1937

Present: **Soertsz and Hearne JJ.**

WIJEYEWARDENE *v.* RAYMOND

14—D. C. Kurunegala, 17,537

Writ of execution—Application after one year from decree—No petition or affidavit necessary—Court is required to give notice to respondent—Civil Procedure Code, ss. 224 and 347.

Where application for execution of a writ is made one year after the date of the decree, the application need not be by petition.

In such a case the Court is required by section 347 of the Civil Procedure Code to give notice to the judgment-debtor in order to give him an opportunity to be heard against the issue of the writ.

Muttiah Chetty v. Meera Lebbe Marikar (*1 S. C. R. 244*) followed; *Perera v. Novishamy* (*29 N. L. R. 242*) not followed.

Per SOERTSZ J.—There is no provision in the Civil Procedure Code, which requires an application for execution to be supported by affidavit.

APPEAL from an order of the District Judge of Kurunegala.

D. S. L. P. Abeyesekera (with him *Senaratne*), for plaintiff, appellant.

Tisseverasinghe (with him *C. T. Olegasegaram*), for defendant, respondent.

Cur. adv. vult.

June 22, 1937. SOERTSZ J.—

In this case the defendant-respondent obtained a decree for costs against the plaintiff-appellant on July 23, 1934. After more than a year

had elapsed he applied for a writ of execution against the appellant for the recovery of the amount due to him on the decree. Notice of this application was duly served on the appellant and he was required to show cause, if any, why the application should not be allowed. He had no other cause to show, " except that proper procedure was not followed and that necessary materials were not placed before the Court for adjudication ". The trial Judge overruled the objection and directed writ to issue.

The appeal is from that order.

The objection taken by the appellant in the terms I have quoted was amplified by his Counsel on the hearing of the appeal to mean that the application for execution should have been refused inasmuch as although over a year had elapsed since the date of decree, it was not made on a petition supported by the affidavit. I wish to say at once that there is nothing in the Civil Procedure Code, so far as I am aware, to require an application for execution to be supported by *affidavit*. Even the contention that in cases where a period of one year has elapsed, the application should be by *petition* is based on the fact that section 347 provides that " in cases where there is no respondent named in the *petition* of application, for execution . . . . the court shall cause the petition to be served on the judgment-debtor " . . . . It is submitted for the appellant that those words mean that a petition is necessary where over a year has elapsed from the date of the decree sought to be executed. In my opinion that submission is unsound. Section 224 of the Code states how the application for writ should be drawn up. There is no provision in it for the judgment-debtor being made a respondent for the reason, I suppose, that judgment having gone against him he should expect that the judgment would be put into execution. But section 347 says that in cases where there has been a delay of over a year in applying for a writ the debtor shall be served by the Court, with the petition for execution and that he be heard to show cause *as if he had been made a respondent*. He is not required to be named as respondent by the decree-holder. The decree-holder is only required in applying for writ to comply with the provisions of section 224 of the Code. But when that application comes before the Court and the Court sees that over a year has elapsed the Court is required to proceed as if the judgment-debtor was a respondent to the application and to notice him of the application and proceed as if he had originally been named a respondent, that is to say, give him an opportunity to be heard against the issue of the writ.

The words with which section 347 begins, namely, " in cases where there is no respondent named in the petition of application for execution " are unhappily chosen. In no case is there a definite provision in the Code for the judgment-debtor being made respondent to an application for writ. I find that in section 248 of the Indian Code of 1882 which is the counterpart of section 347 of our Code, those words do not occur. The Indian section runs as follows :—" The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause . . . . why the decree should not be executed against him—(*a*) if more than one year has elapsed between the date of the decree and the

application for its execution, or (*b*) . . . . provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application be made within one year from the date of any decree, passed on *appeal* . . . . or if the last order against the party against whom the execution is applied for, passed on any previous application for execution" . . . . I have omitted those parts of this section that have no application to the present case.

It is not clear to me why our section departed from the language used in the Indian section in the opening part of it and provided that "in cases where there is no respondent named in the petition of application for execution". As I have already observed there is no earlier provision for a respondent to be named in certain circumstances, and the interpretation I venture to put upon these words is that they should be read in this context to mean "although there is no respondent named in the petition of application for execution". This reading is supported by the fact that the duty is cast on the Court where more than one year has elapsed to cause the petition to be served although in the form in which the petition is presented to the Court by the applicant for execution in accordance with section 224, no respondent, is named. I find O'Kinealy in his *Commentary* on the Indian section quotes from an Indian case *Gooroo Das v. Modhos*[1] as follows:—"The judgment-creditor should ask for the execution of the decree and not for the issue of a notice; *it is the duty of the Court to issue the notice*".

In regard to the words "*petition*" of application for execution which have been seized upon by the appellant for insisting that the application should have been by petition and not on the form No. 42 in the schedule to the Civil Procedure Code, I would respectfuly agree with Withers J. and adopt his words in *Muttiah Chetty v. Meera Lebbe Marikar*[2] "Petition in this section to my mind obviously embraces the written application required by the 224th section". I have examined this question at some length as it is one that arises with some frequency and not because the present case is one of any merit. In fact, in my opinion, the attitude of the appellant is a vexatious one. He says I have no cause to show except that you have not crossed your t's and dotted your i's. In this connection I would refer to the observation of Dalton J. in *Nanayakkara v. Sulaiman*[3], to the effect that in execution proceedings the Court will look at the substance of the transaction and will not be disposed to set aside an execution upon merely technical grounds when the execution has been found to be substantially right".

The case of *Perera v. Novishamy*[4] cited to us dealt primarily with the question of a re-issue of writ and of exercise of due diligence on the previous occasion and therefore, it is not quite in point, but in so far as it was there laid down that according to section 347 "the application should be by petition and the judgment-debtor should be named as respondent", I venture to dissent.

The appeal is dismissed with costs.

[1] *6 Sutherlands W. R. Mis. 98.*
[2] *1 S. C. R. 244.*
[3] *28 N. L. R. 314.*
[4] *29 N. L. R. 242.*

HEARNE J.—

The point in this appeal is whether the order made by the Judge for the issue of a writ in execution of a decree which had been obtained more than a year prior to the application was bad for the reason that in the application "there was neither a petitioner nor a respondent named".

In *Perera v. Novishamy*[1], the view would appear to have been taken that in cases where more than a year has elapsed between the date of decree and application for execution a special mode of application, namely, by petition, has been prescribed by section 347 of the Civil Procedure Code. With this view I find myself unable to agree. The object of the section, as it appears to me, is merely intended to ensure that where a delay of more than a year has occurred in applying for execution, the Court, instead of making an order in the absence of the judgment-debtor, will in the first place cause the application to be served upon him and give him an opportunity to be heard. Applications for execution are made under section 224 of the Civil Procedure Code and the word "petition" unhappily introduced into section 347 is in my opinion identical with an application under section 224. I respectfully agree with Withers J. in *Muttiah Chetty v. Meera Lebbe Marikar*[2], where he says "Petition in this section to my mind obviously embraces the written application required by section 224".

I would dismiss the appeal with costs.

Appeal dismissed.