

LEELANANDA
V.
MERCANTILE CREDIT LTD.

COURT OF APPEAL

WIJETUNGA & ANANDACOOMARASWAMY, J

C. A./L. A. APPLICATION NO. 26/88 WITH C.A. 281/88

D.C. COLOMBO CASE NO. 86797/M

JULY 11, 1988

Civil Procedure — Execution — Civil Procedure Code, s. 347 and Rule 49 of the Rules of the Supreme Court — Computation of one year.

Ex parte judgment was entered on 15.03.84 against the 3rd defendant petitioner seeking revision and a copy of it was served on him on 22.02.1985. On 25.04.1985 the District Judges directed writ to issue against the petitioner. On or about 17.12.1986 the petitioner sought to set aside the seizure and a suspension of execution proceedings as one year had lapsed between the date of decree and the application for execution.

Held:

(1) The year should be computed from the date of the valid executable decree. Although judgment was entered on 15.03.84 there was no valid decree until the lapse of 14 days from the date of service of the decree. The period of one year under section 347 C.P.C. should be computed from the date of a valid executable decree.

(2) The provisions of section 347 are directory and not mandatory and in the absence of prejudice or injustice by the issue of writ after one year without notice the Court will not interfere.

(3) Rule 49 of the Supreme Court rules had not been complied with because though court ordered notice to issue 30.03.88 returnable 05.05.88 the notice was tendered after 05.05.88. Compliance with Rule 49 is imperative and non-compliance is fatal.

Application for revision of the order of the District Court, Colombo
Ikram Mohamed for petitioner

Chula de Silva for respondent.

Cur. adv. vult.

July 27, 1988

ANANDACOMARASWAMY, J.

This is an application by way of Revision to revise the order of the Learned District Judge dated 11.03.88 and to set aside the seizure of the property of the petitioner effected on the application made by the Plaintiff-Respondent on 25.04.85. Counsel for Petitioner and Respondent moved that both the Revision application No. 281/88 and C.A.L.A. 26/88 be taken together. Accordingly we heard both the applications together.

There are two matters to be decided on the application

1. Whether a notice under section 347 of the Civil Procedure Code had to be issued in this case before the writ can be executed.
2. Whether these applications before this Court had to be rejected for non-compliance with Rule 49 of the Rules of the Supreme Court.

The facts relevant to these matters are set out below: — An *ex parte* judgment was entered against the 3rd Defendant-Petitioner (hereinafter referred to as Petitioner) on 15. 3. 84 and a copy of the decree was served on the Petitioner on 22.02.85. On 25. 04. 85 the District Judge directed that writ be issued against the Petitioner. The Petitioner on or about 17. 12. 86 sought to set aside the seizure and to suspend the execution proceedings on the ground that no notice had been given to the Petitioner although according to him one (1) year had lapsed between the date of decree and the application for its execution.

In order to compute the period of one (1) year, one has to examine whether one (1) year has passed between a date of valid executable decree and the application for its execution. On 15.03.84 although ex parte judgment was entered against the Petitioner there was no valid decree until after the lapse of 14 days from the date of the service of the ex parte decree. If the period is to be computed as from the date of ex parte judgment then in a case where the decree is served on the judgment-debtor after a lapse of one (1) year from the date of ex parte judgment there should be in every such case a notice issued before an order to issue the writ is made, even though an application for writ is made soon after the decree is served. This is meaningless and therefore the period of one (1) year should be computed from the date of a valid executable decree. The word decree in section 347 means an executable decree and any other interpretation would mean that section 347 would become meaningless in relation to ex parte judgment.

In the instant case decree was served on 22. 02. 85 and application for writ was made on 25. 04. 85, and therefore no notice in terms of section 347 is necessary.

In any event provisions of section 347 are directory and not mandatory and the Court ought not to interfere where the party had not shown prejudice or that injustice has been caused to him. In the instant case there is no averment that the Petitioner was prejudiced or injustice has been caused to him by the issue of writ without notice.

On the 2nd question it is quite clear that Rule 49 had not been complied with, in that although this Court on 30.03.88 directed notice to be issued on the Respondent returnable 05.05.88 the notice in fact was tendered after 05.05.88

This Court in an unreported case of *Piyasena Gangodagedera v. Mercantile Credit Limited (C.A.1304/87 D.C.Colombo, No. 93714/M* held that provisions of Rule 49 are imperative in nature and call for strict compliance and failure to comply with such a mandatory requirement is fatal to the application.

The Petitioner has not submitted any explanation as regards his failure to comply with the Rule and therefore - the Respondent is entitled to succeed on this ground also

For the foregoing reasons we dismiss these applications with costs.

WIJETUNGA, J.— I agree

Application dismissed.