

1939

*Present : Soertsz A.C.J. and de Kretser J.*ZEINUDEEN v. SAMSADEEN *et al.*

123—D. C. Ratnapura, 6,138.

*Mortgage action—Sale of property by Fiscal—Resistance to delivery of possession—Donation of property subsequent to mortgage—Failure of donee to register address—Power of Court to direct delivery of possession—Ordinance No. 21 of 1927, s. 12 (1).*

The petitioner sued on a mortgage bond dated July 28, 1931, and in execution of the decree the mortgaged property was sold by the Fiscal and purchased by the petitioner.

In execution of an order for delivery of possession issued by the Court in favour of the petitioner, the Fiscal was resisted by the respondent who claimed the property on a deed of gift from the defendant in the action, dated May 3, 1933.

The respondent had registered the deed of gift but had failed to register the address.

*Held*, that the Court had power to give directions under section 12 (1) of the Mortgage Ordinance for delivery of possession and for removal of the respondent as the latter was bound by the decree by virtue of section 6 (3) of the Ordinance.

**A** PPEAL from an order of the District Judge of Ratnapura.

*H. E. Weerasooria, K.C.* (with him *D. D. Athulathmudali* and *A. E. R. Corea*), for the third respondent, appellant.

*Colvin R. de Silva*, for the petitioner, respondent.

June 19, 1939. SOERTSZ A.C.J.—

This case has run a very erratic course in the Court below. The plaintiff sued on a mortgage bond dated July 28, 1931. Decree was entered on October 8, 1935, directing the payment of the principal and interest due on the bond, subject to the condition that if a sum of Rs. 100 was paid on or before December 11, 1935, an application for further time to pay the balance would be considered, but that if the defendants made default, order for sale of the mortgaged property would issue, without notice to them. The defendants made default, and the Fiscal on an order made on April 20, 1936, sold the mortgaged property on August 1, 1936, and the plaintiff who had been authorized by the decree to bid for and purchase the property in reduction of his claim, became the purchaser. Before the sale took place, to be precise on March 24, 1936, the present appellant had submitted a petition stating that she held a deed of gift of May 3, 1933, from her husband the first defendant, for this land and protesting against the proposed sale. That was an unstamped petition and no notice appears to have been taken of it. Again on August 29, 1936, that is to say nearly a month after the sale, the appellant wrote to the District Judge notifying her claim, but she was informed that her petition should be stamped and that an application to set aside the sale should be made by way of summary procedure. She took no steps, and on September 9, 1936, the sale to the plaintiff was confirmed and Fiscal's transfer No. 2,967 of November 12, 1936, was issued to him. On December 1, 1936, the plaintiff's Proctor filed petition and affidavit and moved that an order for delivery of possession be issued to the Fiscal to the end that he might be placed in quiet and vacant possession of the house described in the petition and affidavit. This was allowed. On December 7, 1936, the Fiscal reported that the present appellant claimed the land and premises on the deed of gift dated May 3, 1933, and that she refused to give up possession and prevented the Fiscal's officer from delivering possession. The Fiscal's return on page 119 of the record shows that this resistance occurred on December 5, 1936. On January 6, 1937, the plaintiff's Proctor filed petition and affidavit complaining of this resistance and praying for a notice on this appellant to show cause why she should not be dealt with according to law. The Secretary of the Court wrote a memorandum on the motion paper filed with the petition and affidavit laying down the law in peremptory terms with the result that plaintiff's Proctor was called upon to see the Judge in Chambers. (See pages 76 and 77 of the record). What transpired in Chambers does not appear, but on page 78 of the record appears another motion by the plaintiff's Proctor asking for a notice on the appellant to show cause why she should not be ejected from the house "as the deed of gift in her favour executed by the first defendant is subject to the debt due on the bond". Notice issued accordingly. It was served and on March 15, 1937, her Proctor appeared and stated that she was not a party to the case and that she was not affected by the decree and could not be ejected. The Court fixed a date for inquiry into the matter of the application and objection, and eventually on April 30, 1937, made order that the application was out of time in that it was not made within a month of the resistance as required by section

325 of the Civil Procedure Code and that the appellant "was not bound by the decree not having been made a party to the mortgage action". The application was refused.

On May 13, 1937, another Proctor filed plaintiff's proxy and moved for a writ of delivery of possession. He stated that all necessary parties had been joined in the action and that the party who resisted the Fiscal was a party bound by the decree under section 6, sub-section (3), of the Mortgage Ordinance of 1927. This motion was allowed.

On July 2, 1937, the journal entry shows that the Fiscal reported once more that the appellant on June 30, 1937, refused to vacate the house or to allow anyone to enter into it. On July 28, within a month of this resistance, plaintiff's Proctor filed petition and affidavit and asked that a day be appointed for the determination of the matter of the petition. That was allowed and the matter came up for consideration on June 29, 1938.

The appellant's Proctor contended that the plaintiff is concluded by the order of April 30, 1937, and that the matter of the resistance could not be re-agitated on the issue of a fresh writ; that the appellant was not bound by the mortgage decree; and that section 325 did not apply except in the case of proprietary decrees.

For the plaintiff it was urged that the present application was in respect of resistance to a writ of May 13, 1937, and that, therefore, the dismissal of the earlier application did not bar the plaintiff; that the appellant not having registered her address was bound by the mortgage decree; and that sections 325 and 326 applied to an order under section 287 of the Civil Procedure Code.

The learned Judge by his order of July 27, 1938, allowed the plaintiff's application and directed that "The Fiscal will proceed to put the purchaser in possession of the property purchased, and if need be, remove the respondents therefrom, should they refuse to vacate the same".

The appeal is from that order. As I have already observed, the learned District Judge and the Proctors appearing for the parties, treated the applications for delivery of possession, as made under the Civil Procedure Code. On the facts in this case, I do not think sections 325 and 326 of the Code apply. Section 325 enacts that "if in the execution of a decree for the possession of property under heads B and C (that is of section 217 of the Civil Procedure Code) the officer charged with the execution of the writ is resisted" &c. In this case, the decree entered did not order the delivery of possession or the removal of a party bound by the decree as it might have done. The Fiscal proceeded to deliver possession on orders made by the Court subsequently to the decree. These orders were regarded as orders made under section 287 of the Code. In the case of *de Silva v. de Silva*<sup>1</sup>, a Full Bench held that sections 325 and 326 applied only to cases of resistance to a decree for delivery of possession and not to an order made under section 287. That ruling was doubted in the case of *Silva v. de Mel*<sup>2</sup>, but the Divisional Bench that considered this latter case sought to escape from the Full Bench ruling by holding that it applied only to sections 325 and 326, and not to

<sup>1</sup> 3 N. L. R. 161.

<sup>2</sup> 18 N. L. R. 164.

section 328 with which they were concerned. But that emergency exit is not open to us for we are occupied with a case dealing with sections 325 and 326 and we are bound by the Full Bench decision, that is if this order is one under section 287. It is obvious, however, that section 287 does not apply. It provides for three specific cases:—(a) where the property sold is in the occupancy of the judgment-debtor, (b) where it is in the occupancy of someone on his behalf, (c) where it is in the occupancy of a person claiming under a title created by the judgment-debtor subsequently to the decree. The appellant is not the judgment-debtor. She is not in occupancy on behalf of the judgment-debtor, but she is setting up a right in herself. (a) and (b) do not, therefore, apply. Nor does (c) because there was no seizure at all, the Fiscal having acted under section 12 (3) (a) of the Mortgage Ordinance. What then is the result? Is the purchaser's only remedy a regular action against the appellant for declaration of title and ejectment? I do not think so. It would be unfortunate if a purchaser were put to the expense and delay of a regular action to obtain possession from a party bound by the decree entered in his favour. The appellant is bound by the decree. The mortgage bond was registered, and although the appellant had registered her deed, it is admitted that she failed to register her address. She was not, therefore, a necessary party and the decree binds her. In my opinion the order made by the District Judge is an order that he could have made under section 12 (1) of the Mortgage Ordinance. Although section 12 (2) provides that in the case of a sale carried out by the Fiscal, it shall be carried out in like manner as if there had been a seizure under a writ of execution for the amount of the mortgage amount, and that sections 255 to 289 and 290 to 297 of the Civil Procedure Code shall be applicable, the District Judge has authority under section 12 (1) to give directions for delivery of possession and for the removal of persons bound by the decree, when such directions become necessary. In this case such directions were necessary because section 287 of the Code did not apply.

I would therefore, treat the order made by the District Judge as one made under section 12 (1) of the Mortgage Ordinance and I would uphold it. In my view, this is essentially a case to which the concluding part of section 36 of the "Courts and their Powers" Ordinance applies.

I think this is a case in which the parties should bear their costs in both Courts.

DE KRETZER J.—I agree.

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