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SINNAPPAR *v.* VEERAPODI *et. al.*

D. C., Batticaloa, 21,434.

Old decree—Application for execution against property—Civil Procedure Code, s. 298—Issue of writ of execution against person before return of writ against property—Recall of writ against person—Effect of order of Supreme Court made per incuriam.

Section 298 of the Civil Procedure Code does not mean that a writ of execution against the person of the judgment-debtor cannot be issued before a return to the writ against property has been made.

It is competent to the District Court to issue a warrant for the arrest of the judgment-debtor, if before the return to the writ against his property the Court is satisfied that one of the cases (*a*), (*b*), (*c*), and (*d*) mentioned in section 298 had occurred.

Where a decree was signed in 1880 and several applications against the property of the debtor were allowed without resulting in satisfaction of the decree, and after an interval of many years a fresh application for the issue of a writ against property was made in 1897 and the District Court refused it; and where the Supreme Court *per incuriam* set aside that order and allowed writ against property to issue, on the assumption that the original decree was signed in 1893 and revived in later times, whereas in truth it was signed in 1880 and had not been revived for several years; and where the writ allowed by the Supreme Court was made returnable on 18th June, 1898, but before the return was made the execution-creditor applied for and obtained from the District Court under section 298 a writ against the person of the judgment-debtor; and where the debtor applied to the Court for a recall of that writ and his motion was allowed—

Held, that the order recalling the writ against person was good; that the writ against property should not have issued; and the writ against person, which was ancillary to the writ against property, ought not to issue.

Held, further, that, though the Supreme Court had by its order of 13th July, 1897, directed the issue of the writ against property, such order having been made *per incuriam* made no difference in principle.

Soysa v. Soysa (*1 S. C. R. 29*) overruled.

THIS was an appeal against an order made by the District Judge of Batticaloa recalling a writ of execution against the person of the respondent under the following circumstances.

The decree was signed in 1880. Several applications for execution were made and granted, which, however, did not result in satisfaction of the decree. After the Civil Procedure Code of 1889 came into operation a further application for execution against property was made and allowed. No steps were taken to enforce that execution, owing, it was stated, to the judgment-debtor having requested the forbearance of the execution-creditor. In 1897 a fresh application for the issue of a writ against property was

made, which was refused by the District Court, and the execution-creditor appealed to the Supreme Court. The execution-debtor did not appear in appeal. The Supreme Court reversed the decision of the District Court and ordered the writ to issue. The writ was accordingly issued, returnable on the 18th June, 1898. Before the return to the writ was made the execution-creditor applied under section 298 for the issue of a writ against the person of the execution-debtor, and having satisfied the Court that one of the cases (*a*), (*b*), (*c*), and (*d*) mentioned in that section had occurred, the Court allowed a writ of execution against the person of the debtor. Before that writ was executed the debtor applied to the District Court to recall its order, and the District Judge having allowed the motion, plaintiff preferred this appeal.

Wendt, for appellant.

Dornhorst (with *Sampayo*), for respondent.

28th September, 1898. BONSER, C.J. (after setting forth the facts material to the present appeal) :—

I am of opinion that the order of the District Judge was right, but I do not agree with the reasons on which the District Judge bases that order. His principal reason was that the application for the issue of the writ was made before the writ of execution against the property had been returned by the Fiscal, and he held that to be a fatal objection. He relied upon some words which were contained in a judgment of Chief Justice BURNSIDE in the case of *Soysa v. Soysa* (*1 S. C. R. 29*), where the Chief Justice is reported to have said :—" The person of a judgment-debtor is " only liable to be taken in execution after execution against " property has been returned in one of the returns (*a*), (*b*), (*c*), (*d*) " prescribed in the 298th section."

It is quite clear that there must be some mistake in the report. That passage is in itself unintelligible. The Acting District Judge has construed it to mean that a writ of execution against a person cannot be issued before a return to a writ of execution against property has been made. Whatever the meaning of the passage may be, it cannot mean that, for such a construction would be opposed to the plain words of section 298, which provides that if " before the return to the writ of execution is made " the Court is satisfied, on the application of the judgment-creditor made by petition, that any one of certain states of facts specified under that section has occurred, the Court may issue a warrant for the arrest of the judgment-debtor. The view of the Acting District Judge would require us to read in section 298 the word " after " instead

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of the word " before." The District Judge gives a further reason. He said :—" Moreover, the writ against property having expired, " there should have been a fresh application for execution." I must confess myself unable to understand what is meant by the words I have just read. I do not know what he means by the writ against property having expired. The application was made on the 15th June. The returnable date of the writ was the 18th June.

But, as I said before, I am of opinion that the order was right, and for this reason : it seems to me that this case is almost on all fours with the case of *Meera Saibo v. Samaranayaka* (*1 N. L. R. 342*) decided by my brothers WITHERS and LAWRIE. In that case an application had been made for execution of a decree, which was more than ten years old, as in this case. That application had been allowed by the District Court, and then that writ having proved ineffectual, a further application was made, as in this case for writ against the person.

This Court held that there having been in that case an application for the issue of a writ against property to which the application for a writ against person was ancillary, that order by the District Court for the issue of the writ against property ought not to have been allowed, and that, therefore, the subsequent application for a writ against person ought not to have been granted. Now, the only difference between that case and the present one is this, that in that case the second application for a writ against property was granted by this Court overruling the decision of the District Court. I do not think that that makes any difference in principle. If a decree *improvide emanat*, it does not matter whether it issues from this Court or a District Court.

My brother WITHERS, who presided in the Supreme Court when the order allowing the second application was made, informs me that the fact that a previous application had been allowed and that the decree was more than ten years old at the date of the application were not brought to the knowledge of the Court ; that if they had been so brought, the order of the Court would not have been made. I think, therefore, that as a necessary consequence it follows that, being of opinion that the order for issuing a writ against property ought not to have been executed, the writ against person, which is ancillary to that writ, ought not to issue.

WITHERS, J.—

I quite agree with the CHIEF JUSTICE that the order appealed from must be affirmed, for the reason that the judgment of this Court of the 13th July, 1897, was made *per incuriam*, and ought not to have been made under the circumstances.

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No one appeared for the judgment-debtor on the former occasion. The only point pressed upon us by the appellant was that he had not been wanting in diligence and had not applied for execution, because the judgment-debtor had specially requested him to postpone the execution on the promise that he would make some payment if he did so.

It is clear when I wrote the judgment and referred to the "decree of the 15th December, 1893," that I was labouring under an erroneous idea,—either that the decree itself was comparatively modern or had been revived in comparatively modern times.

I venture to think that, if my attention had been called to the fact that the original decree had been made in 1880 without revival, I should not have made the order of the 13th July, 1897.