

WELIWITIGODA
v.
U. D. B. DE SILVA AND OTHERS

SUPREME COURT.

G. P. S. DE SILVA, C.J.,

KULATUNGA, J. AND

RAMANATHAN, J.

S.C. APPEAL NO. 31/94.

C.A. APPLICATION NO. 190/93 (MISC).

D.C. COLOMBO NO. 4857/ZL AND NO. 3642 SPL.

FEBRUARY 2, 1995.

Civil Procedure Code – Powers of Fiscal in executing a writ – Resistance to execution – Inquiry into dispossession of bona fide claimant in execution – Section 324, 325 and 328 of the Civil Procedure Code.

Held:

- (1) On a proper construction of the proviso to Section 324 of the Civil Procedure Code, a mere claim of tenancy which is not supported by facts will not *ipso facto* bar the Fiscal giving vacant possession to the Judgment-Creditor in terms of the enacting part of that section. Such a claimant may become liable to removal as an Agent, servant or other person bound by the decree subject, however, to his right to make an application under section 328 of the Code. He has no "right" to resist execution and require the Fiscal to only give symbolic possession or to report resistance to court, under Section 325. A claim under the proviso to section 324 cannot be entertained unless it is *prima facie* tenable.

(2) If, after the Fiscal has duly delivered possession to the 'Judgment-Creditor' after removing an occupant bound by the Decree the occupant re-enters the property, the judgment creditor is entitled to proceedings under Section 325 on the strength of the Writ of Execution. That right should not be prejudiced by setting aside the writ in revision without a proper consideration of the facts.

APPEAL from the judgment of the Court of Appeal.

A. K. Premadasa, P.C. with *C. E. de Silva* for Appellant.

S. Mahenthiran for 1st Respondent.

Miss N. Abeyratne for 2nd Respondent.

3rd Respondent absent and unrepresented.

Cur. adv. vult.

March 24, 1995.

KULATUNGA, J.

The appellant who is the plaintiff in D.C. Colombo Case No. 4857/ZL appeals to this Court against the judgment of the Court of Appeal (in revision) directing that the writ of execution issued in the said action for the delivery of possession of premises No. 53, C.W.W. Kannangara Mawatha (formerly Alexandra Place) Colombo 7 be set aside.

The above action which was filed against the 2nd respondent, seeking a declaration of title and ejectment in respect of the premises in suit, was settled on 26.05.87. In terms of the said settlement the defendant acknowledged the appellant's title to the premises in suit and agreed to vacate the same on condition of the deposit of a sum of Rs. 200000/- by the appellant, to be drawn by the defendant. The issue of writ of ejectment was postponed until 31.12.92 (Exhibit P3).

On 18.12.92 the 1st respondent filed D.C. Colombo case No. 3642/Spl. against the appellant and the 2nd respondent. The 1st respondent claimed that he had been a tenant of some of the buildings situated on the aforesaid premises No. 53, under the 2nd respondent. He prayed for a declaration that he was not liable to be ejected there from in terms of the decree in case No. 4857/ZL to which he was not a party. He also sought an interim injunction to

restrain the appellant from ejecting him and for an enjoining order to the same effect (Exhibit P5). On 28.12.92 the Court issued an enjoining order (Exhibit P8). Thereafter the appellant filed papers for vacation of the enjoining order and objections to the application for an interim injunction. After inquiry, the District Judge by his order dated 12.02.93 vacated the enjoining order and refused the application for an interim injunction. The Court observed that it was not possible in that action to adjudicate on the alleged tenancy; and that the 1st respondent should make his claim if any, in execution proceedings (Exhibit P15).

After the aforesaid order in case No. 3642/Spl., the appellant obtained writ of execution in case No. 4857/ZL on 16.02.93 (Exhibit P16). Thereafter, on 09.03.93 the Fiscal visited the premises with two police constables and executed the writ. As per his report (Exhibit P17), the 1st respondent claimed the right to remain in occupation of the premises and produced the proceedings in case No. 3642/Spl. in support. However, the appellant produced the order made therein refusing the interim injunction, whereupon the Fiscal removed the 1st respondent and delivered vacant possession of the premises to the appellant. It is to be noted that the 1st respondent did not produce any evidence, documentary or otherwise, in support of his claim of tenancy.

On 10.03.93 the 1st respondent submitted an affidavit to the President, Court of Appeal complaining that despite his resistance, the fiscal purported to execute the writ, without reporting to Court the fact of such resistance. He claimed the right to remain in possession of the premises as tenant and sought an order quashing the purported execution proceedings. He also prayed that the Court specially deal with the 3rd respondent, Fiscal Officer. In his affidavit, the 1st respondent gives his address as 229/3, Mahawatte Road, Colombo 14 (Exhibit P21). On the same day, the Court heard Counsel for the 1st respondent and made order, *ex parte*, staying all proceedings in the District Court and directing the 3rd respondent to appear on 23.03.93 (Exhibit P22).

The appellant alleges that, after the delivery of possession of the premises to him, the 1st respondent re-entered the property on

10.03.93 at about 8.00 p.m., along with some thugs and ousted him and his security officers. The next day the appellant made a complaint to the Cinnamon Gardens Police (Exhibit P19). P19 shows that the appellant was evicted with the assistance of police officers who visited the premises and arrested the appellant's son and 5 of his men. They were detained at the Police Stations after which the police ordered the appellant not to enter the premises. Consequently, he left the premises.

On 22.03.93 the appellant intervened in the proceedings before the Court of Appeal and filed his objections to the 1st respondent's application (Exhibit P22).

On 23.03.93, the appellant, obtained a variation of the stay order issued by the Court of Appeal and obtained permission to institute proceedings before the District Court under S.325 of the Civil Procedure Code (Exhibit P28). Thereafter, he made a complaint in terms of S.325 that he had been ousted from possession on 10.03.93 (Exhibit P30). The said proceedings were thwarted when on 11.05.93 the Court of Appeal, on an *ex parte* application by Counsel for the 1st respondent, once again stayed "all proceedings" in the District Court (Exhibit P35). Consequently, all proceedings remained stayed until 08.10.93 when, after hearing the submissions of Counsel for the appellant, the Court permitted the District Judge to proceed with the S.325 application (Exhibit P36).

On 15.11.93 the Court of Appeal heard submissions of Counsel and held that the 1st respondent had failed to report resistance to execution of the writ. The Court directed that "the writ of execution be set aside" and further directed that "writ cannot lie" against the 1st respondent until other proceedings are taken on the basis of his resistance. The Court warned and discharged the 3rd respondent.

It was the position of the 1st respondent that the fiscal could only have given the appellant "symbolic possession" of the premises. Alternatively, the Fiscal should have reported resistance to Court for steps under S.325 of the Code. The appellant's position was that as

far as he was concerned, the Fiscal had delivered vacant possession; and if the 1st respondent complained that he was a *bona fide* claimant on his own account, his remedy was to have made an application for relief under S.328 of the Code.

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 Fiscals 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.

The evidence shows that after the 1st respondent was removed by the Fiscal, he re-entered the property under the cover of the stay order issued by the Court of Appeal and with the assistance of the police. The judgment of the Court of Appeal which does not appear to have taken these facts into consideration gave sanctity to the acts of the 1st respondent. What is more, the Court directed that the writ of execution itself which the appellant had lawfully obtained be set aside. This has prejudiced the appellant's rights in proceedings under S.325.

If there was misconduct on the part of the 3rd respondent, the 1st respondent could have complained to the District Judge and made an application under S.328, if so advised. As far as the trial court was concerned there was no decision which called for the intervention of the Court of Appeal. As regards the complaint against the 3rd respondent's conduct, the proper procedure would have been to make no order therein. The parties should have been left to their remedies before the trial Court.

For the foregoing reasons, I allow the appeal and set aside the judgment of the Court of Appeal. The 1st respondent is directed to pay the appellant costs in a sum of Rs. 5000/- (Rupees Five Thousand).

G. P. S. DE SILVA, C. J. – I agree.

RAMANATHAN, J. – I agree.

Appeal allowed.