ARIYAPALA
VS
SWARNAMALI AND ANOTHER

COURT OF APPEAL.
SOMAWANSA, J. (P/CA) AND
WIMALACHANDRA, J.
CA 238/2004 (REV.).
DC COLOMBO 3533/RE.
JUNE 22, 2005.

Civil Procedure Code, section 325(1), 325(3), 325(4), 326(1), 327 and 329- Resistance to writ-Sections 325(1) and 325(4) applications are two different applications ? - Alternative remedy provided in section 329 - Does revision lie ? Evidence Ordinance, section 101 - Trust Ordinance, section 102 - Burden of proof.

The fiscal was resisted by the claimant, and the judgment - creditor-respondent made an application in terms of section 325(4). The judgment-creditor-respondent's application (s. 325 (I)) was dismissed due to a defect in the petition. The application of the claimant (S. 325(4)) was also dismissed and the court ordered that the judgment creditor be placed in possession. The claimant moved in revision. The judgment creditor-respondent contended that there is an alternative remedy under section 329.

HELD:

1. Section 329 gives an alternative remedy to an aggrieved party. It is the duty of court to carry out effectually the object of the statute.

2. Ordinarily court will not interfere by way of revision, particularly when the law has expressly given an aggrieved party an alternate remedy *except* when non interference will cause a denial of justice or irremediable harm.

3. Petitioners' claim that, the land belonged to the Ruhuna Kataragama Devalaya and it was leased out to him was not established. The burden of proof was on the petitioner (claimant)

4. Applications made in terms of sections 325(1) and 325(4) are two different applications and an application in terms of section 325(4) could be made regardless of an application in terms of section 325(1)

Quarere :

"Could the petitioner take advantage of the dismissal of the respondent's application that was dismissed due to a technical default when in fact the court did not consider the merits of the application."

APPLICATION in revision from an order of the District Court of Colombo.

Cases referred to :

1. *Letchumi* vs. *Perera and Another* (2000) 3 Sri LR 151
2. *Rasheed Ali* vs. *Mohamed Ali* (1981) 1 Sri LR 262
3. *Chinnathamby* vs. *Somasundera Aiyer* (48) NLR 51 at 516

M. U. M. Ali Sabry with *Ernha Kalkidasa* for petitioner.

Mohan Peiris, P. C. with *Widura Ranawaka* for respondent.

Cur.,adv.vult.

November 11, 2005.

ANDREW SOMAWANSA, J. (P/CA)

This is an application to revise and to set aside and/or vacate and/or vary the order of the learned Additional District Judge of Colombo dated 27.01.2004 and to allow the application preferred by the respondent-claimant-petitioner (hereinafter called the claimant) to the District Court of Colombo in terms of Section 325(3) of the Civil Procedure Code.

When the application was taken up for argument both counsel agreed to tender written submissions and they have tendered their written submissions as well as further written submissions by way of reply.

The relevant facts are the judgment-creditor-petitioner-respondent-respondent (hereinafter called the respondent) instituted the instant action against the judgment-debtor-respondent-respondent and obtained judgment to eject him from the premises in suit. Thereafter when the Fiscal went to execute the writ of possession the claimant resisted the execution of the writ. Accordingly the respondent made an application in terms of section 325(1) of the Civil Procedure Code. The claimant too claiming that he is in independent possession of the premises in suit filed a written statement in terms of section 325(4) of the Civil Procedure Code.

The respondent's application in terms of section 325(1) of the Civil Procedure Code was dismissed due to a defect in the petition. Subsequently the claimant's claim in terms of section 325(4) of the Civil Procedure Code was taken up for inquiry and the claimant's claim too was dismissed by the aforesaid order dated 27.01.2004. The learned Additional District Judge having dismissed the claimant's claim proceeded to act in terms of section 326(1) of the Civil Procedure Code and has ordered that the respondent be put in possession of the premises in suit.

It is contended by counsel for the respondent that as there is an alternative remedy provided for in section 329 of the Civil Procedure Code the petitioner cannot have and maintain this action. I must say there is merit in this argument for section 329 of the Civil Procedure Code reads as follows :

> "No appeal shall lie from any order made under section 326 or section 327 or section 328 against any party other than the judgment-debtor. Any such order shall not bar the right of such party to institute an action to establish his right or title to such property".

It would also be pertinent at this stage to refer to section 326(1) of the Civil Procedure Code which reads as follows :

"On the hearing of the matter of the petition and the claim made, if any the court, if satisfied-

(a) that the resistance, obstruction, hindrance or ouster complained of was occasioned by the judgement-debtor or by some person at his instigation or on his behalf;

(b) that the resistance, obstruction, hindrance or ouster complained of was occasioned by a person other than the judgment-debtor, and that the claim of such person to be in possession of the property, whether on his own account or on account of some person other than the judgment-debtor, is frivolous or vexatious;or

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

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

In the case of *Letchumi vs. Perera and Another* [1] it was held :

"S. 329 gives an alternative remedy to an aggrieved party. It is the duty of court to carry out effectually the object of the statute. It must be so construed as to defeat all attempts to do so or avoid doing in a direct or circuitours manner that which has been prohibited or enjoined."

Also in the case of *Rasheed Ali vs. Mohamed Ali* [2] it

was held :

"The powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. Where the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstances. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternate remedy such as the right to file a separate action except when non-interference will cause a denial of justice or irremediable harm".

It is also interesting to consider the observation made by the Additional District Judge as to the documentary evidence produced by the petitioner to establish his case. The petitioner claims that he was in occupation of the land in suit since 1980. However as observed by the learned Additional District Judge documents marked R 2 to R 10 that has been placed before Court by the petitioner are all dated from the year 1988 onwards when the instant action was instituted in 1979 and the judgment delivered in 1981. It is also curious to note that extracts of the electoral lists show that the petitioner's name appears in that list after the year 1995. Considering the aforesaid facts it is to be seen that as the learned Additional District

Judge has observed there is very strong presumption that the petitioner has acted collusively with the judgment-debtor to prevent the respondent from taking possession of the premises in suit.

The petitioner has also led the evidence of the Administrative Officer and Divisional Secretary of the Ruhunu Kataragama Devalaya who testified that Ruhunu Kataragama Devalaya had issued rent receipts to the petitioner and an officer of the Regional Office of the Department of Buddhist Affairs has testified to the fact that in 1988 the Commission has granted permission to the Ruhunu Kataragama Devalaya to lease out the land in suit to the petitioner. However it is to be seen that no document was placed before the learned Additional District Judge to establish the fact that the land in suit belonged to the Ruhunu Kataragama Devalaya.

In the case of *Chinnathamby vs. Somasundera Aiyer* [3] at 516, it was observed :

"Plaintiffs obtained an order under section 102 of the Trusts Ordinance appointing them trustees of a Hindu Temple and vesting the temporalities in them. Thereafter the plainfiffs obtained an order against the 1st defendant for delivery of possession of the temporalities to them. Execution of the order was resisted by certain persons who were not parties to the action and who claimed the right to manage the temple. The plaintiffs thereupon filed a petition under section 325 of the Civil Procedure Code and their petition was numbered as a plaint under section 327. The District Judge dismissed the plaintiffs' claim on the ground that the plaint did not disclose a cause of action".

In any event, Section 101 of the Evidence Ordinance reads as follows :

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustration :-

(a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B committed the crime.

(b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts, and which B denies to be true.

A must prove the existence of those facts."

For the foregoing reasons I am not impressed at all with the argument of counsel for the petitioner that since the respondent's application has been dismissed the learned District Judge erred when he ordered that the respondent should be restored to possession. Question arises as to whether the petitioner could take advantage of the dismissal of the respondent's application that was dismissed due to a technical default when in fact the Court did not consider the merits of the application. However as for the claim of the petitioner it was decided on merit. One should also not forget the fact that applications made in terms of section 325(1) and section 325(4) of the Civil Procedure Code are two different applications and that an application in terms of section 325(4) could be made regardless of an application in terms of section 325(1).

For the foreging reasons, I have no hesitation in dismissing this application to revise the order of the learned Additional District Judge dated 27.01.2004. Accordingly the application is dismissed with costs fixed at Rs. 20,000.

Wimalachandra, J.—I agree.

Application dismissed.