

1961

*Present* : H. N. G. Fernando, J.

E. H. PERERA, Petitioner, and F. MUNASINGHE  
and 2 others, Respondents

*S. C. 12/1961—Application for Revision and Restitutio in integrum in  
C. R. Gampaha, 6234*

*Execution of a proprietary decree—Resistance thereto—Procedure thereafter—Burden  
of proof—Civil Procedure Code, s. 377 (b).*

When obstruction is alleged by a judgment-creditor in respect of the execution of a proprietary decree, the Court must be satisfied, before it makes an order under section 377 (b) of the Civil Procedure Code, that the material facts of the petition are *prima facie* established. It must also appear from the record that the Court considered and formed an opinion upon the allegation made by the petitioner.

At a hearing under section 377 (b) the burden is on the judgment-creditor to satisfy the Court both as to the obstruction caused and as to its having been caused at the instigation of the judgment-debtor.

**A**PPPLICATION to revise an order of the Court of Requests, Gampaha.

*Colvin R. de Silva*, with *M. L. de Silva*, for 2nd Respondent-Petitioner.

*Cur. adv. vult.*

June 13, 1961. H. N. G. Fernando, J.—

In an action between the plaintiff, who is a respondent to this petition, and the defendant in that action a writ of possession had apparently been issued in execution of the decree previously entered. On 4th August 1960 the plaintiff filed a petition and affidavit alleging that the present petitioner and some other person had, at the instigation of the defendant, obstructed the Fiscal from giving possession to the plaintiff of the premises to which the decree applied. The Journal Entry of 5th August 1960 contains a Minute relative to that petition and affidavit followed by the following order of the Commissioner of Requests:— “Take steps under section 377 (b) for 6.9.660.” After the parties appeared the matter was taken up for inquiry on 20th March 1960, when (according to an order of that date made by the learned Judge) proceedings had apparently commenced by an opportunity being given by counsel for the present petitioner to lead evidence. At that stage apparently counsel for the petitioner did not call any evidence. Thereafter evidence concerning the alleged obstruction was led by the plaintiff and at the close of that evidence counsel for the present petitioner made two submissions:—

firstly, that all the proceedings were nullified by the fact that the order made by the Commissioner on 5.8.60 was illegal, and

secondly, that he be permitted at this stage to lead evidence.

Both these submissions were rejected and the present application for revision had been made in consequence. In *Thuraisingham v. Kanagaratnam*<sup>1</sup> Basnayake, C.J. pointed out that before a matter of this nature is dealt with under section 377 (b) of the Code, the Court must be satisfied that the material facts of the petition are *prima facie* established, and also that it must appear from the record that the Court has considered and formed an opinion upon the allegation made by the person who seeks such an order. There is nothing in the record in this case to indicate that the order of August 5th 1960 for steps to be taken under section 377 (b) was duly made after consideration. In the same judgment it was decided that at a hearing under section 377 (b) the burden is on the judgment-creditor to satisfy the Court both as to the obstruction caused and as to its having been caused at the instigation of the judgment-debtor. Accordingly the refusal of the learned Commissioner to permit evidence to be led on behalf of the petitioner after the judgment-creditor had led his evidence was also wrong.

For these reasons I would set aside all orders made by the learned Commissioner on and after 5th August 1960. The petitioner will be entitled to the costs of this application which are fixed at Rs. 105.

*Order set aside.*

