1972 *Present :* **Alles, J., and Wijayatilake, J.**

MAHANT SWAMY RAMAGIRI, Appellant, *and* H. V. KARONCHI-HAMY and another, Respondents

S. C. 3/1967 (F)—D. C. Badulla, 2536/L

Civil Procedure Code—Section 325—Execution of proprietary decree—Hindrance of judgment-creditor from " taking complete and effectual possession "—Quantum of evidence.

A writ of possession in favour of the petitioner-appellant in respect of about six acres of unfenced jungle land with a Kovil and a number of temporary sheds standing thereon was executed on 17th January 1964. He was delivered

possession of the buildings at about 4 p.m. that day. Immediately thereafter, at about 5 or 5.30 p.m., the 4th respondent, who was not a party to the action and had been warned by the Fiscal not to interfere with the petitioner's possession, forcibly broke open the locks of the doors and took forcible possession of the buildings and premises during the absence of the petitioner in circumstances when he was unable to take adequate steps to protect his possession. The petitioner filed the present application three days later under Section 325 of the Civil Procedure Code.

Held, that the petitioner was hindered from taking complete and effectual possession of the premises as contemplated in Section 325 of the Civil Procedure Code. In such a case the shortness of the interval between the delivery of possession and the disturbance of possession is important.

APPEAL from a judgment of the District Court, Badulla.

C. Ranganathan, *Q.C.*, with *N. E. Weerasooria* (Jnr.), for the plaintiff-petitioner-appellant.

A. C. Gooneratne, *Q.C.*, with *L. C. Seneviratne*, for the 4th defendant-respondent.

Cur. adv. vult.

January 21, 1972. ALLES, J.—

The plaintiff-petitioner-appellant (hereafter referred to as the petitioner) who is the Trustee of Sri Thevanai Amman Temple, Kataragama, filed an action in the District Court of Badulla against the 1st to the 3rd defendants-respondents for a declaration of title to Lots 1AB and 1AC described in the schedule to the plaint, and on 16th December 1963 obtained decree by consent against them. According to the terms of settlement (4D2) and the journal entry of 16th December 1963, judgment was entered for the petitioner as prayed for and the 3rd defendant agreed to hand over possession of all the lands and buildings that constituted the subject matter of the action to the petitioner in the presence of the Grama Sevaka, Kataragama, on 10th January 1964. She also undertook to have a temporary shed that was occupied by a Buddhist monk (the 4th respondent) demolished and peaceable possession handed to the petitioner. In the event of the 3rd respondent fulfilling her obligations under the consent decree she was entitled to a sum of Rs. 5,000, which the petitioner was to deposit in Court on or before 15th January 1964. The 3rd defendent failed to carry out her undertaking. The petitioner accordingly took out writ of possession against the defendants on 15th January 1964. The writ of possession was executed by the Fiscal on 17th January 1964 and the petitioner was purported to be placed in possession of Lots 1AB and 1AC with the buildings standing thereon at about 4 p.m. the same day. The petitioner's complaint is that immediately after he was placed in possession of the said Lots, the 4th respondent, who was not a party to the action, at about 5 or 5.30 p.m. the same day forcibly broke open the locks of the doors and took possession of the

said Lots and buildings and continues to remain in unlawful possession. It was the submission of Counsel for the petitioner that his client had been hindered from taking complete and effectual possession of the said Lots and buildings. The petitioner thereafter filed his petition under Section 325 of the Civil Procedure Code three days later, but the learned trial Judge, after inquiry, held on a preliminary issue of law, that the procedure available under Section 325 was not available to the petitioner. The petitioner appeals from this order.

The Lots in question consist of about 6 acres of jungle land, unfenced, bordering the Menik Ganga and on the Lots there was a Kovil and a number of temporary sheds thatched with cadjans. The Kovil consisted of a verandah and a shrine room with an asbestos roof and could be locked. This Kovil was situated about 4 miles from the main shrine at Kataragama and access was through dense jungle.

According to the petitioner he went with the Fiscal and a Police officer about 3 or 3.15 p.m. and obtained possession of the buildings. He could not go round the land because it was full of thorns. There was a pupil priest in occupation of the kovil and the belongings of the pupil priest and the 4th respondant were taken out of the kovil and the petitioner was given the keys. Poojas were performed in the shrine room and the petitioner locked the kovil and placed one Selliah in charge and left the premises about 4 or 4.30 p.m., as the petitioner and his party had to traverse through the jungle before darkness set in to reach Kataragama. About ¾ mile from the land the petitioner met the 4th respondent and the petitioner told the Fiscal to warn him not to create any disturbance as the premises had been handed to him by the Court. The petitioner however learnt, the same night, that the 4th respondent had forced open the doors of the kovil and taken forcible possession of the buildings and premises. That same night he made a complaint to the Kataragama Police and subsequently filed his petition under Section 325.

There is no dispute in regard to the facts and the main question that has been argued in the course of the appeal is one of law whether, in the circumstances of this case, the petitioner obtained complete and effectual possession of the said Lots and buildings within the meaning of Section 325. The order for the delivery of possession issued to the Fiscal directed him to place the petitioner in possession of the Lots and buildings described in the schedule to the order. The Fiscal's report was to the effect that he delivered possession of the Lots to the plaintiff and that he evicted the priest who was in occupation, put his belongings out of the building and thereafter gave possession of the Lots and buildings to the petitioner. Would the report of the Fiscal and the evidence led in the case be sufficient to indicate that the petitioner had taken "complete and effectual possession of the premises" ?

Section 325 of the Civil Procedure Code, in regard to resistance or obstruction to a judgment-creditor, contemplates two separate and distinct acts—the delivery of possession to the judgment-creditor by the

Fiscal and the hindrance by any person to the judgment-creditor taking complete and effectual possession. Our section differs from the corresponding section of the Indian Code (Order XXI, Rules 97 and 98) which gives the right to the judgment-creditor or the purchaser of property sold in execution of a decree to make an application in case of obstruction or resistance and enables the Court to give relief to the judgment-creditor, if the Court is satisfied that the obstruction or resistance was occasioned without just cause. Our law has contemplated a "complete and effectual possession" being taken by the judgment-creditor. The taking of "complete and effectual possession" must necessarily be more comprehensive than the mere taking of possession. Would for instance "complete and effectual possession" be satisfied if the Fiscal delivers possession, hands over the keys of the building to the judgment-creditor and soon after he leaves the premises, the judgment-creditor is forcibly dispossessed by any person who is lurking in the background and comes forward after the Fiscal has left ? Would the same position arise if after the Fiscal has delivered possession and the judgment-creditor proceeds to the neighbouring house to meet somebody, any person who has remained in concealment invades the house and dispossesses the judgment-creditor ? Again take the case of a large estate where it is not possible for the Fiscal to deliver possession of every part of the land except by giving symbolic possession of the keys of the factory or the superintendent's bungalow. Would the judgment-creditor take complete and effectual possession, when a person living on the boundary of the property enters the estate and continues to remain in occupation after the Fiscal has left the premises ? To permit this type of conduct on the part of the judgment-debtor or some person acting on his instigation would appear to amount to a mockery of the legal process. In this connection I am impressed by the observations of Lawrie, J. in *Menik v. Hamy*[1] (1892) 2 Ceylon Law Recorder 145 ; 1 S.C.R. 332, where there was resistance to the execution of a proprietary decree and the judgment-creditor was subsequently dispossessed :—

> "My inclination is to extend the powers of our Courts to enforce their decrees and when the obedience shown to the order of a Court is proved by the subsequent conduct of the party, to have been a pretended and not a real obedience, I would reissue the writ. When, for instance, a man against whom a decree in ejectment was given, makes no appearance on the day when the Fiscal Officer goes to put the successful man in possession, but afterwards resumes the possession in defiance of the decree, I am much inclined to the opinion that a Court ought to have power to compel complete obedience to its decree, and on due proof of dispossession that a fresh writ of possession ought to issue."

[1] *(1892) 2 C. L. Rec. 145 ; 1 S. C. R. 332.*

Would there be any difference between the example given by Lawrie J. and the facts of this case where the 4th respondent was informed soon after the delivery of possession that possession had been lawfully given to the judgment-creditor but the 4th respondent in defiance of the law forcibly retook possession ? In *Menik v. Hamy* the disturbance to the judgment-creditor's possession was several weeks after the judgment-creditor was placed in possession and both Lawrie and Withers JJ. held that the judgment-creditor was not entitled to proceed under Sections 325 and 326. Both Judges, however, were inclined to take the view that had the hindrance been shortly after possession was delivered, the judgment-creditor would have been entitled to relief. Said Withers J. :—

> " What is meant by 'taking' possession of a thing after it has been 'delivered' is not quite apparent, but anyhow I think the attempt to take complete and effectual possession of that which has been but imperfectly delivered to the execution-creditor (a state of things I repeat not very intelligible) should follow as instantly upon the so-called delivery *as the circumstances of the case will permit*, and that the hindrance is contemplated as occurring at that time and not at any time after the delivery of possession. Taking cannot mean keeping possession....."

and Lawrie J. expressed himself in the following language :—

> " In cases where the decree holder is ejected soon after the Fiscal has put him in possession he might, I think, complain to the Fiscal in order that his complaint might be reported to the Court in the return, but when, as in the present case, the disturbance or ejectment complained of occurred several weeks after the plaintiff was put in possession, the only remedy may be the very insufficient one of a new action. I am inclined to treat with disfavour any rule of practice which renders judgments of Courts ineffectual."

The principle accepted in *Menik v. Hamy* that the hindrance to the taking of complete and effectual possession, contemplated by Section 325 is a hindrance which takes place in connection with or immediately after delivery of possession by the Fiscal was followed by Bertram C.J. with whom De Sampayo J. agreed in *Kumarihamy v. Banda*[1] (1922) 1 Ceylon Recorder 53 and by Schneider J. in *Mohomado Lebbe v. Ahamado Ali*[2] (1922) 23 N. L. R. 406. In both these cases however the judgment-creditor did not obtain relief because the judgment-creditor came into Court long after possession was delivered and consequently it was not open to him, in the circumstances, to maintain that he had not taken complete and effectual possession. It would therefore appear from a consideration of the early cases that the vital question that arises for determination, as to whether the provisions of Section 325 apply, depends on the circumstances of each individual case whether complete and effectual possession was taken by the judgment creditor. The time element

[1] *(1922) 1 C. L. Rec. 53.* [2] *(1922) 23 N. L. R. 406.*

between the delivery of possession and the taking of possession is of importance but is not necessarily conclusive. In *Pereira v. Aboothahir* [1] (1935) 37 N. L. R. 163 the petitioner was placed in complete and effectual possession of every part of the premises after ejecting the judgment-debtor therefrom. The door was then locked and the key was handed by the Fiscal to the petitioner and the judgment-creditor accepted that complete and effectual possession had been given to him. The petitioner then elected to take the key and leave the house. About two hours later the judgment-debtor returned and succeeded in re-entering the house and getting into occupation. Garvin S.P.J. with whom Maartensz A.J. agreed held that where a person has been given complete and effectual possession of the premises by the Fiscal, the remedy under Section 325 was not open to him in respect of a subsequent interruption of possession. Said Garvin S.P.J. in the course of his judgment :—

> " The language (of Section 325) 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."

With respect, I am in agreement with the observations of Garvin S.P.J. in the above case. The premises, bearing Assessment No. 900A situated at Lower Srteet, Badulla, were seized and sold and it was clear on the evidence that the judgment-creditor had taken complete and effectual possession of every part of the premises before he was dispossessed. Koch J. in *De Silva v. Bastian* [2] (1936) 15 Ceylon Law Recorder 237 seemed to think that the above pronouncement was in conflict with the views expressed by the Judges in the earlier cases but this need not necessarily be the case because the facts in the earlier cases can be distinguished from the facts in *Pereira v. Aboothahir* (supra.) In the present case, even if it can be argued that possession of the Kovil was taken by the petitioner, I do not think it is possible to maintain that he took complete and effectual possession of the Lots in question. It is pertinent at this stage to draw attention to the observations of De Sampayo J. in *Suppramaniam Chetty v. Jayawardena* [3] (1922) 24 N.L.R. 50 where that distinguished Judge held that in giving relief to a party seeking to obtain effectual possession, the District Court should not take a narrow view of its duty and power, and whatever the form of the application (i.e., whether it be under Section 325 or 287 of the Code) if it reasonably makes clear the position of the applicant, the Court is entitled to cause

[1] *(1935) 37 N. L. R. 163.* [2] *(1936) 15 C. L. Rec. 237.*

[3] *(1922) 24 N. L. R. 50.*

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 and this view has been accepted by Garvin J. in *Sedera v. Babahamy* [1] (1923) 1 Times Law Reports 259 at 260. In *De Silva v. Bastian* [2] (1936) 38 N.L.R. 277 the judgment-creditor was turned out within half an hour of being put in possession by the judgment-debtors who were waiting outside the boundary wall until the fiscal's officer took his departure. Koch J. with whom Soertsz J. agreed, approved of the observations of De Sampayo J. in *Suppramaniam Chetty v. Jayawardene* (supra) and gave relief under Section 287 of the Code as the application under Section 325 failed *in limine* having been made out of time. In giving relief to the judgment-creditor in *De Silva v. Bastian* the learned Judges took an eminently reasonable view. As Koch J. remarked in that case :—

> "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."

Would the position be any different, if after possession is delivered, the judgment-debtor or someone claiming through him, is warned that possession has been lawfully delivered but in defiance of the law forcibly retakes possession ? De Sampayo J. expressed himself in stronger language in the earlier Full Bench case of *Silva v. De Mel* (1915) which held that Section 328 and the preceding sections applied not only to cases of dispossession in execution of proprietary decrees, but to orders for delivery of possession under Section 287 as well. In that case De Sampayo J. stated as follows :—

> "I think that by the second paragraph of Section 287, which provides for the enforcement of an order for delivery of possession to an execution-purchaser, the relevant provisions to the Code relating to enforcement of a decree for possession, including those of section 328, are made applicable. I am of this opinion all the more, because the whole scheme of the Procedure Code is to provide speedy and inexpensive remedies, and it appears to me only reasonable to allow disputes arising from the execution of an order for possession in favour of a purchaser at a Fiscal's sale to be inquired into and settled by the means provided in section 328 instead of driving parties to a separate action."

If these observations had been brought to the notice of the learned trial Judge in this case, he might have given relief to the judgment-creditor and entertained his application under Section 325.

[1] *(1923) 1 Times 259 at 260.* [2] *(1936) 38 N. L. R. 277.*

In *Nagamuttu v. Kumarasegaram*[1] (1960) 64 N.L.R. 214 Weerasooriya J. sitting single, followed the decision in *Pereira v. Aboothahir* (supra) in a case where the judgment-creditor after being given complete and effectual possession was dispossessed two days later. In both the above cases the evidence would seem to indicate that, although the dispossession was within a very short time, complete and effectual possession had been taken by the judgment-creditor. Learned Counsel for the 4th respondent relied strongly on the decision of Basnayake C.J. in *Rahamath Umma v. Abdul Sameem*[2] (1960) 63 N.L.R. 1. The petitioner in that case prayed that they be declared entitled to an allotment of land in extent 15 cubits in length, 20 cubits in width with a tiled house from and out of a divided portion of a larger land. The petitioner's application had to fail *in limine* because the learned Chief Justice found that the Fiscal was authorised to execute a writ which was not in terms of the decree and was not authorised by it. The officer charged with the execution of the writ did not say that he was resisted or obstructed by any person nor was there any evidence that after the officer delivered possession, the judgment-creditor was hindered by any person in taking complete and effectual possession, although if it was done it would have been legitimate, as the Fiscal's action in ejecting the defendants from the land was illegal. The dispossession took place 2½ hours after the judgment-creditor had been purported to be placed in possession but the time element in any event would have been immaterial since the writ was not in terms of the decree. The learned Chief Justice then considers the effect of the words "complete and effectual possession" in Section 325 of the Code and states as follows, at p. 6 :—

> "In the case of execution of decrees for possession of immovable property the Fiscal is required to repair to the ground and there deliver over possession of the property described in the writ to the judgment-creditor or to some person appointed by him to receive delivery on his behalf. Two acts are contemplated; delivery over of possession and receiving or taking of possession. *Both acts are symbolic as the thing itself in the case of immovable property cannot as in the case of movable property be handed over to the recipient.* The act of delivery of possession falls to be performed by the Fiscal, and the act of taking of possession by the judgment-creditor or his agent. The section is designed to prevent the Fiscal from being resisted or obstructed in the performance of his function and the judgment-creditor from being hindered from performing his. *These acts though performed by two parties are interdependent and by their very nature must take place at the same time.* There can be no delivery of possession by the Fiscal without the judgment-creditor receiving or taking possession. The mode of delivery and the mode of taking delivery vary with the circumstances of each case and it will be unwise to endeavour to specify the different modes of such delivery or of taking possession."

[1] *(1960) 64 N. L. R. 214.* [2] *(1960) 63 N. L. R. 1.*

These observations of the learned Chief Justice, though entitled to the greatest respect appear to me to be *obiter* because the applications could have been decided on the preliminary point that the writ was not in conformity with the decree. Furthermore it appears to me that it does not necessarily follow that both " the delivery over of possession and receiving or taking of possession " are acts that are " symbolic " or that " these acts though performed by two parties.....by their very nature must place at the same time." To give this construction to the words of the section does not appear to give proper effect to the words " complete and effectual possession ". While I agree that the act of delivery of possession of immovable property must be symbolic it does not necessarily follow that the taking of such property need be symbolic. The words "complete and effectual possession" connote that the judgment-creditor must be able to have complete control over every part of the property, possession of which is delivered to him. This cannot be done in the case of immovable property which consists of both land and buildings by merely handing over the keys of the building. If this be the construction that should be placed on these words the door will surely be open to the abuses referred to in the earlier part of this judgment and make the provisions of the law ineffectual. In *Gunaratne v. A. J. M. de Silva,*[1] 58 N.L.R. 542 writ of possession was issued on 21st September but was returned by the Fiscal with a report that the tenant was not in occupation and that the persons in occupation were Gunaratne and others. The Court thereupon ordered constructive possession to be delivered under Section 324 of the Code and *possession was delivered* accordingly. On 26th November the plaintiff went to the premises with his Proctor for the purpose of taking effectual possession but was obstructed by some persons one of whom was Gunaratne. Thereafter on 7th December (within one month of the alleged obstruction) the plaintiff applied for an order ejecting all persons in occupation and the Court granted an interlocutory order presumably in pursuance of Section 377 (*b*) read with Section 325. The present Chief Justice dealt with the appeal of Gunaratne against the order of the Court and rejected it. One of the arguments on behalf of the appellant was that the application should have been made within one month of the date of the constructive possession but the Chief Justice held that the complaint was of hindrance *after* the date of the constructive delivery and fell to be made within one month of the hindrance. The complaint was not one of obstruction or resistance to the Fiscal's officer but of hindrance to the plaintiff in obtaining effectual possession. The facts therefore would indicate that it does not necessarily follow that in an application under Section 325 the act of delivery by the Fiscal and the act of taking complete and effectual possession by the judgment-creditor should

[1] *(1957) 58 N. L. R. 542.*

"by their very nature take place at the same time". In this context the averment in the affidavit of the petitioner that he obtained possession of Lots 1AB and 1AC together with the buildings thereon from the Fiscal —an averment which has been strongly stressed by the learned District Judge—is *per se* not conclusive that complete and effectual possession *had been taken over* by the judgment-creditor.

In my view, if substantial justice has to be achieved and the process of the law not made ineffective, it is essential that the Court must examine the realities of the application and consider on the facts of each case whether complete and effectual possession has been taken by the judgment creditor. In the present case, I am of the view that the petitioner was hindered from taking complete and effectual possession of the premises and buildings described in the writ of possession. He had only a limited time to take possession because he had to get back to Kataragama before darkness set in ; it was not possible for him to traverse the entirety of the jungle area which was unfenced and take possession of the Lots , he was unable to take adequate steps to protect his possession and the 4th respondent after being warned, presumably not to interfere with the petitioner's possession, chose to flout the law and render the legal process nugatory. For the above reasons I hold that the petitioner was hindered from taking complete and effectual possession of the premises as contemplated in Section 325. The order of the learned District Judge is therefore set aside.

The District Judge in the concluding paragraph of his order has stated that in view of the conclusion reached by him on the legal objections raised by the 4th respondent, it was not necessary to consider the 4th respondent's claim to bona fide possession of the property.

I accordingly direct him to entertain this application and in accordance with the procedure set out in Section 325 *et seq.* of the Civil Procedure Code consider the 4th respondent's claim to bona fide possession of the property and thereafter make an appropriate order.

Since the petitioner has been dispossessed of his property from 1964, it is hoped that these proceedings will be concluded as expeditiously as possible. The petitioner will be entitled to the costs in appeal and in the Court below.

WIJAYATILAKE, J.—I agree.

Order set aside.