LEECHMAN & COMPANY LTD.

V.

RANGALLA CONSOLIDATED LIMITED

COURT OF APPEAL
SOZA, J AND SENEVIRATNE, J.
C. A. APPLICATION NO. 2132/80
WITH C. A. APPLICATION LA. 99/80
JUNE 11, 12, 16 AND 18, 1981.

Garnishee order – s. 230 Civil Procedure Code – prohibitory notice under s. 229 (a) of the Civil Procedure Code – execution proceedings – inherent powers – s. 839 C. P. C. – concurrence.

It is the Fiscal who must sign the prohibitory notice but even if the Registrar signs it the validity of the notice will not be affected where the Registrar and the Fiscal are one and the same person. Nor will the notice be bad because it was addressed to the Chairman, Land Reform Commission when it should have been addressed to the Land Reform Commission because no prejudice was caused and the objection was not taken at the earliest opportunity.

In execution proceedings the Court will look at the substance of the transaction and will not be disposed to interfere on technical grounds especially where the objection was not taken at the earliest opportunity.

A garnishee is one who has money or property in his possession belonging to a judgment-debtor or owes a debt to the judgment-debtor. The debtor of the judgment-debtor may be summoned by the Court to show cause why he should not pay to the judgment-creditor the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the judgment. If such debtor does not dispute the debt due or claimed to be due from him and fails within such time as may be allowed by the court to pay into court the amount due from him to the judgment-debtor or an amount equal to the judgment, whichever is less, or if he does not appear upon summons then the court may order execution to issue to levy the amount due from such debtor or so much thereof as may be sufficient to satisfy the judgment. The garnishee proceedings will be confined to cases in which the debtor would have had no defence if he had been sued by his own creditor, the judgment-debtor. Where the debtor of the judgment-debtor can set up a claim or set off against the judgment-debtor or *bona fide* disputes the existence of a debt no garnishee order can issue. It is not a sufficient defence for the debtor of the judgment-debtor to say that there are other debts of the judgment-debtor which have to be satisfied.

The right of the Minister to determine the manner and mode of payment given him by s. 42J(3) of the Land Reform Law does not entitle him to reduce the amount of the payment or order rateable settlement.

When the substantive law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun unless the new statute shows a clear intention to vary such rights. Garnishment is an executory process of Court. It does not proceed on the basis of the garnishee being bound by the decree but on the basis that he is a party prohibited and cast with statutory obligations as a debtor of the judgment-debtor. Section 839 CPC merely saves the inherent powers of the Court to make such orders as may be necessary for the ends of

justice or to prevent abuse of the process of court. Where no provision exists it is the duty of the Judge and it lies within his inherent power to make such order as the justice of the case requires. On any point dealt with by the Code, the Court cannot disregard the letter of the enactment according to its true construction.

The Civil Procedure Code supersedes the Roman Dutch law on the question of concurrence and therefore only decree holders have a status to claim money held in court.

A pure question of law which does not require the ascertainment of new facts can be raised for the first time in appeal.

Cases referred to :

(1) Pieris v. The Commissioner of Inland Revenue (1963) 65 NLR. 457, 458.
(1)a. Nanayakkara v. Sulaiman (1926) 28 NLR 314.

(2) Choice Investments Ltd. v. Jeromnimon (Midland Bank Ltd.) Garnishee [1981] 1 All E R 225, 226, 227.
(3) Gurusamy Pillay v. Palaniappen (1907) 3 ACR 15.
(4) Usoof v. Sinna Umma (1909) 3 Weerakoon 46.
(5) Supramanian Chetty v. Cave & Co. (1930) 32 NLR 25.
(6) Jayaweera v. Abdul Cader (1934) 36 NLR 269.
(7) Saibo v. Peiris (1932) 34 NLR 133.
(8) Paulusz v. Perera (1933) 34 NLR 438.
(9) Hukum Chand Boid v. Kamalanand Singh (1905) 33 Cal. 927.
(10) Karunaratne v. Mohideen (1941) 43 NLR 102.
(11) Victor de Silva v. Jinadasa de Silva (1964) 68 NLR 45, 48.
(12) Konamalai v. Sivakolunthu (1891) 9 SCC 203.
(13) Raheem v. Yoosoof Lebbe (1902) 6 NLR 169.
(14) Mendis v. Peiris (1915) 18 NLR 310.
(15) Meyappa Chetty v. Weerasooriya (1916) 19 NLR 79.
(16) Sellappa Chettiar v. Arumugam Chettiar (1942) 43 NLR 508.
(17) A. G. v. De Croos (1925) 26 NLR 451, 454.
(18) Deerananda Thero v. Ratnasara Thero (1956) 20 NLR 7, 14.

Application in Revision from the order of the District Judge of Colombo.

H. W. Jayewardene Q.C. with Chula de Silva and Lakshman Perera for plaintiff-petitioner.

1st respondent absent and unrepresented.

C. Ranganathan Q.C. with H. L. de Silva and Niranjan Sinnethamby for 2nd respondent.

J. Weerasekera with G. P. Mahinkanda for 3rd Respondent.

Cur. adv. vult.

August 5, 1981.

SOZA, J.

We are in this case called upon in the exercise of our revisionary powers to set aside the order made by the learned District Judge of Colombo on 25th September 1980 during execution proceedings rejecting an application of the petitioner-company (the judgment-creditor in this case) that the Land Reform Commission be directed to pay it an amount sufficient to satisfy the decree out of the funds which that institution holds as compensation on account of two estates of the defendant-company vested in it by virtue of the Land Reform (Amendment) Law No. 39 of 1975. The petition for revision before us has been filed by Leechman & Co. Ltd. the plaintiff-judgment-creditor naming Rangalla Consolidated Ltd. the original defendant as 1st respondent, Vinitha Ltd. a party which came into the case as a result of a notice issued on it on the orders of the Learned District Judge of Colombo as 2nd respondent and the Land Reform Commission a party summoned under section 230 of the Civil Procedure Code as 3rd respondent.

The action in which the decree sought to be executed in this case was entered was filed by Leechman & Co. Ltd. a company incorporated in Sri Lanka as plaintiff in the District Court of Colombo against Rangalla Consolidated Ltd. a public company incorporated under the laws of England and having its registered office at 202, Bishop's Gate, London EC 2 England, for the recovery on a first cause of action of a sum of Rs. 419,478/33 with interest thereon being agency fees alleged to be due on a contract of agency with the defendant company and on a second cause of action of a sum of Rs. 56,244/- with interest thereon for the wrongful termination of the said contract. The contract concerned the management of two estates belonging to the defendant company in Sri Lanka namely Elkaduwa Group and Rangalla Group. The defendant company while admitting the contract of agency denied the claims set out in the plaint, and counter-claimed by way of reconvention a sum of Rs. 474,238/27 being losses incurred owing to the negligence of the plaintiff company. On 15.7.1975 when the case came up before the District Judge of Colombo the plaintiff company dropped its claim on the 2nd cause of action while the defendant company gave up its claim in reconvention and the remaining dispute on the first cause of action was referred to the arbitration of Mr. M. C. Sansoni a retired Chief Justice. On 10.5.1976 the arbitrator made his award holding that the defendant company was liable to pay the plaintiff company Rs. 412,614/66 with legal interest thereon from the date of plaint, namely, 13.10.1969 till payment in full along with costs of action and costs of the arbitration – see P2. The award was received in Court on 28.5.76 but its validity was disputed by the defendant company. After inquiry the court by its order of

13.12.1976 upheld the award, and decree (P3) as of this date was entered on 2.2.77 in terms of the award. In the meantime by the Land Reform (Amendment) Law No. 39 of 1975 which became law on 17.10.1975 Elkaduwa Group and Rangalla Group belonging to the defendant company were vested in the Land Reform Commission which however became liable to pay compensation in respect of the said estates. On 25.6.77 the plaintiff company (hereafter sometimes referred to as the judgment-creditor) filed an application under Section 496(3) of the Administration of Justice Law No.44 of 1973 (amended by Law No. 25 of 1975) which was then in operation for execution of the decree (Journal Entry No. 102). The Court ordered notice to show cause why writ should not be issued on the defendant company (hereafter sometimes called the judgment-debtor). Eventually notice was issued for service on the judgment-debtor through its attorney. The Fiscal reported service of notice to Court and upon this on 29.9.1978 the Court ordered writ to issue (J. E. 108). Attempts to get the Land Reform Commission to deposit sufficient money from the compensation it held payable to the judgment-debtor, to satisfy the decree proved abortive. On 27.11.1978 the Attorneys-at-Law for the Judgment-creditor wrote to the Registrar's Fiscal *(sic)* of the District Court of Colombo calling upon that official to issue a prohibitory notice on the Chairman of the Land Reform Commission seizing in his hands the moneys it held payable to the defendant in this case.

Writ in fact was issued on 2.3.1979 (J. E. 108A) and the Fiscal in a memorandum filed of record in the District Court proceedings noted that he had received the writ on the same day. The Fiscal also made an entry on the same memorandum stating that he received letter dated 27.11.1978 of the Attorneys-at-Law for the judgment-creditor requesting that a prohibitory notice be issued on the Land Reform Commission on 2.3.1979. Under the date 6.8.79 the Fiscal made the following entry in the memorandum referred to :–

> "*Vide* section 226 (proviso) it is not necessary to demand payment as defdt. is out of Ceylon. Proh. notice issued –
>
> (1) defdt. } Under regd. cover
> (2) Chairman L.R.C. }
> (3) Process server James to post on Court notice Board."

The prohibitory order that was in fact issued was presumably under section 229(a) of the Civil Procedure Code and was dated 6.3.1979. It prohibited the defendant from receiving from the Chairman of the Land Reform Commission any money up to the extent of the claim and costs due on the decree entered in this case. It also prohibited the Chairman of the Land Reform Commi-

ssion from making payment of the said money or any part thereof to any person. The order in question has been drawn up in substantial conformity with Form 44 provided in the First Schedule of the Civil Procedure Code. The defendant referred to was the judgment-debtor in the case and a creditor of the Land Reform Commission in respect of the compensation referred to. The Land Reform Commission was a debtor of the defendant.

On a separate sheet filed of record in the lower court proceedings process server James has noted the fact that the notice in question was posted on the notice board of the District Court. The writ of execution dated 2.3.1979 issued to the Fiscal is filed of record obviously after its return, with the following endorsement on its back under date 8.3.1979.

"It is not necessary to demand payment when defdt. is out of Ceylon – *vide* proviso to section 226 C.P.C."

The person who signed the prohibitory notice, however, described himself as Registrar of the District Court of Colombo – see P4.

The following facts clearly emerge from the record:

(1) The Fiscal was put in motion by an application duly made for execution of decree to the Court which made the decree sought to be enforced (s.496(1) A.J.L. and s.223 C.P.C.).

(2) The application for execution of decree was in substantial conformity with the requirements of the law operative then and even now (s.496(3) A.J.L. and s.224 C.P.C.)

(3) The applicant being the unsatisfied judgment-creditor was entitled to obtain execution of the decree (s.496(5) A.J.L. and s.225(1) C.P.C.).

(4) On 29.9.1978 the court presumably satisfied on points (2) and (3) ordered writ to issue (s.225(3) C.P.C.)

(5) Writ was in fact issued in proper form (Form 43 of the First schedule C.P.C.) from the Court on 2.3.1979 and the Fiscal received it on the same day (s.225(3) C.P.C.).

(6) No demand was made of the judgment-debtor because it was a company with residence out of Sri Lanka – (proviso to s.226 C.P.C.).

(7) This was a debt not secured by a negotiable instrument. The seizure was made by a written prohibitory order sent by registered post to the judgment-debtor and to the Chairman, Land Reform Commission. It was signed by an official under the designation of Registrar (s.229(1) and (a) C.P.C.)

(8) A copy of the order was posted on the Court notice board (s.229 C.P.C.).

It will be seen therefore that there has been except in two matters compliance to the letter with the requirements prescribed by sections 223, 224, 225, 226 and 229 of the Civil Procedure Code with special reference to what is laid down in sub-section (a) of section 229. One debatable matter is the requirement that the Fiscal should sign the prohibitory notice. The Fiscal and his deputy are officials who earlier functioned under the provisions of the Fiscals Ordinance No. 4 of 1867 as amended from time to time (Cap. 11 L.E.C. – 1956 Revision). Under section 4 of the Fiscals Ordinance it was lawful for the Fiscal or Deputy Fiscal to appoint by writing under his hand any person to execute process in any particular case and process by that ordinance included all citations, monitions, summonses, mandates, subpoenas, notices, writs, orders, warrants and commands issued by the Court. The Administration of Justice Law No. 44 of 1973 came into force on 1st January 1974 and by its section 3 Chapter 1, the Fiscals Ordinance was repealed. By virtue of section 39(1) of the Administration of Justice Law, to each court established under the new laws provision was made for the appointment of a Registrar, Fiscal and such other officers as may be necessary for the administration of such court and the performance of its duties including the service of process and the execution of decrees and other orders. It is a matter of common knowledge that the Registrar of every court was invariably appointed as Fiscal. Under section 62 of the Judicature Act No. 2 of 1978, Chapter 1 of the Administration of Justice Laws was repealed but of course this did not bring the Fiscals Ordinance back to life. Section 52 of the Judicature Act like section 39 (1) of the Administration of Justice Law before it, provided for the appointment of Registrars, Fiscals and other officers for the administration of every court and the performance of its duties including the service of its process and execution of its decrees and orders. The old practice was adhered to and every Registrar was appointed Fiscal. In fact the writ of execution and some of the later precepts to serve process filed of record in the instant case are addressed to the Registrar/Fiscal by the Court itself and this shows recognition of the dual capacity of this official. The letter of the Attorneys-at-Law for the plaintiff dated 27.11.1978 moving for a prohibitory notice was addressed, as I have already noticed, to the "Registrar's Fiscal." This letter was in

fact addressed to the Fiscal. The prohibitory order was signed under the description Registrar by an official who was both Registrar and Fiscal. The official who signed the prohibitory notice was in fact the Fiscal whatever the description he gave himself.

In any event any irregularity in the matter of signing the notice and addressing it to the Chairman, Land Reform Commission need not be considered fatal in view of section 8 of the Civil Procedure (Special Provisions) Law No. 19 of 1977. By Section 8(1) of this law no party to any action, application or other matter instituted in or made to any civil court shall be non-suited where no prejudice is caused by reason of non-compliance with any of the provisions of the Administration of Justice Law or the Civil Procedure Code if the requirements are substantially complied with. No prejudice has been caused by the fact that the official who signed this prohibitory notice addressed it to the Chairman, Land Reform Commission and not to the Commission and signed it under the description of Registrar. These objections were not specifically taken before the District Judge. When the lawyers for the Commission filed their objections that the prohibitory notice was bad obviously they did not contemplate the objections that were formulated before us on the grounds of the Registrar signing the notice or the notice being addressed to the Chairman.

A party aggrieved must either show that he has taken an objection, such as these at the hearing below or state in his affidavit that he had no knowledge of the facts which would enable him to do so. The judgment-debtor and the Land Reform Commission knew how the prohibitory orders were signed and addressed but did not take the point in the lower court. Had it been so taken, this court would have had the advantage of knowing what the District Judge had to say about the question. He would have known best whether the Registrar of his Court was not also the Fiscal. The judgment-creditor would then have been able to place evidence before the Court to meet the point. Further, the Chairman of the Land Reform Commission wrote to the judgment-creditor letter P8 dated 3.9.1979 which inferentially is an admission of the validity of the prohibitory notice. The Chairman concedes he is "prohibited and restrained from making payment of the said debt or any part thereof to any person whatsoever." The present objections are in the teeth of the earlier concession. So far as the judgment-creditor was concerned he had sought compliance in terms of the section from the correct official. As Sansoni, J. (later C.J.) stated in *Peiris v The Commissioner of Inland Revenue.*[1]

"It is well settled that an exercise of power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory."

In the case of *Nanayakkara v Sulaiman (1(a))* it was held that in execution proceedings the Court will look at the substance of the transaction and will not be disposed to interfere on technical grounds. Especially where no objection has been taken at the earliest possible opportunity technicalities will be allowed only very exceptionally to prevail in execution proceedings. Accordingly all preliminary steps up to the stage of the garnishee proceedings under section 230 of the Civil Procedure Code must be held to have been duly complied with.

I will now discuss the controversy in regard to the validity of the garnishee proceedings in this case which more or less lie at the centre of the dispute. In the English case of *Choice Investments Ltd. v Jeromnimon (Midland bank Ltd. garnishee)*[2] Lord Denning M. R. explained the word 'garnishee' as follows:

"The word 'garnishee' is derived from the Norman-French. It denotes one who is required to 'garnish,' that is, to furnish, a creditor with the money to pay off a debt. A simple instance will suffice. A creditor is owed £ 100 by a debtor. The debtor does not pay. The creditor gets judgment against him for the £ 100. Still the debtor does not pay. The creditor then discovers that the debtor is a customer of a bank and has £ 150 at his bank. The creditor can get a 'garnishee' order against the bank by which the bank is required to pay into court or direct to the creditor, out of its customer's £ 150, the £ 100 which he owes to the creditor."

The garnishee therefore is the person garnished, that is, the person against whom process of garnishment is issued. He is one who has money or property in his possession belonging to a judgment-debtor or who owes the judgment-debtor a debt which is attached in his hands. The garnishment itself is a warning to a person in whose hands the effects of another are attached, not to pay or deliver the money in his hands to the judgment-debtor but to appear and answer the judgment – see Black's Law Dictionary.

In Sri Lanka garnishee proceedings are provided for in section 229 and 230 of the Civil Procedure Code. Section 230 is linked with the steps taken under section 229(a). Under subsection (1) of section 230 a debtor prohibited under clause (a) of section 229 may upon an *ex parte* application of the judgment-creditor be summoned by the Court to show cause why he should not pay to

the judgment-creditor the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the judgment. Notice under this section, it must be observed, is sent to a debtor of the judgment-debtor. If such debtor does not dispute the debt due or claimed to be due from him, and fails within such time as may be allowed by the court to pay into court the amount due from him to the judgment-debtor or an amount equal to the judgment, whichever is less, or if he does not appear upon summons then the court may order execution to issue to levy the amount due from such debtor or so much thereof as may be sufficient to satisfy the judgment. The key words in this section are "if such debtor does not dispute the debt due or claimed to be due from him."

The section itself has been interpreted in a number of cases. The first case to which reference may be made is the case of *Gurusamy Pillay v Palaniappen.* [3] (Wood Renton J. as he then was) who decided this case stated as follows at page 18:

"It is clear that the object of sec. 229 of the Civil Procedure Code is to facilitate the expeditous recovery of the property of the judgment-debtor. Among the property which may be so recovered the section, taken in conjunction with sec. 230, provides for the inclusion of debts due to the judgment-debtor as to whose existence there is no dispute. It appears to me in principle that these sections should be confined to cases in which the debtor would have had no defence if he had been sued by his own creditor, the judgment-debtor."

It was held in that case that where the debtor of the judgment-debtor can set up a claim or set off against the judgment-debtor, he cannot be made subject to an order under section 229 and section 230 of the Civil Procedure Code.

In the case of *Usoof v Sinna Umma* [4] a garnishee order had been issued under section 230 and among the objections raised was that the debtor was disputing the debt and therefore no order could be made under section 230. Hutchinson C.J. held that this was a valid objection.

In 1930 there was the case of *Supramaniam Chetty v Cave & Co.* [5] In that case a garnishee order had been issued under section 230 of the Civil Procedure Code. When the debtor of the judgment -debtor appeared and stated that there was no money of the judgment-debtor in his hands the trial court refused to hold an inquiry into the question. Jayawardena A. J. who decided this case in appeal after referring to the fact that in various cases it had been held that where a debtor disputes the debt due to the judgment-debtor the court had to stay its hand, added that there were

two requisites before the court could decide the matter: First there must be a debt in existence and secondly that debt must be disputed. In the case before His Lordship the debtor had denied the existence of the debt. Jayawardena A. J. took the view that the court had ample power to inquire into the matter. The appeal was allowed and the case was sent back leaving it to the debtor to prove that there was never a debt due.

Four years later in the case of *Jayaweera v Abdul Cader*[6] Dalton, J. referred to the earlier decisions and made, what I would describe with very great respect, a not altogether successful attempt to distinguish the case of *Supramaniam Chetty v Cave & Co.* (supra). He himself however took the view that where it is apparent that there is a *bona fide* dispute as to the existence of the debt by the debtor to the judgment-debtor the court had no power to hold any inquiry but must discharge the debtor. Obviously the reasoning behind this principle is that the court should not hold what would amount to a trial within a trial. Although *Jayaweera v Abdul Cader* (supra) was decided by a single Judge still the decision accords with sound sense and with what the statute lays down. Further, it is consistent with the earlier decisions except *Supramaniam Chetty v Cave & Co.* (supra). The decision in *Jayaweera v Abdul Cader* (supra) must be regarded as laying down the law correctly. If there is a *bona fide* dispute as to the existence of the debt, that will provide a good defence to a garnishee summoned under section 230 of the Civil Procedure Code.

In the instant case the judgment-creditor made an application under section 230 of the Civil Procedure Code when it found that the Land Reform Commission was undecided on the question of bringing in the compensation due to the judgment-debtor. The court then summoned the Land Reform Commission to show cause why it should not pay the judgment-creditor the debt due from it to the judgment-debtor or so much thereof as may be sufficient to satisfy the judgment (see J. E. 113, 113A).

It is conceded that the Land Reform Commission holds in its hands the compensation due on the vesting of Elkaduwa Group and Rangalla Group belonging to the judgment-debtor. The simple question is, has the debtor, in this case, the Land Reform Commission *bona fide* disputed the debt ? In my view it has not. To say that there are other creditors of the judgment-debtor and there is not enough money to go round, is not a denial of the debt. The Land Reform Commission has not expressly denied the debt. Liability to pay and inability to pay are two different things. The Land Reform Commission offered to pay 60% of the debt. This obviously is on the footing that it recognises and admits its liability to pay the debt. Its plea of inability to pay is an entirely

different matter and can be easily resolved as the Land Reform Commission holds enough money of the judgment-debtor in its hands to satisfy the decree.

The plea of the Land Reform Commission that the compensation is insufficient to pay all the creditors can be substantiated only on the footing that it is obliged to deduct the amount due to Vinitha Ltd. the 2nd respondent. But is it ? The 1st respondent repudiates liability to pay Vinitha Ltd. In addition the claim of Vinitha Ltd. on the face of it seems prescribed. The Land Reform Commission by its insistence on satisfying this disputed liability is putting its own *bona fides* under a cloud.

The obligation to deduct the liabilities imposed on the Land Reform Commission by section 42B(5) of the Land Reform (Amendment) Law No. 39 of 1975 should not be understood as a duty to accept blindly the profit and loss account, balance sheet and other information supplied by the statutory lessees (here Vinitha Ltd.) under section 42 (C) (3) of the same law. The Land Reform Commission has also a duty by the previous owner to deduct only such debts as can be regarded as properly established and must therefore be circumspect especially where the claim is for the benefit of the statutory trustee. The liabilities which the Land Reform Commission is duty bound to meet are admitted liabilities or only liabilities established as on a court decree. A disputed liability as here and on the face of it prescribed is not a liability of the Commission until the claimant has it properly resolved for instance by recourse to Court proceedings. Leave out the alleged debt to Vinitha Ltd., and there is enough money to pay all the other creditors. Therefore even inferentially it cannot be said that there is a *bona fide* dispute as to the existence of the debt to the judgment-debtor. There is no express denial of the debt. Nor even by implication.

I will deal presently in greater detail with the provisions of the Land Reform Law but suffice it to say for the present that even these provisions do not help the Land Reform Commission out of the obligation to pay the amount decreed in this case. Here I would like to refer to the case of *Saibo v. Peiris.*[7] In this case Lyall Grant J observed that an examination of section 230 of the Civil Procedure Code points to the inference that the only cause which a debtor prohibited under clause(a) of section 229 is allowed to show against remitting money to court is that he is not indebted. In that case the debtor had appeared in answer to the notice and claimed that the money which he held of the judgment-debtor constituted the salary of a public servant which was not seizable under section 218(h) of the Civil Procedure Code. The Court took the view that so far as the debtor was concerned it did not

lie in his mouth to raise a defence which the judgment-debtor himself could have raised. That was a matter for the judgment-debtor. This decision went against the garnishee.

It is one thing for the debtor to say that the money he holds is insufficient to pay all the creditors and quite another and a different thing to say he does not owe any money to the judgment-debtor. In the instant case the Land Reform Commission on being summoned says the former but not the latter and this is demonstrated by the fact that the Commission by its letter dated 3.9.1979 written to the judgment-debtor accepted the prohibitory notice and only wanted a court order to pay the money into court. In fact after considerable vacillation (see P6, P7, P8 and P9) the Commission by the letter of 4.10.1979 said it was unable to make the payment as the liabilities exceeded the amount of compensation. Eventually on 13.6.1980 the Commission on an order of Court made of consent deposited to the credit of this case the sum of Rs. 1,338,903/- being the amount of compensation payable by it to the account of the judgment-debtor (see J.E. 119 and 120 and the account sheet). This sum is more than enough to satisfy the decree in this case.

It is now necessary to see what impact the provisions of the Land Reform Law No. 1 of 1972 as amended by the Land Reform (Amendment) Law No. 39 of 1975 have on the question before us. The amendments to the Land Reform Law effected in 1975 consisted of the addition of a new part entitled Part IIIA setting out special provisions relating to the estate lands owned by public companies in new sections numbered 42A to 42M. The judgment-debtor in the case before us is a public company and therefore the new sections 42A to 42M apply to it. By virtue of section 42A every estate land owned or possessed by a public company was deemed to vest in and be possessed by the Land Reform Commission with effect from 17.10.1975 which is the date on which the new provisions came into operation. Elkaduwa Group and Rangalla Group owned and possessed by the judgment-debtor were deemed to vest in and be possessed by the Land Reform Commission with effect from 17.10.1975. Under sub-section 5(a) of section 42B the rights and liabilities of the former owners, in this case the judgment-debtor, under any contract or agreement, express or implied, which related to the purposes of these estate lands and which subsisted on the day immediately prior to 17.10.1975 and the other rights and liabilities of the owner which related to the running of these estate lands and which subsisted on such day became the rights and liabilities of the Commission. The amounts required to discharge all these liabilities had to be deducted from the amount of compensation payable in respect of these estate lands. The rights and liabili-

ties referred to in section 42B would ordinarily be disclosed in the profit and loss account and balance sheet up to the date of vesting, which the agency house or organization managing the estate land before the vesting and after it for the Commission as statutory trustee, had to furnish under subsections (1) (e) and (3) of section 42C. Section 42J provides for the payment of compensation in respect of every estate land vested in the Commission – see subsection (1). Under subsection 3 of this section the manner and mode of payments of compensation had to be determined by the Minister in consultation with the Minister of Finance and the Minister of Planning and Economic Affairs. From the amount of compensation payable the Commission was under a duty after reasonable notice to the owner to pay any sum certified as due to the Commissioner of Inland Revenue and to the Commissioner of Labour – see subsection 6(a) and (b).

The following arguments were advanced on the basis of these provisions:

(1) Compensation has not been finalised and awaits the Minister's determination as to the manner and mode of payment under section 42J(3). The Minister's determination becomes very relevant as the liabilities exceed the assets.

(2) As the Land Reform Commission became vested with the rights and saddled with the liabilities of the judgment debtor with effect from 17.10.1975 and decree was entered on 13.12.1976 the proper course for the judgment creditor to have followed was to have the Commission substituted in the room of the judgment-debtor or added as a party defendant. As this was not done the Land Reform Commission not being a party to the action is not bound by the decree in this case.

(3) There is a statutory duty imposed on the Land Reform Commission to deduct all liabilities from the amount of compensation payable and it is not possible to do this except on a rateable basis as the amount of compensation is insufficient to meet all the liabilities.

In regard to the first point, there is material to show that compensation has been assessed at a flat rate of Rs. 663/- per acre. During the argument it was revealed that compensation at the same rate had been agreed upon for estate lands between representatives of the sterling public companies and the Land Reform Authorities. The figure of Rs.663/- per acre was a standard rate for all estate lands of public companies subject to fluctuations where special considerations came into play. There is no reason to doubt

the authenticity of the statement that compensation had been fixed for Elkaduwa Group and Rangalla Group at Rs. 663/- per acre. It is true that counsel who appeared for the judgment-creditor at the hearing of 12.5.1980 had mentioned that the total acreage for which compensation had been fixed may not be correct as uncultivated extents where buildings stood had been left out. But there can be no question that compensation was fixed by the time the matter came up on 12.5.1980, at Rs. 1,400,750/- out of which certain deductions had already been made leaving a balance of Rs. 1,358,903/-. The Attorney for the Land Reform Commission mentioned that this sum was in its custody but payment in full satisfaction of the decree could not be made as the total claims of all creditors amounted to Rs. 1,747,624/-. He was prepared to pay 60% of the claim of the Judgment-creditor. He however agreed to deposit the sum of Rs. 1,358,903/- in court. He also added he will file a list of claimants. It is clear from these circumstances that a definite amount of compensation due on account of the vesting of the judgment-debtor's estate lands had come into the hands of the Land Reform Commission. Under Section 42J(3) true enough the Minister can determine the manner and mode of payment. But it is not open to him to reduce the amount of the payment. The statute does not give him this power. Payment must be made of the amount determined as compensation but the manner and mode of payment can be fixed by the Minister. For instance, he can determine that payment be made in bonds or in instalments. But he cannot vary the amount of the payment or order rateable settlement. Under the guise of determining the manner and mode of payment he can in no wise interfere with the amount of compensation or the quantum of the claims of creditors. The section gives him no such powers.

On the second point it must be borne in mind that the suit in which the decree sought to be executed was entered was filed long before the land reform law was even thought of. The parties to the suit agreed to arbitration on 15.7.1975 before the Land Reform (Amendment) Law No. 39 of 1975 became operative. The agreement was to abide by the award of the arbitrator.

Clause 3 of the agreement reads as follows:

> "The award of the Arbitrator as to the sum so found to have been properly and necessarily incurred and due and owing, if any, from the defendant to the plaintiff will be accepted by both parties without question and without any dispute as to the legality of the arbitration or the award."

There were agreements as to interest and costs of arbitration and costs of suit also. It is significant that the present 2nd respondent was at this time acting as agent of the judgment-debtor.

It must be borne in mind that a precise and definite formula for the determination of the action had already been entered into by the parties on 15.7.1975 before the Land Reform Law came into force. By the time the amended Land Reform Law came into force the plaintiff in the case had already a vested right – its claim having become a chose in action. The new legislation had no retrospective effect. Substantive rights in a pending action will not ordinarily be affected by a change in the substantive law. As Maxwell states in his work **The Interpretation of Statutes** 12th Ed. (1969) pp. 220, 221, in general when the substantive law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights. Further, the liability of the defendant company was according to the agreement of the parties to be fixed with reference to and in terms of the arbitrator's award which, subject to jurisdictional defects, would become the decree of court. To have brought in the Land Reform Commission at the stage of the arbitration would have unnecessarily hampered the arbitration. Further, as the liability was one incurred by the defendant company before the vesting and the rights of parties would be determined as they were at the time the action was instituted, the plaintiff had the option open to it of proceeding against the defendant company alone. The Land Reform Commission is not in this case as a party bound by the decree but as a party prohibited and cast with statutory obligations as a debtor of the judgment-debtor under sections 229(a) and 230 of the Civil Procedure Code. Garnishment is an executory process of court. It does not proceed on the basis of the garnishee being bound by the decree such as a party to the action would be.

To say that the Land Reform Commission is not bound by the decree is irrelevant and not a defence. The only defence available is that the debt is being *bona fide* disputed – see *Saibo v. Peiris* (supra) and *Jayaweera v. Abdul Cader* (supra). This defence the Land Reform Commission has not taken either expressly or by implication.

The statutory duty to deduct liabilities should not be understood to mean a duty to deduct disputed liabilities. In the matter of the application for leave to appeal the judgment-debtor in its objections dated 22.1.1981 and in the affidavit of one of its directors of the same date denies that any sum is owed by it to Vinitha Ltd. the 2nd respondent. Unless the claim of Vinitha Ltd. is admitted or has been adjudicated upon and embodied in a decree of court the Land Reform Commission would be stepping outside the pale of its legal rights and obligations to seek to deduct such a claim from the amount of compensation. Senior counsel at

one stage contended that there was an admission of the claim by an agent of the judgment-debtor. This so-called admission has been made by a firm of auditors in a letter 2RI dated 13.3.1981 but this letter was written at a time when they were on their own showing no longer auditors or accountants of the judgment-debtor. This unauthorised admission is of no avail against the objections and affidavit filed on behalf of the judgment-debtor.

The Land Reform Commission has, to put it shortly, no authority to pay claims disputed by the party against whom they are being made. No one has constituted the Land Reform Commission an adjudicator of disputes between the owners of lands vested in it and their creditors. Even if indirectly it seeks to do this it is arrogating to itself powers it does not have.

And then there is the submission that the claim of the 2nd respondent is on the face of it prescribed. Whether it is or not, the repudiation of the liability by the judgment-debtor is clear. Therefore the Land Reform Commission is under no statutory obligation to deduct the claim of Vinitha Ltd. In this situation the plea that the compensation is insufficient to meet the liabilities of the judgment-debtor is without substance. In these circumstances the objections raised by the Land Reform Commission cannot relieve it of its obligations to submit to garnishment.

I will now come to the question of the status of the 2nd respondent Vinitha Limited to participate in the proceedings. The learned District Judge on being informed by the Land Reform Commission that there were other creditors who had to be satisfied took a step for which there is no provision in the Civil Procedure Code. He directed that a list of such creditors be filed and when this was done he directed that notice be issued on these creditors. Fortunately only one creditor responded to the notice and that was Vinitha Ltd. I shudder to think what would have happened if all the creditors had turned up and if some of them advanced competing claims inter se. All this was done despite opposition by the judgment-creditor. Thereafter the learned District Judge went on to hold an inquiry for which procedure too there is no provision in our Civil Procedure Code.

Learned counsel for the 2nd respondent submitted that under section 839 of the Civil Procedure Code it was open to the District Judge to *in debito justitiae* to do that real and substantial justice for the administration of which alone the court exists. Therefore the Judge was right in the course of action he took. Section 839 as has been pointed out in more than one decided case does not create new powers but merely saves the inherent powers of the court to make such orders as may be necessary for the ends of

justice or to prevent abuse of the process of the court – see for instance the case of *Paulusz v Perera.*[8]

A Woodroffe J. laid down in the case of *Hukum Chand Boid v Kamalanand Singh*[9] the Civil Procedure Code binds all courts so far as it goes but it is not exhaustive. The Legislature cannot anticipate and make provision to cover all possible contingencies. The power and duty of the Court in cases where no specific rule exists to act according to equity, justice and good conscience remain unaffected. In the exercise of its inherent powers the Court must be careful to see that its decision is based on sound general principles and is not in conflict or inconsistent with them or the intentions of the Legislature. Howard, C. J. adopted Woodroffe J. 's enunciation in the case of *Karunaratne v. Mohideen.*[10] In the case of *Victor de Silva v. Janadasa de Silva*[11] Manickavasagar J. explained these principles as follows:

> " . . . . our Code is not exhaustive on all matters; one cannot expect a Code to provide for every situation and contingency; if there is no provision, it is the duty of the Judge, and it lies within its inherent power to make such order as the justice of the case requires."

The inherent powers of the court were preserved in section 151 of the Indian Code of Civil Procedure 1908 and our section 839 is a verbatim reproduction of it brought in by an amendment of 1921. The inherent powers are not to be used for the benefit of a litigant who has his remedy under the Code of Civil Procedure. On any point specially dealt with by the Code the Court cannot disregard the letter of the enactment according to its true construction.

The only provisions in the Civil Procedure Code under which Vinitha Ltd. could have participated in these proceedings are sections 350, 351 and 352. These sections deal with the question of concurrence but apply only to decree-holders. The Roman-Dutch Law regarding concurrence has been superseded by the Civil Procedure Code. By the Roman-Dutch Law all creditors were entitled to claim concurrence regardless of the dates of their decrees or application for execution or indeed whether they had obtained decrees or not. But that principle is now superseded by the provisions of the Civil Procedure Code. This has been affirmed in a series of cases notably *Konamalai v. Sivakulanthu,*[12] *Raheen v. Yoosoof Lebbe,*[13] *Mendis v. Peiris,*[14] *Meyappa Chetty v. Weerasooriya*[15] and *Sellappa Chettiar v. Arumugam Chettiar.*[16]

What the learned District Judge has done on this case is to hark back to the days before the Civil Procedure Code and invite a

scramble by creditors, even those without decrees, which has the effect of keeping at bay a creditor who has been vigilant enough to obtain a decree. This is the very situation which the Civil Procedure Code seeks to avert. As Burnside C. J. said in the case of *Konamalai v Sivakulanthu* (supra) at p. 204.

> ". . . . . I cannot think that the Legislature intended only to provide for some claims, and to leave others unprovided for. In my opinion, for the future claims must be governed by the Code, and I should regard it as a misfortune if in addition to the claims which the Code has provided for, the unsuitable provisions of the Roman-Dutch Law must still be reckoned with. It would, in my opinion, be contrary to the intent of Legislature, and wholly at variance with the approved and common sense maxim *vigilantibus non dormientibus equitas subvenit.*"

Giving every credit to the desire of the learned District Judge to do justice, I think he strayed too far afield in seeking to dispose of this matter by resorting to inherent powers in a manner so as to thwart the well laid down procedures of our Code. In fact the procedure he adopted creates dangerous precedents and in effect he adjudicates in favour of Vinitha Ltd. to the prejudice of the judgment-debtor without hearing the parties on the dispute between them.

In the proceedings before us Vinitha Ltd. has been named as the 2nd respondent. Learned senior counsel argued that his client had been brought into the case by notice issued by the court and thereafter made respondent in the proceedings before us. In these circumstances he is entitled to participate in the proceedings. No doubt these are considerations that should be taken into account. The 2nd respondent is entitled to be provided with an opportunity to justify its presence in the case. But this does not imply a waiver on the part of the judgment-creditor-petitioner of its right to object to the status of Vinitha Ltd. in the case. Here I would like to refer to the case of *A. G. v. De Croos.*[17] In this case counsel had objected to the question of status being raised in appeal as the point had not been taken in the District Court or in the petition of appeal. De Sampayo J. pointed out that as the question did not depend on the ascertainment of new facts and it was purely a question of law it could be raised in the appellate Court. In the instant case objection was taken in the District Court and even in the petition filed before us.

There is also the case of *Deerananda Thero v. Ratnasara Thero*[18] where the Court said as follows:

"Where it is shown that the proceedings are illegal in the sense that the court had no jurisdiction to proceed to make an order there is in my opinion no room for argument that it is too late at this stage of appeal to object to the proceedings taken and the order of court consequent upon these proceedings."

Where the point depends upon a question of fact which is disputed and should be determined on evidence, then it cannot be taken up for the first time in appeal unless the facts necessary for the determination appear in the evidence and are not in dispute at all. If the court in any case is itself satisfied it has no jurisdiction to entertain a matter it is its duty to give effect to its view taking if necessary the initiative upon itself.

The question whether Vinitha Ltd. the 2nd respondent has a status to appear in this case is a question of law. It does not depend upon the proof of any additional facts. Hence it can always be taken up before us. The fact that the 2nd respondent has been made a party to these proceedings does not resolve the question whether it is entitled to be made a party. The 2nd respondent was made a party to the proceedings in the District Court in the teeth of protests by the judgment-creditor and therefore had to be made a party to the proceedings before us and heard on the very question of its *locus standi* in the case.

As I said before the procedure adopted by the learned District Judge is in conflict with what is enacted in the Civil Procedure Code and accordingly cannot be justified as an exercise of inherent powers. Under the Civil Procedure Code the 2nd respondent is not entitled to participate in these proceedings even if its claims are admitted. Under the Land Reform Law, the Land Reform Commission is under no obligation to treat a disputed claim as a liability and deduct it from the compensation. Therefore the 2nd respondent has no *locus standi* in this case and no consideration need be paid to its claims.

For the reasons I have given I set aside the order of the learned District Judge of 25.9.1980 and make order directing the 3rd respondent to pay to the petitioner before us its full claim, costs and interest as embodied in the decree P3. As the compensation with accrued interest due to the 1st respondent is in deposit in this case the petitioner will be entitled to receive the full amount of its claim, costs and interest as specified in the decree from the amount in deposit.

In the proceedings before us the opposition was led by the 2nd respondent whom we heard at length on the full range of the case on its own insistence that this was necessary if it is to justify its

participation in the proceedings and establish its position that the petitioner's application should be refused. The 3rd respondent merely played a supporting role and the 1st respondent was unrepresented. Hence I order that the 2nd respondent alone do pay the petitioner the costs of the proceedings before us and make no order for costs against the 1st and 3rd respondents of the proceedings before us. Regarding the execution proceedings in the District Court of Colombo, I order the 1st respondent to pay the costs of the petitioner from 25.6.77 till 2.3.1979 both dates inclusive, the 3rd respondent to pay the petitioner the costs from 3.7.1979 till date of payment of the claim, costs and interest in terms of my order and 2nd respondent to pay the petitioner the costs from 11.7.1980 till date of payment as aforesaid. In respect of the proceedings in the District Court therefore the petitioner will receive three sets of costs. The costs due from the 1st respondent will also be paid from the money in deposit.

SENEVIRATNE, J. I agree.

Order of District Judge set aside.