

1918.

[FULL BENCH.]

Present: Wood Renton C.J., Shaw J., and De Sampayo A.J.,

SILVA v. DE MEL.

143—D. C. Colombo, 39,566.

Civil Procedure Code, ss. 326, 287, 217—Order for delivery of possession to purchaser in execution—Right of party dispossessed to take proceedings under s. 328, Civil Procedure Code.

Section 328 of the Civil Procedure Code does not apply only to cases of dispossession in execution of proprietary decrees, but to orders for delivery of possession under section 267 as well.

*De Silva v. De Silva*¹ distinguished.

THE facts are set out in the judgment of Wood Renton C.J.

A. St. V. Jayewardene, for the plaintiff, appellant.

Bawa, K.C., (with him B. F. de Silva), for defendant, respondent.

Cur. adve. vult.

¹ (1896) 3 N. L. R. 161.

February 5, 1915. WOOD RENTON C.J.—

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*SCoa v.
De Mel*

This case raises an interesting and important question under section 328 of the Civil Procedure Code. The plaintiff sued certain debtors of his on a promissory note and obtained judgment against them. In the execution of the decree certain premises in Hunupitiya, Colombo, were seized and sold to the defendant. The defendant obtained an order for delivery of possession and dispossessed the plaintiff, who thereupon instituted proceedings under section 287 of the Civil Procedure Code. The learned District Judge accepted the petition presented by the appellant under that section and directed that it should be treated as a plaint. Objection was, however, subsequently taken on behalf of the defendant that section 328 applies only to cases of dispossession in execution of proprietary decrees, and has no application to orders for delivery of possession under section 287 of the Code. The learned District Judge upheld this objection, vacated his order as having been made *improvidē*, and dismissed the petition. The plaintiff appeals.

The question has been referred to three Judges in view of the decision of Sir John Bonser C.J., Lawrie J., and Withers J. in *De Silva v. De Silva*.¹ If that decision directly governs the point at issue, and is an authority for the proposition that orders under section 287 of the Code are excluded from the scope of the whole group of sections dealing with resistance to the execution of decrees, it is clearly, binding upon us. I am of opinion, however, that it might fairly be considered as limited in its application to sections 325 and 326, which attach penal consequences to resistance to, or obstruction of, the execution of writs in certain cases. The Judges held, it is true, that the word "decree" in section 325 cannot be read as if it were equivalent to "order," but both Sir John Bonser and Withers J. justify this interpretation on the ground that the enactment is one in which the liberty of the subject is concerned. Lawrie J., although he concurred in the view expressed by his colleagues, had serious doubts as to its correctness—doubts which, with the utmost respect, I confess that I fully share. On the ground that I have stated, I am of opinion that, in spite of *De Silva v. De Silva*,¹ we are at liberty to construe section 328 for ourselves. In view of the provision in section 287 that an order for delivery of possession may be enforced as an order falling under section 217 (C) (the purchaser being considered as judgment-creditor), of the use of the words "or order" in section 323 and of their subsequent omission, which must have been *per incuriam*, it appears to me that the Legislature intended to put orders under section 287 on the footing of decrees for the purposes of the group of sections with which we are here concerned, and that we ought to interpret section 328 in this sense so as to effectuate its clear intention.

I agree to the order proposed by my brother De Sampayo.

¹ (1898) 3 N. L. R. 161.

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SHAW J.—.

*Silva v.
De Mel*

I agree. I think the group of sections of the Code 323 to 330 relate to both "decrees" and "orders," and that the word "decree" when it is used alone, should be held to include an "order." I am therefore of opinion that the original order of the District Judge made under section 328, that the appellant's application should be numbered and registered as a plaint, was properly made, and should not have been vacated. I feel some difficulty about the case of *De Silva v. De Silva*¹, but, on the whole, I think that it need not be considered as a binding decision of the Full Court, except for the proposition that for the purposes of punitive proceedings under sections 325 and 326 the word "decree" should not be held to include "order" because for the purpose of proceedings of a criminal nature the Legislature had not expressed its intention in sufficiently unmistakable terms. This is the ground on which Bonser C.J. based his decision in the case.

DE SAMPAVO A.J.—

The appellant, being dispossessed of certain premises by the Fiscal in execution of a writ of possession taken out by the respondent as purchaser in execution of the decree in action No. 35,314 of the District Court of Colombo, petitioned the Court under section 328 of the Civil Procedure Code. The District Judge, having considered that the appellant had been in *bona fide* possession of the property on his own account, ordered the petition of complaint to be numbered and registered as a plaint in an action between the appellant as plaintiff and the respondent as defendant, but when the case came on for trial he upheld an objection taken on the respondent's behalf that the appellant could not apply under section 328, and dismissed the action with costs.

The District Judge has relied on *De Silva v. De Silva*.¹ That is a Full Bench case, and if it decided the particular point involved in this appeal, it is a binding authority and we shall not be in a position to review it. But when closely examined, it will be found not to be an express authority. Those proceedings had been taken under sections 325 and 326 by an execution purchaser against a person who had resisted the execution of a writ of possession issued by Court, and though certain remarks of Bonser C.J. in his judgment may have a general bearing on the construction of the sections relating to execution of decrees for possession of immovable property, the ratio of that decision, as I understand it, is that as the application before the Court was to enforce the penal provisions of sections 325 and 326, which ought therefore to receive a strict construction, and as those sections do not speak of an "order," but only of a "decree," the second paragraph of section 287, which provided

¹ (1898) 3 N. L. R. 161.

that an order for delivery of possession to an execution purchaser may be enforced as an "order" falling under head (C) of section 217, the penal provisions in question should not be held to be applicable. But as regards the general scope of section 287, and the application of the provisions of section 328 to the matter of putting an execution purchaser in possession, I think, with great respect to the learned Judges who took part in *De Silva v. De Silva*,¹ that we may go upon our own view. Bonser C.J. thought that section 287 only referred to the manner in which the Fiscal should act in carrying out the order for delivery of possession. But I think this is taking too narrow a view, for, then, the provision would have taken the form that the order for delivery of possession may be "executed," and not that it may be "enforced" as an order falling under head (C). We must therefore look for some other meaning in section 287. Section 217 contains an enumeration of the various decrees or orders which a Court may enter, and the following sections are concerned with the mode by which they are respectively to be enforced. Sections 323 to 330 lay down the mode of execution of decrees or orders falling under head (C) of section 217. Now, it is remarkable that section 323 begins "if the decree or order is for the recovery of possession of immovable property." &c., but thereafter neither in that section nor in any of the following sections does the word "order" occur at all; it disappears altogether and the only word found is "decree." I cannot resist the conclusion that in these sections "order" is synonymous with "decree," for otherwise there would be no provision in the Code at all for enforcing an "order" for delivery of possession as distinguished from a "decree." I think that by the second paragraph of section 287, which provides for the enforcement of an order for delivery of possession to an execution purchaser, the relevant provisions of the Code relating to enforcement of a decree for possession, including those of section 328, are made applicable. I am of this opinion all the more, because the whole scheme of the Procedure Code is to provide speedy and inexpensive remedies, and it appears to me only reasonable to allow disputes arising from the execution of an order for possession in favour of a purchaser at a Fiscal's sale to be inquired into and settled by the means provided in section 328 instead of driving parties to a separate action.

I would set aside the order of dismissal and restore the proceedings up to the order numbering and registering the petition as a plaint, and send the case back to be proceeded with in due course. As the order of dismissal was made on objection taken by the respondent, I think he should pay the costs of the day in the District Court and also the costs of this appeal.

Set aside.

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DE SAMPAVO
A.J.

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