

1966      *Present* : H. N. G. Fernando, S.P.J., and Abeyesundere, J.

VISALATCHI and others, Appellants, and R. R. CHETTIAR and others,  
Respondents

*S C. 201/1964—D. C. Matara, 1406/L*

*Execution of proprietary decree—Procedure in event of resistance—Civil Procedure Code, ss. 325, 326, 327, 327A.*

Where, in consequence of obstruction to the execution of a proprietary decree, the judgment-creditor files a petition under section 325 of the Civil Procedure Code alleging that resistance was offered at the instigation of the judgment-debtor, it is the duty of the Court, if it finds that the obstruction had not been at the instigation of the judgment-debtor, to determine whether or not the person who offered the resistance comes within the description in section 327 or 327A.

**A**PPEAL from a judgment of the District Court, Matara.

*C. Ranganathan, Q.C.*, with *S. Sharvananda*, for the Judgment-Creditors (Petitioners-Appellants).

*S. H. Mohamed*, with *K. Viknarajah*, for the 2nd and 3rd Respondents.

September 19, 1966. H. N. G. FERNANDO, S.P.J.—

In this case a decree had been entered against the 1st defendant for ejection but resistance to the execution of the decree was offered by the 3rd respondent. A petition was thereafter filed under section 325 of the Code, in which the judgment creditor alleged that the resistance has been offered at the instigation of the 1st defendant. The learned trial Judge thereafter held an inquiry at which he decided on the evidence that the obstruction had not been at the instigation of the 1st defendant. He seems to have taken the view that because the judgment creditor had alleged instigation, it was not open to the judgment creditor to ask for an order under section 327 or section 327A. This view of the matter is erroneous and would not have been formed by the trial Judge if he had troubled to read the judgment in 58 N. L. R. which was cited to him. Section 325 only provides for a petition informing the Court of the resistance. When the matter is inquired into the Court must make one of the orders set out in section 326, 327 or 327A and the Court has therefore a duty to determine whether or not the person offering the resistance comes within the description in sections 327 and 327A. In the present case neither counsel nor ourselves are able to point to any decision of the trial Judge as to the character of the obstructor's occupation. There is, however, some evidence that the third respondent is the manager of the 2nd respondent and that the 2nd respondent is himself a tenant of the premises. There appears to be some dispute as to whether the 2nd respondent is a tenant under the 1st defendant or else whether he is a tenant under the plaintiff. At the stage when the decree was entered for ejection the 2nd respondent had been a party to the action as 2nd defendant named therein but when decree was entered, counsel for the plaintiff (Judgment-Creditor) stated that he was withdrawing the action against the 2nd defendant with liberty to institute a fresh action. I do not think that statement should prevent proceedings from now being taken under Section 327 because those proceedings are a perfect substitute for a fresh action.

The order appealed from is set aside and the case is remitted to the District Court for directions to be given in terms of Section 327. The appellant is entitled to the costs of this appeal.

ABEYESUNDERE, J.—I agree.

*Order set aside.*