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

Rev. Omalpe Somananda Thero,
Sri Jinaraja Viharaya,
Danvilana, Veyangoda.
Petitioner-Petitioner-Appellant

SC/APPEAL/206/2012
WP/HCCA/GAM/10/2010/REV
DC GAMPAHA 38834/L

Vs.

Rev. Ratmale Sri Somarathna Thero,
Sri Poorwaramaya, Naiwala, Veyangoda.
Substituted Plaintiff-Respondent-Respondent

Before: Hon. Chief Justice Murdu N.B. Fernando, P.C.
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: Manohara De Silva, P.C. with Harithriya Kumarage for the Appellant.
Rohan Sahabandu, P.C. with Pubudu Weerasuriya for the Respondent.

Argued on: 24.10.2024

Written Submissions on:
By the Appellant on 28.02.2013 and 13.12.2024
By the Respondent on 20.02.2013 and 12.12.2024

Decided on: 14.03.2025

Samayawardhena, J.

This case has a history spanning thirty years. The plaintiff filed this action against the defendant in the District Court of Gampaha by plaint dated 08.08.1995 seeking, *inter alia*, a declaration that he was the *Viharadhipathy* of *Jinaraja Viharaya* in Veyangoda, and the recovery of damages from the defendant until the plaintiff is restored to possession. The defendant filed answer seeking dismissal of the plaintiff's action on the basis that he had been in lawful possession of the temple. In the answer the defendant took up the position that the premises in suit was gifted to *Paththalagedara Sri Ubhayalokartha Saadhaka Bauddha Samithiya* by deed No. 115 of 03.05.1915. After a lengthy trial, the District Court pronounced the judgment dated 05.05.1997 in favour of the plaintiff. The District Judge held that the plaintiff was entitled to evict the defendant from the temple and to recover possession and damages.

Although the defendant appealed against this judgment to the Court of Appeal, the appeal was abated by the Court of Appeal on 21.02.2003, as no steps were taken to prosecute the appeal after the death of the defendant. The original case record was returned to the District Court.

The decree was then entered in the District Court and the order to execute the writ was made. When the Fiscal went to the premises with the original plaintiff on 25.09.2003 to deliver possession to the plaintiff, another priest, namely, *Rev. Parakandeniye Dhammathilaka*, had been in possession of the temple who had told the Fiscal that he was in possession of the temple with the permission of the *Dayaka Sabhawa*. The members of the *Dayaka Sabhawa/Bauddha Samithiya* have resisted the Fiscal in executing the writ. The Fiscal reported this to Court by report dated 29.09.2003 with the names of those members of the *Dayaka Sabhawa*.

The plaintiff-judgment creditor made an application to the District Court dated 21.10.2003 under section 325 of the Civil Procedure Code making those persons mentioned in the Fiscal's report who resisted the execution of the writ as respondents. The 2nd to 6th respondents were respectively the chairman and the office bearers of the said *Dayaka Sabhawa*. The District Court dismissed the claim of the *Dayaka Sabhawa* by order dated 29.07.2004. On appeal, the Court of Appeal affirmed this order by Judgment dated 19.10.2007.

In the meantime, the original plaintiff passed away on 23.11.2005 and the District Court substituted the present substituted plaintiff in his place by order dated 08.12.2008.

Thereafter, the substituted plaintiff made an application to the District Court dated 23.11.2009 seeking to reissue the writ, after appointing another priest, namely, *Rev. Omalpe Somananda Thero*, who was at that time allegedly in unlawful possession of the temple, an *executor de son tort*, for the purpose of the execution of the decree in terms of section 341(1) of the Civil Procedure Code. The District Judge, by order dated 25.11.2009, appointed *Rev. Omalpe Somananda Thero* as the *executor de son tort* and reissued the writ.

When the Fiscal repaired to the premises to execute the writ of possession on 26.04.2010, he had again been resisted by a large number of people. The entrance gate to the temple had been padlocked. The Fiscal reported this to Court by report dated 26.04.2010.

Thereupon, by order dated 10.05.2010, the District Judge directed the execution of the writ by breaking open the padlocks. When the Fiscal proceeded to the premises on 03.06.2010, an Attorney-at-Law informed the Fiscal that he was resisting the execution of the writ in terms of section 325(1) of the Civil Procedure Code. Consequently, the Fiscal

returned to Court with the writ unexecuted and submitted a report dated 03.06.2010.

It is against this backdrop, *Rev. Omalpe Somananda Thero*, who was allegedly in unlawful possession of the temple, filed a revision application before the High Court of Civil Appeal of Gampaha on 21.05.2010, seeking to set aside the order of the District Court dated 25.11.2009 whereby he was appointed as the *executor de son tort* for the purpose of executing the writ. His primary contention was that the said order had been made *ex parte* without affording him an opportunity to be heard.

According to paragraph 15 of the petition tendered to the High Court, he came to know that he had been appointed as the *executor de son tort* in the action only when the Fiscal visited the premises to execute the writ. The petitioner reiterates this fact in page 3 of the pre-argument written submissions dated 28.02.2013 and in page 6 of the post-argument written submissions filed in this Court. He obtained a stay order from the High Court staying execution of the writ. After inquiry, the High Court dismissed the revision application by Judgment dated 08.03.2011. This appeal with leave obtained by *Ven. Omalpe Somananda Thero* (hereinafter "the appellant") is against the said Judgment of the High Court.

This is yet another textbook case of the abuse of the execution procedure to deprive the judgment-creditor of the fruits of his victory. Despite the judgment of the District Court having been delivered 28 years ago, the plaintiff has still been unable to execute the writ.

In my view, on the facts and circumstances of this case, the High Court should not have entertained the revision application mainly on two reasons.

If the complaint of the appellant was that the order of the District Court dated 25.11.2009 was made against him without giving him a hearing,

he ought to have first made the application to the District Court which made the *ex parte* order. He could go before the High Court only if he was dissatisfied with that order. He could not have straightaway gone before the High Court against the original *ex parte* order. This is the settled law.

In *Andradie v. Jayasekera Perera* [1985] 2 Sri LR 204, a decree entered in a divorce suit was sought to be set aside before the Court of Appeal by way of an application for revision and/or *restitutio in integrum* on the ground that summons was never served on the petitioner. Upholding the preliminary objection taken on behalf of the respondent and dismissing the application *in limine*, Siva Selliah J., citing a spate of earlier authorities held:

> *The practice has grown and almost hardened into a rule that where a decree has been entered ex parte in a District Court and is sought to be set aside on any ground, application must in the first instance be made to that very Court and that it is only where the finding of the District Court on such application is not consistent with reason or the proper exercise of the Judge's discretion or where he has misdirected himself on the facts or law that the Court of Appeal will grant the extraordinary relief by way of Revision or Restitutio in Integrum.*

In *Hotel Galaxy (Pvt) Ltd v. Mercantile Hotels Management Ltd* [1987] 1 Sri LR 5, Atukorale J. with the agreement of Sharvananda C.J. and H.A.G. de Silva J. held:

> *A party seeking to canvass an order entered ex-parte against him must apply in the first instance to the court which made it. This is a rule of practice which has become deeply ingrained in our legal system.*

In arriving at this conclusion, Atukorale J. cited *Loku Menika v. Selenduhamy* (1947) 48 NLR 353, *Habibu Lebbe v. Punchi Etana* (1894) 3 CLR 85, *Caldera v. Santiagopulle* (1920) 22 NLR 155 at 158, *Weeratne v. Secretary, D.C. Badulla* (1920) 2 C L Rec 180, *Dingirihamy v. Don Bastian* (1962) 65 NLR 549, *Bank of Ceylon v. Liverpool Marine & General Insurance Co Ltd* (1962) 66 NLR 472, *Nagappan v. Lankabarana Estates Ltd* (1971) 75 NLR 488 in support.

In *Penchi v. Sirisena* [2012] 1 Sri LR 402 at 408 and *Jana Shakthi Insurance v. Dasanayake* [2005] 1 Sri LR at 299 303, Wimalachandra J. also emphasized this important principle in law. In the latter case it was held:

> *It is settled law that a party affected by an order of which he had no notice must apply in the first instance to the Court which made the order. The petitioner must first file the necessary papers in the original Court and initiate an inquiry into the allegations made by him. After such inquiry, if the petitioner is dissatisfied with the order made by the District Court, he can thereafter raise the matter before the Court of Appeal. The Court of Appeal then would be in a position to make an order on the issues after taking into consideration the order made by the District Court.*

In addition to the abovementioned reason, there was another valid reason for the High Court not to have entertained the revision application. It is settled law that when there is an effective alternative remedy recognized by law, the Appellate Court is loath to exercise revisionary jurisdiction which is reserved to deal with extraordinary situations. In this case, there was no such extraordinary situation which warranted the High Court to intervene by invoking the extraordinary jurisdiction by way of revision. The reason is, if the Fiscal comes to execute the writ, the law provides for the appellant to resist the execution by convincing the Fiscal on *prima*

facie basis that he is not bound by the decree. If the Fiscal accepts it, he can report it to Court without executing the writ. If the Fiscal is not satisfied, he can execute the writ, and the appellant can make an application to Court to restore him to possession. These steps are outlined in sections 324-328 of the Civil Procedure Code. I have discussed the applicability of these provisions in detail in *Mohamed Fawsan v. Majeed Mohamed* (SC/APPEAL/135/2017, SC Minutes of 31.03.2023) and therefore do not wish to reiterate them here.

In this case, the Fiscal could not execute the writ on three separate occasions because certain individuals informed him that they were resisting its execution. On one occasion, an Attorney-at-Law informed the Fiscal of this, and on each occasion, the Fiscal returned the writ unexecuted. This is based on the popular view that when the Fiscal goes to execute the writ and if he encounters resistance, it is his duty to report the resistance to the Court with the writ unexecuted. This is a misconception. Section 324 of the Civil Procedure Code 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

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.

(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) authorizes 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.

Merely because a party to the action or a third party objects to the execution of the writ, the Fiscal should not abdicate his duty and return the writ unexecuted. The objection shall be well-founded and the Fiscal shall be *prima facie* satisfied that there is a *bona fide* claim and that it is not a sham to frustrate the execution of the writ. The execution of a decree is not a retrial, nor should it be an ordeal. It is the process of translating the decree into reality allowing the winner to reap the fruits of his victory.

In *Tyagarajah v. Perera* [1983] 1 Sri LR 384 at 391, Soza J. with the concurrence of Sharvananda J. and Colin-Thome J. made this clear in the following terms:

At the outset it is well to remember that in execution proceedings the statutory procedures are so designed as to assist the judgment-creditor to recover the fruits of his judgment and not to

> *afford facilities to the judgment-debtor to defeat or delay the execution of the decree of court. Hence the general principle is that notice is not required of an application for execution of a decree. The application for execution should conform to the requirements of section 224 of the Civil Procedure Code (Form 42 of the First Schedule to the Code). There is a stipulation to mention the names of the parties but no petition to which any party is named respondent is necessary.*

In the Supreme Court case of *Weliwitigoda v. U.D.B. De Silva* [1997] 1 Sri LR 51, at the time of execution of the writ, the 1st respondent made a claim on tenancy but did not support it 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 the agreement of G.P.S. De Silva C.J. and Ramanathan J.) rightly pointed out that, in the execution of the decree, the Fiscal need not surrender to resistance as a matter of course but do so only if there is a *prima facie* case made out by the party resisting. This was explained at page 55 as follows:

> *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.

Let me now consider the status of the appellant in the instant case afresh. According to the document marked X1B tendered by the appellant himself with the leave to appeal application filed in this Court dated 18.04.2011 and page 6 of the pre-argument written submissions of the appellant dated 28.02.2013, the appellant is in occupation of the temple as the trustee of the *Baudda Samithiya* in which the office bearers were the 2nd to 6th respondents in the section 325 application, which I mentioned previously. The said letter X1B appointing the appellant as the trustee of the temple has been signed by the 2nd respondent to the

section 325 application. It may be recalled that the said 2nd to 6th respondents' application was dismissed by the District Court and the Court of Appeal affirmed it. This purported appointment as the trustee of the temple was made even after the Fiscal had gone to the premises for the third time to hand over possession after breaking open the padlock of the entrance gate to the premises. It is this appointment that provided the appellant with the *locus standi* to file the revision application in the High Court. The revision application was filed by the appellant about one month after the said appointment. It is clear that the appellant is a nominee or an agent of the said respondents. The appellant has no independent survival. He cannot reagitate the matter and argue that a separate action shall be filed to evict him from the premises.

The appellant did not make the application to the District Court nor did he make the said 2nd respondent whom he says appointed him as the trustee of the temple, a party to his application. Instead, he went directly to the High Court perhaps because he knew his predicament before the District Court.

Given the unique facts and circumstances of this case, in my view, there was no necessity to appoint the appellant as the *executor de son tort* in order for him to be evicted in the execution of the decree.

Then why did the substituted plaintiff make an application to appoint the appellant as the *executor de son tort*? Is the appointment of the appellant as the *executor de son tort* wrong in law?

Section 341 of the Civil Procedure Code reads as follows:

> *341(1) If the judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the court which passed it, by petition, to which the legal representative of the*

deceased shall be made respondent, to execute the same against the legal representative of the deceased.

(1A) On an application made under subsection (1), the court shall enter the name of the legal representative on the record in place of the name of the deceased and shall proceed to determine the application for execution.

(2) Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the court executing the decree may on the application of the decree-holder compel the said representative to produce such accounts as it thinks fit.

(3) If the judgment-creditor dies before the decree has been fully executed, the legal representative may apply to the court to have his name entered on the record in place of the deceased and the court shall thereupon enter his name on the record.

According to section 341(1), when the judgment-debtor dies before the execution of the decree, the decree holder shall take steps to appoint a legal representative of the deceased judgment-debtor for the purpose of the execution of the decree.

I must pause for a while to observe that it is illogical to assume that a decree holder can only execute the writ if a legal representative of the deceased judgment-debtor exists, but he cannot execute the writ if there are no legal representatives.

According to section 338 of the Civil Procedure Code, as amended, in general terms, a legal representative means an executor or administrator or in the case of an estate below the value of four million rupees, the next

of kin who have adiated the inheritance. In the event of a dispute as to who is the legal representative, the Court shall decide it.

However, in execution of the decree upon the death of the judgment-debtor, the rigid application of the law is relaxed. In the result, even a stranger in possession of the property in suit who does not claim under the judgment-debtor may be appointed as the legal representative for the purpose of section 341(1) of the Civil Procedure Code depending on the facts and circumstances of the case.

In *Simon v. Gunatilake* [2005] 1 Sri LR 249 the plaintiff filed action seeking ejectment of the 1st defendant from the land in suit. After trial, the District Judge entered judgment for the plaintiff. Pending appeal, the 1st defendant died and the application to substitute the petitioners in the room of the deceased 1st defendant was objected to, on the basis that they were not children of the deceased 1st defendant. The District Judge did not accept that position and the substitution was allowed. On appeal, Wimalachandra J. affirmed the decision of the District Judge and explained the law at page 253 as follows:

> *Sarkar's Law of Civil Procedure, 8th edition, Volume 1, at page 220 has made the following observation on the Indian section 50(1) which is identical to ours: "A stranger in possession of deceased judgement-debtor's property but who claims no title from him may be proceeded against in execution as legal representative under section 50 [Baliram v. Mukinda (A 1951 N 145)"*
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> *The property possessed by the judgement-debtor is now in the hands of the petitioner (1st to 3rd substituted defendants). It seems to me that they come within the meaning of section 341(1), as the legal representatives of the deceased 1st defendant. The legal*

representative includes any person who intermeddles with the estate of the deceased.

In the instant case, there are no legal representatives to the deceased as defined in section 338 of the Civil Procedure Code. The appeal of the deceased defendant was abated by the Court of Appeal as nobody was forthcoming to prosecute the appeal.

An *executor de son tort*, meaning, an executor of his own wrong, is a legal fiction. He is someone who wrongfully interferes with the deceased's estate or assumes the office of executor without legal basis. He has all the liabilities but none of the privileges attached to a duly constituted executor. In *Nesaratnam v. Vaithilingam* (1975) 78 NLR 457, Pathirana J. with the agreement of Vythialingam J. held that an *executor de son tort* is a legal representative of the deceased within the meaning of section 341(1) of the Civil Procedure Code. In support of this proposition of law, Pathirana J. cited, *inter alia*, *Prins v. Peiris* 4 NLR 353, *Arunachalam Chettiar v. Arunachalam Chettiar* (1934) 36 NLR 49 at 51, *Perera v. Pathumma* (1919) 21 NLR 76 at 77, *Junaid v. Commissioner of Inland Revenue* (1962) 65 NLR 561 and *Dahanayake v. Jayasinghe* (1966) 71 CLW 112. Pathirana J. further stated at page 468 that "*The trend seems to favour an extended meaning to be given to the term executor or administrator as to include an executor de son tort. Both reason and logic seem to favour this view, particularly in interpreting section 341 of the Civil Procedure Code.*"

In *Dahanayake v. Jayasinghe* (supra), Sri Skanda Rajah J. with Alles J. agreeing stated that "*The legal representative is either the executor or the administrator, under section 394(2) of the Civil Procedure Code. In our opinion, an executor also includes executor de son tort. There was ample evidence to indicate that the appellant intermeddled with her late husband's estate and thereby constituted herself executrix de son tort.*"

On the unique facts and circumstances of this case, the appointment of the appellant as *executor de son tort* for the limited purpose of the execution of the decree in compliance with section 341(1) can be justified by giving an extended meaning to the term *executor de son tort*.

In *Tyagarajah v. Perera* [1983] 1 Sri LR 384, Soza J. with the concurrence of Sharvananda J. and Colin-Thome J. held that where the judgment-debtor dies before execution of the decree and where a legal representative should be substituted for the deceased judgment debtor, no service of notice on the legal representative is necessary before the substitution. Substitution and execution should be asked for in one petition in which the legal representative shall be made respondent. Substitution will be *ex parte* and thereafter notice will be issued on the legal representative although section 341(1) does not mandate to do so. It is nothing but fair to assume that the provision in section 341 to make the legal representative a party respondent is to ensure that he receives notice of the application for execution. Soza J. stated that it is now settled law that service of notice on the legal representative prior to execution is mandatory and failure to do so is a fatal irregularity. However, it was further held that where the legal representative becomes otherwise aware of the application for execution, the failure to issue notice before issuance of writ is not fatal.

As pointed out previously, the appellant was appointed as the trustee of the temple by the 2nd to 6th respondents to the section 325 application. When the 2nd to 6th respondents unsuccessfully resisted the execution, it can reasonably be assumed that the appellant was aware of the execution process initiated by the substituted plaintiff.

Why is notice issued on the legal representative? That is for the legal representative to show cause why writ shall not be executed against him. In the instant case, the legal representative (the appellant) has no cause

to show as he has no independent title or claim other than through the 2nd to 6th respondents. Hence, on the unique facts and circumstances of this case, the failure to issue notice on the appellant prior to the issuance of writ is not fatal.

In any event, if the appellant was dispossessed by the execution of the decree wrongfully, he was not without remedy. Section 328 of the Civil Procedure Code provides the answer.

> *328 Where any person other than the judgment-debtor or a person in occupation under him is dispossessed of any property in execution of a decree, he may, within fifteen days of such dispossession, apply to the court by petition in which the judgment-creditor shall be named respondent complaining of such dispossession. The court shall thereupon serve a copy of such petition on such respondent and require such respondent to file objections, if any, within fifteen days of the service of the petition on him. Upon such objections being filed or after the expiry of the date on which such objections were directed to be filed, the court shall, after notice to all parties concerned, hold an inquiry. Where the court is satisfied that the person dispossessed was in possession of the whole or part of such property on his own account or on account of some person other than the judgment-debtor, it shall by order direct that the petitioner be put into possession of the property or part thereof, as the case may be. Every inquiry under this section shall be concluded within sixty days of the date fixed for the filing of objections.*

It is important to understand that there is no place for technical objections in execution proceedings. This matter was discussed by me in *Mohamed Fawsan v. Majeed Mohamed* (supra). In execution proceedings the Court will only look at the substance and not the form. Even if there

are minor lapses, if no material prejudice has been caused thereby, resulting in grave miscarriage of justice, the Court will not intervene.

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. expressed a similar opinion:

> *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 been emphatically endorsed in an array of decisions including *Suppramanium Chetty v. Jayawardene* (1922) 24 NLR 50, *Wijewardene v. Raymond* (1937) 39 NLR 179 at 181, *Latiff v. Seneviratne* (1938) 40 NLR 141 at 142, *Sirimala Veda v. Siripala* (1954) 55 NLR 544, *Perera v. Thillairajah* (1966) 69 NLR 237, *Wijetunga v. Singham Bros. & Co.* (1964) 69 NLR 545 at 546, *Dharmawansa v. People's Bank and*

Another [2006] 3 Sri LR 45 and *Leechman & Co. Ltd. v. Rangalla Consolidated Ltd.* [1981] 2 Sri LR 373.

In *Samad v. Zain* (1977) 79(2) NLR 557, the plaintiff made five applications for writ and died while the fifth was pending, resulting in the execution being stalled. 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 ("due diligence" was a requirement under section 377 before the Amendment by the 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 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."*
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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.*

Before I part with this judgment, let me touch upon one more matter. After the death of the original plaintiff, the respondent was appointed as the substituted plaintiff in the District Court. The appellant now attempts to argue that this substitution was made erroneously through an *ex parte* application to the District Court, on the basis that the action is personal to the original plaintiff and the defendant, and therefore the question of substitution did not arise. The appellant cannot challenge the validity of this substitution in these proceedings. If he thought that the substitution was improper, he should have first raised that matter in the District Court, rather than hastily going before the High Court to stay the execution of the writ. In any event, no leave has been granted by this Court to consider such a question of law.

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

Q. Did the High Court err in law in holding that the appellant can be appointed as a legal representative of the deceased defendant on the basis that the appellant is the *executor de son tort* of the deceased defendant?

A. No. On the facts and circumstances of this case, this appointment could have been made.

Q. Did the High Court fail to consider that the substituted plaintiff has failed to comply with the provisions of section 341(1) of the Civil Procedure Code by naming the appellant as a respondent filed under the said section?

A. On the facts and circumstances of the case, the answer is in the negative.

Q. Did the High Court err in holding that the appellant was aware of the application for substitution and execution of writ?

A. On the facts and circumstances of the case, the answer is in the negative.

For the aforementioned reasons, the appeal is dismissed with costs payable by the appellant to the substituted plaintiff. The appellant cannot have an independent claim against the decree holder. If the appellant does not vacate the premises within two months from today, the Fiscal shall eject the appellant from the premises and hand over the possession of the premises to the substituted plaintiff in the execution of the decree.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., C.J.
I agree.

Chief Justice

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court