

Present : Lascelles C.J.

ROBSON v. FERNANDO.

395—C. R. Panadure, 9,857.

Concurrence—Application for satisfaction of decree must have been made to Court holding assets before realization—Civil Procedure Code, ss. 350, 352.

Under a writ in D. C. Colombo, 30,538, a property was seized in execution, but was not sold on account of a claim. Subsequently, under a writ in C. R. Panadure, 9,857, the same property was sold, and the proceeds lodged in the Court of Requests of Panadure. Thereafter the Court of Requests of Panadure received a prohibitory notice under section 232 of the Civil Procedure Code desiring that the proceeds of the property be held subject to the order of the District Court of Colombo.

Held, that the judgment-creditor under the Colombo writ was not entitled to concurrence, as the application was not made to the Court which held the assets prior to realization.

“The application in the Colombo action for the issue of a writ cannot on any construction of the section be considered as an application to the Court by which the assets are held.”

THE facts are set out in the judgment.

Bawa, K.C., for appellant.

A. St. V. Jayewardene, for respondent.

May 15, 1912. LASCELLES C.J.—

This in an appeal from an order of the Commissioner of Requests of Panadure rejecting the appellant's claim to concurrence in the assets of the defendant. The appellant having obtained judgment against the defendant in D. C. Colombo, 30,538, on April 24, 1910, moved for execution, and his motion was allowed on May 14, 1910.

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A writ then issued, under which certain property of the defendant was seized. The property was not sold then on account of a claim which had been preferred. Subsequently, on March 10, 1911, and May 26, 1911. the same property was sold in execution of the decree in this case, and the proceeds lodged in the Court of Requests, Panadure. The sale report in this case notes the fact that the property had already been seized under the Colombo writ. On June 1, 1911, the Court of Requests, Panadure, received a prohibitory notice under section 232 of the Civil Procedure Code desiring the proceeds of the sale of the property to be held subject to the order of the District Court of Colombo. On these facts the Commissioner of Requests has rejected the application for concurrence, on the ground that under section 352 of the Civil Procedure Code the application should have been made to the Court which holds the assets, that is, to the Court of Requests, Panadure, prior to realization. From this order the present appeal is taken. The difficulty of bringing section 352 into line with our procedure was discussed in *Mirando v. Kiduru Mohamadu.*¹ It was there pointed out by Sampayo J. that section 352 has been borrowed from the Indian Code of Procedure, without the modifications which are required in order to adapt the Indian section to our system. The section requires application to be made prior to the realization "to the Court by which such assets are held for the execution of decrees for money against the same judgment-debtor." This provision, it was pointed out, was intelligible under the Indian system, where decrees may be sent for execution from one Court to another, but the result would be, if the section were literally construed in Ceylon, where decrees cannot be transferred as in India, that claimants, in order to obtain concurrence, must have obtained their decrees in the same Court. This was held to be a derogation from the rights of creditors under the Roman-Dutch law, which was not contemplated by the Code. The Court, therefore, construed the words "for execution of decrees" as equivalent to "for satisfaction of decrees," so as to include the case of "application for payment of money realized by one Court in satisfaction of decrees of other Courts." But can it be said in the present case that the appellant, prior to the realization, applied to the Court by which such assets were held for satisfaction of the decree? He clearly did not do so, for his application in the Colombo action for the issue of a writ cannot on any construction of the section be considered as an application to the Court by which the assets are held. The first application to the Panadure Court was the prohibitory notice of June 1. The construction of section 352 adopted in *Mirando v. Kiduru Mohamadu.*¹ liberal as it is, does not help the appellant, for he did not make the application to the Court which held the assets within the prescribed time. Then, it is argued that the concurrence may be allowed under

¹ (1904) 7 N. L. R. 280.

section 350, but in *Mirando v. Kiduru Mohamadu*¹ the petitioner was allowed to take this course because he had fulfilled the requirements laid down in *Konamali v. Sivakulanthu*,² because, in other words, he had obtained a decree, and had prior to the realization of the proceeds applied to the Court for the execution of such decree. *Mirando v. Kiduru Mohamadu*¹ is clearly no authority for the proposition that section 350 may be resorted to in a case like the present, where no application was made to the Court which holds the assets before realization. To hold that section 350 is applicable in such a case would be to sweep away the time limit imposed by section 352. In my opinion the decision of the learned Commissioner is right, and in accordance with previous decisions of this Court. The appeal is dismissed with costs.

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Appeal dismissed.

