

1963

*Present : H. N. G. Fernando, J.*

M. S. UMMU ZACKIYA, Appellant, and H. S. WICKRAMARATNE,  
Respondent

*S. C. 168 of 1961—C. R. Colombo, 71244*

*Resistance to execution of proprietary decree—Complaint to Court after expiry of one month—Right of judgment-creditor to apply for re-issue of writ—Civil Procedure Code, ss. 325, 326.*

Where an application complaining of resistance to execution of a proprietary decree is dismissed by Court on the ground that it was made after the expiry of one month from the date of the alleged obstruction, section 326 of the Civil Procedure Code does not preclude the judgment-creditor from applying, in appropriate circumstances, for the re-issue of the writ.

**A**PPEAL from an order of the Court of Requests, Colombo.

*A. Sivagurunathan*, for the plaintiff-petitioner, appellant.

*V. Thillainathan*, for the defendant-respondent.

March 18, 1963. H. N. G. FERNANDO, J.—

This action for ejectment was settled of consent on the 20th November 1959. One of the terms of settlement was that the rents for the months of September, October and November, 1959, will fall due on the 30th November 1959, and that in the event of the non-payment of this sum by the 31st December 1959 the Plaintiff would be entitled to a decree in ejectment. On the footing that this payment had not been made the Plaintiff applied on the 30th January 1960 for ejectment and the Court thereupon entered decree having regard to the terms of settlement. All that was necessary was for this decree to provide for ejectment and it should have been dated as on the day on which it was signed by the

learned Commissioner, but, instead, many other matters, some of which did not even form part of the settlement, were included in the decree and it was dated as on the date of the settlement, i.e., 20th November 1959. However, the decree did, in fact, say that in the event of the non-payment of the sums falling due on the 30th November 1959 the Plaintiff will be entitled to a decree in ejectment. Here again what should properly have been said was that the Defendant must be ejected.

The Defendant was noticed and he filed certain objections against the decree, but he withdrew his objections in order to file fresh objections which latter were never filed. Ultimately writ of execution and possession was issued on the 1st August 1960 and thereafter on the 1st December 1960 an application under Section 326 of the Civil Procedure Code was made on the ground that the Defendant had obstructed the Fiscal. An inquiry into this matter was fixed and later the application under Section 326 was dismissed on the ground that it had been made after the expiry of one month from the date of the alleged obstruction.

Thereafter the Plaintiff again applied on the 19th May 1961 for the re-issue of the Writ. To this application the Defendant, by his affidavit of 5th July 1961, filed objections, none of which provided a ground why the writ should not be re-issued. At an inquiry, however, the Counsel for the Defendant took the ground that because the Plaintiff had not duly and within time made an application under Section 326 of the Code, the Plaintiff was thereafter precluded from applying for the re-issue of the Writ. In my opinion the learned Commissioner wrongly upheld this ground of objection. Section 326 is primarily intended to confer a power of punishment against persons who obstruct the issue of writ of possession, and there is no provision in Section 326 which limits the right of a judgment-creditor to apply more than once in appropriate circumstances for the re-issue of a Writ. The order of the learned Commissioner, therefore, cannot stand.

There has been no allegation by the Respondent in the lower Court of any want of due diligence on the part of the Plaintiff, and, therefore, there would be no grounds upon which the learned Commissioner could have refused the re-issue of the Writ.

The record will be returned to the learned Commissioner who is directed to issue writ of possession in favour of the Plaintiff and directing the ejectment of the Defendant. Counsel for the Plaintiff submits that in terms of the original settlement certain payments which have not been made are still due from the Defendant. On the other hand, Counsel for the Defendant has argued that payments of these amounts were tendered but were not accepted. It will be open to the Plaintiff to require the learned Judge to issue Writ for the recovery of these monies, but, if so, the Defendant will have an opportunity of raising any matters of fact relevant to the liability to pay the damages. The Plaintiff will be entitled to the costs of this appeal and of the inquiry on 19th July 1961.

*Appeal allowed.*