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1960 Present : Basnayake, C.J. and K. D. de Silva, J.

RAHAMATH UMMA and others, Appellants, and ABDUL SAMEEN  
and another, Respondents

*S. C. 284—D. C. Gampaha, 1478*

*Execution of proprietary decree—Civil Procedure Code, ss. 325, 326—“ Hindered by any person in taking complete and effectual possession ”—Requirement of committal to jail.*

Where, a short while (two and a half hours) after the judgment-creditors had been completely and effectively placed in possession of immovable property in pursuance of a decree to yield up possession of the property, the judgment-debtors entered into possession again of the property—

*Held*, that the judgment-creditors were not entitled to avail themselves of the provisions of section 325 of the Civil Procedure Code. The entry of the judgment-debtors subsequent to the effective delivery of possession did not come within the ambit of the second limb of the section which speaks of a case where the judgment-creditor is “ hindered in taking complete and effectual possession ”.

*Held further*, that, without an order of committal to jail, section 326 of the Civil Procedure Code does not empower the Court to direct that the judgment-creditor be placed in possession.

**A**PPPEAL from an order of the District Court, Gampaha.

*Sir Lalita Rajapakse, Q.C.*, with *S. P. Wijewickreme, S. H. Mohamed* and *D. C. W. Wickremasekera*, for 1st to 3rd Respondents-Appellants.

*N. E. Weerasooria, Q.C.*, with *W. D. Gunasekera*, for Plaintiffs-Respondents.

*Cur. adv. vult.*

April 6, 1960. BASNAYAKE, C.J.—

This is an appeal in a proceeding under section 325 of the Civil Procedure Code. Six persons, three of whom are minors, instituted an action in which they prayed that they be declared entitled to the following allotment of land, that the defendants be ejected therefrom, that they be placed in possession thereof, and for damages :—

“ An extent of 15 cubits in length, 20 cubits in width with the tiled house from and out of that divided portion of about  $2\frac{1}{2}$  acres described in Schedule B hereof which extent of ground borders the southern boundary is edged by a live fence on the north and is situated on the southernmost corner of the said divided portion of land described in Schedule B hereof.”

This land is a portion of a land called Mahawalauwewatte in extent 19 acres and 5 perches according to a plan dated 4th December 1881 made by D. I. S. Goonewardene, Licensed Surveyor, and described in Schedule A to the plaint as bounded on the North by Pokunulanda and the ditch of the land belonging to Sir Solomon Dias Bandaranayake Mudaliyar of Hapitigam Korale, South by the live fence of the land of Siddi Lebbe and others, West by the footpath to Keragalawatta. The plaintiffs state that it was amicably divided about 30 years ago and A. L. M. Salihu Hadjar who owned an undivided  $\frac{2}{16}$  share entered into possession of the divided portion described in Schedule B to the plaint as bounded on the North by the portion of the same land of A. R. M. Mohamadu Lebbe, East by the field of Dias Bandaranayake Mudaliyar of Hapitigam Korale, South by the live fence of the land of Siddi Lebbe and others, and West by the footpath to Keragalawatta and the land of A. L. M. Mubarak and containing in extent about two acres two roods and or approximately  $2\frac{1}{2}$  acres.

Judgment was given for the plaintiffs as prayed for with damages as agreed upon. Decree was accordingly entered in their favour in the following form :—

“ It is ordered and decreed that the plaintiffs be and they are hereby declared entitled to that portion of land called Mahawalauwewatte described in Schedule hereto.

“ It is further ordered and decreed that the defendants be ejected therefrom and the plaintiffs be placed in possession thereof.”

The schedule to the decree described the land as in Schedule C of the plaint.

In the application for execution of the decree the plaintiffs' proctor described the mode in which the Court's assistance was required thus :—

“ By issue of writ of ejectment against the defendants to have them ejected from the land described in Schedule B of the plaint.”

and accordingly on 4th July 1956 the following writ was issued returnable on 4th September 1956 :—

“ Whereas by a judgment of this Court dated 25th day of February 1954 in the above named action it was ordered and decreed that the plaintiffs be restored to possession of all that divided portion of land from and out of the land called Mahawalauwewatta situated at Walgama and morefully described in the Schedule hereto, and that the defendants above-named be ejected therefrom.

“ These are to command you that without delay you enter same and cause the said plaintiffs to have possession of the said land and premises by ejecting the above named defendants or any one claiming under them from the said land and putting the plaintiffs or their agents in possession thereof.

“ And in what manner you shall have executed this writ may appear to this Court immediately after the execution thereof, and have you there this mandate.”

The land was described in the Schedule to the writ as follows :—

“ All that divided portion of land from and out of the land called Mahawalauwewatta situated at Walgama in the Adicari Pattu of Siyane Korale in the District of Colombo, Western Province, and which divided portion is bounded on the North by portion of this same land of A. R. N. Mohamadu Lebbe, East by the field of Dias Bandaranayaka Mudliyar of Hapitigam Korale, South by the live fence of the land of Siddi Lebbe and others, and West by the foot path to Keragalamawatha, and the land of the heirs of A. L. M. Mubarak, and containing in extent about two acres and two roods and or approximately  $2\frac{1}{2}$  acres.”

The application for writ and the writ itself are not in accordance with the judgment or decree. The decree was for ejectment of the defendants from the land in Schedule C ; the writ is for their ejectment from the land described in Schedule B, which is a very much larger extent, and in the writ there is no reference to a tiled house.

On 26th July 1956 the Fiscal's officer reported :—

“ I repaired on 7.7.56 to Walgama in Adicari Pattu of Siyane Korale in the District of Colombo, Western Province, to deliver over possession to the plaintiffs all that divided portion of land from and out of the land called Mahawalauwewatta situated at Walgama morefully described in the annexed hereto writ but the possession thereof could not be delivered as the doors of the house in the aforesaid land were closed.”

When this return was made the proctor for the plaintiffs moved on 7th August 1956 that the writ be reissued for execution and that the Fiscal's officer be authorised to break open the doors of the house if necessary.

On 28th August 1956 after the inquiry into the Fiscal's report the Judge made his order. In the concluding portion of it he said :

“ I therefore direct the Fiscal to force open the doors of the house standing on the land in question in order that possession may be delivered to the judgment-creditor. If there is any movable property in the building the Fiscal is authorised to make a list thereof and take charge of the same. He will forward to this Court a list of such property together with the names of any claimants thereof.”

On 11th September 1956 the Judge made the following endorsement on the writ :—

“ Extended and reissued for execution and return. Returnable on 11.11.56.”

The writ itself does not contain the above quoted directions of the Judge ; but it would appear, from the minute in the journal of 12th September 1956, that a copy of the Judge's order was sent to the Fiscal. On 27th September 1956 the Fiscal made the following return :—

“ I repaired to Walgama in the Adicari Pattu of Siyane Korale in the District of Colombo, Western Province, to deliver over possession to the plaintiffs all that divided portion of land from and out of the land called Mahawalauwewatta situated at Walgama aforesaid and more fully described in the annexed hereto writ and the possession thereof was delivered to the 1st plaintiff on behalf of himself and other plaintiffs, by ejecting the defendants and ordering them to take away their belongings in the house etc. which they removed.”

On 2nd October 1956 the 1st plaintiff through his proctor filed a petition stating that a short while after he had been placed in possession of the land and the defendants had been ejected therefrom by the Fiscal on 27th September 1956 the 2nd defendant in the case who was named as 1st respondent to the petition and the 2nd and 3rd respondents who are the husband and son respectively of the 1st respondent acting on her instigation “ unlawfully entered into possession of the said land, and prevented petitioner, from taking complete and effectual possession of the said land ”. He prayed that the 1st to 3rd respondents be dealt with under section 326 of the Civil Procedure Code, and that the writ of possession be “ reissued ”.

On the same day the 1st and 2nd respondents filed a petition under section 328 of the Civil Procedure Code. The investigation into that petition was made in case 6288/L and the decision of the District Judge is the subject matter of another appeal S. C. 285 which has been heard and decided separately. When the two petitions came up for hearing on 25th February 1957 the District Judge made the following minute :—

“ It is agreed that both applications under sections 325 and 328 be dealt together.”

Eventually on 5th June 1957 the matters were taken up for hearing and the learned Judge made order in the course of which he said :—

“ I have already held in case No. 6288/Land which was so numbered in accordance with the provisions of section 328 of the Civil Procedure Code and refers to the same action that the defendants were ejected from Mahawalauwewatta. I would not therefore deal with the facts in this matter separately.”

At the end of his order after discussing the submissions of law, he said :

“ In the result I only direct that the judgment-creditors be put in possession of the property and that the Fiscal do break open any padlocks that may be put on these premises. If there is any further resistance, obstruction or hindrance to the taking of complete and effectual possession I will have no option but to send such persons to jail until complete and effectual possession is given.

“ The 1st, 2nd and 3rd respondents will pay to the petitioners as costs a sum of Rs. 315/-. The 4th respondent was a necessary party to this application being the 1st defendant. He is not entitled to any costs.”

The learned Judge and the parties do not appear to have realised that the Fiscal was authorised to execute a writ which was not in terms of the decree and was not authorised by it. Apart from that the learned District Judge not only omitted to deal with the merits of the petition but he also appears to have lost sight of the provisions of sections 325 and 326. Section 325 provides that a petition presented under it shall be dealt with by the Court in accordance with the alternative (b) of section 377, but he did not do so. The officer charged with the execution of the writ does not say that he was resisted or obstructed by any person, nor is there any evidence that, after the officer delivered possession, the judgment-creditor was hindered by any person in taking complete and effectual possession, although if it was done it would have been legitimate as the Fiscal's action in ejecting the defendants from the land described in Schedule B is illegal. It would appear from the report that the officer charged with the execution of the writ delivered possession to the 1st plaintiff by ejecting the defendants and ordering them to take away their belongings in the house which they did. The 1st plaintiff alleges that after he was placed in possession about 12.30 p.m. the 2nd defendant, her husband, and son entered into possession of the land on her instigation at about 3 p.m. by driving away the persons she had placed in charge of it. The entry of the 2nd defendant, her husband, and son, even though it be two and a half hours after the 1st plaintiff had been placed in possession, does not come within the ambit of the second limb of section 325 which speaks of a case where the judgment-creditor is “ hindered in taking complete and effectual possession ”. In the instant

case possession was delivered and “complete and effectual possession” was taken. The entry by the respondent was after “complete and effectual possession” had been taken. That is what the Fiscal’s report and the petitioner’s evidence shows. The section contemplates the following cases:—

- (a) where the officer charged with the execution of the writ is resisted by any person,
- (b) where the officer charged with the execution of the writ is obstructed by any person,
- (c) where the judgment-creditor is hindered by any person in taking complete and effectual possession after the officer has delivered possession.

In the case of execution of decrees for possession of immovable property the Fiscal is required to repair to the ground and there deliver over possession of the property described in the writ to the judgment-creditor or to some person appointed by him to receive delivery on his behalf. Two acts are contemplated; delivery over of possession and receiving or taking of possession. Both acts are symbolic as the thing itself in the case of immovable property cannot as in the case of movable property be handed over to the recipient. The act of delivery of possession falls to be performed by the Fiscal, and the act of taking of possession by the judgment-creditor or his agent. The section is designed to prevent the Fiscal from being resisted or obstructed in the performance of his function and the judgment-creditor from being hindered from performing his. These acts though performed by two parties are interdependent and by their very nature must take place at the same time. There can be no delivery of possession by the Fiscal without the judgment-creditor receiving or taking possession. The mode of delivery and the mode of taking delivery vary with the circumstances of each case and it will be unwise to endeavour to specify the different modes of such delivery or of taking possession. Section 324 contains certain specific modes of delivery of possession of immovable property. In the instant case the Fiscal states in his report the modes of delivery and of taking possession. The entry by the respondents was after the act of taking had been completed and effectually performed. As stated by Garvin S. P. J. in *Pereira v. Aboothahir*<sup>1</sup> “the hindrance contemplated is the hindrance to the taking of complete and effectual possession by the judgment-creditor in a case in which the officer charged with the execution of the writ had delivered possession but had not delivered complete and effectual possession of every part of the property”. That was also a case in which the entry was about two hours after delivery of possession.

<sup>1</sup> (1935) 37 N. L. R. 163.

Although the word "hinder" which seems more appropriate in the context and not "resist" or "obstruct" is used in connexion with the judgment-creditor's taking of possession, the distinction is not observed later on in section 325 or the next section. It reads: "may at any time within one month from the time of such *resistance* or *obstruction* complain thereof to the Court by a petition in which the judgment-debtor and the person *resisting* and *obstructing* shall be named respondents". Unless the words "resist" and "obstruct" are construed to include "hinder" a part of section 325 would be rendered useless for even though the judgment-creditor is hindered from taking complete and effectual possession he will not be able to invoke the aid of the Court under that section. A construction which gives effect to every part of the section is to be preferred to one which renders a part ineffective or useless. The decisions of this Court which hold that section 326 does not apply to the act of hindering a judgment-creditor from taking complete and effectual possession do not seem to attach sufficient weight to the omission of the word hindering in that part of section 325 which provides for a complaint to the Court by the judgment-creditor.

If after hearing the complaint under the section it is satisfied that the obstruction or resistance (which expression includes the act of hindering the judgment-creditor) complained of was occasioned by the judgment-debtor or by some person at his instigation, the only course the Court may take is to commit the judgment-debtor or such other person to jail and direct the judgment-creditor to be put into possession.

In the instant case there is no finding that the Judge was satisfied that the obstruction or resistance complained of was occasioned by the judgment-debtor or by some person at his instigation. Apart from that, in a proceeding under section 325, the direction that the judgment-creditor be put in possession must be preceded by an order committing the judgment-debtor or other person acting under his instigation to jail. Without such an order of committal to jail the section does not empower the Court to direct that the judgment-creditor be placed in possession.

For the reasons stated above the order of the learned District Judge is set aside.

The appellants are entitled to their costs.

DE SILVA, J.—I agree.

*Order set aside.*