VEERASAMY *v.* TAMBIPILLAI.

1897.
April 8.

D. C., Jaffna, 22,331.

Writ of execution—Motion to re-issue—Defence of debtor that his creditor has not used due diligence in procuring satisfaction upon previous issue of writ.

Where an execution-creditor moved for re-issue of writ after an interval of six years, averring that at the time the writ was previously issued the Fiscal had reported the debtor not to be possessed of any property, but that now he owned property, and where the debtor resisted the motion on the ground that soon after the writ was issued he had paid and settled the amount of the writ, and where on the day fixed for the hearing of the case he, without proving payment, raised the defence that his creditor had not used due diligence in procuring complete satisfaction, *held* that the latter defence was not open to him.

Per WITHERS, J.—A judgment creditor is not the less entitled to be paid his judgment debt because his debtor defers payment as long as possible.

Per LAWRIE, J.—The two defences of payment and want of due diligence in procuring satisfaction of writ, set up by the execution-debtor, are contradictory. If he fails to prove payment, writ should re-issue.

ON the 2nd July, 1891, plaintiff obtained a decree against the defendant for Rs. 1,500 and took out execution on 12th August following, but as he was unable to point out any property belonging to defendant for seizure, the writ was returned unexecuted. On the 11th January, 1897, plaintiff moved for re-issue of the writ, alleging on oath that he had exercised all reasonable diligence to have the writ executed, but that he was unable to find any property of the defendant; and that now the defendant had acquired property on which a levy could be made. The defendant, on the other hand, averred that he had paid and settled the amount of the writ soon after it was first issued.

After hearing the parties the District Judge recorded as follows:—

"Mr. Advocate Allegakoon, for defendant, objects that due diligence was not used on the previous occasion to procure complete satisfaction of the decree, and that the execution was not stayed by the decree-holder at the request of the judgment-debtor.

"Mr. Advocate Kanakasabhai, for plaintiff, states that the steps provided for by section 219 of the Civil Procedure Code were not taken by the plaintiff for the reason that the defendant had no property, and that he only became the owner of property on 13th November, 1896; that therefore the only question for the Court to decide is whether the defendant had or had not between

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1892 and 1896 any property, in support of which it is asserted that writ against the defendant's person was issued in October, 1892, in case No. 21,905 of this Court, in consequence of the Fiscal having reported that he was not possessed of any property.

" It does not appear that the defendant was arrested, and it must therefore be presumed that the claim was paid, as indeed the Fiscal's return shows. However this may be, it does not concern this Court now whether the defendant was or was not possessed of property. Nor am I prepared to listen to evidence on that point, though Mr. Kanakasabhai offers to call witnesses in support of the contention.

" The time to establish that fact was whilst the first writ was in the hands of the Fiscal, and the manner of establishing it was by examination on oath or affirmation of the defendant as provided by section 219 of the Civil Procedure Code.

" The application is therefore refused with costs.

" The fact that property was only subsequently acquired by the defendant would have been relevant, and important to establish by way of explaining the delay between 1892 and 1897 in applying for fresh writ, had the steps provided for in section 219 been taken on the first application, but they are useless now in the absence of those steps. A second application would have been refused even if made between August and December, 1892."

The plaintiff appealed against this order.

Dornhorst, for appellant.

Wendt, for respondent.

Cur. adv. vult.

8th April, 1897. LAWRIE, J.—

The District Judge allowed order on the defendant calling on him to appear and show cause why a fresh writ of execution should not issue against his property for the recovery of the amount of judgment.

The defendant appeared, and the cause he had to show was that, after the last writ was served on him, he paid the whole amount due, and he moved that the matter be set down for inquiry.

On the day fixed the defendant, instead of adducing evidence to prove payment, objected that a fresh writ could not issue, because due diligence had not been used on the previous application to procure complete satisfaction.

The learned District Judge sustained this objection and discharged the rule.

It seems to me that this was wrong.

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The execution-debtor had averred that due diligence had been used, diligence so complete that payment had been enforced. He could not after that be heard to say that due diligence had not been used; these are two contradictory defences. I would set aside and remit to the District Court to proceed with the inquiry whether the defendant paid the amount of the judgment. If he did not, I think a fresh writ should issue.

Plaintiff to have the costs of this appeal.

WITHERS, J.—

I agree in the order proposed by my brother. The case relied on by Mr. Dornhorst does not seem to me to apply to the circumstance of this case.

A judgment-creditor is not the less entitled to be paid his judgment debt because his debtor defers payment as long as possible. Here, the creditor had applied to renew his writ of execution, and the Court summoned the debtor to show cause why this application should not be allowed. The debtor's answer was:—" I admit I owed the money, but I have paid it. Apart from " that, the creditor is in default for not putting in force all the " machinery of the law against me for recovering his judgment " debt, and you, therefore, must not let him attempt to execute " his judgment."

This argument prevailed with the judge; but it seems to me to come with odd effect from the debtor.

It is expected of creditors—in order that litigation may be once and for all determined—that they should use due diligence in enforcing their judgments. But, surely, it is for the judge, who is asked by the creditor for a second execution, to decide whether he deserves what he asks for.

If the judge is not prepared to certify that the debtor has satisfied the judgment-creditor's claim, I think the execution-creditor ought to be allowed to enforce his judgment accordingly.