

COURT OF APPEAL

Kandiah & Another
V.
Kanapathipillai & Another

C.A. Appeal 2388/80 — D.C. Point Pedro No 12028

Sections 325, 326 and 330 of C.P.C. Interruption of Possession after Judgment-Creditor has been put in complete and effectual possession — Appropriate procedure for dealing with such offence — Contempt.

Plaintiff-Respondents filed action against first Respondent-Petitioner and asked for damages possession and ejection in respect of some land at Uduppidy. Judgment was entered for Plaintiff-Respondents on 3.6.74. On Plaintiff Respondents application for execution of decree possession was given to them on 4.9.78. Thereafter Plaintiff-Respondents were ousted by two others at the instigation of 1st Respondent-Petitioner and 1st Respondent-Petitioner was dealt with for contempt of court and Plaintiff-Respondents were ordered to be placed in possession. Possession was delivered on 20.06.79. On 14.08.79 Plaintiff Respondents made an application under 325 of Civil Procedure Code and complained that 1st Plaintiff Respondent and K.T. had on 17.07.79 prevented them from possessing and cultivating the land and prayed that notice be issued on them for contempt of court. On 30.10.80 court imposed punishment on them after inquiry.

Petitioners appealed.

- Held**
- (1) That in the instant case the interruption of possession took place after possession was delivered to plaintiff-respondents and therefore the provisions of Section 325 of Civil Procedure Code was not applicable.
 - (2) that the District Judge ought to have treated the application as one made under Section 330 and dealt with petitioner for contempt of court as provided in Chapter 65 of C.P.C.
 - (3) that as the District Judge did not follow procedure laid down in Chapter 65 of C.P.C. in respect of contempt of Court, his conviction of the Petitioner under Section 325 must be quashed.

APPLICATION for revision of order of the District Judge of Point Pedro.

Before: Tambiah, J. & B.E. De Silva, J.
Counsel: C. Chellappah with S. Navaratnam for the
Defendant-1st Respondent-Petitioner.
A. Shanmugalingam with K. Thevarajah
for the Plaintiffs-Respondents
Argued on: 08.12.1981
Decided on: 22.01.1982

Cur. adv. vult.

TAMBIAH, J.

This is an application in revision to set aside an order made under sections 325 and 326 of the Civil Procedure Code, dealing with the petitioners for preventing the plaintiffs-respondents from possessing and cultivating their land, after possession was delivered to them by the Fiscal. According to the petitioners, the 1st respondent-petitioner was sentenced to 3 months' imprisonment and a fine of Rs.250/- was imposed on the 2nd respondent-petitioner, Sundaram Nallathamby; but it would seem that the fine was in fact imposed on one Kanapathipillai Thamotharampillai, who was the 2nd respondent to the application under s. 325. He, however, is not a party to the present application before us.

It appears that in October 1972, the plaintiffs-respondents filed Action No. 12028, D.C., Point Pedro, against the 1st respondent-petitioner and asked for damages, possession and ejectment, in respect of a land called "Ponnar Veeddu Vasal", situated at Udupiddy. Judgment was entered on 03.06.74 for the plaintiffs-respondents. The 1st respondent-petitioner appealed to the Supreme Court and the same was dismissed on 20.06.77. The plaintiffs-respondents then applied for execution of decree and possession was given to them by the Fiscal on 4.9.78. Thereafter the plaintiffs-respondents were ousted from the land by 2 others at the instigation of the 1st respondent-petitioner, and the 1st respondent-petitioner was dealt with for contempt of Court and ordered to pay as costs of inquiry Rs. 100/-, and Rs. 50/- as crown costs for acting in disrespect of the court. Further, it was ordered that the

plaintiffs-respondents be placed in possession and on a writ of possession issued to the Fiscal, possession was delivered to the plaintiffs-respondents on 20.06.79.

On 14.08.79, the plaintiffs-respondents made an application under s. 325 of the Civil Procedure Code and complained that the 1st respondent-petitioner and the said Kanapathipillai Thamotherampillai had on 17.07.79 prevented them from possessing and cultivating the said land and prayed that notice be issued on the said 2 persons to show cause why they should not be punished for contempt of Court, that they be placed in possession and that writ of possession be reissued to the Fiscal. The journal entries in the case show that the 1st respondent-petitioner was served with notice and also that notices were published in the *Elanadu* Newspaper and on the Notice Board of the Court House. Attorney-at-Law for the said K. Thamotherampillai stated to Court that notice was not served on his client. However, statements of objections were filed by the 1st respondent-petitioner and the said Thamotherampillai and they participated in the inquiry. After inquiry, the learned District Judge, by his order dated 30.10.80, rejected their objections and held that they have acted in disrespect of the authority of the Court and imposed on them the aforesaid punishment.

The application in revision is dated 05.12.80, but I find that writ of possession was reissued to the Fiscal and he has executed the same and had delivered possession of the land to the plaintiffs-respondents on 19.11.80.

The main submission of learned Counsel for the petitioners is that in dealing with the petitioners for contempt of Court, the District Judge ought to have followed the summary procedure laid down in Chapter LXV of the Civil Procedure Code, and his failure to do so is a fatal objection to a conviction under s. 326 of the Civil Procedure Code. I am inclined to agree with this submission.

S. 325 of the old Civil Procedure Code provided that where the officer charged with the execution of the writ is resisted or obstructed by any person, or if after the officer has delivered possession, the judgment-creditor is hindered by any person in taking complete and effectual possession, the judgment-creditor may, at any time within 1 month from the time of such resistance or obstruction, complain

thereof to the Court by a petition in which the judgment-debtor and the person resisting and obstructing shall be named respondents, and which shall be dealt with by Court in accordance which the alternative (b) of s. 377. When the matter is inquired into, the Court has to make one of the orders set out in sections 326, 327 or 327A. In terms of s. 326, if the Court is satisfied that the obstruction or resistance complained of was occasioned by the judgment-debtor or by some person at his instigation, it may commit the judgment-debtor or such other person to jail for a term which may extend to 30 days, and direct the judgment-debtor to be put into possession of the property.

An examination of the provisions 325 and 326 of the old Civil Procedure Code reveals:- (1) the penal provision of s. 326 applied only to resistance to or obstruction of, the officer charged with the execution of the writ and not to the offence of hindering a judgment-creditor from taking complete and effectual possession, after the officer has delivered possession. (2) the obstruction or resistance referred to in s. 326 was not declared to be punishable as a contempt of Court. (3) the procedure prescribed in s. 325 was a petition by the judgment-creditor complaining to Court of resistance, obstruction or hindrance and not the procedure prescribed in Chapter LXV of the Code. The Court in inquiring into the complaint was empowered, if the obstruction or resistance was occasioned by the judgment-debtor or by some person at his instigation, to commit the person to jail and to order delivery of possession. As was observed by Sir Anton Bertram, in *Kumarihamy v. Banda* (1 C.L. Rec. 54),-

“The obstruction, resistance, or hindrance referred to in s. 326 is not declared to be punishable, as a contempt of court. Further, the special procedure prescribed in that section, namely, the petition of complaint, is not consistent with the procedure which is prescribed in Chapter 65, which is initiated by a summons.....”

It was held in *Pereira v. Aboothahir* (37 NLR 163) that where a person has been given complete and effectual possession of premises by the Fiscal, the remedy under s. 325 of the Civil Procedure Code is not open to him in respect of a subsequent interruption of possession, and that he must seek his remedy in the Courts in the same way as any person who complains of having been ejected from

the property which belongs to him. But the Court has power under s. 287 of the Code to cause the writ holder to be restored to possession (*See Silva v Bastian* - 38 NLR 277).

The Civil Procedure Code (Amendment) Law No. 20 of 1977 repealed sections 325 to 330 and substituted new sections. The new substituted s. 326 (1) reads-

- 326 (1): On the bearing of the matter of the petition and of the claim made, if any, the court if satisfied -
- (a) that the resistance, obstruction, hindrance or ouster complained of was occasioned by the judgment-debtor or by some person at his instigation or on his behalf,
 - (b) that the resistance, obstruction, hindrance or ouster complained of was occasioned by a person other than the judgment-debtor, and that the claim of such person to be in possession of the property, whether on his own account or on account of some person other than the judgment-debtor, is frivolous or vexatious, or
 - (c) that the claim made, if any, has not been established, shall direct the judgment-creditor to be put into or restored to the possession of the property and may, in the case specified in paragraph (a) in addition deal with the judgment-debtor or such other person in the manner provided by law for the punishment of contempt of court.

A new s.330 was also introduced to deal with any subsequent resistance, obstruction, hindrance or ouster. It enacts:-

330. Any subsequent resistance, obstruction or hindrance to the execution of the writ or ouster of the judgment-creditor within a year and a day of the delivery of possession may be dealt with summarily as for a contempt of court.

Thus 2 changes were effected - (1) the penal provision of the new s.326 was extended to cover not only resistance or obstruction to the Fiscal, but also hindrance to or ouster of, the judgment-creditor, after delivery of possession to him. (2) the obstruction, resistance, hindrance or ouster became offences punishable as contempts of Court

In the instant case, there has been a subsequent interruption of possession, after possession was delivered to the plaintiffs-respondents on 20.6.79. The learned District Judge ought to have treated the application of the plaintiffs-respondents as one made under s.330 and complied with the provisions of sections 793 and 796 in Chapter LXV of the Civil Procedure Code before the defendants-petitioners were punished for contempt of Court, viz, summons in the form, No. 132, in the 1st schedule or to the like effect should have been issued and the hearing should have been commenced by asking the accused whether or not he admits the truth of the charge. These are imperative provisions which must be complied with for a trial to commence and failure to comply with them, renders the conviction an invalid one (*See Fernando v Fernando* - 71 NLR 344). I hold that there has been no inquiry according to law and accordingly the conviction of the 1st respondent-petitioner must be quashed.

The Civil Procedure Code (Amendment) Act No. 53 of 1980 made further amendments to sections 326 and 330. By s.10 of the Amending Act, the old penal provision of s.326, prior to Law No. 20 of 1977, has been restored. s.326 (1) (c) now reads as follows:-

“shall direct the judgment-creditor to be put into or restored to the possession of the property and may, in the case specified in paragraph (a) sentence the judgment-debtor or such other person to imprisonment for a period not exceeding 30 days.”

The resistance, obstruction, hindrance or ouster are no longer offences punishable as contempts of Court, and there is now no requirement therefore, to follow the procedure prescribed in Chapter LXV of the Code. However, with certain changes, s. 330 has been retained, declaring any subsequent resistance, obstruction etc., an offence punishable as a contempt of Court.

Learned Counsel for the plaintiffs-respondents cited Maxwell (Interpretation of Statutes, 11th Edn. at p. 216) and submitted that statutes affecting procedure have retrospective operation; that even if the correct procedure under Law No. 20 of 1977 was not followed, yet the amending Act of 1980 applies to the resistance or obstruction, to the execution of the decree by the 1st respondent-petitioner and the said Thamootherampillai, and therefore justified the punishment imposed on them.

I am unable to accept this submission. The proceedings in the instant case commenced on 14.8.79, and the impugned order, after inquiry, was delivered on 30.10.80. Act No. 53 of 1980 passed into law, on 11.12.80. The law that amended the law relating to procedure operates retrospectively only means the pending cases, although instituted under the old Act but still pending, are governed by the new procedure under the amended law (*See Bindra on "Interpretation of Statutes", 6th Edn. p. 751*). The new procedure also applies to actions in the future, but not to concluded cases. To accept the learned Counsel's submission would mean that the wrong procedure, already applied and concluded before the amendment came into force, now becomes good and legal under the new procedure after the amendment. However, as I stated earlier, the instant case is one of subsequent interruption of possession, after possession was delivered to the plaintiffs-respondents, which, even under the amending Act of 1980, still remains an offence punishable as a contempt of Court (s. 330).

I set aside the conviction of the 1st respondent-petitioner, and the sentence of imprisonment imposed on him and discharge him. The said Kanapathipillai Thamotherspillai is not a party to this application, but I think he is entitled to the benefit of my judgment. I therefore set aside the conviction and the fine of Rs. 250/- imposed on him also. The order placing the plaintiffs respondents in possession of the land, however, will stand.

B. E. DE SILVA. J. — I agree.

Appeal allowed. Convictions set aside