RASHEED ALI

v.

MOHAMED ALI AND OTHERS

COURT OF APPEAL.
SOZA, J. AND L. H. DE ALWIS, J.
C. A. APPLICATION No. 997/80 – D. C. COLOMBO 3290/ZL.
DECEMBER 8, 9, 1980.

Civil Procedure Code, Chapter XXII, sections 325 to 329 – Execution proceedings – Resistance or obstruction – Delivery of constructive possession – Whether claim of person resisting frivolous or vexatious.

Revision – Application to revise order of District Court in execution proceedings – Preliminary objection that revision did not lie – In what circumstances is the claimant entitled to relief by way of revision.

Supreme Court Rules, 1978, Rule 46 – Requirement that documents material to the case be filed – Whether imperative – Effect of non-compliance.

One *M* purchased the premises in suit on 22.2.1979 and thereafter instituted a vindicatory action against his vendor in which he also sought an order of ejectment of the vendor and "all those holding under him" and the recovery of damages. At the trial in December, 1979, the vendor (defendant) consented to judgment without costs and damages. Writ of ejectment was thereafter issued on M's application. However, the Fiscal was able only to deliver constructive possession as *R* the present petitioner who was in occupation of the main portion of the premises resisted ejectment claiming to occupy the same on an agreement entered into by him with one *S*. After the Fiscal reported the facts to Court there were proceedings under section 325 of the Civil Procedure Code. The petitioner's claim at the inquiry was twofold, namely, that he was directly a tenant of the vendor who was the defendant in the main action and therefore entitled to the protection of the Rent Act and alternatively that he was a sub-tenant, being the tenant of *S* who had himself been a tenant under the vendor. The learned District Judge after inquiry rejected the version of the petitioner and his findings showed that he had treated the claim as one which was vexatious and frivolous and not made bona fide, and accordingly the respondent was entitled to be put in possession.

The petitioner filed papers in the Court of Appeal to revise this order. Two preliminary objections were taken in the Court of Appeal on behalf of the respondents which were also argued along with the main case on the facts. These objections were that the petition must fail for non-compliance with Rule 46 of the Supreme Court Rules, 1978, and that an application for revision would not lie in the circumstances of the present case.

Held

(1) On the facts the claims of the petitioner must fail. After constructive delivery had been given to the respondent (judgment-creditor) the claims of both the petitioner and

the judgment-creditor had been investigated and order made by the learned District Judge as provided for in the Civil Procedure Code. An examination of the facts showed that the petitioner's claim to be a tenant under the vendor could not be maintained and must be regarded as frivolous or vexatious and not made bona fide. His claim that he was a tenant of *S* which claim was based on a deed marked "A4" was, as a consideration of this deed together with the facts of the case showed, equally untenable, and the learned District Judge rightly rejected this claim also. Accordingly the petition must fail.

(2) The provisions of Rule 46 of the Supreme Court Rules, 1978, are imperative and should be complied with by a party who seeks to invoke the revisionary powers of the Court of Appeal. This is subject, of course, to the proviso that where a matter of great urgency arises and a party has no time to obtain the documents required by the Rule, the Court would extend such indulgence as was necessary in order to enable a petitioner to make compliance subsequent to the filing of the petition. In a case where circumstances beyond the petitioner's control prevent compliance in this manner, the petitioner should comply with the Rule as soon as possible. In the circumstances of the present case, the petitioner failed to comply with the Rule at the time he filed his petition and even though he could be excused for non-compliance because of the urgency of his application he had made no efforts since then to comply with the Rule. The preliminary objection was therefore entitled to succeed.

(3) The powers of revision conferred on the Court of Appeal are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal had been taken or not. However, this discretionary remedy can be invoked only where there are "exceptional circumstances" warranting the intervention of the Court. Although the Courts have not attempted to define the expression "exceptional circumstances" the authorities show the guide lines which had been laid down and applying these there was here a case for intervention by way of revision in the interests of justice, particularly as the original Court had already ordered the respondent to be restored to possession and there was every likelihood that the order would be carried out before the petitioner could appeal and obtain stay of execution of the order complained of and this would make the ultimate decision, if it went in favour of the petitioner, nugatory. However, the petitioner in the present case had not made a full disclosure of all material facts as a person who invokes a discretionary remedy such as revision was bound to do; and the Court would not extend relief to such a party.

Cases referred to

(1) *Navaratnasingham v. Arumugam and another, (1980) 2 Sri L. R. 1.*
(2) *Atukorale v. Samynathan, (1939) 41 N.L.R. 165; 14 C.L.W. 109.*
(3) *Silva v. Silva, (1943) 44 N.L.R. 494; 26 C.L.W. 3.*
(4) *Fernando v. Fernando, (1969) 72 N.L.R. 549.*
(5) *Rustom v. Hapangama & Co., (1978-79) 2 Sri L.R. 225.*
(6) *Alima Natchiar v. Mariker, (1949) 47 N.L.R. 81.*
(7) *Lebbaythamby v. The Attorney General, (1964) 70 C.L.W. 53.*
(8) *Suranimala v. Grace Perera, (1964) 67 C.L.W. 37.*
(9) *Ranasinghe v. Henry, (1896) 1 N.L.R. 303.*
(10) *Sinnathangam v. Meeramohaideen, (1958) 60 N.L.R. 394.*
(11) *In the matter of the insolvency of Hayman Thornhill, (1895) 2 N.L.R. 105.*
(12) *Sabapathy v. Dunlop, (1935) 37 N.L.R. 113.*
(13) *Fernando v. Abdul Rahaman, (1951) 52 N.L.R. 462.*
(14) *Ibrahim Saibo v. Mansoor, (1953) 54 N.L.R. 217.*

APPLICATION to revise an order of the District Court, Colombo.

C. Thiagalingam, Q.C., with *S. Mahenthiran* and *A. Gnanathasan*, for the petitioner.
H. W. Jayewardene, Q.C., with *N. S. A. Goonetilleke* and *N. Mahendra*, for the 1st respondent.

Cur. adv. vult.

January 30 1981.

SOZA, J.

This is an application for revision made by the petitioner Mohamed Haniffa Rasheed Ali inviting the Court to revise the order made by the learned District Judge of Colombo on 1.8.1980 whereby he rejected the claim of the petitioner to remain in possession of premises No. 19, Galle Road, Bambalapitiya as a tenant or as a sub-tenant. The facts leading to the present application may be stated as follows: One Khan Mohamed Ali bought the premises in suit from one L. W. R. P. Marshal on deed No. 2208 of 22.2.1979. Khan Mohamed Ali instituted vindicatory suit bearing No. 3290(ZL) in the District Court of Colombo against L. W. R. P. Marshal for a declaration of title to the premises in dispute in the present proceedings and for an order of ejectment of Marshal and "all those holding under him" and for the recovery of damages. This case came up for hearing on 19.12.1979. Marshal consented to judgment without costs and damages and decree was entered accordingly declaring Khan Mohamed Ali entitled to the said premises and ordering the ejectment of Marshal and all those holding under him. On the application of Khan Mohamed Ali the Court ordered writ to issue. The Fiscal was able to make only constructive delivery of possession to Khan Mohamed Ali because Mohamed Haniffa Rasheed Ali the present petitioner claimed to occupy the premises on the basis of an agreement entered into between himself and one Sangaralingam Muthusamy on deed No. 182 of 27.8.1978 marked A4. There was also a gramseller one M. Muthulingam occupying a portion of the premises. He claimed to be there having obtained the permission of S. Muthusamy to carry on the business of selling gram on a writing dated 28.7.73. There was a case bearing No. 812/M pending against Muthulingam which had been instituted by Muthusamy. The Fiscal reported these facts to Court and thereafter the proceedings which culminated in the order in favour of Khan Mohamed Ali sought to be revised in the present application before us were initiated under the sections of the Civil Procedure Code dealing with resistance to execution of proprietory decrees. The petitioner Mohamed Haniffa Rasheed Ali has named Khan

Mohamed Ali as the 1st respondent, L. W. R. P. Marshal as the 2nd respondent and M. Muthulingam as the 3rd respondent in his application to this Court. This is the second hearing of this application. Earlier the matter was argued before Wimalaratne, J. President of the Court of Appeal and Rodrigo, J. on 1.10.1980 and judgment was reserved. But before the judgment could be delivered Wimalaratne, J. was elevated to the Supreme Court and this necessitated a hearing *de novo* before us of this case.

It was submitted by way of preliminary objection that the present petition should be dismissed as the petitioner has failed to comply with Rule 46 of the Supreme Court Rules of 1978 published in Gazette Extraordinary No. 9/10 of 8.11.1978. By virtue of this rule an application for revision should be made by way of petition and affidavit and should be accompanied by originals of documents material to the case or duly certified copies thereof in the form of exhibits and also two sets of copies of the proceedings in the Court of first instance. In the case of *Navaratnasingham v. Arumugam and another* (1) I held that the provisions of Rule 46 are imperative and should be complied with by a party who seeks to invoke the revisionary powers of this Court. I would merely like to add that what I said in that judgment should be read subject to the principle that the law does not expect a person to do what is impossible. There may be occasions when matters of great urgency arise where a party has to seek the revisionary powers of this Court but is left with no time to obtain the documents as required by Rule 46. On such an occasion the Court no doubt will take a reasonable view of the matter and extend such indulgence as is necessary to enable a petitioner to comply with the requirements, subsequent to the filing of the petition. But it should be remembered that a petitioner who is asking this Court to act in revision is not exempted from complying with Rule 46. If circumstances beyond his control prevent his complying with the rule at the moment of filing the application he should yet comply with it as soon as possible. There is provision in the rules for amendment of the petition or tender of additional papers with permission of Court to which a petitioner can resort so as to comply with Rule 46—see Rules 50, 51 and 54. Where the rules are not complied with the Registrar of the Court is obliged without any delay to list the application for an order of Court—see Rule 59. In the instant case the petitioner failed to comply with Rule 46 at the time he originally filed his papers. For this failure he can be excused because of the urgency of his application.

But since then he has made no effort to comply with Rule 46. It is true the first respondent filed a statement annexing a number of documents so as to present an adequate picture of the dispute between the parties. Yet this does not absolve the petitioner from complying with Rule 46 as soon as it was possible for him to do so by moving for amendment of the petition or tender of additional documents. Instead as late as 19.11.1980 he tendered one document—a copy of a complaint to the Police (2R3)—without verification and without obtaining the permission of Court and after the pinch of the argument was ascertained at the earlier hearing concluded on 1.10.1980. Two documents—a certified copy of the Magistrate's Court case No. JMC 34213 relating to the payment of Rs. 40,000 by the petitioner to the first respondent and the Certificate of Business Registration of the petitioner—remain yet to be presented. For these reasons the preliminary objection is entitled to succeed.

I will now turn to the argument advanced on behalf of the 1st respondent that in the circumstances of the instant case an application for revision will not lie. It is well established that the powers of revision conferred on this Court are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal where it lies has been taken or not. But this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the Court—see the cases of *Atukorale v. Samynathan* (2), *Silva v. Silva* (3), *Fernando v. Fernando* (4) and the unreported case of *Rustom v. Hapangama & Co.* (5). In the absence of exceptional circumstances the mere fact that the trial Judge's order is wrong is not a ground for the exercise of the revisionary powers of this Court—see *Alima Natchiar v. Marikar* (6).

The Courts have not attempted to define the expression "exceptional circumstances". But there are guidelines laid down in the decided cases. Where an appeal would take time to come up for hearing and the ensuing delay would render the ultimate decision nugatory then that would be an exceptional circumstance calling for the interference of the Court by way of revision *(Athukorale v. Samynathan (supra)* and *Lebbaythamby v. The Attorney-General* (7).) In the case of *Suranimala v. Grace Perera* (8) the Court acted in revision despite the fact that an appeal was available but was not taken as the circumstances called for a speedier remedy than was available by way of appeal. Where the

order of the trial Court is wrong *ex facie* it will be quashed by way of revision even though no appeal may lie against such order *(Ranesinhe v. Henry* (9) or the appeal was abated owing to a technicality *(Sinnathangam v. Meeramohaideen* (10). Where the interests of justice demand it the Court will not hesitate to act in revision *(In the matter of the Insolvency of Hayman Thornhill* (11) and *Sabapathy v. Dunlop* (12).)

In the instant case were there exceptional circumstances calling for the intervention of this Court by way of revision? If what the petitioner complains of is justified this was a case for the intervention of this Court in the interests of justice. Further, the original Court had already ordered that the judgment-creditor be restored to possession and there was every likelihood that the order would be carried out with the least possible delay before the petitioner could appeal and obtain stay of execution of the order complained of. This would make the ultimate decision, if it went in favour of the petitioner, nugatory. In such exceptional circumstances an application for revision would always lie. But the application has to fail for non-compliance with Rule 46 referred to earlier.

Further, a person who invokes a discretionary remedy like revision must make a full disclosure of all material facts. In the instant case the petitioner has failed to place before this Court available proof of the facts and circumstances of the dispute. The Court will not extend relief by way of revision to such a party.

It was submitted that the action which the present 1st respondent brought against the 2nd respondent was a collusive one designed to encompass the eviction of the petitioner and Muthulingam the 3rd respondent. Marshall as he legally might sold the premises. He undertook to hand over vacant possession to the vendee and this is one of his obligations cast upon him by the law. When a person acts on the basis of his legal rights and duties howsoever immoral his action, he cannot be penalised. So far as Marshall the 3rd respondent was concerned he had no defence to the action and he was a wise man to have settled the case without costs and damages. In these circumstances the decree entered in this case is not open to attack on the ground of fraud or collusion.

I will now consider the legal principles which should guide the Court in dealing with the situation that arose in the present

case. The sections I would be referring to are those of the Civil Procedure Code incorporating the amendments up to the 31st December, 1977. Under section 325 (1) of this Code where the Fiscal is resisted or obstructed or where within one year and one day after he has delivered possession the judgment-creditor is hindered or ousted by the judgment-debtor or any other person in taking complete and effectual possession, the judgment-creditor can complain to 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. Such petition must be filed within one month of the date of the resistance or obstruction or hindrance or ouster as the case may be. It should be observed that in this section the statute speaks of resistance or obstruction to the Fiscal and also, where possession had been handed over by the Fiscal, of hindrance to or ouster of the judgment-creditor.

On receiving a petition under section 325 (1) the Court shall direct the Fiscal to publish a notice announcing the complaint that has been made 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—vide section 325 (2). Subsection (3) of section 325 spells out the manner in which the Fiscal shall make the publication. Upon such publication being made, in addition to the persons already referred to, any person claiming to be in possession of the whole of the property or part thereof as against the judgment-creditor can within fifteen days of the publication of the notice file a written statement of claim setting out his right or interest entitling him to present possession—see section 325 (4). On inquiry into the matter of the petition and of any claim that has been made, if the Court is 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 judgement-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 frivolous or vexatious; or

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

the Court shall direct the judgment-creditor to be put into or restored to possession of the property. In addition the Court may deal with the judgment-debtor or such other person as for contempt of Court. It will be seen that under section 326 (1) there is being observed a difference between the level of proof required in regard to resistance, obstruction, hindrance or ouster as contemplated under section 325 (1) and the level of proof required in regard to the claim of a person not involved in any of these acts but who has merely made a claim under section 325 (4). Where a person has made a claim under section 325 (4) the Court must be satisfied that the claim has not been established. Where there has been resistance to or obstruction of the Fiscal or hindrance to or ouster of the judgment-creditor the Court must be satisfied that the claim of the person guilty of such resistance, obstruction, hindrance or ouster is frivolous or vexatious. Here it is also necessary to refer to section 327 where again the distinction earlier observed persists. Where the resistance or obstruction or ouster (the word hindrance is omitted) is found by the 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 (obviously a claim under section 325 (4)) 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. It will be observed that section 327 does not deal with hindrance of the judgment-creditor. So far as resistance or obstruction or ouster goes if it has been occasioned by any person on his own account or on account of some person other than the judgment-debtor claiming in good faith to be in possession of the whole of such property by virtue of any right or interest then the petition will be dismissed. So a claim in good faith to a share of the property is not covered by this section nor is hindrance to the judgment-creditor after he has obtained possession. So far as claims under section 325 (4) go, if the claim 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 dismiss the petition. No good faith is necessary and the claim need not be established. Such claimant need only show that he has some right or interest and that to the whole of the property. On the other hand section 326 (2) makes provision for claims being established to a share of the property. It will be observed therefore that there are inconsistencies between the two sections 326 and 327. The sections need amendment but that is a matter for the Legislature.

Limiting the provisions to the question before us, we see that if the resistance or obstruction to the Fiscal is frivolous or vexatious then section 326 stipulates that the judgment-creditor shall be put back into possession of the property. Or the Court should find that the resistance or obstruction has been made by the petitioner acting in good faith on the basis of a claim to a right or interest in the whole of the property on his own account or on account of some person other than the judgment-debtor. To reconcile the inconsistent statutory provisions one has to regard the expression frivolous or vexatious as the antonym of good faith. In the instant case the Court should be satisfied that the claims of the petitioner and the 3rd respondent are not frivolous or vexatious or find that they have been made in good faith by virtue of some right or interest in the whole of the property and on their own account of a person other than the judgment-debtor.

One requirement is that the claim should be made by a person on his own account or on account of some person other than the judgment-debtor. That is the initial qualification that a person should have to claim the protection offered by sections 326 and 327.

Here I should observe that the petitioner claims he is not bound by the decree as he was not made a party to the case. No doubt the petitioner could have been added before the trial under section 18 of the Civil Procedure Code. This was one course of action open to the petitioner. As this was not done the petitioner is not bound by the decree *(Fernando v. Abdul Rahaman* (13)). In such a situation the proper procedure for the Court to adopt is to direct the Fiscal to hand over constructive delivery of the premises to the judgment-creditor and thereafter to investigate the judgment-creditor's claim to complete and effectual possession in accordance with the provisions relating thereto of the Civil Procedure Code.

(Ibrahim Saibo v. Mansoor (14)). This was substantially what was done in the instant case. The claims of the petitioner and the judgment-creditor have been investigated and the order has been made as provided for in the Civil Procedure Code.

Now to get back to the facts it will be seen that the present petitioner has two strings to his bow. One is that he was directly a tenant of the former owner Marshall, and therefore entitled to the protection of the provisions of the Rent Restriction Act. The other is that he was a tenant of one Sangaralingam Muthusamy who is not a party to the present proceedings but who it has transpired in evidence was a tenant of the premises under the former landlord. The petitioner's claim to be a subtenant hinges on deed No. 182 of 27.8.1978 marked A4. These two claims must be examined in order to ascertain whether the Court should be satisfied in these proceedings, that the claim of the petitioner is frivolous or vexations or that his claim has been made in good faith by virtue of some right or interest in the whole of the property.

On the question whether the petitioner was a tenant under the former owner L. W. R. P. Marshall the evidence proceeds on two lines. The petitioner claims that he made a direct payment to Marshall of one month's rent in a sum of Rs. 750/-. The second is that when he paid his rent to Muthusamy a portion of it was meant for Marshall. The claim is that every month an amount of Rs. 1,350/- was paid to Muthusamy and of this sum Rs. 750/- was to be appropriated by Muthusamy the tenant and the balance Rs. 600/- was to be chanelled through Muthusamy to Marshall. It should be observed that there is no documentary evidence of either of these claims, i.e., there is nothing to show that any money was channelled to Marshall from the amount the petitioner paid to Muthusamy and there is nothing to show that the petitioner paid Rs. 750/- on one occasion to Marshall on account of rent. The petitioner mentioned none of these matters as entitling him to remain in possession to the Fiscal when that official visited the premises to execute the writ. The account books of the petitioner although listed have not been produced to prove any of these claims of payment. There is only the oral evidence of the petitioner himself. It has been submitted that as no evidence to the contrary has been placed before Court and this is a civil case the Court is obliged to accept the version of the petitioner. I agree with the general proposition that ordinarily in a civil case where evidence

is placed on a certain point in issue by one party and there is no evidence contrary to that led by the opposite side, then the Court would act on the footing that the uncontradicted evidence has been proved by a balance of probabilities. But this is not an invariable rule. It cannot be used to oblige the Court to accept evidence that is demonstrably or palpably false. No Court can be obliged to accept evidence that is false. It was submitted that in fact the petitioner had given by way of advance to Marshall a sum of Rs. 40,000/- on an unwritten agreement and without any receipt to buy the property. There were Magistrate's Court proceedings in respect of this which ended with the return of the money by Marshall to the petitioner. A copy of the proceedings of the Magistrate's Court has not been placed before us. The complaint which the present petitioner made to the police has been tendered just before the hearing of the present application before us commenced. The learned District Judge who heard and saw the witnesses was not prepared to accept the story of the petitioner that he paid Rs. 750/- directly to Marshall on any occasion with a view to becoming Marshall's tenant. Indeed it would seem unlikely that he made such a payment in view of the fact that he was to buy the premises and had even paid the advance. Muthusamy died on 1.3.1979 and therefore his evidence was unfortunately not available to the Court. In the light of the infirmities and short-comings in the evidence on the question of payment I cannot fault the learned District Judge for disbelieving the petitioner's statement that he paid Rs. 750/- to Marshall directly or that of the sum of Rs. 1,350/- which he paid monthly to Muthusamy a sum of Rs. 600/- was meant to be channelled to Marshall. The version of the petitioner that he was the tenant under the former owner Marshall was rightly rejected by the learned District Judge. That claim was obviously an afterthought and must be regarded as frivolous or vexatious and not made *bona fide.*

The claim that the petitioner was a subtenant on the basis of a letting out by Muthusamy is equally untenable. This claim is based on deed 182 of 27.8.1978 marked A4. This deed is a partnership agreement for a period of three years operative from 1.11.1978. By this agreement Muthusamy handed over the management of a hotel of the name and style of Dhawalagiri Hotel which was being run in these premises along with the stock-in-trade. In no part of this agreement is there any clause which says that the premises are being sublet to the petitioner. Every item of this agreement deals with the management of the business called

Dhawalagiri Hotel. There is provision for payment of salaries and wages of the employees, electricity bills and water tax by the present petitioner. Muthusamy undertook to pay the rent. The present petitioner undertook not to sublet the premises and he had to pay a sum of Rs. 45/- per day to Muthusamy. This was in respect of the business. The responsibility for paying any rent whether to Muthusamy or Marshall has not been cast on the present petitioner. Further, this agreement is in respect of a business called Dhawalagiri Hotel. It is conceded that the business now being run in these premises is that of a hotel under the name and style of New Wappa Eating House. The position of the petitioner, so far as the Court can ascertain it, is that he came in here to run the business called Dhawalagiri Hotel in terms of a partnership agreement which he signed. The mutual obligations of the two partners are set out in the deed. The petitioner altered the name of the business to New Wappa Eating House. The claim that petitioner was a subtenant based on this deed 182 of 27.8.1978 was therefore rightly regarded as without any foundation. The findings of the learned District Judge show that he has treated the claim of the present petitioner as vexatious and frivolous and not made *bona fide.* On the facts the petition must fail and must be dismissed. The position of the third respondent stands in far worse light than that of the petitioner. Accordingly the judgment-creditor i.e., the present 1st respondent must be put back into possession and the claims of the petitioner and the 3rd respondent dismissed. I make order accordingly. The order of the learned District Judge is affirmed. The application is dismissed with costs.

L. H. De ALWIS, J.—I agree.

Application dismissed.