1895.
November 7.

PALANIAPPA CHETTY *v.* GOMES *et al.*

D. C., Colombo, 3,430.

Civil Procedure Code, ss. 337–349, 219, 298—Second application for writ—Due diligence.

When a judgment-creditor issues writ against the property of the judgment-debtor, and the Fiscal reports that the judgment-debtor is not possessed of any property, it is the duty of the judgment-creditor to apply under section 219 of the Civil Procedure Code to have the debtor examined as to what property he is possessed of and what debts are due to him, or to have the debtor's person arrested under section 298 of the Code. If a judgment-creditor does not avail himself of either of these provisions, he cannot be said to have used due diligence to secure complete satisfaction of the decree, as contemplated by section 337 of the Code, and is not entitled to make a second application for execution of the decree.

THE facts of the case are sufficiently stated in the judgment of WITHERS, J.

Sampayo, for appellant.

Jayewardene, for respondent.

7th November, 1895. WITHERS, J.—

1895.
November 7.
WITHERS, J.

This appeal is against an order of the Acting District Judge, Mr. Templer, refusing to allow the plaintiff, as execution-creditor, to execute a decree under section 337 of the Civil Procedure Code. He obtained a decree on the 14th December, 1892, and applied for a writ on the 19th of the same month. Writ against property was issued on the 12th February following. This matter came up before the Chief Justice and myself a short time ago, and we called for the Fiscal's return to that writ. When the return was exhibited, we found it to be no return at all, and the record was sent back to the District Court that the Fiscal might be directed to make a return conforming to the requirements of the Code. This amended return is before us now, and from it it appears that the Fiscal duly applied to the execution-debtor, in person, for the payment of the debt, and that the debtor failed to comply with the demand, and further failed to surrender any property when requested. It was open to the plaintiff-creditor in this case to have adopted two steps: one, which might have disclosed the seizable debts of his judgment-debtor; and another, which probably would have compelled the payment of his debt. I refer to section 219 of the Civil Procedure Code as regards the first step, and to taking out warrants against the person of the debtor under the provisions of section 298 of the Code as regards the other.

Having failed to take either steps, the creditor was *primâ facie* wanting in due diligence. But he attempts to excuse himself by saying that soon after the writ issued he came to some arrangement with the judgment-debtor by which the debt was to be paid off by instalments, and he declared that he has, from time to time, received money on account from his judgment-debtor, and it is for the balance of this unsatisfied judgment that he made application for a second issue of process. The judgment-debtor strenuously denies that he ever made any arrangements of the kind, or any of the payments on account of this claim. In his answering affidavit he says that judgment was recovered against him without any knowledge of these proceedings on his part, and he alleges that the note on which judgment was recovered was negotiated in breach of trust by the payee, one Arunasalam.

With these conflicting affidavits before him, the Acting District Judge advised himself to treat the matters as if these were no affidavits at all, and I think he was justified in taking that course. It is clear that the appellant did not exercise due diligence in attempting to recover his judgment debt. Assuming, however, that this agreement was entered into and that these payments were made, his conduct in this matter is open to these objections.

1895. *November 7.* WITHERS, J.

In the first place, he ought to have moved to recall the writ, and further he ought, under the provision of section 349, to have certified the payments to the Court from time to time. His having done neither the one nor the other leads me very strongly to suspect that the arrangement and these alleged payments are fictitious, prepared to procure his present application being granted, in view of the time that has elapsed between decree and his application to re-issue writ.

Affirmed with costs.

BROWNE, J., concurred.