1945 *Present :* **Jayetileke J.**

H. C. FERNANDO *et al.*, Appellant, *and* M. THAMBIRAJA, Respondent.

237—C. R. Negombo, 45,321.

Execution—Application for writ more than one year after decree—Notice to defendant—Application by petition—Civil Procedure Code, s. 347.

Where more than one year has elapsed between the date of the decree and the application for its execution the failure to give the defendant notice of the application for writ renders the execution proceedings void and of no effect.

The provisions of section 347 of the Civil Procedure Code requiring application by petition and notice of it to the defendant must be strictly followed.

APPEAL from an order of the Commissioner of Requests, Negombo.

D. S. L. P. Abeyesekere for defendants, appellants.

S. N. Rajaratnam (with him *S. P. M. Rajendram*) for the respondents.

Cur. adv. vult.

[1] *8 Times Reports 71.*

February 9, 1945. JAYETILEKE J.—

This is appeal by the defendant from an order dismissing her application to have a sale held by the Fiscal set aside. On September 2, 1942, the plaintiff obtained a decree against the defendant for a sum of Rs. 45 and costs payable by monthly instalments of Rs. 3. The defendant paid thirteen instalments and defaulted thereafter. On March 27, 1944, the plaintiff applied for and obtained an order for a writ of execution for the recovery of the balance amount due to him on the decree without notice to the defendant. The application is in tabular form No. 42 in Schedule II of the Civil Procedure Code. On June 27, 1944, the Fiscal put up for sale a land belonging to the defendant and the second respondent purchased it for a sum of Rs. 15. The question that arises for for consideration is whether the failure to give the defendant notice of the application for writ renders the execution proceedings void. Section 347 of the Civil Procedure Code provides that where more than an year has elapsed between the date of the decree and the application for execution the application shall be by petition, and that when no respondent is named in the petition of application for execution the Court shall cause the petition to be served on the judgment-debtor. Beale on Cardinal Rules of Legal Interpretation says at page 375, 3rd Edition :—

> " When a statute declares that something ' shall ' be done, the language is considered imperative, and the thing must be done ; where the word ' may ' is used, the language is, as a general rule, permissive ".

In *Perera v. Novishamy* [1], Schneider J. pointed out that the procedure indicated in this section must be strictly followed. In *Ran Menik Etana v. Appuhamy* [2] where an application to certify payment under section 349 of the Civil Procedure Code was not made by petition, as required by the section, it was held that the procedure must be strictly followed before payment can be recognized. In the present case there is, in addition to the defect in the form of the application, the fact that no notice of the application was given to the defendant. The legislature has, presumably, provided for notice to be given to the judgment-debtor in order to give him an apportunity of showing cause against the issue of writ or paying the amount due on the decree. Had the defendant been served with notice of the application it is, at least, probable that she would have paid the amount due having regard to the fact that she has brought it into Court when she made the present application.

The effect of the failure to give notice under section 248 of the Indian Code of Civil Procedure of 1882, which corresponds with section 347 of our Code, has been considered in several cases. In *Gopal Chunder Chatterjee v. Gunamoni Dasi* [3] Norris J. said :—

> " I am of opinion that the issuing of the notice required by section 248 of the Code of Civil Procedure is a condition precedent to the execution of the decree against the representative of the deceased judgment-debtor ".

[1] *29 N. L. R. 242.* [2] *24 N. L. R. 357.*

[3] *I. L. R. 20 Cal. 371.*

In *Sadhro Pandey v. Gasiram Gyawal* [1] Ghose and Gordon JJ. in their joint judgment said :—

> "And we are of opinion that the whole of the proceedings commencing with the application of April 7, 1892, are altogether bad by reason of no notice under s. 248 having been issued upon the judgment-debtor and the judgment-debtor having had no opportunity to show cause why the decree should not be executed, it seems to us that the sale at which Palakdhari purchased the property cannot be sustained. The matter that has been complained of in this case is not one of irregularity but one of illegality, if we may say so, and if the whole of the proceedings were altogether bad and ineffectual so as to bind the judgment-debtor, it is obvious that anything done by the Court in the course of the execution that was taken out against the judgment-debtor must fall through ".

The same view was taken by the Privy Council in the case of *Ragunath Das v. Sunder Das Khetri* [2]. Lord Parker said :—

> "As laid down in *Gopal Chunder Chatterjee v. Gunamoni Dasi* (*supra*) a notice under section 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor ".

These cases were cited with approval in *Kannangara v. Perics* [3] where Drieberg A.J. said :—

> "Notice is required in the interest of parties against whom execution is sought, and the absence of notice makes the execution proceedings void as against them and not merely voidable ".

With the views expressed by the learned Judges in these cases I respectfully agree. The sale in question is, in my opinion, void and of no effect. I would accordingly allow the appeal with costs here and of the inquiry in the Court below.

Appeal allowed.