

1927.*Present:* Lyall Grant J. and Drieberg A.J.VANDERPORTEN *v.* AMERESEKERE.

210—D. C. (Inty.) Colombo, 18,277.

Execution—Delivery of possession—Investigation of title—Civil Procedure Code, ss. 325 to 327.

An investigation under the provisions of section 327 of the Civil Procedure Code is not limited to the determination of the right of possession.

Questions of title arising between the parties in connection with their right of possession may be determined in such an investigation.

*Fernando v. Fernando*¹ considered.

A PPEAL from a judgment of the District Judge of Colombo.

The plaintiff instituted action No. 18,277 against Don Daniel Warusaperuma for declaration of title to Muruthagaspiya estate and for ejection and damages. The defendant claimed a block of 40 acres and stated that 65 acres were in the possession of the respondent. After some contest the defendant abandoned his claim and judgment went against him.

When the plaintiff sought to execute his decree he was resisted by the respondent. The plaintiff thereupon presented a petition, under the provisions of section 325 of the Civil Procedure Code, for ejection of the respondent. The respondent filed an affidavit in which he set out the grounds upon which he relied in support of his claim to retain possession against the plaintiff.

The District Judge made order under section 327 of the Code that the petition of the plaintiff be numbered as a separate action and that the respondent should file an answer. After inquiry

¹ (1923) 24 N. L. R. 502.

the learned District Judge held that the question before the Court was one of possession and not ownership and that the plaintiff was not entitled to succeed.

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Hayley, for appellant.

H. V. Perera, for respondent.

May 12, 1927. DRIEBERG A.J.—

The plaintiff brought action No. 18,277 against Don Daniel Warusaperuma for declaration of title to Muruthagaspiyiya estate and for ejectment and for damages.

Muruthagaspiyiya estate is described in the plaint as 102 acres and 7 perches "according to the survey and description thereof." It is not stated what this plan is. The survey referred to is that attached and referred to in the conveyance No. 100 of November 3, 1921, issued to the plaintiff when he bought the estate at the sale held under the mortgage decree in D. C. Colombo, 1,615, which the plaintiff obtained against the present respondent and his wife.

The entirety of Muruthagaspiyiya is said to have been included in the mortgage, but for the purpose of the survey it was recast into five blocks as follows: Lot A of 33 acres 2 roods and 9 perches; lot B of 2 acres and 39 perches; lot C of 34 acres 2 roods and 10 perches; lot D of 5 acres 3 roods and 26 perches; these amount in the aggregate to 76 acres 1 rood and 4 perches. The survey including one other block in extent 26 acres 3 roods and 30 perches which is not lettered; this brings up the entire extent to 103 acres and 34 perches, which is a little in excess of the extent claimed in the plaint.

The conveyance No. 100 described the subject of it as Muruthagaspiyiya estate consisting of the four allotments A, B, C, and D appearing in the plan No. 1,157.

The unlettered lot of 26 acres 3 roods and 30 perches was not included, and the plaintiff acquired no title to it under that conveyance.

The defendant's answer, so far as it is relevant to this appeal, was a claim to 40 acres, and he said that 65 acres were in the possession of the respondent.

After some contest the defendant seems to have abandoned his claim and judgment was entered against him; by this time the difficulty arising from the conveyance, not including the lot of 26 acres 3 roods and 30 perches, had come to the notice of the Court, but the learned Judge held that as the defendant had no right to any part of the land, and as the block was included in the mortgage and had been in fact sold and bought by the plaintiff,

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When the plaintiff sought to execute his writ of possession consequent on this decree he was resisted by the respondent, who, he alleged, was acting in collusion with the defendant. The plaintiff then presented a petition, under the provisions of section 325 of the Civil Procedure Code, asking for the relief provided by sections 326 and 327 for the ejectment of the respondent and the defendant and that he be placed in quiet possession of the land.

The respondent filed an affidavit in which he set out many matters on which he relied in support of the claim to retain possession against the plaintiff; it is not necessary to refer to this, as the respondent is for the purpose of this appeal limited to the matters of defence set up later in his answer.

After consideration of the plaintiff's petition and the affidavit of the respondent and the defendant, the Court made order under section 327 that the petition of the plaintiff be numbered 18,277A as in a separate action, that the respondent should file his answer or statement, and fixed a date for the trial of the action; the application was not pressed against the defendant, and he was discharged. The respondent in his answer relied on the following grounds for his defence:—

- (1) That the Court had no jurisdiction.
- (2) That the decree in action No. 13,155 of the District Court of Colombo was a bar to this action.
- (3) That the plaintiff in D. C. Colombo, 1,615, the mortgage action, had made a fraudulent attempt to obtain possession, and that his application for that purpose had been refused.
- (4) That D. C. 18,277 was instituted against Warusaperuma, who was not in possession, with the object of ousting the respondent in execution of the decree against Warusaperuma, knowing that the respondent was in possession of the land in his own right.

No issues were framed at the trial. The plaintiff put in evidence the mortgage bond by the respondent and his wife, the plaint in the mortgage action and the conveyance No. 100 of November 3, 1921, the plaint answer and decree in D. C. Colombo, 18,227, also the agreement No. 400 of February 3, 1923, used in the D. C. Colombo, 13,155, together with the proceedings in that case.

This evidence was sufficient to prove that the respondent's title to the four blocks of Muruthagaspitiya had passed to the plaintiff, and with it the right to the possession of these blocks against the respondent.

The plaintiff then closed his case, reserving the right to lead evidence in rebuttal:

I omit at this stage reference to the unlettered block of 26 acres 3 roods and 20 perches, the position regarding this being different.

The respondent read in evidence the deposition of the plaintiff in case No. 18,277, and relied upon certain cases, to which I shall refer later, in support of his contention that the only question in the case was one of possession.

If the question before the Court was the conflicting claims of the plaintiff and the respondent to the right to possess these blocks the plaintiff was entitled to succeed, for the respondent showed no reason why the right to possession did not pass to the plaintiff with the title to the land.

The learned District Judge held that the question before the Court was one not of ownership but of possession only, and that as it was proved that the respondent was in possession and holding the property against the plaintiff he was entitled to succeed. He regarded the ruling in *Fernando v. Fernando (supra)* as an authoritative decision that the question in this case was one of possession only, and not a question of conflicting rights to possession to be decided by the test of title.

He dismissed the action of the plaintiff, with costs, and the plaintiff has appealed.

In my opinion the learned District Judge has not correctly understood this judgment. The point for decision in that case was this: The plaintiff under a decree of a Court of Requests seized land which was over Rs. 300 in value. There was resistance to the writ of possession, and an action under section 327 followed; objection to the jurisdiction of the Court to hear this action was raised, it being contended on the authority of the case of *Tama' ji v. Raghu*¹ that the investigation under section 327 was merely a continuation of the action in which writ issued and should be regarded as a step in execution of the decree; it was held that this was not so, and that for the purpose of jurisdiction an investigation under section 327 should be regarded as a fresh suit.

The view of the learned District Judge and the argument in appeal based on the following passage in the judgment of Schneider J. :—

“The decree sought to be executed is a decree only for possession of immovable property. Accordingly the claim for its execution should rightly be confined to the limits of the question of possession.”

That the question is one of possession is correct, in the sense that the Court makes no declaration of title in plaintiff or claimant, but merely passes an order for executing or staying execution of

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¹ (1879) 4 Bom. 123.

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the decree, that is to say, it orders the ejection of the claimant or allows him to remain in possession; but it reaches the objective by deciding whether the claimant has the right to retain possession or whether he has no right to retain possession against the plaintiff.

Schneider J. has pointed out the change in the law in India by which the scope of this action has widened from one of the nature of a possessory suit to an investigation in which "any question of title arising between the contesting parties in connection with their right of possession may now be finally determined in such investigation as in an ordinary action for ejection"—these words are from the judgment of Birdwood J. in *Moula Khan v. Gori Khan*,¹ and in the same case Jardine J. referring to section 331 of the Act of 1882, which is the same as sections 327 and 329 of our Code, said: "In these words I can see no indication that the Legislature intended to confine the plaintiff to any particular pleading or proof or to restrict him from showing any right superior to that of the defendant which he might wish to allege. It is apparently vexatious to require two suits to be brought between the same parties when the real question at issue between them might be determinable at one trial."

This has been followed among other cases in *Babojirao and another v. Fatesing Shahaji Bhosle*,² *Mancharam v. Fakirchand*,³ and *Mahip Rai v. Dwarka Rai*.⁴

The same view of the scope of the investigation under section 327 has been adopted in the local cases. See in particular the case of *Abubaker Lebbe v. Ismail Lebbe and another*⁵ and also *Perera v. Brampy*,⁶ *Domingu v. Sandarasakera*,⁷ *Lebbe v. Aponsu*.⁸

Mr. H. V. Perera sought to support this contention by two cases, in which it was held that in the case of the investigation under section 328 the only question is the "right to possession," or, as Withers J. expressed it, the right to immediate possession; these cases are *Rosanahamy v. Diago*⁹ and *Ratnaike v. Rodrigo*,¹⁰ where it was held that the question was whether the claimant is entitled to be restored to possession and that the question of title should not be gone into.

It is not necessary for the purpose of this appeal to consider these decisions, but I may state that the right of the claimant in an investigation under section 327 to retain possession and the right of a claimant in an investigation under section 328 to be restored to possession may well be determined on different grounds; in the former case the claimant is given an opportunity of showing why he should not be dispossessed by process of law—

¹ (1890) I. L. R. 14 Bom. 627.² (1896) I. L. R. 22 Bom. 967.³ (1901) I. L. R. 25 Bom. 478.⁴ (1905) I. L. R. 27 All. 453.⁵ (1908) 11 N. L. R. 309.⁶ (1896) 2 N. L. R. 121.⁷ (1892) 2 C. L. R. 108.⁸ (1909) 1 Cur. L. R. 197.⁹ (1898) 3 N. L. R. 203.¹⁰ (1913) 1 Bal. N. C. 68.

and in the latter case he seeks to be restored to a possession of which he had been deprived by process of law not directed against him; in a possessory action a person ejected otherwise than by due process of law is entitled in certain circumstances to be restored to possession as against the rightful owner who has ousted him. I am, therefore, of opinion that as regards the lots A, B, C, and D the plaintiff has proved his right to possession against the respondent, and it only remains to consider whether he is barred from proving his right in this action by the decree in D. C. Colombo, 13,155.

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This action was brought by the plaintiff and Mr. A. C. Abeywardena, a proctor, against the defendant on an agreement No. 400 of February 22, 1923. By this agreement the plaintiff after his purchase of the mortgage properties gave possession of them to Mr. Abeywardena, who agreed to buy them within five years, making payment by instalments during that period. This was no doubt a plan to enable the respondent to buy back the properties, and Mr. Abeywardena placed the respondent in possession on the understanding that he should be accountable to him for the income.

The respondent failed to account to Mr. Abeywardena for the income, and the instalments of price payable under the agreement were consequently not paid by Mr. Abeywardena to the plaintiff.

The plaintiff and Mr. Abeywardena then filed action No. 13,155 against the respondent; Mr. Abeywardena pleaded that plaintiff had rightly terminated the agreement owing to his default in payment, but that he was unable to give him possession as the respondent unlawfully retained possession. The cause of action alleged was Mr. Abeywardena's right to have the respondent ejected.

Judgment was entered for the plaintiff, and the present plaintiff ultimately got possession of the land claimed. For some reason however no part of Muruthagaspitiya estate was claimed in that action, though it is said that possession of it was given under the agreement No. 400.

The respondent claims that as the plaintiff in suing for what the respondent says was a breach of the agreement No. 400 omitted to claim relief in respect of Muruthagaspitiya estate, he is now barred by the provisions of section 34 of the Civil Procedure Code from maintaining this action for the estate.

It is a sufficient answer to this objection that the action No. 13,155 was not brought so far as the respondent was concerned on the agreement No. 400. He was treated as a trespasser, who prevented Mr. Abeywardena from carrying out his obligations under the agreement. The agreement may have been made for his benefit, but he was no party to it, and it cannot be said that this action is one arising out of the breach of agreement.

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The plaintiff is therefore entitled to the possession of the blocks A, B, C, and D, and the plaintiff is entitled to execute his decree against the respondent for them.

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The position of the plaintiff as regards the block of 26 acres and 8 roods is different. The title to this block has not passed to the plaintiff. The plaintiff claims that this lot was mortgaged to him, that in fact it was sold, and that at one time he had possession of it, and that he is entitled to have the conveyance rectified by its inclusion.

I set aside the order of the learned District Judge, and order that the decree for possession be executed against the respondent for the lots A, B, C, and D in the plan No. 1,157 market P1.

The plaintiff is allowed, after obtaining a rectification of the conveyance, to have the question of his right to possession of the 26 acres 2 roods and 30 perches lot decided in this action, and for this purpose the petitioner is allowed leave to amend his petition and the respondent to amend his answer if so advised.

The appellants are entitled to the costs of the trial and of this appeal.

LYALL GRANT J.—I agree.

Appeal allowed.

