

1922.

Present : Schneider J.MOHOMADO LEBBE *v.* AHAMADO ALI *et al.*51—*C. R. Colombo, 56,809.**Civil Procedure Code, s. 325, et seq.—Purchaser placed in possession—Obstruction five months thereafter.*

A purchaser at a Fiscal's sale was placed in possession of the property sold on March 18, 1921. He alleged that the second respondent hindered him in taking complete and effectual possession of the premises, and prayed in terms of section 328 of the Civil Procedure Code that the second respondent be ejected.

Held, that the summary procedure laid down in section 325 *et seq.* did not apply to this case, as the obstruction was five months after the purchaser was placed in possession. "The hindrance or obstruction should be at the time of giving of possession, or shortly thereafter."

THE facts appear from the judgment.

Cader, for second respondent, appellant.

Rajakariar, for petitioner, respondent.

June 16, 1922. SCHNEIDER J—

The petitioner in this matter is the purchaser of certain property sold by the Fiscal in execution of a writ. It appears that he obtained an order for possession. In his petition he states that the Fiscal placed him in possession of the property on March 18, 1921, but that on August 26 the second respondent hindered him in taking complete and effectual possession of the premises, and was in possession of them. The petition proceeds to pray that in terms of section 328 of the Civil Procedure Code that the second respondent be ejected and the petitioner be given complete possession. The petition was supported by an affidavit. Then followed a motion by the petitioner's proctor that for the reasons stated in the petition he moved in terms of section 328 that the second respondent be ejected. Subsequently notice of this motion appears to have issued to the second respondent. The second respondent appeared in obedience to this notice, and the matter was fixed for inquiry. On that day arguments seem to have been put before the Commissioner on both sides. It was contended on behalf of the petitioner that

the second respondent must be ejected. The learned Commissioner thereupon made the following order :—

“I agree. There is no doubt that possession was with petitioner. Second respondent to be ejected. Petitioner to have his costs.”

It seems to me that the whole procedure and this order are most extraordinary. Section 325 distinctly indicates the procedure which should have been followed, namely, an application by way of petition and affidavit and an order under section 377 (b). Instead of obtaining such an order, the proctor for the petitioner obtained a notice of a motion that the second respondent should be ejected. Section 327 indicates what should be done if a *bona fide* claim were made by the person alleged to have offered the hindrance to be in possession of the property on his own account. The second respondent was not a judgment-debtor, and, therefore, his claim, which he placed before the Court by way of an affidavit, should have been investigated under the provisions of section 327, and after such investigation the petition should have been registered and numbered as a plaint. Thereafter the ordinary procedure should have been followed in the trial of the dispute and its decision. Instead of there being a trial or any sort of inquiry, the learned Commissioner has summarily ordered that the second respondent be ejected, a procedure which, as I have already pointed out, is in direct contradiction of the express provisions of the Code. But it seems to me that the petitioner is out of Court for another reason in regard to the procedure he has followed in this case. Upon the allegations in his petition and affidavit he had been put in possession on March 18, 1921. The hindrance complained of was on August 20, 1921. Section 325 was not intended to apply to a case of this kind. The hindrance or obstruction should be at the time of giving of possession or shortly thereafter. It cannot be said that an interval of five months is a short period. This construction of section 325 has been adopted in the case of *Menika v. Hamy*.¹ Unless that principle of construction be adopted, it will be open to any person who had been placed by the Fiscal to come into Court after a long interval of time, say, seven or eight years, and adopt this summary procedure in order to have his dispute settled. It is impossible to take the view that the section was intended for a case where the obstruction or hindrance did not follow very shortly after.

I would, therefore, dismiss the petition, casting the petitioner in the costs of these proceedings in the lower Court and the costs in appeal.

I would add, though it is not necessary to do so, that this would be no bar to the petitioner asserting his claim to the land in a rightly constituted action.

1922.

SOHNHEIDER

J.

Mohomado
Lebbe v.
Ahamado Ali

Petition dismissed.