

1921.

Present : De Sampayo J. and Schneider A.J.

PERERA v. IBRAHIM.

70—D. C. Galle, 6,209.

Application for writ after nineteen years—Application disallowed—Subsequent application to vacate order—Power of Court—Ex parte order—Prescription—Civil Procedure Code, ss. 189, 337.

An *ex parte* application for writ of execution made for the first time (nineteen years after judgment) was disallowed on the ground that the decree was prescribed. Plaintiff made a subsequent application that the previous order be vacated and writ be allowed, which the Court allowed.

Held, that the Court had no power to vacate its first order and to issue writ.

THE facts appear from the judgment.

Elliott, K.C. (with him *Abdul Cader*), for defendant, appellant.—The District Judge had no right to vacate his previous order of February 26, 1921, except for reasons stated in section 189 of the Civil Procedure Code. The only remedy the respondent had was to appeal to the Supreme Court (Courts Ordinance, section 75). If his application of March 9, 1921, be treated as a subsequent application, then it is nineteen years after the decree, and should not be allowed (Civil Procedure Code, section 337).

M. W. H. de Silva, for plaintiff, respondent.—The first order was an *ex parte* order; the proper procedure was to apply to the District Judge to vacate the same. Further, the first application was only for a notice on the judgment-debtor to show cause why writ should not issue. It was not one for execution. Therefore, plaintiff could not have appealed.

September 28, 1921: DE SAMPAYO J.—

In this action judgment was entered in favour of the plaintiff so far back as January 23, 1902. The next step taken on behalf of the plaintiff was on February 26, 1921, nineteen years after the decree, when proctor for the plaintiff tendered an application for writ of execution against the property of the defendant. The District Judge at once refused the application, as he thought the decree was prescribed. On March 9, 1921, the plaintiff's proctor again moved that the previous order be vacated, and the application for writ be allowed. In support of this motion, he cited a decision of this Court to the effect that when the application for execution was the first application, there was no prescription of the decree. This motion was allowed by the District Judge. The defendant has appealed

Unless there is something very distinct in the law, I think that justice requires interference by this Court with the present order,

Mr. Elliott, for the defendant, contends that the District Judge had no right to vacate his previous order and to make a fresh order allowing writ. I think the contention is sound. Rightly or wrongly the District Judge made a distinct order refusing the application for writ, and there his authority ended. Mr. Silva, for the respondent, says that as regards this point the proper course for the defendant was to have moved to vacate the first order, which was *ex parte*. I do not think there is any good purpose to be served by requiring the defendant to go back again. I think we have sufficient power to deal with the order as it stands and to interfere with it, if we find the ends of justice require it. I have no doubt that justice does require that the plaintiff should not be allowed after this long interval of time to harass the defendant by reuing writ. In view of the fact that the District Judge disallowed the application for writ when first applied for, the second order I think was not right.

I would set it aside, with costs.

SCHEIDER A.J.—I agree.

Set aside.

1921.

DE SAMPAYO
J.

Perera v
Ibrahim