1907.
July 17.

Present: Mr. Justice Wood Renton.

ELIYAPILLAI *et al. v.* MURUKESU.

C. R., Point Pedro, 7,028.

Writ—Re-issue—"Due diligence"—Plea of payment—Execution stayed at the instance of the debtor—Civil Procedure Code, ss. 219, 337, *and* 349.

Delay in the enforcement of a writ and the failure to take proceedings under section 219 of the Civil Procedure Code create a presumption of want of due diligence on the part of the judgment-creditor; but it is a presumption that may be rebutted by other evidence.

The judgment-debtor may set up the pleas of payment and want of due diligence to an application for execution, there being no necessary inconsistency between the two pleas.

APPEAL from an order of the Commissioner (W. G. Vallipuram, Esq.) refusing an application for execution.

The facts sufficiently appear in the following judgment of the Commissioner:—

"The decree in this case is dated 22nd January, 1900; writ of execution was issued on 4th April, 1900. In his return dated 10th April, 1901, the Fiscal reported: 'Demand of payment was not made, as the debtor was absent at Vavuniya. No property was pointed out or surrendered. Writ has expired by effluxion of time and is returned to Court.'

"According to affidavit now filed by the heirs of the judgment-creditor the judgment-creditor died in September, 1904; that is, about 3½ years after the date of the Fiscal's return. During these 3½ years no steps whatever were taken by the judgment-creditor.

"The present application made by the heirs (substituted-plaintiffs) of the judgment-creditor is dated 14th August, 1906; that is, about two years after the death of the judgment-creditor. No reason whatever has been shown in their affidavit for the delay in making this application for execution.

"In his answering affidavit the judgment-debtor has pleaded settlement of the judgment amount during the judgment-creditor's lifetime. He has raised no other objection.

"It has been urged by counsel for the substituted plaintiffs that evidence will be led to prove that on the last occasion the writ was stayed at the request of the judgment-creditor, that fraud was perpetrated by him, and that all due diligence was exercised. These reasons, however, have not been set out in the affidavit filed by the substituted plaintiffs. I do not, therefore, think that I need proceed to hear evidence on these points.

"It is clear that the judgment-creditor took no steps whatever on the first issue of the writ to have the debtor examined under section 219, Civil Procedure Code, and it cannot therefore be said that he

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used due diligence to secure complete satisfaction of the decree as contemplated by section 337, Civil Procedure Code. It does not matter whether the debtor was in his village or away at Vavuniya, but the question is whether the judgment-creditor did take any steps to have the debtor examined. So long as the judgment-creditor took no steps to fulfil this requirement, I think the substituted plaintiffs are not entitled to this application being allowed.

" *Palaniappa Chetty v. Gomes* [1] is, I think, in point. The application is disallowed, but I give no costs to the judgment-debtor, since the application has failed for a reason other than that pleaded by him in his affidavit."

The substituted plaintiffs appealed.

F. J. de Saram, for the substituted plaintiffs, appellants.

Balasingham, for the defendant, respondent.

Cur. adv. Vult.

17th July, 1907. WOOD RENTON J.—

In the present case Mr. Balasingham urged all that could be said in support of the decree appealed against; but I have come to the conclusion that it must be set aside. It would appear that the plaintiff obtained judgment against the respondent for a sum of Rs. 100, interest, and costs so far back as the 22nd January, 1900, and that writ of execution was issued on the 4th April in the same year. In the return to that writ the Fiscal reported on the 10th April that demand of payment had not been made since the debtor was absent at Vavuniya, and no property was pointed out for seizure. In September, 1904, the judgment-creditor died; and, so far as the evidence shows, no steps seem to have been taken either in the interval from the date of the Fiscal's return up to his death or in fact till the 14th August, 1906, when the plaintiff-appellants applied to be substituted as his heirs for the purpose of the enforcement of the judgment decree. It was held by the learned Commissioner of Requests that, inasmuch as the appellants' affidavit in support of their present application for the re-issue of the writ disclosed no reasons for the delay in its enforcement, and also as there had been raised a plea of payment on the part of the judgment-debtor, who had at no period been examined as to his property under section 219 of the Civil Procedure Code, the re-issue ought not to be allowed. In my opinion this decision cannot be supported. It appears from the record that on the argument of the present application the appellants' counsel asked leave to adduce evidence for the purpose of showing that the non-execution of the writ had been due to the request of the judgment-debtor himself, that he had held himself fraudulently out of the reach of process, and that under all the circumstances there had been no lack of due diligence on the part either of the original judgment-creditor or of his heirs,

[1] (1895) 1 *N. L. R.* 356.

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the present appellants. It was urged before me by Mr. de Saram when this came first on for argument that in view of the decision of the Supreme Court in the case of *Veerasamy v. Tambipillai* [1] it was incompetent to join the two defences, viz., that of payment and want of due diligence in procuring satisfaction of the writ set up by the execution-debtor, inasmuch as the two pleas are contradictory. In the recent case, however, of D. C., Galle, No. 4,299,[2] which is not yet reported, it was held by my brothers Wendt and Middleton, and I entirely agree myself with the decision, that there is no necessary inconsistency between the two pleas to which I have referred; for the plea of payment only brings matters up to the date of the payment, and it must still be open to the judgment-debtor to allege that there has been a lack of due diligence since that date. In the present case, however, it was clearly within the right of the appellants to prove the facts on which they rely. It was, of course, competent for the Commissioner, if he thought that there was any danger of the other side being taken by surprise, in view of the defective nature of the appellants' affidavit, to postpone the proceedings to such time and on such terms as to costs or otherwise as he thought fit. It may clearly be conceded that the delay in the enforcement of the writ creates a presumption of the absence of due diligence (see the cases of *Sangarapulle v. Tangam*[3] and *Sellappa Chetty v. Kandiah*[4]). It is clear also that the failure of the judgment-creditor to take proceedings under section 219 creates a presumption against him (see *Palaniappa Chetty v. Gomes and others*[5]). But it is only a presumption (see case of *Silva v. Alwis*[6]), and it is the duty of the Court conducting an investigation into the circumstances under which the re-issue of the writ is claimed, to hear all the evidence that the applicant can put forward in support of his claim. It is a duty which was all the more incumbent on the Court in the present case in view of the fact that, in spite of the allegation of payment, no payment had been certified in conformity with the provisions of section 349 of the Civil Procedure Code, which, although it applies primarily to the execution-creditor, applies also to the judgment-debtor (see *Sellappa Chetty v. Kandiah* already referred to, *Bristol Hotel Co., Limited, v. Power*,[7] and *Letchimanan v. Sanmugam et al.*[8]) In the present case I set aside the decree appealed against, and send the case back for inquiry and adjudication. The appellants will have the costs of the present appeal, but it seems to me that the costs of the original proceedings should abide the event, in view of the unsatisfactory character of their petition in support of the application for the re-issue of the writ.

Appeal allowed; case remitted.

[1] (1897) 4 *N. L. R.* 57.
[2] *S. C. Min. 27th February*, 1907.
[3] (1904) 4 *Tambiah* 163.
[4] (1904) 4 *Tambiah* 171; 2 *Balasingham* 61.
[5] (1895) 1 *N. L. R.* 356.
[6] (1907) *App. Court Reports*, 102.
[7] (1894) 3 *S. C. R.* 168.
[8] (1903) 8 *N. L. R.* 121.