

Present : Wood Renton C.J. and De Sampayo A.J.

1914.

FERNANDO *v.* LATIBU.

111—D. C. Galle, 7,329.

Re-issue of writ—Fraud—Evading arrest—Time limit—Civil Procedure Code, s. 387.

The systematic evasion of service by a judgment-debtor is "fraud" within the meaning of that term as used in the proviso to section 387, Civil Procedure Code, and it prevents the expiry of the statutory time limit from operating as a bar to a re-issue of the writ.

IN this action decree was entered in favour of the appellant on May 25, 1904, writ against the property of the defendant was thereafter issued on May 17, 1907, and the writ was returned by the Fiscal with a report that the defendant was possessed of no property.

On November 2, 1907, writ against person was issued against the defendant, but the Fiscal reported that he was in concealment and could not have been arrested.

The writ against person was thereafter re-issued eight times, but the defendant was in concealment, and successfully evaded arrest on every occasion, in spite of all efforts made by the appellant to have him arrested.

The appellant subsequently applied for a re-issue of writ against person of the defendant, and notice of such application having been served on the defendant, the same was on July 22, 1914, allowed, the defendant being absent though noticed for that date.

Writ against person was accordingly re-issued, and the defendant was arrested thereon and produced in Court on August 10, 1914. The defendant then filed an affidavit stating that he was not possessed of property, and moved for his release from custody, and further objected that as more than ten years had elapsed from the date of the decree, the writ against person should not have been re-issued.

After inquiry the learned District Judge held that the writ against person should not have been re-issued, and made order discharging the defendant from custody, with costs to be paid by the appellant.

De Soysa, for plaintiff, appellant.

No appearance for respondent.

Cur. adv. vult.

October 15, 1914. WOOD RENTON C.J.—

It is unnecessary to consider one of the main points argued before us at the hearing of this appeal, namely, whether the failure of the defendant-respondent to appear on July 22, 1914, and show cause

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against the allowance of the appellant's application to issue writ against him, precludes him at a later stage from raising any objection to the validity of the order made in his absence. There is a good deal of authority which seems to point to the conclusion that, if the facts had supported the appellant's argument in regard to this contention, this question would have had to be answered in the affirmative. See *Hukm Chand* (p. 751, para. 296), *Mungul Pershad Dichit v. Grija Kant Lahiri*,¹ *Manjunath Badrabhat v. Venkatesh Govind Shanbhog*,² and *Behari Lal v. Majid Ali*.³ But the date fixed for the appearance of the accused was July 21, and the case was disposed of on the 22nd—a date for which he had not been cited to appear.

The appeal must, however, in my opinion, succeed upon another point. It is clear that the defendant has for years been evading arrest. It has been held in India (see *Annamalai v. Rangasami*,⁴ *Venkayya v. Raghava Charlu*,⁵ *Bhagu Jetha v. Malek Bawa-sahab* *) that the word "fraud" in the proviso to section 230 of the old Indian Code of Civil Procedure, which corresponds to the proviso to section 337 of our own, should receive an extensive interpretation, and that the systematic evasion of service by a judgment-debtor is "fraud" for the purpose of the enactments in question, and prevents the expiry of the statutory time limit from operating as a bar to a re-issue of the writ. The principle of these decisions is, in my opinion, sound.

I would set aside the order under appeal, and send the case back to the District Court to be dealt with on the basis of this judgment. The appellant is entitled to the costs of the appeal and of the proceedings in the District Court which led to the order appealed against.

DE SAMPAYO A.J.—I am of the same opinion.

Set aside.

¹ (1881) I. L. R. 8 Cal. 51.

² (1881) I. L. R. 6 Bom. 64.

³ (1897) I. L. R. 24 AU. 133.

⁴ (1883) I. L. R. 6 Mad. 365.

⁵ (1899) I. L. R. 22 Mad. 320.

* (1885) I. L. R. 9 Bom. 318.