

PERERA v. BRAMPY *et al.*

D. C., Colombo, 6,272.

1896.  
July 28  
and 31.

*Purchaser in execution of immovable property—Delivery of possession—Resistance to Fiscal—Claim by third party in good faith—Numbering and registering purchaser's petition as a plaint.*

A, a purchaser in execution of certain immovable property, obtained, under section 287 of the Civil Procedure Code, an order on the Fiscal for delivery to him of the property purchased. In execution of this order the Fiscal was resisted by B and C, who were in possession of the property, and claimed it as their own. A thereupon petitioned the Court under section 325.—

*Held*, that if the Court found that the resistance had been occasioned by B and C claiming in good faith to be in possession of the property on their own account, A was entitled to have his petition numbered and registered as a plaint, and proceedings taken thereon under section 327; but before the Court directed the petition to be so numbered and registered, it should put on record its distinct finding, if that be so, that B and C were claiming in good faith to be in possession of the property on their own account.

THE facts of the case appear in the judgment of WITHERS, J.

*Pereira*, for appellant.

*Jayawardena*, for respondents.

July, 1896. WITHERS, J.—

The appellant is a purchaser of certain lands at a Fiscal's sale. The sale has been confirmed by the Court, and conveyance executed in pursuance of the sale. It does not appear that the Fiscal had by himself or his agents taken possession of any of these lands between sale and execution. By section 292 the person in possession of immovable property sold in execution is bound forthwith, on confirmation by Court and of execution of conveyance, to give possession to the grantee in the conveyance.

The grantee in this case applied for a delivery order under section 287. The Court granted the order, and in doing so no doubt *primâ facie* satisfied itself that the lands in question were in the occupation of the judgment-debtor (in execution of judgment against whom the land had been sold), or of some person on his behalf, or of some person claiming under a title created subsequently to the seizure of the property.

Such a delivery order may be enforced as an order falling under head (c), section 217, the purchaser being considered as a judgment-creditor.

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217 (c) relates to a decree or order of Court which commands the person against whom it operates to yield up possession of immovable property.

217 is the first section of chapter XXII. relating to execution.

Section 323 is the first of a series of sections relating to the execution of a decree for possession of immovable property. By that section a writ of execution in form 63 in second schedule may be taken out by a decree holder, if the latter is satisfied that he is entitled to obtain execution of his decree for possession of immovable property.

324 prescribes how the Fiscal is to execute the writ of execution.

Section 325 and subsequent sections deal with resistance to execution of proprietary decrees.

Reading sections 292 and 323 and 324 together, it looks as if a delivery order under 292 is to be executed as a writ of possession under section 323.

It would seem to follow that if a purchaser has the same right as the holder of a decree for possession of immovable property to have the purchased property in certain conditions delivered up to him, he should have in those conditions the same remedy if the officer in charge of the order of delivery is resisted in his attempt legally to enforce it. This remedy of a purchaser has been questioned by my Lord the Chief Justice in the case *Supramanian Ayer vs. Chankare Pillai D. C., Jaffna*,\* and I shall certainly not now decide the point.

The baffled purchaser in this case prayed that his unexecuted order might be enforced by his being put into possession of the lands which were withheld from him by the third and fourth respondents who had resisted the execution of his delivery order.

The District Judge, on the material before him, appeared to me to come to the conclusion that the resistance was not occasioned by the judgment-debtor or by the third and fourth respondents at his instigation. I cannot say that he was wrong in so finding, but without more, he dismissed the purchaser's petition.

The purchaser complains of this dismissal, and his counsel urges that in the circumstances of the case he was entitled to an order under section 327, directing that his petition of complaint, which has been dismissed, should be numbered and registered as a plaint in an action between the decree-holder (here purchaser, he being under section 287 considered as judgment-creditor) as plaintiff and the resisting claimants respondents as defendants, and an inquiry into the hostile claim of the respondents and

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\* *N. L. R.*, 19.

decision such as that section contemplates. The appellant expects to have a favourable decision, *i.e.*, an order for the enforcement of his delivery order under section 287. After hearing counsel on both sides, I am satisfied that the appellant has made out a good case for his petition and the respondents' claim being made the subject of a trial and determination within the purview of section 327 of the Civil Procedure Code. Order accordingly giving him his costs of this appeal.

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I have since seen my brother's judgment, and I agree with him in thinking that before the District Judge numbers the petition and proceeds under section 327 he should put on record his distinct finding as to whether the fourth and fifth respondents obstructed the order of delivery at the instigation of the judgment-debtor, or claiming in good faith to be in possession of the premises on their own account.

July, 1896. LAWRIE, J.—

My doubt is whether the learned District Judge has found that the resistance and obstruction was occasioned by the fourth and fifth respondents claiming in good faith to be in possession on their own account.

I think a distinct finding to that effect should precede the direction to number the petition of complaint as a plaint as is provided by the 327th section.

My brother Withers reads the order of the District Judge as a finding that the resistance was not occasioned by the judgment-debtor's instigation. I am not sure that the District Judge has so found; if he has, he will have no difficulty in making a more express finding on the facts: I quite agree that the dismissal of the petition was a mistake; if the fourth and fifth respondents were acting in *malâ fide* at the instigation of the judgment-debtor, they ought to be sent to jail under section 326; if they claim in *bonâ fide*, and not at the instigation of the debtor, and if the purchaser thinks himself strong enough to undertake an action for vindication of the property, the petition should be numbered as a plaint, and the Court should proceed to investigate the claim.

I agree with my brother Withers. My only difference is that before the District Judge makes the order to number and register the petition, he should make distinct finding in fact as to the status and *bonâ fides* of the respondents in occupation.

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