

1957

Present: Basnayake, C.J., and Palle, J.

THURAISINGHAM and another, Appellants, and KANAGARATNAM
and others, Respondents

S. C. 794—D. C. Jaffna, 10,875

Execution of proprietary decree—Procedure in event of resistance to execution—Civil Procedure Code, ss. 325, 377 (b).

A Judge making an order under section 325 of the Civil Procedure Code must indicate in his order that he has considered the evidence exhibited or adduced and that he is satisfied that the material facts of the petition are *prima facie* established and that he is of opinion that on the footing of those facts the petitioner is entitled to the remedy, or to the order in his favour.

At the hearing of the petition after the interlocutory order the judgment-creditor is not relieved of the burden of satisfying the Court that the obstruction or resistance complained of was occasioned by the judgment-debtor or by some person at his instigation. Section 377 (b) of the Civil Procedure Code does not cast that burden on the judgment-debtor nor has it the effect of imposing on him the burden of leading evidence to the contrary before the judgment-creditor has proved his case.

APPPEAL from an order of the District Court, Jaffna.

R. Manikkavasagar, for 5th and 6th Defendants-Appellants.

S. Sharvananda, for Plaintiffs-Respondents.

February 15, 1957. BASNAYAKE, C.J.—

This is an appeal by the 5th and 6th respondents to an action under section 325 of the Civil Procedure Code. The allegation is that when the writ officer went to execute the writ the 5th and 6th respondents, who are the son and wife respectively of the judgment-debtor, pushed the writ officer out of the premises and prevented him from delivering possession thereof. At the hearing of the petition under section 325 of the Civil Procedure Code, the learned trial Judge ruled "that the onus is on the 5th and 6th respondents". It is not clear what he had in mind when the learned Judge made this order. Section 325 of the Civil Procedure Code provides that a petition under that section should be dealt with by the Court in accordance with the alternative (b) of section 377. That section read with section 325 provides that in the matter of a petition under section 325 if the Court is satisfied on the evidence exhibited or adduced that the material facts of the petition are *prima facie* established, and is of opinion that on the footing of those facts the petitioner is entitled to the remedy, or to the order in his favour, for which the petition prays then the Court shall accordingly make an interlocutory order appointing

a day for the determination of the matter of the petition, and intimating that the respondent will be heard in opposition to the petition if he appears before the Court for that purpose on the day so appointed.

The order of the Judge does not show that he considered the evidence exhibited in the affidavit and was satisfied that the material facts were *prima facie* established and was of opinion that on the footing of those facts the petitioners were entitled to the remedy they sought, for his order reads :

“ Order ”

- “ (1) Vide order of 28.2.55 and J. E. of 20.5.55
(2) Enter Interlocutory Order under Sec. 377 (b) and issue returnable 1.7.55. ”

A Judge making an order under section 325 must indicate in his order that he has considered the evidence exhibited or adduced and that he is satisfied that the material facts of the petition are *prima facie* established and that he is of opinion that on the footing of those facts the petitioner is entitled to the remedy, or to the order in his favour.

At the hearing of the petition after the interlocutory order the judgment-creditor is not relieved of the burden of satisfying the Court that the obstruction or resistance complained of was occasioned by the judgment-debtor or by some person at his instigation. Section 377 (b) does not cast that burden on the judgment-debtor nor has it the effect of imposing on him the burden of leading evidence to the contrary before the judgment-creditor has proved his case.

The only evidence called by the judgment-creditor alleging the obstruction is the evidence of the Udaiyar who stated in cross-examination that the 5th and 6th respondents obstructed him, but there is no evidence to show that they did so at the instigation of the judgment-debtor. The relationship of the 5th and 6th defendants-appellants to the judgment-debtor may give rise to a suspicion that they resisted at his instigation ; but in a proceeding under section 325 it is not sufficient to create a suspicion. It must be established by evidence that the resistance was occasioned by them at the instigation of the judgment-debtor. There is no such evidence in the instant case.

We therefore set aside the order committing the 5th and 6th defendants-appellants to jail and allow the appeal ; but without costs.

PULLE. J.—I agree.

Appeal allowed.