Present: Bertram C.J. and Garvin J.

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SHELL TRANSPORT COMPANY *v.* DISSANAYAKE.

160—D. C. (Inty.), Colombo, 10,753.

Civil warrant—Application for writ—Appeal pending—Stay of execution —Notice to judgment-debtor of application for warrant—Civil Procedure Code, s. 763.

Where an application for the execution of a money decree had been granted, and the Fiscal had made a return of "no property," a warrant for the arrest of the judgment-debtor may be issued without notice to him.

It is not competent to a Court to refuse a warrant for the arrest of a judgment-debtor merely on the ground that the latter has preferred an appeal against the decree.

APPEAL from an order of the District Judge of Colombo disallowing an application for a warrant of arrest of a judgment-debtor. The plaintiff, appellant, obtained judgment on July 30, 1924. On the following day he applied for execution of the decree, and a writ was issued to the Fiscal. To this writ the Fiscal made a return dated August 22, 1924, that he was unable to

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find any property of the judgment-debtor. In the interval between the issue of the writ and the return, the defendant entered an appeal against the judgment. On August 28 an application was made for the issue of a warrant, which was refused apparently on the ground that an appeal had been preferred against the decree.

Choksy, for plaintiff, appellant.

November 28, 1924. BERTRAM C.J.—

I agree with the judgment of my brother Garvin. The question to be decided is by no means free from difficulty. Section 763 says that in the case of an application being made by the judgment-creditor for execution of a decree which is appealed against, the judgment-debtor shall be made respondent. The question, therefore, arises, Is an application under section 298 by way of petition for the arrest of a debtor an application for the execution of a decree? It is undoubtedly the case that arrest is a form of execution, and the Code freely refers to arrest as being ordered in execution of a decree. See section 298 itself, " the arrest or imprisonment of a woman in execution of a money decree "; " the decree or order in execution of which he is arrested, " section 298; " warrant for the arrest of a judgment-debtor in execution of a decree, " section 298; " arrest in execution of a decree for money, " section 300. Further, in section 224 itself, which deals with " the application for execution of the decree, " it is required that the application shall contain the following particulars, " the mode in which the assistance of the Court is required whether . . . . by the arrest and imprisonment of the person named in the application. " On the face of these words in section 224, it is very difficult at first sight not to conclude that an application under section 298 is an application for the execution of a decree.

It is impossible to harmonize with exactness the various provisions of the Code on this subject. If we proceed from section 224 to section 225, we find that the only form of execution there contemplated is an execution by sale of property; neither that nor any other immediately succeeding sections make any provision for execution by arrest. This subject is only reached in section 298, and it appears there that an application for an arrest is necessarily a supplemental process, and cannot be entertained until a writ for the seizure and sale of property has already issued.

There are in fact two forms of application for execution of a decree: The first is the initial or general application, which is primarily that which is contemplated in section 224, and the second is a supplemental application, when the writ issued in pursuance of the original application has proved, or is likely to prove, ineffective.

I agree with my brother Garvin that if the terms of section 763 are carefully examined, it is necessary to hold that in the context in which the words are used, " the application for execution of a decree " there referred to means the original initial application, and not any subsequent supplemental application that may become necessary.

GARVIN J.—

This is an appeal from an order of the District Judge disallowing an application for a warrant of arrest against a judgment-debtor. The appellant, who is the plaintiff in the case, obtained judgment on July 30, 1924. On the following day he applied for execution of the decree, and a writ for that purpose was duly issued to the Fiscal. By that writ the Fiscal was empowered to recover from the defendant the sum of Rs. 7,341.93, and further damages at the rates specified therein, and for this purpose to seize and, if necessary, to sell the property of the defendant. To this writ the Fiscal made a return that he was unable to find any property of the judgment-debtor. This return is dated August 22, 1924. In the interval between the issue of the writ of execution and the return above referred to, the defendant entered an appeal against the judgment. On August 28 an application was made for the issue of a warrant for the arrest of the defendant. Upon this the District Judge has endorsed: " Let this await the decision of the appeal. " Then on September 3, 1924, a further application was made for the issue of a warrant, and this application after argument in support of it had been heard was also disallowed. The learned District Judge has not stated the reason for his order which consists of the one word " Refused. " Counsel for the appellant, who was the counsel who supported the application in the Court below, informs us that the reason for the refusal so far as he understood was that the learned District Judge felt that, inasmuch as an appeal had been entered against the judgment in execution of which the original writ was issued, he was for some reason precluded from directing the arrest of the debtor until the appeal was decided. Now the leading principle relating to the issue of the execution of a decree under appeal is that " it shall not be stayed by reason only of an appeal having been preferred against the decree "—these are the opening words of Chapter LIX. of the Civil Procedure Code, which deals with the execution of decrees under appeal. It is competent for the person who appeals from such a decree to move for a stay of execution before the expiry of the time allowed for the appeal therefrom, and for the Court which passed the decree to order the stay of execution, provided that the Court is satisfied of the matters referred to in sub-sections (*a*), (*b*), and (*c*) of section 761. No such application has been made, and it would seem, therefore, that it is

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not competent for the Court now to stay the execution of this decree merely on the ground that the debtor has preferred an appeal against it. The sole remaining question is whether the judgment-debtor should have been made a respondent to the application for this warrant of arrest. Section 763 provides that in the case of an application for the execution of a writ which is appealed against the judgment-debtor should be made respondent. Is an application for a warrant of arrest made under the circumstances above detailed an application for the execution of a decree within the meaning of section 763? It must be observed that an application for the execution of this decree which was a money decree had been made and granted before any appeal had been taken. Is an application for the issue of a warrant for the arrest of a judgment-debtor to enforce payment of a decree to execute which permission has already been granted, an application for the execution of a decree within the meaning of section 763? It is I think clear that the sole purpose of section 763 is to give the appellant an opportunity of satisfying the Court to which such an application is made that there are reasons why the judgment-creditor should not be permitted to execute his writ without giving security for the restitution of any property taken in execution of the decree or for the payment of the value of such property, and for the due performance of the decree or order of the Supreme Court. This implies that the application contemplated is the original application to execute the decree by taking property of the judgment-debtor in satisfaction of the decree. An application for a warrant of arrest of the judgment-debtor, where the decree sought to be executed is a money decree, can only be made after writ of execution by seizure and sale of property has already been issued, and subject to certain exceptions only after a return of " no property " had been made to that writ. The appellant is not seeking to take the property of the judgment-debtor, but as I have already observed is invoking the assistance of the Court to obtain satisfaction of his decree by seizing the person of the judgment-debtor, and he is taking this step because no property of the judgment-debtor has been found.

An application for a warrant of arrest made in these circumstances is not, in my opinion, an application for the execution of a decree within the meaning of section 763, and no notice to the judgment-debtor is therefore necessary.

I would, therefore, allow the appeal and direct the issue of the warrant applied for.

Appeal allowed.