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

Dissanayaka Mudiyanselage
Senarath Bandara Dissanayaka,
16, Uplands, Kandy.
Plaintiff

SC APPEAL NO: SC/APPEAL/74/2016
HCCA KANDY NO: CP/HCCA/Rev/16/2010
DC KANDY NO: 168/2004/L

Vs.

Muthukuda Wijesuriya Arachchige
Jayantha Nishantha Wijesuriya,
103, Polgolla, Kandy.
Defendant

AND

Muthukuda Wijesuriya Arachchige
Jayantha Nishantha Wijesuriya,
103, Polgolla, Kandy.
Defendant-Petitioner

Vs.

Dissanayaka Mudiyanselage
Senarath Bandara Dissanayaka,

16, Uplands, Kandy.
Plaintiff-Respondent

AND NOW
Dissanayaka Mudiyanselage
Senarath Bandara Dissanayaka,
16, Uplands, Kandy.
Plaintiff-Respondent-Appellant

Vs.

Muthukuda Wijesuriya Arachchige
Jayantha Nishantha Wijesuriya,
103, Polgolla, Kandy.
Now at
16, Uplands, Kandy.
Defendant-Petitioner-Respondent

Before: Hon. Justice P. Padman Surasena
Hon. Justice Mahinda Samayawardhena
Hon. Justice K. Priyantha Fernando

Counsel: Sumedha Mahawanniarachchi with Nishan Balasooriya for the Plaintiff-Respondent-Appellant.
Dr. Sunil Cooray for the Defendant-Petitioner-Respondent.

Written Submissions:
By the Appellant on 14.09.2016

Argued on: 11.01.2024

Decided on: 27.02.2024

Samayawardhena, J.

Background

The plaintiff filed this action in the District Court of Kandy on 16.06.2004 seeking a declaration of title to the land in suit and ejectment of the defendant therefrom. Halfway through the trial, on 09.10.2009, the case was settled whereby the defendant agreed to purchase the property from the plaintiff for a sum of Rs. 2,750,000 on or before 31.12.2009. If payment was not made, it was agreed that the plaintiff is entitled to the judgment, and he can get the writ executed to eject the defendant without prior notice. The defendant did not pay, notwithstanding further extended time was granted for it.

The fiscal went to the land on 26.02.2010 to execute the writ but as the land could not be properly identified, writ was not executed.

The fiscal went to the land again on 19.03.2010 with surveyor Weerakoon and other officers to execute the writ. However, according to the fiscal's report, although the surveyor showed the land (Lot 21 of Surveyor-General's plan No. 641 dated 19.02.1978), the defendant, under the influence of liquor, prevented the fiscal from executing the writ. Upon reading the fiscal's report, it is abundantly clear that the writ was not executed at all.

The defendant made an application dated 17.03.2010 to the District Court to issue a commission to identify the land and call for a valuation report. The Court suspended the execution of the writ until the matter was looked into. The plaintiff filed objections to this application. After inquiry (vide journal entry Nos. 61, 63, 64 of the District Court case record), the District Judge refused this application by order dated 25.05.2010 and ordered the fiscal to execute the writ.

The fiscal executed the writ on 01.06.2010.

The defendant then made an application to the District Judge dated 02.06.2010 seeking to set aside the order dated 25.05.2010. The defendant argued that when the fiscal was obstructed in executing the writ on 19.03.2010, the judgment-creditor was required to make the application under section 325 of the Civil Procedure Code. Since this was not done, he contended that the order to re-issue the writ on 25.05.2010, was given *per incuriam*. The defendant moved to vacate the order. The District Judge by order dated 04.06.2010 rejected this application on the basis that, if the writ could not be executed due to the conduct of the defendant, the Court could re-issue the writ under section 337 of the Civil Procedure Code.

The defendant filed a revision application in the High Court of Civil Appeal of Kandy seeking to set aside the orders of the District Court dated 25.05.2010 and 04.06.2010. The High Court accepted the said argument of the defendant that it was mandatory on the part of the plaintiff to have come before the District Court under section 325 when the fiscal was obstructed in executing the writ. The High Court, by judgment dated 27.01.2011, set aside both orders of the District Court and restored the defendant to possession.

The plaintiff is before this Court against the judgment of the High Court. Although leave was granted against the judgment of the High Court on several questions, during the argument, learned counsel for both parties conceded that the essential question of law to be decided by this Court is whether, when the fiscal was resisted in executing the writ by the judgment-debtor, the judgment-creditor shall necessarily make the application under section 325 or if the Court can re-issue the writ under section 337(3) of the Civil Procedure Code.

I accept that the execution of a writ is a complicated area of law, particularly due to the various procedural intricacies involved and the potential challenges that may arise during the enforcement process. Due to this complexity, the judgment-debtor raises numerous technical objections in a rather convoluted fashion, hindering the judgment-creditor from enjoying the fruits of his victory. The case at hand provides a good example. The judgment-creditor in this case has been unable to execute the writ for 14 long years. With this in mind, in *Fawsan v. Majeed Mohamed and Others* (SC/APPEAL/135/2017, SC Minutes of 31.03.2023) I dealt with this area of law quite extensively.

The instant case is a straightforward one. The judgment-debtor obstructed the fiscal to execute the writ under the influence of liquor. The fiscal reported it to Court. The Court re-issued the writ. The fiscal executed it and ejected the defendant. The High Court restored him to possession on the basis that the judgment-creditor did not make the application under section 325 of the Civil Procedure Code.

The defendant judgment-debtor made one application before the District Court prior to the execution of the writ, and another after the execution of the writ. The District Court, after inquiry, refused both applications. It was not the contention of the judgment-debtor that he paid the money in satisfaction of the decree and therefore the writ should not be executed. His purported objection related to the identification of the property. Although the property was properly identified with the assistance of a surveyor, the defendant, under the influence of liquor, did not allow the fiscal to execute the writ. He also moved to call for a valuation report. There was absolutely no necessity to call for a valuation report. It is obvious that he was adopting dilatory tactics to delay the execution of the writ. In such circumstances, does the Court lack jurisdiction to re-issue the writ? Is it necessary to conduct another inquiry upon an application

made by the judgment-creditor under section 325? The answer should be in the negative.

What is the duty of fiscal in the execution of writ?

Section 324 is an important section, but this section is often misinterpreted hindering the fiscal from executing the writ. It is argued that, in case of resistance, the fiscal has no authority to execute the writ but he must report it to Court. This is a misconception. Section 324 reads as follows:

> *324. (1) Upon receiving the writ the Fiscal or his officer shall as soon as reasonably may be repair to the ground, and there deliver over possession of the property described in the writ to the judgment-creditor or to some person appointed by him to receive delivery on his behalf, and if need be by removing any person bound by the decree who refuses to vacate the property:*
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> *Provided that as to so much of the property, if any, as is in the occupancy of a tenant or other person entitled to occupy the same as against the judgment-debtor, and not bound by the decree to relinquish such occupancy, the Fiscal or his officer shall give delivery by affixing a copy of the writ in some conspicuous place on the property and proclaiming to the occupant by beat of tom-tom, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property; and*
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> *Provided also that if the occupant can be found, a notice in writing containing the substance of such decree shall be served upon him, and in such case no proclamation need be made.*
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> *(2) The cost (to be fixed by the court) of such proclamation shall in every case be prepaid by the judgment-creditor.*

Once the Court issues the writ of execution to the fiscal, section 324(1) authorises the fiscal to deliver possession either to the judgment-creditor or his nominee "*if need be by removing any person bound by the decree who refuses to vacate the property*". However, if there is "*a tenant or other person entitled to occupy the same as against the judgment-debtor*", the fiscal can deliver constructive or symbolic possession. An empty claim or a mere objection to the execution of the writ shall not prevent the fiscal from executing the writ. The objection shall be well-founded and the fiscal shall be *prima facie* satisfied that there is a *bona fide* claim, not a sham designed to frustrate the execution of the writ by the judgment-debtor or someone acting on his behalf.

In the Supreme Court case of *Weliwitigoda v. U.D.B. De Silva and Others* [1997] 1 Sri LR 51, at the time of execution of the writ, the 1st respondent made a claim to tenancy but did not support his claim with documentary evidence. The fiscal executed the writ and delivered possession of the premises to the appellant. The Court of Appeal quashed the writ of execution. On appeal to the Supreme Court, whilst setting aside the judgment of the Court of Appeal, Kulatunga J. (with G.P.S. De Silva C.J. and Ramanathan J. concurring) held at page 55:

> *The powers of Fiscal in executing a writ are set out in S.324 of the Code which requires him to deliver possession of the property to the judgment creditor "if need be by removing any person bound by the decree who refuses to vacate the property". However, if there is a tenant or other person "**entitled** to occupy the same as against the judgment-debtor, and not bound by the decree to relinquish such occupancy" the Fiscal can only give symbolic possession viz. by affixing a copy of the writ on the property and taking other steps, required by the proviso to S.324.*

As regards the requirement to give symbolic possession, it does not appear that the Fiscal is bound to do so on the basis of a mere claim of tenancy, which is not in any way supported by facts. Such a claimant may become liable to removal as an agent, servant or other person, bound by the decree. The 1st respondent was not residing on the premises in dispute. His claim was that he was a sub-tenant under the judgment debtor and in that capacity used some of the buildings on the premises to conduct a school. However, he has not placed any material before the Fiscal to support that claim. If so, he became liable to be removed, in view of his empty claim subject, however, to his right to make an application under S.328 of the Code.

It seems to me that the 1st respondent acted in the belief that if he merely claimed to be a tenant the Fiscal was ipso facto barred from giving the appellant vacant possession of the property; and that if the fiscal then attempted to remove him, he was entitled to resist, whereupon the Fiscal ought to have reported such resistance to Court. ***If this were the law and the occupants have such a "right" to resist execution, effective execution of writs would indeed be impeded. I am of the view that a claim under the proviso to S.324 cannot be entertained unless it is prima facie tenable.***

I am in total agreement with these dicta of Kulatunga J.

In the instant case, the person who resisted the fiscal was not a third party but the judgment-debtor himself. Upon careful examination of the execution proceedings set out in the Civil Procedure Code, it becomes evident that the judgment-debtor has virtually no defence except to claim that he has already satisfied the decree.

Section 325

Section 325 of the Civil Procedure Code was amended by Act Nos. 20 of 1977, 53 of 1980 and 79 of 1988. Section 325 as it stands today 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.*
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> *(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).

In terms of section 325(1), the judgment creditor may at any time within one month from the date of resistance, obstruction, hindrance or ouster make an application to Court for relief. In addition, if the property is an immovable property, such hindrance or ouster shall fall within one year and one day of such delivery of possession.

If the argument of learned counsel for the defendant is accepted, for instance, if the judgment-debtor resisted the fiscal in executing the writ, but, due to some reason, the judgment-creditor could not complain to Court within one month from the date of such resistance under section 325, or if his application, having been filed within one month, was dismissed on a technical ground, he would have no option but to institute a fresh action against the judgment-debtor. Accepting such an argument would clearly result in a travesty of justice.

If the judgment-creditor fails to make the application within one month, this failure will not disqualify him from making an application for execution of the writ in terms of section 337. If the judgment-creditor's complaint falls outside the timeframe specified in section 325(1), the procedure outlined in section 325 and related sections will not be applicable. In such cases, for example, the provisions for imprisonment (as contemplated in section 326(1)(c)) and contempt of court proceedings (as contemplated in section 330) will not apply.

As the District Judge rightly pointed out in the order dated 04.06.2010, there was no necessity for a section 337 inquiry. The Court had the power to re-issue the writ under section 337.

Section 337

After the Civil Procedure Code (Amendment) Act, No. 53 of 1980, section 337 reads as follows:

> *337. (1) No application (whether it be the first or a subsequent application) to execute a decree, not being a decree granting an injunction, shall be granted after the expiration of ten years from-*
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> *(a) the date of the decree sought to be executed or of the decree, if any, on appeal affirming the same; or*

(b) where the decree or any subsequent order directs the payment of money or the delivery of property to be made on a specified date or at recurring periods, the date of the default in making the payment or delivering the property in respect of which the applicant seeks to execute decree.

(2) Nothing in this section shall prevent the court from granting an application for execution of a decree after the expiration of the said term of ten years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within ten years immediately before the date of the application.

(3) Subject to the provisions contained in subsection (2), a writ of execution, if unexecuted, shall remain in force for one year only from its issue, but-

(a) such writ may at any time, before its expiration, be renewed by the judgment-creditor for one year from the date of such renewal and so on from time to time; or
(b) a fresh writ may at any time after the expiration of an earlier writ be issued,

till satisfaction of the decree is obtained.

Simply stated, in terms of section 337(1), no application to execute the decree shall be allowed after 10 years from the date of the decree or, if there was an appeal, after 10 years from the date on which the decree was affirmed on appeal.

In cases where the decree or any subsequent order directs the payment of money over a period of time on part payments or the delivery of property on a specified date, the 10-year period is calculated from the date of the default in making such payment or delivery of such property.

However, as per section 337(2) if the judgment-debtor has by fraud or force prevented the execution of the decree within that period, the rigidity of this rule is relaxed. In such circumstances, the 10-year period begins to run from the date of removal or cessation of such malady or disability.

The 10-year period should be interpreted broadly in favor of the decree holder, not against him. For example, if the judgment-debtor had fraudulently held himself out of reach of the legal process, the Court shall take cognizance of this in calculating the 10-year period.

Wood Renton C.J. in *Fernando v. Latibu* (1914) 18 NLR 95 held that the systematic evasion of service by a judgment-debtor constitutes "fraud" within the meaning of that term as used in section 337.

This judgment was cited with approval by Wanasundara J. in *Union Trust Investment Ltd v. Wijesena and Another* (SC/APPEAL/91/2012, SC Minutes of 06.03.2015) when the Court allowed the execution of writ 10 years after the date of the decree on the basis of "fraud" in a case where the judgment-debtor had evaded service of notice of writ *inter alia* by changing his address.

In the Supreme Court case of *Mohamed Azar v. Idroos* [2008] 1 Sri LR 232 at 241, Amaratunga J. held:

> *The time bar prescribed by section 337(1) commences to operate only from the date on which the judgment creditor becomes entitled to execute the writ, and as such it has no application to a case where the judgment creditor is prevented by a rule of law from executing the writ entered in his favour. The time bar will apply in cases where the judgment creditor after becoming entitled to obtain the writ has slept over his rights for ten years.*

Under section 337(3), introduced by Act No. 53 of 1980, a writ of execution remains in force for only one year from its issue. It can be renewed before its expiration for another one year from the date of such renewal and so on, continuously. If renewal is not done within the year, fresh writs can be issued until the satisfaction of the decree, provided the application is within the 10-year period mentioned above.

Before the said amendment, once an application to execute a decree had been allowed under section 337(1), no subsequent application to execute the same was allowed unless the Court was satisfied that on the last preceding application "due diligence" had been exercised to procure complete satisfaction of the decree. This was removed by the amendment. Irrespective of due diligence, the judgment-creditor can now make successive applications for writ until satisfaction of the decree.

If the judgment-creditor did not or could not in law make the application under section 325 in case of resistance or obstruction or hindrance or ouster, he can make the application under section 337 within 10 years as provided therein for a fresh writ/re-issue of writ subject to section 347.

Technical objections

The defendant's objection is a technical objection. It is not based on merits. In execution proceedings, there is no room for technical objections. The Court shall focus on the substance rather than the form. It is the duty of the Court in such proceedings to facilitate the judgment-creditor to enjoy the fruits of his victory. The decree should not merely be a paper decree. It must be translated into practical and effective relief, enforcing the judgment-creditor's rights.

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 a

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 has received strong endorsement 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. and *Leechman & Co. Ltd. v. Rangalla Consolidated Ltd.* [1981] 2 Sri LR 373 at 380 per Soza J.

In *Samad v. Zain* (1977) 79(2) NLR 557, the plaintiff filed five applications for writ. While the fifth one was pending, he passed away. The substituted judgment-creditor filed a 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. The Supreme Court opined that section 337 should not be construed rigidly 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-*
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> *"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."*
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> *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* in interpreting the provisions of the execution proceedings broadly.

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.

Conclusion

On the facts and circumstances of this case, the District Court was correct in re-issuing the writ. The execution of the writ by the fiscal on 01.06.2010 is lawful.

The High Court was in error when it decided that the District Court had no power to re-issue the writ without an application made under section 325 and restored the defendant to possession.

The question of law is answered as follows: When the fiscal is resisted or obstructed by the judgment-debtor, it is not mandatory for the judgment-creditor to make an application under section 325 of the Civil Procedure Code in order to get the writ re-issued.

I set aside the judgment of the High Court and affirm the orders of District Court dated 25.05.2010 and 04.06.2010 and allow the appeal.

The defendant shall pay to the plaintiff Rs. 150,000 as costs of this appeal.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.
I agree.

Judge of the Supreme Court