1972 *Present :* **G. P. A. Silva, S.P.J.**

THE PUBLIC TRUSTEE, Appellant, *and* P. P. SUWARIS APPUHAMY, Respondent

S.C. 52/70—C.R. Colombo, 88653/R.E.

Execution of proprietary decree—Writ of ejectment executed by Fiscal bona fide *after Court had ordered stay of execution—Whether judgment-debtor can forcibly re-enter the premises in question—Civil Procedure Code, s. 325.*

In compliance with an order of Court to execute a writ of ejectment, the Fiscal put the plaintiff-appellant in possession of a dwelling-house on 20th May 1969. The Fiscal was not aware that an order had been made by Court earlier on 19th May staying execution of the writ. Shortly after the Fiscal had delivered possession to the plaintiff, the defendant broke open the doors of the house and forcibly re-entered and occupied it.

Held, that if the defendant desired any relief, it was his duty to have reported the matter to Court. He was not entitled to forcibly enter the house of which possession had been granted to the plaintiff by the Fiscal only in due compliance with the order of the Court.

APPEAL from a judgment of the Court of Requests, Colombo.

W. D. Gunasekera, for the plaintiff-appellant.

No appearance for the defendant-respondent.

November 15, 1972. G. P. A. SILVA, S.P.J.—

In this case the Public Trustee of Ceylon—the plaintiff-appellant—sued the defendant-respondent for arrears of rent and for ejectment of the defendant from premises No. 514, Dematagoda Road which belonged to Maha Visudharamaya Temple Trust. On the 21st January 1965, judgment was entered for the plaintiff by consent of parties for the recovery of a certain sum as arrears of rent and for the ejectment of the defendant on 31.7.66 if the defendant made certain monthly payments without default. The defendant-respondent having defaulted in making the stipulated payments, a writ was issued for the ejectment of the defendant-respondent on 28.4.69 and the Fiscal, in terms of the said writ, ejected the defendant on 20.5.69 and reported accordingly to the Court. On the 18th May, 1969, however, the defendant had applied to the Court for the recall of the writ already issued on the ground that he had made certain payments to the plaintiff after the period decreed by Court and that a new tanancy had been created thereby and the Court on 18.5.69 at the instance of the defendant only, but without notice to the Fiscal, made an order staying the writ pending the inquiry into the application of the defendant. Shortly after the Fiscal had

delivered possession to the plaintiff-appellant the defendant had broken open the doors of the house on the said premises and forcibly re-entered the house and occupied it. The plaintiff on 9.6.69 made a report in terms of Section 325 of the Civil Procedure Code and the learned Commissioner dismissed the plaintiff's application on the ground that the Fiscal had acted without jurisdiction in ejecting the defendant-respondent. The above facts were not contested by the defendant and up to a point the learned trial judge directed himself on the correct lines. I think he was quite correct in making the following observations :—

> " Indeed, I am inclined to the view that to compel a party who had been dispossessed shortly after delivery of possession of the premises comprised in the suit had been made over to him would only put him to unwanted expense and permit a designing defendant to hold the Court and its machinery to ridicule. I am therefore of the view that in appropriate circumstances a Court could acting under either the provisions of Section 326 or under the provisions of Section 838 of the Code re-issue writ to remedy the evil done to the party to whom possession had been delivered. "

Having made these observations, however, the learned Commissioner went on to consider the fact that an application had been made on 18.5.69 by the defendant moving the Court to revoke the writ issued in this case and to stay the writ pending inquiry into the application made. On the 19th the Court made order after calling the case : " Proctor for plaintiff takes notice of the application. Inquiry 26.6.69. Stay writ till then. " This order to stay writ, however, has not been communicated to the Fiscal who had previously received the order of Court to execute the writ. The learned Commissioner took the view that because the execution of the original writ took place after the order was made by the Court to stay execution until the application by the defendant was inquired into, the writ officer acted wrongly in executing the writ. In view of this circumstance, he held that no application would lie to the plaintiff under the provisions of Section 325 of the Civil Procedure Code. I think the learned Commissioner was in error in taking this view. Supposing, for instance, the order made by the Court on the 19th May 1969 to stay writ was not communicated to the Fiscal even till the 20th June 1969 when the matter of the recall of the writ was fixed for inquiry, the Fiscal would have been guilty of not complying with the original order of the Court to execute the writ and it was therefore the duty of the Fiscal to execute the writ at some time and to report to Court in view of the order made by Court on 30th March 1969 issuing writ of possession, unless an order staying execution was communicated to him. I think, therefore, that the Fiscal in ejecting the defendant and handing over possession to the plaintiff was only complying with an order of the Court properly issued to him. Thereafter, if the defendant desired any relief, it was his duty

to report the matter to Court and call for an inquiry and not to forcibly enter the house of which possession had been granted by the Fiscal only in due compliance with the order of the Court.

For these reasons, the order made by the learned Commissioner is, in my view, not justifiable. I accordingly set aside the order made by the learned Commissioner and make order that writ be issued ordering the Fiscal to eject the defendant and to hand over possession of the premises in question to the appellant. It is open to the defendant, of course, to make any representations he may wish to do, to the Court below which, no doubt, will inquire into them at the appropriate stage.

The appellant is entitled to the costs of this appeal.

Order set aside.