Present : Mr. Justice Wood Renton and Mr. Justice Wendt.

1908. September 22.

ABUBAKKER LEBBE *v.* ISMAIL LEBBE *et al.*

D. C., Kandy, 17,919.

Resistance to execution of decree—Constructive possession—Onus of proof —Interlocutory orders, appeals from—Right to question interlocutory orders on final appeal—Civil Procedure Code, ss. 324, 325, and 327.

The remedy by way of petition under section 325 of the Civil Procedure Code is open to a judgment-creditor, to whom the Fiscal has only given constructive possession under section 324.

Gunaratna v. Dingiri Banda [3] referred to.

A suitor is not bound to appeal from every interlocutory order by which he may deem himself to be aggrieved; he may question the propriety of such order on an appeal against the final judgment.

Maharajah Moheshur Singh v. Bengal Government, [4] *Sheonath v. Ramnath;* [5] *Forbes v. Ameeroonissa Begum,* [6] followed.

Punchi Appuhamy v. Mudianse [7] explained.

Under section 327 of the Civil Procedure Code the onus lies on the decree-holder of proving title to the property in dispute, as against the party resisting the execution of the decree.

D. C., Chilaw, 1,101, [8] approved.

APPEAL from an order of the District Judge of Kandy (J. H. Templer, Esq.) under section 327 of the Civil Procedure Code. The facts which gave rise to the application sufficiently appear in the following judgment of J. H. de Saram, Esq., District Judge. (July 23, 1906.)

[1] *(1895) 3 N. L. R. 128.*
[2] *S. C. Min. August 24, 1908.*
[3] *(1898–99) 4 N. L. R. 252.*
[4] *(1859) 7 Moo. Ind. App. 283, 302, 303.*
[5] *(1865) 10 Moo. Ind. App. 413.*
[6] *(1865) 10 Moo. Ind. App. 359–60.*
[7] *(1907) 2 App. Court Rep. 159.*
[8] *S. C. Min. Nov. 3, 1897.*

1908.
September 22.

"I understand that when the Fiscal proceeded to deliver possession of the property described in the writ issued in this section, he found the second respondent in occupation.

"The second respondent, claimed right to occupy the property under the third respondent, who holds a lease thereof from the first respondent, the judgment-debtor. As the second respondent was not bound by the decree to relinquish his occupancy, the Fiscal gave formal delivery to the petitioner by affixing a copy of the writ in some conspicuous place on the property, and proclaimed to the occupant the substance of the decree in regard to the property. As the judgment-creditor was immediately hindered from taking complete and effectual possession, he complained of the obstruction under the provisions of section 325 of the Code. I thereupon made an interlocutory order in accordance with the alternative (*b*) of section 377.

"The first and second respondents, though served with a copy of the order and of the petition, have not appeared. The third respondent appeared by his proctor, who was heard showing cause against the petitioner's application. He read the third respondent's affidavit of the 13th instant, from which it appears that the third respondent claims right to occupy the premises described in the writ, under two leases, one dated February 4, 1905, and the other dated April 13, 1906, both executed by the first respondent, *qua* administrator of the estate of Pattu Muttu Natchia, deceased. The first lease was executed before this action was instituted, and the second during the pendency of the action. The leases are not before me, but it is, at this stage, sufficient for me to know that the third respondent claims in good faith to be in possession on his own account under a lease from the judgment-debtor.

"I think I am right in holding that the third respondent claims to be in possession on his own account, and not on that of the judgment-debtor. Of course, the lease may be a fraud (just as a sale might be), but that could only be properly determined in an action. Unless the lease is an obvious fraud, and the third respondent therefore obviously acting in bad faith, of which there is no evidence, I should hold in his favour, and deal with the petition under section 327.

"It would be premature for me at this stage to express any opinion on Mr. Vanderwall's argument that the third respondent cannot be in any better position than the first respondent, the lessee's possession being that of the lessor. I find that the obstruction was occasioned by the third respondent, claiming in good faith to be in possession of the property on his own account. I direct the petition of complaint to be numbered and registered as a plaint in an action between the decree-holder as plaintiff and the claimant as defendant, and I fix the investigation of the claim for August 15.

When the claim has been investigated, I will pass such order as I think fit for executing or staying execution of the decree."

The claim was subsequently inquired into, and judgment was entered in favour of the decree-holder.

The claimants appealed.

H. Jayewardene, for them.

Van Langenberg (with him Bawa), for the decree-holder, respondent.

Cur. adv. vult.

September 22, 1908. WOOD RENTON J.—

I think that this appeal should be dismissed. The facts are sufficiently stated in the judgment of the learned District Judge; and I propose to allude to them again only where it is necessary to do so for the purpose of dealing with the arguments urged before us on appeal. The points taken by Mr. Hector Jayewardene, who represented both appellants, may be summarized as follows.

(1) He argued that the remedy by way of petition under section 325 of the Civil Procedure Code is not open to a judgment-creditor to whom the Fiscal has only been able to give constructive possession under section 324. This point, I think, is clearly bad. Section 325 applies itself in terms to the heading (*c*), to which section 324 belongs. Its language shows that it contemplates just such a case as the present, where the judgment-creditor, having received some sort of possession, is yet prevented from obtaining "the complete and effectual possession" to which his decree entitles him. Moreover, it is clear that in *Gunaratna v. Dingiri Banda*,[1] to which Mr. Jayewardene referred us, Withers J., at least, was prepared to hold that, if hindrance had been sufficiently established, the case, which involved an adverse claim of the character contemplated by section 324, was a proper one for a petition by the judgment-creditor under section 325.

(2) Mr. Jayewardene's next point was that, in the present case, there was no sufficient allegation or proof of hindrance to lay a foundation for proceedings under section 325. At this stage it may be convenient to note a few of the salient facts. The respondent to this appeal obtained a decree against the now added party appellant, Ahamadu Lebbe, on March 29, 1906, giving him possession of certain houses, Nos. 190, 191, and 192, in Colombo street, Kandy. Writ issued on April 11, 1906. When the Fiscal proceeded on April 12, 1906, to execute the writ, he found one Salgado in occupation. Salgado claimed the right to keep possession as tenant of the present defendant-appellant (Aponso), who is a lessee of the now added party appellant, Ahamadu Lebbe. The Fiscal thereupon, in compliance with section 324 of the Civil Procedure Code,

[1] *(1898–99) 4 N. L. R. 252.*

1908.
September 22.

WOOD RENTON J.

gave formal possession of the premises to the respondent by posting a copy of the writ on a conspicuous part of them, and by serving a notice in writing of the substance of the decree on Salgado. The respondent then petitioned under section 325. To that petition he made the now added party appellant Ahamadu Lebbe first respondent, Salgado second respondent, and the now defendant-appellant Aponso third respondent. He alleged in his petition (paragraphs 7 and 8) that since the issue of the writ he had been hindered and prevented from taking complete and effectual possession of the premises by the second (Salgado) and third (Aponso) respondents, at the instigation, as he believed, of the first (Ahamadu Lebbe). How were these allegations met by the present appellants? The defendant-appellant Aponso said in his affidavit of July 13, 1906, that Salgado was merely in occupation as his monthly tenant, and that he himself possessed the premises in question as lessee of Ahamadu Lebbe. Ahamadu Lebbe, in an affidavit of September 6, 1906, averred that he had leased the premises in question to Aponso, as administrator of his wife Pattu Muttu Natchia, to whom the property really belonged; that he had not hindered any one from taking possession of it; and that to the best of his belief Salgado was in possession of it as tenant of Aponso. We have here therefore (1) a distinct allegation by the respondent that he had been prevented from taking complete and effectual possession of the property adjudged to him by Salgado and Aponso at the instigation of Ahamadu Lebbe; (2) an assertion by Aponso of an adverse claim to possession; and (3) an avowal by Ahamadu Lebbe that he had granted the lease on which that adverse claim was based. The facts above stated constitute, in my opinion, quite a sufficient allegation and proof of hindrance to satisfy section 325 of the Code. This objection also fails.

(3) Mr. Jayewardene next argued that, even assuming that the respondent could properly have recourse to section 325 of the Code and that a satisfactory case of hindrance had been made out, the learned District Judge ought to have (1) framed issues, and (2) treated the case as a regular land action, in which the burden of proof rested on the respondent, and the proof required was proof of title and not merely of possession. Although no appeal was taken against the order in which the then District Judge of Kandy set the respondent's petition down under section 327 of the Civil Procedure Code for hearing as an action, I entertain no doubt—and this observation applies equally to the objections already dealt with (1 and 2)—as to the appellant's right, in strict law, to challenge the propriety of that order and of anything done under, still a suitor is not bound to appeal from every interlocutory order by which he may deem himself to be aggrieved (*cf. Maharajah Moheshur Singh v. Bengal Government,*[1] *Sheonath v. Ramnath,* [2] *Forbes v. Ameeroonissa*

[1] *(1859) 7 Moo. Ind. App. 283, 302, 303.* [2] *(1865) 10 Moo. Ind. App. 413.*

Begum[1]), although, where an interlocutory order is made which goes to the very root of the proceedings, the fact that it is not appealed against at once may fairly be regarded by an Appellate Tribunal, before which it is challenged on a final appeal, as evidence of acquiescence in it on the part of the appellant. It was on this latter ground that Middleton J. and I held, and I venture to think rightly held, in *Punchi Appuhamy v. Mudianse*,[2] that, now that the Full Court has recognized a right of appeal from an order refusing to frame an issue, the proper time for appealing from that order is when it is made. The decision in that case must not, however, be understood as in any way running counter to the clear right of every litigant to invite the Appeal Court to consider on a final appeal any interlocutory decree, even if he did not directly challenge it at the time when it was made.

In the present case I do not think that the points urged by Mr. Jayewardene against the proceedings in the Court below should prevail. (1) Section 327 of the Code provides that where the obstruction of which a petitioner complains is found by the Court to have been occasioned by a *bona fide* claimant in possession, the petition is to be numbered and registered as a plaint in an action between the decree-holder as plaintiff and the claimant as defendant, and investigated by the Court " in the same manner and with the like powers " as if it were an ordinary action between the parties. It was held in *Domingu v. Sandarasekere*[3] that no " answer " was necessary under this section. It imposes on the Court, in terms, no duty of framing issues. The question therefore arises, whether, under the circumstances of the present case, the absence of issues has so seriously prejudiced the appellants as to require the whole proceedings to be set aside. (2) The answer to this question depends on the soundness of Mr. Jayewardene's second objection, under the head that I am dealing with, viz., that the District Judge has wrongly thrown upon his clients the burden of justifying their position, instead of requiring the respondent to prove his title. In this connection I desire to associate myself with the observations of Wendt J. in the course of the argument as to some of the language used by Withers J. in *Domingu v. Sandarasekere* (*ubi sup.*). " So far, " he remarks, " from anything being said in section 327 about the necessity of formal pleadings consequent upon complaint made of resistance to the execution of a proprietary decree, the Court is required at once to investigate the claim, just as if an action had been instituted against the claimant. The claimant being treated as a respondent to a petition, on which an interlocutory order has been made in accordance with alternative (*b*), section 377, should be required to appear on a certain day to show cause why the mandate should not be enforced. On that day he opens his case, stating his objections,

[1] *(1865) 10 Moo. Ind. App. 359, 360.*
[2] *(1907) 2 App. Court Reports 159.*
[3] *(1892) 2 C. L. R. 108.*

1908. September 22.

WOOD RENTON J.

and supporting them by affidavit. In the end the Court either stays execution of the proprietary order or directs its enforcement. "

If this language is to be interpreted as meaning that, at the ultimate investigation directed by section 327 the burden of proof is on the claimant, I venture to dissent from the view which it expresses. The alleged obstructor is brought before the Court by an order under section 377 (*b*) of the Civil Procedure Code. Before any investigation under section 327 is ordered, it is for him to satisfy the Court that he is a *bona fide* claimant. But when once the obstructor has satisfied the Court on that point, the application of section 377 (*b*) has exhausted itself, and the initial and ultimate burden of proving title or possession, as the case may be, is on the decree-holder. I find that in D. C., Chilaw, No. 1,101,[1] this view of the law was taken by Lawrie A.C.J., and Browne A.J., and that, in giving his decision, Lawrie said that he had the authority of Withers J. for saying that he now accepted it himself. In the present case, however, I think that the respondent has made out, within the meaning of D. C., Chilaw, No. 1,101, a " superior title " as against both appellants. There is abundant evidence that the respondent, through his father Sinna Tamby Muhandiram and latterly by himself, was in possession of all three houses till his ouster therefrom by Ahamadu Lebbe in October, 1904, as regards Nos. 190 and 191, and in February, 1905, as regards No. 192. He starts therefore with the *primâ facie* evidence of title which possession affords in his favour. That *primâ facie* evidence is strengthened by the possessory decree in D. C., Kandy, No. 17,032. It is true that that decree was obtained against Ahamadu Lebbe personally, and not in his capacity of administrator of his wife Pattu Muttu Natchia, to whom he now alleges that the properties in dispute belonged, and also that Aponso was not made a party to it. But I think that Ahamadu Lebbe, having allowed judgment to go against him personally in the possessory action, is not entitled to be listened to with much favour when he now sets up his representative character; and his second lease of April 13, 1905, to Aponso was, at any rate, an attempt to alter the rights of parties pending action, for the possessory suit had been instituted on February 17, and therefore, on the principle affirmed in *Bellamy v. Sabine*,[2] Aponso, too, is affected by the possessory decree. The respondent's case on the ground of possession derives further corroboration from its repeated acknowledgment by Ahamadu Lebbe in previous judicial proceedings. In an action (D. C., Kandy, No. 13,212) brought by him in 1899 against Sinna Tamby Muhandiram, the respondent's father, to enforce the alleged rights of his wife under her marriage contract, he alleged in his plaint that Sinna Tamby had been in wrongful possession of it " since the marriage, " *i.e.*, since 1896, and prayed for his ejectment. In a later case (D. C., Kandy, No. 15,122)

[1] *S. C. Min. Nov. 3, 1897.*

[2] *(1857) 1 De G. and J. 566.*

against the present respondent for the same property, he says (*Record, p. 143*): " For the last three years (*i.e.*, from 1899-1902) the defendant has been taking the rents and profits." So much for the respondent's claims on the ground of possession. I come now to his paper title. In dealing with it, I think we must hold that the different documents on which he relies mean what they say: that they were executed in his favour, and that his father, whatever may have been his dishonest intermediary transactions with the properties, did not claim them as his own. As regards house No. 190, the respondent's title to it rests securely on the certificate of sale by the Municipality to his father in his name on July 22, 1886, for non-payment of taxes. This certificate was duly registered on August 13, 1886. Under section 22 of Ordinance No. 11 of 1878 it is presumptive evidence in the respondent's favour that the taxes were due, that there was default of payment, and that the sale was duly carried into effect (*Gunasekere v. Teberis* [1]). There can be no question on the evidence and on the findings of the District Judge thereupon as to the respondent's right to No. 190. The deed of September 22, 1886, by which the appellants seek to impeach that right, cannot avail for that purpose in the absence of any proof of the title of the Chetties who purported to grant it. If Mr. Jayewardene's contention is right, that all the three houses in dispute—Nos. 190, 191, and 192—were dealt with under the one number (190) in the deed of September, 1886, in favour of Pattu Muttu Natchia, Ahamadu Lebbe's wife, and if these properties really constituted one house, *cadit quæstio*. Nos. 191 and 192 in that case pass equally under the certificate of sale for non-payment of taxes. On the other hand, if Nos. 191 and 192 do not come under No. 190, the respondent can show title to them under the deed No. 3,216 of November 22, 1883, registered in the following December (December 4, 1883), while the appellants have nothing to rely upon except the deed of September 22, 1886, in favour of Pattu Muttu Natchia, a deed dealing in terms only with house No. 190, not registered till May 4, 1899, and found by the learned District Judge to be a " bogus " document, " got up by Sinna Tamby Muhandiram for some sinister purpose of his own, and never intended to convey title to his daughter."

I think that the respondent has sufficiently established the superiority of his title to that of the appellants to give him a right, under section 325 of the Civil Procedure Code, to the complete and effectual possession of the premises in question. I would dismiss the appeal with costs.

Wendt J.—

I entirely agree, both as to the construction of the Civil Procedure Code and as to the facts of this particular case.

Appeal dismissed.

[1] *(1906) 10 N. L. R. 18.*