

1970

Present : de Kretser, J.

A. C. M. ZAHIR and another, Petitioners, *and* **W. D. CHARLES PERERA**
and another, Respondents

S.C. 796/69—Application in Revision in C. R. Colombo, S9452

*Civil Procedure Code—Sections 325, 326, 327, 327A—Order made under s. 327A—
Remedy of the affected person—Revision does not lie.*

Where, in consequence of resistance to execution of a proprietary decree, application is made by the judgment-creditor under section 325 of the Civil Procedure Code and he is directed to be put in possession of the premises in question in terms of section 327A, the Supreme Court will not allow its powers of revision to be invoked by the person against whom such order is passed, except in the most exceptional circumstances.

APPPLICATION to revise an order of the Court of Requests, Colombo.

M. Tiruchelvam, Q.C., with R. Manikkavasagar, for the petitioners.

E. B. Vannitamby, with M. Kanagaratnam and L. M. D. Silva, for the plaintiff-respondent.

No appearance for the defendant-respondent.

Cur. adv. vult.

April 7, 1970. DE KRETZER, J.—

The learned Commissioner of Requests has found that the claim of the 2nd and 3rd Respondents who are the present petitioners that they are in possession of the premises in suit as partners with the Defendant Respondent of the firm known as Lanka Jayanthi Textiles and not as sub-tenants of the Defendant, to be false and frivolous and has directed the Fiscal to put the Plaintiff in possession of the premises by ejecting them in terms of Section 327A of the Code. Section 327A also provides the remedy that a person against whom such an order is made has, and I see no reason why the Respondents who have apparently not sought that remedy should be allowed to ask the Court to revise an order which the Section itself lays down shall otherwise be final.

In the case of *Gunaratne v. De Silva*¹, H. N. G. Fernando, J. said as follows: "I would hold also that the provision in Section 327A that the order is final means that it is not appealable. A perfectly reasonable alternative is provided to the claimant in that he can bring within one month an action to establish his right to possession and if successful in that action, be restored to possession. Just as what appears to be a bona fide claim 'keeps out' the judgment creditor until the claim is regularly investigated (Section 327), so also what appears to be a frivolous and vexatious claim is insufficient to entitle the claimant to continue in possession and he is compelled to seek a remedy by regular action. In each case the powers of this Court in appeal cannot be invoked until the regular action is tried".

Mutatis mutandis these appear to be cogent reasons why this Court should not allow its powers of revision to be invoked in respect of such an order except in the most exceptional circumstances.

In this case Mr. Justice Wijayatilake has set aside an order made by the Commissioner apparently because he was not satisfied that the Commissioner had not given his mind to the need for a specific finding that a claim was frivolous or vexatious before making an order under Section 327A and he sent the case back "for due inquiry and order under Section 327A and not under Section 327".

¹ (1957) 58 N. L. R. 542.

The Commissioner (Mr. Devendra) who held the inquiry so ordered has in the course of an order which I have found of much assistance held that the claim was false and frivolous. I see no reason to disagree with that finding so that even if I were disposed to consider the matter in revision, the application must be refused.

Before parting with this matter I would like to say that in these proceedings the inquiry is always in connection with the application under the provisions of Section 325 of the Code and Sections 326, 327 and 327A only provide for the making of alternate orders by the Court in accordance with its findings of fact at the inquiry.

In the instant case Counsel also sought to make the point that the application under Section 325 was out of time as constructive possession was not given until long after the first effort at executing the writ. His submission was that as there was no attempt thereafter at taking effective possession there was no impediment or hindrance which could be the basis for an application under Section 325. There appears to be no merit in this contention for the Court had ordered the re-issue of the writ and it was in that connection that constructive possession was given obviously because the Fiscal was even then not able to give possession for the tenant would not leave. The application under Section 325 was well within thirty days of that resistance to the Fiscal.

The application is dismissed with costs which I fix at 15 Guineas payable by the Petitioners to the Plaintiff-Respondent.

Application dismissed.
