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

In the matter of an Application for Leave to Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka, read with Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the Act, No. 54 of 2006.

Lindamulage Paul Jesudasa De Silva,
No. 508/1, De Soyza Road,
Molpe, Moratuwa.

PLAINTIFF

SC APPEAL 232/2016
SC/HCCA/LA 502/2014
CA Appeal: WP/HCCA/MT/No. 01/13/RA
DC Moratuwa No. 254L

Vs.

Rambukkanage Lesman Fernando
De Soyza Road,
Molpe, Moratuwa.

DEFENDANT

AND THEN

Lindamulage Paul Jesudasa De Silva,
No. 508/1, De Soyza Road,
Molpe, Moratuwa.

PLAINTIFF-PETITIONER

Vs.

Rambukkanage Lesman Fernando
De Soyza Road,
Molpe, Moratuwa.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Rambukkanage Lesman Fernando
De Soyza Road,
Molpe, Moratuwa.

DEFENDANT-RESPONDENT-APPELLANT

Vs.

Lindamulage Paul Jesudasa De Silva,
No. 508/1, De Soyza Road,
Molpe, Moratuwa.

PLAINTIFF-PETITIONER-RESPONDENT

BEFORE: Hon. Buwaneka Aluwihare, PC, J
Hon. Murdu N. B Fernando, PC, J
Hon. Yasantha Kodagoda, PC, J

COUNSEL: Darshana Kuruppu with Chinthaka Udadeniya for the Defendant-Respondent-Appellant.
Dhanya Gunawardena for the Plaintiff-petitioner-Respondent.

WRITTEN SUBMISSIONS: 21st November 2016 and 22nd May 2020 for the Defendant-Respondent Appellant.

ARGUED ON: 10.03.2020.

DECIDED ON: 13.10.2023

Judgement

Aluwihare, PC, J

(1) The Plaintiff-Respondent-Respondent [hereinafter referred to as 'the Plaintiff'] filed action against the Defendant-Respondent-Petitioner-Appellant [hereinafter 'the Defendant'] in the District Court seeking an order to obtain a right of way over the Defendant's land on the basis that

the Plaintiff had acquired prescriptive rights over the roadway by immemorable user of the right of way.

(2) At the conclusion of the trial, the learned trial judge held with the Plaintiff and delivered judgement holding that the Plaintiff is entitled to the right of way sought by him.

(3) The Defendant asserts that, consequent to the entering of the decree, the writ was executed and possession in respect of the right of way had been handed over to the Plaintiff on 19.06.2003.

(4) The Defendant, however, sought to have the decree amended on the basis that the same was not in conformity with the judgement. Having heard the parties, by his order dated 04.03.2004, the learned District Judge rejected application of the Defendant.

(5) Aggrieved by the order referred to in the preceding paragraph, the Defendant moved the High Court of Civil Appeals by way of an appeal. Upon consideration of the same, the appeal was dismissed by the learned Judges of the Civil Appellate High Courts on 29th March 2011.

(6) During the pendency of the appeal filed by the Defendant referred to above, in 2009, the Plaintiff had filed charges of contempt against the Defendant for obstructing his roadway. The District Court, however, by its order dated 31.03.2010, held that the District Court does not have the power to inquire into and determine the allegation of contempt against the Defendant.

(7) Consequent to the dismissal of the Defendant's Appeal, [referred to in paragraphs 4 and 5 above] the Plaintiff, in 2012, by way of Petition and affidavit moved the District Court for a direction on the fiscal, to have the obstructions removed and to have the possession of the 8-foot roadway handed over to the Plaintiff, who became entitled to the same, by virtue of the judgement delivered by the District Court in 2001.

(8) The said application was made by the Plaintiff on the premise that the Defendant had constructed a building on the entire property in a manner causing obstruction to the usage of the roadway the Plaintiff was granted by virtue of the judgement aforesaid.

(9) It was in this backdrop that the Plaintiff sought an order directing the fiscal to hand over possession of the roadway, free from any obstacles. The relief prayed for by the Plaintiff [according to the petition he filed] is reproduced;

(අ) මෙම නඩුවේ තීන්දුව ක්‍රියාවට යෙදවීමේ ක්‍රියාවලිය අවහිර කිරීමට වත්තිකරුට කිසිදු අයිතියක් නොමැති හෙයින් වෂී 2003/06/19 වන දින මෙම අධිකරණයේ පිස්කල් නිලධාරී විසින් පැමිණිලිකාරුට නඩුවට අදාළ ස්ථානයේදී බාදුන් ආකාරයට අඩි 08ක් පළල මාර්ග ප්‍රවේශය ඒ ආකාරයෙන්ම ලබා ගැනීම සඳහා ඇති සියළු බාධා ඉවත් කොට එම මාර්ගයේ ඵුක්තිය පැමණිලිකරු වෙත බාර දෙන ලෙසට මොරටුව පිස්කල් නිලධාරීට නියෝගයක් නිකුත් කරන මෙන් ද

(ආ) මෙම නඩුවේ ගාස්තු යහ ගරු අධිකරණයට යෙහෙකැයි හැගෙන වෙනත් සහ වැඩිමනත් සහනයන් ලබා දෙන ලෙයත් වේ

(10) The learned District Judge by his order dated 28-11-2012, rejected the relief sought by the Plaintiff on the basis that the Plaintiff had been handed over possession of the roadway once, way back in the year 2003 and as such there is no provision in the law to order the execution of the writ [of possession] for the second time.

(11) Aggrieved by the said order, the Plaintiff moved the High Court of Civil Appeal by way of revision and after the inquiry, the High Court held that the Plaintiff was entitled to have the writ executed again. The basis for drawing this conclusion was that, the Plaintiff had not received the complete and effectual possession in terms of Section 325 of the Civil Procedure Code and in the instant case the rights of the parties were finally determined only on 29.03.2011, when the High Court of Civil Appeals dismissed the Defendant's appeal. The Court went on to observe that the issue of lapse of time does not arise as the Plaintiff had not 'got complete and effectual possession' in terms of Section 325 of the Civil Procedure Code. On this basis, the learned judges of the High Court of Civil Appeals held that the Plaintiff was entitled to have the writ executed as the

application [for writ] was made after all the disputes in relation to the rights of the parties had been settled. Accordingly, acting in revision, the relief sought by the Plaintiff was granted.

(12) Being aggrieved by the said Judgement of the High Court of Civil Appeals, the Defendant invoked the jurisdiction of this Court by way of leave to appeal, to have the judgement of the High Court set aside.

(13) On the 6th of June 2016, this Court granted leave to appeal on the questions of law referred to in sub-paragraphs (i) to (v) of Paragraph 13 of the petition of the Defendant dated 7th October 2014. At the hearing of this appeal, however, the learned counsel for the Defendant confined himself to the following questions:

i. Have the Learned Judges of the Civil Appellate High Court of Mount Lavinia failed to consider that the Plaintiff has not averred any exceptional circumstances in his petition?

ii. Have the learned Judges of the Civil Appellate High Court of Mount Lavinia erred in Law by holding that the application for issue of a fresh writ was not time barred when there is one year and six months delay from 29/03/2011?

Respective positions of the parties;

(14) The Plaintiff, in explaining the delay, submits that he could not have sought the remedy that was available to him in terms of Section 325 of the CPC to have the writ executed for the second time as the Defendant's appeal relating to the variation of the decree, was pending and it was on that basis that his complaint of contempt against the Defendant was rejected. As such, he had no option but to await the conclusion of the appeal process in 2011, before moving court to have the writ executed for the second time as provided in Section 325(1) of the CPC in 2012.

(15) Elaborating the delay further, the Plaintiff takes up the position that, it was correct that the writ was executed in 2003, but when he complained to the

District Court of the disturbance to his peaceful enjoyment of the rights he had obtained from the court, the District Court was *functus*, as far as the case was concerned, in view of the appeal[of the Defendant] challenging the District Court order rejecting his application to vary the decree was pending before an appellate forum.

(16) It was argued on behalf of the Plaintiff that the jurisprudence developed over the years has now crystalised into a rule, that the Court can exercise its inherent powers vested in it under the Section 839 of the Civil Procedure Code to avert injustices in situations of this nature, particularly in instances where parties take the law into their own hands and that the court was not hamstrung by the period statutorily stipulated [Section 325] in the CPC relating to issuing of the writ for the second time which is one year and one day from being disposed.

(17) The learned Counsel for the Plaintiff relying on the decision of ***Senevirathne Vs. Francis Fonseka Abeykoon*** **1986 2 SLR** and ***Sirinivasa Thero Vs. Suddassi Thero*** **63 NLR 31**, submitted that in the case of ***Senevirathne*** [supra] it was held that *'since the plaintiff had taken the law into his hands and forcibly evicted the defendant alleging abandonment and deterioration of the premises, the Court could in the interest of justice resort to its inherent powers saved under Section 839 of the Civil Procedure Code and make order of restoration of possession for the fiscal to execute even though the Civil Procedure Code provided for such restoration to possession only on a decree to that end entered under section 217(c) of the Civil Procedure Code.*

(18) The Defendant, on the other hand argued that the application for a writ in terms of Section 325 of the CPC requires strict compliance and even if the appellate process had come to an end on 29.03.2011, the Plaintiff had moved court for the execution of the writ for the second time only on 06.09.2012, which is almost 18 months after the decision of Defendants Appeal was delivered.

(19) Before I address the questions of law on which leave to appeal was granted, it would be of significant importance to consider the findings and the conclusions of the learned District Judge in refusing the application of the Plaintiff to refuse to issue the writ for the second time based on his application made in 2012.

(20) The reason being, the judges of the High Court set aside the order of the learned District Judge who refused to issue the writ for the second time, in exercising the revisionary jurisdiction vested in them. The criteria for exercising revisionary power, as a discretionary remedy, is when the court's conscience is shocked by the illegality of the order that is sought to be revised.

(21) In the circumstances aforesaid, it would be pertinent to consider the order made by both the learned District Judge as well as the High Court of Civil Appeals. It is significant to note that the learned High Court judges have not referred to any illegality of the order of the learned District Judge but have merely stated in their order that *"a writ for the second time cannot be issued only if the Plaintiff gets complete and effectual possession in terms of section 325 of the Civil Procedure Code. In the instant action the parties can only obtain complete and effectual possession of a land only after the rights of parties are finally determined. In this case the rights of the parties were finally determined only on 29.03.2011. Thus, the issue of lapse of time does not arise as the Plaintiff had not got complete and effectual possession in terms of Section 325 of the Civil Procedure Code"* [page 5 of the Order].

(22) Apart from the passage referred to above, nowhere in the order had the High Court pointed out any illegality of the impugned order of the learned District Judge. Essentially, it appears to me that the only element which the learned Judges of the High Court deem to have been incorrectly concluded by the learned District Court Judge is that "*parties can only obtain complete and effectual possession of a land only after the rights of parties are finally determined"* [supra]. The power of the court to issue a writ for the second

time is undisputed. In my opinion, the issue which had to be determined by the learned Judges of the High Court, is whether the impugned order of the learned District Judge was 'illegal' or whether in refusing to issue the writ for the second time, he had exercised his discretion wrongly, and in a manner which shocked 'the conscience of the court'. The same question – whether in refusing to issue the writ for the second time, the Order of the learned District Judge had broached legality, is now placed for determination before this Court.

(23) I have given the sequence of events in paragraphs 2 to 7 of this judgement. For convenience, I shall briefly refer to them here;

(i) The Judgement of the District Court was delivered in 2001.
(ii) The writ of possession was executed in 2003.
(iii) The defendant sought a variation of the decree in 2004.
(iv) The Defendant challenged the refusal before the High court in 2004.
(v) The Plaintiff filed contempt proceedings in 2009.
(vi) Contempt charges were rejected by the District Court in 2010.
(vii) The High Court refused the application of the Defendant for a variation of the Decree in 2011.

(24) From the sequence of events referred to above, it is clear that from 2003 up to 2009, there had been no complaint by the Plaintiff of any obstruction on the part of the Defendant. The District Court by its considered order delivered on 31.03.2010, held that the District Court has no jurisdiction to inquire into the contempt charges filed by the Plaintiff. The Plaintiff did not challenge the said order.

(25) It was in this backdrop that the Plaintiff moved the District Court in 2012 for a writ of possession for the second time. The ground on which this application was made is that the District Court rejected the contempt charges on the basis that there was a connected matter pending in appeal and that the District Court is *functus officio* due to that reason.

(26) Although the petition filed before this court also states that the reason to dismiss the contempt proceeding filed by the Plaintiff was due to the fact that the challenge by the Defendant to vary the decree was still pending before an appellate forum, when perusing the said order of the District Court, it is evident that the refusal to proceed with the contempt charges was based on the *ratio* of the case of ***Regent International Hotel Ltd v. Cyril Gardiner*** **78-79 1 SLR 278** and the order does not refer to any pending case before an appellate forum as a fetter to inquire into the allegation of contempt against the Defendant.

(27) The assertion, therefore, of the Plaintiff, that he had to wait to make an application to issue the writ for the second time till the rights of the parties were finally determined in 2011, does not appear to be accurate. The fact remains that the Plaintiff's complaint of interruption to his peaceful enjoyment of the roadway was only after six years from the date of the execution of the writ which was in 2003.

(28) Undoubtedly, the Defendant appears to have prevented the Plaintiff from enjoying the right he won years after litigation and the conduct of the defendant cannot be condoned by this court; however, this court is called upon to decide on specific legal issues and not the contumacious conduct of the Defendant.

(29) As referred to earlier, all we are called upon to decide is whether the High Court of Civil Appeals had corrected an illegality of the Order made by the learned District Judge.

(30) The learned District judge, in refusing to issue the writ for the second time, had observed that the application was made many years [six years] after the previous order was made, and in terms of Section 325(1) of the CPC, where after the officer [fiscal] has delivered possession, the Judgement-Creditor is hindered or ousted by the Judgement-Debtor, in taking complete and effectual possession, in the case of immovable property, ***where the judgement creditor had been hindered or ousted within a period***

of one year and one day, the judgement-creditor any time within one month of the date of such obstruction or hindering or ouster, complain thereof to the court by a petition. The learned District Judge relying on the decision of ***Badrun Nisa Wazeer Vs. Velayuthan*** **90 2 SLR 146** held that the Plaintiff was not entitled to have the writ obtained for the second time.

(31) As stated before, in granting the writ for the second time and revising the Order of the learned District Judge, the learned Judges of the High Court had only noted that per Section 325, a writ sought for the second time could only be refused if the Plaintiff who sought such writ had obtained 'complete and effectual possession', and since the matter was pending in appeal and the legal rights of the parties were, at the time, unresolved, the "*issue of lapse of time does not arise as the Plaintiff had not got complete and effectual possession in terms of Section 325 of the Civil Procedure Code"* [Supra]. No reliance is placed on any judicial precedent to support the above position.

(32) The concept of 'complete and effectual possession' does not in any way contemplate the legal entitlement or rights of the parties. In my view, all that is contemplated by the phrase is de facto possession of the property concerned, in a manner which allows for the complete enjoyment of the property. The fact that legal entitlement to such property was being resolved by a Court of Law did not and should have any bearing on the *factum* of physical possession of the property.

(33) The issue of time lapse is therefore central to this determination of this case. Section 325(1) and its requirements have been comprehensively addressed in a recent judgement of this court.
In ***Saleem Mohamed Fawsan v. Majeed Mohamed & Others***, **SC Appeal No. 135/2017, S.C Minutes of 31.03.2023**, his Lordship Justice Samayawardhena observed that; [at pages 18 and 19]
"*According to section 325(1)*
(a) *Wherein 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.*

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

The second limb of section 325(1) contemplates two situations:
(i) after the fiscal had delivered possession of the property, the judgment-creditor has been hindered in taking complete and effectual possession thereof; or
(ii) ousted therefrom.
….
It may further be observed on a careful reading of section 325(1) that, in a situation of ***(a)*** *above, the judgment-creditor shall come to Court within one month from the date of resistance or obstruction to the fiscal, but in a situation of* ***(b)*** *above where possession has been delivered,* ***if it is immovable property, in addition to the one month restriction from the date of the hindrance or ouster, such hindrance or ouster shall also fall within one year and one day from the date of delivery of possession.***"** [Emphasis added]

(34) The limb which would be applicable to the present case is the second limb of Section 325(1). As noted above, the Plaintiff was hindered by the Defendant from enjoying the 'effectual possession' of the property after the execution of the decree and after the fiscal had delivered possession. Accordingly, the Plaintiff could seek a writ by invoking the jurisdiction of the District Court if and only if the hindrance occurred within one year and

one day from the date the fiscal delivered the property, and only by complaining to the court **within one month** of the date of the hindrance. This position was previously affirmed in ***Badrun Nisa Wazeer Vs. Velayuthan*** **90 2 SLR 146** and in ***Sinna Lebbe Saliya Umma Vs. Shahul Hameed Mohammed & Others*****, S.C Appeal No. 99/2014, S.C Minutes of 04.04.2018**. In the case of ***Badrun Nisa Wazeer***, it was held that the time clause in S. 325(1) of the Civil Procedure Code is mandatory, and that per the Section, in matters relating to immovable property, a party who was dispossessed or obstructed from exercising possession within one year and one day can complain to court within one month of ouster or hindrance. The learned District Court Judge had also relied on the aforementioned judgement in his Order.

(35) The Fiscal delivered possession to the Plaintiff on 19th June 2003. The Plaintiff invoked the jurisdiction of the District Court to seek a writ for the second time on 06th September 2012. If there had been a hindrance to the Plaintiff enjoying complete and effectual possession within one year and one day of 19th June 2003, the Petitioner should have invoked the jurisdiction within one month of such hindrance. The Petitioner had only made an application under Section 325(1) after 9 years of being delivered possession. Therefore, it is evident that the Plaintiff had not invoked the jurisdiction of the District Court in the manner required by the law and the Order of the learned District Cort Judge was lawful and could not have shocked the conscience of the court.

In the circumstances, I find that it would not be necessary to determine the first (i) question of law since the application for the issue of a fresh writ, as stated in the question of law (ii) was in fact time barred. Accordingly, the questions of law; "*Have the learned Judges of the Civil Appellate High Court of Mount Lavinia erred in law by holding that the application for issue of a fresh writ was not time barred when there is one year and six months delay from 29/03/2011"* is answered in the affirmative.

For the reasons stated above, the Order of the High Court dated 26.08.2014 is hereby set aside and the Order of the learned judge of the District court dated 28.11.2012 is hereby affirmed.

In the circumstances of this case, the parties may bear their own costs.

Appeal Allowed.

JUDGE OF THE SUPREME COURT

MURDU N. B FERNANDO, PC, J
I agree

JUDGE OF THE SUPREME COURT

YASANTHA KODAGODA, PC, J
I agree

JUDGE OF THE SUPREME COURT