

Present : Lascelles A.C.J. and Van Langenberg A.J.

Mar. 14, 1911

DOLOSWALA v. AMARISA *et al.*

24—D. C. Ratnapura, 952.

Refusal of application for re-issue of writ—Res judicata.

An application in November, 1910, for a notice on the judgment-debtor to show cause why writ should not be re-issued to recover the balance due was refused, as the "last step was taken as far back as 1905 and nothing done since." Subsequently the judgment-creditor filed another application explaining what steps he had taken to recover his money.

Held, that it was competent for the Judge to entertain the subsequent application.

An order passed by a Court rejecting an application for execution of a decree on the ground that the period allowed by law for execution had expired is not an adjudication within the rule of *res judicata*.

THE facts are fully set out in the judgment.

A. St. V. Jayewardene, for the defendants, appellants.—The Court having refused the application of November 15, 1910, had no power to entertain the subsequent application for issue of writ. The rule as to *res judicata* applies to applications for issue of writ. *Ensohamy v. Maricar*.¹ The plaintiff should have appealed against the order refusing his first application. *Bandey Karim v. Bundo-padhya* ;² see also *Coventry v. Tulshi Pershad Narayan Singh*.³

The second application if allowed would have the effect of vacating the first order of refusal. It has been held that a Court has no power to vacate its own order (*Ramasampulle v. De Silva* ⁴).

No appearance for respondent.

Cur. adv. vult.

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On December 6, 1900, the plaintiff obtained a decree against the defendant for Rs. 600 and costs. On March 20, 1901, writ was issued and a small sum was recovered. On November 15, 1910, the plaintiff moved for a notice on the defendant to show cause why the writ should not be re-issued to recover the balance due, when the learned Judge made the following order : "Refused, last step having been taken as far back as 1905 and nothing done since".

¹ (1908) 11 N. L. R. 225.

² (1904) 31 Cal. 822.

³ (1882) I. L. R. 9 Cal. 65.

⁴ (1909) 12 N. L. R. 298; 1 Cur. L. R. 226.

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The learned Judge, while making this order, had no material whatever before him to show what action the plaintiff had taken since the first issue of the writ. On December 2, 1910, the plaintiff filed another application for writ, and supported it with an affidavit explaining what steps he had taken to recover his money. The defendant received notice of this application, and after hearing both sides the District Judge recorded that he was satisfied that the plaintiff had taken all steps possible to recover the balance due, and he allowed the application. The defendant has appealed. It was urged for him that as the learned District Judge's order of November 15, 1910, did not reserve to the plaintiff the right to renew his application for writ, it was not competent for the Judge to entertain the subsequent application made by the plaintiff. It seems to me that the point is covered by authority. In the case of *The Delhi and London Bank, Limited, v. Orchard*¹ it was held by the Privy Council that an order passed by a Court rejecting an application for execution of a decree on the ground that the period allowed by law for execution had expired was not an adjudication within the rule of *res judicata*. I may also refer to *Hurrosoondary Dasse v. Jugobundhoo Dutt*.² I think that the objection is not a sound one. On the merits the plaintiff's affidavit being uncontradicted, I agree with the learned District Judge that the writ should issue. I would dismiss the appeal with costs.

LASCELLES A.C.J.—I agree.

Appeal dismissed.

¹ (1877) I. L. R. 3 Cal. 47.

² (1830) I. L. R. 6 Cal. 203.