1960 *Present :* **Basnayake, C.J., and H. N. G. Fernando, J.**

RATWATTE, Appellant, *and* ABDUL AZEEZ, Respondent

S. C. 8—D. C. Kandy, 4963/MS

Civil Procedure Code—Subsequent application for execution of decree—Conditions necessary for granting it—Application for writ more than one year after decree—Effect of failure to serve notice on debtor—Sections 224, 337, 347.

Where a subsequent application in terms of section 337 of the Civil Procedure Code is made for the execution of a decree, the Court has no power to grant the application unless it is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree or that execution was stayed by the decree-holder at the request of the judgment-debtor.

Quaere, whether, where one year has elapsed from date of decree, non-compliance with the requirement of section 347 of the Civil Procedure Code that a copy of the application for execution should be served on the judgment-debtor can invalidate an execution sale which has already taken place.

APPEAL from a judgment of the District Court, Kandy.

B. S. C. Ratwatte, for Defendant-Appellant.

M. T. M. Sivardeen, for Plaintiff-Respondent.

Cur. adv. vult.

[1] *(1942) 43 N. L. R. 436.*

[2] *(1958) 60 N. L. R. 381.*

June 17, 1960. BASNAYAKE, C.J.—

The question that arises for decision on this appeal is whether the learned District Judge was right in allowing the subsequent application for execution of the decree.

The material facts shortly are as follows :—On 22nd March 1956 the plaintiff-respondent obtained judgment in a sum of Rs. 25,000 with legal interest thereon and costs against the defendant-appellant. On 24th April 1956 the plaintiff made his application for the execution of the decree as required by section 224 of the Civil Procedure Code. The application was allowed on 30th April 1956 and the writ was issued on 4th May 1956. It would appear that the Fiscal returned the writ unexecuted with the following remark : " That the defendant could not be found to demand payment and that the plaintiff too did not take any steps to point out any properties for seizure and sale. " On 9th July 1958 a second application for the execution of the decree was made in the prescribed manner. The application made in the form required by section 224 stated : " We pray that the sum of Rs. 25,000 with legal interest and costs of suit may be realised by reissue of writ against defendant's properties. " The Judge ordered that an affidavit be filed as this was not the first application for execution of the decree and he presumably desired to satisfy himself that the conditions precedent to the grant of a subsequent application for execution prescribed in section 337 of the Civil Procedure Code existed. On 1st August 1958 an affidavit dated 28th July 1958 was filed. In that affidavit the plaintiff stated :

" 2. I obtained judgment in this case against the defendant for the recovery of the sum of Rs. 25,000 with legal interest thereon from 5.10.55 till payment in full and costs of suit.

" 3. As the defendant failed to pay the amount due to me as aforesaid I issued writ and instructed the Fiscal, Central Province, to execute the writ.

" 4. Thereafter the defendant having come to know the said fact came to me and asked me not to take further steps but would pay the amount due and asked for time to pay.

" 5. I fully believing the defendant did not take further steps and the writ has been returned to court after lapse of time.

" 6. The defendant as promised failed and neglected to pay the amount due and I am therefore desirous of taking further steps in this case to enable me to recover the amount due.

" 7. I would have taken steps early if not for the facts mentioned in the 4th paragraph hereof. "

Upon this affidavit the court made the order : " Reissue writ now " and on 11th August 1958 the writ was reissued. Before it was executed on 30th September 1958 the defendant filed a petition in which he prayed

that the Fiscal, Central Province, Kandy, be directed to return the writ unexecuted and that the decree entered be vacated and that the case be fixed for trial. After hearing counsel for the respective parties on 6th January 1959 the learned Judge dismissed the defendant's application to have the writ returned unexecuted holding that his order to reissue writ was valid and that the judgment-creditor was entitled to execute the decree. He rejected the contention of counsel that the order to reissue writ should not have been made unless notice had been served on the judgment-debtor. On the authority of *Silva v. Kavanihamy* [1] he held that the failure to serve notice did not render his order to reissue writ invalid.

It is common ground that the application for execution under consideration was not the first application but a subsequent one. But both counsel and Judge appear to have lost sight of that fact. Though the considerations that govern a first application for execution and a subsequent application are not the same they seem to have overlooked the special provisions of section 337 and focussed their attention on section 347 of the Code. In the result the argument appears to have been confined to the question whether the failure of the court to cause the petition of application for execution to be served on the judgment-debtor was fatal to the application.

The learned Judge was bound by the provisions of section 337 and he had no power to grant a subsequent application to execute the same decree unless he was satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree or that execution was stayed by the decree-holder at the request of the judgment-debtor. He has not found that either of these matters was established by the judgment-creditor to his satisfaction. His order is therefore bad and must be set aside as one made in contravention of section 337.

I shall next consider the effect of non-compliance by the court with the requirement of section 347 that it should cause to be served on the judgment-debtor the petition of application for execution. The requirement that the petition should be served on the judgment-debtor is designed to give him an opportunity of being heard before a writ of execution is granted in those cases mentioned in that section. The omission to comply with such a valuable safeguard deprives the judgment-debtor of an opportunity of being heard before an order against him is made in favour of a judgment-creditor who has delayed to execute his decree. Such a statutory requirement designed to give statutory effect to the rules of natural Justice must be construed as imperative and not directory even though the duty is not one imposed on the petitioner. An examination of the section reveals that the Legislature intended to impose an imperative duty on the court in cases where no respondent was named in the petition. The use of the word " shall " coupled with the words of the proviso " no such service shall be necessary if the application be made within one year " compel me to that conclusion. Apart from the

[1] *(1948) 50 N. L. R. 52.*

requirements of natural Justice and the language of the section there is a third reason why the proviso must be read as imperative. It is a well-established rule of interpretation of statutes that enactments regulating the procedure in the courts are to be construed as imperative and not merely directory. A denial to the judgment-debtor of the opportunity of being heard must necessarily be fatal to the application of the petitioner.

I find myself unable to agree with the view taken in *Silva v. Kavanihamy* (*supra*). In that case the fact that non-compliance with the section results in the denial of an opportunity of being heard to the judgment-debtor does not appear to have received the consideration that it deserves. I am in accord with the view taken by this court in *Fernando v. Thambiraja* [1] which follows a number of previous decisions of this court and which I think is the correct view. It finds support in the decisions of the Privy Council in *Malkarjun Bin Shidramappa Pasare v. Narhari Bin Shivappa* [2] and *Ragunath Das v. Sundar Das Khetri* [3], and of the Madras Full Bench case of *Rajagopala Aiyar v. Ramanujachariyar & another* [4] on the corresponding section of the Indian Civil Procedure Code (see s. 248 old Code, and Order 21 rule 22, new Code).

I am therefore of opinion that on the application of the true principle of interpretation the requirement in section 347 that a copy of the petition should be served on the judgment-debtor is imperative and that a writ issued without that requirement being observed is bad as being contrary to the statute.

The appeal is allowed with costs both here and below and the order of the learned District Judge is set aside.

H. N. G. FERNANDO, J.—

I agree that the application for execution made on 9th July 1958 was one to which Section 337 of the Code applied ; such an application cannot be granted unless the Court is satisfied that on the last preceding application " due diligence " was used to procure complete satisfaction of the decree, or that execution was stayed at the request of the judgment-debtor. It was presumably for this reason that the learned District Judge ordered an affidavit to be filed. The affidavit of the plaintiff did contain allegations of fact, which, if true, may have sufficed to satisfy the requirements of Section 337. But even if one were to assume, from the fact that the Judge ordered that the writ should re-issue, that the Judge accepted the truth of the allegations in the plaintiff's affidavit, he should not have done so without affording to the judgment-debtor an opportunity to challenge those allegations. There can be instances where an application falling within the scope of Section 337 may properly be grantd *ex parte* ; in *Perera v. Novishamy* [5] the Fiscal's return to the last preceding issue of writ was " Sale adjourned at the request of the

[1] *(1945) 46 N. L. R. 81.*
[2] *27 I. A. 216 at 226.*
[3] *(1914) A. I. R. (P. C.) 129.*
[4] *(1924) A. I. R. Madras 431 at 435.*
[5] *(1927) 29 N. L. R. 242.*

plaintiff who has allowed the defendant two months' time to settle", and on this material Schneider, J., was satisfied that the earlier writ was returned unexecuted *for no default on the part of the decree-holder.* But except in those cases where the record "speaks", a Court cannot be judicially satisfied, merely upon averments in the affidavit of the decree-holder, of the truth of the facts deposed to by him. I would hold, therefore, that the order for the re-issue of the writ was illegal for the reason that the Court, on the material before it, was not or else could not have been duly satisfied as to either of the two conditions precedent which are specified in Section 337.

As this appeal must succeed for the reason just mentioned, it is not in my opinion essential to pronounce upon the further ground relied upon by the appellant, namely that because of the lapse of the specified period of time, Section 347 imperatively required notice of the application for execution to be served on the judgment-debtor. The opinion to that effect expressed in *Fernando v. Thambiraja* [1] was one of a single judge, and was reconsidered in the later case of *Silva v. Kavanihamy* [2] by a bench of two judges. Canekeratne, J., there thought that in the earlier appeal the Court may not have had the benefit "of a full and clear argument with reference to the earlier cases", and said also that the contrary view (i.e. that Section 347 was not imperative) had stood unchallenged for a period of little over fifty years. He sought to distinguish one at least of the Indian cases cited by Jayetileke, J., on the ground that it dealt, not with a failure to issue notice on a judgment-debtor, but with the failure to notice the assignee of his insolvent estate. If invited to disapprove the more recent judgment, particularly one pronounced by Canekeratne, J., on a question of Civil Procedure, I would require the benefit (which I have not had at the argument of the present appeal), of a searching examination of both those decisions and of the precedents on which they depend.

For present purposes, it suffices to note that the decision in *Silva v. Kavanihamy* (supra) does not prevent us from ordering that the writ issued in this case be returned unexecuted. In *Silva v. Kavanihamy*, the proceedings had reached a stage where a sale in execution had in fact taken place, and in the circumstances of the case the Court declined to hold that the sale was void on the ground that a copy of the application for execution had not been served on the judgment-debtor. But Canekeratne, J.'s opinion (at page 55), that "the non-issue of a notice to a judgment-debtor is a material irregularity in proceedings *which are anterior to the publishing or conduct of the sale*", would appear to indicate that in his view the writ should be recalled if, before the publishing of a sale, attention is drawn to the failure to issue to the judgment-debtor a copy of the application for execution. That opinion, which I would respectfully adopt, is decisive in favour of the appellant in this case, and the further question whether *Silva v. Kavanihamy* was rightly decided does not need to be considered for the purposes of this appeal.

[1] *(1945) 46 N. L. R. 81.* [2] *(1948) 50 N. L. R. 52.*

The appellant in his petition to the District Court has asked that the decree entered against him be vacated and that the case be fixed for trial ; that part of his prayer has not been pressed and cannot be granted. But he is entitled to an order that the writ issued on 11th August 1958 be recalled unexecuted, and also to the costs of his application in the District Court and to the costs of this appeal.

Appeal allowed.