

1935

Present : Garvin S.P.J. and Maartensz A.J.

PEREIRA v. ABOOTHAHIR.

60—D. C. (Inty.) Badulla, 4,652.

Writ of possession—Complete and effectual possession given by Fiscal—Subsequent interruption—Remedy—Civil Procedure Code, s. 325.

Where a person has been given complete and effectual possession of premises by the Fiscal, the remedy under section 325 of the Civil Procedure Code is not open to him in respect of a subsequent interruption of possession.

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

H. V. Perera, for respondent, appellant.

Tiyagarajah, for purchaser, respondent.

¹ (1911) *South African Law Reports, Appellate Division* 73.

January 22, 1935. GARVIN S.P.J.—

In execution of a judgment against the first of the two appellants certain premises bearing assessment No. 900A, situated at Lower street, Badulla, were seized and sold. At the sale the premises were purchased by one V. K. S. Aboothahir. On November 4, 1932, Aboothahir obtained a Fiscal's conveyance in his favour. On December 2 he obtained an order for delivery of possession. On the 17th of that month he was placed in possession of the premises by the Fiscal. He complains to Court in a petition dated January 14, 1933, that on that day after he had been given possession of the premises by the Fiscal, who on that occasion had ejected the second appellant from the premises, he forcibly re-entered some time later and has since been in occupation of the premises. He therefore prayed that he be placed in effectual possession of the property. The petition does not state under what provision of the Civil Procedure Code the application was made but it appears, judging from the proceedings in the Court below, to have been treated as a complaint under section 325 of the Civil Procedure Code, and that is the basis upon which we were invited to consider the matter here in appeal by counsel for the purchaser. The learned District Judge held an inquiry into the petition and made order directing that writ be reissued and that the respondents to the petition should pay the petitioner's costs. They have now appealed.

It is to be noticed that on the averments made by the petitioner himself both in his petition as well as in the course of his evidence that the Fiscal succeeded in ejecting from the premises the second appellant who at the time was in occupation and that the petitioner was placed in complete possession of every part of the premises. The door was then locked and the key was handed by the Fiscal to the petitioner who elected to take the key and go away. About two hours after this Karuppiah the second appellant returned and succeeded in re-entering and getting into occupation.

Now the first point taken by counsel for the appellants is that the provisions of section 325 do not contemplate or apply to such a case as this. That section contemplates a complaint in any case in which "the officer charged with the execution of the writ is resisted or obstructed by any person, or if after the officer has delivered possession the judgment-creditor is hindered by any person in taking complete and effectual possession". The first part of that provision clearly does not apply, for there is no suggestion here that there was any resistance or obstruction to the Fiscal. The second part contemplates a complaint being made in a case in which after the officer has delivered possession the judgment-creditor is hindered in taking complete and effectual possession. The language read as a whole indicates to my mind that 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. This is not therefore a case which comes within the words referred to. Where it is clear that a person has been given complete and effectual possession, then in respect of any interruption

of his possession thereafter he must seek his remedy in the Courts in the same way as any person who complains of having been ejected from property which belongs to him.

Since these considerations are decisive of the appeal it is unnecessary to consider numerous other objections which have been taken, of which I would briefly refer to the objection that in view of the decision in *Silva v. Silva*¹, the remedy under section 325 is not available in a case such as this where we are concerned, not with a decree for possession but with an order for delivery of possession. The difficulties of construing the provisions of the group of sections of which section 325 is one have been noticed in several judgments of this Court and attention specially drawn to the unsatisfactory state of the law in the case of *Daniel v. Rasiah*². I can only repeat once more what I said there, that if the law is to be placed upon a satisfactory basis it seems to me that it must be by the intervention of the legislature.

The order under appeal is set aside and the petition will be dismissed with costs both here and below.

MAARTENSZ A.J.—I agree.

Set aside.

