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Present: Ennis J. and De Sampayo J.

RAMEN CHETTY *v.* JAYAWARDENE.

118.—D. C. Colombo, 25,978.

Application for re-issue of writ—Due diligence—Civil Procedure Code, ss. 219 and 337.

A second or subsequent application for execution of a decree is not barred for want of due diligence by reason of the fact that on the previous application the judgment-creditor had not taken steps to examine the judgment-debtor under section 219 of the Civil Procedure Code.

THE facts are set out in the judgment of De Sampayo J. as follows:—

This is an appeal from an order allowing an application for the issue of writ of execution against property, and the ground of appeal is that the plaintiff had failed to use due diligence to procure complete satisfaction of the decree on the last preceding application, as required by section 337 of the Civil Procedure Code. For this purpose the last preceding application was one which was allowed

on February 11, 1914. Upon that application a writ was taken out on March 18, 1914, returnable on December 8, 1914; and it was returned to Court on December 9, 1914, with the report that the second defendant had failed to pay the amount, though demanded, or to point out any property for seizure, and that the plaintiff had not pointed out any property and the Fiscal had been unable to discover any. On December 23, 1914, the District Judge allowed a motion made by the plaintiff for a notice on the second defendant to appear in Court to be examined as to his assets under section 219 of the Civil Procedure Code. At this stage the proceedings were delayed by two motions on behalf of the second defendant. One was to discharge the order of December 23 for the examination of the second defendant, and the other was to certify payment of the decree. Neither of these motions succeeded, and ultimately the District Judge allowed the plaintiff's application for re-issue of writ, and also warrant of arrest, by his order of August 18, 1915, from which this appeal has been taken.

Bawa, K.C. (with him *De Zoysa*), for defendant, appellant.

Drieberg, for plaintiff, respondent.

Cur. adv. vult.

November 12, 1915. ENNIS J.—

This is an appeal from an order allowing execution of a decree dated June 12, 1908. A previous application for execution was made on December 5, 1913. Writ issued on February 11, 1914, and was returned on December 9, 1914, with the Fiscal's report that he was unable to find any property. On December 23, 1914, the creditor made an application under section 219 of the Civil Procedure Code to examine the debtor as to his assets. That application, for a number of causes, was suspended, and the present application was made on August 18, 1915. It was urged that the application should have been refused, as there had been a want of due diligence on the earlier application; this is the only point for determination on the appeal.

Section 337 of the Civil Procedure Code provides that a subsequent application to execute a decree should not be granted unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree.

The argument for the appellant was that the last preceding application abated on the return of the writ, and that the creditor-respondent had not used due diligence on that application, as he had not applied under section 219 to examine the debtor while the application was still pending. A series of cases were cited in support of the contention, but none of them in my opinion contains any clear authority for the proposition. In all of them there seems

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to be some confusion between the question of due diligence on the previous application and due diligence after the previous application; and not one of them says that an application under section 219 should be made before the return of the writ.

In *Ana Perumal Chetty v. Perera* [1] Bonser C.J. said: "It is quite clear that the creditor did not use due diligence. He seems to have rested satisfied with the abortive sale, and to have made no further effort to have his writ executed. Section 219 of the Code empowers him to summon the debtor before the Court and have him orally examined as to his property and his means of satisfying the decree; and if the creditor does not exercise the powers which the Court gives him he cannot be said to have used due diligence."

The Court, however, held that the writ issued on the first application for execution was still outstanding. It would seem, therefore, that the first application was still pending when the second application was made, which alone would be a sufficient reason for not allowing the second application.

In *Palaniappa Chetty v. Gomes* [2] it appears that an earlier application for execution of writ against property had been issued, and according to the head-note in the case, returned by the Fiscal with a report that the judgment-debtor was not possessed of any property. According to the judgment, however, it appears that when the case first came up on appeal it was found that the Fiscal had not made any return at all. It was held that it was open to the plaintiff-creditor to have adopted one of two steps, *i.e.*, to have applied under section 219 of the Code to examine the debtor as to his property, or to have applied under section 298 to attach his person, and that having failed to take either of these steps the creditor was *primâ facie* wanting in due diligence. If the facts were as stated in the judgment, it would seem that in this case, as in *Ana Perumal Chetty v. Perera*,[1] the writ issued on the first application was still outstanding and the first application still pending when the second application was made. But if, as indicated in the head-note, a return of the writ had been made by the Fiscal, then the case dealt with circumstances showing want of due diligence in applying for a new writ, and not any want of due diligence on the application for the application would cease to be pending as soon as a complete return to the writ had been made. It is to be observed that the finding was that the creditor did not execute due diligence in "recovering the judgment debt," not that there had been a want of due diligence "on the earlier application."

The case of *Palaniappa Chetty v. Gomes* [2] was followed in *Ephraims v. Silva* [3] without any further consideration of the point.

In *Silva v. Alwis* [4] the question before the Court was whether there had been an unreasonable delay in making the first application

[1] *2 Br. 29.*
[2] *1 N. L. R. 356.*
[3] *6 N. L. R. 301.*
[4] *1 A. C. R. 192*

for execution, and Wendt J. observed, referring to the provisions of section 219: "Such an examination may be, and under ordinary circumstances is, a means of information which a creditor is obliged to adopt; but if without that means he is able to satisfy the Court on the point . . . . I am not prepared to say he is debarred from doing so."

Elyapillai v. Murukesu [1] was clearly a case of delay in applying a second time for execution, and the cases I have already cited were referred to in support of the contention that there had been a want of due diligence in obtaining satisfaction of the decree, rather than a want of due diligence on the previous application. Wood Renton J. there remarked that any presumption which might be drawn from the absence of any application under section 219 was a presumption only, and might be rebutted.

In the present case there has been no want of due diligence after the return of the writ on the earlier application. As soon as the Fiscal's return showed that he could find no property of the debtor, an application was promptly made under section 219 to examine the debtor.

The question whether a failure to make application under section 219 or under section 298, before the return of the writ, is *prima facie* evidence of want of due diligence on the application, turns on whether the creditor knew or had reason to believe that no property of the debtor could be found. Until then no application under section 298 to attach the person of the debtor could, by the express terms of the section, be successful, and it would be equally unreasonable in my opinion for the creditor to call upon the debtor, and add to the costs, by an application under section 219, until satisfied that no property of the debtor could be found which could be seized in execution. No presumption from the absence of an application under section 219 before the return of the writ would necessarily arise from that fact alone. Whether such a presumption can be drawn would turn on the fact in each particular case, and the cases cited do not in my opinion establish the proposition that the presumption can be drawn in every case. In the present case the learned Judge is in my opinion right in saying that until the Fiscal made the return the plaintiff-respondent could not know whether any property had been found or not, and there is no suggestion in the case that there was any possibility that property would not be found. The learned Judge was satisfied from the record that there was no want of due diligence on the previous application, or afterwards. I see no reason to think he was wrong, or that any presumption which would require evidence in rebuttal could be raised against the respondent. I would dismiss the appeal, with costs.

[1] (1907) 10 *N. L. R.* 249.

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[His Lordship set out the facts, and continued]:—

"The contention as to the absence of due diligence is based on the fact that either before the issue or during the currency of the writ of execution of March 18, 1914, the plaintiff had not taken steps to have the second defendant examined under section 219 of the Civil Procedure Code. Several decisions of this Court have been cited on behalf of the second defendant, but I do not think that any of them supports the contention to its full extent. Those decisions have the effect of reading section 219 into section 337. Now, section 219 is a reproduction of Order 42, Rule 32, framed under the English Judicature Acts, but there is nothing in the English rules of practice corresponding to section 337 of our Code. The above English rule being independent of any such provision as section 337, I find it difficult to agree that section 219 must necessarily be connected with section 337. I can quite conceive that a judgment-creditor, who does not take advantage of means of discovery in aid of execution, may in particular cases be taken to have failed to use due diligence to procure complete satisfaction of the decree. I think the cases cited go no further than that, and certainly do not support the proposition, which is practically maintained on this appeal, that, whenever a second or subsequent application is made for execution of a decree, there is a rigid rule that on the previous application the judgment-creditor should have taken steps to examine the judgment-debtor under section 219. As a matter of fact, the argument went even further, for it was contended that even on a first application the judgment-creditor should show that he had used due diligence, and that, as that implied the examination of the judgment-debtor for discovery of assets, section 219 must be brought into play before any application for writ is made. This view was at one time entertained, as appears from *Silva v. Alwis* [1] and *Ephraims v. Silva*,[2] but these decisions have been over-ruled by the Full Court in *Silva v. Singho*. [3] The main reliance, however, is placed on the argument that in connection with the execution of the first writ, and before its return to Court by the Fiscal, it was imperative for the plaintiff to have exercised his right under section 219. There is no express provision of the law to that effect, and I am not inclined to impose on execution-creditors the observance of such a condition precedent by implication. Section 219 is, after all, intended to facilitate the realization of claims, and not to create any obstruction. I think none of the decided cases meant to put the matter higher than it was in *Eliyapillai v. Murukesu*,[4] where it was said that the failure to examine the debtor under section 219 was only presumptive evidence of the absence of due diligence.

[1] *1 A. C. R. 102.*

[2] *6 N. L. R. 301.*

[3] *(1907) 10 N. L. R. 312.*

[4] *(1907) 10 N. L. R. 249.*

The question, then, is always one of fact. There may be due diligence without any examination of the debtor, or there may be absence of due diligence even with such examination, and in determining the question all the circumstances should be taken into consideration. In the present case the proceedings show that the plaintiff all throughout exercised a great deal of forbearance, and the period of nine months, during which the writ was allowed to remain in the hands of the Fiscal, is to my mind an indication of the same spirit, rather than any evidence of want of due diligence. In my opinion the learned District Judge is right in holding that until the Fiscal made his return to the writ the plaintiff cannot reasonably be expected to have taken steps to examine the second defendant under section 219. Nor is there any substance in this appeal, because the second defendant, beyond depending on the technical objection, does not suggest that his examination would have effected any useful purpose. I think the appeal fails, and should be dismissed with costs.

Appeal dismissed.