

1953

Present : Swan J. and K. D. de Silva J.W. S. PETER *et al.*, Appellants, and W. S. CAROLIS, Respondent*S. C. 69-70—D. C. (Quasi-Criminal) Galle, 5,115L*

Civil Procedure Code—Section 326—Appeal from order thereunder—Civil in nature—Scope of jurisdiction of Court under s. 326—Proceedings against minor—Requirement of appointment of guardian ad litem under s. 480.

Proceedings under section 325 *et seq.* of the Civil Procedure Code are not criminal in their nature but are steps in aid of execution, and an appeal under these sections should be constituted as an appeal in a civil case.

A minor may be dealt with under section 326 for obstructing a Fiscal's officer although he is not represented by a guardian *ad litem*. Section 480 can only apply to actions or applications in which the civil rights of minors are affected and not in any matter where only their personal liberty is at stake.

In committing a person under section 326 the Court should merely order him to be committed to jail for a specified period. The terms "simple imprisonment" or "rigorous imprisonment" cannot be used. Nor can such person be ordered to enter into a bond to be of good behaviour for any period.

APPEALS from certain orders of the District Court, Galle.

S. W. Jayasuriya, for the appellants.

No appearance for the respondent.

Cur. adv. vult.

December 4, 1953. SWAN J.—

The chief point that arises for decision in this appeal is whether any order can be made against unrepresented minors for having obstructed the fiscal's officer in the execution of a writ of possession. Before dealing with this matter I should like to point out that this appeal has been wrongly designated a quasi-criminal matter. It should have been marked, numbered and listed as an ordinary D. C. Interlocutory appeal.

The plaintiff-respondent had obtained a decree against the two defendants for declaration of title to a certain allotment of land and for ejectment. Writ of delivery of possession was duly taken out and when the fiscal's officer went to eject the defendants it was alleged that he was obstructed by the 1st defendant and the present appellants who are the children of the 1st defendant. The plaintiff thereupon filed an application under Section 325 of the Civil Procedure Code making the defendants the 1st and 2nd respondents and the appellants the 3rd and 4th respondents. No application was made to have the 3rd and 4th respondents who were stated to be minors represented by a *guardian ad litem* nor did the court *ex mero motu* do so. It should be noted that the 2nd defendant was formally made a respondent to the application. In the fiscal's report it was not alleged that he had resisted the execution of the decree. At the inquiry held under Section 326 of the Code the court discharged the 1st respondent but found that the 3rd and 4th respondents had obstructed execution of the writ at the instigation of the 1st respondent and committed the 3rd respondent to two weeks simple imprisonment and ordered the 4th respondent to enter into a bond in Rs. 100 to be of good behaviour for a period of six months.

Mr. Jayasuriya appearing for the appellants drew our attention to the case of *Kumarihamy v. Banda*¹ in which Bertram C.J. pointed out that proceedings under Section 325 *et seq.* were not criminal in their nature but were steps in aid of execution and that an appeal under these sections should be constituted as an appeal in a civil case. By a parity of reasoning the term "simple imprisonment" could not properly have been used by the learned District Judge when he committed the 1st appellant to jail. Simple and rigorous imprisonment are terms which are appropriate to penal offences and even when a person is sentenced to a term of simple imprisonment there are certain consequences that follow while he is in jail. In committing a person under Section 326 a District Judge or Commissioner of Requests should merely order

¹ (1918) 1 C. L. Rec. 53.

him to be committed to jail for a specified period which of course could not exceed thirty days. I would therefore so far as the 3rd respondent is concerned delete the words simple imprisonment and order that he be committed to jail for two weeks. In ordering the 4th respondent to enter into a bond to be of good behaviour for six months the learned District Judge was clearly acting without jurisdiction. I would therefore delete that order and direct that she be discharged.

This, however, is not the substantial point. The real question is whether the minors should have been represented by a guardian *ad litem*. Chapter 35 of the Civil Procedure Code deals with actions by and against minors and persons under other disqualifications. Section 480 in that chapter is as follows :—

“ Every order made in an action or on any application before the court in or by which a minor is *in any way concerned or affected* without such minor being represented by a next friend or guardian for the action, as the case may be, may be discharged on application made on summary procedure for the purpose ; and, if the proctor of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, it may on such application be discharged with costs to be paid by such proctor, provided he was duly made a respondent to the application. ”

It was stressed that an application made by the decree holder under Section 325 of the Code was one in which the minors were concerned or affected. I think the Section can only apply to actions or applications in an action in which the civil rights of minors are affected and not in any matter where only their personal liberty is at stake. It would have been different if the learned District Judge had found that the appellants were claiming in good faith to be in possession of the property and had made an order under Section 327. Then undoubtedly representation of the minors would become necessary.

I would therefore hold that the minors need not have been represented in these proceedings. Subject to the variation in the orders made by the learned District Judge the appeal is dismissed.

K. D. DE SILVA J.—I agree.

Orders varied.