

1980

Present : Fisher C.J. and Akbar J.

ALLIS APPU v. ANDERSON.

234—D. C. (Inty.) Galle, 18,378.

*Writ of possession—Purchaser of property under mortgage decree—
Right to delivery of possession—Defendant in mortgage action.*

An order for delivery of possession under section 287 of the Civil Procedure Code cannot be made in favour of a purchaser of property sold under a mortgage decree except as against a defendant in the mortgage action.

A PPEAL from an order of the District Judge of Galle allowing a writ of possession against the appellant. The respondent, who purchased the property in question under a mortgage decree entered under section 201 of the Civil Procedure Code, moved the Court for an order for delivery of possession. The appellant claimed the property under a Fiscal's conveyance. After inquiry the learned District Judge allowed the writ.

N. E. Weerasooria, for appellant.—An application for delivery of possession under section 287 of the Civil Procedure Code can follow only a sale by the Fiscal held upon a writ issued under section 225. The present application is irregular as the sale through which the petitioner-respondent derives his title was one under a mortgage decree entered in terms of section 201 of the Code.

Counsel cited *Fernando et al. v. Cadiravelu*.¹

C. V. Ranawake, for petitioner, respondent.—The fact that the sale in question was not a Fiscal's sale should not deprive the Court of its inherent power to give due effect to an order to sell issued by itself.

Counsel cited *Abeyaratna v. Perera*.²

¹ 28 N. L. R. 492.

² (1912) 15 N. L. R. 347.

February 26, 1930. AKBAR J.—

1930

Allis Appu
v.
Anderson

This appeal is on a point of law against the order of the District Judge allowing writ of possession against the appellant in respect of a certain property. The respondent to this appeal purchased this property under a mortgage decree dated November 18, 1921, entered under section 201 of the Civil Procedure Code. The respondent obtained a conveyance from the Secretary of the District Court on August 27, 1922, but after making an attempt to get possession of the property on May 24, 1924, he took no further steps till February 6, 1929, when he moved the Court for an order for delivery of possession of the property. On April 8, 1929, the Fiscal reported, according to the journal entries, that the appellant refused to give up possession and that he produced Fiscal's transfer No. 13,699 in his favour. On this report, after certain preliminary steps, the District Judge inquired into this matter on October 8, 1929, and as a result of the inquiry the District Judge allowed a writ of possession to issue against the appellant, who was also condemned to pay the costs. The appeal is from this order. It will be noticed that the respondent was not a purchaser at a Fiscal's sale, the sale being under a mortgage decree entered under section 201 of the Civil Procedure Code. The District Court had, therefore, no authority to issue a writ under section 287 of the Civil Procedure Code, which only applies to a Fiscal's sale on a writ issued under section 225 of the Civil Procedure Code. Mr. Ranawake, however, for the respondent, cited the case of *Abeyaratna v. Perera*¹ in support of his argument that the Court has an inherent power to direct delivery of possession to the purchaser purchasing under a sale held under section 201 of the Civil Procedure Code to render the sale effectual. It will, however, be seen from the judgment of Wood Renton J. that he was careful to point out that delivery of possession could only be allowed as against the defendant in a mortgage action, who in contempt of the powers of the Court remains in possession of the property. The following extract makes this quite clear: "I would set aside the order under appeal and send the case back to the District Court for the purpose of the defendant being noticed to show cause, if he has any to show, why the appellant should not be put in possession of the property purchased."

In this case the appellant was not a party to the original mortgage action and has apparently been in possession for a considerable number of years. The case referred to above came up for consideration in a later case before the Full Bench, namely, *Fernando v. Cadiravelu*.² The remarks of Garvin J., at page 499, clearly show that he was averse to the extension of the principle enunciated in *Abeyaratna v. Perera* (*supra*) to any person who was not a defendant in the mortgage action. For these reasons I am of

¹ (1912) 15 N. L. R. 347.

² 28 N. L. R. 492.

1929
AKBAR J.
Allis Appu
v.
Anderson

opinion that the judgment of the District Judge was wrong, and that the appeal should be allowed with costs in both Courts and the writ stayed.

FISHER C.J.—I agree.

Appeal allowed.

