1960 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

W. SIRINIVASA THERO, Appellant, *and* SUDASSI THERO, Respondent

S. C. 440—D. C. Kandy, L 3167/A

Action for declaration that plaintiff was entitled to office of Viharadhipathi of a Vihara and Pansala and to the management and control of their temporalities—No possession of any property asked for —Decree entered as prayed for—Issue of writ of possession in respect of a room in the Pansala—Absence of jurisdiction of Court to issue such writ—Remedy of dispossessed party—Civil Procedure Code, ss. 217 (c), 325, 328—Buddhist ecclesiastical law.

A Buddhist priest sued three other priests for a declaration that he was entitled to the office of Viharadhipathi, incumbent and trustee of a Vihara and Pansala and to the management and control of their temporalities. He did not ask for possession of any property. He obtained judgment and decree as prayed for and, upon his application to execute the decree, a writ of possession was issued in respect of a room in the Pansala.

Held, that the decree entered in the action could not be construed as one which decreed possession of any property. The decree could not be said to fall within section 217 (*c*) of the Civil Procedure Code which relates to a decree commanding the person against whom it operates "to yield up possession of immovable property"; nor could it fall within section 323 which applies if the decree or order is "for the recovery of possession of immovable property or any share thereof by the judgment-creditor, or if it directs the judgment-debtor to yield or deliver up possession thereof to the judgment-creditor". The position of the judgment-creditor was no better than that of a plaintiff who obtains a declaration of title to immovable property without also obtaining a declaration of his right to the immediate possession of that property.

Held further, that, inasmuch as the Court acted without jurisdiction in issuing the writ, the person who was dispossessed of property in consequence of the execution of the writ was entitled to be restored to possession. In such a case a Court of Justice has inherent power to repair the injury done to a party by its act. The objection that the Court acted in excess of jurisdiction can be taken for the first time even at the stage of appeal.

APPEAL from a judgment of the District Court, Kandy.

T. B. Dissanayake, for Plaintiff-Appellant.

Vernon Jonklaas, for Defendant-Respondent.

Cur. adv. vult.

December 13, 1960. SANSONI, J.—

The plaintiff in the present action was ejected from a room in the Hippola Pansala in Malwatta Vihara when a writ, issued by the District Judge in case No. L. 3167, was executed. In that case the defendant sued three other Buddhist priests for a declaration that he was entitled

to the offices of Viharadipathi, incumbent and trustee of Bogahapitiya Vihara and Hippola Pansala, and to the management and control of their temporalities. The defendant obtained judgment as prayed for in that case and on 2nd August, 1957, upon his application to execute the decree, a writ of possession was issued.

Complaint was made by the defendant as judgment-creditor, under section 325 of the Code, that he could not get complete possession of Hippola Pansala, and on 13th May, 1958, the District Judge ordered that the writ be re-issued to the Fiscal to deliver possession to the defendant of a room which was locked, breaking open the door of the room it necessary At the time that order was made in Court, it was brought to the notice of the Judge that the room which was locked was claimed by the plaintiff, and the Judge thereupon directed that if the plaintiff resisted the writ officer and made a claim, that should be reported to Court.

The writ was accordingly re-issued on 17th May, and it was returned to Court on 30th May with an affidavit of the Fiscal's officer who stated that he went to the premises on 21st May, accompanied by the judgment-creditor and two Police Constables, and delivered possession of the room to the judgment-creditor. The affidavit continued, " This room which was found closed on the previous occasion was kept open on this day ". The plaintiff in his affidavit of 27th May, which was filed in Court the next day, stated that he informed the Fiscal, Central Province, of his claim to the room by a letter dated 19th May, and that he also informed the writ officer of his claim and produced documents in support of it, when that officer came to execute the writ together with the judgment-creditor and two Police Officers. He complained in that affidavit that he was assaulted and removed bodily out of the room, after which the defendant took possession of it together with the furniture and other articles in it. He said that he still had the key, and complained that the writ officer had not reported his claim.

On 2nd July, the plaintiff filed a petition and affidavit ; he asked that his application be numbered as a plaint and proceedings taken under section 328, and that he be restored to possession of the room. The plaintiff was examined on oath and the Judge directed that the petition be numbered as a plaint, and that a plaint in proper form be filed. Accordingly a plaint was filed in the present action No. L. 3167 A wherein the plaintiff prayed that he be restored to possession of the room. The defendant, who is the judgment-creditor in L. 3167, filed answer denying that the plaintiff was in any way entitled to the room or exclusive possession of it. The learned Judge has, in his judgment, accepted the position that the plaintiff was ejected from the room in execution of the decree, and having regard to the earlier history of this matter there can be no doubt that the plaintiff was dispossessed of the room notwithstanding his protests. But the learned Judge also held

that the plaintiff was not in law entitled to possession of the room or to be restored to possession, because the defendant as Viharadhipathi was entitled to control the occupation of the Pannsala.

At the hearing before us, Mr. Dissanayake for the plaintiff submitted that the decree entered in L. 3167 was not a decree under section 217 (*c*) of the Code and no writ of possession should have been issued. In view of the terms of that decree, which merely declared that the plaintiff in that action was entitled to certain offices and to the management and control of certain temporalities, I do not think it can be said to fall within section 217 (*c*) which relates to a decree commanding the person against whom it operates " to yield up possession of immovable property "; nor does it even fall within section 323 which applies if the decree or order is " for the recovery of possession of immovable property or any share thereof by the judgment-creditor, or if it directs the judgment debtor to yield or deliver up possession thereof to the judgment-creditor." I am unable to construe the decree as one which decrees possession of any property to the defendant in these proceedings : nor was any possession asked for in case No. L. 3167. The position of the defendant is no better than that of a plaintiff who obtains a declaration of title to immovable property, without also obtaining a declaration of his right to the immediate possession of that property : see *Vangadasalem v. Chettiyar* [1]. It follows that sections 323 to 330 do not apply, because they only apply to decrees for the recovery of possession of immovable property.

Since the decree was one in respect of which, under the Code, the judgment-creditor could not ask for, and the Court had no power to issue, a writ of possession, it seems to me that the Court was acting without jurisdiction in issuing such a writ. The foundation of a writ of possession is a decree for possession, and a writ of possession which is not founded on such a decree is a nullity, because in issuing it the Court acts in excess of its jurisdiction. Where a Court makes an order without jurisdiction, as in this case, it has inherent power to set it aside ; and the person affected by the order is entitled *ex debito justitiae* to have it set aside. It is not necessary to appeal from such an order, which is a nullity : see the judgment of the Privy Council in *Kofi Forfie v. Seifah* [2].

The failure of the present plaintiff to take the objection that the Court had no jurisdiction, which he could have taken at an earlier stage of this action, does not prevent him from taking it now, for an objection to the jurisdiction of the Court is one which we must entertain when our attention is called to it, since we are dealing with an absence of jurisdiction which is apparent when one looks at the decree. Mr. Jonklaas referred us to the case of *Jayalath v. Abdul Razak*[3], but the the Court was not there dealing with a case of absence of jurisdiction, but with a case of a wrong or irregular exercise of jurisdiction.

[1] (*1928*) *29 N. L. R. 445.* [2] (*1958*) *A. C. 59.*

[3] (*1954*) *56 N. L. R. 145.*

The question now arises as to what order we should make on this appeal. The plaintiff asked the Court to restore him to possession of the room, because he had been dispossessed of it in execution of the decree. Section 328, no doubt, contemplates dispossession under decrees for possession of immovable property, but this is not a matter which we can allow to stand in the way of the plaintiff, for we must have regard to the substance rather than the form. Justice requires that he should be restored to the position he occupied before the invalid order was made, for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act. The Court will, so far as possible, put him in the position which he would have occupied if the wrong order had not been made. It is a power which is inherent in the Court itself, and rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act : see *Rodger v. Comptoir D'Escompte de Paris* [1]. The duty of the Court under these circumstances can be carried out under its inherent powers.

I would, therefore, direct that the plaintiff be restored to possession of the room which he was occupying in the Hippola Pansala prior to the execution of the writ in case No. L. 3167. With regard to costs, seeing that the plaintiff failed to take the point of jurisdiction in the District Court and permitted these lengthy proceedings to go on in that Court, he is not entitled to any costs of the proceedings in the lower Court, but he will have his costs of appeal.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.