”

Chancellor v. Webster (1893) 9 T.L.R. 568; *Potter v. Bradley* (1894) 10 T.L.R. 445; Hailsham Halsbury's Laws, Vol. 10, p. 483, para. 623.

There is therefore no substance in this contention.

(2) Counsel for the claimants Dalamal submitted that this motion is misconceived and that the proper procedure is for the plaintiff to proceed by interpleader summons. Counsel relies on Supreme Court Rules, Ord. 43, rr. 1 and 5.

This objection was taken after the plaintiff's counsel's argument and after the claimants' counsel had filed an additional affidavit, and claimants' counsel had started his argument during which it was pointed out by the court that there was no affidavit by the sheriff or sheriff's officer as to the time of delivery of the claimants' writs to the under-sheriff, and that the affidavit of Tommy did not state definitely when the writs were delivered to the under-sheriff—counsel then asked the court for an adjournment to enable him to get the under-sheriff to file an affidavit—this adjournment was granted and counsel procured the under-sheriff to file an affidavit—the hearing of the motion then continued and the court then examined the under-sheriff and Tommy on their affidavits and claimants' counsel also examined them—Richards and Terry—on their affidavits and then resumed his arguments in answer to plaintiff's counsel and then took this objection last, after he had argued his other contentions.

In the first place, I find that Order 43 only provides (1) the procedure to be taken by a sheriff who receives notice of claim to property or proceeds of property taken under a writ of fi.fa. issued at the instance of another—or (2) the procedure in the case of property in the hands of a stakeholder. Nowhere does it provide that a claimant to property in the hands of a sheriff should himself proceed by or take out an interpleader summons. There has been no return by the sheriff to any of the writs of fi.fa. issued—nor has he clearly stated that he levied execution on Dalamal's or Basma's writs. All he says is what is contained in a letter dated June 22, 1960, written by him to the plaintiff in which he states inter alia, “I shall be obliged to pay the amount into the

account of Dalamal & Sons Ltd. whose writ was received in this office before your client." I should have thought that if Dalamal's writs were first received and execution was levied on Dalamal's writs, that there would have been evidence before this court that at the time of execution Dalamal's writs and warrants were produced and shown to the judgment debtor—there is no such evidence. Again it seems to me that Order 43 does not apply to claims by rival judgment creditors who have issued simultaneous writs of fi.fa.—for there are already definite rules of procedure as to execution of several writs and the order of priority. Order 43 in my opinion clearly applies only to sheriff and stakeholders who have no interest whatever in the subject-matter (Ord. 43, r. 2 (a)) and where the claim is made not on the ground of priority of writ of fi.fa. issued by the claimant.

Furthermore in the letter quoted immediately above from the under-sheriff to the claimant dated June 22, 1960 (exhibit B), it is clear that the plaintiff had made a claim to the sheriff and that the sheriff had refused to take any action under Order 43 for he writes:

" Sheriff's Office,
Law Courts,
22nd June, 1960.

Sh. 208/60

Sir,

Mohammed Hassan Basma v. K. O. Gidwani.

With reference to our conversation on the above Writ of Possession and Fi.Fa., I am still keeping the proceeds of sale of the property of the Judgment Debtor as you expressed a desire to ask the Court to declare how the amount realised should be paid. This is to request you to take out an action within 48 hours of receipt of this letter, after which, I shall be obliged to pay the amount into the account of Dalamal and Sons Ltd. whose Writ was received in this Office before your clients.

2. You have also prevented me from selling the Steel Shelves in the premises at 39 Kissy Street as you consider them as irremovable fixtures. As in my opinion they are trade fixtures, unless within 48 hours you take out an action to prevent me, I shall proceed to sell them.

I have the honour to be,
Sir,
Your obedient servant
(Sgd.) Z. C. L. Richards
Ag. Under-Sheriff.

To:

E. L. Luke, Esq.,
31, Westmoreland Street,
Freetown."

The only course therefore open to the plaintiff was to apply to the court. This he has done by motion—the issue has been brought before the court and is clear—all the parties are before me.

Again, if there has been a non-compliance with the rules of court, in my opinion it amounts only to an irregularity and it seems to me this is a proper

S. C.

1960

BASMA

v.

GIDWANI

Benka-Coker J.

case in which to apply the provisions of Order 50, r. 1, of our local Rules—“effect of non-compliance.” I quote an extract from the judgment in *Smith v. Baker* (1864) 2 H. & M. 498; 71 E.R. 557:

“Whenever the court is satisfied that substantial justice requires any of its own regulations to be waived or any help to be remedied, it will interfere for the purpose, but not where a matter is directly regulated by Act of Parliament.”

The parties and the issue have been brought before this court by the cheapest and speediest way—on a motion—an action would have been expensive and entailed a considerable length of time.

Again, it seems to me that even if the objection were a good one, it has been taken too late. In my opinion claimant took a fresh step after knowledge of the irregularity by applying for an adjournment during the argument of counsel, in order to enable counsel to get sheriff to file an affidavit, and by so filing it and by counsel examining the under-sheriff and Tommy on their affidavits before taking the objection. In the case of *Boyle v. Sacker* (1888) 39 Ch.D. 249, “filing affidavits in a motion and arguing the case on its merits was held to be a step which waived the objection—within the Rule.” It cannot be denied that this objection was taken after counsel had filed affidavit of Tommy—that counsel for plaintiff had argued the motion—that counsel for the claimants had argued on the merits in answer, i.e., priority and that Dalamal’s writs were delivered to the sheriff prior to that of Basma—that the right to distress for arrears of rent was lost—he examined the witnesses Tommy and Richards on their affidavits—all these took place before this objection was taken.

For all these reasons I hold that the writ of fi.fa. issued by the plaintiff in *Basma v. Gidwani* (C.C. 388/59) is entitled to priority over the writs of Dalamal & Sons (London) and (Hong Kong) against Gidwani (C.C. 113 and 114/60) and that the plaintiff is entitled to be preferred to Dalamal & Sons as to payment of his judgment debt out of the proceeds of the execution levied against the property of the judgment debtor.

During the hearing, it came out that a writ of fi.fa. had been issued out of this court at the instance of U.A.C. and delivered to the sheriff prior to Basma’s and Dalamal’s writs of fi.fa. I find however that by an arrangement between U.A.C. and the judgment debtor—this writ had been suspended—U.A.C. are therefore not entitled to any priority as regards the proceeds of the execution. I therefore order the sheriff to make a return to the writ of fi.fa. issued at the instance of the plaintiff and that the plaintiff be preferred to Dalamal as to payment of the plaintiff’s claim out of the proceeds of the execution levied against the judgment debtor. The plaintiff to have the costs of this motion to be taxed and to be paid by claimants.