

ABEYEDERE v. MARIKAR et al.

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D. C., Galle, 49,861.

Execution, purchaser in—Delivery of possession to him—Remedy where property sold is in possession of third person claiming independent title—Order for delivery of possession made irregularly—Civil Procedure Code, ss. 287, 290, 292, and 325.

Per BONSER, C.J.—(1) Under section 292 of the Civil Procedure Code, after a sale in execution is confirmed by the Court, and a conveyance executed by the Fiscal, it is the duty of the Fiscal or the person in possession of the property sold to forthwith give possession thereof to the purchaser. The duty of the Fiscal would only arise if he were already in possession under section 290, and the duty of the other person in possession if he were the judgment-debtor or some person claiming under him by a title created subsequently to the seizure, or were holding on behalf of the judgment-debtor or such person.

(2) If the person in possession on being applied to by the purchaser to deliver possession declines to do so, the Court may make an order under section 287 for delivery of possession, provided that such person is the judgment-debtor or a person claiming under him or holding on his behalf; but if such person claims the property by an independent title, the Court will leave the purchaser to the remedy of an action *rei vindicatio*.

(3) An order for delivery of possession under section 287 made *ex parte* and unsupported by any evidence is irregular, and is not a good foundation for proceedings under section 325 and the following sections.

(4) *Quære*, whether proceedings under section 325 and the following sections can properly be said to be proceedings for enforcing a decree of possession.

(5) *Semble*, that all that clause 2 of section 287 means is that in executing an order for delivery of possession of premises to a purchaser in execution, the Fiscal may break open doors and use force to expel persons found on the premises, as he may in the execution of a writ of possession.

THE facts of the case sufficiently appear in the judgment of
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Sampayo, for appellant.

Dörnhorst and *De Saram*, for respondent.

8th July, 1895. BONSER, C.J.—

This is an appeal from an order of Mr. Moyses, Acting District Judge of Galle.

The appellant purchased certain immovable property, to wit, a boutique, at a sale made by the Fiscal in execution of a mortgage decree. The sale was confirmed and the property conveyed by

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the Fiscal to the purchaser. Under section 292 of the Civil Procedure Code it was then the duty of the Fiscal or the person in possession of the property to forthwith give possession to the purchaser. This duty of the Fiscal would only arise if he were already in possession under section 290. The duty of "the person in possession" could only arise if he were the judgment-debtor or some person claiming under him by a title created subsequently to the seizure, or were holding on behalf of the judgment-debtor or such person. If the person in possession on being applied to by the purchaser to deliver possession declines to do so, the course to be taken by the purchaser will depend on the circumstances. If the person in possession is the judgment-debtor or some other such person as before referred to, the purchaser can apply to the Court for an order under section 287, and the Court, on being satisfied that the case comes within that section, will make an order for delivery of possession.

If, on the other hand, the person in possession claims the property by an independent title, the purchaser must resort to the remedy of an action *rei vindicatio*. If an order for delivery of possession is made, that order may be enforced as an order falling under head (c), section 217, the purchaser being considered judgment-creditor (section 287). What this means I will discuss presently.

In the present case it does not appear that the purchaser made any application to the person in possession to be let into possession of the property. But he moved the Court for "an order on the Fiscal of Galle to deliver quiet possession to him of the said boutique as provided for by section 287 of the Civil Procedure Code." That motion was made *ex parte*, and was not supported by any evidence either by affidavit or otherwise. Upon that motion an order was issued by the Court addressed to the Fiscal, which, after reciting the sale and purchase of the property, proceeded as follows: "And whereas the said boutique is in the possession of Allia Marcar Mahammadu of Kumbalwela, you are hereby ordered to put the said purchaser into possession of the said boutique, and, if need be, to remove any person bound by the decree who may refuse to vacate the same."

This order follows the form given in the schedule to the Civil Procedure Code, but what the words "bound by the decree" mean I have been unable to ascertain. The decree was a mortgage decree, and the only persons bound by it would be the defendants and their legal personal representatives after their death. They are not to be found in the corresponding section of the Indian Code, and probably were inserted by mistake.

Armed with this order the Fiscal's officer and the purchaser repaired to the premises, and it appears by the return made to and endorsed on the order by the Fiscal's officer that "the individuals, Allia Marcar Mahammadu of Kumbalwela and Kaluwu Marcar Pawadu Marcar of Kumbalwela, resisted and obstructed them in carrying out the order." He does not return whether he obeyed the orders of the Court by putting the purchaser in possession, or whether he was unable, in consequence of the resistance or obstruction, to obey the order of the Court, or whether these persons made any claim to the property.

The return is defective and bad.

The purchaser then filed a petition in the original suit, to which the original defendants and the persons alleged to have obstructed the Fiscal's officer were made respondents, and in which he prayed "that in terms of section 287, paragraph 2, and section 325 *et seq.* (*sic*) of the Civil Procedure Code, for (*sic*) an interlocutory order under section 377 (6) appointing a day for the determination of the matter of the petition, for costs of this petition, and for such further and other relief in the premises as to this Court shall seem meet."

It will be observed that there is no prayer for any order to be made against the respondents. However, upon this petition the District Judge made an interlocutory order, whereby, after stating "the petition praying for an order to the respondents to show cause why they should not deliver possession of the boutique to the petitioner by virtue of writ executed in the action of this Court, No. 49,861, had been read," he appointed a day for the determination of the matter in the petition contained.

The petition, as we have seen, contained no such prayer.

On the appointed day the present respondents, who were the two persons alleged to have obstructed the Fiscal's officer, appeared and called the District Judge's attention to the fact that the order for delivery of possession was irregularly obtained.

The District Judge being of that opinion discharged the interlocutory order with costs.

Against that discharge the purchaser now appeals.

It was admitted by the appellant's counsel that the order for delivery was irregularly obtained, but it was urged that the Court could not go behind that order, but was bound to deal with the matter of the petition.

The order made discharging the interlocutory order was technically incorrect: such an order was suitable to a case where an order *nisi* under section 377 (a) had been made. Where an interlocutory order has been made under section 377 (b) the Court

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must either dismiss the petition or make such order within the prayer of the petition as it shall consider right (section 388). Considering the prayer of the present petition, it is difficult to see what order could be made on it. But in substance the order was right, for the order for delivery having been irregularly obtained would not be a good foundation for proceeding under section 325 and the following sections. The District Judge ought also to have discharged the order for delivery, and we now discharge it under the powers of revision given by section 753.

It is interesting to note that this boutique, which was sold for Rs. 115, is stated by the petitioner in his petition to be worth Rs. 1,500. This fact leads me to suspect that the purchaser knew all along that he was purchasing property which was *bonâ fide* claimed by the present respondents, and that his omission to file an affidavit in support of his motion was not accidental but intentional.

But I doubt whether the proceedings under section 325 and following sections can properly be said to be proceedings for enforcing a decree of possession; for they may be taken in cases where the judgment-creditor has obtained possession, and they contemplate the punishment of an unsuccessful resistance unlike the corresponding sections of the Indian Code from which they were borrowed, under which it is only continuing resistance that is punishable. The procedure of section 325, &c., is not expressly made applicable to the case of a purchaser under an execution by the second clause of section 287.

It is difficult to give any intelligible meaning to that clause, for if it is to be construed literally it would mean that the purchaser having obtained an order for delivery must begin afresh and apply to the Court for leave to execute that order and get a writ of possession issued in form No. 63 of the schedule. This can hardly have been intended.

Perhaps all that it means is that the Fiscal may break open doors and use force to expel persons found on the premises, as he may in execution of a writ of possession.

However, it is unnecessary to decide this point.

The appeal will be dismissed with costs.

BROWNE, A.P.J.—

I agree in holding that the proper order for the District Judge to have made was to dismiss the petition, and in supplementing his order by that my Lord proposes to make by way of revision. As to the construction of so much of sections 287 and 325 as are

additions to sections 318 and 328 of the Indian Code, it would seem advisable to note them for reconsideration at any amendment of the Civil Procedure Code, more especially as it has been held (*1 S. C. R. 257*) that when the additional contingency of hindrance to the judgment-creditor was added to section 325 no penal provision therefore was enacted. It may be the procedure directed in section 287 was intended to be somewhat analogous to that supplemental to the original decree directed by section 321, and that all these might be much simplified in procedure.

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