1931 *Present:* **Drieberg J. and Akbar J.**

EBRAHIM *v.* THIAGARAJAH *et al.*

26 D. C. (Inty.) Colombo, 35,982.

Sequestration before judgment—Sale in execution of decree—Fiscal's transfer executed—Application for delivery of possession—Property under mortgage—Bond not reduced to decree—Application by mortgagee to stay delivery of possession—Civil Procedure Code, s. 287.

The plaintiff in an action for the recovery of an unsecured debt applied for and obtained a writ of sequestration before judgment and seized a property belonging to the defendant. In execution of his decree the property was sold and purchased by the plaintiff, in whose favour a Fiscal's transfer was issued.

Thereafter the plaintiff applied under section 287 of the Civil Procedure Code for an order of delivery of possession.

The petitioner, who held a mortgage over the property, which had not been reduced to a decree, moved to have delivery of possession to the plaintiff stayed.

Held, that the petitioner-mortgagee was not entitled to have delivery of possession to plaintiff stayed.

APPEAL from an order of the District Judge of Colombo.

Hayley K.C. (with him *Tisseverasinghe*), for appellant.

Keuneman, for respondent.

September 10, 1931. AKBAR J.—

The plaintiff sued the defendant in this case on December 19, 1929. On December 21, 1929, he obtained a mandate of sequestration, and the estate of the defendant was seized and registered on January 11, 1930. The plaintiff obtained judgment against the defendant for Rs. 4,000, with interest and costs on March 7, 1930; writ was issued on June 11, 1930, and the property in dispute in this appeal was sold on September 15, 1930, to the plaintiff. The Fiscal's transfer was signed on December 17, 1930, and on December 18, 1930, plaintiff moved for an order for the delivery of this property which was issued to the Fiscal on December 19, 1930. The petitioner, namely, the Hong Kong and Shanghai Banking Corporation, Colombo, obtained a mortgage bond from the defendant on December 24, 1929, as collateral security for moneys due by the defendant, which was registered on January 3, 1930. On January 13, 1930, another mortgage bond, unregistered, was executed for the same property by the defendant increasing and fixing the amount secured, in favour of the petitioner. On January 8, 1931, the petitioner intervened and applied to the District Court of Colombo *ex parte* and obtained an order staying the delivery of possession pending the further orders of the Court till January 21, 1931. On January 15, 1930, the petitioner filed an action on the mortgage bonds and judgment was obtained on January 18, 1930. The sale under the mortgage decree was fixed for January 20, 1931, that is one day before the notice on the plaintiff was made returnable. Owing to this conflict of interests the plaintiff moved the Court to vacate the order of January 8, 1931, staying delivery of possession. After argument the Court confirmed the order of January 8, 1931, and directed that the writ for the delivery of possession to the plaintiff be recalled and the plaintiff was also ordered to pay the costs of the inquiry. The main ground on which the District Judge made his order was that the application for delivery of possession was made by the plaintiff appellant by way of a motion and that in the Judge's opinion it should have been supported by an affidavit to the effect that nobody was in possession except the judgment-debtor. The District Judge mentions in his judgment that applications for writ of possession are commonly made by motions without any affidavit, but in spite of this fact, he ordered that the writ should be recalled owing, as I said, to the failure of the plaintiff-appellant to file an affidavit along with his motion. In the case of *Abeyedere v. Marikar*[1], cited before us, the facts were different to the facts here.

In that case, when the Fiscal tried to enforce the order for the delivery of possession, there was obstruction by two persons. Thereupon the purchaser filed a petition against the persons obstructing, and the judgment-debtor.

It is true that in those proceedings, the Supreme Court mentioned the fact that the order for delivery had been irregularly obtained, but that was owing to the peculiar facts of that case. As the Chief Justice pointed out, the order to deliver possession that was issued to the Fiscal stated that the boutique was in the possession of one Allia Marcar (one of the

[1] *11 N. L. R. 19.*

two persons who afterwards obstructed the Fiscal and who was one of the respondents to the petition). In view of these facts as the purchaser must have disclosed the fact that Allia Marcar was in possession of the boutique in question, the Supreme Court held that the motion for delivery of possession should have been accompanied by affidavit or some other evidence. As a matter of fact it is not necessary for me to decide in this case the point whether an application under section 287 should be supported by an affidavit or not; but I may mention *en passant* that the form given in the schedule authorizes the Fiscal to put the purchaser in possession and to remove only a person "bound by the decree", *i.e.*, bound by the order to deliver possession (see 2nd paragraph of section 287); therefore, probably anyone claiming by a title independent of, or created before the seizure of the property by the judgment-debtor could not be turned out of the possession of the property. Even if an affidavit is insisted on in every case, in view of the wording of section 287, it is bound to be nothing more than a formal document, because a purchaser will always state that it is the judgment-debtor or somebody on his behalf who is in possession. What else can the purchaser say when there has been a seizure and no claim has been made? It seems to me that sections 325, 326, &c., dealing with resistance to the execution of proprietary decrees have an important bearing on section 287. The former sections are self-contained and were drafted to preserve the interest of the purchaser as well as that of persons *bona fide* in possession of the property independent of the judgment-debtor. Section 325 states that if the Fiscal is resisted or obstructed in giving possession of the property the judgment-creditor may report the resistance or obstruction to the Court and then the Court has got power to inquire into the matter and to punish any person who resists the execution of the decree at the instance of the judgment-debtor, by sending him to jail. But if the person resisting claims to be in possession *bona fide* the judgment-creditor's petition is to be registered and numbered as a plaint between the decree holder as plaintiff and the claimant as defendant, and then the Court is empowered to proceed to inquire into the matter as if it were an action for the property by the decree holder against the claimant. Section 328 provides for a dispossessed claimant, who claims to be in possession *bona fide*, to bring the matter up before a Court and for the Court to inquire into it. It is true that sections 325, 326, &c., refer to the judgment-creditor, but the second paragraph of section 287 states that a purchaser at a Fiscal's sale trying to enforce an order under head (*c*) of section 217 is to be considered as a judgment-creditor. So that it will be seen that there is ample provision, in the Civil Procedure Code for a *bona fide* possessor of property, with regard to which the order for delivery of possession has been made, to test his right to possess against the purchaser.

Resistance or obstruction under section 325 does not necessarily mean the actual use of physical violence; on the other hand a mere refusal to give up possession on the ground that the claimant holds not under the judgment-debtor but independently of him or by a title created by him prior to the seizure will be sufficient (see section 287). All these provisions I think were inserted as I have stated to meet the case not only

of a *bona fide* claimant, but also of a person who has been set up by a judgment-debtor to give trouble to the judgment-creditor or to the purchaser at the Fiscal's sale. That, I take it, is the reason why the Court is given the power to send the obstructor to jail in certain circumstances. If an alternative procedure is to be allowed whereby instead of following this course, the person claiming to be in possession can seek to move the Court, as has been done in this case, for a recall of the writ for delivery of possession, this will give rise to further difficulties in the execution of judgment debts. Any person who has been set up by a judgment-debtor can avoid the penalty by moving in this way and hanging up the whole proceedings by an inquiry, followed by an appeal. Moreover, the Court will be deprived of a valuable piece of evidence, namely, the Fiscal's report that the claimant was really in possession. This is an important question on the procedure which it is not necessary to decide in this case, as I am of opinion that the reason why the petitioner moved in this way seems to be obvious. The sale on his mortgage decree was fixed for January 20, 1931, and very important and difficult questions of law are bound to rise when the plaintiff and the petitioner test their respective claims to the property in a Court of law.

It would have been a serious matter to the petitioner if the plaintiff was allowed to get into possession, because then an action *rei vindicatio* would have to be instituted by the petitioner against the plaintiff. The petitioner appears to have been doubtful himself as to the legal procedure, because when the petition was filed by him on January 8 (see paragraphs 12 and 13) certain preliminary discussions took place between the lawyers on both sides and according to paragraph 14 the petitioner claimed the right to stay the writ on the ground of equity (whatever that may mean), viz., that " it will be inequitable to allow the plaintiff to take possession as the value of the petitioner's security (already very inadequate) might be seriously depreciated thereby." It is quite obvious that his object on January 8 was to get time to enable him to buy the property at the sale which was fixed for January 20, 1931. In the petitioner's petition, paragraph 15, it is stated that the agents of the petitioner were in possession of the property on behalf of the petitioner and that the plaintiff would not be prejudiced because the petitioner was willing to submit accounts of the working of the estate during any period for which it may ultimately be held that the plaintiff could have claimed the benefit of possession, and it is also stated that he was willing to pay the profits of the estate during such period. In the beginning of paragraph 14 there is a virtual admission that the plaintiff is entitled to possession at least between January 10 and 20, 1931. All these facts show that the petitioner was very doubtful of his own legal position in the matter.

It is true that subsequently on January 19, *i.e.*, the very day of the inquiry, he filed a further affidavit in which he stated that he was in possession owing to a clause in the mortgage bond; but that clause in the mortgage only empowers the petitioner to get possession of the property mortgaged if there is any breach of any of the convenants or conditions on the part of the mortgagor or if he is declared insolvent. The mortgage bond was not a usufructuary mortgage bond. Presumably the petitioner

put in his application in this form asking for a stay of the delivery of possession for the sole purpose of getting time to enable the Bank to purchase the property at the sale on the mortgage decree. The petitioner himself, it is admitted, bought this property on January 20, 1931, and a deed was executed in favour of the Bank on February 21, 1931.

It seems to me that the very equity, which the petitioner invokes to justify his application for the stay of writ, is against the petitioner. I need only decide this appeal on the ground that the circumstances of this particular case did not justify the petitioner in moving the Court to stay execution of the plaintiff's order for possession. I think the appeal should be allowed and the order recalling the writ should be set aside. I have had great difficulty on the question of costs. It will be seen that even if the order for delivery of possession is put into the hands of the Fiscal, the petitioner having already bought the property mortgaged will set up this new title as against the plaintiff when the Fiscal tries to put him in possession. The plaintiff I think is entitled to the costs of the inquiry in the Court below, but I would make no order as to the costs in this Court, because the plaintiff filed his petition of appeal on January 26, 1931, on which date he must have known that the property was bought by the petitioner at the sale on the mortgage decree, and that the petitioner was bound to claim the benefit of sections 325 and 327 of the Civil Procedure Code. In the result the appeal is allowed with costs incurred in the Court below but there will be no order as to the costs of this appeal.

DRIEBERG J.—I agree.

Appeal allowed.