1960 *Present :* **Weerasooriya, J.**

NAGAMUTTU, Appellant, *and* KUMARASEGARAM and another, Respondents

S. C. 61—C. R. Jaffna, 1610/A

Resistance to execution of proprietary decree—" Hindrance in taking complete and effectual possession "—Re-issue of writ—Permissibility—Civil Procedure Code, ss. 287 (2), 323, 325, 326.

Where, two days after execution of a proprietary decree in respect of a land, the judgment-debtor re-entered the land (which was an open one)—

Held, that the subsequent re-entry by the judgment-debtor did not amount to a hindrance offered to the judgment-creditor in taking complete and effectual possession within the meaning of section 325 of the Civil Procedure Code.

Quaere, whether, in such a case, a fresh writ of possession may be issued for the removal of the judgment-debtor.

APPEAL from an order of the Court of Requests, Jaffna.

J. D. Aseervathan, for the defendant-respondent-appellant.

No appearance for plaintiffs-respondents.

Cur. adv. vult.

October 7, 1960. WEERASOORIYA, J.—

This is an appeal from an order made by the Commissioner of Requests, Jaffna, committing the appellant (the judgment-debtor) to jail for a term of 30 days under section 326 of the Civil Procedure Code and also directing that the two plaintiffs-respondents (the judgment-creditors) be put in possession of a land called Kokkanpulam. The order was made on an application by the plaintiffs-respondents under section 325 of the Code, and is based on the Commissioner's finding that the appellant hindered the plaintiffs-respondents in taking complete and effectual possession of the land after the Fiscal's officer had delivered possession of the same to them in execution of a writ for the appellant's ejectment which had issued under the decree entered in the action in which the present proceedings arose. The action was one for the cancellation of a lease of the land which the plaintiffs, as lessors, had entered into with the appellant, and for ejectment.

The writ was executed on the 8th August, 1959, by the Fiscal's officer placing the 1st plaintiff in possession of the land at a time when the appellant was not present. But the appellant re-entered the land (which was an open one) on the 11th August, 1959, and has been in occupation of it since then.

In submitting that the order appealed from was wrongly made, learned counsel for the appellant relied on the case of *Pereira v. Aboothahir* [1]. In that case the purchaser of certain premises at an execution sale—under section 287 (2) of the Civil Procedure Code such a purchaser is placed in the same position as a judgment-creditor—obtained a writ for recovery of possession of the premises. The Fiscal in execution of the writ ejected from the premises a person who was in occupation and gave the purchaser complete and effectual possession of the same. The door of the premises was locked and the key handed by the Fiscal to the purchaser who elected to take the key and go away. Two hours later the person ejected succeeded in re-entering and getting into occupation of the premises. Garvin, J., in a judgment with which Maartensz, A.J., agreed, held that in these circumstances sections 325 and 326 had no application as the interruption of possession took place *after* the Fiscal had already given complete and effectual possession.

The 1st plaintiff in his evidence at the inquiry under section 326 stated that he remained in effectual possession of the land for two days after he was given possession by the Fiscal's officer (on the 8th August, 1959). In view of this admission it is clear that the subsequent re-entry by the appellant on the 11th August, 1959, did not amount to a hindrance of the kind contemplated in section 325, as the section specifically refers to hindrance offered to the judgment-creditor in taking complete and effectual possession.

Although the case of *Pereira v. Aboothahir* (supra) was cited to the Commissioner, in making the order appealed from he seems to have acted on the strength of an observation of Schneider, J., in *Mohomado Lebbe v. Ahamado Ali et al.*[2] that the " hindrance or obstruction should be at the time of giving of possession or shortly thereafter ". In another part of his judgment in that case Schneider, J., stated that it is impossible to take the view that section 325 was intended for a case where the hindrance or obstruction did not follow " very shortly after ". But even if the procedure laid down in sections 325 and 326 cannot be invoked by a judgment-creditor unless the hindrance or obstruction is either at the time of giving of possession or shortly (or very shortly) thereafter, I do not think that those conditions can be said to be satisfied where the hindrance or obstruction was two days afterwards, as in the present case. In so far as the observations of Schneider, J., are in conflict with the decision in *Pereira v. Aboothahir* (supra) the latter case, being a judgment of a bench of two Judges, was binding on the Commissioner, even as it is binding on me.

If the plaintiffs-respondents are not entitled to an order under section 326, a question that poses itself is what legal remedy for the recovery of possession of the land is available to them short of filing a regular action against the appellant who, even on the 11th August, 1959, was bound by the decree entered in the case and is still bound by it. In considering a

[1] *(1935) 37 N. L. R. 163.*

[2] *(1922) 23 N. L. R. 406.*

similar question in *Menika v. Hamy*[1], Lawrie, J., expressed the opinion that a Court "ought to have the power to compel complete and lasting obedience to its decree, and that on due proof of dispossession, a fresh writ of possession ought to issue". While I am of the same opinion, and see no reason why a writ under section 323 of the Civil Procedure Code should not be re-issued for the removal of the appellant, the weight of authority seems to be against such a course being adopted—see *Queen v. Abraham*[2] and also *Pereira v. Aboothahir* (*supra*). Moreover, no application for the re-issue of writ under section 323 has been made by the plaintiffs-respondents.

The order appealed from is set aside and the application made by the plaintiffs-respondents under section 325 is dismissed with costs in both Courts.

Order set aside.

[1] (*1892*) *2 C. L. Reports 145.* [2] (*1843–55*) *Ramanathan's Reports 79.*