

1961

Present : Weerasooriya, J.

K. P. SOMAWATHIE, Petitioner, and B. M. COORAY, Respondent

*S. C. 406—Application in Revision in C. R. Colombo, 74824*

*Execution of proprietary decree—Resistance occasioned by a person other than judgment-debtor—Order of Court directing judgment-creditor to be put in possession—Remedies of aggrieved party—Power of Court to order judgment-creditor to give security pending subsequent action—Right of appeal—Revision—Civil Procedure Code, ss. 325, 326, 327, 327A.*

The revisionary powers of the Supreme Court may be invoked in a case where, in consequence of resistance by a person other than the judgment-debtor to the execution of a proprietary decree, an order is made by Court under section 327A of the Civil Procedure Code against the person resisting.

The power given to the Court under section 327A to make an order that the judgment-creditor be put in possession includes a power to impose such terms as the Court may think fit in regard to the giving of security by the judgment-creditor for the due performance of the decree which would be entered in the action filed in terms of that section by the party against whom the order is passed.

*Quære*, whether there is a right of appeal from an order made under section 327A of the Civil Procedure Code.

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

*T. Nadarajah*, for the petitioner.

*S. Sharvananda*, with *M. T. M. Sivardeen*, for the respondent.

*Cur. adv. vult.*

October 11, 1961. WEERASOORIYA, J.—

The respondent to this application filed C. R. Colombo Case No. 74824 against one Mahadevan for the recovery of arrears of rent in respect of certain premises of which the latter was said to be the tenant, for his ejection therefrom and damages. The petitioner was at the time married to Mahadevan and living in the same premises. Mahadevan and the petitioner fell out and Mahadevan left the premises. The petitioner then instituted proceedings against Mahadevan for a divorce on the ground of malicious desertion, and eventually obtained a decree in her favour.

On the 24th April, 1961, while the divorce proceedings were pending, Mahadevan consented to judgment being entered against him as prayed for in C. R. Case No. 74824. On the 8th May, 1961, writ for delivery of possession of the premises issued to the fiscal, but according to a petition subsequently filed by the respondent under section 325 of the Civil Procedure Code he complained that the writ could not be executed because of resistance offered to the fiscal's officer by the petitioner and three others, and he moved that they be dealt with under sections 326, 327 and 327A of the Code. The position taken up by the petitioner at the inquiry into the respondent's complaint was that from about October, 1959, she was accepted as the tenant of the premises by the respondent, that she had been paying rent to him on that basis thereafter and is entitled to remain in possession. This plea was rejected by the learned Commissioner of Requests. He held that the resistance offered by the petitioner and the three others was frivolous and vexatious and directed that writ should issue against all of them under section 327A. This order was made on the 25th August, 1961. On the same day the petitioner filed the present application to have that order revised and for stay of execution of the writ. On the 29th August, 1961, she also filed action No. 9610L in the District Court of Colombo, in terms of section 327A, to establish her right to the possession of the premises.

Section 327A, which was introduced by the Civil Procedure Code (Amendment) Act, No. 7 of 1949, provides as follows :—

“ If the resistance or obstruction was occasioned by a person other than the judgment-debtor and the Court finds that the claim of such person to be in possession of the property, whether on his own account or on account of some person other than the judgment-debtor is frivolous or vexatious, the Court may by order direct the judgment-creditor to be put in possession of the property :

The person against whom such order is passed may within one month institute an action to establish the right which he claims to the possession of the property, but subject to the result of such action, if any, the order shall be final."

Mr. Sharvananda who appeared for the respondent, in taking objection to this application being entertained, submitted that the only remedy open to a person against whom an order under section 327A has been made is to file an action to establish the right which he claims to the possession of the property, as provided in the second paragraph of that section. If Mr. Sharvananda is right in his submission, even though the petitioner may have a prima facie valid claim as tenant to be in possession of the premises, and the case should have been dealt with as one falling under section 327 of the Civil Procedure Code, and not under section 327A, she has no right of appeal from the order of the Commissioner which, if given effect to, will result in her being forthwith ejected from the premises and the respondent being placed in possession.

Mr. Sharvananda relied on the judgment of my brother H. N. G. Fernando in *Gunaratne v. de Silva*<sup>1</sup> where he held that no appeal lies against an order made under section 327A. In the case of *Arlis Appuhamy et al. v. Siman*<sup>2</sup> an order under section 330 (1) of the Civil Procedure Code was held by Dias, J., to be an appealable order. Section 330 (2) is in terms similar to the terms of the second paragraph of section 327A in that it enables a party against whom an order under section 330 (1) has been made to institute an action within one month to establish the right which he claims to the possession of the property, and subject to the result of such action, the order is declared to be final. The decisions in these two cases do not appear to be reconcilable.

The question whether an appeal lies from an order under section 327A does not, however, arise for decision by me in the present application, in which the revisionary powers of the Supreme Court are being invoked with a view to obtaining relief from the order of the Commissioner. It may be that the petitioner was advised to make this application on the basis that she had no right of appeal from an order under section 327A, as decided in *Gunaratne v. de Silva (supra)*. But even if that decision is correct, I do not think that the provisions of section 327A in any way affect or limit the powers of this Court to revise such an order. I would, therefore, hold that the present application is one that may be entertained. But as regards the merits, although the petitioner alleged that she was accepted as the tenant of the premises by the respondent from about October, 1959, she has no document which supports her on the point. Moreover, she admitted that all rent receipts issued thereafter continued to be in the name of Mahadevan. It seems to me, therefore, that the learned Commissioner was justified in dealing with the case as one falling under section 327A. The power given to the court under that section to make an order that the judgment-creditor be put in possession includes, in my opinion, a power to impose such terms as the

<sup>1</sup> (1957) 58 N. L. R. 542.

<sup>2</sup> (1947) 48 N. L. R. 298.

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court may think fit in regard to the giving of security by the judgment-creditor for the due performance of the decree entered in the action filed in terms of that section by the party against whom the order is passed. I accordingly direct that before the respondent is put in possession of the premises he should give security in such sum as may be determined by the Commissioner of Requests for the due performance of any decree (subject to appeal) which may be entered against him in D. C. Colombo Case No. 9610L. Subject to this variation of the order passed by the Commissioner under section 327A, the application is dismissed.

I make no order as to costs.

*Application dismissed.*

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