1916.

Present : Schneider A.J.

NADAR *v.* NADAR.

292—C. R. Chilaw, 16,726.

Warrant for arrest of judgment-debtor—Issued before writ of execution against property was issued—Civil Procedure Code, s. 298.

A warrant in execution of a decree cannot issue unless a writ against property had issued previously.

THE facts are set out in the judgment.

C. H. Z. Fernando, for defendant, appellant.—The case is covered by authority. It was held in several cases that a writ cannot be issued against the person before writ is issued against property. See *Soysa v. Soysa;*[2] *Meera Saibo v. Samaranayaka;*[3] *Sinnapper v. Veerapodi;*[4] *Costa v. Perera.*[5]

Balasingham, for plaintiff, respondent.—The words in section 298 of the Civil Procedure Code "if before the return to the writ of

[1] *(1885) 14 Q. B. D. 811 C. A.*
[2] *(1892) 1 S. C. R. 28.*
[3] *(1896) 1 N. L. R. 342.*
[4] *(1898) 3 N. L. R. 254.*
[5] *(1913) 17 N. L. R. 319.*

execution " indicate only a point of time. A plaintiff may obtain warrant of arrest before judgment on the ground set out in section 298 (*d*). It would be strange, indeed, if the law is that after judgment he cannot apply for warrant of arrest against his judgment-debtor before first applying for a writ against property. What use would it be to apply for writ against property if the debtor is about to leave the Island and there is no property to the knowledge of the creditor which could be seized.

The cases cited do not apply to the facts of this case. The reason for the decision in *Meera Saibo v. Samaranayaka*[1] was that the writ against property itself was wrongly issued. If a writ cannot be issued against property for want of due diligence, clearly writ against person cannot issue at all. If it were issued, it would be illegal.

The ground for the decision in *Sinnapper v. Veerapodi*[2] was the same; it was held that the writ against person was ancillary to the writ against property; or, in other words, where no writ could have issued against property, the writ which was issued against the person was illegal. It is not the same thing as saying that writ cannot issue against person unless writ is first issued against property.

The judgment in *Soysa v. Soysa*[3] is clearly wrong. See the comments of Bonser C.J. in *3 N. L. R. 255*.

The judgment in *Costa v. Perera*[4] merely decides that before a warrant of arrest is issued the provisions of section 298 should be complied with.

It is no authority for the contention that unless a writ against property is issued warrant of arrest cannot be issued.

Cur. adv. vult.

October 6, 1916. SCHNEIDER A.J.—

Of consent decree was entered on June 24, 1915, that the defendant should pay the plaintiff Rs. 200 in two equal instalments, one on June 24, 1915, the other on August 24, 1915. If the first instalment was not duly paid, " writ " was to be issued for the whole amount. The defendant paid nothing. On August 4, 1916, the plaintiff filed petition and affidavit alleging that the defendant was " about to leave the Island under circumstances affording reasonable probability that the judgment-debtor will thereby be obstructed or delayed in the execution of the decree," and prayed for a warrant of arrest. The words of the petition which I have quoted lead to the inference that the application was intended to be under section 298 (*d*) of the Civil Procedure Code, but it was not expressly so stated in the petition, but the motion stated that the application was under section 298. It is not disputed that this was the first and only application for execution of the decree. The motion was

[1] *(1896) 1 N. L. R. 342.*
[2] *(1898) 3 N. L. R. 254.*
[3] *(1892) 1 S. C. R. 28.*
[4] *(1913) 17 N. L. R. 319.*

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allowed, a warrant issued, and the defendant was arrested and produced before the Court on August 14, 1916. He stated that he could not pay the amount, and was committed to jail.

On the next day Mr. Proctor Fernando, who was the defendant's proctor on record, moved that the defendant be released as the arrest was illegal, inasmuch as no warrant should have issued because no writ against property had been previously issued. On August 16, 1916, the Commissioner framed the issue whether the warrant had been issued illegally, and a discussion followed upon this issue. The plaintiff's counsel did not object to the procedure adopted by Mr. Fernando. I shall, therefore, assume that the plaintiff was a consenting party to the question of the legality of the defendant's committal being discussed after the Court had made the order of committal. I notice that Mr. Fernando's proxy does not authorize him to appear on behalf of the defendant in these proceedings, but no objection seems to have been raised on this score, and I shall therefore say no more about it.

The substantial question for determination is whether a warrant in execution of a decree can issue unless a writ against property had issued previously. I think it cannot. The only section under which a warrant of arrest in execution of a decree can issue is 298. To my mind the language of that section is clear that a Court may issue a warrant only in one of two events: (1) " If the Fiscal returns to the writ of execution that he is unable to find any property of the judgment-debtor "; or (2) " if before the return to the writ of execution is made, the Court is satisfied " of the matter and things stated in heads (*a*), (*b*), (*c*), and (*d*) of section 298.

In my opinion the words " if before the return to the writ of execution " predicate that a writ had issued, and is in the hands of the Fiscal. They do not, as was contended by the respondent's counsel, indicate only a point of time or a stage of the proceedings. He contended that the Code divides the time within which a warrant of arrest may issue into (1) before judgment, (2) before return to a writ of execution issued to the Fiscal. Such a division is illogical. It should be (1) before judgment, (2) after judgment. According to his contention, the words of the section should be read " or if at any time after decree, " instead of " or if before the return to the writ of execution is made," which are the actual words used. This is a contention which it is impossible to entertain without doing violence both to the context and the plain and only meaning of the words of the section. The only reason given for this construction was that it was inconceivable that a plaintiff should have the right to arrest a defendant before judgment, but that this right after decree should be postponed to his first taking out writ against property. I am not touched by this argument. It has no force which appeals to me. The procedure for the arrest of a defendant before judgment is founded upon special circumstances which

may render a judgment subsequently obtained inoperative. Those considerations do not hold once a decree is obtained. The plaintiff can at once sue out writ against property, and before return to the writ obtain a warrant of arrest, if he satisfies the Court of the existence of the conditions enumerated in sub-sections (*a*), (*b*), (*c*), and (*d*). It was also contended for the respondent that section 336 provides for cases in which a judgment-creditor is entitled to apply for execution against the person and property of the judgment-debtor simultaneously. This is true, but it does not help the argument in favour of the respondent. Section 298, as I have already indicated, is the only section we must look to in determining the circumstances under which a warrant may issue for the arrest of a judgment-debtor. After a return of *nulla bona* to a writ against property has been made by the Fiscal, there is nothing to prevent a decree-holder applying simultaneously for a writ against property and for a warrant under section 298.

It is worthy of note that the circumstances mentioned under heads (*a*) and (*b*) of section 298 are identically those on which the Fiscal would be justified in making a return of *nulla bona*, and they therefore favour the construction that a warrant may not be issued until after a writ against property has been issued. This construction of section 298 is consonant with the spirit of the Code, which is to discourage the incarceration of honest debtors, and to confine the creditor's remedy of imprisoning his debtor to those cases mainly where the debtor is contumacious and will not pay or disclose for seizure property available for levy. The construction I am placing on section 298 finds support in the following cases decided by this Court: *Soysa v. Soysa*,[1] *Meera Saibu v. Samaranayaka*,[2] *Sinapper v. Veerapodi*,[3] and *Costa v. Perera*.[4] In the last of these cases it was held that if the conditions of section 298 were not fulfilled, the warrant and all proceedings thereunder were bad. Here there was no application for writ against property before the application for a warrant, and therefore the conditions of section 298 were not complied with.

The application for execution was one year after decree, and it therefore falls under the provisions of section 337, as held in *Meera Saibu v. Samaranayaka*[2] already quoted above. The provisions of section 337 were also not complied with.

I would therefore allow this appeal with costs, and direct the discharge of the defendant. But I do this with reluctance.

Appeal allowed.

[1] *(1892) 1 S. C. R. 28 or 2 C. L. R. 15.*
[2] *(1896) 1 N. L. R. 342.*
[3] *(1898) 3 N. L. R. 254.*
[4] *(1913) 17 N. L. R. 319.*