1896. *January 24 and 31.*

MEERA SAIBO *v.* SAMARANAYAKA *et al.*

D. C., Kandy, 94,630.

Writ of execution against property—Commitment of judgment-debtor—Civil Procedure Code, ss. 224, 337, 347—Fatal irregularities.

Where plaintiff petitioned in terms of section 347 of the Civil Procedure Code, after several years had elapsed between the date of the decree in his favour and the application for its execution, but suppressed the facts that he had made previous applications for execution of the decree and levies had been made on his writ, and, nevertheless, his application was allowed,—

Held that, in the absence of any evidence to satisfy the Court, as provided in section 337 of the Code, that in the last preceding application due diligence had been used to procure complete satisfaction of the decree, or that execution was stayed at the request of the judgment-debtor, leave to execute the decree should not have been granted.

Writ against property having issued, and the Fiscal having made return thereto that the judgment-debtors neither complied with his requirement to pay nor pointed out property for seizure, plaintiff moved for and obtained a warrant for the arrest of the judgment-debtor, and had him arrested and committed to prison.

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Held that, as the order allowing writ against property had *improvide emanavit*, the writ and the return thereto was unsound, as also the warrant of arrest and the commitment of the defendant to prison.

De Silva v. Sella Umma, *2 S. C. R.*, *155*, explained.

THIS was an appeal from an order made by the District Judge of Kandy on the 9th December, 1895, committing to civil imprisonment the appellant who had been arrested under a warrant against person in execution of a decree obtained against him on the 27th September, 1884.

The facts of the case are fully set forth in the judgments given below :—

Wendt, for appellant.

Dornhorst, for respondent.

Cur. adv. vult.

WITHERS, J.—

On the 27th September, 1884, the appellant and another of the same name were decreed jointly and severally liable to pay the plaintiff a sum of Rs. 256 with interest till payment in full and costs.

Writ against property issued thereupon, and on the 11th November, 1884, two lands were sold, one for Rs. 46, bought by an outsider, and one for Rs. 20, bought by the plaintiff, who was fortunate enough to secure for Rs. 20 a land valued by the Fiscal's officer at Rs. 400, and for this he obtained an order of credit.

On the 11th March, 1885, writ against property was allowed to re-issue, accompanied with writ against person, but writ against property was not taken out till the 6th August following, and no writ against person was taken out at all.

No further steps towards execution was taken till the 22nd March, 1889, when plaintiff took out a *rule nisi* on the judgment-debtor to show cause why judgment should not be revived to recover the balance.

Here the plaintiff stopped and waited till the 4th May, 1891, when he applied for execution of the decree, of which notice was ordered to issue to the defendants, and the 26th May, 1891, was fixed for the hearing of the application.

The defendants were both in default, and the plaintiff was allowed to take out execution. His application was made after the Code had come into operation, but the petition required by the 347th section of the Code did not contain the particulars required by the 224th section of the Code.

I cannot find that plaintiff took advantage of the concession to issue writ.

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On the 31st January, 1895, he applied to the Court again for leave to execute his decree, but in his petition he suppressed a very important particular, viz., (*f*) in section 224 of the Code, "whether any and what previous applications have been made for "execution of the decree, and with what result."

The appellant did not appear on notice. His co-debtor appeared in person. The application was allowed; but, looking at the strict provisions of the 337th section of the Code, that where one application to execute a decree has been made under the Code and granted, no subsequent application to execute the same decree shall be granted, unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree, or that execution was stayed by the decree holder at the request of the judgment-debtor, I feel confident that the Judge was unaware of the application for execution and the grant in 1891.

Writ was issued, and the Fiscal made return thereto on the 26th June, 1895, that his officer had repaired to the residence of the judgment-debtors and required them to pay the amount of the writ; that neither complied with this requirement; that neither pointed out property for seizure; and that his officer was unable to find any property of either debtor, movable or immovable. Upon this return the plaintiff moved on the 10th July, 1895, for a warrant for the arrest of the judgment-debtor, and he was brought up and committed to prison.

I think this order of committal cannot be sustained. In the first place the Fiscal's return upon which the committal is found was made in a writ of execution under an order which *improvide emanavit.*

The order of the 7th March, 1895, was evidently made in ignorance of the application of the 4th May, 1891, to execute the unratified decree, and the grant of that application on the 26th May, 1891.

That order being unsound, the writ and the return become unsound also.

In the next place, I think that the Fiscal's return to the writ of execution mentioned in the 298th section of the Civil Procedure Code must be his return to the writ of execution originally issued.

I would have our judgment in case of *De Silva v. Sella Umma* (*2 S. C. R. 155*) so read.

I would discharge the order of the 7th March, 1895, and the order committing the appellant to prison.

31st January, 1896. LAWRIE, J.— 1896. January 31.

The learned District Judge on the 5th of November, 1895, stated that he was satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree, and he therefore granted the application for execution to re-issue against the person of the judgment-debtors. Against this finding and order no appeal was taken. On 28th November the second defendant was brought before the Court under the warrant of arrest.

His proctor then objected that the debtors could not legally be committed because more than ten years had expired since the date of the decree.

The learned Judge repelled that objection, and directed the debtor to be committed. Against that order this appeal was taken.

In this case a previous application to execute the decree had been made and granted under chapter XXII. of the Code.

That fact distinguishes the present case from that reported in *1 S. C. R. 307*, and brings it within the scope of the judgment in 81,658, D. C., Kandy, referred to in the petition of appeal.

It seems to me that the 337th section is applicable, and that section enacts that no subsequent application shall be granted after the expiration of ten years from the date of the decree sought to be enforced unless the judgment-creditor has by fraud and force prevented the execution of the decree at some time within ten years immediately before the date of application. The date of decree in this case was 27th September, 1884.

The application for warrant against person was 10th July, 1895. More than ten years had elapsed.

I am unable to agree with the reasoning of the learned District Judge, by which he has satisfied himself that the 337th section does not apply to warrants of arrest against person. It seems to me opposed to the spirit of the enactment, and indeed to its plain words, and in that I am confirmed by the judgment of this Court (Bonser, C.J., and Browne, A.P.J.) in the Kandy case already referred to.

On this ground I am for setting aside the judgment under appeal.