1942 *Present :* **Soertsz and Keuneman JJ.**

SELLAPPA CHETTIAR v. ARUMUGAM CHETTIAR.

60.—D. C. Colombo, 6,188.

Concurrence—Appellant obtains judgment against first defendant and takes out writ—Petitioner-respondent obtains judgment—Failure to take out writ—Right to concurrence—Civil Procedure Code, ss. 350 and 352.

Plaintiff in the present action sued the first defendant on November 20, 1936, and obtained judgment on February 14, 1938.

In October, 1938, the petitioner-respondent sued the first defendant and his brother, Mohamed, in case No. 9,165, as partners doing business as Buhari Bros. On October 21, 1938, second defendant, Mohamed, consented to decree being entered against himself and the first defendant in the case (who is also the first defendant in this case), jointly and severally for a sum of Rs. 3,095, with interest and costs, and also consented to plaintiff being declared entitled to the sum of Rs. 2,233 lying to the credit of defendant with Messrs. Narottam & Pereira. On October 26, 1938, plaintiff in case No. 9,165 applied for writ, which was allowed. But no writ was taken out. In the meantime, the plaintiff in this case applied for execution of his writ on October 20, 1938. Application was allowed only to the extent of the amount due on his claim and interest. Writ was issued on October 21, 1938. On a notice issued to them by the Fiscal under section 229 of the Civil Procedure Code, Messrs. Narottam & Pereira paid into the District Court a sum of Rs. 3,688, which represents the amounts due to Buhari Bros.

Held, that the petitioner-respondent was not entitled to concurrence under section 352 of the Civil Procedure Code and that the plaintiff-appellant was entitled to the whole of the amount for which his writ had been allowed.

Konamalai v. Sivakolunthu et al. (*9 S. C. C. 203*) followed.

Held, further, that the petitioner-respondent was entitled to claim the balance proceeds under section 350 of the Civil Procedure Code.

APPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him *F. A. Tisseverasinghe*), for substituted plaintiff, applicant.

N. Nadarajah, K.C. (with him *V. K. Kandaswamy*), for second respondent.

Cur. adv. vult.

October 7, 1942. SOERTSZ J.—

In this appeal, we have to deal with a matter of some difficulty, which raises once again the question of the correct interpretation of section 352 of the Civil Procedure Code. The material facts are as follows:—The original plaintiff in this case sued the first defendant on November 20, 1936. He obtained judgment on February 14, 1938. An appeal was taken on February 15, 1938. Early in October, 1938, the present petitioner-respondent sued the first defendant in this case and his brother, Mona Mohamed, as partners doing business as Buhari Bros. On October 7, 1938, he obtained a mandate of sequestration. On October 21, 1938, the second defendant in case No. 9,165, that is to say Mona Mohamed, who alone had signed the proxy given to the proctor purporting to act for

Buhari Bros., consented to decree being entered against himself and Habubu Mohamed, who is first defendant in that case as well as in this, jointly and severally for a sum of Rs. 3,095 and interest and costs and he also consented to the plaintiff in case No. 9,165 "being declared entitled to the sum of Rs. 2,233 more or less lying to the credit of defendants with Messrs. Narottam & Pereira". On October 26, 1938, the plaintiff in case No. 9,165 applied for writ. That application was allowed, but no writ was actually taken out.

In the meantime, the plaintiff in this case applied for execution of his writ on October 20, 1938. This application was allowed only in respect of the amount due on the claim and interest. Writ was issued on October 21, 1938, and the Fiscal made his report on October 24, 1938, to the effect that he had taken action under section 229 of the Civil Procedure Code. On being served with this notice, Messrs. Narottam & Pereira paid into the District Court a sum of Rs. 3,688.15 on October 26, 1938, and a further sum of Rs. 91.42 on November 22, 1938. In bringing these sums into Court, they said they represented amounts due by them to Buhari Bros. The plaintiff-respondent claims that he is entitled to draw the entire amount decreed to him in case No. 9,165 out of this sum under section 350 of the Civil Procedure Code or, alternatively, that he is entitled to concurrence with the substituted-appellant under section 352. The substituted-appellant contests both these claims.

In these circumstances, two questions have been submitted to us for consideration and determination, *namely*:—

(*a*) what are the rights of the two parties under section 352 of the Civil Procedure Code?

(*b*) if the plaintiff in D.C. 9,165, that is the petitioner-respondent in this appeal, has no right to any part of this money under section 352 of the Civil Procedure Code, has he a preferent claim or any claim at all to the money under section 350 of the Civil Procedure Code?

In regard to the first question, we are fettered by the authority of a Collective Court. In the case of *Konamalai v. Sivakolunthu, and Sabapathipillai—claimant* [1], Burnside C.J., Clarence and Dias JJ., held, on facts almost exactly the same as the material facts in this case, that no judgment-creditor who had no writ in the hands of the Fiscal at the time of the realization of the assets, is entitled to claim concurrence. It is difficult to follow the *ratio decidendi* in that case. Not one of the Judges stated in express terms that a writ in the hands of the Fiscal at the instance of a particular judgment-creditor is a condition precedent to a claim by him for concurrence. But that was the effect of their judgments.

Section 352 appears to be susceptible of an interpretation more favourable to the respondent in this case as would appear from the judgment delivered by de Sampayo J. in *Mirando v. Kidura Mohamadu* [2] and in *Mendis v. Pieris* [3]. But, the Collective Court judgment, already referred to, is binding upon us. It has been followed, as was pointed out by Layard C.J. in his judgment in *Raheem v. Yusoof Lebbe* [4], "for

[1] *9 S. C. C. 203.*
[2] *7 N. L. R. 280.*
[3] *18 N. L. R. 310.*
[4] *6 N. L. R. 169.*

so many years". That was in 1902. It has been followed since then too, as pointed out by Shaw A.C.J., in "numerous other cases", for instance in *Muttiah v. Abdulla*[1]; *Letchiman v. Arunasalam Chetty*[2]; *Sadayappa Chetty v. Siedle*[3]; and as already observed by me, it was followed in *Mendis v. Pieris* (*supra*) and in *Meyappa Chetty v. Weerasooriya*[4]. In the case of *Mendis v. Pieris* (*supra*) Wood-Renton C.J.and Shaw J, de Sampayo J. taking a different view, followed *Konamalai v. Sivakolunthu* (*supra*), and allowed the appellant in the case they were considering the right to concurrence in regard to two writs of his, on the ground that, at the time of the realization of the assets, the Fiscal had in his hands those two writs, as well as the writ of the other party in that case. They refused to allow him concurrence in regard to a third writ he held on the ground that that writ was not in the hands of the Fiscal at that time. De Sampayo J. was of opinion that the appellant in that case was entitled to concurrence in respect of all three writs. Again, in the case of *Meyappa Chetty v. Weerasooriya* (*supra*), Shaw A.C.J. and Ennis J. followed *Konamalai v. Sivakolunthu* (*supra*). Shaw A.C.J. observed as follows.—"In *Mendis v. Pieris*, following the decision in *Konamalai v. Sivakolunthu*, it was held that a creditor who had applied for execution after the procedure of the execution had been paid into the Kachcheri is not entitled to share in the proceeds, and the reason given by the Judges who constituted the majority of the Court was that *such creditor had no writ in the hands of the Fiscal at the date of* the sale". Ennis J., in a separate judgment, took the same view and both Shaw A.C.J. and Ennis J. were of opinion that "the object of the enactment contained in section 352 of the Code was clearly . . . ., that stated in the judgments in *Konamalai v. Sivakolunthu*, namely, to give the creditors who had been to the trouble of realizing the assets of the debtor an advantage over more dilatory creditors". (Per *Shaw A.C.J. at p 82*). "The whole object of the section seems to me to be to give a creditor who has been vigilant a preference over other creditors who have been less vigilant" . . . (per *Ennis J. at p 96*). De Sampayo J., who was associated with Shaw A.C.J. and Ennis J. in that case, took a different view on the point raised in that case and, in the course of his judgment, referred to the full court case as follows:—"The sheet anchor of the Counsel for the respondent for this argument is *Konamalai v. Sivakolunthu*, to which all the other cases cited are referable. That case is very difficult to understand . . . . . my impression is that the learned Judges who decided that case did not mean to construe section 352 of the Code when they made the observations now depended on. Indeed, there is hardly any reference to its terms, and certainly there is none to the numerous difficulties which surround that section and with which this Court has since had from time to time to grapple". There can be no doubt as to the difficulties created by section 352. Shaw J. has drawn attention to them in his judgments in both *Mendis v. Pieris* (*supra*) and *Meyappa Chetty v. Weerasooriya* (*supra*) and has pointed out the urgent need for amendment. That was over twenty-five years ago. But nothing has been done and there is no alternative open to us but to continue to grapple with section 352 in the

[1] *1 C. W. R. 180.*
[2] *2 C. W. R. 130.*
[3] *2 Br. 3.*
[4] *19 N. L. R. 79.*

way in which it has been grappled with ever since the judgments in *Konamalai v. Sivakolunthu* were delivered.

I would, therefore, hold that the respondent was not entitled to concurrence under section 352.

The next question is in regard to the position of the petitioner-respondent under section 350 of the Civil Procedure Code. That is a much wider section than section 352 and deals with "money in court, whether realized in execution of a decree or not", and it appears to me that the petitioner-respondent is entitled to have his claim investigated under this section. That he did make a claim that he was entitled to the money in Court to the exclusion of the present appellant appears from the proceedings of November 23, 1938. He has also filed cross-objections. on this appeal, in which he makes the same claim.

For the purpose of considering this claim, the following facts are material. On February 14, 1938, decree was entered in favour of the present appellant for Rs. 2,240, with interest thereon at 9 per cent. per annum from the date of decree and for costs of suit. When the appellant asked for writ on October 20, his application was allowed *to the extent of the claim and interest only.* That amounted to Rs. 2,240 plus interest Rs. 128.60.

Although Messrs. Narottam & Pereira, on the notice issued to them, brought into Court the sum of Rs. 3,688.15 and Rs. 91.42, that is to say Rs. 3,779.57, the only assets realized, in virtue of the appellant's writ. must be taken to be Rs. 2,368.60 for the recovery of which writ had been allowed. It seems to me that the appellant is entitled to the whole of that amount, inasmuch as Messrs. Narottam & Pereira did not dispute the debt alleged to be due by them to the first defendant as they were entitled to do under section 230 of the Civil Procedure Code. The fact that in bringing the money into Court they referred to the two sums as money due to Messrs. Buhari Bros. does not, in my opinion, amount to showing cause within the meaning of section 230. The position therefore, is, I think, what it would have been if Messrs. Narottam & Pereira had paid this sum of Rs. 2,368.60 into the hands of the appellant himself.

In that view of the matter, the investigation under section 350 of the Code must be limited to the sum of Rs. 1,410.97, which is the amount over and above the amount for which the appellant's application for writ was allowed.

In regard to that amount it represents less than half the amount due by Messrs. Narottam & Pereira to Buhari Bros. The trial Judge has found that Moona Mohamed was a partner of that Firm. I see no reason for differing from that view. It follows that that sum is now in Court as the amount left over after the appellant's writ had been satisfied to the extent to which it was limited by the order of the Judge and may fairly be regarded as Mona Mohamed's share of the money to which the plaintiff-respondent is entitled on the consent decree in case No. 9,165.

I set aside the order of the District Judge and make order as stated above. Each party will bear his costs of appeal.

KEUNEMAN J.—I agree.

Appeal allowed.