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KAMANIE ALLES DE SILVA
v.
WIJEWARDANE

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
CA NO. 872/98 (F)
DC BALAPITIYA NO. 731/L
MAY 10, JULY 19,
SEPTEMBER 03, 17, 23 AND
OCTOBER 14, 2002

Civil Procedure – Civil Procedure Code, sections 337 and 337 (2), as amended by Act, No. 53 of 1980 – Application for writ – Limitation – 10 years – Disappearance of party – Preventing execution – Application after 10 years – Plaintiff presumed to be dead – No fraud or force preventing execution alleged – Applicability of the proviso.

Held:

(1) The decree is dated 28. 11. 1983; the first application for writ is dated 14. 06. 1994; the second application is dated 10. 07. 1997. Both applications for a writ to execute the decree have been made after 10 years from the date of decree – 28. 11. 1983.

(2) The contention that in view of the special circumstances the court should deduct the period – the date of disappearance of the original plaintiff to the date she was presumed in law to be dead – from the 10-year period stipulated, cannot be accepted. Section 317 is very clear and specific. There is no force or fraud alleged – section 337 (2).

APPEAL from the judgment of the District Court of Balapitiya.

Cases referred to:

1. *Rajadurai v. Emerson* – (1995) 2 Sri LR 30.
2. *Haji Omar v. Bodhidasa* – (1994) 2 Sri LR 191.

Nihal Jayamanne, PC with *Noorani Amerasinghe* for substituted plaintiff-appellant.

C. J. Laduwahetti for defendant-respondent.

Cur. adv. vult.

December 05, 2002

A. M. SOMAWANSA, J.

The instant appeal is preferred from an order of the District Judge of Balapitiya dated 04. 09. 1998 refusing the issue of writ in terms of section 337 of the Civil Procedure Code on the basis that the application for writ was made after the lapse of ten years from the date of the decree. The facts relevant are the original plaintiff filed the instant action for a declaration that she is entitled to the exclusive possession of the land described in paragraph 02 of the plaint and for ejectment of the defendant-respondent therefrom. Summons were duly served on the defendant-respondent but the defendant-respondent did not appear in Court on the summons returnable date and the case was fixed for *ex parte* trial.

On 18. 10. 1983 *ex parte* trial was concluded and as per journal entry 6 the *ex parte* judgment was delivered on 28. 11. 1983. As per journal entry 16 dated 12. 02. 1986 a copy of the *ex parte* decree had been duly served on the defendant-respondent personally by the Fiscal of Balapitiya. However, the defendant-respondent did not appear in Court in response to the service of the decree nor did she take any steps to have the said *ex parte* decree vacated. According to the position taken by the substituted plaintiff-appellant before any steps could be taken to issue writ to execute the decree the original plaintiff the mother of the substituted plaintiff-appellant disappeared on 12. 06. 1986 and her whereabouts were not known. Hence, no further steps could be taken.

As per journal entry 17 dated 05. 05. 1994 the substituted plaintiff-appellant as the sole heir of the original plaintiff made an application to Court to get herself substituted in the room of the original plaintiff and Court allowed the application. As per journal entry 18 dated 16. 06. 1994 the substituted plaintiff-appellant filed an application for writ with notice on the defendant-respondent to show cause if any as to why writ of possession and ejectment should not be allowed against the defendant-respondent.

The defendant-respondent filed objections and the matter was taken up for inquiry. At the inquiry the defendant-respondent took up the position that as no notice of the application for substitution of the present plaintiff-appellant was given to the defendant-respondent the substitution was bad in law and all steps taken thereafter by the substituted plaintiff-appellant are also bad in law. The learned District Judge by his order dated 30. 04. 1996 upheld the objection raised by the defendant-respondent. Thereafter, another application was made by the substituted plaintiff-appellant to get herself substituted in place of the original plaintiff. Though the defendant-respondent objected to this application too, at the inquiry she did not object to the substituted plaintiff-appellant being substituted in the room of the original plaintiff and the said substitution was effected. Thereafter, the substituted plaintiff-appellant for the second time filed an application for writ with notice on the defendant-respondent to show cause if any as to why writ of possession and ejectment of the defendant-respondent from the land in suit should not be allowed. As defendant-respondent filed objection the matter was taken up for inquiry. The main objection taken up by the defendant-respondent was that in view of the provisions in section 337 of the Civil Procedure Code the substituted plaintiff-appellant could not, have and maintain this application for a writ, in that the said application is time-barred. The learned District Judge by his order dated 04. 09. 1998 upheld the said objection of the defendant- respondent and rejected the substituted plaintiff-appellant's application for a writ.

At the hearing of this appeal, learned President's Counsel appearing for the substituted plaintiff-appellant contended that the learned District Judge has failed to consider the intervening circumstances, the disappearance of the original plaintiff without a trace on 12. 06. 1986, which prevented the execution of the decree within the time period stipulated by section 337 of the Civil Procedure Code.

The relevant provisions in section 337 of the Civil Procedure Code as amended by Act, No. 53 are as follows:

337. (1) "No application (whether it be the first or a subsequent application) to execute a decree, not being a decree granting an injunction, shall be granted after the expiration of ten years from–

(*a*) the date of the decree sought to be executed or of the decree, if any, on appeal affirming the same; or

(*b*)

(2) Nothing in this section shall prevent the court from granting an application for execution of a decree after the expiration of the said term of ten years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within ten years immediately before the date of the application."

In the instant case the decree is dated 28. 11. 1983 and the first application for writ is dated 14.06.1994 and the second application for writ appears to have been tendered as per journal entry 40 on or about 10. 07. 1997. Therefore, it is clear that both applications for a writ to execute the decree dated 28. 11. 1983 have been made after 10 years from the date of the decree. In the case of *Rajadurai v. Emerson*[1] action was instituted for declaration of title and ejectment. Consent decree was entered on 15. 06. 1976 –

Plaintiff died on 03. 10. 1979 without making an application for execution. The respondent, the administrator and sister of the plaintiff was substituted on 12. 06. 1986 in terms of section 395

of the Civil Procedure Code and obtained writ. The Court of Appeal set aside the order and observed that the application should have been under section 339 (1) and not under 395.

Another application for writ under section 339 (1) was made by the administrator, which was resisted on the basis that in terms of section 337 (1) of Act, No. 53 of 1980, since a period of ten years have elapsed after the decree, writ could not issue. The District Court allowed the application for writ.

It was held the ten year limitation period does not apply in relation to a decree for immovable property and possession entered prior to the date of coming into operation of Act, No. 53 of 1980.

It was also held that by amended section 337 (1) of Act, No. 53 of 1980, the ten year bar became applicable to all decrees, other than a decree granting an injunction, subject to the exceptions that are provided.

The amendment brought in by Act, No. 53 of 1980 cannot be regarded as purely procedural legislation insofar as it purports to affect the vested right of the judgment-creditor.

In arriving at this finding S. N. Silva, J. (P/CA) as he then was followed the principles as laid down in the SC decision of *Haji Omar v. Bodhidasa*[2] where it was held –

Under the amended section 337 (1) no application to execute a decree shall be granted after the expiration of ten years from the date of the decree subject to certain exceptions.

The Amendment Act, No. 53 of 1980 cannot be regarded as purely procedural legislation insofar as it purports to affect (or rather to destroy) the vested right of the judgment-creditor.

In the said case at page 197 Dheeraratne, J. in dealing with the application of Amendment Act, No. 53 of 1980 observed:

> "Learned counsel for the substituted plaintiffs contended that if the provisions of Amendment Act, No. 53 of 1980 are applicable to the present application, in terms of subsection 3 of section 337, a writ of execution may be issued at any time until satisfaction of decree is obtained and therefore there is no time constraint for such application. This submission commended itself to the Court of Appeal. I am unable to justify such an interpretation because the amended section 337 (1) states that no application to execute a decree shall be granted after the expiration of ten years from the date of the decree, and it is clear that what is stated in subsection (3) must be read subject to that general provision contained in subsection (1) as regards the time frame. Besides, the opening words of subsection (3) "subject to the provisions contained in subsection (2)" would itself attract the limitation of ten years specified in that subsection."

In the instant case it is quite clear that the plaintiff-appellant did not apply for the execution of the decree on the basis that the judgment-debtor the defendant-respondent has by fraud or force prevented the execution of the decree at some time within 10 years immediately preceding the date of the application. The provisions of subsection 2 of section 337 of the Civil Procedure Code as amended by Act, No. 53 of 1980 would therefore not be applicable to the instant case. It is to be noted that the fact that of defendant-respondent objecting to substitution when application was first made, cannot be held against the defendant-respondent, for the Court upheld the objection of the defendant-respondent.

It was also contended by the counsel appearing for the plaintiff-appellant that in view of the special circumstances of this case the Court should deduct the period from the date of disappearance of the original plaintiff to the date on which she was presumed in law

to be dead from the 10 years stipulated in section 337 of the Civil Procedure Code. In fact, various formulaes in deducting this period are set out in the written submissions. However, I am unable to accept these formulaes for deducting any period from the 10 year period stipulated in section 377 of the Civil Procedure Code, for section 337 is very clear and specific that no application to execute a decree shall be granted after the expiration of ten years from the date of the decree and as stated above section 337 (2) will not apply as no fraud or force has been pleaded by the plaintiff-appellant as having prevented him from applying for execution of the decree which are the only grounds contemplated in the said section 337 as empowering Court from granting an application for execution of a decree after the expiration of the said term of ten years.

It must also be noted here that the Counsel appearing for the defendant-respondent also took up a preliminary objection that the order of the learned District Judge refusing the application for writ is not a final order but an interim order made in the course of the action and hence no direct appeal would lie. However, at the hearing of the appeal, Court was informed that he was not pressing the said preliminary objection.

In view of the above reasoning, I am of the view that there is no reason to disturb the order of the learned District Judge dated 04. 09. 1998 refusing the issue of writ. Accordingly, the appeal of the plaintiff-appellant is dismissed with costs.

DISSANAYAKE, J. – I agree.

Appeal dismissed.