

1954

Present: Gunasekara, J., and Fernando, A.J.

ISMAIL, Appellant, and MARIKAIR, Respondent

S. C. 146 (Inty.)—D. C. Batticaloa, 536L

Execution—Decree for possession of immovable property—Issue of writ of possession.—Obstruction by a transferee pendente lite—Application for re-issue of writ—Power of Court to grant it—Civil Procedure Code, ss. 324 to 325.

In an action for declaration of title to a certain land the plaintiff obtained decree against the defendant. Writ of possession in favour of the plaintiff was issued, but was later returned unexecuted by the Fiscal for the reason that a person who was not a party to the action claimed the land under a deed which was executed in his favour by the judgment-debtor during the pendency of the action and after the *lis pendens* had already been registered.

Held, that the claimant, being a transferee *pendente lite*, was a person bound by the decree and liable to be removed by re-issue of writ under section 324 of the Civil Procedure Code. Section 327A of the Civil Procedure Code is not applicable in such a case.

APPPEAL from an order of the District Court, Batticaloa.

C. Ranganathan, for the petitioner-appellant.

No appearance for the respondent.

Cur. adv. vult.

August 6, 1954. FERNANDO, A.J.—

The plaintiff instituted this action on 11th November 1949 for a declaration of title to a certain land and for the ejectment of the defendant therefrom. Decree nisi was entered against the defendant on 19th September 1950 and was made absolute on 17th April 1951. Writ of possession in favour of the plaintiff was issued on 29th September 1951, but was returned unexecuted by the Fiscal for the reason that the respondent to this appeal (who was not a party to the action) claimed the land under a deed executed in his favour by the defendant on 20th June 1950. In October 1952, the plaintiff applied to the Court by petition and affidavit for a direction to the Fiscal to remove the respondent and any person bound by the decree from the land. Notice of this application was served on the present respondent who filed his objections to the plaintiff's application; the only claim made in the statement of objections was that the claimant had purchased the land from the defendant on 20th June 1950.

The plaintiff having registered the *lis pendens* of his action on 24th November 1949, the respondent who acquired title from the defendant *pendente lite*, would *prima facie* appear to be a person bound by the decree and therefore properly removable under the writ of possession in

pursuance of s. 324 of the Civil Procedure Code. The learned District Judge refused, however, to issue the direction prayed for and this appeal is against that refusal.

The opinion of the learned Judge was that the proper procedure applicable in such a case is that prescribed by ss. 325 to 328 of the Civil Procedure Code, and that the plaintiff may not otherwise establish that the respondent is a person bound by the decree. An examination of ss. 325 to 328 demonstrates that, until 1949 at any rate, those sections were of no avail whatever to a plaintiff in a case where resistance was offered by a person claiming title on a document executed *pendente lite* by the judgment-debtor. S. 326 applies only where the resistance is offered *by the judgment-debtor or some person at his instigation*; and sections 327 and 328 are expressly declared (by s. 328 (3)) to be inapplicable in the case of a transfer *pendente lite* by the judgment-debtor. S. 327A was introduced by the amending Act No. 7 of 1949 and would seem to be applicable (if at all) on the basis that a claim by a transferee *pendente lite* would necessarily be regarded by the Court as *frivolous or vexatious*. The Judge does not expressly refer to s. 327A as affording support for his opinion, but, having taken that section into consideration, I cannot think that its introduction into the Code in 1949 had the effect of converting a procedure, which was formerly inapplicable to cases of a particular class, into one which can be said, not merely to be applicable to such cases but also to be the only proper and available procedure. On its face s. 327A purports only to discourage to a greater extent than before resistance on frivolous or vexatious grounds; and it cannot be construed as having the effect of depriving a judgment-creditor of other means of redress which the Code already gave him.

There is yet another reason which impels me to disagree with the view taken by the learned Judge. If the mere fact that the Legislature's provision in 1949 of a new remedy (under S. 327A) available against a transferee *pendente lite* can be construed to deprive a plaintiff of any alternative remedy previously available to him against such a transferee, then, equally or *a fortiori*, s. 326 (which expressly provides a most efficacious mode of ejecting *an obstructive judgment-debtor*) must be held to have always precluded a plaintiff from seeking redress by the less vindictive course of applying for a re-issue of the writ against the judgment-debtor. But it is clear that s. 326 has no such effect, for it has been held (*Nanayakkara v. Nanayakkara*)¹ that the Courts can only act under s. 326 if the case merits so extreme a punishment; accordingly it is open to the plaintiff (and in an appropriate case even obligatory on him) to allow the judgment-debtor a second or third chance to see reason, before seeking to rely on the obstruction.

What has to be decided therefore is whether the Code prior to 1949 contemplated any procedure by which effect could be given to the requirement in s. 324 that the Fiscal "shall deliver possession . . . if need be *by removing any person bound by the decree who refuses to vacate the property*". Counsel could not refer us to any judgment of this Court, but to my mind the simplicity of the point at issue explains the absence

¹ (1925) 6 C. L. Rec. 98.

of authority. The Fiscal is under s. 324 entitled (and perhaps even required) to remove a person who is in law bound by the decree. But if the Fiscal declines to do so, his ignorance of the law or his fear of the consequences of error cannot deprive the plaintiff of the rights which s. 324 confers on him. These rights must be secured to him by the Court if he can satisfy the Court that the person offering resistance is a person bound by the decree, and an application in that behalf by way of petition and affidavit, with notice to the respondent, seems perfectly appropriate for the purpose. I would refer in this connection to a comment in Chitale and Annaji Rao (2nd. Edn. Vol. 2 p. 180⁴) upon the corresponding Order 21, Rule 35 of the Indian Code :— “Therefore, if the property for which a decree for possession has been made is in the occupancy of a person claiming under a title created by the defendant subsequent to the institution of the suit, actual possession under sub-R. (1) must be given to the decree-holder, by removing, if necessary, the person bound by the decree and who refuses to vacate the property”.

In the case before us, the plaintiff adduced evidence that the *lis pendens* of his action was duly registered on 24th November 1949, and the respondent in his objections admitted that his claim was upon a subsequent transfer from the defendant. The respondent, being a transferee *pendente lite*, is clearly a person bound by the decree and liable to be removed under s. 324.

I would accordingly set aside the order appealed from, and remit the case to the District Court which will order the re-issue of the writ of possession with the requisite direction to the Fiscal as prayed for in the plaintiff's petition of 14th October 1952. The plaintiff will be entitled to the costs of this appeal and the costs of the proceedings in the District Court on that petition.

GUNASEKARA, J.—I agree.

Order set aside.
