1949 *Present :* **Nagalingam J. and Pulle J.**

KANAGASABAI, Appellant, *and* BALASUBRAMANIAM, Respondent.

S. C. 424—D. C. Point Pedro, 10,271.

Civil Procedure Code—Writ returned partly satisfied—Application for extension of returnable date ten years after date of decree—Power of court to grant it—"Subsequent application"—Section 337.

When a writ is returned partly satisfied and, after the expiration of ten years from the date of the decree, application is made to extend the returnable date the question whether it is a "subsequent application" within the meaning of section 337 of the Civil Procedure Code has to be determined according to the facts of each case.

Quaere, whether the power which a court has of re-issuing a writ which has been returned unexecuted can be exercised after the expiration of ten years from the date of decree.

APPEAL from an order of the District Court, Point Pedro.

C. Chellappah, with *A. Nagendra*, for defendant appellant.

H. Wanigatunga, with *S. Sharvananda*, for plaintiff respondent.

Cur. adv. vult.

November 30, 1949. PULLE J.—

The first defendant-appellant in this case is the judgment-debtor against whom a decree was entered on December 16, 1937, for payment of a sum of Rs. 1,706, interest and costs of suit. The first application for writ was made on July 8, 1947, and on that application being allowed a writ was issued on February 10, 1948, made "returnable" on February 10, 1949. The question for determination in this appeal is whether an order made by the learned District Judge on April 6, 1949, for the re-issue of the writ, amounts to a grant of a subsequent application for execution after the expiration of ten years from the date of the decree and is, therefore, obnoxious to the provisions of section 337 of the Civil Procedure Code.

Before dealing with the submissions of law, it is necessary to state in greater detail the events that took place between the date of the writ, namely, February 10, 1948, and the date of the order from which this appeal is taken.

It would appear that on the authority of the writ various sums of monies representing the salary of the appellant for the months of March to December, 1948, were seized and deposited in Court. The writ was returned to Court by the Fiscal with the endorsement dated February 11, 1949, "The writ is returned by lapse of time". In the meantime on January 13, 1949, the plaintiff's Proctor moved that the writ be re-called, extended and re-issued to enable the plaintiff to recover the balance amount due from the appellant. An order was made that the application should be made after the return of the writ. If the plaintiff thought

that it was essential to his application that the returnable date of the writ should be extended before February 10, he ought not to have acquiesced in the order that his application should be made after the return of the writ.

After the writ was returned to Court, that is, on March 23, 1949, the plaintiff's Proctor filed an application for the further execution of the decree on Form No. 42 in the First Schedule to the Civil Procedure Code. There are two matters to be noted in this application. First, it set out the steps taken by the Proctor on January 13, and the order made thereon. Secondly, it prayed " that the writ which has been returned to Court by the Fiscal partly executed owing to lapse of time be re-issued for further execution by seizure and, if necessary, by the sale of the movable and immovable property of the 1st defendant ". The application was supported by an affidavit from the plaintiff which stated, among other things, that he had on the previous application exercised all possible and due diligence to realise the amount due on the decree. On March 24, the learned District Judge made order refusing the application on the ground that it was made ten years from the date of the decree. On April 5, the plaintiff's Proctor asked for an opportunity to support his application and asked that the matter be fixed for hearing on April 6, as that was the last date on which, he said, he should appeal from the order made on March 24. Plaintiff's Proctor was heard on April 6, and the Judge made the following order :—

> " An application was made for extension of time on 13.1.49. The present application is virtually an application for extension of time. In the circumstances I vacate my order of 24.3.49 and allow the application for re-issue of writ ".

On April 21, the writ which had previously been returned was extended and re-issued, returnable on April 20, 1950. On May 5, 1949, appellant's Proctor submitted that the re-issue of writ was barred by section 337 and moved that it be recalled. Argument was heard on the 13th May and on the 8th June, 1949, the learned District Judge made order declining to interfere with his order of the 6th April allowing the application for re-issue of writ. The present appeal is from this order.

It is not disputed that it is competent for a Court to extend the time within which a writ is returnable. Hence it was within the discretion of the District Judge on plaintiff's application dated the 10th January to extend the returnable date. It is also not disputed, having regard especially to the Divisional Bench case of *Andris Appu v. Kolande Asari*,[1] that a writ of execution returned to Court may under certain circumstances be re-issued. Now the argument for the plaintiff is that the application for writ having been made on the 8th July, 1947, and allowed, the writ dated 10th February, 1948, and its extension and re-issue all draw their efficacy from the first application of the 8th July, 1947. In other words, the re-issue was not in pursuance of a subsequent application within the meaning of section 337 of the Code.

I do not think that the position taken up by the plaintiff is tenable. The numerous authorities cited do not give any clear guidance on the

[1] *(1916) 19 N. L. R. 225.*

question whether the power which a Court has of re-issuing a writ which has been returned unexecuted can be exercised after the expiration of ten years from the date of decree. The proper approach to the problem is, in my opinion, to ascertain on the facts of each case whether the steps taken, after the return of a writ, to recover the whole or the balance of the judgment debt constitute a "subsequent application". There are two aspects of the application of the 24th March, 1949, which indicate that it is in every respect a subsequent application. The first is the form of the application which gives the various particulars required by section 224 and the second is the statement in the affidavit which accompanied the application that on the "previous" application due diligence was exercised to realise the amount decreed. Section 337 clearly shows that the exercise of due diligence is a condition precedent to the grant of a subsequent application. It is nowise associated with the first application, however late it may be made. To hold, as the learned Judge has done, that the application of the 24th March is only a continuation of the first application without possessing an identity of its own is to ignore both the substance and the form of the second application. In judging whether the second application is independent of the first, it is immaterial that the mode in which the Court's assistance was required was by re-issue of the writ which had been returned to Court. What has primarily to be considered is whether there has been a grant of the application. The re-issue of the writ is a result which flows from the grant of the application.

In my judgment plaintiff's application of the 24th March, 1949, is barred by section 337. I would, therefore, set aside the order appealed from but in all the circumstances of the case there will be no costs of appeal.

NAGALINGAM J.—I agree.

Order set aside.