

DE SILVA v. DE SILVA et al.

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D. C., Colombo, 5,941.

Civil Procedure Code, ss. 217, 287, 323, 325, and 326—Obstruction to Fiscal delivering possession of land sold under a money decree—Commitment to jail of the person obstructing—Distinction between “decree” and “order”—Jurisdiction of Police Court to deal with such obstruction under s. 183 of the Ceylon Penal Code.

Resistance or obstruction to the delivery of possession, ordered by the District Court under section 287 of the Civil Procedure Code, to be made to a purchaser of land sold by Fiscal in execution of a money decree, is not an offence that could be summarily dealt with by that Court under sections 325 and 326 of the Code.

Per LAWRIE, J.—Such resistance or obstruction could be dealt with more rapidly in the Police Court under section 185 of the Ceylon Penal Code than under section 326 of the Civil Procedure Code.

PLAINTIFF, having obtained a money decree against the defendants, purchased a land seized and sold by the Fiscal in execution of it. She obtained an order of Court under section 287 of the Civil Procedure Code for delivery of possession thereof to her or any person whom she may appoint, and she sent one Nonis Silva with the Fiscal's officer entrusted with the execution of the order to obtain possession of the land, when one Hendrick Silva, a defendant in the case, with certain others, prevented the Fiscal's officer from placing Nonis Silva in possession of the land. The plaintiff thereupon petitioned the District Court against Hendrick Silva and his agents, praying that they may be dealt with under section 325 of the Civil Procedure Code.

The Acting District Judge (Mr. Felix Dias) on inquiry found that Hendrick Silva had forcibly resisted the Fiscal's officer in the

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execution of the order above referred to, and committed him to jail for a period of one month, and ordered the plaintiff to be forthwith put into possession of the land.

Hendrick Silva appealed.

The case came on before LAWRIE, J., and WITHERS, J., on 16th December, 1897, when their Lordships disagreeing, desired that the case should be listed for argument before the Collective Court.

De Saram, for appellant :—It was not competent for the learned District Judge to have committed the appellant to jail.

The provisions of section 325 and the following sections of the Civil Procedure Code refer only to resistance to execution of proprietary decrees. The decree in this case was a decree for money, and in execution of that decree the land in question was sold and purchased by the petitioner, who obtained an order for the delivery of possession of the land under section 287 of the Code; and this being only an order of Court and not a decree, the respondent could not proceed under section 325 *et seq.*

Section 217 of the Code speaks of a decree or order of Court, but section 325 only refers to decree for possession of land, and the appellant submits that section 325 will only apply where a particular land is in dispute and a decree is entered adjudicating on the rights of parties with regard to that land.

The Code (section 5) defines “decree” to mean “a formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the action or appeal”; and “order” to mean “the formal expression of any decision of a Civil Court which is not a decree.”

From the above-mentioned definitions it is clear that what was obtained by the respondent in this case was an “order,” and therefore section 325 does not apply.

The order under section 287 of the Code is enforceable as an order under section 323, but there is no provision in the Code whereby disobedience to such an order could be punished under section 325 as there is in the Indian Code (section 324), and as there was under the old Fiscals’ Ordinance, 1867, section 79.

H. Jayawardena, for respondent :—Decree and order as used in these sections mean one and the same thing; a comparison of the wording of the sections shows this. The order is a step in the execution of the decree, and forms as it were a part of the decree. It is quite clear that the Code intended to re-enact the old law (*vide* section 79 of Ordinance No. 4 of 1867); the Indian Law

gives the same remedy to a purchaser at a Fiscal's sale (Indian Procedure Code, section 334). The intention of the Legislature being clear, the omission of the word "order" in section 325 is immaterial, especially as that word is used in these sections without any special or technical meaning. This very procedure has been allowed by the Supreme Court in the case of *Perera v. Brampy* (2 N. L. R. 121).

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29th July, 1898. BONSER, C.J.—

In this case the appellant was committed to prison for one month by the District Judge of Colombo for obstructing a purchaser of some landed property, sold at the instance of the Court, from taking possession of the property. The order was made under section 326 of the Civil Procedure Code.

Sections 325 and 326 render it an offence punishable summarily by the District Judge for a person to resist or obstruct the officer charged with the execution of a writ in execution of a decree for the possession of property under head (c). Section 287, which deals with the delivery of possession of property purchased on a sale by the Court, provides that the Court shall, on the application of the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint in possession of the property. It goes on to provide that such an order for delivery of possession may be enforced as an order falling under head (c), section 217, the purchaser being considered as judgment-creditor. Now, section 217 provides that a decree or order may command the person against whom it operates (c) to yield up possession of immovable property, and therefore we have to ascertain what provision is made for the enforcement of an order under head (c) of section 217. It will be noticed that the word is "order" and not "decree." If we turn to section 323 we find an answer to that question. It is there provided that "if the decree or order is for the recovery "of possession of immovable property," a certain procedure is to be followed. Then, section 325, to which I have before referred, provides for resistance or obstruction in the case of a "decree." The words "or order," which occur in the previous section, do not occur in this section. Therefore, to hold that sections 325-326 apply to that case, we must either insert the words "or order" in section 325; or we must read in section 287 the word "order" as though it were "decree." I do not think we are at liberty to do either of these things. Where the liberty of the subject is concerned, a statutory enactment must be construed strictly.

A man must not be deprived of his liberty unless the Legislature has so enacted it in unmistakable terms. Whatever the

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BONSER, C.J. intention of the Legislature may have been, in the present case it seems to me that it has not expressed its intention, in unmistakable terms, that the conduct of the appellant is punishable under this Code.

LAWRIE, J.—

I am content to agree in holding that the Code is imperfect in awarding no punishment to those who obstruct the Fiscal under an order to put in possession a purchaser of land sold at a Fiscal's sale ; I am the less reluctant to agree because I think that a case like the present could be dealt with and punished with more rapidity in the Police Court under section 183 of the Penal Code than under section 326 of the Civil Procedure Code. At the same time I must say that in my opinion it is plain that the Legislature intended that those who resist the possession by a purchaser of land should be dealt with in precisely the same manner as those who resist the enforcement of a decree for land, and I have been unable to share (perhaps to understand) the doubts and difficulties which have led to much time being occupied in the criticism of sections 287, 217, 323, 325, and 326. It is well that the point should be now decided one way or the other.

WITHERS, J.—

In consequence of a slight difference between my learned brother LAWRIE and myself we thought it proper to refer the matter to the Full Court, as it involved an important question of procedure. I wrote an opinion at some length, but the draft seems to have disappeared from the record. To the best of my recollection the effect of it was very much the same as that of the judgment just pronounced by the Chief Justice.

I pointed out the distinction between " order " and " decree " as marked by the Code itself, and I pointed out the omission of " order " from section 325 of the Code. If I remember rightly, I observed that as resistance was punishable by imprisonment it became imperative strictly to construe the provisions of the Code. .

As I cannot improve upon what the Chief Justice has said, I shall content myself by expressing my entire concurrence in his judgment.

