

1933

Present : Macdonell C.J. and Driberg J.

WIJEYESINGHE *et al.* v. ULUWITA.

418—D. C. Badulla (B. T. O.) Special.

Buddhist Temporalities—Application to recover possession of property from a suspended trustee—Order of suspension under hand of President of District Committee—Power of Court to vacate the order entered per incuriam—Ordinance No. 8 of 1905, s. 35.

An application to the District Court under section 35 of the Buddhist Temporalities Ordinance for the issue of a writ to recover possession of property from a suspended trustee must be supported by the order of suspension certified under the hand of the President of the District Committee.

The District Court has power to recall process which it has issued improvidently.

A PPEAL from an order of the District Judge of Badulla.

The first appellant petitioned the District Court under section 35 of the Buddhist Temporalities Ordinance for the issue of a writ to eject the second respondent from property of which he was in possession as trustee on the ground that the latter had been suspended by the President of the District Committee. The application was allowed. The second respondent thereupon appeared in Court and represented to Court that the suspension was without the authority of the District Committee. The learned District Judge then recalled the writ until the order of suspension under the hand of the President of the District Committee was produced in accordance with the requirements of section 35 of the Ordinance.

N. E. Weerasooria (with him *Ranawake* and *Sri Nissanka*), for appellant.—Once the Court has issued the writ it is *functus officio*. It cannot inquire into whether the person making the appointment was in fact President or not. Any party aggrieved has a separate action for damages (*Nugawela v. Ratwatte*).¹ Otherwise whenever a question arises under section 35 the Court will have to inquire into the constitution of the District Committee. The District Court has no jurisdiction over the District Committee except where such jurisdiction is conferred by the Ordinance (*Subasinghe v. Ecknelligoda*).²

H. V. Perera (with him *E. B. Wickramanayake*), for respondent.—The order was obtained on insufficient material and false representations.

¹ 5 *Bal. Rep.* 54.

² 4 *C. W. R.* 166.

The order was made *ex parte* and can be vacated. The power to vacate such an order is inherent in every Court. In *Sayadoo Mohamedu v. Maula Abbubakkar*¹ an order made *ex parte* allowing leave to defend under Chapter 53 of the Code was vacated. No express power to vacate such an order is given in the Code. The power is therefore the inherent power. Section 839 does not give powers to a Court. It only preserves *an existing power* (33 Cal. 927). In *Muttiah v. Mutusamy*² an *ex parte* order for sequestration before judgment on insufficient material was vacated. On the power to vacate judgments, see *Black on Judgments*, Vol., I., ss. 297 and 318. The power of the District Court is not exhausted under the Buddhist Temporalities Ordinance when writ is issued. It continues till the decree is completely executed.

N. E. Weerasooria in reply.—Under section 35 the only power given to the Court is to issue the writ. This is not a civil suit.

February 10, 1933. MACDONELL C.J.—

In this appeal the facts are as follows: The first appellant, who is President of a District Committee under the Buddhist Temporalities Ordinance of 1905, petitioned the District Court of Badulla that it should be pleased to issue a writ under section 35 of that Ordinance for the ejection of the second respondent from such Buddhist property as he then was in possession of as trustee. In the petition, and in the affidavit upon which the appellant made this application, he stated that the second respondent whose ejection he asked for had been "suspended by the President of the Kataragama District Committee under section 16 of the Ordinance." He does not give the name of that President but it seems common cause that by "President" he meant the second appellant. Now section 16 is quite clear that power of suspending a trustee is given to the District Committee, and not to the President of that body. The first appellant took this petition and affidavit to the District Judge and applied in person for a writ issuable under section 35 and obtained it. This was clearly the issue of a writ *per incuriam* since the petition and affidavit on which the writ was issued were *ex facie* defective; they allege suspension by the President and not by the District Committee. The next day representation was made to the District Judge of Badulla by the first respondent in a petition and affidavit in which he stated amongst other things that the second appellant did not possess the position of President, that any suspension of the second respondent was without the authority of the Committee and that the issue of the writ was wrong. This application came before the District Judge, and he made the following order: "I think the proper order for the Court to make is to call upon the person who claimed to be the President communicating a decision of the Committee to the Court to produce evidence of that decision, over and above his own

¹ 28 N. L. R. 58.

² 1 N. L. R. 4.

averment." In effect the learned Judge was asking for the evidence required by the concluding sentence of section 35 of the Ordinance which requires an application for a writ to be accompanied by the order of suspension or dismissal duly certified under the hand of the President of the District Committee. No such order had yet been produced to the District Judge and he was therefore staying the writ until such order was produced to him in terms of section 35. It is from that order recalling the writ and asking for further evidence as to the facts which would justify its issue that the present appeal is brought.

It has been contended that once the learned Judge had issued the writ he had done all that he was empowered to do under the section and that the subsequent proceedings which he took and the order which he made, that which is now appealed against, were beyond his powers. I doubt that this would be so for the reasons given previously. No order of suspension or dismissal had yet been produced to him as required by section 35, and such order would have to be produced to him before he could grant that writ. The case in *5 Balasingham, p. 54*¹ was pressed on us but it deals with a different matter, viz., whether an ordinary Court of justice can revise or reverse a decision come to by a District Committee. The present case is a totally different one as is apparent if one considers those words in section 35 which says: "It shall be competent for a District Court to issue its writ to a Fiscal or Deputy Fiscal, and give possession accordingly as if it were a writ issued in execution of its own decree." The case in *5 Balasingham, p. 54*, does not deal with that point. On the words of section 35 it seems to me that what the learned Judge did when he recalled the writ and ordered an inquiry was something done under the powers given him by the Ordinance.

If one puts the case on wider grounds I cannot help thinking that a District Court has the power to recall process which it has issued improvidently, that is to say, on information which is or which is alleged to be insufficient or misleading. It seems clear from section 839 that a District Court has certain inherent powers, and the various authorities cited to us in argument support this view. It would indeed be extraordinary if such Court has not the power of vacating an order which had been obtained from it on insufficient or inaccurate information and there is abundant authority that it has that power. That will be so generally and if we come to the particular matter before us an *ex parte* order, it is clear that a District Court has power on notice to the party interested to vacate or recall an *ex parte* order—see *per* Jayewardene J. in 28 N. L. R. 63. An almost stronger case is that in 1 N. L. R. 25 which is a decision binding upon us and with which I respectfully agree, that a District Court has power on notice to vacate an order for sequestration, although there is no section in the Civil Procedure Code expressly giving this power to vacate an order for sequestration; it is an inherent power then.

Therefore on general grounds, and on the particular ground of this matter also, it seems that a District Court has the power to stay process by such an order as the one now under appeal. For the foregoing reasons I am of opinion that this appeal should be dismissed with costs.

DRIEBERG J.—I agree.

Appeal dismissed.

