

1970

Present : G. P. A. Silva, A.C.J.

M. S. M. YOOSOOF, Appellant, and Mrs. C. M. J. RAJARATNAM  
and 2 others, Respondents

S. C. 14/69—C. R. Colombo, 85927/R.E.

*Civil Procedure Code (Cap. 101)—Sections 325-327A—Landlord and tenant—  
Execution of decree for ejection of tenant—Resistance by third party on the  
basis of a deed of transfer in his favour—Burden of proof.*

Where, in the execution of a decree obtained by a landlord for ejection of his tenant, a third party offered resistance claiming that he had a right to be in possession of the rented premises on his own account on the basis of a sale of an undivided share of the premises to him by a co-owner subsequent to the judgment in favour of the judgment-creditor—

*Held*, that the burden of proving that the transfer was fraudulent was on the judgment-creditor. In such a case, if the deed of transfer appears to be equally consistent with *bona fides* as well as with *mala fides*, the Court would be justified in making an order in terms of section 327 of the Civil Procedure Code.

**A**PPEAL from a judgment of the Court of Requests, Colombo.

*N. E. Weerasooria, Q.C.*, with *M. S. M. Nazeem*, for the plaintiff-appellant.

*H. Rodrigo*, with *Asoka Abeysinghe*, for the 3rd defendant-respondent.

*Cur. adv. vult.*

November 16, 1970. G. P. A. SILVA, A.C.J.—

The plaintiff-appellant sued the 1st and 2nd defendants-respondents in this case for the recovery of arrears of rent and for ejectment from certain premises and obtained judgment in his favour on the 16th of January 1967. On the 29th of March, the proctor for the plaintiff moved for writs of ejectment to be issued against the defendants notwithstanding the appeal to the Supreme Court and writs were ultimately issued on the 6th of April 1967. On the 4th May 1967, the Fiscal returned the writ of possession to the Court of Requests together with his report to the effect that one Shahul Hameed was in occupation of the premises claiming to have purchased it on Deed No. 4187 (which was executed on 12th February 1967) and to be carrying on business in the said premises. Five days later the proctor for the plaintiff moved Court to reissue the writ of possession to the Deputy Fiscal to enable the plaintiff to take constructive possession for the purpose of filing papers under section 325 of the Civil Procedure Code. The application was allowed and the writ of possession was re-issued to the Fiscal returnable on 31st December 1967. On the 25th May 1967, the proctor for the plaintiff moved the Court for an order under s. 326 of the Civil Procedure Code committing to jail Shahul Hameed, who at that stage was made the 3rd respondent to the application, or an order under ss. 326 and 327A that the Fiscal should eject all the respondents and deliver vacant possession to the plaintiff. On the 26th May, the Court, being satisfied that a prima facie case was made out in terms of ss. 325-326, issued an interlocutory order under s. 377 (b) and appointed 16th of June 1967 as the day on which the respondents were to be heard. On the 16th June, the 3rd respondent filed his proxy and objections and eventually the matter came up for inquiry on 2nd August 1967. The plaintiff gave evidence and the 3rd respondent, who is also the 3rd respondent to this appeal, was heard in opposition supported by documents which included the deed of transfer No. 4187 of 2/3 of the premises, No. 232, Old Moor Street, Colombo, which formed the subject matter of this suit, to the 3rd respondent by one Madar Sahib Mohamed Sameer *alias* Mohamed Sameer, who was admittedly a 2/3 owner of the premises in question. The consideration for this deed was Rs. 10,000 which, according to the attestation of the Notary, was paid in his presence and the date of attestation was 12.2.1967. The other important document produced in favour of the 3rd respondent was a certificate of registration of a business called Fawmey Grinding

Mills, conducted by the 3rd respondent, commencing on 1.2.1967, at the said premises No. 232, Old Moor Street, Colombo 13. On the evidence before him the learned Commissioner, not being satisfied that there was resistance or obstruction or that the presence of the 3rd respondent at the time that the Fiscal visited the premises was caused by the 1st and 2nd respondents who were the judgment debtors, dismissed the plaintiff's application. The plaintiff appealed to this Court against this order. The relevant portion of the order of this Court after argument was as follows :—

“ Apart from filing an affidavit where the appellant has stated that he was resisted by the 3rd respondent, he also gave evidence to that effect. The learned Commissioner has dismissed his application . . . The 3rd respondent gave evidence and stated that he did not resist. The learned Commissioner should have come to a finding on this matter and made one of the three orders which are referred to in these cases (the cases being those reported in 58 N. L. R. at 542 and 69 N. L. R. at 473). I set aside the order and send the case back in order that there will be an adjudication in this matter. After adjudication the learned Commissioner should make one of these orders which he is empowered to make.”

The orders referred to in these cases are those which are provided for in ss. 326 and 327 and 327A of the Civil Procedure Code. I have set out the order made by this Court in some detail in view of the arguments raised by both sides regarding the interpretation to be placed on the substance of the order itself which I shall refer to later.

Counsel for the respondent in his submission appeared to be critical of the order that was made by Tambiah J. and suggested that that order caused some difficulty to the Commissioner of Requests as to the course of action he should take. I think, however, that the order made by Tambiah J. was unexceptionable and was the only order he could have made in the circumstances. Sections 325 to 327A of the Civil Procedure Code, when analysed, would appear to be most logical in the sphere of execution of decrees such as the one we are concerned with in this case. Counsel's suggestion seemed to be that the appeal should at that stage have been dismissed without a further order to the Commissioner to make an adjudication in the matter. Had the appeal been dismissed, in my view there would have been a stalemate or a deadlock. For, the plaintiff had obtained a decree in his favour; he pursued the matter further by applying for a writ of execution; a third party made a claim; the plaintiff resorted to his remedy of reporting the matter to the Court which pronounced the decree; that Court dismissed his application at that stage and had this Court also dismissed the plaintiff's appeal from that order, the plaintiff would almost have been left without a remedy and without being able to secure the advantage of the decree he obtained in his favour. It is to avoid such a situation that ss. 326, 327 and 327A have been provided so as to enable the Court in those circumstances

either to grant possession to the decree holder under s. 326 or, if the claim of the third party appears to be bona fide, to investigate the matter fully as if it was hearing a case between the decree holder and the claimant in terms of s. 327 and thirdly, if a third party was in possession of the property and his claim was found to be frivolous or vexatious to give possession to the judgment-creditor in terms of s. 327A leaving it open to the person in possession at the time to file a fresh action against the judgment-creditor within one month. The provisions of ss. 326, 327 and 327A would thus appear to be most logical and comprehensive for meeting every situation that could arise after a person has obtained a decree in his favour and for reaching a finality in respect of the suit. The order made by Tambiah J. in appeal was therefore entirely justified.

When the record reached the Court of Requests for compliance with the order of this Court, counsel for the plaintiff commenced his submissions by making an observation that for a proper adjudication on this matter as required by the order of this Court, there should be an inquiry, and he undertook to lead evidence, as it was sometime ago that evidence had been recorded and it would not be satisfactory to have an order on the proceedings already recorded. Counsel for the 3rd respondent made submissions to the contrary and the learned Commissioner ultimately decided to make an order on the evidence already led before his earlier order was made. This order of the 3rd July 1968, which is now appealed against, is one made in terms of s. 327 directing the petition of complaint of the plaintiff to be numbered and registered as a plaint in an action between the decree holder as the plaintiff and the claimant as defendant.

The initial submission of counsel for the plaintiff-appellant was that the learned Commissioner was wrong in not allowing the plaintiff to lead further evidence as there could be no proper adjudication as required by the order of this Court without such evidence. It was admitted by counsel however that the earlier order which was set aside by Tambiah J. was made by the same Commissioner of Requests as the one who made the order which is now under appeal, both orders being based on the same evidence. Counsel for the respondent submitted on the other hand that there was no application to lead further evidence as such by the plaintiff and that counsel only made certain observations in regard to the matter of leading fresh evidence. The record appears to support the submission of counsel for the respondent, there being no specific application to lead evidence which was pursued by counsel for the plaintiff nor an order refusing such an application. Furthermore, the order made by Tambiah J. did not suggest that any fresh evidence should be recorded before making an adjudication but considered the Commissioner to be in error in merely dismissing the plaintiff's application for delivery of vacant possession, without proceeding to make an order as required by law. He therefore directed the Commissioner to reach a finding on the complaint made by the plaintiff-judgment-creditor and to make one of the three orders provided for in ss. 326, 327 or 327A. In the circumstances I am

unable to agree with this submission of counsel for the appellant, nor can I accept the further argument that the learned Commissioner has thus made an adjudication without evidence. Both orders are made by the same Commissioner, the second being necessitated by an omission on his part, and there was ample evidence placed by the plaintiff as well as the 3rd respondent on which he could make a proper adjudication as required by the relevant provisions.

The only other question for decision is whether sufficient grounds exist to set aside the order of the learned Commissioner who has found that the resistance or obstruction complained of was occasioned by a person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account having purchased a 2/3 share from a brother of the plaintiff, and accordingly directed that the petition of the plaintiff be numbered and registered as a plaint in an action between the plaintiff and the 3rd respondent. This question was not raised by the appellant among his grounds of appeal but in view of certain submissions of the learned counsel for the appellant I decided to consider it as a ground of law. Mr. Weerasooria's contention was that the documents on which the 3rd respondent relied, namely, the lease and the subsequent transfer of a 2/3 share in his favour by its owner as well as the certificate of registration of a business of the 3rd respondent in the premises in question, were all effected after the judgment in favour of the plaintiff and that the timing excluded any bona fides on the part of the 3rd respondent. Mr. Rodrigo's contention however was that the conduct of the 3rd respondent in giving the plaintiff notice of a lease in his favour and a subsequent purchase by him of the premises on the 30th January and 12th February 1967, months before any steps were taken in execution of the decree, would negative any bad faith on his part. While the contention of the appellant is based on an inference which is not altogether unreasonable, the contention of the respondent is based on the fact of an actual deed of transfer, duly attested by a notary and, *ex facie*, for valuable consideration. Both principle and precedent would support the view that when a transfer is effected for valuable consideration the burden of proving that it was fraudulent rests on the plaintiff in these circumstances. It is an accepted rule that such a burden even in a civil proceeding must be discharged to the satisfaction of a Court. For that degree of satisfaction to be reached the standard of proof that is required is the equivalent of proof beyond reasonable doubt. The observation of Howard C.J. in the case of *Lakshmanan Chettiar v. Muttiah Chettiar*<sup>1</sup> fortifies me in this view. If a claimant, at the stage of delivery of possession upon a writ, relies on a transaction which is equally consistent with *bona fides* as well as with *mala fides*, I think that the Court should lean towards the view that is favourable to the claimant. Even a strong suspicion that a transaction which has the effect of obstructing a decree in favour of a judgment creditor is *mala fide* or fraudulent will not justify a Court in making an order under s. 326 of the Civil Procedure Code which involves a penal

<sup>1</sup> (1948) 40 C. L. W. 65 ; 50 N. L. R. 337.

provision. In the present case, on the limited material contained in the summary inquiry, it would appear that the deed of sale in favour of the 3rd respondent, executed by an admitted co-owner of the premises, who is not a stranger but a brother of the judgment creditor, for valuable consideration, may well be a genuine transaction and that the 3rd respondent was claiming the premises as against the plaintiff in good faith. In my view the learned Commissioner in these circumstances took the correct decision in making an order in terms of section 327 so that the plaintiff may have an opportunity of proving any allegations against the 3rd respondent at a proper trial. I therefore see no reason to interfere with the order made by him.

The appeal is accordingly dismissed with costs.

*Appeal dismissed.*

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