ABEYSINGHE
v.
COMMERCIAL BANK OF CEYLON

COURT OF APPEAL
DE SILVA, J.,
WEERASURIYA, J.
C.A. NO. 972/97
D.C. COLOMBO NO. 8272/M
SEPTEMBER 30, 1998

Civil Procedure Code – S. 218 (n), 226, 329 Consent judgment-default – Seizure of residential house – ignorance of the law is not an excuse.

The plaintiff-respondent Bank instituted action for the recovery of moneys due to it. The petitioner agreed for a settlement and consent judgment was entered; in terms of same, the petitioner agreed to pay the amounts due in instalments and further agreed that on default writ would be issued without notice.

The petitioner defaulted and the respondent applied for writ of execution and Court allowed same; residential property was seized, and court ordered a sale of the said property. Prior to the sale, the petitioner filed an application under s. 218 (n) CPC – stating that the property that was seized is the sole residential house of the petitioner. This application was dismissed after inquiry.

The appeal lodged was rejected, and the application to the Court of Appeal to reinstate the appeal was disallowed. Special leave was refused by the Supreme Court.

Thereafter the petitioner moved in Revision.

Held:

1. The contention of the petitioner that the appeal lodged was misconceived and is therefore 'no appeal at all' in law cannot be urged as he should not be excused for his ignorance of the law. He must take the consequences of his action.

2. The submission that in terms of s. 226 CPC before the property is seized the Fiscal must make a demand from the debtor cannot be sustained; it must be taken up in the same proceedings at the District Court itself.

Per de Silva, J.

> "Failure of the Fiscal to demand payment does not render a sale a nullity, where the decree is entered as a result of a consent judgment and where the defendant agrees to allow the Writ to be issued without notice to him, if he fails to carry out his undertaking to Court."

3. Delay of 18 months is fatal.

APPLICATION in Revision from the Order of the District Court of Colombo.

Cases referred to:

1. *Rustom v. Hapangama* – (1978-79) 1 SLR 352.

2. *Sarkin v. James Fernando* – 63 NLR 34.

D. P. Mendis with *Bandula Wellala* for defendant-petitioner.

S. A. Parathalingam, PC with *Chandana Liyanapatabendi* for plaintiff-respondent.

Cur. adv. vult.

December 12, 1998.

DE SILVA, J.

This is an application seeking to revise the order of the learned District Judge dated 27th of June, 1996, wherein the District Judge refused to set aside the order for seizure and sale.

The facts of this case are briefly as follows. The plaintiff-respondent Bank (hereinafter referred to as the respondent) instituted action in District Court bearing numbers 8272/M and 8273/M against the defendant-petitioner (hereinafter referred to as the petitioner) for the recovery of moneys due on the banking facilities provided to the said petitioner.

The petitioner filed answers in both cases denying liability. However, at the trial on the 20th of August, 1991, petitioner agreed for a settlement and consent judgments were entered in both cases.

In terms of the said consent judgment, petitioner agreed to pay the amounts due to the respondent in instalments and further agreed that in the event of his failure to pay accordingly, writ to be issued without notice to the petitioner.

The petitioner defaulted and the respondent applied for writ of execution and the District Court allowed the same. In execution of the said writ the property at No. 41, Samagi Mawatha, Ratmalana, belonging to the petitioner was seized and the Court ordered the sale of the said property.

Prior to the said sale, the petitioner filed an application in the District Court stating that the said property at No. 41, Samagi Mawatha, Ratmalana, is not liable to be sold in terms of section 218 (n) of the Civil Procedure Code as the property is the sole residential house of the petitioner.

At the inquiry the petitioner gave evidence and marked several documents in support of this contention. In the course of the evidence it was revealed that the petitioner had another residential house at Matara too and the learned District Judge on 27.06.1996 dismissed the application made by the petitioner.

Aggrieved by the said order, the petitioner preferred an appeal bearing No. CA/351/96/7 to the Court of Appeal and by order dated 07.10.1996 the Court of Appeal rejected this appeal.

Thereafter the petitioner made an application bearing No. CA/351/96/7 to the Court of Appeal to reinstate the appeal. This application too was disallowed by the Court of Appeal.

The petitioner sought special leave to appeal to the Supreme Court and the Supreme Court refused to grant special leave and the application was dismissed.

Consequent to this dismissal the present revision application was filed by the petitioner in this court on 8th of December, 1997, to set aside the same order of the District Judge made on 27.06.1997.

At the hearing of this application the respondent raised a preliminary objection on the ground of jurisdiction. It was submitted that the petitioner having failed in his previous appeals to the Court of Appeal and to the Supreme Court has no right to invoke the jurisdiction by way of revision again in the Court of Appeal as the matter is now finally decided by the Supreme Court.

Counsel for the petitioner contended that the order made on the 27th of June, 1996, in terms of section 329 of the Civil Procedure Code was not an appealable order and therefore the petitioner could not have filed an appeal but only an application for leave to appeal and/or Revision. Hence the appeal he preferred to Court of Appeal is no appeal at all in law. Counsel invited this Court to treat the earlier appeal preferred by the petitioner to Court of Appeal as a nullity.

It is to be noted that the petitioner cannot be heard to say that he should be excused for his ignorance of the law. The petitioner had taken certain steps to vindicate his rights. In the circumstance he must take the consequences of his actions.

Counsel for the respondent also raised the question that the petitioner has not shown any exceptional circumstances to invoke the extraordinary revisionary jurisdiction and relied on the decision in the case of *Rustom v. Hapangama*[1]. Mr. Mendis contended that the order made by the District Judge is "*ex facie*" wrong and therefore that itself is an exceptional circumstance to invoke the revisionary jurisdiction. We agree with the submission of Mr. Mendis on this point. However, the question is whether the order in the instant case is *ex facie* wrong. It was the submission of counsel that in terms of section 226 of the Civil Procedure Code before the property is seized the Fiscal must make a demand from the debtor to pay the amount of the writ. Reliance was placed on the judgment of Basnayake, CJ. in *Sarlin v. James Fernando*[2] where it was held that the requirement of section 226 (1) of Civil Procedure Code is imperative.

On a careful consideration of the judgment of Chief Justice Basnayake referred to above it is clear that for this objection to be sustained it must be taken up in the same proceedings, namely at the District Court itself.

In the instant case the judgment debtor has not chosen to challenge the legality of the Fiscal's action in the District Court. This objection has not been taken up in the very action in which execution had been levied. Therefore he is precluded from raising the matter by way of Appeal/Revision or in any other proceedings. The order made by the learned Judge is not '*ex facie*' wrong.

Another interesting matter to be considered is whether the protection given in 226 (1) is applicable where the decree is entered as a result of a consent judgment and where the defendant agrees to allow the writ to be issued without notice to him if he fails to carry out his undertaking to Court. In my view in such circumstances failure of the Fiscal to demand payment of the amount of the writ does not render a sale a nullity to enable the defaulter to attack the sale on that ground.

In any event the order against which revision is sought had been delivered on 27.06.1996. But the petitioner has filed this application only on 08.12.1997 which is one and a half years after the delivery of this order. There are no averments contained in the petition and affidavit filed by the petitioner, explaining the delay in filing this revision application. On this ground too the present application should fail.

For the above reasons the application of the petitioner is refused and the application is dismissed with costs.

WEERASURIYA, J. – I agree.

Application dismissed.

Note by Editor :

The Supreme Court on 8.3.99 refused special leave to the Supreme Court in SC SPLA 41/99.