Present: Mr. Justice Wendt and Mr. Justice Middleton.

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IBRAHIM SAIBO *v.* SILVA.

D. C., Badulla, 1,292.

Civil Procedure Code. s. 337—Application for Writ—Failure to take out writ—Subsequent application—" Due diligence."

Where an application for writ is allowed once, but no writ is taken out, and a subsequent application is made for execution of writ, the provisions of section 337 of the Civil Procedure Code as to the exercise of due diligence apply.

IN this case the plaintiff obtained judgment against the defendant on March 30, 1897, and thereafter duly filed an application for execution of the decree, which was allowed on March 1, 1898. The plaintiff, however, took no steps to execute the decree.

On April 12, 1907, the plaintiff filed an affidavit setting out that he had omitted to take steps to execute the decree earlier owing to the defendant having left the district and his whereabouts not being known; that the defendant had now returned to his village and was said to possess property, and that the amount of the plaintiff's claim was still due, and thereupon moved for a notice on the defendant to show cause why writ should not be issued against him to recover the amount of the judgment. This notice was served on the defendant, who appeared on August 7, 1907, and stated that he had settled the debt, and the matter was then fixed for argument on that issue. On October 16, on the case being called, the defendant's proctor, abandoning the issue, contended (*a*) that section 347 of the Civil Procedure Code had not been complied with, and (*b*) that under section 337 of the Civil Procedure Code the issue of writ was prescribed. The District Judge (W. A. G. Hood, Esq.), on October 19, delivered judgment over-ruling the first of these objections, but upholding the second contention, and disallowed the plaintiff's application with costs.

The judgment of the District Judge was as follows:—

" Taking the two points raised by defendant's proctor in order, I find—

" (1) That though no copy of the affidavit attached to the plaintiff's motion was served on defendant, yet the purport of the motion itself was, and this, I consider, to meet the requirements of section 347, which requires service of ' the petition ' only. I cannot think that this means a copy of the affidavit (as in the present case), or that a separate petition (with affidavit) is necessary in addition to the motion. I over-rule the first objection.

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" (2) That, though plaintiff's proctor is literally right in his contention that no term is set by the Code for the issue of writ after application granted, yet the argument that the application granted on March 1, 1898, is therefore still pending, and can be acted upon at any future time, however distant, seems clearly opposed to the intention of section 337. Though that section omits reference to the issue of writ, the clause ' on the last preceding application due diligence was used to procure complete satisfaction of the decree ' implies, beyond question, that application for execution and issue of writ were considered as forming a single act, not two distinct operations. In the present case decree was entered on March 20, 1897; application for execution was allowed on March 1, 1898, and nothing further was done till the present affidavit of April 12, 1907, was filed. The affidavit sets forth the reasons why earlier steps were not taken; and an Indian decision was quoted to me to prove that defendant's absence and evasion constitute ' fraud ' (as per last part of section 337); but I do not think this decision would bind me in a Ceylon case, and in any case I certainly cannot find that ' due diligence has been used ' in connection with the original application for execution, when writ never issued upon it. The reason alleged may be genuine enough, but under the circumstances I find that section 337 does apply, and that the issue of writ is now prescribed. I therefore uphold the second objection, and disallow the motion with costs. "

The plaintiff appealed.

Van Langenberg, for the plaintiff, appellant.

Tambayah, for the defendant, respondent.

Cur. adv. vult.

February 28, 1908. WENDT J.—

This is an appeal by the plaintiff against an order of the District Judge refusing to let him take out a writ of execution for the recovery of the judgment amount. The judgment was an ordinary money decree, and was dated March 30, 1897. On March 1, 1898, the plaintiff made his first application for execution, stating that the whole judgment and costs were still unpaid. The application was allowed, but plaintiff never took out the writ, nor did he take any other step in the action until April 16, 1907, when he filed an affidavit and moved for a notice on the defendant to show cause why the judgment should not be revived and writ issued against him to recover the judgment amount. The affidavit stated that " the omission to take steps earlier was owing to defendant's having left the district and his whereabouts not being known; that the defendant had now returned to his village and was said to possess property. " The notice asked for was allowed, and on the returnable day it was

contended for the defendant, among other points which it is not necessary to notice, that the application could not be granted, as the ten years' period of limitation prescribed by section 337 of the Civil Procedure Code had elapsed. This contention the District Judge upheld and disallowed the application.

It was argued before us for the appellant that section 337 did not apply because it was in terms directed against "subsequent" applications for execution, and the plaintiff's present application was not an "application to execute the decree," but merely a request to be allowed to take out the writ which had been allowed upon the application of March, 1898. I am of opinion that this contention cannot be sustained. It is true that the Code does not expressly enact that the writ of execution should be taken out within any defined period after the Court has sanctioned its issue. That is because the issue of the writ is a public ministerial act which the law expects to be done forthwith according to the routine of business in the office of the Court. It was never contemplated that a decree-holder, having satisfied the Court of his present right to execute the decree, could lie by for an indefinite period, during which the circumstances as to which the Court had required to be satisfied might materially have altered, and then take out his writ as a matter of course. In the present instance the plaintiff failed to take advantage of the Court's order granting him execution of the decree, with the result (as he himself recognized) that a new application was necessary. I am unable to distinguish between the application which he then made and the ordinary application for execution. He was allowed to execute the decree; he took no single step towards doing so; and he now again seeks to execute the decree. The Court is reasonably entitled to ask that it be again satisfied as to the particulars contemplated by section 224 of the Code, and the application is in my opinion a "subsequent application," which the Court is precluded from granting after the lapse of ten years from the date of the decree. The view I am taking does not in any way conflict with the decision of the Full Court in *Silva v. Singho*,[1] where it was held that upon a first application to execute a decree, even though such application was made several years after the date of the decree, it is not incumbent on the creditor to show due diligence in seeking to obtain satisfaction of the decree.

I think the appeal should be dismissed with costs.

MIDDLETON J.—

I agree that this appeal should be dismissed. The application upon which the order appealed against was made must be and is in my opinion, from the circumstances connected with the application

[1] (1907) 10 *N. L. R.* 312.

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antecedent to it, and from the provisions of sections 224 and 225 of the Civil Procedure Code, a subsequent application to that which was made on March 1, 1898.

The judgment sought to be executed was dated March 30, 1897, and this subsequent application to execute it was made on April 16, 1907, and is therefore in my opinion barred by the terms of section 337 of the Civil Procedure Code.

Appeal dismissed.