1937

Present : **Abrahams C.J.**

SAIBO *v.* MOHAMADU.

96—C. R. Gampola, 1,592.

Writ of execution—Application for writ before taking copy of decree—Rectification of omission—Writ not void—Seizure of property without demand of payment from the defendant—Civil Procedure Code, s. 226.

Where at the time an application for writ was made no copy of the decree had been taken but the omission was rectified before the issue of the writ.

Held, that the writ was not void.

Seizure of property under a writ is not bad merely because the Fiscal had failed to comply with section 226 of the Civil Procedure Code in that he made no demand upon the defendant for payment of the amount due.

De Silva v. Wijesekere (*36 N. L. R. 287*), and *Hadjiar v. Kuddoos* (*37 N. L. R. 376*) distinguished.

APPEAL from a judgment of the Commissioner of Requests, Gampola.

Cyril E. S. Perera (with him *Dodwell Gunawardene*), for defendant, appellant.

E. F. N. Gratiaen, for plaintiff, respondent.

Cur. adv. vult.

December 2, 1937. ABRAHAMS C.J.—

This is an appeal against an order of the Court of Requests, Gampola, dismissing an application by the defendant that a writ of execution issued by that Court should be recalled and that the goods seized under that writ should be released. The facts are that the plaintiff in the action

obtained a decree against the defendant for the sum of Rs. 300 with legal interest and costs. He applied for a writ of execution on February 7, 1935, the application was allowed and the writ was issued on the 15th of that month. The sort of delays that is not unusual in this country apparently followed the issue of the writ. What these were it is not necessary to inquire, and on February 7, 1936, another application was made for the "reissue of writ". This was allowed. On July 9 of the same year another application was made for a "reissue of writ", and this also was allowed. It has been argued for the defendant that the writ that was issued on February 15, 1935, was bad because at the time that the application was made no copy of the decree had been taken as required by Schedule B., Part II., of the Stamp Ordinance, No. 22 of 1909. That provision reads as follows :—

> "No party shall be allowed to take any proceedings on or by virtue of any decree or judgment without first taking a copy thereof".

It is admitted that at the time the application was made no copy of the decree had been taken, but this omission was rectified at the time that the writ of execution was issued and it is therefore argued on behalf of the plaintiff that the grant of the application by the Court of Requests is, at the most, an irregularity, and that the writ itself ought not therefore to be pronounced void. There is no doubt that the purpose of requiring a copy of the decree to be taken before proceedings were taken on any decree or judgment was to protect the revenue. In support of his argument Counsel for the defendant cites the case of *de Silva v. Wijesekera*[1], where Garvin S.P.J. was of the opinion that an application for execution of a decree was manifestly a proceeding taken on or by virtue of the decree and that the Legislature in enacting the relevant provision in Schedule B., Part II., of the Stamp Ordinance, did so in order to prevent evasion of stamp duty by the simple expedient of not taking out copies of the decree. The facts in that case were different from the facts in this case. There, judgment was entered in the case on August 21 at 3.55 P.M. and at 4.20 P.M. an application was filed on behalf of the plaintiff for execution of the decree. That application, which was made *ex parte*, was allowed. On the very next day after that on which judgment was entered petitioner filed a petition of appeal and filed also a motion by which he sought to have the order allowing the writ set aside. Notice of the motion was issued. The matter was heard on September 3, 1934, and the petitioner's motion disallowed. On appeal, however, the order was set aside and the writ was recalled. It will be observed therefore that an appeal was taken against the order of the Court allowing the application for the execution of the writ before the decree had been entered.

The question then is, does this judgment preclude me from now holding that the writ in this case was quite valid because at the date of issue a copy of the decree had been taken ? I am by no means sure that I am so precluded because despite the fact that the application was improperly allowed the mischievous results which the above-referred to provision of the Stamp Ordinance was designed to prevent did not follow, and the irregularity permitted by the Court might be said to be the barest technicality and it would be unjust to hold the writ invalidated.

[1] *36 N. L. R. 287.*

I am, however, excused from coming to any definite conclusion on the foregoing question because it appears that the application for a writ on February 7, and a similar application on July 9, 1936, were quite in order as a copy of the decree had been taken long before. Counsel for the defendant argues that the writ following on the application on these respective occasions was the same writ, as each application applied for "reissue of writ". The mere use however of the word "reissue" does not prevent the writ being an entirely new writ if it is so in fact, for on each occasion the order of the Commissioner of Requests was that the application should be allowed on fresh stamps being fixed, and the returnable date was assigned. How can it then be said that this was the same writ merely because the same piece of paper was used, presumably for convenience sake, which, I understand, is frequently the practice in the Court of Requests. In *Andris Appu v. Kolande Asari*[1], Ennis J. held that there was no objection to the use of the term "reissue" to describe a second or subsequent writ, but it appears to me that the matter is too obvious to require authority.

The defendant finally contends that the seizure was bad because the Fiscal failed to comply with section 226 of the Civil Procedure Code in that he made no demand upon the defendant for payment of the amount. In support of this contention the case of *Hadjiar et al. v. Kuddoos et al.*[2] was cited. In that case it was held by Koch and Soertsz JJ. that a failure of the Fiscal to perform this duty invalidated the sale under the writ, Koch J. observing that the necessity for the demand itself went to the root of the interests of the judgment-debtor and that he surely ought to be given an opportunity of paying and discharging the writ, which could only happen if he were informed of the issue of the writ. But it seems to me that that case is no authority for saying that the seizure was invalid when no demand was made if the defendant was aware of the seizure. How can he say that he has been given no opportunity of paying the amount of the judgment debt? He has only to pay it now. This defendant cannot claim the benefit of section 226, when he is not injured by the mere non-compliance with it. This is not even a question of his crying out before he is hurt; he cannot even be hurt.

I am of opinion that the order of the Commissioner of Requests is right. In making that order he expressed himself very strongly in regard to the evasiveness of the defendant. His language was thoroughly justified. The defendant has deliberately kept the plaintiff out of his money as long as he could do so and now he seeks to find a loophole in the law of civil procedure through which he can creep. Every now and again, unfortunately, the want of foresight or the incautious use of words by the Legislature enables a creditor to be defeated by his debtor. On this occasion, however, the debtor has not been able to find any chink in the law small enough to enable him to wriggle through and elude his creditor's grasp. The appeal is dismissed with costs.

Appeal dismissed.

[1] *19 N. L. R. 225.*

[2] *37 N. L. R. 376.*