

## HETTIARACHCHI

v.

MOTHA

COURT OF APPEAL

BANDARANAYAKE, J., VIKNARAJAH, J.

C.A. No. 1053/87—D.C. COLOMBO 8627/L.

NOVEMBER 4 AND 6, 1987.

*Civil Procedure—Death of plaintiff after decree—Application for substitution and execution of decree re Lots B, B1, and B2 and for writ under s.553 of A.J.L. (same as 339(1) C.P.C.)—Order to issue writ not issued because of stay order in respect of Lot B only—Where C.A. decree did not cover Lots B1 and B2 was fresh application for execution necessary?*

The Supreme Court by its judgment declared the plaintiff entitled to Lots B, B1 and B2 of the land depicted in Plan marked X. After the Supreme Court judgment, the plaintiff died and his widow Mrs. Motha filed an application to be substituted and for execution and petition and affidavit for writ. Notice was issued on the defendant. He filed objections. After inquiry the application for substitution was allowed. The substituted plaintiff then filed application (petition and affidavit) for writ. On 6.10.1982 the District Judge ordered writ to issue. On 8.10.82 an application to amend the writ by inserting assessment numbers in the schedule and empowering the fiscal to break open the gates was allowed. On 11.10.82 the Court of Appeal ordered writ to be stayed in respect of Lot B. This Lot had been acquired under the Land Acquisition Act. The District Judge stayed the writ. Later the Court of Appeal delivered judgment but this did not apply to Lots B1 and B2. Although writ should have issued on the old order the District Judge held a fresh inquiry and on 1.10.87 ordered the writs to issue in respect of Lots B1 and B2.

**Held—**

(1) Application for substitution and execution was properly made under s. 553 of the A.J.L. (identical with s. 339(1) C.P.C.) No objection had in fact been raised to the substitution.

(2) The District Judge had not signed the writ and it had not been issued to the Fiscal. Neither the stay order nor later the Court of Appeal judgment covered Lots B1 and B2. What remained to be done was purely a ministerial act for the writs already filed to be signed and issued. There was no fresh application for writ needed and no further inquiry was necessary. However the order of 1.10.87 to issue the writs is good.

APPLICATION for revision of the order of the District Judge of Colombo.

P. A. D. Samarasekera, P.C. with A. L. M. de Silva for petitioner.

Nimal Senanayake, P.C. with S. Parathalingam, Miss S. M. Sarnaratne and J. Wewelwela for respondent.

Cur. adv. vult.

January 18, 1988.

**VIKNARAJAH, J.**

This is an application by the defendant respondent petitioner by way of revision to set aside the order of the learned District Judge dated 1.10.87 to issue writ in respect of two lots marked B1 and B2 in Plan 594 and 418 marked P1 and P2 of the land called Gorakagahakumbura.

When this application was supported on 7.10.87 this Court issued notice and also directed the District Court to stay the operation of the order dated 1.10.87. This matter was listed on 4.11.87 for consideration as to whether the stay order should be extended because learned Counsel for respondent objected to the extension of the stay order. As this would involve a consideration of the merits of the main application Counsel on both sides agreed that the main application be taken up for argument and accordingly the main application was taken up for argument on 4.11.87, so that the entire application could be disposed of.

The facts set out in the petition and affidavit of the petitioner are as follows: (No counter affidavits were filed by the respondent):

- (1) The Supreme Court of Sri Lanka on 3.3.76 by its judgment reversed the judgment of the District Court of Colombo and declared the original plaintiff entitled to lots B, B1 and B2 in Plan 418 marked X of the land called Gorakagahakumbura and entitled to ejectment of the defendant-petitioner therefrom.
- (2) After the Supreme Court delivered the said judgment the original plaintiff died. The original plaintiff's wife then made application to District Court to be substituted in the room of the deceased plaintiff.
- (3) The defendant-petitioner was not given any notice of the application for substitution and the Court effected such substitution.
- (4) The substituted plaintiff (who is the respondent to the present application) made an application for the execution of the Decree against this petitioner and the other defendants to the action.

- (5) The petitioner filed objections to the said application for writ and pleaded inter alia that lot B had vested in the State under the Land Acquisition Act and that as such no writ could be issued for the said Lot B since the petitioner was a licensee of the said Lot under the State.
- (6) The District Court held an inquiry into the said application for writ and made order on 6.10.82 for the issue of writ for the ejection of the petitioner from Lots B, B1 and B2.
- (7) Against the said order the petitioner filed revision application No. 1329/82 and leave to appeal application No. 141/82 seeking to set aside the order of the District Judge dated 6.10.82 and an order pronouncing that Lot B could not be the subject matter of the writ of execution.
- (8) The respondent had filed objections to the said application and after the matter was argued on 13.10.86, this Court delivered judgment on 5.12.86 setting aside that part of the order of the District Judge issuing writ of execution in respect of Lot B in plan 594.
- (9) The respondent filed an application bearing No. 218/86 against the said judgment in the Supreme Court and sought leave to appeal against the said judgment. Leave was granted and the said appeal is still pending.
- (10) Pending the said appeal to the Supreme Court the respondent filed a motion in the District Court and sought a writ of execution in respect of lots B1 and B2. The said application was made on 30.03.87.
- (11) The petitioner filed objection to this application and after inquiry made order on 01.10.87 allowing the application of the plaintiff respondent and issued writ in respect of lots B1 and B2. (The present application is to revise and set aside this order).
- (12) The original writ issued by Court and signed by the District Judge dated 08.10.82 had lapsed as no application had been made for its renewal.

The above are the facts as set out by petitioner in his application and relied on by learned Counsel for petitioner.

Learned Counsel for petitioner submitted,

- (1) that the original application for substitution and execution of writ made by the substituted plaintiff, on which the District Judge made order on 06.10.82 for the issue of writ, was not made in conformity with the provisions of section 339 of the Civil Procedure Code and therefore the entire proceedings from the date of substitution is a nullity.
- (2) As the writ issued by Court and signed by the District Judge dated 08.10.82 had lapsed the respondent should have made a fresh application for writ and that the learned District Judge had disregarded the imperative provisions of section 337 of the Civil Procedure Code.
- (3) As there is an appeal pending before the Supreme Court in respect of the writ issued by District Court on 06.10.82 and the Supreme Court is seised of the subject matter of the writ, it is incorrect for the District Judge to deal with a part of the corpus and issue writ.

Regarding (1) and (2) above learned Counsel for petitioner relied on the following facts pleaded in the petition and affidavit.

- (a) when the original plaintiff's wife made application to the District Court to be substituted in the room of the deceased plaintiff, the defendant-petitioner was not given notice of the application and the Court effected such substitution.
- (b) the application for substitution and execution of decree was not made in conformity with s. 339 of the Civil Procedure Code in that both applications were not combined in one application.
- (c) original writ was signed by the District Judge on 08.10.82 and issued by Court to Fiscal and the writ had lapsed and thereafter a fresh application for writ should have been made.

Learned Counsel for respondent made his submissions on the basis of the above facts, and submitted that a fresh application for writ was not necessary and as the Court of Appeal in Application No. 1329/82

had only set aside that part of the order of the District Judge issuing writ of execution in respect of Lot B, writ should issue in respect of lots B1 and B2 in respect of which there was no dispute.

After the submissions of Counsel on both sides concluded this Court called for the original record in D.C. 8627/L from the District Court of Colombo.

On a perusal of the record it would appear according to J.E. (Journal Entry) 118 of 08.11.77 that the Attorney-at-Law for the widow of the deceased plaintiff has filed proxy, petition and affidavit for substitution and execution of decree. An application for writ has also been filed along with the petition and affidavit. This application was made under the Administration of Justice (Amendment) Law No. 25 of 1975 which was then in force. Section 553 of the A.J.L. is identical with section 339 (1) of the Civil Procedure Code. The petition filed is in the form provided in the A.J.L. The relief claimed in the petition is that she be substituted in place of deceased plaintiff and decree entered in the case be executed by issuing writ of possession against the respondent and for the recovery of the money and costs of action against the respondent.

Along with the petition an affidavit has been filed by Mrs. Mary Motha the proposed substituted plaintiff in which she prays that she be substituted in place of the deceased plaintiff and the decree for ejectment be executed and for recovery of money by issuing writ of possession and by seizing the respondent's property. Notice was issued on defendants-respondents. The 1st defendant-respondent (i.e. the present petitioner) filed objections on 12.04.78 stating that plaintiff had failed to exercise due diligence to procure complete satisfaction of decree and that in the event of writ being allowed provision be made for 1st defendant (i.e. petitioner) to continue undisturbed as tenant cultivator.

The application for substitution and execution came up for inquiry on 19.11.79 and the proposed substituted plaintiff and 1st defendant petitioner were represented by Counsel.

Counsel for the proposed substituted plaintiff submitted to Court the Last Will of deceased plaintiff and probate and moved that Mrs. Mary Motha be substituted in the room of the deceased plaintiff. To this application Counsel for the present defendant petitioner had no

objection and the application for substitution was allowed. Counsel for the substituted plaintiff then moved for a further date to file fresh application for writ as the application for writ already filed was made before substitution. This application was allowed.

According to J.E. 141 of 10.1.80 substituted plaintiff filed petition and affidavit and moved for issue of writ. It is this application that is pleaded in para. 4 of the petition of petitioner and produced as P3. The petitioner filed objection to the said application for writ and pleaded inter alia that Lot B had vested in the State under the Land Acquisition Act and that as such no writ could be issued for the said Lot B. The District Court held an inquiry on 6.10.82 and the Judge made order on 6.10.82 that writ be issued forthwith for lots B, B1 and B2.

According to J.E. 167 of 8.10.82 the writ for delivery of possession is tendered in duplicate for signature by Judge.

The original writ duly stamped is at folio 323 of the record and duplicate writ is at folio 324.

On the same day Attorney-at-Law for substituted plaintiff has filed a motion to insert the present assessment numbers in the schedule to the writ and also moved for an order for Fiscal to break open the gate when he goes to execute the writ. This motion is journalised under same date 8.10.82 at J.E. 168.

The Judge has not signed the J.E. 167 whereby the writ was tendered for signature. The original writ on record is duly stamped but not signed by the Judge. He has signed the duplicate writ and when he found that a motion has been filed on same day for an order to insert certain assessment numbers in the writ he did not sign either the original writ or the journal entry by which the writs were tendered for signature but made order on the motion to amend writ that the matter be supported on 14.10.82.

On 11.10.82 the Court of Appeal issued a stay order in Application No. CA 1392/82 on the application of the defendant petitioner to revise the order to issue writ as follows:—

“The District Judge is directed to stay the issue of the writ in respect of Lot B in extent of 3 acres 29 perches only depicted in Plan No. 594 dated 31.10.80. The stay order will be in operation till 1.12.82.”

It will be seen that the stay order was in respect of Lot B only because that was the subject matter of the complaint to the Court of Appeal. The stay order was extended from time to time.

On the order of the Court of Appeal, the District Judge stayed the issue of the writ.

The above facts emerged from an examination of the record.

The complaint of the petitioner that when the original plaintiff's wife made an application for substitution he was not given notice of the application and that the Court effected such substitution is factually wrong. Petitioner's further complaint that the application for substitution and execution of decree were not made in conformity with section 339 of the Civil Procedure Code is also wrong. It will be seen from the facts found and stated by me from the record that the application for substitution and execution was properly made under S.553 of the A.J.L. which is identical with S.339 of C.P.C. and the order for substitution was made by Court in the presence of Counsel for petitioner and Counsel for petitioner did not object to the substitution. Although an application for writ was filed with the application for substitution a further affidavit was filed for issue of writ and there was an inquiry into the application which culminated in the order of the District Judge on 6.10.82. This order was the subject of Revision Application No. 1392/82 and it was not submitted during the course of argument into this application that the application for writ was not in conformity with section 339 of the C.P.C. for the simple reason that such a complaint could not have been made because the application was in conformity with S. 339 of C.P.C.

In the course of the argument in revision application No. 1392/82 the issue of writ in respect of lots B1 and B2 was not complained of. The relief claimed in that application was for a pronouncement that the decree entered is incapable of execution in so far as ejection from the land depicted as Lot B in plan No. 594 is concerned. In the judgment delivered by my brother Bandaranayake, J., it is stated that "the objections of the 1st defendant petitioner were confined in respect of Lot (9) which is Lot B and do not extend to lots B1 and B2".

The submissions of Counsel for 1st defendant-petitioner that the application for writ was not in conformity with section 339 of the C.P.C. is based on a misstatement of facts and has no merit whatsoever.

The next submission of Counsel for petitioner is that the writ issued by Court and signed by the District Judge on 8.10.82 had lapsed and therefore the substituted plaintiff respondent should have made a fresh application for writ under S.224 of the C.P.C. and that the District Judge has disregarded the imperative provision of section 337 of the C.P.C.

This submission is based on two misstatements of facts.

- (1) that the writ has been signed by the District Judge on 8.10.82.
- (2) that the writ has been issued by Court to the Fiscal. From what I have stated earlier from the record the writ has not been issued to the Fiscal and the original writ has not been signed by the Judge. In fact before it was issued the Court of Appeal issued a stay order in respect of Lot B only and the District Court stayed the issue of writ.

Submissions were made by Counsel for respondent on the basis of these misstated facts.

It was submitted on behalf of respondent that even if writ had been issued it is not necessary to make a fresh application for writ. I do not think it is necessary to go into this matter because it is purely academic for the reason that in fact writ has not been issued to the Fiscal. The writ has not even been signed. The Court has stayed the issue of the writ.

The correct position is that writ has not been issued following the order of the District Judge dated 6.10.82, because that order was under review in Revision Application C.A. No. 1392/82. In this application judgment was delivered by my brother Bandaranayake J. setting aside "that part of the order of the District Judge made on 6.10.82 issuing writ of execution and ejection of the petitioner from the land depicted as Lot B in plan No. 574 prepared by M. Peter Fernando Licensed Surveyor". In this judgment the order made by the District Judge to issue writ in respect of Lots B1 and B2 was not interfered with.

After the judgment was delivered on 5.12.1986, the respondent filed a motion on 30.03.87 in the District Court and sought a writ of execution in respect of Lots B1 and B2. The writs should have been



issued forthwith on the order made by the District Judge on 6.10.82 allowing the application for writ. The issue of writs was stayed pending the decision of Revision Appl. No. 1392/82. The judgment of the Court of Appeal did not interfere with the order for the issue of writs made on 6.10.82 in respect of Lots B1 and B2. What remained to be done was purely a ministerial act for the writs to be signed and issued to the Fiscal.

But the learned District Judge issued notice on the 1st defendant-petitioner and an inquiry was held and order was made on 1.10.87 to issue the writs in respect of Lots B1 and B2. The present application is in respect of this order.

The submission of Counsel for petitioner that the District Judge has disregarded provisions of section 337 of the Civil Procedure Code and that the respondent should have made a fresh application for writ is also based on misstatement of facts and has no merit whatsoever.

The final submission of Counsel for petitioner is that as there is an appeal pending before the Supreme Court in respect of the order made by the Court of Appeal in Revision Appln. No. 1392/82, the District Court has no jurisdiction to issue writ because the whole matter is before the Supreme Court and the Supreme Court has power to vary the entire order of the District Judge dated 6.10.82.

As I have stated earlier the petitioner had no objection to the issue of writ in respect of Lots B1 and B2 as stated in the judgment of my brother Bandaranayake J., and the matter before the Supreme Court is the order in respect of Lot B and that was the only matter argued in the Court of Appeal. I do not think the Supreme Court will interfere with matters in respect of which the petitioner had no complaint to make in the Court of Appeal.

In any event the petitioner is relying on the misstated facts for this submission.

I hold that there is no merit in this final submission

I affirm the order of the District Judge dated 1.10.87 viz to issue writ in respect of Lots B1 and B2. The stay order issued in this case is discharged.

What remains to be done in this case after receipt of the record by the District Court is for the writ after signature to be sent to the Fiscal for execution in respect of Lots B1 and B2.

I dismiss the application of the petitioner with costs fixed at Rs. 1575.

I direct the Registrar to return the record in D.C. 8627/L forthwith to the District Court of Colombo.

**BANDARANAYAKE, J.**—I agree.

*Application dismissed.*

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