1959 *Present :* **H. N. G. Fernando, J., and Sinnetamby, J.**

H. S. DEWANDARA, Appellant, *and* U. L. H. FERNANDO, Respondent

S. C. 162—D. C. Kandy, 2,289/L

Execution of proprietary decree—Resistance by bona fide *claimant—Procedure thereafter—Burden of proof—Civil Procedure Code, ss. 79, 325, 327, 377 (b), 384.*

In proceedings arising out of resistance to the execution of a decree for the possession of property, once the petition of the judgment-creditor is numbered as a plaint under section 327 of the Civil Procedure Code the onus of establishing possession or the right to possess the property is upon the judgment-creditor who, as against the claimant, has all the obligations which the law casts upon a plaintiff in a regular action.

Chinnathamby v. Somasundaram Iyer (1947) 48 N. L. R. 515, not followed.

Aboobucker v. Ismail (1908) 11 N. L. R. 309, followed.

APPEAL from a judgment of the District Court, Kandy.

P. Somatilakam, with *E. B. Vannitamby*, for the 4th defendant-appellant.

T. B. Dissanayake, for the plaintiff-respondent.

Cur. adv. vult.

February 5, 1959. SINNETAMBY, J.—

The plaintiff instituted this action in January, 1948, against one James Appuhamy and Ukku Banda for declaration of title to the land depicted in plan No. 755 of 6th May, 1949, filed of record marked " X ". Subsequently James Appuhamy died and the present first and second defendants were substituted in his place. Ukku Banda was made the third defendant. The plaintiff was declared entitled to the land and decree was entered against the defendants on 22nd October, 1951. The plaintiff took out writ of possession against the defendants on 14th September. 1954. There was an appeal which was dismissed.

The appellant to the present appeal, H. S. Dewandara, was in occupation of the premises and the Fiscal reported on 24th September, 1954. that he was unable to deliver possession as Dewandara claimed the property on Deed No. 1379 of 8th February, 1952, and Deed No. 220 of 19th July, 1954. It is to be noted that these two deeds were executed after the decree was entered in this case. The proctor for the plaintiff thereupon filed a petition and affidavit and asked that the writ of possession be re-issued or in the alternative that the respondents be noticed to show

cause why they should not be dealt with for obstructing the Fiscal. The respondents to that application were the original defendants and the person obstructing, namely, Dewandara. Presumably, this application was made under section 325 of the Civil Procedure Code. The learned Judge instead of proceeding in the manner provided for in section 325, namely in accordance with alternative (*b*) of section 377, made an order directing notice to issue on 11th November. The respondents appeared and the first, second and third respondents who were the original defendants stated that they had already left the premises. The fourth defendant's proxy was filed in due course along with a petition and affidavit.

It is to be noted that the procedure adopted was not in strict compliance with the summary procedure provided for in section 377 (*b*). According to these provisions a day should have been appointed for the determination of the matter and the respondents informed that they would be heard in opposition on that date. Where both parties appear on the appointed date, the respondent is heard in opposition and permitted to read affidavits and documentary evidence. Thereafter the petitioner is entitled to be heard in reply or the Court may frame issues of fact between the petitioner and the respondent. It will thus be seen that before the Court makes an order under section 327 it must be satisfied that the respondent has made out a *prima facie* case. If no *prima facie* case has been made out the Court will enter a final order and endorse it on the interlocutory order itself. The essence of summary procedure is that the Court first satisfies itself upon the petition and affidavit filed by the petitioner that an order in terms of section 377 should issue. Thereafter it is only if the respondent makes out a *prima facie* case in support of his defence that the Court sets the matter down for trial, if it thinks it necessary, on issues that may be framed.

That procedure was not followed in the present case but no objection was taken to it in the Court below. One may, therefore, assume that the affidavit filed by the respondent with his petition was filed in terms of section 384 of the Civil Procedure Code. One may also assume that upon the affidavit filed the Court was satisfied that the fourth respondent claimed in good faith to be in possession of the property on his own account and that it therefore proceeded to make an order in terms of section 327 of the Code when it directed that the petition be numbered as a plaint. Curiously, however, although according to the journal entry under date 17th December, 1954, the Court's order was that the petition was to be numbered as a plaint, in the judgment delivered on 19th February, 1956, the Court mistakenly stated that the fourth respondent's claim had been so numbered and registered.

It seems to me that all this confusion in the learned Judge's mind arose as a result of the incorrect procedure he had adopted. He had permitted the fourth respondent to file a *petition* also in addition to an affidavit. If on the judgment creditor's petition and affidavit the learned Judge had made an interlocutory order in terms of section 377 (*b*) of the Civil Procedure Code and on the appearance of the

respondent heard him in person or by proctor and permitted the respondent only to file affidavits in support of his defence, he would, it seems to me, not have fallen into this error.

Section 327 itself makes no provision for any other pleadings after the judgment creditor's petition has been numbered as a plaint. If affidavits are filed the Court no doubt could take their contents into consideration in "investigating the claim". It must, however, be conceded that the situation in which the Court would find itself would be most unsatisfactory. It is usual at this stage for the Court in actual practice to frame issues and this would be certainly most difficult without proper pleadings. Our Courts have held, if not directly at least by implication, that an investigation under this section, though it relates mainly to actual possession, also includes an investigation into the right to possess and therefore would include an investigation of title—vide *Aboobucker v. Ismail* [1]. It may be for this reason that the provisions in the old Indian Code which corresponded with section 327 of our Code have been replaced by Order XXI r. 99 where the Court merely dismisses the application of the judgment creditor if it is satisfied that the obstruction was occasioned by a person other than the judgment debtor claiming in good faith to be in possession of the property on his own account and leaves it to the judgment creditor to bring a regular suit if so advised.

Under the procedure laid down in section 327 once the claimant has established a *prima facie* case entitling him to remain in possession the judgment creditor's petition is numbered as a plaint and subsequent proceedings follow ordinary regular procedure. In some Courts the practice has developed for the Court to order fuller and amended pleadings by directing the judgment creditor to set out his title and by directing the claimant to file an answer. This procedure which, it seems to me, is the only sensible way of proceeding further in the matter, is warranted by the provisions of section 79 of the Code as by such means the Court is able to ascertain the real issues between the parties.

In the present case, however, there were no further pleadings but the Court framed issues of fact. Except on the question of prescription the issues framed placed the burden on the defendant. It was urged in appeal that the learned Judge misdirected himself in placing that burden on the defendant. I agree that in proceedings of this kind once the petition is numbered as a plaint the burden is on the judgment creditor. The learned Judge in my opinion was clearly wrong in stating :

> "There is a decree in favour of the plaintiff and the onus is on the claimant to support his claim as against the decree."

I am aware that a similar view was expressed by Windham, J. in *Chinnatamby v. Somasundaram Iyer* [2]. I find myself unable to agree with this view. I prefer to follow the opinion of this Court expressed in *Aboobucker v. Ismail* (*supra*). Unfortunately that case does not appear to have been cited in *Chinnatamby v. Somasundaram Iyer* (*supra*) and in the course of his judgment Windham, J. makes no reference to it.

[1] *(1908) 11 N. L. R. 309.*

[2] *(1947) 48 N. L. R. 515.*

Ordinarily in a regular action the burden of establishing title is upon a plaintiff and if that rule were to be followed once the judgment creditor's petition is numbered as a plaint the burden would fall on him. Why should he be placed in a more favourable position merely because he has obtained a decree against a third person ? One could visualise immediately the abuses that the acceptance of such a proposition would promote. All a speculative litigant has to do to place the onus of proving title on a person in actual possession of property is to bring a collusive action in respect of that property against an obliging defendant, obtain judgment, take out writ against the person in possession who is bound to resist, and then institute proceedings under section 325. By this device he would place himself at an advantage and put the burden of establishing title on the person in possession. With great respect I do not agree that the expression " investigate the claim " has the meaning assigned to it by Windham, J. I am definitely of the view that once a petition has been numbered as a plaint the onus of establishing possession or the right to possess is upon the judgment creditor who, as against the claimant, has all the obligations which the law casts upon a plaintiff in a regular action.

The only question that now remains to be considered is whether in misdirecting himself in this way in regard to " onus " the learned Judge came to a wrong conclusion on the issues that were framed. It seems to me that on the facts of this particular case he has not.

The claimant had leased the property from one Charles de Silva who in turn obtained a transfer 4 D 6 from one Anohamy who is the niece of Frederick de Silva in whom admittedly title at one time vested. Both deeds were subsequent to the decree in this case. The learned Judge has come to a strong finding against the claimant in regard to the genuineness of these transactions but he has not considered the title of the plaintiff. On the question of prescription, however, he has held with the plaintiff and has accepted the evidence that she and her parents had possessed the land exclusively since 1920. On this issue the burden was clearly on the plaintiff and there can be no complaint of misdirection with regard to it. Having regard to the learned Judge's strong findings on this issue, which were not seriously canvassed at the hearing of the appeal, the fact that he took a wrong view of the law in regard to onus does not, it seems to me, affect the ultimate result. On the facts of this particular case I do not consider it necessary to send the case back for retrial. I cannot, however, stress too strongly on the Courts of first instance the importance of following the correct procedure in cases of this kind.

In the circumstances I would dismiss the appeal with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.