1916.

Present : Ennis J. and Shaw J.

P. L. K. N. M. K. CHETTY *v.* PERERA.

27—D. C. Colombo, 36,571.

Civil Procedure Code, s. 337—Re-issue of writ—Due diligence.

Per SHAW J.—The Court should not construe section 337 of the Civil Procedure Code unnecessarily strictly against the judgment-creditor, or search about for possible steps that he might possibly have taken had he exercised great diligence in enforcing his first decree.

THE facts appear from the judgment.

E. W. Jayewardene, for appellant.

A. St. V. Jayewardene, for respondent.

Cur. adv. vult.

May 29, 1916. ENNIS J.—

This is an appeal from an order under section 337 of the Civil Procedure Code allowing executing of a decree. In *Ramen Chetty v. Jayawardene* [3] it was held that whether or not a judgment-creditor had exercised due diligence on the previous application is a question of fact depending on the circumstances in each case. It was for the appellant to show clearly that the order appealed from is wrong. There are circumstances which have been urged with some force in favour of the appellant's view, but there are also matters upon which the finding of the learned Judge could properly be based. The writ in the previous application had been returned with an endorsement of " no property. " Some ten

[1] *Wendt 232.* [2] *8 S. C. C. 153.* [3] *(1915) 18 N. L. R. 392.*

months later the plaintiff applied for the arrest of the defendant in execution of his decree. On that application coming on for hearing, the plaintiff's manager filed an affidavit stating that every effort had been made to find out property belonging to the defendant, and that the plaintiff had delayed his application for arrest for six months, as the debtor had promised to pay the amount within that time. The creditor then filed an affidavit disclosing his property, and the plaintiff elected to make a fresh application for execution against the property. It is the order in the last application which is now under appeal. The plaintiff-creditor intimated to the Court a desire to cross-examine the debtor with regard to the statements in his affidavit, but the debtor did not ask to cross-examine the plaintiff's manager as to the statement in the manager's affidavit to ascertain what endeavours had been made to find property. The learned Judge, who had the debtor in the witness box before him, has disbelieved the debtor, and has held that the plaintiff exercised due diligence on the earlier application, and that the debtor had requested the plaintiff's attorney to stay execution thereafter. In these circumstances, I am unable to say that the order appealed from is wrong, and would dismiss the appeal, with costs.

SHAW J.—

The provision contained in section 337 of the Civil Procedure Code, that where an application to execute a decree has been 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 satisfaction of the decree, is a highly penal one against the judgment-creditor, and one which prevents him altogether from thereafter recovering a sum of money that the Court has decided to be his due, should he be found not to have exercised due diligence on his former application. I think the Court should, therefore, not construe it unnecessarily strictly against the judgment-creditor, or search about for possible steps that he might possibly have taken had he exercised great diligence in enforcing his first decree. I agree entirely with the decision in *Ramen Chetty v. Jayawardene* [1] that it is not in all cases necessary that the creditor should have taken proceedings for the examination of the debtor under the provisions of section 219, and that it is a question of fact in each particular case whether, under the circumstances, due diligence was exercised.

With regard to the particular case now before the Court, I find it impossible to say that I am satisfied that the Judge has exercised his discretion to re-issue the writ wrongly.

I therefore agree that the appeal should be dismissed, with costs.

Appeal dismissed.

[1] *(1915) 18 N. L. R. 392.*