

1938

Present : Maartensz and Hearne JJ.

CADER v. JOONOOS *et al.*

201—D. C. Colombo, 47,499.

*Execution of writ—Demand for payment of debt by Fiscal—Judgment-debtor's place of residence—Civil Procedure, s. 226.*

Where section 226 of the Civil Procedure directs the Fiscal to repair to the judgment-debtor's dwelling house or place of residence and to require him to pay the amount of the writ, there is a compliance with the provisions of the section if he repairs to the place or residence disclosed by the judgment-debtor himself.

(1865) 34 L. J. Ec. 172.

<sup>2</sup> 14 N. L. R. 398.

<sup>2</sup> (1879) 4 A. C. 504.

**A** PPEAL from an order of the District Judge of Colombo.

*C. Thiagalingam* (with him *Mahroof*), for appellant.

*N. Nadarajah* (with him *S. J. V. Chelvanayagam*), for respondent.

*Cur. adv. vult.*

February 21, 1938. MAARTENSZ J.—

This is an appeal by a purchaser at a sale in execution from an order of the District Judge of Colombo, setting aside the sale on the ground that the Fiscal's Officer did not repair to the dwelling house or residence of the judgment-debtor and require him to pay the amount of the writ before proceeding to execute it as required by section 226 of the Civil Procedure Code.

The judgment-debtor was the second plaintiff in the action against whom an order for costs had been made. It appears from the evidence that the Fiscal's Officer entrusted with the execution of the writ went to the address given by him in his plaint—No. 12, Peer Saibo's lane (now No. 71)—to demand payment of the writ but did not find him there and proceeded to the execution of the writ.

The District Judge has accepted the evidence led by the judgment-debtor that at the time in question he was not living at No. 12 but at No. 71, Peer Saibo's lane. I am not prepared to interfere with the finding of fact.

There is no evidence, however, that the judgment-debtor informed the Court or the judgment-creditor, the defendant, that he had changed his place of residence. The appellant's Counsel accordingly contended that the Fiscal's Officer had complied with the provisions of section 226 and that he was not bound to search for the judgment-debtor anywhere else before executing the writ.

The point has never been raised before and is not covered by authority. It is a provision peculiar to the Code adapted from the old rules and orders and there are no Indian or English decisions to assist us.

The section requires that the request for payment should be made at the debtors' dwelling house or place of residence. The words are, "and there require him, if present, to pay the amount of the writ". Strictly construed, if the Fiscal's Officer met the judgment-debtor anywhere else and demanded payment, it would not be a compliance with the section. The debtor may therefore avoid execution of the writ by continually changing his place of abode. I am, therefore, of opinion that, in the absence of any information given to the Court of a change of residence, it would be sufficient compliance with the terms of the section if the Fiscal's Officer went to the place of residence mentioned by the debtor in the plaint or answer. This view is consistent with the earlier provision in the section that the Fiscal or other officer should repair to the house of the debtor within the time prescribed in the section. The officer obviously could not comply with this provision unless the judgment-debtor's place of abode had been ascertained at the time the Fiscal received the writ of execution. In this case that place of residence is the one mentioned by the second plaintiff in his plaint.

As I am of opinion that the requirements of section 226 had been complied with, the other questions argued by appellant need not be discussed.

I would set aside the order appealed from. The second plaintiff-respondent will pay the appellant the costs of appeal. The District Judge allowed the second plaintiff Rs. 52.50 as his costs of the inquiry. The appellant will be entitled to recover the same amount from the second plaintiff as costs incurred in the Court below.

HEARNE J.—

In execution of a decree for costs the defendant seized and sold a property belonging to the plaintiff. An application to set aside the sale was made to the trial Court and was refused. On appeal to this Court by the plaintiff it was ordered that the application should be reconsidered under section 344 of the Civil Procedure Code after the reception of evidence by the plaintiff on the points raised by him. These points were that the Fiscal had not repaired to the plaintiff's house and required him to pay the amount of the writ and that there was collusion between the purchaser and the defendant. The Judge found that the allegation of collusion was unsupported by evidence. He held, however, that the Fiscal had not repaired to the house of the plaintiff, that the requirements of section 226 of the Civil Procedure Code had not been complied with, and that the sale was therefore bad. From this finding the purchaser has now appealed.

The evidence which this Court ordered to be recorded brought to light certain additional facts. It is now agreed that the Fiscal did not fail in his duty in the sense that he made no attempt to repair to the dwelling house or place of residence of the plaintiff, but that he went to the house which the plaintiff had mentioned (section 40, Civil Procedure Code) as his place of residence. The plaintiff, however, subsequent to the filing of his plaint and unknown to the Fiscal had moved to a house a few doors away. The change of residence had not been communicated by him to the Court.

The point for decision is whether there has been a compliance with section 226 of the Civil Procedure Code if the Fiscal goes to the place of residence disclosed by the judgment-debtor himself or whether it is imperative, if the judgment-debtor has changed his place of residence, that the Fiscal should repair to what is, at that time, the dwelling house or place of residence of the judgment-debtor.

In my opinion it is not the function of the Court to keep itself constantly acquainted with the movements of judgment-debtors. Nor is it the duty of judgment-creditors to do so. On application for execution being made under section 224 the judgment-creditor is not even required to state the present address of the judgment-debtor. That has been supplied by the judgment-debtor himself, whether he was the original plaintiff or defendant, and is on the record of the case. The Legislature appears to have contemplated that prior to execution a personal demand should be made of the judgment-debtor, whenever it is practicable. For this reason the Fiscal is enjoined to repair to the judgment-debtor's dwelling house or place of residence. A dwelling house is a place of residence but a place

of residence, for instance a residential club or hotel, would not be a dwelling house in the usually accepted meaning of that term. Usually the two are the same and in my opinion when the law requires the Fiscal to repair to a judgment-debtor's dwelling house or place of residence there is a compliance with the law if he repairs to the place of residence disclosed by the judgment-debtor himself. The direction in section 226 which requires the Fiscal to act within a time which varies with the distance from the Fiscal's Office of the residence of a judgment-debtor presupposes that it is a place of residence which is known to the Fiscal and not one regarding which he will be put upon inquiry.

If section 226 were read in the sense for which Counsel for the respondent contended, viz., that if the judgment-debtor has moved from one dwelling house to another the Fiscal should ascertain the dwelling house to which he has moved and repair there, an absconding judgment-debtor (other than one who has left the Island in whose case special provisions apply) could indefinitely keep the judgment-creditor out of the fruits of his decree and the Court would be powerless to help him. Section 226 is designed to give a judgment-debtor an opportunity for satisfying a decree passed against him instead of having his property sold. Its intention is not to fetter a Court in enforcing its own decree against a dishonest judgment-debtor.

In the present case the Fiscal went to the judgment-debtor's "place of residence" and finding him absent acted under the second paragraph of section 226.

In my opinion the appeal should be allowed and the sale confirmed. I agree with the order as to costs proposed by my brother.

*Appeal allowed.*

