

1928.

Present : Lyall Grant J.

PERERA v. SILVA.

120—D. C. (Crim.) Kalutara, 10,574.

Writ of possession—Obstruction to Fiscal's officer—Judgment debtor must be respondent—Civil Procedure Code, s. 325.

In proceedings under section 325 of the Civil Procedure Code for obstructing a Fiscal's Officer in the execution of a writ of possession, the judgment debtor must be made a party-respondent. *Kumarathy Fernando v. Hetu Etana*¹ followed.

A PPEAL from an order of the District Judge of Kalutara.

N. E. Weerasooria, for appellants.

De Zoysa, K.C. (with *Rajapakse*), for respondent.

November 12, 1928. LYALL GRANT J.—

This is an appeal from an order made under sections 325 and 377 of the Civil Procedure Code, dealing with the appellants for obstruction to a Fiscal's officer delivering the possession of property. The first and second appellants were sentenced: the first appellant to imprisonment till the rising of the Court, and the second appellant to one week's simple imprisonment.

It appears that the petitioner, who is the respondent to this appeal, got a decree in a mortgage action which was originally brought against the second defendant as representative of the estate of the deceased mortgagor. In the course of the proceedings, however, it was objected that the defendant was not the legal representative of the estate, as it was of the value of over Rs. 1,000, and the Secretary of the Court was substituted in his place. The decree actually proceeded against the Secretary of the Court and the purchaser of the land which was mortgaged. Accordingly neither of the present appellants was mentioned in the decree.

Now, section 325 provides that in proceedings for and in respect of obstruction to a Fiscal's Officer, the judgment-debtor and the person resisting and obstructing shall be named respondents. It was decided by Hutchinson C.J. and Wood-Renton J. in the case of *Kumarathy Fernando v. Hetu Etana*¹ that the fact that the defendant was not made a respondent to the proceedings was a fatal objection to a conviction under these provisions.

This in itself would be sufficient to set aside the convictions, but it was further pointed out that section 325 was not applicable to the present case inasmuch as the complainant was not a judgment-creditor under a decree for the possession of property. What she

¹ S. C. D 43.

had obtained was a decree on a mortgage under which the land was sold, and it was as purchaser of the land on a Fiscal's sale that she acquired a direct interest in the property. That also in itself takes these proceedings outside the operation of section 325. This has been decided by a Full Bench of this Court in the case of *De Silva v. de Silva et al.*¹

For these reasons, the appeals must be allowed and the convictions quashed.

Appeal allowed.

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LYALL
GRANT J.
Perera
v.
Silva

