

Present : Bertram C.J. and Schneider J.

1924.

SITTAMPARAMATHER KURUKAL *et al.* v.
RATNASABAPATHY KURUKAL.

109—D. C. Jaffna, 15,159.

Execution sale—Fiscal's transfer—Sale by judgment-debtor—Resistance by purchaser—Civil Procedure Code, ss. 287 and 328.

Section 287 of the Civil Procedure Code, which provides a summary means of putting into possession a person who has obtained a Fiscal's transfer of property in pursuance of an execution sale, does not apply where the person in possession of the property is one who has derived title to it from the judgment-debtor, before the property is seized in execution.

In section 328 of the Civil Procedure Code, in the paragraph which says "that nothing in this section or section 326 applies to a person to whom the judgment-debtor has transferred the property after the institution of the action in which the decree is made," the figure 326 is a mistake for 327.

Per BERTRAM C.J.—There is no reason why a person who has taken a conveyance from a judgment-debtor after the institution of the action should be exempted from the provisions of section 326 if he obstructs the execution of the decree at the instigation of the judgment-debtor.

A PPEAL from an order of the District Judge of Jaffna. The facts appear from the judgment.

Drieberg, K.C. (with him *Rajaratnam*), for appellant.

James Joseph, for plaintiff, respondent.

Samarawickreme, for purchaser, respondent.

1924. September 16, 1924. BERTRAM C.J.—

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This is a case relating to civil proceedings of some complication. It arises out of litigation with respect to a temple in the Jaffna peninsula. Two members of the same family were at issue with regard to the title and the right of management of this temple. In that action the plaintiff successfully established his title to a share in the temple and a right to participate in its management. The defendant against whom the action has been brought thereupon, before any execution proceedings had been initiated, and before any seizure therefore had been made, transferred all his rights in the temple to his son, the present respondent, appellant. Although the terms of the deed are not very certain on this point, the defendant appears to have purported to transfer all the rights in the temple, as though he were the person solely entitled to. On his side the plaintiff took certain measures. He taxed his costs as expeditiously as possible, and then purported to execute his judgment for the costs by the sale in execution of the defendants' title to the temple, and also all his rights to the management. This title and these rights so sold were bought in by the second petitioner, who is a member of the same family. The defendant then so arranged that the Udaiyar, when putting in force the execution of the decree, that is to say, when going to the spot in order to put the plaintiff in possession of his share in the temple, should at the same time execute the order of the Court which was made under section 287, directing the purchaser at the execution sale to be put in possession of the property which he had purchased. On the Udaiyar so presenting himself, it appears that the appellant in a very violent and determined manner opposed his proceedings. He claimed to be entitled to the whole of the temple, both under the deed he had received from his father and independently of that deed by virtue of inheritance. He did not then take up the position which is now taken on his behalf that he had no objection to the plaintiff in action entering into possession of the share which the judgment in that action had declared him to be entitled to, but that he did object to the execution-purchaser claiming possession not only of the title of the defendant to the temple, but also to the management thereto. He, as far as can be seen, obstructed the execution altogether. Afterwards the writ was reissued, and there the Fiscal himself, the Government Agent of the Province, no doubt desiring to avoid any disturbance in a religious building, went to the spot, and again the execution proved abortive owing to the obstruction of the appellant.

Proceedings were accordingly taken under section 325 of the Civil Procedure Code, and two petitions were presented, one on behalf of the plaintiff and the other on behalf of the execution-purchaser. No apology was made by the present appellant for his resistance to the execution, but it was intimated that he no longer resisted

the claim by the plaintiff for possession. The learned Judge, however, having, I presume, read the reports of the Fiscal and the Udaiyar by consent of both parties, took a very severe view of the contumacy of the appellant, and ordered him to be imprisoned for thirty days, and at the same time directing the judgment-creditor, that is, the first petitioner, should be put in possession of the property. The appeal is now taken against this order, and I will consider the matter first.

Mr. Driberg, on behalf of the appellant, claims that he was entitled to obstruct any attempt to put the purchaser, the second petitioner, into possession, and that, therefore, any actual obstruction to which the appellant was guilty ought to be attributed to that matter. I do not think we can take this view. It appears from the very full reports of the Udaiyar and the Fiscal that the appellant, apparently under some excitement, objected to the execution proceedings under both heads. I do not think that his conduct can be wholly passed over. At the same time, the order for imprisonment for thirty days was an extremely severe one. The plaintiff on his side as a member of the family does not press for the imprisonment of his kinsman, and I think that, under the circumstances, the case will be met if the appellant in open Court makes an apology to the satisfaction of the District Judge for his obstruction of the Udaiyar and of the Fiscal. If that apology is duly made, the order for imprisonment may I think be remitted; but the order of the learned Judge should stand with the verbal variation that the judgment-creditor be put in possession of that share of the property to which he was declared entitled under the decree.

We now come to the question of the obstruction of the order for putting the purchaser into possession. That is on a different footing. This case has been argued on the supposition that section 327 applied to the case. But this appears to be a misconception. In section 328 there is a paragraph which says that nothing in this section or section 326 applies to a person to whom the judgment-debtor has transferred the property after the institution of the action in which the decree is made. It is quite apparent that the figure 326 there is a mistake for 327. There is no reason why a person who has taken a conveyance from a judgment-debtor after the institution of the action should be exempted from the provisions of section 326, if he obstructs the execution of the decree at the instigation of the judgment-debtor. It is quite plain that the paragraph has reference to the two sections which are in *pari materia*, namely, sections 327 and 328. This becomes quite manifest if we refer to the corresponding provisions of the old Indian Code of Civil Procedure, namely, section 333. That runs, "Nothing in section 321 or 332 applies, &c.," and sections 331 and 332 are the sections which correspond with our sections 327 and 328.

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It is recognized that it is competent to a Court in construing a Statute to correct an obvious clerical error—see *Maxwell on the Interpretation of Statutes*, pp. 380 and 381, and *The Queen v. Joseph Wilcock*¹ where it was held that a mistake had been committed by the Legislature in setting out the word of the Statute which it intended to repeal, and the Court considered that the incorrect word might be rejected. This being the position, the result is that the Legislature intended that a person, who had taken a conveyance *pendente lite*, should not be entitled to the comparatively mild provisions of sections 327 and 328, but should be left liable to be dealt with under section 326, if he offended against the provisions of that section. I may here remark, if one reads the corresponding provisions of the old Indian Code of Civil Procedure, one very much better appreciates the scheme of these sections. Section 326 was intended to deal with cases in which there was no just cause for the resistance, and there was reason to expect that resistance would be continuous. Sections 327 and 328 were intended to apply to cases of less seriousness. It appears, however, that these sections 327 and 328 do not apply to the present case at all. What then is the position ?

Mr. Samarawickreme says the only result is that he is free to enforce his order for possession, and that that order being enforced, the appellant must pursue any remedy which he thinks is open to him by a separate action.

Mr. Drieberg contests this position, and takes up what I think is the right attitude. Section 287 declares in its final paragraph that an order for a delivery of possession made under that section may be enforced in the same way as an order to yield up possession of immovable property under section 217. But one must carefully note the scope of that section. It provides a summary means of putting into possession a person who has obtained a Fiscal's transfer in pursuance of an execution sale. The cases in which that section may be applied are limited by the words of that section. They are, firstly, where the property sold is in the occupancy of the judgment-debtor ; secondly, where it is in the occupancy of some person on his behalf ; and, thirdly, where it is in the occupation of some person claiming under a title created by the judgment-debtor, provided that that title was created subsequent to the seizure. The section does not apply where a person in possession is not a judgment-debtor or some person holding on his behalf, but is a person who has derived title from the judgment-debtor before the property is seized in execution. As against that person the final paragraph of the section does not apply. The person who has obtained a Fiscal's transfer under those circumstances, if he seeks to give effect to his title, must do so by a separate action.

¹ (1845) 14 L. J. Rep. M. C. 104.

The second petitioner, therefore, must be left to pursue his rights under his transfer in this way. The result is that as against the first petitioner, the appellant's appeal must be dismissed, subject to the modifications I have indicated. As against the second petitioner, it must be allowed with costs in both Courts.

SCHNEIDER J.—I agree.

Decree varied.

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