1945 *Present:* **Soertsz A.C.J. and Canekeratne J.**

EDWARD, Appellant, *and* DE SILVA, Respondent.

42—D. C. (Inty.) Matara, 15,119.

Execution—Appeal filed by judgment-debtor—Subsequent application by decree-holder for execution of decree—Notice to judgment-debtor—Condition precedent—Civil Procedure Code, s. 763.

In an application for execution of decree after an appeal has been filed by the judgment-debtor it is the duty of the judgment-creditor to make the judgment-debtor a party respondent. The failure to comply with this requirement of section 763 of the Civil Procedure Code would result in a failure of jurisdiction or power of the court to act and would render anything done or any order made thereafter devoid of legal consequence.

APPEAL from an order of the District Judge of Matara.

H. V. Perera, K.C. (with him *Vernon Wijetunga*), for the defendant, appellant.

N. E. Weerasooria, K.C. (with him *H. W. Jayewardene*), for the plaintiff, respondent.

Cur. adv. vult.

August 21, 1945. SOERTSZ A.C.J.—

The respondent to this appeal obtained judgment against the appellant for a certain sum of money. The appellant lodged an appeal on September 7, 1943. Thereafter, the respondent applied for and obtained a writ of execution returnable on March 18, 1944. He did not make the appellant a party-respondent to that application. On September 16, 1943, the appellant's proctor moved to have the writ recalled on the ground that the application for it had been made in contravention of the requirement of section 763 of the Civil Procedure Code in that, although his client had taken an appeal at the time the writ was applied for, he had not been made a respondent to the application. This motion was fixed for inquiry on September 29, 1943, but on that date a settlement was reached, the respondent undertaking to give security in the amount of the Fiscal's valuation of such property as came to be seized on the writ, before proceeding further with its execution. However, on October 12, 1943, the respondent's proctor informed the Court that " his client was not tendering security " and, thereupon, the Court made this order: " Recall writ unexecuted. Forward appeal in due course." On the same day, the appellant's proctor brought to the notice of the Court that the Fiscal had already seized property on the writ that had issued on September 9, 1943, and he asked that the Fiscal be directed to release that property from seizure. This was allowed and the Fiscal was directed accordingly. Four months later, namely, on February 28, 1944, the respondent's proctor filed a fresh application for writ and asked that writ be issued, on the respondent tendering the necessary security

The Judge made order " Call on Bench ". On the following day, February 29, 1944, the case was so called, and the following order was made:

" I allow application for writ on security based on the Fiscal's valuation of the property seized."

This application and the order upon it were made *ex parte*. The appellant had not been made respondent or given notice and he was not present before the Court. But, he appears to have heard of what had happened, for two days later, on March 2, 1944, his proctor moved that the writ be recalled unexecuted. This motion was fixed for inquiry on March 9, 1944, and on that day, the Court heard both parties and made order on the following day refusing to recall the writ. Hence this appeal.

The question now is whether the order made on February 29 and March 10, 1944, are well founded. The answer to that question must depend on the correct interpretation of Chapter 49 and, particularly on the correct interpretation of section 763 for, in this instance, the application for execution was made by the judgment-creditor and was made after an appeal had been filed. Section 763 enacts that—

" In the case of an application being made by the judgment-creditor for execution of a decree which is appealed against, the judgment-debtor shall be made respondent.

If, on any such application, an order is made for the execution of a decree against which an appeal is pending, the Court which framed the decree shall, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property, and for the due performance of the decree or order of the Supreme Court.

And when an order has been passed for the sale of immovable property in execution of a decree for money, and an appeal is pending against such decree, the sale shall, on the application of the judgment-debtor, be stayed until the appeal is disposed of, on such terms as to giving security or otherwise as the Court which passed the decree thinks fit."

Now, the ordinary rule is that once an appeal is taken from the judgment and decree of an inferior Court, the jurisdiction of that Court in respect of that case is suspended except, of course, in regard to matters to be done and directions to be given for the perfecting of the appeal and its transmission to the Court of Appeal. As Lord Westbury, Lord Chancellor (1864), observed in *Attorney-General v. Sillem* [1], " the effect of a right of appeal is the limitation of the jurisdiction of one Court and the extension of the jurisdiction of another ". It follows as a corollary that on that right being exercised the case should be maintained *in statu quo* till the appellate Court has dealt with it and given its decision. It is hardly necessary to labour the point since the language of Chapter 49 of the Code makes it sufficiently clear that the Legislature in enacting, as it did, was creating an exception to the ordinary rule, but in a qualified

[1] *11 English Reports at p. 1208.*

and limited way. In other words, the Legislature continued the jurisdiction, that is to say, the competency of the Court as the Court appointed to try and determine the case, beyond its ordinary limits, but it took care to see, as it almost invariably does, that its jurisdiction, in the sense of its power to act, and of its correct action are made dependent on the observance of rules of procedure. Some of those rules are so vital, being of the spirit of the law, of the very essence of judicial action, that a failure to comply with them would result in a failure of jurisdiction or power to act, and that would render anything done or any order made thereafter devoid of legal consequence. The failure to observe other rules, less fundamental, as pertaining to the letter of the law and to matters of form would not prevent the acquisition of jurisdiction or power to act, but would involve the exercise of it in irregularity. Or, it may happen that the Court having acquired jurisdiction, thereafter acts irregularly or erroneously and thereby prejudice is caused to some party. In these latter cases, it would be for the party concerned to resort to appropriate action to repair the wrong or to obtain relief, and subject to that, the thing done or the order made would be binding upon the parties.

The question then is to which of these categories the failure to comply with the requirement of section 763 that the judgment-debtor shall be made a party respondent should be ascribed.

In regard to that question, I find myself assisted today more confidently to answer I ventured to give, in the case of *Keel and others v. Asirwathan and another* [1], in view of the two opinions delivered in the Privy Council in the case of *Ragunath Das v. Sundra Das Khelri* [2], and in the case of *Malkar Jun v. Nahari* [3] of which I was not been aware.

In the former case, section 248 of the Indian Code of Civil Procedure, then in force, required that a certain party should be brought before the Court by serving him with the notice indicated in that section, calling upon him to show cause why the decree should not be executed against him, and by obtaining an order binding upon him. This the judgment creditor had failed to do. Their Lordships held that the party concerned was not bound by anything that was done. Lord Parker observed " a notice under section 248 (that was the section of the Indian Code that arose there. Here it would be under section 763 of our Code) is necessary in order that the Court should obtain jurisdiction ". Referring to the latter case cited above and to another case Their Lordships observed as follows " attention was called to the case of *Malkar Jun v. Nahari and another*, but in their opinion there is nothing in that case that has a bearing upon the present appeal. As laid down in *Gopal Chunder Chaterjee v. Gunanomi Dasi* [4] a notice under section 248 of the Code is necessary *in order that the Court should obtain jurisdiction to sell property* by way of execution as against the legal representative of a deceased judgment-debtor. In the case in 27 Indian Appeals (*i.e.*, *Malkar Jun's* case *supra*) such a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had, therefore, jurisdiction to sell though the

[1] *4 C. L. W. 128.*
[2] *A. I. R. 1914 P. C. 129.*
[3] *I. L. R. 25 Bombay 338.*
[4] *(1892) 20 Calc. at 370.*

decision as to who was the legal representative was erroneous . . . . The present case is of a wholly different character. No proper notice was served under the section and the respondents had full notice of and indeed were responsible for . . . the procedure adopted ". In *Malkar Jun's* case (*supra*) Lord Hobhouse in the course of delivering the opinion of the Judicial Committee said—

> " The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramalingappa. He contended that he was not the right person but the Court, having received the protest, decided that he was the right person and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake it is true, but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken, the decision, however wrong, cannot be disturbed."

To apply those principles, the case before me falls unequivocally within the rule in *Rāgunath Das v. Sundra Das Khelri* (*supra*). Section 763 of our Code enacts that " in the case of an application being made by the judgment-creditor for execution of a decree which is appealed against, the judgment-debtor shall be made respondent " that is to say that he shall be brought before the Court or shall be given the opportunity of coming before the Court by being served with a notice calling upon him to show cause, if he has any cause to show, against the application for execution. This is precisely what the party concerned in the Indian case and the judgment-creditor in this case failed to do. This failure in respect of the original application for execution in this case proved immaterial because the parties reached a settlement on that occasion and agreed that the writ should go on the judgment-creditor giving security. But later the judgment-creditor resiled from that agreement. His proctor informed the Court that " his client was not tendering security ", and the Court made order " Recall writ unexecuted. Forward appeal in due course ". That order put an end to the application for execution. It was tantamount to an order refusing to allow execution of the decree and in my view—*primae impressionis*—it was not open to the judgment-creditor to make another application for execution. But let us assume that it was. Such an application would nevertheless have to conform to the requirement of section 763 that the judgment-debtor shall be made respondent. But on this new application for execution made by the judgment-creditor several months later, once again the judgment-debtor was ignored. He was not made respondent. That omission was the omission of the party in the Indian case too and it follows inevitably that the result must be the same—a failure of jurisdiction, not merely an irregular or an erroneous exercise of it as happened in the second Indian case cited, that of *Malkar Jun v. Nahari* (*supra*).

Counsel for the respondent sought to escape from this result by relying on the fact that, in this case, the judgment-debtor had ultimately the opportunity of being heard when he came before the Court to ask that the order made without notice to him be rescinded. But that was too late.

The law gave him the right to be heard before the order was made. It did not impose upon him the burden of contending against an order that had been made, by no means a light burden for, after all, a man convinced against his will is of the same opinion still. If the judgment-debtor had been given an opportunity of showing cause at the proper time he might have succeeded to the extent of securing the refusal of the application altogether for it was open to the Court under section 763 to refuse the application, or at least to the extent of securing better terms. At any rate, he was entitled to try. The words of Lord Parker in *Ragunath Das's* case apply exactly on the facts of this case:

> " No proper notice was served under the section and the respondent had full notice of and indeed was responsible for the irregularities of the procedure adopted."

For these reasons, I would hold that the orders of March 10, 1944, and of February 29, 1944, were made without the Court equipping itself with the power to make them and I would, *pro forma*, set them aside, although *ex hypothesi* it is not necessary to do so. The respondent will pay the appellant the costs of both Courts in respect of this matter.

CANEKERATNE J.—I agree.

Appeal allowed.