

1944

Present: Howard C.J. and Wijeyewardene J.

PELIS, Appellant, and SAMICHCHI, Respondent.

3—D. C., Tangalla, 3,216.

Decree—Application for execution of mortgage decree—Time limit—Civil Procedure Code, s. 337.

Plaintiff obtained a hypothecary decree in 1930 against the defendant's intestate and on an application for "execution of the decree" by the plaintiff's Proctor, in September, 1941, the Court issued to the Fiscal an order to sell, authorising him to sell the property bound and executable under the decree. The Fiscal sold the mortgaged property and as the proceeds of sale were insufficient to satisfy the amount of the decree, an application for execution of decree to recover the balance by seizure and sale of other property in the hands of the administrator was made in December, 1942.

Held, that the application was not barred by the provisions of section 337 of the Civil Procedure Code.

Aiyadurai v. Chittambalam, 42 N. L. R. 25, followed.

A PPEAL from an order of the District Judge of Tangalla.

L. A. Rajapakse, K.C. (with him *R. N. Ilangakoon*), for substituted defendant, appellant.

E. B. Wikremanayake, for plaintiff, respondent.

Cur. adv. vult.

October 24, 1944. WIJEYEWARDENE J.—

The plaintiff-respondent sued one Miguel in this action and obtained a hypothecary decree against him in 1930. The decree ordered the sale of the mortgaged lands, if the defendant failed to pay the decreed amount within two weeks of the decree. It further directed that the defendant should pay the deficiency to the plaintiff, if the proceeds of the sale of the mortgaged properties were insufficient for the full payment of the decreed amount. Miguel died sometime afterwards, and the appellant who was administrator of Miguel's estate was substituted as defendant in 1935. The plaintiff's Proctor filed "an application for execution of decree" in September, 1941. Notice of this application was served on the appellant and he failed to show cause against the application. The Court, thereupon, issued to the Fiscal an "Order to sell" authorising him "to sell the properties declared bound and executable in terms of the decree" upon the Fiscal's "usual conditions of sale". The Fiscal sold the mortgaged properties and made his return to Court in September, 1942. As the proceeds of sale were less than the amount due under the decree, the plaintiff's Proctor filed another "application for execution of decree" in December, 1942, to recover the balance due by "seizure and sale" of the properties belonging to the appellant as administrator of the estate of Miguel. The appellant objected in the granting of this application, but the District Judge held against him.

It was argued in appeal before us that the application of December, 1942, was barred by the provisions of section 337 of the Civil Procedure

Code as it was made ten years after the decree. It was held in *Peries v. Cooray*¹ that this section did not limit the time within which the first application for execution should be made under Chapter 22 of the Civil Procedure Code. The argument of the appellant could, therefore, succeed only if the application of December, 1942, could be regarded as a "subsequent application" within the meaning of section 337. It could be so regarded only if the application of September, 1941, was also an application under Chapter 22 of the Code. I do not think that the application of September, 1941, was such an application. The mortgage decree was entered under section 12 (1) of the Mortgage Ordinance. Under that section the Court had the power, even after decree was entered, to give directions as to the person who should conduct the sale. The Court exercised that power when it issued the "Order to sell" to the Fiscal in 1941. It is true that the plaintiff invited the Court to exercise that power by filing an application which he called "an application for execution of decree". The fact that the plaintiff chose to call his application "an application for execution of decree" does not and cannot alter the true nature of the proceedings. When an application execution made under Chapter 22 of the Code is granted, the Fiscal has to perform certain duties. He must go to the debtor's place of residence and require the debtor, if present, to pay the amount of the debt and if he is unable to get payment he should seize the property of the debtor before he proceeds to sell it (see section 226). No such thing happened in this case, because the decree fixed a date for the payment of the debt and directed the sale of certain specific properties in default of such payment. I do not think it necessary to discuss this matter at length, as the reasoning underlying the decisions, *Perera v. Jones*² and *Aiyadurai v. Chittambalam*³ applies to this case.

I would dismiss the appeal with costs.

HOWARD C.J.—I agree.

Appeal dismissed.

¹ (1909) 12 N. L. R. 362.

² (1940) 41 N. L. R. 193.

³ (1940) 42 N. L. R. 25.