1936 *Present :* **Koch J. and Soertsz A.J.**

DE SILVA *v.* BASTIAN *et al.*

77—D. C. (Inty.) Galle, 32,771.

Writ of possession—Decree-holder placed in possession by fiscal—Ouster by judgment-debtor—Power of Court to restore writ-holder—Civil Procedure Code, ss. 287 and 325.

Where the holder of a decree for land was placed in possession by the fiscal under a writ of possession and was soon after dispossessed by the judgment-debtor,—

Held, that the Court had power under section 287 of the Civil Procedure Code to cause the writ-holder to be restored to possession.

Silva v. de Mel (18 N. L. R. 164) followed, *Pereira v. Aboothahir (37 N. L. R. 163)* referred to.

APPEAL from an order of the District Judge of Galle.

L. A. Rajapakse (with him *R. C. Fonseka*), for defendants, appellants.

Colvin R. de Silva, for plaintiff-respondent.

April 8, 1936. Koch J.—

A point of importance and interest and also of difficulty arises on this appeal. A judgment-creditor, under decree declaring him entitled to a certain land, applied for and obtained a writ of possession. The fiscal placed him in possession of these premises on February 28, 1935. Within half an hour the judgment-creditor was turned out by the judgment-debtors who were waiting outside the boundary till the fiscal's officer took his departure. The judgment-creditor thereafter on April 3 made an application to Court for a reissue of the writ of possession. This was opposed by the judgment-debtors and inquiry was fixed for April 11. On that day Counsel for the judgment-creditor and the judgment-debtors were heard, and the learned District Judge reserved order for April 16. The points taken by the judgment-debtors were (1) as the fiscal had on

February 28 placed the judgment-creditor in possession, the writ of possession under which this took place, it was argued, was duly executed and an application for a reissue of it was therefore bad and must fail. (2) The only remedy, if any, was under section 325 of the Civil Procedure Code, and the application not having been made within one month of the dispossession was out of order and should therefore be disallowed. The learned District Judge made order on April 16 in favour of the plaintiff. The appeal is from that order.

Now, if the present application is treated as one that can only be made under section 325 of the Cilvil Procedure Code, the second point must necessarily prove successful, and so far as the first point is concerned a real difficulty will arise. This difficulty is the outcome of a pronouncement of Garvin J. (with which Maartensz J. has agreed) in the case of *Pereira v. Aboothahir*[1]. The learned Judges in that case decided that what was intended in section 325 was to give relief in such cases only where the fiscal had delivered possession to the judgment-creditor but had not delivered complete and effectual possession of every part of the property. This decision would appear to be in conflict with *Kumarihamy v. Banda*[2]—a decision of two Judges who followed the ruling in *Menika v. Hamy*[3]—and with *Mohamed Lebbe v. Ahamedu Lebbe*[4]. Briefly put, the point decided in these cases was that although the fiscal had placed the judgment-creditor in possession of the property named and described in the writ, the section applied if the judgment-creditor *immediately* or shortly after was turned out by the judgment-debtor, or by someone acting under his instigation. The fine distinction drawn by Garvin J. does not seem to have been appreciated by the learned Judges who decided these cases. It is not necessary for us to say which of these views is correct, as in our opinion there is nothing to prevent our regarding the present application as not necessarily made under section 325 but preferred by reason of a different remedy that was open to the judgment-creditor in circumstances such as these. The word in this section is "may", not "must", and I feel we are right in interpreting it as permissive only and not imperative, as this is the view that has been taken by the Indian Judges in the corresponding section, viz., 328 of the Indian Procedure Code, which is substantially the same. See *Muttrarv v. Appasami*[5] and *Balvant v. Babaji*[6]. One clear remedy is by way of regular action. This the plaintiff has not done. Will another be by application to reissue the writ of possession? Section 287 of the Civil Procedure Code lays down that there is procedurally no distinction in regard to the steps to be taken by a judgment-creditor who is seeking to enforce his decree obtained under section 217 (*c*), *i.e.*, a decree to yield up possession of immovable property, and those that may be taken under section 287 by a purchaser at a fiscal's sale who has obtained his conveyance. In *Suppramaniam Chetty v. Jayewardena*[7], de Sampayo J. held, in giving relief to a party seeking to obtain effectual possession, that the District Court should not take a narrow view of its duty and power, and whatever the form of the application, if it reasonably makes clear the position of the applicant, the

[1] *37 N. L. R. 163.*
[2] *1 Cey. Law Rec. 53.*
[3] *2 C. L. R. 145.*
[4] *23 N. L. R. 406.*
[5] *I. L. R. 13 Madras 504.*
[6] *I. L. R. 8 Bombay 602.*
[7] *18 N. L. R. 50.*

Court is entitled to cause the party resisting the execution of the writ of possession to be removed and the writ holder to be put in possession. Schneider J. agreed. This view was accepted by Garvin A.J. in *Ledera v. Babahamy et al.*[1] In the Full Bench case of *Silva v. de Mel*[2], de Sampayo J, drew attention to the words of section 287 and emphasized that the order for delivery of possession was to be "enforced" and not merely "executed", and decries a narrow view being taken. The contention of Mr. Rajapakse therefore amounts to a subtlety and cannot be accepted by us. A somewhat more extreme case has to be advanced to bring out this subtlety conspicuously. What if the fiscal takes the judgment-creditor right round the boundaries of the land and after placing him formally in possession, enters his car and drives away, and the next minute the judgment-debtor who is skulking behind one of these boundaries enters the land and bundles out the decree holder. Can it be reasonably said that the writ of possession was duly executed ? I should certainly say not, for to declare to the contrary would be to introduce a legal fiction which de Sampayo J. has deprecated.

The learned District Judge's reasons for permitting a reissue of the writ I agree cannot be sustained, but his order in granting the judgment-creditor this relief can be supported on the grounds I have set out. I am quite in agreement with the remark of Garvin J. in *Pereira v. Aboothahir* (*supra*) that the state of the law on this point is unsatisfactory and claims the intervention of the legislature.

The appeal must therefore be dismissed with costs.

SOERTSZ A.J. agreed in a separate judgment.

Appeal dismissed.