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Present : Schneider J.FERNANDO *v.* FERNANDO.

74—C. R. Colombo, 83,340.

Jurisdiction—Courts of Requests—Inquiry under section 327, Civil Procedure Code—Value of land over Rs. 800—Scope of inquiry.

The appellant made complaint by petition that the respondents had resisted the execution of a decree of the Court of Requests, directing that F be ejected from certain premises and the appellant be placed in possession. The respondents stated that they were in possession of the premises on their own account, and not under the judgment-debtor (F). The premises were over Rs. 800 in value.

Held, that the Court of Requests had no jurisdiction to investigate the claim under section 327 of the Civil Procedure Code.

Section 327 has not by its provisions vested Courts of Requests with a higher jurisdiction than that conferred on them by the Courts Ordinance.

It is not the question of ownership, but of possession which should be the subject-matter of the investigation under section 327. Actual or physical possession as well as constructive possession, such as a possession through a tenant, come within the scope of the inquiry; not only the fact of possession, but also the title of possession are within the scope of the sections.

THE facts are set out in the judgment.

Nagalingam, for appellant.

H. V. Perera, for respondents.

June 11, 1923. SCHNEIDER J.—

A new and interesting point in the construction of section 327 of the Civil Procedure Code, and a point of importance in practice, is raised by this appeal. The appellant, as judgment-creditor, made complaint by petition that the respondents had resisted the execution of decree of the Court of Requests of Colombo, directing that one William Fernando be ejected from certain premises and the appellant placed in possession. The respondents admitted the resistance complained of, and stated that they were in possession of the premises on their own account, and not under the judgment-debtor. The proceedings were regarded by both parties as if the complaint were numbered and registered as a plaint, though I am unable to find from the record that this was in fact done.

It was admitted that the premises are over Rs. 800 in value. The respondents took the objection that, therefore, the Court of Requests had no jurisdiction to investigate their claim. The investigation proceeded upon the two issues following:—

- (1) Is the petitioner (appellant) or are the respondents (respondents in this appeal), the owners of this property?
- (2) Has this Court jurisdiction?

Instead of deciding the second issue which, if upheld, would have ended the contest, the learned Commissioner tried the first issue upon evidence, but eventually, without adjudicating upon it, held that he had no jurisdiction, as the property was over Rs. 800 in value. He made order that execution be stayed "till plaintiff has established his title against the respondents in a regular action."

The plaintiff has appealed.

The first issue indicates that the scope of an investigation under section 327 was not rightly understood. It is not the question of ownership, but of possession which should be the subject-matter of the investigation. The language of the section itself makes this clear. It speaks of the claim of the defendant as a claim "to be in possession of the property," and directs the Court to investigate this claim. This has been pointed out in several cases decided in India under the corresponding section of the Indian Code. Of these, I need only mention *Pillai v. Pillai*,¹ *Moula Khan v. Gorikhan*,² *Mancharam v. Fakirchand*,³ and *Isab Takappa*.⁴

It is of interest to note that in these cases the nature of the possession has been considered, and it has been pointed out that actual or physical possession as well as constructive possession, such as a possession through a tenant, come within the scope of the inquiry, and that not only the fact of possession, but also the title of possession are within the scope of the section.

Of the sections grouped in the Code under the head of "Resistance to execution of proprietary decrees," it is noticeable that sections 325 to 328 fall into one group, as they all deal with the claim of a person in possession or dispossessed, and the orders which the Court may make are for execution or stay of it. While section 330 seems to stand apart from those sections in that it deals with claims as proprietor, mortgagee, lessee, or under any other title by a person not in occupation. The order which the Court may pass under this section is worded differently to the order it may pass under sections 327 and 328. Section 329 is expressly made applicable to sections 327 and 328 only. (In section 330 alone is express provision made for the party aggrieved with the order bringing another action to establish his claim to the present possession of the property. Therefore, it would appear that even in the subsequent action permitted by section 330 the

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¹ (1881) I. L. R. 3 Mad. 104.
² (1899) L. L. R. 14 Bom. 627.

³ (1901) I. L. R. 25 Bom. 478.
⁴ (1903) I. L. R. 27 Bom. 302.

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question at issue is confined to possession. There appears to be a good reason why this is so. The decree sought to be executed is itself a decree only for possession of immovable property. Accordingly, the claim made against its execution should rightly be confined to the limits of the question of possession.

Before proceeding to discuss the precise point raised by this appeal, I would cite a passage from one other Indian case because of its practical importance. It is on the question of onus. Under section 327 the decree holder is the plaintiff, and the claimant the defendant. The passage is—

“ Whether the claimant really had or was entitled to the possession, which he claimed under section 229, was a question to be tried in this suit, and the plaintiffs, as I consider, fulfilled *prima facie* the onus which the law casts upon them, when they proved that the judgment-debtor, whose rights they had acquired, held possession as against the claimant at the time when the latter made his claim.

“ If this was not so, section 229 would be productive of the greatest injustice. A man who holds possession of property has a right to retain possession until some other person can show a better right to it. But if a man who merely claims possession under section 229, without, in fact, being in possession, is to be entitled in law to possession as against the actual possessor, unless the latter proves his title, the consequences would be serious indeed. A claimant under that section, although he had no possession, would then be in a better position than the actual possessor.

“ The section may often operate unjustly enough against the decree holder as it is; but the injustice would be far greater if the appellant were right in his contention.”
 Garth C.J., pp. 54-55 in *Churn v. Watson & Company*.¹

Sections 327 and 329 of our Code were taken over from the Indian Code of 1882 (Act XIV. of 1882), and correspond to section 331 of that Code. It would be helpful to an understanding of our Code to glance at the history of the legislation of the Indian Codes in connection with this subject.

The first Indian Civil Procedure Code was Act VIII. of 1859. Section 229 of that Code dealt with resistance to the execution of decrees. That Code was repealed and replaced by Act X. of 1877, section 331 of which directed that the claim of the person who resisted the execution of a decree for possession should, when registered as a suit between the decree holder as plaintiff and the claimant as defendant, “ be investigated by the Court with the like power as if a suit for the property had been instituted by the decree holder against the claimant under the provisions of the

¹ (1883) 10 Cal. 50.

Specific Relief Act, 1877, section 9." This section of this Act dealt with possessory actions. The reference was therefore held to show that it was intended that the only question to be tried was one of possession as distinguished from title. By clause 2 of that section 9, the parties were permitted, notwithstanding the decision, to proceed afterwards to try the title. The Code of 1877 was amended by section 52 of Act XII. of 1879, and this amendment was re-enacted in the Code of 1882. For the words "the Specific Relief Act, 1877, section 9," in section 331, were substituted "chapter V., that is, chapter V of the Code," and the following was added to section 331: "Every such order shall have the same force as a decree, and shall be subject to the same conditions as to appeal or otherwise." This addition is section 329 of our Code. Commenting on the amendment of the Indian Code, Birdwood J. said in *Moula Khan v. Gorikhan* (*supra*): "The intention of the Legislature in so altering the section was clearly to enlarge the powers of the Court in the investigation of claims under section 331. Any question of title arising between the contesting parties in connection with their right of possession may now be finally determined in such investigation as in an ordinary action in ejectment. The order made under section 331 whether for executing or staying execution has now the force of a decree determining the title and right of possession, and it is not intended that the plaintiff should be forced to a fresh suit or should have the right to bring a fresh suit of the decree, is against him.

The contention on appeal on behalf of the appellant in this case was that the investigation under section 327 was not to be regarded as a fresh action, but merely as a continuation of the action in which the writ issued, and as a step in execution of the decree. In support the case of *Tama'je v. Ra'ghu*¹ was cited. That case undoubtedly supports the contention, but it has been dissented from or is not reconcilable in its general terms with a number of cases. I would refer to *Hemchand v. Dharmachand*,² *Twatadswami v. Shidlingaya*,³ *Jaichan v. Pestanjii*,⁴ and *Muttammal v. Gounden*.⁵

It is hard to understand how the investigation is not a fresh action, when the section itself directs that the petition is to be numbered and registered as a plaint in an action between the contending parties, and that the investigation is to be proceeded with the like power as if an action had been instituted by the one party against the other, and that the final order shall be in the nature of, and shall have the same force as, a decree in a regular action, and shall be subject to the same conditions as to appeal or otherwise (sections 327, 329). The words "shall pass such order as it thinks fit for execution or staying execution of the decree" cannot deprive all the other words of the section of their effect

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*Fernando*¹ (1879) I. L. R. 4 Bom. 123.² I. L. R. 4 Bom. 515, 527.³ P. J. for 1884, p. 82.⁴ 11 Bom. H. C. Rep. 186.⁵ I. L. R. 4 Mad. 220.

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in constituting the investigation with the character and incidents of an ordinary action. I find it equally hard to understand how the investigation in which the issue is the right of possession to premises which is valued as being over Rs. 300 can be said to be a continuation of the other action in which the claim was for a sum of Rs. 40 as rent and for Rs. 16 as damages, and for further damages at Rs. 8 from the date of the decree. It must be admitted that if the plaintiff had sued in that action not as a landlord suing a tenant for rent and for damages for overholding, but as a person entitled to possession seeking to recover possession he could not have maintained the action in the Court of Requests. I am at a loss to understand how the Court of Requests can assume jurisdiction when the same contest is raised by proceedings taken under section 327. It would not be sound to say that section 327 has by its provisions vested Courts of Requests with a higher jurisdiction than that conferred on them by the Courts Ordinance. The provisions of section 327 do not expressly confer any such jurisdiction. The use of the words "the Court" in the sections under consideration hardly justifies a conclusion that such jurisdiction can be implied.

The Courts Ordinance is the rightful authority to look to in respect of the jurisdiction of Courts and not the Civil Procedure Code, unless there is some express provision in the latter. The words "with the like power as if an action for the property had been instituted" are inconsistent with an intention to confer any extraordinarily special jurisdiction in addition to that of treating the claim as a regular action. The intention of section 327 is to enable the decree holder to render his decree effectual against a person who was not a party to the decree and who is in possession of the property affected by the decree, and to obtain an adjudication as to the title of the judgment-debtor and the person in possession. For this purpose, it does not appear necessary to confer any special jurisdiction on the Court. We are familiar with the provisions of the Code as to actions under section 247, which have to be brought in a Court other than the Court in the execution of whose decree the claim was made which result in actions under section 247. Such a claim and that action might with greater force be said to be steps in the execution of a decree than proceedings under section 327. It is true that the sections do direct that the Court which should hold the investigation is the Court, the execution of whose decree has been resisted, but, nevertheless, section 327 expressly provides that the Court is not to have larger powers in dealing with the claim than it would have if a regular action had been brought in respect of the claim. There is another reason why section 327 must be construed as not conferring any special jurisdiction on Court of Requests. It is the intention of section 327. As I have already said that intention

is to enable a plaintiff to enforce his decree for possession against his judgment-debtor against the claimant who is not a party to that decree. If the plaintiff's original action was within the competence of the Court of Requests, the plaintiff by proceedings under section 327 can only seek to enforce a right, the value of which cannot exceed Rs. 300. Therefore, if the claim raises a question exceeding that value, the jurisdiction of the Court of Requests is ousted. In *Muttammal v. Gounden (supra)*, already referred to, it was held that for the purpose of jurisdiction a claim under section 229 of Act VIII. of 1859 is a fresh suit and not a continuation of the suit in which the claim is made, and if the Court which dealt with the original suit has no jurisdiction over the subject-matter of the claim, that Court cannot try the claim. In this case the claim was in respect of immovable property, and the parties were agreed that the claim was over Rs. 500 in value. From the very nature of the claim the Court of Requests could not entertain it, because the claim could not be split up so as to bring it within the monetary jurisdiction of the Court of Requests. It might have been open to the appellant to have treated the respondent's claim as a counter claim to his claim for execution and as a counter claim exceeding the jurisdiction of the Court of Requests, and to have applied for the transfer of the action, but he failed to do this, and I, therefore, need not consider the point.

I would uphold the order of the learned Commissioner, and dismiss the appeal, with costs.

Appeal dismissed.

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