IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Sabaragamuwa Development Bank,
No. 28, Bandaranaike Mawatha,
Ratnapura.
Petitioner

SC APPEAL NO: SC/APPEAL/219/2014
SC LA NO: SC/HCCA/LA/197/2013
HCCA NO: SP/HCCA/RAT/12/2011 (RA)
DC EMBILIPITIYA NO: 9364/SPL

Vs.

1. Ranjith Lionel Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
2. Ranjula Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
3. N.A. Abedeera,
   Ratnapura – Hambantota Road,
   Padalangala.
4. Manoja Srimathi Abeysinghe,
   Ratnapura – Hambantota Road,
   Padalangala.

5. Bulathsinhalage Nadeera Thushari
   Bulathsinhala,
   No. 189, Pothgul Vihara Mawatha,
   Ratnapura.
   Respondents

AND BETWEEN

Sabaragamuwa Development Bank,
No. 28, Bandaranaike Mawatha,
Ratnapura.
Petitioner-Petitioner

Vs.

1. Ranjith Lionel Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
2. Ranjula Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
3. N.A. Abedeera,
   Ratnapura – Hambantota Road,
   Padalangala.
4. Manoja Srimathi Abeysinghe,
   Ratnapura – Hambantota Road,
   Padalangala.

5. Bulathsinhalage Nadeera Thushari
   Bulathsinhala,
   No. 189, Pothgul Vihara Mawatha,
   Ratnapura.
   Respondent-Respondents

AND NOW BETWEEN

Sabaragamuwa Development Bank,
No. 28, Bandaranaike Mawatha,
Ratnapura.
Petitioner-Petitioner-Appellant

Vs.

1. Ranjith Lionel Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
2. Ranjula Kuruneru,
   Ranjula Motors,
   Ratnapura – Hambantota Road,
   Padalangala.
3. N.A. Abedeera,
   Ratnapura – Hambantota Road,
   Padalangala.
4. Manoja Srimathi Abeysinghe,
   Ratnapura – Hambantota Road,
   Padalangala.

5. Bulathsinhalage Nadeera Thushari
Bulathsinhala,
No. 189, Pothgul Vihara Mawatha,
Ratnapura.
Respondent-Respondent-Respondents

Before: P. Padman Surasena, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Manohara de Silva, P.C., with Harithriya Kumarage and Sasiri Chandrasiri for Petitioner-Petitioner-Appellant.
Chathura Galhena for the 1st-4th Respondent-Respondent-Respondents.

Argued on: 11.02.2022

Written submissions:
by the Petitioner-Petitioner-Appellant on 30.01.2015.
by the 1st-4th Respondent-Respondent-Respondents on 03.05.2016.

Further Written submissions:
by the 1st-4th Respondent-Respondent-Respondents on 10.03.2022.

Decided on: 06.04.2023

Samayawardhena, J.

Introduction

The appellant, Sabaragamuwa Development Bank, as the judgment-creditor, made an application to the District Court of Embilipitiya seeking delivery of possession of the property described in the Certificate of Sale

marked P12 issued in terms of section 16 of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990. The Court allowed the application. The fiscal executed the writ on 05.10.2006. The fiscal's report insofar as relevant for the present purposes reads as follows:

> මෙම දේපල තුල දකුණු මායිමේ ප්‍රධාන පාරට මුහුණලා මහල්දෙකක් වනසේ තැනු ගොඩනැගිල්ලක් මෑතදී ඉදි කර ඇත. එකී ගොඩනැගිල්ලේ ප්‍රධාන පාර මට්ටමට ඇති උඩ කොටසේ එක් කාමරයක් වශයෙන් තිබුන අතර එහි රංජුල මෝටර්ස් නමින් යතුරුපැදි සේවා කරනවායැයි කියන ව්‍යාපාර ස්ථානයක් පවත්වාගෙනයයි. මෙම ගොඩනැගිල්ල රංජුල කුරුනේරු නමැති තම පුතාට අයිති බවත් 2004 වසරේ මෙම ඉඩම් කොටස එන්.ජී. අබේධීර නැමති අයගෙන් මිලදී ගත් බවත් මා සමග පවසනලදී.
>
> මෙම ඉඩමේ බස්නාහිර පැත්තේ අයිතිය තමන් සතු බවත් එන්.ඒ. අබේවීර නැමැති අයට අයත් බව ඔහුගේ බිරිඳ යයි කියන මනෝජා ශ්‍රීමනී අබේසිංහ නමැති අය පවසනලදී.
>
> බලයලත් මිනින්දෝරු එච්.එච්.ඩී.එස්. ශාන්ත මහතා විසින් මෙම අධිකරණ ආඥාවේ උපලේඛණයේ සඳහන් අංක 1058 පිඹුරේ සඳහන් මායිම් පොලවේ ලකුණු කරවා එම දේපල පෙත්සම්කාර සබරගමුව සංවර්ධන කළමණාකාර පී.ජී. දයාවංශ මහතාට පෙන්වාදුනිමි. ඉන්පසු ඉහත කී රංජුල මෝටර්ස් නැමති ගොඩනැගිල්ලේ සිටි රංජිත් ලයනල් කුරුනේරු නැමැති අයටද, එන්. ඒ. අබේධීර නමැති අයගේ නිවසේ සිටි මනෝජා ශ්‍රීමනි අබේසිංහ යන අයද පැමිණි සිටි අනෙකුත් සියලු දෙනා ද ඉදිරියේ අධිකරණ ආඥාව කියවා තේරුම් කර දී මෙම ඉඩමේ භුක්තිය පෙත්සම්කාර බැංකුවේ කළමණාකාර පී. ජී. දයාවංශ මහතාට භාරදුනිමි. රංජුල කුරුනේරු නැමති අය දේපලේ නොසිටි බැවින්ද ඔහු මෙම නඩුවේ පාර්ශවකරුවෙකු කර නොතිබූ බැවින්ද සුදුසු නියෝගයක් ලබාදෙන ලෙස ගරු අධිකරණයෙන් අයැද සිටිමි. මේ සම්බන්ධයෙන් ගරු අධිකරණයට ඉදිරිපත් වී සහන අයදින ලෙස පෙත්සම්කාර බැංකුවේ කළමණාකාර මහතාටත්, ඉඩමට අයිතිවාසිකම් කියූ දෙදෙනාටත් දැනුම් දුනිමි.

The 2nd and 3rd respondents made an application dated 11.10.2006 in terms of section 328 of the Civil Procedure Code seeking restoration to possession. However, this application was not pursued.

The appellant judgment-creditor made an application dated 18.10.2006 in terms of sections 325 and 326 of the Civil Procedure Code, stating that although the fiscal had delivered possession to the appellant on 05.10.2006, such possession was not properly delivered as the 1st-4th respondents namely, (1) Ranjith Lionel Kuruneru, (2) Ranjula Kuruneru, (3) N.A. Abeydheera, (4) Srimathi Abeysinghe had obstructed the fiscal from ejecting them from the property. The appellant sought effective delivery of possession by removing the buildings and ejecting the respondents from the property.

> 15. 2006.10.05 වන දින පැමිණිලිකාර ආයතනය වෙත භුක්තිය භාරදීමට පිස්කල් නිලධාරී තැන කටයුතු කර ඇතත් 1,2,3,4 වගඋත්තරකරුවන් බාධා කිරීම නිසා එය නිසි පරිදි භාරදී ඔවුන් දේපලින් ඉවත් කිරීමට කටයුතු කර නොමැත.
>
> 16. එසේ හෙයින් 2,3,4 වගඋත්තරකරුවන් සහ/හෝ වෙනත් කිසිවෙක් මෙම දේපල සම්බන්ධයෙන් හිමිකම් ඉදිරිපත් කරන්නේ නම් ඒ අයත් මෙම වගඋත්තරකරුවන්ද මෙම දේපලේ තනන ලද නිවාස ගොඩනැගිලි සහ වෙනත් ඉදිකිරීම් ඉවත්කර පැමිණිලිකාර ආයතනයට නැවත භුක්තිය භාර ගැනීමේ ආඥාවක් ලබා ගැනීමට කරුණු යෙදී ඇති බව ගරු අධිකරණය සැලකර සිටී.

Then the 1st-4th respondents made an application dated 12.11.2006 in terms of sections 325 and 326 of the Civil Procedure Code seeking restoration to possession.

According to the journal entry No. 6 dated 15.11.2006, the appellant's Attorney-at-Law made an application to the District Court to amend the petition dated 18.10.2006 by adding the judgment-debtor as the 5th respondent. The respondents did not object to that application and the Court allowed it. Accordingly, the amended petition dated 06.12.2006 was filed reflecting only that amendment. The 5th respondent did not come forward to contest the writ of execution.

The inquiry was held before the learned District Judge and several witnesses gave evidence. The 1st, 3rd and 4th respondents also gave evidence. At the time of the execution of the writ, the 1st and 4th respondents were present. In paragraph 2 of the petition dated 12.11.2006, the 1st and 4th respondents admit that they resisted the fiscal in the execution of the writ. This is also stated in the fiscal's report and by the 4th respondent in her evidence. There is no dispute that they resisted but the fiscal executed the writ nonetheless.

After the inquiry, the learned District Judge dismissed the application of the appellant on two grounds:

(a) The application of the appellant is unclear due to failure to establish which of the two limbs in section 325(1) of the Civil Procedure Code the appellant was relying on.
(b) The application of the appellant is time-barred.

On appeal, the High Court of Civil Appeal of Ratnapura, affirmed the order of the District Court. Hence this appeal by the judgment-creditor.

Let me now consider the legitimacy of the above two grounds relied on by the Courts below to dismiss the appellant's application.

Was the application of the appellant unclear?

Section 325 of the Civil Procedure Code reads as follows:

> *325. (1) Where in the execution of a decree for the possession of movable or immovable property the Fiscal is resisted or obstructed by the judgment-debtor or any other person, or where after the officer has delivered possession, the judgment-creditor is hindered or ousted by the judgment-debtor or any other person in taking complete and effectual possession thereof, and in the case of immovable property, where the judgment-creditor has been so*

hindered or ousted within a period of one year and one day, the judgment-creditor may at any time within one month from the date of such resistance or obstruction or hindrance or ouster, complain thereof to the court by a petition in which the judgment-debtor and the person, if any, resisting or obstructing or hindering or ousting shall be named respondents. The court shall thereupon serve a copy of such petition on the parties named therein as respondents and require such respondents to file objections, if any, within such time as they may be directed by court.

(2) When a petition under subsection (1) is presented, the court may, upon the application of the judgment-creditor made by motion ex parte, direct the Fiscal to publish a notice announcing that the Fiscal has been resisted or obstructed in delivering possession of such property, or that the judgment-creditor has been hindered in taking complete and effectual possession thereof or ousted therefrom, as the case may be, by the judgment-debtor or other person, and calling upon all persons claiming to be in possession of the whole or any part of such property by virtue of any right or interest and who object to possession being delivered to the judgment-creditor to notify their claims to court within fifteen days of the publication of the notice.

(3) The Fiscal shall make publication by affixing a copy of the notice in the language of the court, and, where the language of the court is also Tamil, in that language, in some conspicuous place on the property and proclaiming in the customary mode or in such manner as the court may direct, the contents of the notice. A copy of such notice shall be affixed to the court-house and if the court so orders shall also be published in any daily newspaper as the court may direct.

(4) Any person claiming to be in possession of the whole of the property or part thereof as against the judgment-creditor may file a written statement of his claim within fifteen days of the publication of the notice on such property, setting out his right or interest entitling him to the present possession of the whole property or part thereof and shall serve a copy of such statement on the judgment-creditor. The investigation into such claim shall be taken up along with the inquiry into the petition in respect of the resistance, obstruction, hindrance or ouster complained of, after due notice of the date of such investigation and inquiry has been given to all persons concerned. Every such investigation and inquiry shall be concluded within sixty days of the publication of the notice referred to in subsection (2).

Section 325(1) has two main limbs.

According to section 325(1)

(a) where in the execution of a decree for the possession of immovable or movable property the fiscal is resisted or obstructed by the judgment-debtor or any other person, or
(b) where after the fiscal has delivered possession of immovable or movable property the judgment-creditor is hindered or ousted in taking complete and effectual possession by the judgment-debtor or any other person,

the judgment-creditor may at any time within one month from the date of such resistance or obstruction or hindrance or ouster complain to the District Court by way of a petition.

Section 325(1) imposes a further restriction in respect of immovable property, in that, in addition to the one month restriction from the date of hindrance or ouster, it is required that such hindrance or ouster shall

also fall within one year and one day from the date of delivery of possession. This additional condition is inapplicable to movable property.

The learned District Judge held that the appellant judgment-creditor failed to make clear which of the said two limbs apply to the appellant's application and therefore the appellant did not establish its claim. Is this conclusion correct and reasonable?

The learned District Judge says that according to the appellant's petition, possession was not delivered but according to the fiscal's report, possession was delivered, and these contradictory positions remain in obscurity. I beg to differ. The appellant in his petition does not say that possession was not delivered–*vide* what I quoted above. The appellant's complaint is that he could not take complete possession of the property.

The first limb of section 325(1) contemplates a situation where the fiscal is totally prevented from delivering possession to the judgment-creditor due to resistance or obstruction by the judgment-debtor or any other person.

Even if there is no resistance, obstruction, hindrance or opposition, if the property comprises, for instance, a large land with several buildings, the fiscal cannot traverse the entirety of the land and buildings and completely and effectually deliver every part of the land and buildings and every grain of sand to the judgment-creditor. The fiscal can only effect constructive or symbolic delivery of possession.

The second limb of section 325(1) contemplates two situations after the fiscal has delivered possession of the property:

(a) where the judgment-creditor has been hindered in taking complete and effectual possession of the property; or
(b) where the judgment-creditor has been ousted from the property.

The difference between constructive or symbolic delivery of possession by the fiscal and hindrance to the judgment-creditor taking complete and effectual possession after the delivery of possession needs to be clearly understood.

These two things need not happen at the same time. The District Court and the High Court failed to appreciate this difference and, hence, fell into error.

On the facts and circumstances of the instant case, the appellant satisfactorily established the following before Court:

(a) resistance to the fiscal in the execution of the decree, and
(b) hindrance to the appellant taking complete and effectual possession.

According to the fiscal's report, the fiscal could not give complete and effectual possession of the property to the judgment-creditor. The respondents continue to be in possession despite delivery of possession. The 2nd respondent is carrying on a garage business in a building constructed on the land.

In my view, on the facts and circumstances of this case, the appellant is eminently qualified to seek relief under the second limb of section 325(1), i.e. hindrance by the respondents to the appellant taking complete and effectual possession of the property after the delivery of possession.

For the aforesaid reasons, the first ground upon which the learned District Judge rejected the application of the appellant is faulty.

Time bar objection

The next question is whether the application made by the appellant is time-barred? According to section 325(1), the application has to be filed

within one month from the date of such resistance or obstruction or hindrance or ouster. As I stated before, this has a further restriction. That is, if the application is for the delivery of possession of immovable property, the application shall be filed by the judgment-creditor within one year and one day from the date of delivery of possession of the immovable property.

The learned District Judge says the application was filed by the appellant in the District Court on 06.12.2006 because the inquiry was held based on that application. The fiscal executed the writ on 05.10.2006 and the appellant filed the application on 18.10.2006. There is no dispute that the original application was filed within one month from the date of delivery of possession. Thereafter, with the agreement of the respondents and the permission of Court, an amended petition was filed on 06.12.2006 only to add the name of the judgment-debtor as a party. The learned District Judge says the amended petition is not within time and therefore the application is time-barred. I regret my inability to agree. When pleadings (plaint, answer, petition, statement of objections etc.) are amended, it is considered for all purposes as relating back to the original pleadings. *Vide Morris v. Dias* (1892) 2 CLR 185, *Endoris v. Hamine* (1895) 3 NLR 97, *Lucihamy v. Hamidu* (1923) 26 NLR 41, *Ordiris Silva & Sons Ltd v. Jayawardena* (1953) 55 NLR 335, *Nations Trust Bank PLC v. Piyathilake* (SC/APPEAL/146/2014, SC Minutes of 05.10.2016). The application shall be taken to have been filed on 18.10.2006.

Hence, the second ground upon which the learned District Judge rejected the application of the appellant is also unacceptable.

Complexity of execution proceedings

I admit that the provisions pertaining to execution proceedings contained in the Civil Procedure Code are complex and complicated and the

judgment-debtors exploit this complexity to deny or at least delay the decree holder from enjoying the fruits of his victory. These provisions are mainly found in Chapter XXII of the Civil Procedure Code spanning sections 217-354. In addition, there are several other sections scattered across the Code dealing with the execution of decrees. The fact that more than 150 sections are dedicated to the subject of execution of writ itself underscores the complexity of the issue. The statutory provisions in this regard have undergone radical changes over the years. Therefore, the present provisions of the law cannot be understood solely by relying on past decisions. With this in mind, in (SC/APPEAL/135/2017, SC Minutes of 31.03.2023) I dealt with the law relating to delivery of immovable property in the execution of decrees under section 217(c) in some detail. Hence I do not wish to repeat the discussion here.

Section 325 inquiry

Inquiries on execution proceedings held in terms of section 325 are not full-blown trials but summary inquiries to provide speedy and inexpensive remedies. Such inquiries shall be concluded within 60 days of the publication of notice on the land allowing any claimants to intervene.

In the instant case, after the execution of writ, the 2nd and 3rd respondents first made an application in terms of section 328 of the Civil Procedure Code and then, together with the 2nd respondent's father (the 1st respondent) and the 3rd respondent's wife (the 4th respondent), filed another application in terms of sections 325 and 326 of the Civil Procedure Code. It was not the appellant decree holder but the respondents who were uncertain in their applications. In those applications the respondents pray that they be restored to possession whilst they are in possession. This is because the fiscal had delivered constructive possession to the appellant.

In terms of section 325(1), a copy of the judgment-creditor's petition shall be served on the respondents requiring them to file objections, if any, within the given time. In terms of section 325(2), upon the application of the judgment-creditor, the Court can also publish notice on the property, the Court-house and in a newspaper calling upon all persons to give notice of their claims and file their statements of claim, if any, to Court within 15 days of the publication of the notice on the land. The appellant in this case served notice on the respondents and published notice on the land and the Court-house. It is in response to such notice that the respondents filed the written statement of claim dated 12.11.2006. This is different from filing objections in terms of section 325(1).

Both parties claim to have made their applications under sections 325 and 326. Then it can safely be concluded that the appellant made the application under section 325(1) and the respondents submitted their claims under section 325(4).

Section 326 spells out the orders the Court can make after the section 325 inquiry.

> *326. (1) On the hearing of the matter of the petition and the claim made, if any, the court, if satisfied-*
>
> > *(a) that the resistance, obstruction, hindrance or ouster complained of was occasioned by the judgment-debtor or by some person at his instigation or on his behalf;*
> > *(b) that the resistance, obstruction, hindrance or ouster complained of was occasioned by a person other than the judgment-debtor, and that the claim of such person to be in possession of the property, whether on his own account or on account of some person other than the judgment-debtor, is not in good faith; or*

(c) that the claim made, if any, has not been established,

shall direct the judgment-creditor to be put into or restored to the possession of the property and may, in the case specified in paragraph (a), in addition sentence the judgment-debtor or such other person to imprisonment for a period not exceeding thirty days.

(3) The court may make such order as to the costs of the application, the charges and expenses incurred in publishing the notice and the hearing and the reissue of writ as the court shall deem meet.

After the inquiry, the Court shall, if satisfied, direct the judgment-creditor to be put into or restored to (as the case may be) possession of the property.

Who shall prove what at the inquiry?

In general, what is required to be investigated at the inquiry in terms of section 325 are the claims of persons other than the judgment-debtor purportedly in possession of the land. The decree holder's right to have the decree executed arises from his decree and the burden is on the claimant to support his claim as against that decree. Although the right to commence the section 325 inquiry lies with the judgment-creditor as the petitioner, he cannot be expected to prove the negative.

In terms of section 327, if the resistance, obstruction, hindrance or ouster is by a person in possession in good faith independent of the judgment-debtor by virtue of any right or interest which has been established, the Court shall dismiss the petition of the judgment-creditor.

Section 327 is connected to section 326. Section 326 deals with how the judgment-creditor's application can be allowed whereas section 327 deals with how his application can be dismissed confirming the possession of the claimant. Section 327 reads as follows:

> *327. Where the resistance, obstruction, hindrance or ouster is found by court to have been occasioned by any person other than the judgment-debtor, claiming in good faith to be in possession of the whole of such property on his own account or on account of some person other than the judgment-debtor by virtue of any right or interest, or where the claim notified is found by the court to have been made by a person claiming to be in possession of the whole of such property on his own account or on account of some person other than the judgment-debtor, by virtue of any right or interest, the court shall make order dismissing the petition, if it finds that such right or interest has been established.*

When sections 325, 326 and 327 are read together it is clear that the judgment-debtor has no defence (subject to exceptions such as that he has already satisfied the decree), and the person other than the judgment-debtor shall prove to the satisfaction of the Court that, firstly, he is in possession and, secondly, he is in such possession in good faith and on his own account or on account of some person other than the judgment-debtor by virtue of any right or interest. This is more than mere proof of possession but less than proof of title. Since the inquiry shall be concluded within 60 days of the publication of notice on the property in terms of section 325(4), full investigation of title is neither required nor possible. However the Court should know the standing of such persons in order to make a suitable order in terms of section 326, also allowing the dissatisfied party to institute action to establish his right or title to such property in terms of section 329.

If the resistance, obstruction, hindrance or ouster was occasioned by the judgment-debtor or by another at his instigation, the Court may sentence the judgment-debtor or such other person for a period not exceeding thirty days. This is different from a contempt of court charge

contemplated in section 330 of the Civil Procedure Code in terms of chapter 65 of the Civil Procedure Code.

Hence the view of both the District Court and the High Court that there is no burden cast upon the respondents to prove their claim until the initial burden is discharged by the appellant judgment-creditor by proving his application made under section 325(1), is misconceived in law.

Judgment-creditor should not be unnecessarily harassed

In my view, the District Court and the High Court placed an unnecessarily heavy burden on the appellant.

It must be understood that the petitioner is the decree holder or the judgment-creditor and, by virtue of the decree in his favour, he has every right to have it executed. Execution proceedings shall not be converted to a second trial. The Court shall not discourage the judgment-creditor from having the decree executed by imposing unnecessary fetters. Instead, the Court shall facilitate the judgment-creditor reaping the fruits of his hard-earned victory. What is necessary is not the mere execution of the decree but the enforcement of the decree. What is the use of having a decree on a piece of paper if the decree holder cannot translate it into reality? Justice should be real, not illusory.

No technical objections

In execution proceedings, there is no room for technical objections. In such proceedings the Court shall look at substance over form. The Court shall interfere with the execution only if substantial or material prejudice has been caused to a party or a claimant by any lapse on the part of the Court or the judgment-creditor resulting in a grave miscarriage of justice.

In *Brooke Bond (Ceylon) Ltd v. Gunasekara* [1990] 1 Sri LR 71 at 81, it was observed that the provisions relating to execution proceedings should not be construed in such a way as to lightly interfere with the decree-holder's right to reap the fruits of his victory as expeditiously as possible.

In *Ekanayake v. Ekanayake* [2003] 2 Sri LR 221 at 227, Amaratunga J. held:

> *Execution is a process for the enforcement of a decreed right, mere technicalities shall not be allowed to impede the enforcement of such rights in the absence of any prejudice to the judgment debtor.*

In *Nanayakkara v. Sulaiman* (1926) 28 NLR 314 at 315 Dalton J. stated:

> *As observed by the Privy Council in Bissesur Lall Sahoo v. Maharajah Luckmessur Singh (6 Indian Appeals 233) in execution proceedings, the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon merely technical grounds, when the execution has been found to be substantially right.*

This view was emphatically endorsed in an array of decisions including *Wijewardene v. Raymond* (1937) 39 NLR 179 at 181 per Soertsz J., *Latiff v. Seneviratne* (1938) 40 NLR 141 at 142 per Hearne J., *Wijetunga v. Singham Bros. & Co.* (1964) 69 NLR 545 at 546 per Sri Skanda Rajah J.

In *Samad v. Zain* (1977) 79(2) NLR 557, the plaintiff made five applications for the execution of writ. He died while the fifth was pending. The substituted judgment-creditor filed the sixth application for writ, which was refused on the ground that the plaintiff had failed to exercise "due diligence" to procure execution in the previous attempts ("due diligence" was a requirement under section 377 before the amendment

introduced by Civil Procedure Code (Amendment) Act No. 53 of 1980). Whilst setting aside the order of the District Court on the basis that section 337 should not be construed too strictly against the judgment-creditor, Wanasundera J. with the concurrence of Tennekoon C.J. and Rajaratnam J. stated at 563:

> *The Supreme Court has always been disposed to overlook technicalities in dealing with execution proceedings. Hearne, J. in Latiff vs. Seneviratne quoted the words of the Privy Council to the effect that-*
>
> *"In execution proceedings, the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon merely technical grounds, when the execution has been found to be substantially right."*
>
> *We would be interpreting the relevant provisions unduly harshly if we were to deny the appellant relief in the circumstances of this case. I would, therefore, allow the appeal with costs both here and below. The petitioner would be entitled to take out writ of execution with a view to obtaining satisfaction of the decree of which he is the assignee.*

In *Dharmawansa v. People's Bank and Another* [2006] 3 Sri LR 45, the Court of Appeal quoted *Samad v. Zain* to interpret the provisions pertaining to execution proceedings broadly.

In *Leechman & Co. Ltd. v. Rangalla Consolidated Ltd.* [1981] 2 Sri LR 373 it was held "*It is the Fiscal who must sign the prohibitory notice but even if the Registrar signs it the validity of the notice will not be affected where the Registrar and the Fiscal are one and the same person. Nor will the notice be bad because it was addressed to the Chairman, Land Reform Commission when it should have been addressed to the Land Reform*

Commission because no prejudice was caused and the objection was not taken at the earliest opportunity." Soza J. declared at page 380:

> *In the case of Nanayakkara v. Sulaiman (1926) 28 NLR 314 it was held that in execution proceedings the Court will look at the substance of the transaction and will not be disposed to interfere on technical grounds. Especially where no objection has been taken at the earliest possible opportunity technicalities will be allowed only very exceptionally to prevail in execution proceedings. Accordingly all preliminary steps up to the stage of the garnishee proceedings under section 230 of the Civil Procedure Code must be held to have been duly complied with.*

Vide also the judgment of De Sampayo J. in *Suppramanium Chetty v. Jayawardene* (1922) 24 NLR 50 and the separate judgments of Sirimane J. and Alles J. in *Perera v. Thillairajah* (1966) 69 NLR 237.

Respondents' claim not proved

The next question is whether the respondents established their claim to the satisfaction of the Court. In my judgment, they did not.

The 3rd and 4th respondents (husband and wife) gave evidence at the inquiry and attempted to prove that they have title to the land. They do not have any title deed or permit or grant to this land. Their evidence was that the 3rd respondent had a deed of declaration marked 4V7 prepared on 06.04.2004 based on their possession. The 1st respondent in his evidence states at one point that he is in possession on behalf of the 3rd respondent and at another point that he is in possession with the permission of the 3rd respondent. He also did not produce any title deed executed in his name. However, he has transferred a portion of the land by deed No. 7147 to his son (the 2nd respondent) on 02.11.2005.

The land was sold by *parate* auction on 03.12.2005. Before the sale took place, notice was served on the 5th respondent judgment-debtor and publicity of the sale was given by various means, as required by the Recovery of Loans by Banks (Special Provisions) Act. The *modus operandi* of the respondents is clear: they have no right or title or interest known to law to the land and have created a fake title to the land preventing the judgment-creditor from taking possession.

Conclusion

The questions of law upon which leave to appeal was granted and the answers thereto are as follows:

> Q: Did the High Court misdirect itself in not taking into consideration the failure of the District Court to make an order in respect of the claim made by the respondents under section 325(4) of the Civil Procedure Code when section 325(4) requires the Court to take both applications made by the judgment creditor and the respondents together?
>
> A: Yes.
>
> Q: Did the High Court err in failing to take into consideration the failure of the District Court to make an order under section 326(1)(c), when undisputedly the respondents failed to establish their claim made under section 325(4) of the Civil Procedure Code?
>
> A: Yes.
>
> Q: Did the High Court misdirect itself by its failure to consider that the learned District Judge has not properly considered the evidence before Court that the Fiscal was hindered in taking complete and effectual possession thereof within the meaning of section 325(2) of the Civil Procedure Code to deliver possession of the property to

the judgement creditor due to the obstructions made by the judgement debtor and/or the representatives?

A: It was not the fiscal who was hindered in taking complete and effectual possession but the judgment-creditor.

Q: Did the High Court misdirect itself by not observing that the learned District Judge has not properly considered the evidence given by witness Ananda Thogadeniya, Manager Loans of the petitioner Bank which shows that the petitioner Bank has not been able to obtain possession due to the obstruction and resistance of the respondents?

A: Yes.

Q: Did the High Court err in failing to consider the error made by the learned District Judge to the effect that the petitioner failed to establish its claim when the evidence and the conduct of the respondent demonstrate that the petitioner has established its case?

A: Yes.

I set aside the impugned judgment of the High Court dated 04.04.2013 and the order of the District Court dated 15.12.2010 and allow the appeal. The District Court shall direct the fiscal to deliver to the appellant complete and effectual possession of the property described in the schedule to the amended petition dated 06.12.2006. The appellant is entitled to recover costs in all three Courts from the 1st-4th respondents jointly and severally.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court