1964 *Present :* Sri Skanda Rajah, J., and Sirimane, J.

S. G. WIJETUNGA, Appellant, *and* SINGHAM BROS. & Co., Respondent

S. C. 183/1963—D. C. Colombo, 21315/S

Execution of decree—Application made after one year has elapsed from date of decree—Procedure—Civil Procedure Code, ss. 224, 225, 347.

Where, after one year has elapsed from the date of a decree, application for execution of the decree is made in Form No. 42 in Schedule II of the Civil Procedure Code as prescribed by sections 224 and 225 of the Code, the application is equivalent to the "petition" referred to in section 347. Therefore, a petition need not be attached to the application.

It is sufficient compliance to give notice of the application to the judgment-debtor. A copy of the petition need not be served on him.

APPEAL from a judgment of the District Court, Colombo.

A. C. Jayasinghe, with *M. T. M. Sivardeen*, for the defendant-appellant.

No appearance for the plaintiff-respondent.

Cur. adv. vult.

October 23, 1964. SRI SKANDA RAJAH, J.—

We now set down our reasons for the order we made on 16th October, 1964, dismissing the appeal.

Application was made on Form No. 42 in Schedule II of the Civil Procedure Code as prescribed by sections 224 and 225 of the Code. There was no petition attached to it though it was made after the lapse of one year after the decree. The judgment-debtor-appellant's objection is that he was served with only a notice regarding this application and not in addition with a copy of the petition as required by section 347 of the Code.

Mr. Sivardeen cites, in support of this contention, the following cases :—

(1) *de Silva v. Upasaka Appu, (1919) 6 C. W. R. 227*
(2) *Perera v. Novishamy, (1927) 29 N. L. R. 242*
(3) *Fernando v. Thambirajah, (1945) 46 N. L. R. 61*
(4) *Rodrigo v. Weerakoon, (1957) 61 N. L. R. 150*, and
(5) *Ratnatte v. Abdul Azeez, (1960) 62 N. L. R. 400.*

Also, he very properly brought to our notice the following cases which take a view to the contrary :—

(6) *Muttiah Chetty v. Meera Lebbe Marikar, (1892) 1 S. C. R. 244*
(7) *Nanayakkara v. Sulaiman, (1926) 28 N. L. R. 314*

(8) *Wijewardene v. Raymond, (1937) 39 N. L. R. 179*, and
(9) *Silva v. Kavanihamy, (1948) 50 N. L. R. 52*

These cases will now be examined in their chronological order.

In *Muttiah Chetty v. Meera Lebbe Marikar* it was pointed out that " the ' petition ' referred to in section 347 obviously embraces the written application required by section 224 ", per *Withers, J.* at 246. These words of *Withers, J.* reflect our view regarding the word ' petition ' in section 347.

In *de Silva v. Upasaka Appu* the judgment-debtor was not made a party respondent to the application. Nor was notice of the application for writ given to him. *De Sampayo, J.*, at 228, said, " Such an irregularity is substantial, especially in a case like this where the amount due was quite within the competence of the execution-debtor to pay without any writ ", and set aside the order appealed from.

In *Nanayakkara v. Sulaiman* objection was taken by a claimant to property seized to the regularity of the proceedings on the ground that no notice of the application for writ had been given to the judgment-debtor in terms of section 347. *Dalton, J.*, quoted from *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh, 6 Indian Appeals 233 (P. C.)*. " in execution proceedings, the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon merely technical grounds, when the execution has been found to be substantially right ". We would respectfully subscribe to the view contained in this quotation.

Perera v. Novishamy dealt with the re-issue of writ for the third time—a matter falling within the scope of section 337 of the Code—and the Court directed notice to issue on the judgment-debtor. The application was itself in Form No. 42. It was held that the application should have been made by petition and a copy of such petition should have been served on the judgment-debtor. *Muttiah Chetty* and *Nanayakkara* do not appear to have been referred to at all.

In *Wijewardene v. Raymond* it was held that an application for writ under section 347 need not be by petition and that it is sufficient compliance to give notice of the application for writ to the judgment-debtor in order to afford him an opportunity to be heard against the issue of writ. *Soertsz, J.*, whose experience even in the original courts was considerable, expressed his agreement with the view taken in *Muttiah Chetty* and his disagreement with *Perera v. Novishamy*. At 181 he said, " I have examined this question at some length as it is one that arises with some frequency and not because the present case is one of merit. In my opinion, the attitude of the appellant is a vexatious one. He says I have no cause to show except that you have not crossed your t's and dotted your i's. " Also he referred to the observation of *Dalton, J.*, in *Nanayakkara*.

In *Fernando v. Thambirajah* failure to apply by petition and to give notice of application were held to render the execution proceedings void and of no effect. This case too made no reference to *Muttiah Chetty* and *Nanayakkara.*

In *Silva v. Kavanihamy* the provision as to service of notice in section 347 was held to be merely directive and that the failure to serve the notice was only an irregularity. With respect, we find ourselves unable to subscribe to this view.

Rodrigo v. Weerakoon too did not consider those cases but followed *de Silva v. Upasaka Appu.* In that case application was not made in Form No. 42.

The question for decision in *Ratwatte v. Abdul Azeez* was whether the District Judge was right in allowing the subsequent application for the execution of the decree under section 337 of the Code. It was, therefore, unnecessary to consider section 347. Also, neither *Basnayake, C.J.*, nor *H. N. G. Fernando, J.*, examined in his judgment *Muttiah Chetty, Nanayakkara* and *Wijewardene.*

To sumarise our view :—

1. The application in Form No. 42 is equivalent to the 'petition' referred to in section 347. Therefore, a petition need not be attached to the application. (*Muttiah Chetty* ; *Wijewardene*).
2. It is sufficient compliance to give notice of the application to the judgment-debtor. A copy of the petition need not be served on him.

In this case the appellant had the requisite notice. Therefore, he cannot complain that he was denied the opportunity of showing cause. He was not prejudiced in any manner by the failure to annex a copy of the petition to the notice.

SIRIMANE, J.—I agree.

Appeal dismissed.