

1966

Present: Sirimane, J., and Alles, J.

C. Y. S. PERERA and another, Appellants, and
V. THILLAIRAJAH and another, Respondents

S. C. 20-21 of 1966/D. C. Special—D. C. Colombo, 928/ZL

Execution of proprietary decree—Resistance by a person making a frivolous or vexatious claim—Order made against him for delivery of possession—Procedure for enforcing it—Civil Procedure Code, ss. 5, 325, 326, 327A, 328, 329.

An order for delivery of possession made under section 327A of the Civil Procedure Code against a person who resists execution of a proprietary decree by making a frivolous or vexatious claim can be enforced against him in the manner prescribed by sections 325 and 326 if he persists in defying the order.

APPEAL from a judgment of the District Court, Colombo.

H. Rodrigo, for the 2nd and 3rd Respondents-Appellants.

S. Sharvananda, for the Plaintiffs-Respondents.

Cur. adv. vult.

October 7, 1966. SIRIMANE, J.—

The appellants had resisted the execution of a decree for the recovery of possession of immovable property, and an order had been made against them under section 327 (a) of the Civil Procedure Code. When the Fiscal tried to execute *the decree*, by placing the judgment-creditor in possession, as directed by that order, the appellants resisted him again.

When they were brought up before Court a second time on proceedings initiated by the judgment-creditor under section 325, they took up the position in the lower Court that they could not be dealt with under section 326 because they were not "judgment-debtors". This position is clearly untenable as section 5 of the Civil Procedure Code enacts that "judgment-debtor" means any person against whom a decree or order capable of execution has been made".

The learned District Judge rightly rejected this contention and dealt with the appellants under section 326, by committing them to jail for 30 days.

In appeal it was argued that there was a distinction between "Order" and "Decree", and that sections 325 and 326 applied only to "Decrees", and not "Orders", and much reliance was placed on the case of *De Silva v. De Silva*¹. In that case the order was one for delivery of possession to a purchaser at a Fiscal's sale, and not for execution of a

¹ (1898) 3 N. L. R. 161.

decree. In such cases the claim of the person resisting is not examined before an order for the delivery of possession is made. Here, the rights claimed by the appellants were investigated and found to be frivolous and vexatious. There is a clear distinction between an order for delivery of possession to a purchaser under section 287 and an order to the Fiscal under section 327 (a) to execute a decree, after a claim has been investigated and found to be frivolous.

In drawing this distinction between an "Order" and a "Decree", Counsel for the appellants pointed out that by section 329 orders under sections 327 and 328 were equated to a decree in a regular action, but that there was no similar provision in regard to an order under section 327 (a). But, I do not think that this matter affects the question involved here at all. One can see several reasons why it was necessary to regard final orders under sections 327 and 328 as decrees, e.g., a person dispossessed of property who succeeded in his claim under section 328 would have to execute that order as a decree to get back possession. Or again in order to give finality to a decision between a judgment-creditor and a bona fide claimant in possession, it would be necessary to look upon the order under section 327 as a decree in a regular action.

These considerations do not arise in an order to the Fiscal under section 327 (a) to execute the decree. This is not a final order, for the claimant whose claim has been rejected as frivolous may (under the provisions of the same section) canvass that order by instituting an action within a month.

In regard to the distinction between "Order" and "Decree", it is noteworthy that in the case of *De Silva v. De Mel*¹, where *De Silva v. De Silva* (supra) was considered, De Sampayo, J. pointed out that section 323 provides for the application for execution of a decree or order for the recovery of immovable property, and thereafter the word "Order" disappeared altogether. With reference to sections 323 to 330, the learned Judge said, "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 am in respectful agreement with that observation.

In regard to orders under section 327 (a) (which was enacted after these decisions) I think the correct position is: that where such an order is made, a person whose claim has been rejected, is (for the purposes of execution) placed in the same position as the judgment-debtor in the original decree, the execution of which he prevented by his frivolous or vexatious claim. The Court, therefore, orders the original decree to be executed against the claimant as well.

An examination of sections 325 to 330 clearly show that they were intended to empower the Court to grant a judgment-creditor the fruits of the decree he has obtained, in the same action, without resorting to further litigation.

¹ (1915) 18 N. L. R. 164.

I find it impossible to subscribe to the view advanced by learned Counsel for the appellants that the Court having made an order under section 327 (a) is powerless to enforce that order if the persons against whom it was made persist in defying it.

The appeal is dismissed with costs.

ALLES, J.—

I have had the advantage of reading the order proposed by my brother Sirimane J. and I am in entire agreement with his observations.

It has been submitted by Counsel for the respondent-appellants that in as much as the Court has only power to make an 'order' under section 327A, the Court has no power to proceed under Sections 325 and 326 of the Civil Procedure Code, which only deal with resistance to the execution of 'decrees'. If the contention of Counsel is entitled to succeed, it would mean that the appropriate procedure to be adopted in such a case is the institution of criminal proceedings in a Magistrate's Court. Such a course would result in the provisions of the Code with regard to resistance to the execution of proprietary decrees being rendered ineffective. Sections 325 to 330 of the Code were specially designed to enable a judgment-creditor to reap the fruits of a decree successfully obtained with the least possible delay. In *Silva v. De Mel*¹ De Sampayo J. said 'that the whole scheme of the Procedure Code is to provide speedy and inexpensive remedies and it appears 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'. The learned Judge made these observations, with which I am in respectful agreement, in connection with an order for delivery of possession under Section 287 of the Code and before Section 327A found a place in the Statute Book, but it seems to me that, having regard to the scheme of the Code, this observation would apply with equal force to an 'order' made under Section 327A. This Section was apparently introduced into the Code to extend the scope of the procedure available to a successful judgment-creditor to deal with the resistance to the execution of decrees, not only by the judgment-debtor and persons claiming under him, but also third persons who make frivolous and vexatious claims to defeat his rights. Again De Sampayo J. observed in the later case of *Suppramanium Chetty v. Jayawardene*², where the District Judge erroneously refused to exercise the powers of the Court under Section 325 in favour of a successful execution-purchaser or even the inherent powers of the Court in respect of a party who obstructed the execution of the Court's own orders :—

'This is a very narrow view of the Court's duty and power. I think the form of the application is quite sufficient to enable the District Judge whatever power he has in regard to the matter.'

¹ (1915) 18 N. L. R. 164 at 167.

² (1922) 24 N. L. R. 50 at 53.

The reason for not equating an 'order' under Section 327A to a 'decree' is obvious in view of the provision in the latter part of that section which enables a person against whom an order is made under the section to institute proceedings to establish his right to possession in the property within a month of such order. Such a person becomes a judgment-debtor within the meaning of that word in the Code and consequently Sections 325 and 326 would be applicable to him.

The respondents' appeal is dismissed with costs.

Appeal dismissed.