

1919.

Present: Loos A.J.

GUNASEKERA v. POMPEUS

335—C. R. Colombo, 33,903. .

Court of Requests—Jurisdiction to issue writ for over Rs. 300—Section 76, Civil Procedure Code.

A Commissioner of Requests has jurisdiction to issue a writ for more than Rs. 300 and costs if it be in accordance with the decree entered previously. It is too late to take the objection to jurisdiction when writ is issued.

THE facts appear from the judgment.

G. V. Perera (with him *De Alwis*), for appellant.

De Soysa, for plaintiff, respondent.

Cur. adv. vult.

March 17, 1919, Loos A.J.—

The plaintiff sued the defendant in this case for the recovery of a sum of Rs. 300 as rent of certain premises for eleven months at Rs. 50 per mensem (waiving his claim to a sum of Rs. 250 in order to bring the action in the Court of Requests), and for damages at Rs. 50 per mensem, as the defendant had failed to quit the premises, although he had received notice to do so on January 31, 1913.

The defendant failed to appear apparently, and judgment was entered in plaintiff's favour for Rs. 300, and damages at Rs. 50 per mensem from May 1, 1913, till delivery of possession of the premises to the plaintiff, and for ejectment of the defendant therefrom. Writ of execution issued and re-issued in due course several times, and the Fiscal reported a failure to pay the amount and the absence of property for seizure, the last of such reports being made on January 30, 1914.

On September 5, 1918, the plaintiff again moved the re-issue of the writ, supporting his application by an affidavit, in which he deposed that he had exercised due diligence, but was unable to find property belonging to the defendant, and that he was credibly informed that the defendant is now possessed of property, and that the full amount of the decree is still due. The defendant showed cause against the application, limiting his objection to the one point, that there had been a failure to exercise due diligence.

The learned Commissioner found in plaintiff's favour, and also considered the question, which appears to have been incidentally raised at the argument, as to whether he had power to issue a writ for more than Rs. 300 and costs, it being contended, on the authority of *Hewawitarana v. Marikar*,¹ that the Court had no power to do so. The learned Commissioner held that the writ was in conformity with the decree, that it was not competent to him to go behind the decree, and ordered the writ to re-issue.

The defendant has appealed against that order, and the only point argued in this Court was that the Commissioner had no power to order the writ to re-issue for a sum in excess of Rs. 300 and costs.

Section 76 of the Civil Procedure Code provides that where the defendant intends to dispute the jurisdiction of the Court, he must do so by a separate and distinct plea expressly traversing the averment of jurisdiction. In his case the defendant was in default, and no answer was filed by him, so that there was no plea as to jurisdiction raised by him. The decree has, in fact, been entered for an amount in excess of the jurisdiction of the Court of Requests without any demur on the part of the defendant, and has been in force since 1913.

Can the defendant now take the objection that the learned Commissioner had no power to order a writ of execution to issue for the recovery of the amount of the decree? The Court had no power to refuse the application for execution, provided that it was in conformity with the decree, on the ground that the amount for which such decree has been entered is in excess of the jurisdiction of the Court, and the plaintiff is entitled to his writ, which is in conformity with the decree entered in the case, and to recover the amount decreed, so long as that decree remains in force.

The defendant's counsel sought to rely on the authority of the case of *Hewawitarana v. Marikar* (*supra*), already referred to above, but the point now raised did not arise in that case, for there the decree itself was attacked on the ground that the Court had no jurisdiction to enter such a decree.

I would affirm the order appealed against, with costs.

Affirmed.

1919.

Loos A.J.

*Gunasekera
v. Pompeus*