1947 *Present :* **Soertsz S. P. J. and Canekeratne J.**

DIAS Appellant, *and* VADUGANATHAN CHETTIAR, Respondent.

S. C. 116—D. C. Colombo, 52,178

Civil Procedure Code, s. 337, proviso—Execution of decree—Subsequent application for writ—Ten years after decree—Promise by debtor to pay—Fraud.

Where, on a promise by the judgment-debtor to pay the amount of the debt, the creditor refrained from taking out writ till after the lapse of ten years from the date of the decree—

Held, that the judgment debtor had not been guilty of fraud within the meaning of the proviso to section 337 of the Civil Procedure Code.

The bar imposed by section 337 is an absolute bar.

APPEAL from a judgment of the District Judge, Colombo.

H. V. Perera, K. C. with *E. B. Wikramanayake,* for the defendant. appellant.

F. A. Hayley, K. C. with *C. Thiagalingam,* for the plaintiff, respondent.

November 14, 1947. SOERTSZ, S. P. J.—

If it is of any use to the plaintiff respondent to know it, we should have been disposed to help him if we could but, we find ourselves powerless in view of the terms of section 337 of the Civil Procedure Code.

The facts necessary for the determination of the questions here arising are, that on April 12, 1933, there was entered a decree against the defendant-appellant requiring him to pay Rs. 18,057·81 with interest and costs. Later the parties came to an agreement by which the defendant undertook to pay Rs. 400 per annum till the whole debt was paid. These payments were made regularly till 1943, and in respect of 1944, when the date with which we are concerned in this case was reached,

Rs. 300 of the Rs. 400 due for that year had also been paid. After the lapse of 10 years from the date of decree the judgment-creditor made this application for the issue of writ.

Section 337 (1) of the Civil Procedure Code provides : " Where an application to execute a decree for the payment of money or delivery of other property has been made under this Chapter and granted, no subsequent application to execute the same decree shall be granted, unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfation of the decree, or that execution was stayed by the decree-holder at the request of the judgment debtor ". That part of section 337 is not appropriate to the facts in this case, because this was a subsequent, namely, the second-application for writ made for execution of the judgment-debt, and no question of " due diligence " arose. But, the next part of the section goes on to say, " No such subsequent application shall be granted after the expiration of 10 years from any of the following dates, namely :—(*a*) the date of the decree sought to be enforced, or of the decree, if any, on appeal affirming the same ". 337 (*b*) does not arise in this case. Then comes the Proviso to the sections under which the plaintiff-respondent sought escape from the peremptory terms or the section. That proviso is to, this effect. " Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of ten years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within ten years immediately before the date of the application. "

The plaintiff-respondent has been granted relief in this matter by the learned District Judge on the ground that there had been fraud employed by the judgment-debtor to prevent the execution of the decree within 10 years immediately before the date of application. In regard to this question of fraud, purely a question of fact, the learned District Judge bases his order on the evidence given by the Kanakke Pulle of the judgement-creditor. For my part, I find it extremely difficult to accept the evidence of the Kanakke Pulle as truthful evidence. Of course, he has said various things, but the question is whether they can be accepted consistently with the other established facts and circumstances of the case. I think not. But, even taking that evidence at its face value I do not see any fraud established. The learned trial judge relied upon a passage from an Indian case referred to in the course of his judgment to lay down the preposition that in matters relating to the interpretation of section 337, Courts are disposed to take a freer view, than on other occasions, of the question of fraud. Mr. Hayley, seeking to support this judgment of the learned trial judge referred us to a judgment of Wood Renton C. J. reported at *18 N. L. R. 95.* In the course of his judgment the Chief-Justice refers to two Indian cases reported in the *Indian Law Reports 6 Madras 365* and *Indian Law Reports 22 Madras 320.* Mr. Hayley also cited case reported at page 318. *Bombay Reports,* and also to another case in the *All-India Reports 1922, Allahabad 145.* These cases have done nothing more than show that what may be considered systematic evasion of payments due under a decree, or obstruction to the recovery of payments due, may in certain circumstances amount to

fraud. But, in this case, on the most liberal view of the meaning to be given to the word "fraud", as understood either for the purpose of considering section 337 of the Civil Procedure Code or for any other purpose, I am quite unable to see that a case of fraud has been made out. The judgment-debtor has admitted in his evidence that the judgment-creditor was a very good chettiar, meaning, I suppose, a very considerate creditor. That must be so, for, when he had a decree for Rs. 18,000 he agreed to recover that amount at the rate of Rs. 400 an year. Probably he was hoping, and so was the judgment-debtor, that the position of rubber in the Ceylon market would improve, and both parties were optimistic, unduly perhaps, thinking there would be such an improvement in the market that the debtor wuld be able to pay his debts and the creditor would be able to recover the amount of his judgment and so they went along till somewhat too late. Then the judgment creditor realised the difficulty he had got into, and the Kanakke Pulle came into the witness-box to say that the debtor who was himself aware of the bar by the lapse of the 10-year period persuaded him not to carry on with the execution proceedings and undertook to pay the debt. That substantially is the fraud that is relied upon. I do not see how this can, seriously, be said to amount to a fraud.

The bar imposed by section 337 is an absolute bar. There is no alternative but to allow the appeal with costs.

CANEKERATNE, J.—I agree.

Appeal allowed.