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Present : Bertram C.J. and De Sampayo J.

CARRIM *v.* WAHID.

71—D. C. (Inty.) Galle, 16,066.

*Civil Procedure Code, ss. 224, 234, and 337.—Application for re-issue of writ—Due diligence—Effect of seizure of a decree—Rights of judgment-creditor to execute his decree not suspended—Refusal of previous application on ground that decree was seized—Subsequent application—*Res judicata.

An inquiry as to whether due diligence had been used to procure complete satisfaction of the decree on the last preceding application is not a condition precedent to the granting of a subsequent application under section 337.

The seizure of a decree under section 234 of the Code does not deprive the execution-creditor of the right to execute the decree. All that the first paragraph of the section requires is that the proceeds of the decree, when executed, shall be applied in satisfaction of the seizure.

The refusal of an application for the issue of a writ on the ground that the decree in the action had been seized by another creditor under section 234 was held not to be a bar to a subsequent application for the issue of writ.

The provisions of section 224 of the Code as to reference to previous applications for writ are merely directory.

IN this action the plaintiff-respondent obtained judgment against the appellant for a sum of Rs. 1,671·25 legal interest and costs. Decree was entered on May 31, 1918.

On June 7, 1918, the respondents took out writ which was returned to Court on January 16, 1919, a sum of Rs. 820·15 having been recovered thereon.

Again, on January 28, 1919, writ was issued, and was returned to Court on March 21, 1919, a sum of Rs. 11·74 having been recovered.

On April 29, 1919, the plaintiff-respondent's proctor made a third application for the re-issue of the writ, but this application was refused by the learned Judge, on the ground that on March 14, 1919, the decree, in favour of the plaintiff, had been seized by a creditor of his, and that an application had been allowed on that date for an order directing "that the proceeds of the decree in this case be applied in satisfaction of the judgment in claim case No. 2,381, D. C. Galle."

Thereafter, on February 17, 1921, the plaintiff's proctor made the application now in question to have the writ re-issued, and over a year having elapsed since the previous application, a notice was ordered under section 347 of the Civil Procedure Code.

On this notice being served on the appellant, he filed objections to the application being allowed, and inquiry into these objections was held, and the District Judge, T. B. Russell, Esq., made order allowing writ to issue. The defendant appealed.

M. W. H. de Silva, for the appellant.

No appearance for the respondent.

October 11, 1921. BERTRAM C.J.—

This is an appeal against an interlocutory order from the District Court of Galle. The order was an order directing the issue of a writ of execution. Mr. de Silva has taken a number of points on appeal; the first of which is that it was not competent for the District Judge to issue a writ of execution, inasmuch as his predecessor, two years previously, had declined to issue a writ on the ground that the decree in the action had been seized by another creditor under section 234 of the Civil Procedure Code. Mr. de Silva maintains that under those circumstances the matter was *res judicata*. That point is disposed of by the case of *Doloswala v. Amarisa.*[1]

The next point was that it did not appear in the record that the District Judge had inquired whether due diligence had been used to procure complete satisfaction of the decree on the last preceding application (see section 337). Certainly there is no mention of any such inquiry on the face of the record, but I do not think that it is the intention of section 337 that such an inquiry should be a condition precedent to the application of the section. The words in respect of the matter and form are, I think, directory and not imperative. If we were of opinion that they were imperative, it would be a question whether the last application in this case was one which the creditor made and which was refused, or an application preceding that. With regard to the application which was refused, it is difficult to see what more diligence the creditor could have exercised.

Mr. de Silva makes a third point, that no reference to the previous application was made as required by section 224 (*f*) of the Civil Procedure Code. This requirement is again directory. The learned Judge had all the facts before him, and I do not think that the absence of this reference is material.

I come now to the last and most substantial point, and that is that the seizure of a decree under section 234 suspends any remedy of the execution-creditor upon that decree. This was the ground of the refusal of the earlier application, which Mr. de Silva thinks was a right refusal. I do not agree. I think that the learned Judge has made a perfectly correct order. There is nothing in the words of the first paragraph of section 234 to deprive the execution-creditor of the right to execute the decree. All that the paragraph

[1] *(1911) 14 N. L. R. 129.*

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requires is that the proceeds of the decree, when executed, shall be applied in satisfaction of the seizure. The second paragraph of section 234 relates to a case in which two decrees have been recovered in separate Courts, and any implication which may be sought to be drawn from the words of that paragraph cannot be applied by analogy to the first paragraph.

With regard to another case cited, 70 D. C. (Inty.), Galle, decided in this Court on September 28, 1921, that case can be distinguished. In that case the order of the Court complained of purported to vacate the previous order of the same Court. The order now appealed against does not purport to do anything of the kind. It merely follows *Doloswala v. Amarisa.*[1] In my opinion, therefore, the appeal must be dismissed, with costs.

De Sampayo J.—I agree.

Appeal dismissed.