RASHEED ALI

v.

MOHAMED ALI AND OTHERS

SUPREME COURT
WEERARATNE J., SHARVANANDA J.,
AND WANASUNDERA J.,
S. C. APPEAL NO. 6/81
C. A. APPLICATION NO. 997/80
D. C. COLOMBO NO. 3290/2L
JULY 21, 1981, AUGUST 31, 1981
& SEPTEMBER 1, 1981.

Civil Procedure — Execution proceedings — Constructive possession — Resistance to Fiscal — S. 325 and 236 C.P.C. — Can revision lie from order under s. 326 C.P.C. Article 128 of Constitution? Is the order a final order?

Held

(1) 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.

(2) The preliminary objection that the appeal is not properly constituted because the order appealed from is an interlocutory order or judgment and special leave to appeal should have been obtained is not entitled to succeed because the order in question is a final order. There can be a final judgment in execution proceedings.

(3) Held further (a) (Sharvananda J. dissenting) the Court of Appeal has erred in taking the view that unless the application for revision was entertained the appellant would not be able to obtain a stay order until he files an appeal; and the ultimate remedy would be rendered nugatory and that constituted exceptional circumstances. The fact that a Judge's order is merely wrong is not a sufficient ground for exercising the powers of revision.

(b) The appellant had not complied with Rule 46 of the Supreme Court Rules 1978 and has suppressed from the appellate Court some essential material. The claim to title and/or tenancy rights and/or rights of a licensee show a lack of consistency and coherence in the appellant's case and the preliminary objection that material facts were suppressed is entitled to succeed.

Cases referred to:

(1) Ibrahim Saibo v. Mansoor (1953) 54 NLR 217.
(2) Marikar v. Dharmapala Unnanse (1934) 36 NLR 201.
(3) Arlis Appuhamy v. Siman (1947) 48 NLR 298.

(4) Palaniappa Chetty v. Mercantile Bank of India (1942) 43 NLR 352.
(5) Usoof v. Nadarajah Chettiar (1957) 58 NLR 436.
(6) Subramaniam Chetty v. Soysa (1923) 25 NLR 344.
(7) Arnolis Fernando v. Selestina Fernando (1922) 4 CL Rec 71.
(8) Usoof v. The National Bank of India Ltd. (1958) 60 NLR 381, 383.
(9) Zahir v. Perera (1970) 73 NLR 424.
(10) Somawathie v. Cooray (1961) 64 NLR 495.
(11) Krishna Pershad Singh v. Motichand (1913) 40 Cal. 635.
(12) Ramchand Manjimal v. Gower Dhandas AIR 1920 PC 86.
(13) Salaman v. Warner (1891) 1 QB 734.
(14) Bozon v. Altrincham U.D.C. [1903] 1KB 547.
(15) Abdul Rahman v. Cassim & Sons AIR 1933 PC 58.

APPEAL from judgment of the Court of Appeal reported at [1981] (2) SLR 29.

C. Thiagalingam Q.C. with S. Mahenthiram for petitioner-appellant
H. W. Jayewardene Q.C. with N. S. A. Goonetilleke, A. Mahendran, Lakshman Perera and Miss P. R. Seneviratne for the Plaintiff-respondent.

Cur. adv. vult.

November 20, 1981.

WANASUNDERA, J.

In this matter, the applicant (who is a person claiming in good faith to be in possession of certain premises seized in execution proceedings) appeals against the order of the Court of Appeal refusing to revise an order of the District Court in favour of the execution creditor – the plaintiff-respondent in execution proceedings. The main action was filed by the plaintiff-respondent Khan Mohamed Ali against his vendor one Marshall, the present defendant respondent, for a declaration of title to and vacant possession of the property he had purchased.

Khan Mohamed Ali had bought this property on deed 2208 of 22.2.1979 from Marshall and the vendor had undertaken to give him vacant possession of the premises by 30th June 1980. Failing to get vacant possession, Khan Mohamed Ali filed this action on 18th October 1979 against Marshall. When the case came up for hearing, the defendant Marshall consented to judgment, and decree was entered in favour of Khan Mohamed Ali declaring that he was entitled to the premises and ordering the ejectment of Marshall and "all those holding under him."

On the 7th of February 1980, when the Fiscal went to execute the writ he found two persons on the premises. The first was a gram seller in occupation of the front portion of the premises, but we are not concerned with him in this case. The other was the appellant Mohamed Haniffa Rasheed Ali, who stated that he was carrying on business in the premises by virtue of an agreement with one Sangaralingam Muttusamy, which he produced (now

marked as A4). The writ was accordingly returned unexecuted. On a later date, the Fiscal, in accordance with the legal position enunciated in *Ibrahim Saibo v. Mansoor,* 54 N.L.R. 217[1] gave constructive delivery of possession of the premises to the judgment-creditor, without prejudice to his right to take proceedings under section 325, Civil Procedure Code, for a complete and effectual delivery of possession.

In the objections filed by the present appellant in the inquiry under section 325, he appears to have taken a number of different positions. He first stated that he had been placed in possession of the premises by S. Muttusamy who was a tenant of Marshall. Then he went on to add that –

(a) Muttusamy was collecting a sum of Rs. 1350/- per mensem from him and paying a sum of Rs. 600/- to Marshall.

(b) the appellant was in occupation of the premises with the knowledge and acquiescence of Marshall.

(c) about the end of 1978 Marshall had asked the appellant "for an increased rental and a sum of Rs. 750/- was paid from January 1979."

(d) Marshall had negotiated with him for the sale of the premises for a sum of Rs. 140,000/- and a sum of Rs. 40,000/- as an advance was paid by him to Marshall on 6th February 1979.

Along with the objections, an affidavit had also been filed; but it has not been included in the papers filed by the appellant in the Court of Appeal or before us, although produced in the trial court as 2R5.

At the inquiry appellant's counsel, in justifying the resistance and obstruction by his client to the execution of the writ to possession, explained and clarified what was stated in the statement of objections. Counsel had stated that the appellant "remains there on his own rights or that he is there as the tenant of the seller Marshall." The appellant, when he gave evidence, further amplified his position by not only suggesting that he had a direct relationship with Marshall, but went further and produced a certificate of registration under the Business Names Registration Ordinance (2R1), showing that he has been carrying on a business under the name "New Wappa House" in these premises from as early as 23rd July 1975. He also stated that Marshall had wanted to sell these premises to the appellant for Rs. 140,000/- and the

appellant had agreed to buy them and had actually paid Marshall an advance of Rs. 40,000/-. When the appellant heard that Marshall had sold this property to the judgment-creditor behind his back, the appellant had complained to the Police and had gone to the extent of seeing that criminal proceedings were filed in the Magistrate's Court against Marshall. He produced a copy of the plaint 2R3. In the same context, the appellant also referred to the agreement he had with Muttusamy by which Muttusamy had handed over to the appellant the management of the business called "Dawalagiri Hotel" carried on by Muttusamy in these premises. This evidence was clearly contradictory in nature.

The learned trial Judge had disbelieved the appellant and rejected his claim. He held that the evidence did not show that the appellant was either a tenant of Marshall or of Muttusamy, under whom the appellant had merely a management agreement in respect of an eating house called Hotel Dawalagiri. Accordingly, in terms of the provisions of section 326, the learned District Judge held that the resistance and obstruction on the part of the appellant was frivolous and vexatious and directed that the judgment-creditor be placed in possession of the premises.

Now an order made under section 326 against any party other than the judgment-debtor is not appealable. But, any aggrieved party has been given the right to institute an action to establish his right of title to such property (*vide* section 329). The appellant however came directly to the Court of Appeal and applied to have that order revised. A preliminary objection, whether or not an application for revision would lie from an order under section 326 of the Civil Procedure Code, was one of the matters debated before the Court of Appeal and also before us.

It may be convenient to dispose of this matter at the outset. The Court of Appeal, after an examination of numerous authorities, has rightly taken the view that 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. When, however, 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.

The Court of Appeal has however erred in the application of these principles to the facts of this case. The Court was of the view that, unless this application for revision was entertained, the appellant would not be able to obtain a stay order until he files an appeal; and if a stay order was not granted at this stage, the ultimate decision in the case would be rendered nugatory. The Court was of the opinion that this constituted exceptional circumstances. This reasoning is not tenable for more than one reason and the fact that Court by an oversight had forgotten that there is no right of appeal in this case is alone sufficient to invalidate its decision. It would be sufficient in the present context also to state that the fact that a Judge's order may be merely wrong should not be a sufficient ground for the exercise of the powers of revision in a case such as this and, as far as I could see, the appellant could not have placed his case any higher. In an application for revision of this nature, the threshold is much higher than that required from an appellant exercising a mere right of appeal. When the facts are examined, it will be seen that this was not such a case and the Court of Appeal should not have properly exercised its powers of revision in this matter.

Another matter taken up before the Court of Appeal on behalf of the judgment-creditor was a preliminary objection that the appellant had not complied with Rule 48 of the Supreme Court Rules 1978 and has suppressed from the appellate court some essential material. This rule which is applicable to the appellate procedure before the Court of Appeal requires the appellant to place before Court, along with his petition, all "documents material to the case." This objection had been taken when this revision application first came up in the Court of Appeal before a bench presided by Wimalaratne, J. After this bench heard arguments and had reserved its order, Wimalaratne, J., was elevated to the Supreme Court and the case was then argued *de novo* before another bench consisting of Soza, J., and L. H. de Alwis, J. Counsel for the respondents said that the non-production of this material was not a mere omission but a studied suppression of relevant material. The respondent alleges that the Business Registration Certificate which was always available to the appellant for production was kept away from the Court of Appeal when the first bench heard the case, but at a later stage the appellant sought to produce it after that Court had made some adverse comments regarding its non-production. When the case was re-argued, this same document was again withheld presumably because the first bench had given an indication that this document went against the case of the appellant. The same was said of the Magistrate's Court proceedings which have not been produced.

The appellant, on the other hand, has stated that he had to file the revision papers with the utmost urgency with whatever material that was available since he ran a real risk of being evicted from the premises if there had been the slightest delay on his part. It is understandable that in such circumstances a party may well find it difficult or impossible to furnish a complete brief with all the material documents at such short notice. The Court of Appeal has, therefore, taken a practical view of the matter and was prepared to excuse the initial lapse on the part of the appellant in not filing the relevant documents along with his petition.

But the complaint against the appellant does not rest there. The Court of Appeal upheld the preliminary objection, because it took the view that the provisions of regulation 46 have a mandatory effect and any omission must be made good even at a late stage. As the Court of Appeal pointed out, there are provisions in the Rules enabling an amendment of the petition and for the tendering of additional material with the permission of court. This the appellant has failed to do. Referring to this, the Court of Appeal said—

> ". . . . 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. The documents — a certificated 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."

As an excuse for the appellant not complying with Rule 46 even at a late stage, it has been submitted that before he could furnish these documents the respondent had come into the Court of Appeal even before the notice returnable date, and filed those documents. The appellant therefore considered it unnecessary to duplicate that material. Let me examine this excuse a little more closely. While I am against mere technicalities standing in the way of this Court doing justice, it must be admitted that there are rules and rules. Sometimes courts are expressly vested with powers to mitigate hardships, but more often we are called upon to decide which rules are merely directory and which mandatory carrying

certain adverse consequences for non-compliance. Many procedural rules have been enacted in the interest of the due administration of justice, irrespective of whether or not a non-compliance causes prejudice to the opposite party. It is in this context that Judges have stressed the mandatory nature of some rules and the need to keep the channels of procedure open for justice to flow freely and smoothly. The position of course would be worse if such non-compliance also causes prejudice to the opposite party.

If we are to accede to the appellant's plea that he should be excused from complying with the rule, because the respondent has filed some of these documents, we would be virtually investing an appellant with a discretion whether or not to comply with the rule, because the required material has already been filed by the opposite party or it is anticipated that they would be filed by that party. Such I think is not the law. The material filed by a respondent is in support of his own case and is in no way intended to supplement the appellant's case or to make good any omissions on the part of the appellant. I am having in mind here not mere formal documents, but material that have a direct bearing on the issues in a case.

Even assuming that the appellant's excuse is acceptable, it would still cover only those documents which have been produced by the respondent. Mr. Jayewardene pointed out that there are yet other documents which are material to the case and are not before the Court. These are the two documents referred to in judgment of the Court of Appeal. It may be mentioned that an attempt was made at the last moment when the matter was before us to have these documents filed in this Court. This has not been allowed.

Mr. Thiagalingam then submitted that he was prepared to argue his case without reference to these documents and stated that the point he is raising before us is a legal one and can be decided with reference only to two documents, namely A4 and A11, which are now before us. Even in this connection it may be observed that document A4, which now appears to be the foundation of the appellant's argument, was not a document filed by him but is one of the documents tendered by the respondent to the Court of Appeal. In fact, even at the inquiry before the learned District Judge, this document had been produced by the respondent to meet the appellant's claim to legal title in his own right or a tenancy right. The question then is, whether or not this issue raised by Mr. Thiagalingam can be decided in isolation without regard to the totality of the evidence in the case, particularly those

documents not produced by the appellant. A consideration of the evidence is thus necessary and incidentally in this inquiry one has to traverse the same ground as is necessary for a decision on the merits.

The document A11 shows that on 31st October 1975, Muttusamy handed over "the management of the said Hotel business" (namely, Dawalagiri Hotel) of which he claimed to be the owner, to the appellant for a 3 year period commencing on 1st November 1975. The provisions of the agreement relate to matters of pure management — the payment of salaries and wages of the employees, the payment of electricity bills and water tax, which obligations were undertaken by the appellant. There is no indication, express or implied, showing that these premises were sublet to the appellant although he occupied the premises for management purposes. The agreement also does not speak of a payment of rent. As consideration, the appellant had deposited a sum of Rs. 12,250/- as security on the execution of the agreement and agreed to pay Muttusamy Rs. 45/- daily as commission.

By agreement A4, the management agreement was extended for a further period of 3 years, commencing on 1st November 1978, on the same terms as the earlier agreement. Mr. Thiagalingam has submitted that irrespective of any other considerations, these two agreements are sufficient to establish a legal interest in the appellant to enable the appellant to prefer a *bona fide* claim to continue in possession and to resist the judgment-creditor, and that such a claim by the appellant cannot be regarded as being frivolous or vexatious.

There may have been some substance in Mr. Thiagalingam's submission if that was his client's case from the outset, and it was a straightforward account without ramifications and other factors bearing on it. Unfortunately, the matter is complicated by a number of other features and it has become necessary to consider the validity of the appellant's claim in a wider context than suggested by Mr. Thiagalingam. The courts below have thought it fit to consider certain other documents in addition to the two relied on by Mr. Thiagalingam for the resolution of this issue and they are embodied in the two judgments of the courts below. All those matters are before us in this appeal and the relevancy of those documents to this matter will become evident when the facts are carefully examined.

At the time the respondent Khan Mohamed Ali filed action against Marshall, claiming vacant possession of these premises,

Muttusamy who was alleged to be Marshall's tenant had been dead. He had died on 1st March 1979 and his business on these premises was being conducted ostensibly not by any of his heirs but by the appellant. Up to now his heirs have neither come forward to make a claim to the tenancy nor shown any right or interest in these premises. Muttusamy was thus not made a party to the action. Further, the Certificate of Registration of Business Names produced in the trial court (but not produced before the Court of Appeal or before us) appears to be in line with the appellant's claim for an independent title and has therefore the effect of destroying the case the appellant has now sought to put forward, based on documents A4 and A11. This certificate shows that the appellant has registered himself in his own right as the owner of a business called "New Wappa Eating House" at these premises and that this business had been going on since 23rd July 1975. It will be observed that the agreements A4 and A11 are in respect of Dawalagiri Hotel and not "New Wappa Eating House." Further, the management agreements commence from 31st October 1975, which is subsequent to the date given in the certificate. All in all, the certificate cuts across the foundation of the appellant's claim to be a tenant of Muttusamy. The effect of this evidence is to sever the appellant from any connection with the person or persons lawfully entitled to own or occupy these premises and to isolate him and place him in an independent position disabling him from making any valid and *bona fide* claim to remain in possession. It is therefore not surprising that the lower courts have rejected the appellant's claim.

At the inquiry before the District Judge, the appellant placed in the forefront of his case his claim that he was in the premises in his own right. The other position he took up that he was a tenant, was a subsidiary one. This Certificate of Registration of the Business therefore is a vital document without which this case cannot be properly decided and it is inconceivable that any court would make a pronouncement on the issues that arose in this case by shutting its eyes to all this material. I am therefore unable to say that the Court of Appeal erred when it upheld the preliminary objection. Both the trial Judge and the Court of Appeal had also considered the facts with great care and I am again unable to say that their decision on the merits is erroneous. We have therefore the concurrent findings of fact of two courts rejecting the claim put forward by the appellant.

The lack of consistency and coherence in the appellant's case, as revealed by the contradictory nature of the material adduced by him, appears to be explicable in terms of a submission Mr. Jayewardene made to us. He submitted that it is generally

known that tenants are sub-letting their houses in defiance of the Rent Laws, by adopting various ruses and devices. The so-called management agreement is one such favourite device whereby a tenant seeks to give to a third party exclusive occupation or possession of premises intended for his own occupation. Apart from the conflicting material produced by the appellant himself, the strange silence and absence of any interest in this matter on the part of Muttusamy's heirs lends further credence to this view.

In view of the fact that the preliminary objections are entitled to prevail, I do not think that we are now called upon to make a pronouncement and to define our position as regards such sham transactions. Suffice it is to say that the appellant's claim to be a licensee appears to be an afterthought put forward for the first time in the last stages of these proceedings. All the circumstances and the conduct of the parties negative any intention to create such a licence. In reality, Muttusamy and the appellant had agreed to create a sub-tenancy in favour of the appellant and the transaction has been disguised so as to appear as a simple management agreement. The appellant has only himself to blame for his present predicament. If a person enters into a sham transaction, it ought not to surprise him if he were to find himself in a precarious position where he can neither achieve the desired result nor fall back on the purported transaction. There is nothing in the appellant's case to help himself out of this situation. Even if his claim to be a licensee were to be considered, I do not think any court, having regard to the circumstances of this case, would be prepared to concede to him any proprietary right or interest (even of an equitable nature) which is enforceable and valid against third parties. In the result, I am of the view that the Court of Appeal and the trial Judge were right in their conclusions in rejecting the claim put forward by the appellant.

I finally come to the preliminary objection taken by Mr. Jayewardene, namely that the present appeal is not properly constituted. He submitted that what is involved in this case is an interlocutory order or judgment and the appellant should therefore have obtained the Special Leave of this Court under Article 128(2) of the Constitution. Instead, the appellant has got the leave of the Court of Appeal in terms of Article 128(1), but this Mr. Jayewardene submits is of no avail. The question is whether the judgment appealed from is a final judgment or an interlocutory judgment. The reported cases brought to our notice by counsel on both sides do not deal with the interpretation of the present constitutional provisions. They are nevertheless sufficiently close so as to be of some help to us. Mr. Thiagalingam relied on the distinction some

of these cases drew between on the one hand proceedings between the parties to the original action and on the other hand proceedings where third parties come in at the stage of execution proceedings. *Vide Marikar v. Dharmapala Unnanse,* 36 N.L.R. 201[2]; *Arlis Appuhamy v. Siman,* 48 N.L.R. 298[3]; *Palaniappa Chetty v. Mercantile Bank of India,* 43 N.L.R. 352[4]; *Usoof v. Nadarajah Chettiar,* 58 N.L.R. 436[5]. In *Subramaniam Chetty v. Soysa,* 25 N.L.R. 344[6] Bertram, C. J., appears to have come round to this view, although he had expressed a different view in an earlier case - *Arnolis Fernando v. Selestina Fernando,* (1922) 4 C.L. Rec. 71[7]. These decisions held that it was not the intention of the Legislature to deny a right of appeal to persons who were not parties to the original action and whose rights are affected by final orders made in proceedings arising out of the original action. A slightly broader view of what constitutes finality appears to be taken in *Usoof v. The National Bank of India Ltd.,* 60 N.L.R. 381[8] and in some Indian decisions. I think that the distinction which Mr. Thiagalingam sought to draw is a valid one and sufficient for the purposes of the present case. I am therefore of the view that this appeal is correctly before us and the preliminary objection taken by Mr. Jayewardene fails.

For the above reasons I would uphold the judgment of the Court of Appeal and dismiss this appeal with costs payable to the plaintiff-respondent.

WEERARATNE, J. – I agree.

SHARVANANDA, J.

The plaintiff-respondent instituted this action on 18.10.79 against the defendant-respondent for a declaration of title in respect of premises bearing assessment No. 19, Galle Road, Bambalapitiya, for ejectment of the defendant and for damages. The premises are admittedly business premises. In his plaint he stated that by deed of transfer No. 2208 dated 22nd February 1979, the defendant sold and conveyed the said premises to him, and by writing dated the same day, the defendant undertook to give vacant possession of the said premises to the plaintiff on or before the 30th day of June 1979. The defendant by his answer dated 19th December 1979 admitted the sale and his undertaking to give vacant possession of the said premises to the plaintiff but stated that handing over of possession by him was impossible. A consent decree was entered on 19.12.79 declaring the plaintiff entitled to the said premises and ordering the defendant and all those holding under him to be ejected from the said premises. The claim for costs and damages was withdrawn by the plaintiff. Writ of possession was taken out and when the Fiscal went to execute the writ on 7.2.80, the petitioner-appellant resisted the execution of the writ and refused to vacate the premises. The Fiscal in his report states: "There was one Mohamed Haniffa Rasheed Ali (petitioner-appellant) who said he is carrying on business in the premises on an agreement entered into between him and one Sangaralingam Muttusamy. He produced agreement No. 182 (A4) dated 27.8.78 attested by U.L.M. Farook, N.P., and duly registered in the Land Registry. I requested him to vacate the premises, but he refused to do so. He said the premises had been obtained by S. Muttusamy from the defendant in this case." The Fiscal further states in his report that on that occasion the plaintiff, the judgment-creditor, made the following statement to him: "I bought these premises from the defendant L. W. R. P. Marshall. At the time of purchase I was aware that the present occupants did not have any connection with the defendant or these premises." In the circumstances, on 4.3.80 the Fiscal was able to deliver only constructive possession of the premises to the plaintiff. The plaintiff-respondent thereafter by his petition dated 5.3.80 instituted proceedings under section 325 of the Civil Procedure Code pleading that the claim of the petitioner-appellant to be in possession of the premises was frivolous or vexatious. The petitioner-appellant thereafter filed statement of objections dated 19.3.80 justifying his possession of the premises, *inter-alia,* on the following grounds:

(a) The premises in suit is governed by the provisions of the Rent Act.

(b) One S. Muttusamy was the tenant of the premises.

(c) He has been placed in possession of the premises by S. Muttusamy.

(d) The said S. Muttusamy was collecting a sum of Rs. 1,300/- per mensem from him and paying a sum of Rs. 600/- to Marshall, the judgment-debtor.

(e) He was in occupation of the premises with the knowledge and acquiescence of the said Marshall.

(f) In or about the end of 1978, Marshall had asked him for an increased rental and a sum of Rs. 750/- was paid by him direct to Marshall for the month of January 1979.

(g) Marshall also negotiated with him for the sale of the premises in suit and agreed to sell the premises for Rs. 140,000/-, and a sum of Rs. 40,000/- was paid as an advance on 6.2.79.

He further stated: (a) that he had tendered the February rent to Marshall, but the latter had refused to accept same, (b) that a sum of Rs. 12,250/- was deposited with S. Muttusamy on account of his articles being placed in his possession, and (c) that the plaintiff who was carrying on business in the adjoining premises was well aware of his possession and occupation of the premises in suit.

At the inquiry into the plaintiff's application, Counsel for the petitioner-appellant stated that the premises in suit was governed by the Rent Act and that the appellant was not bound by the judgment entered into between the plaintiff and the defendant Marshall and that the appellant remained in the premises on his own rights, or that he was there as a tenant of the defendant Marshall. The appellant gave evidence and stated that his business of New Wappa Hotel, whose registration certificate has been marked 2R1, was started on 23rd July 1975 and that he obtained these premises from Muttusamy in pursuance of the first agreement No. 122 (A11A) dated 31st October 1975 and attested by U. L. M. Farook, N.P., for three years, and the second agreement No. 182 (A4) dated 27th July 1978 for a further period of three years, and that in January 1979, he paid Marshall Rs. 750/- as rent for the premises. By his order dated 1st August 1980, the learned District Judge rejected the petitioner's objections and held that the claim of the petitioner to be in possession of the premises was frivolous or vexatious. He disbelieved the evidence of the petitioner-appellant that he had paid the rent direct to Marshall in January 1979 and become the defendant's tenant. With reference to the petitioner-appellant's claim to be in occupation of

the premises on the strength of the notarial agreements A11A and A4, the District Judge stated that since Muttusamy was dead and since the heirs of Muttusamy were not claiming the tenancy on the death of Muttusamy, "it is not proved that the appellant is a tenant or a sub-tenant."

As soon as the District Judge gave his order holding against the petitioner-appellant, the petitioner-appellant by his petition of the same date moved the Court of Appeal by way of revision to set aside the said order of 1.8.80. The application was supported that date itself and the Court directed issue of notice returnable on 15.8.80 and ordered the stay of execution proceedings pending the hearing of the application. The plaintiff-respondent did not wait till the notice returnable date, but filed his objections with the necessary documents on 7th August 1980. The revision application was ultimately heard by the Court of Appeal on 8th and 9th December 1980. By its judgment dated 30th January 1981, that Court affirmed the order of the District Judge and dismissed the revision application with costs.

At the hearing of the revision application by the Court of Appeal, Counsel for the plaintiff-respondent had taken a preliminary objection that a revision application did not lie and that in any event the petitioner's application should be rejected on the ground that the petitioner had not complied with the provisions of Rule 46 of the Supreme Court Rules of 1978 published in the Government Gazette of 8.11.78. He referred to section 329 of the Civil Procedure Code, which reads:

> "No appeal shall lie from any order made under sections 326 and 327 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"

and submitted that the legislature, by making the order unappealable, intended the order to be final, and since the order of the District Judge 1.8.80 did not bar the right of the petitioner-appellant to institute an action to establish his right to possession of the premises in suit, he was not without any remedy. He further objected that there were no exceptional circumstances in this case to justify the exercise of its revisionary powers by the Court of Appeal. In support of his objection he referred to the case of *Zahir v. Perera* (73 N.L.R. 424)(9). The Court of Appeal rejected the objection. It held that there were exceptional circumstances present in this case calling for the intervention of the Court by way of revision in the interests of justice. It reasoned: "If the order of the District Judge was to stand, on the basis of that order the petitioner-appellant would be ejected and he will be out

of possession of his business premises, thereby suffering irreparable injury, and if the ultimate decision in the action instituted by him goes in his favour, it would turn out to be nugatory." I agree that, in the circumstances of the case, the petitioner was entitled to invoke the Court of Appeal to exercise its revisionary power *(Somawathie v. Cooray* — 64 N.L.R. 495[10] and that if that Court was satisfied that the order of the District Judge could not be justified, it was bound to revise the order, as there would result, if the order was allowed to operate, grave miscarriage of justice.

The Court of Appeal, however, upheld the other objection of the respondent that the application should fail for non-compliance with Rule 46 of the Supreme Court Rules, 1978. Rule 46 reads as follows:

> "Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition and affidavit in support of the averments set out in the petition and shall be accompanied by originals of documents material to the case or duly certified copies thereof in the form of exhibits."

In this connexion , reference was made to the judgment of the Court of Appeal in *Navaratnasingham v. Arumugam and another* [1980] 2 Sri L.R. p.1) where non-compliance with the provisions of Rule 46 was held to be fatal. Soza J., in the present judgment, correctly modified his earlier view expressed in the aforesaid case that the provisions of Rule 46 were imperative, and added that "what I said in the judgment should be read subject to the principle that the law does not expect a person to do what is impossible and that there may be occasions when matters of grave 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 the petitioner to comply with the requirements subsequent to the filing of the petition". I agree with this observation of Soza J. In the present case however, Soza J. held that if circumstances beyond his control prevented the petitioner from complying with Rule 46 at the moment of filing the application, he should yet have complied with it as soon as possible. He referred to Rules 50, 51 and 54 and said that there was provision in the Rules for amendment to the petition or tender of additional papers with the permission of the Court to which a petitioner could resort so as to comply with Rule 46. In the instant case, the

petitioner did not file along with his petition the "originals of documents material to the case, or duly certified copies thereof in the form of exhibits," nor even later. In view of his reasonable apprehension that the order of the District Judge dated 1.8.80 would be carried out without delay and that he would be ejected and his application rendered nugatory by the delay involved in getting the certified copies of documents filed in the District Court in connexion with the inquiry, the Court of Appeal accepted that the urgency of the situation excused his filing the application for revision without the exhibits referred to in Rule 46. However, it could not condone the petitioner's failure to file those exhibits later, after the petitioner had obtained a stay of execution from the Court. The excuse given by the petitioner was that, since the plaintiff-respondent had without waiting for the notice returnable date rushed to Court on 7th August 1980 and filed his objections with the certified copies of documents material to the case, no useful purpose was served by duplicating the papers. In this connection the Court of Appeal observed: "It is true the plaintiff-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." In my view, a party should ordinarily comply with the requirements of Rule 46, and if he fails to do so, his petition is liable to be rejected, unless he had good reason for such non-compliance. It is a matter falling within the discretion of the Court whether, in the circumstances, the petitioner should be excused or not for such non-compliance. In the instant case, I am satisfied that the plaintiff-respondent, by furnishing to Court on 7.8.80 all the necessary exhibits, relieved the petitioner of the requirement to file the material documents. The Court was in possession of the necessary material and hence it was not obligatory on the part of the petitioner to duplicate the exhibits. If the originals or certified copies of documents material to the case have been filed of record by any party, whether petitioner or respondent, and are available to Court for a proper appreciation of the issue involved in the application, the purpose of the requirement of the petitioner filing those documents is satisfied. A procedural requirement should be construed literally. In my view the Court of Appeal has, in the circumstances, erred in upholding this preliminary objection. Counsel for the plaintiff-respondent further pointed out that in any event two documents, viz. certificate of registration and copy of complaint to the Police in M. C. Colombo case No. 34213 marked 2R1 and 2R3, respectively, in the inquiry proceedings, had not been furnished to Court in time. But, in view of the fact that these documents though marked in

the lower court were not material to the decision in the case, in the sense that they were not relevant to the contention pressed in support of the petitioner's case and have no bearing on the question in issue before the Court, this failure to file those documents does not justify rejection of the application. The Rules are designed to facilitate justice and further its ends; they are not designed to trip the petitioner for justice. Too technical a construction of the Rules should be guarded against. Counsel for the petitioner was content to confine his argument before that Court to the documents A11A and A4. The documents 2R1 and 2R3 were not relevant for the arguments centering round the documents A11A and A4 and reference to them was not necessary.

By its order dated 30.1.81, the Court of Appeal affirmed the order of the District Judge and dismissed the application with costs. On the date the judgment was delivered, Counsel for the petitioner-appellant orally applied to that Court for leave to appeal to this Court. Counsel for the plaintiff-respondent stated that he had no objection, and the Court granted leave to appeal. The present appeal has thus come to this Court with the leave of the Court of Appeal.

At the commencement of the hearing of the appeal, senior Counsel for the plaintiff-respondent raised a preliminary objection to the appeal. He submitted that the order of the Court of Appeal appealed from is an interlocutory order and that the Court of Appeal had no jurisdiction to grant leave to appeal to the Supreme court from such an order. He contended that the petitioner-appellant should have sought and obtained the special leave of this Court to appeal, and that since this appeal had not come through that channel, the appeal should be rejected.

Under the provisions of Article 128 of the Constitution, an appeal lies to the Supreme Court from any final order or judgment of the Court of Appeal, either with the leave of the Court of Appeal or of the Supreme Court; and from an interlocutory order/judgment of the Court of Appeal, only on special leave being granted by this Court. Thus, the appellate jurisdiction of this Court can be invoked by a party to question an interlocutory order or judgment of the Court of Appeal only with the special leave of this Court. The Court of Appeal has no jurisdiction to grant leave to appeal from an interlocutory order or judgment.

The foundation of Counsel's objection is the assumption that the order appealed from is an interlocutory order or judgment and

not a final order or judgment. The main burden of his argument was that all steps taken after the final determination of the action by judgment between the parties and all orders made thereon are interlocutory in their nature. He submitted that there cannot be two judgments in an action, that the judgment entered in the present case in favour of the plaintiff against the defendant was the only final judgment in the action, and that the orders made thereafter in the course of execution proceedings were interlocutory orders, even though made against a person who was not a party to the judgment. In support of his submission, he referred us to the case of *Palaniappa Chetty v. Mercantile Bank of India Ltd.* (43 N.L.R. 352)[4]. In that case, which was an action on a mortgage bond, after the mortgage decree had been affirmed in appeal, the parties entered into an agreement with regard to the execution of the mortgage decree. Thereafter, application for execution of the mortgage decree was made in the District Court, and allowed. On appeal, the order allowing execution was affirmed. The appellant thereupon applied for conditional leave to appeal to the Privy Council from the order allowing execution. It was held that the order allowing execution was not a final judgment or order within the meaning of Rule 1(a) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance. In that case, admittedly, the rights of the parties to the action had been finally determined by the mortgage decree; the order allowing execution by the decree-holder against the judgment-debtor related only to the manner of execution of the decree and hence was rightly held to be an interlocutory order as it did not decide the rights of the parties. The case of *Subramaniam v. Soysa* (25 N.L.R. 344)[6] was distinguished. In the latter case, the Supreme Court, at the instance of the execution-creditor, set aside the sale of the judgment-debtor's property on the ground of material irregularities in the conduct of the sale. The purchaser, who was a third party, applied for conditional leave to appeal to the Privy Council. It was held that the order setting aside the sale was a final judgment within the meaning of Rule 1(a) in Schedule I of the Privy Council Ordinance, on the ground that the order setting aside the sale finally disposed of the case between the parties to the proceedings, that is to say, the purchaser and the execution-creditor.

In the case of *Usoof v. Nadarajah Chettiar* (58 N.L.R. 436)[5], it was held that a judgment of the Supreme Court dismissing an appeal from an order of a District Court refusing to set aside the sale of a property belonging to the defendants in execution of a decree entered against them was a final judgment within the meaning of Rule 1(a) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance.

Again, in *Usoof v. National Bank of India Ltd.* (60 N.L.R. 581)[8] it was held that a judgment of the Supreme Court dismissing an appeal from an order of the District Court refusing to set aside the sale of a property in execution of a mortgage decree is a "final judgment" within the meaning of the aforesaid Rule 1(a), although the property sold in execution was purchased by the judgment-creditor himself and not by a third party. The fact that the property that was sold in execution of the decree was purchased by the judgment-creditor himself and not by a third party was held to make no difference to the nature of the order on the sale.

In *Krishna Pershad Singh v. Motichand* ((1913) 40 Cal. 635)[11] which was followed in *Subramaniam v. Soysa* (25 N.L.R. 344) (supra) Lord Moulton, delivering the judgment of the Privy Council, held that the order of the High Court refusing to set aside the sale where the property sold in execution of the decree was purchased by the judgment-creditor was a final order which dealt finally with the rights of the parties and that an appeal to the Privy Council lay to the judgment-debtor.

In *Ramchand Manjimal v. Gower Dhandas* (A.I.R. (1920) P. C. 86)[12] Viscount Cave observed: "The question as to what is a final order was considered by the Court of Appeal in the case of *Salaman v. Warner* ((1891) 1 Q.B. 734)[13] and that decision was followed by the same Court in the case of *Bozon v. Altrincham U.D.C.* ((1903) 1 K.B. 547)[14]. The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties." In *Abdul Rahman v. Cassim & Sons* (A. I. R. (1933) P. C. 58)[15] the Privy Council stated that "the finality must be a finality in relation to the suit. If after the order the suit is still alive, a live suit in which the rights of the parties have still to be determined, no appeal lies against it to the Privy Council as it was not a final judgment or order. Of these Privy Council decisions, the decision in *Krishna Pershad Singh v. Motichand* related to execution proceedings. Referring to this decision, Sansoni J. in *Usoof v. National Bank of India Ltd.* (60 N.L.R. 381 at 383[8] stated that he regarded that decision as authority for the view that there can be a final order or judgment even in execution proceedings between the parties to the action. Rejecting the objection that the order refusing the judgment-debtor's application to set aside the sale of property in execution of a mortgage decree is not a final judgment, he relevantly observed: "It seems to me to dispose of the argument that when the mortgage decree was entered in this action, it had been finally determined and that there could be no further final judgment as

between the parties. While it is true that a judgment is not final unless it finally disposes of the rights of the parties, I do not see why there cannot be a final judgment in execution proceedings whether those proceedings are between the parties to the action or not; and, so far as the judgment-debtors in this case are concerned, they have, by the judgment of this Court, finally lost their rights in the mortgaged property, and execution proceedings are no longer live proceedings". I respectfully agree with this statement.

In the case of *Marikar v. Dharmapala Unnanse* (36 N.L.R. 201)(2) Garvin J. held that where a stranger to a decree claimed possession of the premises in respect of which a writ of possession was issued in his own right and on the ground that the resistance offered by him was not at the instigation of the judgment-debtor but in assertion of his own rights, an order rejecting his plea and committing him to prison under section 326 of the old Civil Procedure Code determined the proceedings in which the order was made and that such order was a final order. He stated that after the decree in a Court of Requests action, there may be execution proceedings in which judgments having the effect of final judgments may be passed. Dias J. in *Arlis Appuhamy v. Simon* (48 N.L.R. 298)(3) followed the principle laid down in this case.

The judgment or order appealed against has determined the appellant's right to possess the premises in suit. True, the order will not, by virtue of section 329 of the Civil Procedure Code, operate as *res judicata* in any action that may be instituted by him to establish his right, but, as far as this action is concerned, he is bound by the order which has decreed him to be ejected and the plaintiff-respondent to be in possession. In relation to the present action, the order has finally disposed of the appellant's right to possess the premises in suit and the execution proceedings have ceased to be live proceedings. For the above reasons, I am of the view that the judgment or order in question is not an interlocutory order but is a final judgment or order within the meaning of those expressions in Article 128 of the Constitution and that it was competent for the Court of Appeal to have granted leave to appeal from the impugned order. The preliminary objection cannot, in the circumstances, be sustained and is accordingly overruled.

In view of the above conclusion as to the nature or quality of the judgment or order appealed against, it is not necessary to examine the submission of Counsel for the appellant that it does not lie in the mouth of the respondent to question the validity of the leave granted by the Court of Appeal, after his Counsel had stated to that Court that he had no objection to the appellant's

application for grant of leave by that Court, and the counter-submission of Counsel for the respondent that his consent did not preclude him from asserting want of jurisdiction in the Court of Appeal to grant the leave.

The facts of the case, so far as relevant to the question involved in the appeal, are very simple and lie within a very small compass and have not been controverted by the plaintiff-respondent who, by the fact of his doing business in the premises adjoining the premises in suit, was in a position to testify that the petitioner-appellant was not in occupation of the premises in suit from 1975 on his own account running a hotel business on an agreement with Muttusamy, the tenant of the premises, as deposed to by him in evidence, if that was so.

Objecting to the plaintiff-respondent's section 325 application complaining of the petitioner's resistance, the petitioner-appellant claimed to be in possession of premises No.19, Galle Road, Bambalapitiya, on his own account. He based his claim on two grounds:

(1) that he had been placed in possession of the premises by Muttusamy. He produced notarial agreement No. 182 dated 27th August 1978 to substantiate such claim; and

(2) that he had become the tenant of the premises by paying the rental for January 1979 to the defendant-respondent, the vendor of the premises.

His evidence that in January 1979 he had become the tenant of the defendant-respondent is tenuous and has been rejected by the trial Judge. Mr. Thiagalingam did not canvass this finding, but he focussed on the other ground that Muttusamy, who was a tenant of the defendant-respondent, had put the petitioner-appellant in possession of the premises as far back as 1975. He referred to the notarial agreement No. 122 dated 31st October 1975 (A11A) whereby Muttusamy had let out the hotel business called and known as 'Dhawalagiri Hotel' "with the furniture, fittings, effects and things fully described in the schedule thereto to the petitioner-appellant as from 1st November 1975 for a period of three years with immediate vacant possession" and the petitioner-appellant had agreed to pay him a sum of Rs. 45/- daily as commission. On the expiry of the said 3-year period, a lease of the business for a further period of three years was given by the said Muttusamy to the petitioner-appellant by notarial agreement No. 182 dated 27th October 1978 (A4). In terms of the said notarial agreements, Muttusamy placed the petitioner-appellant in charge of the hotel business and gave over the manage-

ment, control and conduct of the business for a period of three years; and to enable the petitioner-appellant to carry on the said hotel business, he put the petitioner in possession of the premises in which the hotel was being run. The said agreements provided that "these presents shall bind the parties thereto and their respective heirs, executors and administrators firmly."

Under the notarial agreement No.182 (A4), what was leased was "the hotel business carried on at premises No. 19, Galle Road, Bambalapitiya,"and hence the petitioner-appellant was entitled to carry on the hotel business in the said premises until 31st October 1981, and, for the purpose of carrying it on, it was necessary that he should be in possession of the premises for that period. The business could not be conceived apart from the premises where it was carried on. Both the District Judge and the Court of Appeal do not appear to have appreciated that, for the purpose of the business leased out by the agreements A11A and A4, the petitioner should have possession of the premises where the business was carried on and hence was put in possession of the premises for the periods covered by the lease. It was not seriously disputed that Muttusamy was a tenant of the premises in suit at all relevant times. It is true that Muttusamy died on 1st March 1979, but his death did not affect the tenure of the lease agreement No. 182 (A4). The heirs of Muttusamy stepped into the shoes of Muttusamy. As the premises in suit is subject to the provisions of the Rent Act, No. 2 of 1972, the heirs of Muttusamy are deemed to have succeeded to the tenancy of the premises in suit (section 36 of the Rent Act of 1972). The death of Muttusamy did not terminate the lease of the hotel business, nor the licence to occupy the premises in suit granted to the petitioner-appellant by him. It was not a revocable licence which terminated with the death of the grantor. The licence was an integral part of the lease of the business and endured for the period of the lease. Muttusamy's rights and obligations passed to his heirs (clause 12 of A4), and the petitioner-appellant continued to be a licencee of the premises under the heirs of Muttusamy. On the death of Muttusamy, the tenancy of the premises devolved on his heirs and the petitioner could remain in the premises until that tenancy was terminated and decree entered against them. The petitioner-appellant could not be ejected from the premises by the landlord of the premises, viz. the defendant Marshall, or the plaintiff, unless and until decree for ejectment of the tenant under the provisions of the Rent Act was obtained. It is to be noted that the heirs of Muttusamy were not made parties to the present action and hence they were not bound by the decree entered in the case. The petitioner who was holding under them was therefore not affected by such a decree.

The effect of a concluded contract of sub-tenancy is that the tenant, while remaining liable to the original landlord for the fulfilment of his own contractual obligations, has for the time being transferred to a sub-tenant the right to occupy the rented premises. A sub-tenant is not a trespasser and is, in law, not in wrongful possession. He is entitled to occupy the rented premises so long as the tenant was entitled to occupy same. *(vide Ibrahim v. Mansoor* – 54 N.L.R. 217). A licensee under the tenant is in the same position as the sub-tenant, as far as right to possession of the rented premises is concerned, *vis-a-vis* the original landlord until a decree for ejectment has been entered against the tenant. Thus, as licensee under Muttusamy and his heirs, the petitioner-appellant continues in lawful occupation of the premises as against the plaintiff-respondent and is entitled to continue in occupation until the tenancy of Muttusamy's heirs has been determined and decree for ejectment entered against them.

Section 36 of the Rent Act states that on the death of the tenant of business premises, the heirs or executor/administrator of the estate of the deceased tenant "shall . . . . . .be deemed, for the purpose of this Act, to be the tenant of the premises." The District Judge has erred in holding that the heirs of Muttusamy had not become tenants of the premises on the death of Muttusamy.

It is not disputed that the petitioner-appellant has been in occupation of the premises in suit at least from 1975 under Muttusamy. There has been no nexus between him and the defendant-respondent. This is corroborated by the statement of the plaintiff to the Fiscal: "I bought these premises from the defendant Marshall. At the time of the purchase, I was aware that the present occupants did not have any connection with the defendant or these premises." The occupation of the premises by the petitioner is referable to the aforesaid agreements A11A and A4. The District Judge had failed to draw the proper inferences from the admitted facts of the case and is in error in holding that the agreement A4 of 1978 is not valid after the death of Muttusamy. In affirming the District Judge's findings of fact, the Court of Appeal has also erred.

The Court of Appeal has construed deed No. 182 (A4) as a partnership agreement. This construction is absolutely untenable in the light of the various clauses of that agreement and has not been supported by Counsel for the plaintiff-respondent. The agreement provides for the handing over of the management and control of the hotel business called and known as 'Dhawalagiri Hotel' carried on in premises No.19, Galle Road, Bambalapitiya.

for a period of three years with immediate vacant possession to the petitioner-appellant by Muttusamy, and for the petitioner-appellant to pay Rs. 45/- daily as commission and for Muttusamy to pay the rent of the premises where the business was carried on. According to the tenor of the agreement, during the said period of three years, the business was to be the business of the petitioner-appellant. There was no question of the said business being carried on in common between Muttusamy and the petitioner-appellant during that period. The evidence shows that the petitioner-appellant was from 1975 carrying on hotel business not under the name of Dhawalagiri Hotel' but as 'New Wappa Eating House'. The agreements Nos. 122 and 182 do not prohibit the petitioner-appellant carrying on hotel business under a name other than that of Dhawalagiri Hotel and hence it was not wrongful for the petitioner-appellant to have, from 1975, carried on the said business under the name of 'New Wappa Eating House.' In any event, the only person who could have objected to or complained of the petitioner-appellant carrying on hotel business under a different name in the premises in suit was Muttusamy. But Muttusamy never objected to the new name of the Hotel.

The Court of Appeal has observed that: "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 th two partners are set out in the deed. The petitioner altered the name of the business to New Wappa Eating House. The claim of the petitioner that he was a sub-tenant based on the deed No. 182 of 27.9.78 was therefore rightly regarded as without any foundation." A proper appreciation of the nature of the relationship between Muttusamy and the petitioner-appellant established by deed No. 182 of 27.9.78 (A4) does not warrant this observation. The agreement has not been looked at in its proper perspective. The conclusion both of the District Judge and of the Court of Appeal that the claim of the petitioner-appellant to be in possession of the premises in suit is frivolous or vexatious is based on their erroneous conclusions and is not justified by the admitted facts of the case. The agreement No.182 (A4) entitled the petitioner-appellant to be in lawful possession of the premises.

In the circumstances, this Court can properly, and indeed should, reach its own conclusion by applying the law to the unquestioned facts, such as the occupation of the premises in suit by the petitioner-appellant on the strength of the lease agreements Nos. 122 and 182. This case is not one to which the rule

as to 'concurrent findings' is applicable. Manifest and important errors of law and serious misdirection on the proper inference to be drawn from undisputed facts committed by the courts below inhibit this Court from attaching too much sanctity to their conclusions. In the circumstances, to prevent a miscarriage of justice, this Court is compelled to review the conclusions of fact. In my view, far from the claim of the petitioner-appellant being 'frivolous or vexatious,' it is well founded in law. The conclusion that the resistance to the execution of the decree for possession was occasioned by the petitioner-appellant claiming in good faith to be in possession of the premises on his own account is irresistible.

I allow the appeal, set aside the judgment of the Court of Appeal and the order of the District Court and dismiss the petition of the plaintiff-respondent to the District Court. The plaintiff-respondent shall pay the petitioner-appellant the latter's costs in this Court, in the Court of Appeal and in the District Court.

Appeal dismissed