

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

K. P. Vajiribuddhi Karunaratne,
“Nimal”, Doranagoda, Bemmulla.
Plaintiff-Respondent-Appellant

CASE NO: CALA/87/1993

DC GAMPAHA CASE NO: 30629/M

Vs.

1. Wickrama Pathirannehalage Biyel,
(Deceased)
- 1A. Soma Kumarasinghe,
- 1B. W. P. Maduni Pathirana,
- 1C. W. P. Sanjaya Pathirana,
All of Seethalagara Estate,
Kalepitimulla, Hunumulla.
Defendant-Petitioner-Respondents
Don Kamal Jayakody,
And 10 Others,
All of Kalepitimulla, Hunumulla.
Applicant-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: B. O. P. Jayawardena for the Plaintiff-
Respondent-Appellant.
Chula Bandara for the Defendant-Petitioner-
Respondents.
Sarath Gunawardena for the 1st and 2nd
Applicant-Respondents.

Argued on: 17.01.2020

Decided on: 24.02.2020

Mahinda Samayawardhena, J.

This is an appeal filed with leave obtained by the Plaintiff against the order of the learned District Judge of Gampaha delivered on 19.04.1993.¹ By this order, the applications of the Defendant and 11 Applicants, made under section 282(2) of the Civil Procedure Code, to have the sale conducted on 29.08.1991 by the Fiscal of the District Court of Negombo in execution of an *ex parte* decree was set aside.

Section 282(2) of the Civil Procedure Code reads as follows:

The decree-holder, or any person whose immovable property has been sold under this Chapter, or any person establishing to the satisfaction of the court an interest in such property, may apply by petition to the court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity

¹ Vide JE No.204 at page 132 of Vol. I of the Appeal Brief.

unless the applicant proves to the satisfaction of the court that he has sustained substantial injury by reason of such irregularity, and unless the grounds of the irregularity shall have been notified to the court within thirty days of the receipt of the Fiscal's report.

In my view, there is a material irregularity which amounts to illegality in this impugned sale.

Let me now explain.

The Plaintiff instituted action in the District Court of Gampaha under summary procedure to recover from the Defendant a sum of Rs. 600,000 given on a promissory note. The main case was decided *ex parte* in favour of the Plaintiff on 29.01.1988.² The District Court ordered to issue a writ of execution of the decree on 05.02.1988.³ Upon the Defendant having made an application to have the said *ex parte* decree vacated,⁴ the Court fixed the matter for inquiry. Pending inquiry, the Court, on 07.08.1989, stayed the sale of the property of the Defendant already fixed for 10.08.1989 in execution of the said decree.⁵ Thereafter, on 09.08.1989, the Court made another supplementary order that the said stay of sale shall take effect only after the Defendant deposited all Fiscal's fees.⁶ This order was complied with. After inquiry, the application to set aside the *ex parte* decree was

² Vide JE No.9 at page 33 of Vol. I of the Appeal Brief.

³ Vide JE No.11 at page 33 of Vol. I of the Appeal Brief.

⁴ Vide JE No.14 at page 34 of Vol. I of the Appeal Brief.

⁵ Vide JE No.66 at page 48 of Vol. I of the Appeal Brief, and the proceedings dated 07.08.1989 at page 7 of Vol. III of the Appeal Brief.

⁶ Vide JE No.49 at page 49 of Vol. I of the Appeal Brief.

dismissed by the Court by order dated 02.08.1991.⁷ Thereupon, on 07.08.1991, the Attorney-at-Law for the Plaintiff made an application to Court to re-issue the writ, and the Court accordingly issued the writ on 08.08.1991.⁸

The Defendant filed a Notice of Appeal on 09.08.1991 against the order dated 02.08.1991.⁹

Thereafter, on 22.08.1991, the District Judge of Gampaha made order staying the execution of the writ. In addition, the District Judge stated that the Defendant shall deposit the expenses incurred by the Negombo Fiscal in relation to the execution of the writ. It must be emphatically emphasised that stay of writ was not conditional on the Fiscal's fees being deposited. In other words, payment of the Fiscal's fees was not a condition precedent to the stay of the sale. Stay of the sale was a stand-alone order. (“එතෙක් ඇස්කිසිය අත්හිටවන්න. නිකුත්කර ඇති ඇස්කිසිය සඳහා ගිය ගාස්තුව විත්තිකරු තැන්පත් කළ යුතුය.”¹⁰) This order for stay of the sale, made in the presence of the Attorneys-at-Law for both parties,¹¹ was communicated to the Negombo Fiscal on 23.08.1991.¹²

However, the Negombo Fiscal had conducted the sale on 29.08.1991 and sold the properties seized to the Plaintiff on the

⁷ Vide JE No.129 at page 82 of Vol. I of the Appeal Brief. See order at pages 191-193 of Vol. III of the Appeal Brief.

⁸ Vide JE No.130 at page 83 of Vol. I of the Appeal Brief.

⁹ Vide JE No. 132 at page 84 of Vol. I of the Appeal Brief.

¹⁰ Vide JE No.135 of Vol. I of the Appeal Brief and proceedings dated 22.08.1991 at pages 195-196 of Vol III of the Appeal Brief.

¹¹ Vide proceedings dated 22.08.1991 at pages 195-198 of Vol. III of the Appeal Brief.

¹² Vide JE No.136 at page 86 of Vol. I of the Appeal Brief and for the copy of the letter sent to the Negombo Fiscal see page 175 of Vol. V of the Appeal Brief.

basis that the Fiscal's fees were not paid.¹³ This in my view is a clear misinterpretation of the Court order at the behest of the Attorney-at-Law for the Plaintiff, who appears to have taken an extraordinary personal interest in executing the writ despite stay.

In the newspaper advertisement, handbills, notices etc. in respect of the sale held on 29.08.1991, the Negombo Fiscal had mentioned the date of issuance as 05.08.1991.¹⁴ The position of learned counsel for the Plaintiff is that the Plaintiff obtained a certified copy of the order dated 02.08.1991 on 05.08.1991 and handed it over to the Negombo Fiscal on the same day with the aforesaid newspaper advertisement, handbills, notices etc., and that the writ issued was not a new writ, but the old writ stayed until the conclusion of the inquiry into the vacation of the *ex parte* Judgment.¹⁵

This course of action followed by the Attorney-at-Law for the Plaintiff is not permitted by law.

At 05.08.1991, there was no valid writ to be executed. The original writ issued was stayed by order dated 07.08.1989.

In terms of section 337(3) of the Civil Procedure Code, a writ of execution, if unexecuted, shall remain in force for one year only from its issue. But it can be renewed for one year from time to time before its expiration. Once expired, a fresh writ shall be issued. According to section 337(1), subject to certain exceptions, no application to execute a decree shall be granted after the

¹³ Vide Fiscal's Report at page 218 of Vol. V of the Appeal Brief.

¹⁴ Vide pages 223-229 of Vol. V of the Appeal Brief.

¹⁵ Vide page 12 of the written submission of the Plaintiff dated 22.02.2012.

expiration of ten years from the date of the decree. Section 347 enacts that *“In cases where there is no respondent named in the petition of application for execution, if more than one year has elapsed between the date of the decree and the application for its execution, the court shall cause the petition to be served on the judgement-debtor, and shall proceed thereon as if he were originally named respondent therein.”*.

Therefore, in this instance, a fresh writ appears to have been issued to the Negombo Fiscal only on 08.08.1991.¹⁶ Hence the argument that there was a writ already issued by 05.08.1991 is unsustainable.

In *Victor de Silva v. Jinadasa de Silva* (1964) 68 NLR 45, the Court ordered the Fiscal to stay the sale of certain properties seized in execution of a writ. The order was made because the judgment-debtors had presented an application to the Supreme Court to set aside in revision the decree in execution of which the writ had been issued. Despite the order of the Court to stay execution, and while the application in revision had been pending in the Supreme Court, the Fiscal proceeded with the sale because the Fiscal's charges were not paid. The purchasers of some of the properties seized were the judgment-creditors. After the application in revision had been dismissed by the Supreme Court, the judgment-debtors moved the District Court to set aside the sale, and the District Court allowed the application.

On appeal *inter alia* it was contended that in terms of section 343 a sale could be stayed only on payment of Fiscal charges and

¹⁶ Vide JE 130 at page 83 of Vol. I of the Appeal Brief.

therefore the Fiscal was correct in proceeding with the sale, as Fiscal charges were not remitted.

Section 343 of the Civil Procedure Code runs as follows:

343(1) The court may for sufficient cause stay execution proceedings at any stage thereof, and make order for adjournment of a sale.

(2) The application to court to stay proceedings shall be made by petition, to which all persons interested in the matter of the execution shall be made parties, and no such order shall be made until after payment of all Fiscal's fees then due.

Whilst rejecting the above argument and affirming the order of the District Court, it was held on appeal that:

Where the Court orders the Fiscal to stay execution of a sale under a writ, the Fiscal is bound to obey the order whether it be right or wrong. The Fiscal is an officer of the Court. He executes a writ on the authority of the Court and he is subject to its direction and control at every stage of the execution.

Raman Chetty v. Siriwardene (1925) 27 NLR 269 is a case where a Fiscal's sale was held after an order of the Court had been issued staying the sale, because the order was not communicated to the officer conducting the sale. The District Court set aside the sale. On appeal, it was held that it was competent of the Court to set aside the sale.

I think this is quite sufficient to declare that the sale conducted on 29.08.1991 despite the stay was a nullity.

Hence there is no necessity to delve into the various grounds upon which the appeal was argued before me.

I dismiss the appeal but without costs.

Judge of the Court of Appeal