1942 *Present :* **de Kretser and Wijeyewardene JJ.**

MURUGAPPA CHETTIAR *v.* BANDARANAYAKE *et al.*

*29—D. C. Kandy, 385.*

*Writ—Exercise of due diligence—Examination under s. 219 of the Civil Procedure Code—Res judicata*

**Plaintiff obtained judgment against three defendants and proceeded to apply for writ against first and third defendants. Thereafter he applied for writ against the second defendant and on the latter's objection that he had failed to exercise due diligence on his previous application, the application was refused.**

***Held*** **(in a subsequent application for examination of the first defendant under section 219), that the plaintiff was not barred by the order in the application for writ against the second defendant from making the present application.**

**It is open to a judgment-debtor to raise the question of due diligence when an application is made to have him examined under section 219 of the Civil Procedure Code.**

**The provisions of section 337 of the Civil Procedure Code are highly penal and should not be construed strictly against a judgment-creditor so as to prevent him from recovering money found to be due to him by decree of Court.**

APPEAL from an order of the District Judge of Kandy.

*N. E. Weerasooria, K.C.* (with him *P. Malalgoda*), for first defendant, appellant.

*Cyril E. S. Perera* (with him *C. J. Ranatunga*), for plaintiff, respondent.

*Cur. adv. vult.*

July 22,, 1942. WIJEYEWARDENE J.—

The plaintiff-respondent obtained a decree on October 30, 1939, against three defendants, jointly and severally, for the recovery of a sum of Rs. 1,394 . 25 and costs.

On January 9, 1940, the plaintiff applied for and obtained a writ against the first and third defendants. The writ was made returnable on June 30, 1940. In execution of that writ, the plaintiff caused certain movable property alleged to belong to the first defendant to be seized in Badulla. The property was claimed by the first defendant's wife. The claim was upheld in due course in the Badulla District Court, but the evidence does not show when the order in the claim inquiry was made. Moreover, when the writ was returned by the Fiscal to the Kandy District Court, it had the following endorsement, dated June 29, 1940 :—

> "Sale fixed for January 22, 1940, was stayed on order of Court, dated 19 January, 1940, the articles seized having been claimed."

This endorsement suggests that the order in the claim inquiry could not have been made before June 29, 1940.

On March 20, 1941, the plaintiff applied for writ against the second defendant. After inquiry, the District Judge upheld the objection of the second defendant that the plaintiff had failed to exercise due diligence on the previous application for writ against the first and the third defendants and refused to issue writ against the second defendant. There was no appeal against that order.

The plaintiff then applied to the District Judge for an order under section 219 of the Civil Procedure Code for the examination of the first and the third defendants. The third defendant raised successfully, at that stage, the plea that he was a public servant within the meaning of the Public Servants (Liabilities) Ordinance and the Court, thereupon refused to allow any further action to be taken against him.

The first defendant sought to avoid his examination under section 219 on the ground that the plaintiff did not exercise due diligence on the application for writ made on January 9, 1940. After inquiry, the District Judge held against the first defendant and the first defendant preferred the present appeal against that order.

In my view, it is open to a judgment-debtor to raise the question of due diligence when an application is made to have him examined under section 219. The judgment-creditor could ask for such an examination only if he is entitled to enforce the decree. This connotes a right in the judgment-debtor sought to be examined, to show that the judgment-creditor is not entitled to enforce the decree by virtue of the provisions of section 337 of the Code.

The Counsel for the appellant raised two points in support of the appeal :

(i) that the judgment-creditor was barred by the order made by the District Judge on his application of March 20, 1941, from stating that he exercised due diligence on his application of January 9, 1940.

(ii) that due diligence was not, in fact, used on the application of January 9, 1940.

With regard to the first point, the question should be considered in accordance with the general principles of law analogous to those of *res judicata*. But these principles would not operate where the parties to the subsequent application were neither parties to the previous application nor the privies of such parties. (*Harendra Lal Roy Chowdry v. Shem Lal* [1].) The first defendant was neither a party to the application of March 20, 1941, nor a privy of the second defendant against whom alone that application was made. The first point must, therefore, fail.

As regards the second point, it is sufficient to state that the plaintiff appears to have done all that he could have attempted reasonably within the period of the writ from January 9 to June 30, 1940. He seized movable property belonging to the first defendant and he was then confronted with an inquiry in a distant court as a result of a claim made by the first defendant 's wife. In order to succeed on a subsequent application for writ, it is not incumbent on a judgment-creditor to satisfy a court that on a previous application he took all the possible steps which a creditor exercising the greatest possible diligence would have taken. The provisions of section 337 of the code are highly penal and should not be construed very strictly against a judgment-creditor, so as to prevent him from recovering money found to be due to him by a decree of court.

I dismiss the appeal with costs.

DE KRETSER J.—I agree.

*Appeal dismissed.*