

1957

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

N. D. L. GUNARATNE, Appellant, and A. J. M. DE SILVA,
Respondent

S. C. 201—C. R. Colombo, 56,393

Execution—Decree for possession of immovable property—Procedure in event of resistance or obstruction to execution of writ—Right of appeal—Civil Procedure Code, ss. 324–327.

¹ (1913) 15 N. L. R. 65.² 55 Madras L. W. 532.

In every case of resistance or obstruction to execution of a decree for the possession of immovable property, application for relief is first made under section 325 of the Civil Procedure Code, and the three succeeding sections (including the new section 327A added in 1949) provide for alternative orders which may be made upon such an application.

Where the complaint is one of hindrance subsequent to delivery of constructive possession, the application under section 325 should be made within one month of the date of the hindrance.

Where the Court purports to act summarily under section 327A (after the inquiry under section 377 (b)) upon the ground of frivolousness or vexatiousness set out in section 327A, the order is not appealable.

APPEAL from an order of the Court of Requests, Colombo.

M. M. Kumarakulasingham, for the 10th respondent-appellant.

H. W. Jayewardene, Q.C., with *Neville Samarakoon* and *A. K. Premadasa*, for the plaintiff-respondent.

Cur. adv. vult.

April 2, 1957. H. N. G. FERNANDO, J.—

The plaintiff in this action had successfully sued his lessee one Gunawardene for cancellation of the lease-bond and for ejectment. Writ of possession was issued on 21st September 1955 but was returned by the Fiscal with a report that the tenant was not in occupation, and that the persons in occupation were one N. D. L. Gunaratne and others. The Court thereupon ordered constructive possession to be delivered under section 324 of the Code and possession was delivered accordingly. On 26th November 1955 the plaintiff went to the premises with his Proctor for the purpose of taking effectual possession but was obstructed by certain persons, of whom some claimed to be holding under the plaintiff's tenant; Gunaratne claimed that he was himself the tenant of the premises under the plaintiff, a position which the plaintiff denies. Thereafter on 7th December 1955 (within one month of the alleged obstruction) the plaintiff applied for an order ejecting all the persons in occupation, and the Court made an interlocutory order—presumably in pursuance of section 377 (b) read with section 325 of the Code—appointing 30th January 1956 for inquiry into the plaintiff's application. After hearing evidence on that day, the Court made the following order:—

“ Acting under section 327 (a) of the Code I direct the issue of writ to eject the 2nd, 5th, 6th, 7th, 9th, 10th, and 14th respondents from the premises and order the said respondents to pay Rs. 31/50 as costs of this inquiry.”

The present appeal is by N. D. L. Gunaratne against that order.

One argument urged on behalf of the appellant is that, since the alleged resistance was not by a person claiming under the original ejected tenant, an application under section 325 does not lie, and that application for relief, if any, should have been made under section 327. But section 325

is not in any way restricted to the case of persons claiming under a tenant ; resistance, obstruction or hindrance by any person can be the basis of an application under section 325. Moreover, it is in my opinion a misconception to say that an application for relief may be made under section 327 ; in all cases the application is made under section 325 and the three succeeding sections (including the new section 327A added in 1949) provide for alternative orders which may be made upon such an application.

Secondly it is urged that the application should have been made within one month of the date of delivery of constructive possession ; but in this case clearly the complaint is of hindrance after the date of constructive delivery and fell to be made within one month of the hindrance. The complaint is not of obstruction or resistance to the Fiscal's officer, but of hindrance to the plaintiff in obtaining effectual possession.

A more important argument for the appellant is that the Judge could not have acted under section 327A in a summary manner. It is contended that where the person who refuses to vacate the property is one who claims " on his own account or on account of a person other than the judgment debtor ", the procedure set out in section 327 of registering the complaint as a plaint and of investigating the claim as if it were an action by the decree-holder against the claimant must be followed before an order under section 327A may be made. But if this contention be correct, nothing has been achieved by section 327A, because it would always have been possible to deal with a frivolous or vexatious claimant under section 327 after the trial there contemplated. Read together, sections 325, 326, 327 and 327A have clearly to be construed as follows :—

(1) An interlocutory order under section 377 (b) is made if the right of the petitioner is *prima facie* established ; (2) An inquiry is held (section 377 (b)) if the claimant appears to oppose the petitioner's complaint ; (3) On the hearing of the matter of the petitioner's complaint—

- (a) if the obstruction or resistance was occasioned by the judgment debtor or by some person at his instigation, the Court has power to commit the person to gaol and to order delivery of possession— (section 326) ;
- (b) if the resistance or obstruction was occasioned by any person (other than the judgment debtor) on his own account, or on account of a person (other than the judgment debtor), claiming in good faith . . . , the procedure for registration of the complaint as a plaint is applicable—(section 327) ;
- (c) if the resistance or obstruction was occasioned by a person (other than the judgment debtor) and the Court finds the claim of that person to be frivolous or vexatious, the Court may direct the judgment-creditor to be put in possession— (section 327A).

The distinction drawn in section 327 and in section 327A is that between what appears to the Court to be a *bona fide* claim by a " third party " on the one hand, and a *frivolous or vexatious claim* on the other. In

the former case, the claim must be investigated as in an action and the success or failure of the petition under section 325 will depend on that investigation ; in the latter case, an order for possession will be made forthwith and it is for the claimant *thereafter* to establish (if he can) his claim in an action brought within one month of the order. In the present case the Judge has purported to act under section 327A (after the inquiry under section 377 (b)) and upon the ground of frivolousness or vexatiousness set out in section 327A. The order cannot be challenged because the correct preliminary proceduro was followed.

I would hold also that the provision in section 327A that the order is final means that it is not appealable. A perfectly reasonable alternative remedy is provided to the claimant in that he can bring within one month an action to establish his right to possession and if successful in that action be restored to possession. Just as what appears to be a *bona fide* claim "keeps out" the judgment creditor until the claim is regularly investigated (section 327), so also what appears to be a frivolous or vexatious claim is insufficient to entitle the claimant to continue in possession and he is compelled to seek a remedy by regular action. In each case the powers of this Court in appeal cannot be invoked until the regular action is tried.

There being no right of appeal against the Commissioner's order, the appeal is rejected with costs.

Appeal rejected.
