Present: Pereira J. and Ennis J.

1914.

SIDAMPARAM CHETTY *v.* JAYAWARDENE.

113—D. C. Colombo, 19,718.

Civil Procedure Code, s. 337—Application for writ—Prevention of execution of decree by fraud or force—Notary practising his profession indoors—Failure to surrender his furniture.

The prevention by fraud or force of the execution of a decree in order to deprive a judgment-debtor of the benefit of section 337 (*a*) of the Civil Procedure Code must be strictly traceable to an act done within the ten years immediately preceding the date of the application for execution. The mere fact that the debtor having assets, including household furniture, failed to surrender these to be taken in execution, or that he, being a notary, practised his profession indoors, and thus prevented arrest in execution, does not amount to such fraud or force as is contemplated by the section.

IN this case the plaintiff applied on April 30, 1914, for execution of the decree dated February 10, 1904. The application was opposed on the ground that the plaintiff was not entitled to execution of it as it was more than ten years old. The learned District Judge held that the appellant had within the last ten years prevented execution of the decree by fraud, and that therefore the plaintiff was entitled to have it executed, and allowed the application with costs.

The following is the order of the District Judge:—

I allow the application. Mr. Samarawickreme submitted that the mere fact of the defendant sitting behind trellis work and carrying on his ordinary avocation does not constitute fraud, as the law does permit a debtor to resist an execution by keeping the front doors of his house shut.

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Sidamparam Chetty v. Jayewardene

A glance at the order of November 28, 1910, by the then Judge of this Court, will show that the defendant from the very first inception of this action put obstacles in the way of the plaintiff recovering his due. The defendant is said to be a notary. He must have some assets, even in the shape of furniture. He has not surrendered them for execution. He has not stated that he is too poor, and therefore unable to pay the claim. On the contrary, his conduct only leads to the assumption that he has endeavoured to prevent execution by making it impossible for the officers of law to enforce execution in any form. This conduct I consider fraudulent towards the plaintiff. I allow plaintiff the costs of this application.

G. S. SCHNEIDER, Acting D.J.

Bawa, K.C., and *Samarawickreme*, for defendant, appellant.

Bartholomeusz and *D. B. Jayatilake*, for plaintiff, respondent.

Cur. adv. vult.

November 11, 1914. PEREIRA J.—

This is an appeal by the defendant from an order on an application made by the plaintiff for the issue of execution on the decree entered up in the case. Under section 337 (*a*) no application for the execution of a decree should be allowed after the expiration of ten years from the date of the decree, unless the judgment-debtor has by fraud or force prevented the execution of the decree at some time within ten years immediately before the date of the application. In allowing the application the learned District Judge appears to have been largely influenced by an order made in the case by another Judge, dated the 20th November, 1910. That order, the learned District Judge says, shows that "the defendant from the very first inception of this action put obstacles in the way of the plaintiff in his efforts to recover his due." But, in considering the present application, we are not concerned with the defendant's conduct since the inception of this action. The question is whether the defendant has by fraud or force prevented the execution of the decree at some time within ten years immediately preceding the application. Of such fraud or force I see no evidence whatever. The District Judge says that the defendant is a notary, and he "must have some assets, even in the shape of furniture, but that he has not surrendered these for execution." Assuming that, in the case of a notary, the presumption is that he has assets, including furniture, the fact that these are not surrendered by him hardly amounts to fraud or force. Something by way of fraudulent alienation of property might meet the requirements of the proviso to section 337 of the Code, but the facts relied upon by the District Judge appear to me to be beside the question. Perhaps the greatest sin attributable to the defendant was that he continued to ply the trade of a notary, keeping indoors all the time. Now, the law forbids the forcing open of the outer door of a dwelling-house in order to seize the person under civil

process (section 336, Civil Procedure Code). This is a provision enacted in the highest interests of the liberty of the subject, and for the purpose of maintaining inviolate as far as practicable the sanctity of one's dwelling-house. I see no difference between this provision being taken advantage of by a person, and the provision of section 334 of the Code to the effect that a proctor is immune from arrest under civil process when attending Court for the purpose of his business, being taken advantage of by a proctor. If taking advantage of such a provision amounts to fraud, both that and the provision of section 337 of the Code to the effect that an application for execution should not be allowed after the expiration of ten years from the date of the decree sought to be enforced might well be wiped out of the statute book. It has been said that the defendant once escaped after arrest. This has not been proved, but if he did so escape he would have forfeited his right to the exemption of the outer door of his house from being forced open (see section 336), and he might have been arrested in his own house.

The Indian cases cited by the respondent's counsel do not appear to me to apply to the present case. In them the specific acts relied upon as amounting to fraud or force are totally different from those relied upon in this case. In *Goundan v. Chetti* [1] it was affirmatively shown that the debtor had the means to pay his debt, and on each occasion a warrant was issued for his arrest he succeeded in avoiding capture by taking refuge in the South Arcot district or in some remote part of the Colrayan Hills. Each case must be judged according to its own facts and circumstances. In *Ammal v. Taker* [2] there was just that kind of fraud that I have hinted at above, namely, fraudulent alienation of property. The facts are not similar to those we have to consider in the present case.

For these reasons I would allow the appeal with costs.

ENNIS J.—I agree.

Appeal allowed.

[1] *I. L. R. 6 Mad. 365.*

[2] *I. L. R. 4 Mad. 292.*