

BADRUN NISA WAZEER
v.
VELAYUTHAN AND ANOTHER

COURT OF APPEAL,
PALAKIDNAR, J., AND SENANAYAKE, J.,
C. A. APPLICATION NO. CA 35/90 ; D. C. COLOMBO No. 4906/RE,
AUGUST 31, 1990.

Execution – Re entry by ejected judgement-debtor within a year and a day—Civil Procedure Code, Section 325 – requirement that complaint of judgement-creditor should be within one month of ouster.

The time clause in S. 325(1) of the Civil Procedure Code is mandatory. The present section enables a judgement-creditor who is dispossessed within one year and one day of being placed in possession by the fiscal, to complain to Court of the ouster, but he must do so within one month of the ouster.

Cases referred to :

- (1) *De Silva V. Bastian* 38 NLR 277
- (2) *Perera V. Aboothahir* 37 NLR 163

APPLICATION in revision of the Order of the District Judge of Colombo.

A. I. M. Hidyahulla with *M. Salman* for plaintiff-petitioner
M. H. D. Raheem for defendant-respondent
S. R. Crossette Thambiah for claimant-respondent.

October 30, 1990

SENANAYAKE, J.

The Plaintiff-Petitioner filed this application of revision in respect of an order dated 04.01.90 made by the learned District Judge in case No. 4906/RE in the District court of Colombo.

The plaintiff-petitioner instituted this action against the defendant respondent for ejection from the premises on the ground of arrears of rent. On 2.7.84 consent judgment was entered in favour of the plaintiff-petitioner. The defendant-respondent was given three years time to deliver vacant possession. If he failed to hand over vacant possession on or before 30.6.87 writ was to issue without notice.

The Defendant-Respondant's failure to comply resulted in the plaintiff-petitioner applying for writ. The court issued writ and the fiscal delivered vacant possession of the premises to the Plaintiff-Petitioner on 14.7.87. The Plaintiff-Petitioner in his petition dated 28.08.87 averred that the defendant-respondent with other members of the family re-entered the premises and dispossessed him. He averred that the Defendant-Respondent has committed contempt of court and also prayed for the reissue of writ of possession.

The plaintiff-petitioner's application was made under Section 325 (1) of the Civil Procedure Code. The relevant portion of the section reads as follows :-

" Where the judgment-creditor has been so hindered or ousted within a period of one year and one day the judgment-creditor may at any time within one month from the date of such resistance or obstruction or hindrance or ouster complain thereof to the court by a petition in which the judgment-debtor and the person if any resisting or obstructing or hindering or ousting shall be named respondents. The court shall thereupon serve a copy of such petition on the parties named therein as respondents and require such respondents to file objections if any within such time as they may be directed by court. "

The learned counsel for the plaintiff-petitioner submitted that his petition was not within the stipulated time and it was not filed within one month of the ouster. His submission was that time was not of the

essence and it was not mandatory to file the petition within one month. He submitted that the words "May at any time within one month" make the time limit directory.

I am unable to accept his submission. The question whether a provision is mandatory has to be determined upon a number of considerations. The basic test by which to determine whether the requirement is essential or not is to consider the consequence of the failure to follow the said provision. Time is of the essence. It is stipulated that the application could be made within one month from the ouster. It is of material importance that the petition be tendered in court within the stipulated period. The time clause here is mandatory. Its non observance will result in the object of the provision being frustrated. The object is to conclude the inquiry within the shortest possible time. Section 325 (1) has to be read with 325 (2) (3) and (4). Once the petition is filed within the stipulated time the court has to put the machinery in motion and the Respondents within 15 days of the publication of notice will have to file their claim if any setting out their rights or interest entitling them to possess the property.

Bindra on Interpretation of statutes 7th edition, page 680 states, "The ultimate rule in construing auxiliary verbs like 'may' and 'shall' is to discover the legislative intent and the words 'may' and 'shall' is not decisive of discretion or mandates. The use of the words "May" and "shall" may help the courts in ascertaining the legislative intent without giving to either a controlling or determining effect. The court, have further to consider the subject matter the purpose of the provisions, the object, intent to be secured by the statute which are of prime importance as also the actual words employed.

The provisions of Section 325(1) envisage a resistance, hindrance or ouster within a period of one year and one day. This spells out the time period during which he could claim relief. If after possession is handed over, he is dispossessed the petitioner can complain to court. This is coupled with the petitioner's right to have the assistance of the court provided his application by way of petition is tendered within the stipulated period. The stipulated period is within one month from the date of ouster. There cannot be any extension of time ; any extension will cause frustration. I am of the view that time is of the essence and it is mandatory that the petitioner tenders his application within the stipulated time.

The learned counsel for the petitioner relied on the authority of *De Silva v. Bastian* (1). This authority has no application to the instant case, since the present Section 325(1) differs from the earlier section. The present section gives a party who is dispossessed within one year and one day to complain to court within one month of ouster: The earlier law was limited in its application. Garvin J. observed in *Perera v. Aboothahir* (2) that what was intended in Section 325 was to give relief in such cases when the fiscal had delivered possession to the judgment-creditor but had not delivered complete and effectual possession of every part of the property.

It is my view that this observation has no application to the present provision of Section 325(1) as it stands.

The petitioner had failed to comply with the mandatory time period stipulated in Section 325(1) of the Civil Procedure Code.

In the circumstances I dismiss the application of the petitioner with costs.

In view of the above order C. A. L. A. 4/90 stands dismissed.

PALAKIDNAR, J. – I agree.

Application dismissed.
