1907.
September 3.

[Full Bench.]

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Middleton, and Mr. Justice Wood Renton.

SILVA *et al. v.* SINGHO *et al.*

D. C., Matara, 3,009.

Writ, application for—Delay of more than a year between date of decree and date of application for writ—Explanation of delay—Proof of amount due—Due diligence—Civil Procedure Code, ss. 337 and **347.**

Where more than a year has elapsed between the date of decree and the date of application for writ, the judgment-creditor is not required, as a condition precedent to such application being allowed, to prove the exercise of due diligence, or to explain the delay in making such application.

The judgment-creditor need only show that the decree has not been satisfied.

Chellappa Chetty v. Kandyah[1] and *Silva v. Alwis*[2] over-ruled on this point.

APPEAL from an order of the District Judge (G. F. Plant, Esq.) refusing to allow execution on the ground that the judgment-creditors had failed to explain the delay in applying for writ. The facts sufficiently appear in the judgment of the Chief Justice.

Sampayo, K.C. (*Walter Pereira, K.C., S.-G., Bawa,* and *Prins* with him), for the plaintiffs, appellants.

H. A. Jayewardene (*H. J. C. Pereira* and *R. L. Pereira* with him), for the defendants, respondents.

Cur. adv. vult.

[1] (1905) 2 *Balasingham* 61.

[2] (1907) 1 *App. Court Reports* 102.

3rd September, 1907. HUTCHINSON C.J.— 1907. *September 3.*

The question in this case is whether an execution-creditor who has not applied for a writ of execution until more than one year after the date of his judgment is entitled to the writ upon proof that the judgment debt is still owing, or whether he is barred by the delay unless he gives some excuse for it. It depends on the true meaning of section 347 of the Civil Procedure Code. The action was on a mortgage bond. The judgment was given on the 25th March, 1903, and ordered that the defendant should pay Rs. 2,945 and interest and costs within seven days, and that in default the mortgage property should be sold. No application was made for execution until the 10th July, 1906, when the plaintiffs presented a petition for that purpose, alleging in the petition that the reason for the delay was that the defendants had promised to pay, and also because the most valuable land mortgaged was the subject of a partition decree, which was not yet decided. The second defendant filed an affidavit in opposition, alleging that after the judgment they agreed with the plaintiffs to allow the plaintiffs to possess the mortgaged lands for three years, and that in that way the judgment should be fully satisfied, that the plaintiffs had been in possession since 1898; that the three years expired on the 25th March, 1906; and that the amount of the judgment debt had been thereby fully satisfied.

When the petition came on for hearing, the first defendant did not appear; the second defendant appeared and waived the claim on the ground of settlement of the debt, but urged that the plaintiffs were not entitled to the writ because of their delay, which was not excused.

The District Judge held, on the authority of *Chellappa v. Kandayah*,[1] that the execution-creditors were bound to show that they had exercised due diligence to procure satisfaction of the decree, or that execution was stayed at the request of the debtors. He found that they had not done so, and he therefore refused their application.

Section 347 enacts that "if more than one year has elapsed between the date of the decree and the application for its execution, the Court shall cause the petition to be served on the judgment-debtor, and shall proceed thereon as if he were originally named respondent therein." That seems to mean that in such cases the judgment-debtor must have notice, so that he may state any reasons which there may be against the issue of the writ. But it is said on behalf of the respondents that it has been construed by this Court in the case relied on by the District Judge to mean that the creditor must prove something more than that the debt is still due, that is, he must also "explain the delay."

[1] (1905) 2 *Balasingham* 61.

1907.
September 3.

HUTCHINSON C.J.

In that case the judgment had been given on the 17th July, 1896, and the application for the writ of execution was made on the 11th January, 1905. The District Court made an order allowing the application. On appeal this Court set aside the order. Layard C.J. said he was inclined to think that after one year from the date of the decree the creditor "must satisfy the Court why he has delayed in taking proceedings under his decree." He pointed out that "there is no material before us to show that any debt is due under the decree," and "the amount of the debt due under the decree has not been established." Wood Renton J. concurred.

The fact that it was not proved that anything was due was enough to justify the Court in refusing the writ. But if the Court meant to rule that, even if the amount due was proved or admitted, the writ ought still to have been refused, I cannot think that the ruling was right.

In *Silva v. Alwis*[1] Wendt J. said that he thought he was bound by the above ruling, and that "the applicant must satisfy the Court that he had reasonable grounds for the delay"; but he found in the case before him that the applicant had done so.

The effect of this ruling would be that if the creditor, on a judgment which is still in force and wholly unsatisfied, makes his first application for execution on the 366th day after the judgment, and the debtor appears and admits that the whole debt is still due, execution will not be granted, unless the creditor "explains the delay." This would be to create a new Statute of Limitation. The Legislature has not expressly and, in my opinion, it has not impliedly made any such enactment.

In my opinion the District Court ought not to have refused the plaintiffs' application on the ground on which it did so.

I do not, however, find any evidence as to the amount of the debt which is now due. The second defendant in his affidavit said that it had been satisfied. He withdrew that allegation at the hearing. His advocate now asks to be allowed to withdraw that withdrawal; but I do not think we should allow him to do so. I think the case should be remitted to the District Court for the plaintiffs to prove the amount due. If the defendants have any claim against the plaintiff for wrongfully taking or for keeping possession of the property since 1898, they must sue for it.

Case remitted to the District Court accordingly. Defendants to pay plaintiffs' costs of appeal.

MIDDLETON J.—

I agree that the appeal should be allowed, and that the case should be remitted to the District Court on the terms and for the reasons given by my Lord, with which I entirely concur.

[1] (1907) 1 *App. Court Reports* 102.

I do not think it is necessary for me to say more than that. I think we cannot read into the provisions of the Civil Procedure Code words which would have practically the effect of extending the provisions of the Ordinance regulating the prescription of actions without the express or implied sanction of the Legislature.

WOOD RENTON J.—

In my opinion this appeal must be allowed. The case was referred to a Bench of three Judges by Grenier J. and myself for the purpose of securing a decision on the question whether, as held by Layard C.J. in *Chellappa Chetty v. Kandyah* [1] in a judgment to which I was myself a party, it is necessary for a judgment-creditor to prove that due diligence has been exercised as a condition precedent to the issue of a writ under section 347 of the Civil Procedure Code, where more than a year has elapsed between the date of the decree and the application for its execution. I do not think, now that the point has been fully argued, that any such requirement can be read into the provisions of section 347. Questions of due diligence arise only on applications for re-issue of writs (see section 337, C.P.C.).

Appeal allowed; case remitted.