

1965

*Present : Tambiah, J., and Sirimane, J.*

DHAMMINDHA NAYAKA THERO, Appellant, and F. J. DIAS,  
Respondent

*S. C. 354/64—D. C. Colombo, 781/Z*

*Execution of decree for money—Issue of warrant for arrest of judgment-debtor—  
“ Inquiry ” by Court previously—Civil Procedure Code, ss. 298, 308.*

Where, in an application made under section 298 of the Civil Procedure Code, the Court issued a warrant on the judgment-debtor after considering the affidavit of not only the judgment-creditor but also a relevant affidavit filed by the judgment-debtor on an earlier occasion when he made an application for stay of writ—

*Held*, that there was an inquiry by the Court within the meaning of section 298 of the Civil Procedure Code.

APPEAL from an order of the District Court, Colombo.

*H. V. Perera, Q.C.*, with *Miss Maureen Seneviratne*, for the plaintiff-appellant.

*C. Ranganathan*, with *Bala Nadarajah*, for the defendant-respondent.

April 5, 1965. TAMBLAH, J.—

The plaintiff-appellant made an application under Section 298 of the Civil Procedure Code for the issue of a warrant on the defendant-respondent. He filed petition and affidavit and, after setting out the facts as alleged by him, in paragraph 15 the plaintiff-appellant stated that “ the respondent has removed the property with intent to defraud him and with intent to obstruct him in the execution of the decree.” This application was supported by *Miss Maureen Seneviratne*, who appeared as counsel for the plaintiff-appellant.

On 2.8.63 the learned District Judge, having heard the submissions made by *Miss Seneviratne*, in addition to his perusal of the affidavits filed by the plaintiff as well as the defendant, in the course of his order stated that he was satisfied that this is a case for the issue of warrant in terms of Section 298 of the Civil Procedure Code. He thereupon issued warrant on the defendant-respondent with bail endorsed in Rs. 5,000/5,000 returnable 30.8.63.

Thereafter, the defendant-respondent filed objections and the matter came up for inquiry under the provisions of Section 308 of the Civil Procedure Code. At this inquiry a preliminary objection was taken on behalf of the defendant-respondent that no inquiry had been held as required by Section 298 of the Civil Procedure Code before the warrant was issued. In support of his argument, counsel who appeared for the defendant-respondent cited the case of *Gnanampirakar-Ammal v. Kandiah*<sup>1</sup>. In that case it was held that a mere perusal of the petition and affidavit filed by the judgment-creditor is not sufficient inquiry under the provisions of Section 298 of the Civil Procedure Code, before issue of warrant. Keuneman, J. (with whom Howard, C.J., agreed) took the view that “the District Judge in that case thought that there was another occasion to satisfy himself before the issue of the warrant and, therefore, did not take the trouble to hold an inquiry before issuing notice.” The facts of that case are distinguishable from the present case. In making application for stay of writ on an earlier occasion, the defendant-respondent filed an affidavit in which he stated that movable property worth about Rs. 150,000 was lying in the premises, which is the subject matter of this suit.

The learned District Judge appears to have considered the affidavits of the parties as well as the submissions made by counsel for plaintiff-appellant before he was satisfied that warrant should issue.

The learned Judge, who held the inquiry under Section 308 of the Civil Procedure Code, dismissed the plaintiff-appellant's application on the ground that no inquiry has been held before issue of warrant. I am of the view that the learned Judge has misdirected himself in taking this view.

For these reasons, I set aside the order of the learned District Judge dated 11.6.64 releasing the defendant-respondent from arrest and send the case back for inquiry under Section 308 of the Civil Procedure Code before another Judge.

The defendant-respondent is entitled to stand out on the bail already ordered, if the bail bond is still subsisting. Otherwise, the defendant-respondent is entitled to be released on his furnishing bail in a sum of Rs. 5,000 pending inquiry.

The plaintiff-appellant is entitled to costs of appeal and costs of inquiry.

SIRIMANT, J.—I agree.

*Order set aside.*

<sup>1</sup> (1941) 42 N. L. R. 285.