[IN REVISION.]

1934 *Present* : **Garvin S.P.J. and Akbar J.**

DE SILVA *v.* WIJEYESEKERE

D. C. Colombo, 54,304

Decree—Application for execution—Entering of formal decree—Copy of decree —Stamp Ordinance, No. 22 of 1909, sch. B., Part II.

An application for the execution of a decree should not be allowed until formal decree has been entered in the case and the applicant has obtained a copy of the decree.

APPLICATION to revise an order made by the District Judge of Colombo.

Petitioner in person in support.

Rajapakse, for plaintiff, respondent.

December 20, 1934. GARVIN S.P.J.—

This is an application to revise an order made by the District Court of Colombo on September 3, 1934, disallowing an application made by the present petitioner that a certain writ of execution issued in this action be recalled. Judgment was entered in the case on August 21, 1934, and it is said that that judgment was entered at 3.55 P.M. on that day. At 4.20 P.M. an application was filed on behalf of the plaintiff for execution of the decree. That application, which was made *ex parte,* was allowed. On the very next day after that judgment was entered, that is, on August 22, the petitioner filed a petition of appeal and filed also a motion by which he sought to have the order allowing the writ set aside. Notice of the motion was issued. The matter was heard on September 3, 1934, and the petitioner's motion disallowed.

A preliminary objection is taken to the hearing of this application for revision on the ground that the petitioner should have appealed from the order. In ordinary circumstances it would clearly have been the duty of the party affected by such an order to avail himself of the right which the law gives him to seek relief by way of appeal to this Court, and in the

event of his failing to do so that would, in the absence of special circumstances, be a sufficient ground for refusing to exercise the special power vested in this Court to revise orders of subordinate Courts. But I think that in this case the petitioner has shown sufficient reasons by way of explanation of his omission to appeal. I have already stated that the petitioner filed a petition of appeal on August 22, 1934, the very next day after this judgment was entered. When this motion for the recall of the writ was disallowed, the plaintiff shortly thereafter and before the time for appealing had elapsed, moved for an order of the Court declaring that the appeal entered by the petitioner had abated. That motion was allowed on September 14, 1934. So that at a time when the period allowed for the filing of an appeal from the order made on September 3, 1934, had not yet elapsed the Court, by its later order of September 14, left the petitioner in the position of a person whose appeal had abated. Manifestly to have presented an appeal from the order made in this incidental matter would have been futile, when the right to appeal from the principal judgment was held to have ceased. That order of abatement unless and until it was set aside, placed the petitioner in a position of great disadvantage in regard to this question of the issue of the writ. Had he succeeded in his motion to have the order allowing it set aside the advantage he would have obtained is that thereafter any application for the execution of the decree would have to be made not under the provisions of section 224, but under the provisions of section 763 inasmuch as any such application would then relate to the execution of a decree under appeal. In these circumstances the petitioner took every step to obtain relief from the order holding that his appeal had abated. He moved this Court and then as a result of that proceeding he went back to the District Court. Failing to obtain relief he came back to this Court and ultimately by the order of this Court made about October 25, 1934, he obtained the relief he sought. All proceedings had in the Court below after September 13, 1934, were set aside and the case remitted so that this matter of the application for an order directing that the petitioner's appeal abate should be dealt with after notice to him. On notice given to the petitioner the matter came up for hearing and the District Judge made order holding that the appeal had not abated and directing that it be forwarded to this Court to be dealt with in due course. The petitioner has at last succeeded in winning back to the position of a person who had filed an appeal from this judgment as promptly as the very day after it had been delivered.

For the foregoing reasons, I think that sufficient grounds have been shown here by the petitioner for his omission to exercise his undoubted right of appeal. It remains only to consider his complaint that the order of the District Judge refusing his application to recall the writ was wrong and should not have been made.

The two grounds upon which it is urged that the order is wrong are: (1) that at the date of the application for execution and the order allowing that application no decree had been entered, and (2) that no such application should have been allowed until the Court was satisfied that the applicant had obtained a copy of the decree as required by the Stamp Ordinance.

Now, as to the first of these grounds, the question turns upon the interpretation of sections 223, 224, 225 and the other relevant sections of the Civil Procedure Code, and also the form No. 42 in the schedule attached to the Civil Procedure Code. Every one of these sections seems to contemplate the existence of a decree and so does the form No. 42. Section 223 requires that the Fiscal must be put in motion by an application for the execution of the decree sought to be enforced to the Court, which entered the decree. Section 224 prescribes the form of the application, which is again referred to as an application for the execution of the decree and the applicant is required in that application to state certain particulars, among them "the date of the decree". Manifestly it is impossible to give the date of the decree until a decree has been drawn up, signed, and is in existence. Section 225 seems to place upon the Court the duty even when such an application has been made to examine the record, if need be, for the purpose of satisfying itself that the application is substantially in conformity with the provisions of section 224 and that the applicant is entitled to execution of the decree. Now the decree referred to is, I think, clearly the formal decree which has to be drawn up in conformity with the judgment and signed by the Judge—see section 188. There may, of course, be a context in which it may be necessary to interpret the word "decree" somewhat differently, as for instance in the case of *Perera v. Fernando*[1], where the Court had to consider the meaning to be attached to the word "decree" as it appears in sections 206 and 207 of the Code. One of the questions in that case was whether the plea of *res judicata* could be sustained where no formal decree had been entered, and for reasons, with which I would respectfully state I agree, the Court held that having regard to the subject and the context it was not necessary to give the word "decree" the construction which, in my judgment, it bears in sections 223, 224, &c. This judgment has been cited for a somewhat different purpose. It is said that it holds that a decree whenever entered dates back to the date of the judgment. I am unable, however, to see that it can be relied on as a decision for holding that there was here a decree when we know as a fact that no such decree had been entered or as an excuse for entering in the application for execution a date, which was represented to be the date of the decree, which we now know had never been entered at that time.

Our attention was also drawn to the case of *Rudd v. Abdul Rahaman*[2] which was relied upon in support of the contention that notwithstanding that no decree had been entered an application for execution might be made immediately after judgment and be allowed. But the facts of that case are clearly different. It is true that as in this case the application for execution bore a date anterior to the date upon which the decree was entered, but as a matter of fact the application was held up and was not allowed by the Court until the formal decree had been duly entered and signed. In point of fact, therefore, the Court did not allow execution until the decree had been entered. That being so, the irregularity in the application in that it was tendered before the decree was entered was naturally not regarded as vitiating the proceedings. I cannot see that

[1] *17 N. L. R. 300.* [2] *35 N. L. R. 390.*

the case of *Rudd v. Abdul Rahaman* (*supra*) is an authority for the proposition that an order may be made allowing an application for execution before a formal decree has been entered in the case.

Turning then to the second of the two objections taken, I think that that objection too is entitled to succeed. It is based upon a provision in schedule B, part II. of the Stamp Ordinance, headed "Containing the Duties on Law proceedings," under the sub-head "Miscellaneous". The material words are as follows:—"No party shall be allowed to take any proceedings on or by virtue of any decree or judgment without first taking a copy thereof". Having for the purpose of revenue directed that every copy of a decree shall bear a stamp, the legislature has proceeded in the paragraph just referred to to provide against the evasion of stamp duty by the simple expedient of not taking out copies of the decree. It has therefore directed that once a decree has been entered no party should be permitted to take any proceedings on or by virtue of such a decree without first taking a copy thereof. An application for execution of a decree is manifestly a proceeding taken on or by virtue of a decree. It seems to me therefore that unless the provision in the Stamp Ordinance is to be rendered nugatory we must hold that this proceeding, which is clearly a proceeding on or by virtue of a decree, should not have been allowed at the instance of the plaintiff in this action where admittedly he had not at the time taken out a copy of the decree. It is to be noted that in the case of *Rudd v. Abdul Rahaman* (*supra*) hereinbefore referred to this aspect of the matter does not appear to have been noticed, presumably for the reason that no argument based upon this provision appears to have been addressed to the Court.

I think therefore that the order complained of was wrong and must for both the grounds considered above be held to be bad. Our attention however, has been drawn to the circumstance that, following upon this order, writ issued and that that writ has been executed by the ejectment of the petitioner from the premises in question. It has been urged that the reversal of the order might create for the parties and others, who are not parties to the proceedings, a situation of very great difficulty. But the petitioner very properly said he was perfectly willing to agree not to enter the premises and to any modification of the order which will permit the state of things now existing in respect of the occupation of those premises to continue. In view of the agreement of the petitioner, we would direct, while setting aside the order complained of and in ordering the recall of the writ, that the action taken thereon in so far as it relates to the ejectment of the petitioner shall not be interfered with.

The petitioner is entitled to the costs of this application and also of his motion of September 3, 1934, which was refused by the Judge.

AKBAR J.—I agree.

Application allowed.