1942 *Present* : **Howard C.J. and Soertsz J.**

SUNDARAMPILLAI, Appellant, and SALHA UMMA, Respondent.

74—D. C. Colombo, 3,259.

Writ—Interruption of execution proceedings by claim—Release of seizure—Fresh application for writ—Prescription—Civil Procedure Code, s. 337.

Where on a writ issued to execute a decree, property is seized and, upon a claim being preferred, the seizure is released, a subsequent application for a writ is not one merely to resume execution proceedings interrupted by the claim but is a fresh application which would be barred under section 337 if it was made 10 years after the decree.

[1] *(1912) 13 Cr. L. J. 251.*

Semble, where, in such a case, time has run against a decree-holder while he is contending that the property in question is liable to sale under his writ, and, where he succeeds eventually, it is open to him to obtain execution of the decree in the 247 action.

Silva v. Silva **(5 C. W. R. 98)** and ***Perera v. Mudalali*** **(27 N. L. R. 483)** referred to.

APPEAL from an order of the District Judge of Colombo.

S. Nadesan (with him *Chellappa*), for substituted-plaintiff, appellant.

Cur. adv. vult.

October 29, 1942. SOERTSZ J.—

This is an appeal from an order refusing an application made by the substituted-plaintiff in this case to execute a decree obtained by the original plaintiff, in the District Court of Colombo, on May 2, 1928, and assigned by him to the appellant on November 1, 1934. This application was made on September 18, 1942, and the purpose of the application, to quote from the petition, is "to enable the substituted plaintiff to sell the properties *already seized* by him, and declared liable to be sold by the District Judge in case No. 6,504 of the District Court of Ratnapura".

The Judge before whom this application came up for consideration held that it was obnoxious to section 337 of the Civil Procedure Code because it is "a subsequent application" made after the expiration of ten years from the date of the decree sought to be enforced. He rejected the appellant's contention that this is an application to resume execution proceedings that had been interrupted by a claim preferred to the property seized under the decree, and by the action that followed on the claim being upheld.

In order to determine the question that arises on this application and the contention advanced against it, a statement of the material facts that preceded the application is necessary. Those facts are as follows:— The decree in this case was entered on May 2, 1928, in favour of the original plaintiff for Rs. 2,156.57, and interest and costs against the defendant as administratrix of her husband's estate. He took out writ and succeeded in recovering a sum of Rs. 891.46. Thereafter, by a deed dated November 1, 1934, he assigned and transferred his decree, in respect of the balance that remained due, to the appellant who, in virtue of it, moved for and obtained substitution in his place, and then seized a land known as Ganelandaenblerwatta. On that seizure being effected the defendant, in her personal capacity, and her children preferred a claim under section 241 of the Civil Procedure Code. That occurred towards the end of 1937. The claim *was upheld*. Thereupon, the appellant instituted an action under section 247 to have the property that had been seized declared executable under the decree. That action was instituted in the District Court of Ratnapura, the land seized being situated within the jurisdiction of that Court. Judgment was delivered on May 14, 1940, declaring a half of the land seized executable. Before that judgment came to be entered the appellant applied for a writ "to enable to *seize* and sell certain *other lands* which the defendant is said

to be possessed of". That application was considered on August 30, 1940, and it was disallowed on the ground that it was a subsequent application made after the expiration of ten years and, and as such, barred by section 337 of the Civil Procedure Code. This order was based on the interpretation of section 337 given by de Sampayo J. in the case of *Silva v. Silva*[1]. There was no appeal from that order, and Counsel who appeared before us in support of the present appeal conceded that it was a correct order. But he contends that the present application is on an entirely different footing for, he submits, it is, in effect, an application to be allowed to re-issue his writ, in order to sell the property he had seized in 1937, that is to say, within ten years of the decree.

The question then is whether that submission is sound; whether the writ of 1937 and the seizure effected in virtue of it continued to exist in law, although in a state of suspended animation. The word "re-issue" in the phrase "re-issue of a writ", obviously, postulates an existent writ. A Divisional Bench of this Court pointed out in the case of *Andris Appu v. Kolande Asari*[2], that this word "re-issue" does not occur in the Code itself in connection with writs of execution, but "is commonly used to express the fact that the *same writ* is issued again for execution or further execution". The point that arose in that case was whether in a case in which the Fiscal applied to the Court for an extension of time one day after the writ was due to be returned, a fresh seizure of the property that had been seized under it was necessary to enable the property to be lawfully sold, or whether the seizure already effected affords foundation for the sale. The Judges held that a fresh seizure was not necessary because, to quote from the judgment of de Sampayo J. (at pages 232, 233) "a seizure once effected remains operative until its renewal or withdrawal by order of the Court or, as I ventured to say in my judgment in *Yapahamine v. Weerasuriya*[3], by circumstances of abandonment". This view is reinforced by the judgments delivered in the later case of *Punchiappuhami v. Dharmaratna*[4]. There is another Divisional Bench case, that of *Perera v. Mudalali*[5] bearing on this question. In that case, on a decree entered against the first defendant there in 1909, a property was seized on August 5, 1916, and the seizure was registered on the 18th of that month. A sale was held under this seizure but the Fiscal reported that the purchaser had made default. There were several subsequent applications for execution but none of them bore fruit. Then, on November 11, 1921, ten years after the date of the decree, a further application was made under section 337, and was allowed. But no steps were taken. Writ was again re-issued and the same property was seized and a sale was held on November 6, 1922. The second defendant bought the property. Meanwhile the first defendant mortgaged this property on a bond of December 11, 1916, registered on the 21st of that month, with the plaintiff, who sued on his bond. In this competition of interests, the majority of the Bench held in favour of the second defendant, on the ground that the seizure on which the sale must be held to have taken place was the seizure effected and registered in 1916,

[1] *5 C. W. R. 98.*
[2] *19 N. L. R. 225*
[3] *17 N. L. R. 183.*
[4] *36 N. L. R. 113.*
[5] *27 N. L. R. 483.*

and not on the seizure of 1922, which they said was unnecessary. In the course of his judgment, Dalton J. made this observation (p. 494) "whether or not an application under section 337 is a step in former proceedings or an entirely new proceeding must depend upon the circumstances".

In view of the rules enunciated in these cases, the crucial question for consideration, in the present instance, is whether this application "is a step in the former proceedings or an entirely new step" or, in other words, whether the application can be made referable to an existent seizure.

In regard to this question, Counsel for the appellant referred to two Indian decisions of the Full Bench of the High Court of Allahabad. In the earlier case, that of *Para Ram v. Gardner*[1], the majority of the Judges held that an application to execute a decree against a judgment-debtor's property made more than three years after the last application was not barred by limitation under section 167 Sch. 2 of Act IX. of 1871, which was the act in operation at that time for, as in that case, the last application had been interrupted by a successful objector against whom the decree-holder had to bring a regular suit; that the renewed application to execute within three years of the judgment-creditor obtaining judgment in that regular suit was not a first application, but a continuance or revival of the previous application, that had been interrupted by the objector. Pearson J. dissented in what, to me, appears to be a very convincing judgment, but in the absence of the Act of 1871, which I have not been able to get, a fuller consideration of the matter is not possible.

The other case, however, arose under the Indian Code of Civil Procedure of 1882, which is the Code on which our own Code is largely based. That case is the case of *Rahim Ali Khan et al v. Phue Chand*[2] in which the Bench held that where an application for execution in accordance with section 235 (our section 224) of the Code within the period of limitation prescribed by section 230 (the equivalent of our section 337) of the code, had been made and been allowed, the right of the decree-holder to obtain execution will not necessarily be defeated if, by reason of objections on the part of the judgment-debtor, or action taken by the Court, or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution cannot be obtained within the period of limitation. Knox J. based his decision on the ground that "the attachment of the property made on the writ obtained on the first application has subsisted ever since and has not matured into sale solely by reason of difficulties and objections which the appellant has placed in the way and which have had, one by one, to be removed". The other Judges came to the same conclusion but for different reasons, such as that the application for execution contemplated in section 230 (our 337) is not "an application to proceed with the application for execution already made and granted" (Bannerji J.); or that "it is no violation of section 230 for the Court now to proceed upon the application which was granted by an order passed within

[1] *1 Allahabad 355.* [2] *18 Allahabad 482.*

time, but which order for no fault of the decree-holder and owing to circumstances beyond his control has not been carried out" (Aikman J.). But if I may say so with very great respect, these latter interpretations whittle down the scope of the section in an unwarranted degree, and are opposed to the view taken by de Sampayo J. in *Silva v. Silva* (*supra*), when he said "section 337 of the Civil Procedure Code *inter alia* provides that, where an application for execution have been made and granted, no subsequent application shall be granted after the expiration of 10 years from the date of the decree. This limitation of 10 years is *absolute whatever may have happened in the meantime*". The basis upon which Knox J. put his judgment was that it was not a case of a subsequent application for a writ, but an application to carry out a sale to complete *a seizure that was subsisting*. That is the important question as pointed out in the local cases I have already referred to—*Andris Appu v. Kolande Asari* (*supra*) and *Perera v. Mudalali* (*supra*).

In the Indian case, Knox J. pointed out, "the attachment has subsisted ever since", and on the facts of that case it was so, because the objection made by the objectors was *rejected* under section 281 of the Indian Code (our section 245).

In the case we are now considering however, the claim that was preferred upon the seizure being effected *was upheld* and, consequently, in virtue of section 244 of our Code, the property must be held to have been *released from seizure*. That section enacts that if upon investigation the Court is satisfied in regard to the facts mentioned in the section . . . . "The Court shall release the property wholly, or to such extent as it thinks fit, from seizure". On the facts of this case it is clear that the whole property seized must be deemed to have been so released, for the 247 action that followed was in respect of the whole land. It follows, therefore, that at the time the present application was made, there was no seizure and the present application is, clearly, a subsequent application for a writ to authorise a fresh seizure, and not merely an application to carry out a subsisting seizure to its goal—a sale.

For these reasons, I am of opinion that the present application is barred by section 337.

Counsel for the appellant adduced instances of hardship that could accrue in a case like this by reason of protracted claim proceedings and 247 actions and appeals. But it seems to me that in a case like this, where time has run against a decree-holder while he has been engaged in contending that the property in question is liable to sale under his writ and has succeeded eventually, it is open to him to obtain execution of the decree he has obtained in the 247 action and so attain the end in view, that is to say, complete or partial satisfaction of his decree. At any rate, as at present advised, I do not see any good reason for saying that he may not take such a course.

I dismiss the appeal.

HOWARD C.J.—I agree.

Appeal dismissed.