1944 *Present:* **Soertsz and de Kretser JJ.**

SIRIPINA, Appellant, *and* EKANAIKA; Respondent.

*6—D. C. Kandy, 1,060.*

*Writ of possession—Decree for possession by lessor against lessee—Application for writ of possession against sub-lessee—Civil Procedure Code, s. 325.*

**Where a lessor has obtained a decree for possession against a lessee he is not entitled to invoke the provisions of sections 325 and 326 of the Civil Procedure Code against a sub-lessee holding with the consent of the lessor or his representative.**

APPEAL from a judgment of the District Judge of Kandy.

*E. B. Wikremanayake* (with him *H. W. Jayawardene*), for defendant, appellant.

*N. E. Weerasooria, K.C.* (with him *S. R. Wijayatilake*), for plaintiff, respondent.

*Cur. adv. vult.*

August 9, 1944. DE KRETSER J.—

The plaintiff, claiming to be the duly appointed trustee of the Hudumpola Vihare, sued Siripina alias Ceciliahamy alleging that she was the executrix *de son tort* of the estate of one Kira to whom a previous trustee had leased certain premises upon Indenture No. 830 dated June 4, 1935, for a period of 10 years commencing from January 1, 1935. Neither the lease nor a copy of it was annexed to the plaint. The defendant appeared and consented to the lease being cancelled, damages and costs were waived and writ of ejectment was to issue on October 31, 1942, 16 days after the consent to judgment. On February 24, 1943, the Proctors for the plaintiff moved for a writ of ejectment and a writ of possession. The Fiscal reported that he could not deliver possession as the doors of the goat shed standing on the land were closed and as one Veda Manikka Nadar claimed the shed as having been put up by him.

Section 325 of the Civil Procedure Code indicates the procedure to be followed on such a return being made by the Fiscal. The plaintiff, however, did not present a petition in the manner described in that section, but he swore an affidavit making certain allegations, and his Proctors filed a motion with the affidavit praying that the Fiscal be directed to break open the doors of the goat shed and deliver possession. The Court did not make an order under section 377 (*b*) as required by section 325,

but ordered notice on Veda Manikka Nadar. He appeared and filed a statement of objections, alleging that the plaintiff's predecessor in title had consented and acquiesced in the erection of certain buildings on the land by the party noticed and another, and that he was not a party to the action in which the decree was entered. He also took exception to the form of the application. When the matter came up for inquiry, the Judge does not seem to have had his attention directed either to section 325 or section 326 of the Civil Procedure Code. He heard some evidence and made an order stating that he was not going to inquire either into the question of the ownership of the goat shed or whether the party noticed had the right of *jus retentionis*, because the party noticed had only an informal lease from Kira and being a sub-lessee, was bound by the decree cancelling the lease. I have stated enough to show the plaintiff's application must fail both because he has failed to comply with section 325 regarding the form of his application and section 326 regarding the matters which he had to prove at the inquiry.

Under section 326, before the Court can direct that the judgment-creditor be put in possession, it must be satisfied that the resistance complained of was occasioned by the judgment-debtor or by some person at his instigation. Far from these facts being proved, the evidence shows that Kira and the incumbent of the temple gave a lease in 1926 on document XI for a period of 5 years to the party noticed empowering him to erect a house thereon (if he thinks necessary) and requiring him to pay all taxes and rates. It also provided for a renewal of the lease. This document was not notarially executed but it was not, therefore, devoid of all value. It could at least operate as a tenancy at will or, rather, as a monthly tenancy. The buildings were erected and the erection was expressly sanctioned. Besides, the lessor could hardly have been ignorant of their existence. The party noticed was, therefore, not only a tenant, but he was a tenant let in with the consent of the lessor or his representative, and he had, besides his rights as a tenant, the rights of an improver. The tenancy was extended and there is at least another document (X 2 of 1937) which is called " Lease Deed No. 830 " extending the tenancy. No. 830, it will be remembered, is the number of the lease referred to in the plaint.

The only other document is a document marked Z 1 produced by the plaintiff showing that in 1932 Kira consented to the cancellation of the lease bearing No. 27,873 of June 18, 1931, also for a term of 10 years and also commencing on January 1, 1935. If the plaint be correct in its allegations, a fresh lease was entered into in 1935 from January 1, for a period of 10 years. What happened between 1932 and 1935 has not been disclosed.

Mr. Weerasooria argued that the appellant was a sub-lessee and as such, was bound by the decree against the lessee and he quoted extracts from Indian cases from commentaries (the full reports not being available) in support. These do not go beyond saying that a sub-lessee who has not a title independent of his lessee is bound by the decree. One can conceive of a tenancy where the lessee of a house or of a set of rooms lets in some person into one room—such a person would be more or less his dependant. The term " sub-lessee " must not mislead. It may mean that the lessee

assigns all *his* rights on the lease. In that case the second lessee comes after the first lessee and derives his title through him, but what he has obtained is an assignment and his rights are independant of the lessee. If it is sought to bind him by a decree, then he ought to be made a party to the action. The ruling principle is that no person is bound by a decree unless he is a party to the action. Certain subordinates may be bound by the decree, but a tenant's position is different. Ordinarily he would not be bound by the decree unless he were a party to the case. Section 324 seems to recognize such a situation for it says that if the Fiscal finds the property "in the occupancy of a tenant or other person entitled to occupy the same as against the judgment-debtor, and not bound by the decree to relinquish such occupancy", he shall give possession in the manner indicated, *i.e.*, constructive possession.

Section 326 also recognizes this principle, as do sections 327 and 328. It seems clear beyond doubt, therefore, that the proper order the court should have made was to dismiss the plaintiff's application with costs, leaving him to take fresh proceedings if so desired.

In this connection the case of *Ezra v. Gubbay* [1] is interesting. In that case an identical situation arose. Rankin J. said "It is not absolutely necessary to join as defendants all persons in possession: in some circumstances it may be wrong and oppressive to do so; *Geen v. Herring* [2]. The risk taken by omitting to join any such person is the risk that after decree he may set up a right in possession, and independently of the lease which has become forfeited, whether by equity against the lessor or by adverse title. This, however, is the extent of the risk and, apart from the Code, I should have no difficulty in enforcing this decree against Mrs. Wallace, her estate or interest having come to an end with the forfeiture of the lease (*Minet v. Johnson* [3]) and there being no title of evidence before me as to the action having been collusive.

There is nothing, however, in the least paradoxical in the suggestion that, in order to get an effective right to actual possession through the Sheriff, a plaintiff must make all persons defendants who were in possession at the date of his suit. This used to be the law in England, and there may well be special reasons in favour of insisting on this rule in India. I have to see what the Code provides."

Rankin J. then proceeded to examine the provisions in the Indian Code corresponding with sections 325, &c., of our Code and concluded that the undertenant was not bound by the decree and said "The result is that in my view, an action for possession based upon forfeiture of a term should, for practical reasons, be brought against all persons in possession (including constructive possession, which seems to be covered by R 99 (*Mancharam v. Fakirchand* [4]) at the date of the suit, not that the suit is necessarily defective otherwise, but because the decree will be difficult to enforce under the Court."

The order entered in this case is set aside and the plaintiff's application dismissed with costs in the District Court. He will also pay the costs of this appeal.

SOERTSZ J.—I agree.

*Appeal allowed.*

[1] *A. I. R. (1920) Cal. 706.*
[2] *(1905) I. K. B. 152.*
[3] *(1891) 63 L. T. 507.*
[4] *(1901) 25 Bom. 478.*