

1916.

Present: Ennis J. and Shaw J.

SENATHIRAJA *v.* MUTHUNAYAGAM.

332—D. C. Negombo, 10,204.

Appeal to the Privy Council—Execution of judgment pending appeal.

Where a successful party in appeal applies for execution of his decree in the District Court, after application had been made to the Supreme Court for conditional leave to appeal to the Privy Council, he should give notice to the appellant of his application for execution.

A decree which requires a party to yield up possession of immovable property is a decree which imposes the performance of a duty within the meaning of rule 7 of schedule I. to Ordinance No. 21 of 1909. The Supreme Court may, under rule 7, order security to be given before execution of judgment in such a case.

Section 777 of the Civil Procedure Code is not superseded by the rules in schedule I. to Ordinance No. 21 of 1909.

THE facts appear from the judgment.

A. St. V. Jayewardene, in support.

E. W. Jayewardene, contra

Cur. adv. vult.

February 27, 1916. ENNIS J.—

This is an application for leave to appeal to the Privy Council, and for an order to stay execution on the appellants giving security

for costs, or, in the alternative, that the respondents be ordered to give security before the execution of the decree.

The application for leave to appeal is not opposed.

As regards the stay of execution, it appears that two days after this application was made to the Supreme Court the respondents moved the District Court, under section 777 of the Civil Procedure Code, apparently without disclosing that this application was pending before the Supreme Court, and obtained execution of the decree without notice to the appellants. I am satisfied that had the District Court been aware of the application pending in the Supreme Court it would have stayed proceedings upon the respondent's motion till the Supreme Court application had been disposed of; and, further, I am of opinion that the plaintiff-respondent should have given notice of his application for execution to the defendant. The defendant would then have had an opportunity to bring the pending proceedings in the Supreme Court to the notice of the District Court. Section 777 specifies the procedure to be adopted in executing decrees an application under the section—the rules for the execution of decrees in an action are to be followed. Section 763 requires that the judgment-debtor shall be made a respondent when the decree to be executed is appealed against, and there is no reason that I can see why the provisions of section 763 should not apply, *mutatis mutandis*, when an appeal against the decree is being made to the Privy Council.

The execution of the decree having been obtained in the District Court *ex parte*, and while the application to stay execution was pending before the Supreme Court, I should have no hesitation in setting aside, if necessary, in revision, the order of the District Court granting execution.

With regard to the application before the Supreme Court, this is governed by the rules in schedule I. of the Appeals (Privy Council) Ordinance, 1909. It was urged for the appellants that rule 9 exclusively governed the question where the subject of litigation consisted, as in this case, of immovable property. I am not of that opinion. Rule 7 empowers the Supreme Court to direct execution of the judgment if the person in whose favour it is given shall, before the execution, give security. This rule applies only where the decree requires the appellant to pay money or perform a duty. In my opinion a decree which requires a party to yield up possession of immovable property (see section 217) is a decree which imposes the performance of a duty; and the Supreme Court has powers in such a case under rule 7. Rule 8 enables the opposite party to obtain a stay of execution when "real and substantial justice" requires it. Rule 9 specifies the *quantum* of security

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which may be ordered where the property is immovable property, and rule 10 specifies the nature of the security to be demanded in the case of movable property.

It has already been held in *Sevanather v. Thamotherumpillai* (D. C. Jaffna, 9,671 ¹) and *Hazipeer v. Catheravelu* (86—D. C. Galle, 12,022 ²) that section 777 of the Code is not superseded by the rules in the schedule to the Ordinance No. 31 of 1909. The rules in the schedule merely supplement the provisions of section 777, and empower the Supreme Court to make orders in certain cases "before the execution of the decree" (rule 7), and stay of execution (rule 8) cannot apply where execution has already been effected. In these circumstances it is necessary, if any order is to be made by this Court, to set aside the *ex parte* order of the District Court granting execution.

In view of the years which have elapsed before the respondent filed action, and the long possession by the appellant, I think the proper order would be to direct the judgment to be carried into execution on the respondent giving security, which I would fix at Rs. 7,500, on the principle laid down in rule 9.

I would accordingly grant leave to appeal to the Privy Council; set aside, in revision, the order of the District Court granting execution; and direct execution on the respondents giving security for Rs. 7,500. As the respondents are already in possession, I would allow them twenty-one days in which to give security.

SHAW J.—I agree.

Security ordered to be given.

