

CADERAMANPULLE
v.
CEYLON PAPER SACKS LTD
(Case No 2)

COURT OF APPEAL
UDALAGAMA, J.
NANAYAKKARA, J.
C.A.REV. 759/2001
D.C. COLOMBO 5366/SPL
MAY 31TH, 2001.
JUNE 7TH, 2000.

Civil Procedure Code - S. 377(a) (b), 383(1), 753, 754(1) - Leave to Appeal - Dismissed - Does Revision Lie ? - Exceptional circumstances - Delay - Summary procedure - Intention - Constitution Art. 138, 145

Order Nisi in pursuance of S. 377 was issued to take effect in the event the Petitioner not showing cause on a day appointed for that purpose. On this day, the Petitioner was absent and unrepresented and court made the Order Nisi absolute.

Thereafter the Petitioner made an application to have his default purged but when the inquiry was taken up the Petitioner was absent, the Court dismissed his application. The second application to purge his default was also dismissed. The Petitioner thereafter appealed against the final Order.

When the Respondent made an application for execution of the decree pending appeal, the Petitioner moved by way of Leave to Appeal. This application was dismissed for non compliance with the Rules of the Supreme Court.*

Thereafter the Petitioner moved in Revision.

Held :

- (i) It becomes apparent that the Petitioner has claimed the same reliefs, which he has claimed in his leave to appeal application. The Petitioner is trying to achieve in this application what he could not achieve in his Leave to Appeal application in a devious manner after a lapse of nearly two years.
- (ii) No exceptional circumstances are disclosed why his application for revisionary relief should be entertained after the lapse of nearly two years.

- (iii) His callous disregard and disobedience of the Orders of the Court is clearly evident from the fact that he failed to appear in Court on both of occasions.
- (iv) The existence of exceptional circumstances is a pre condition for the exercise of the powers of Revision.
- (v) Unlike in an ordinary regular action S. 377 casts a burden on the defendant to show sufficient cause against the Order Nisi and if he fails to do so he must face the consequences.

Summary procedure has been designed with a view to expeditious and quick disposal of action. Therefore a Defendant in a summary procedure action is expected to act without delay, if he is to obtain relief from Court.

APPLICATION in Revision from the order of the learned District Judge, Colombo.

Cases referred to :

1. *Perera v. Agidahamy* - 48 NLR 87
2. *Marimuttu v. Siwapakyam* - 1986 1 CALR 264
3. *Rustum v. Hapangama Co. Ltd* - 1978/79 - 2 SLR 225 - 1978/79/80 - 1 SLR 353
4. *Thilagaratnam v. Edirisinghe* - 1982 - 1 SLR 56
5. *Iynul Kareeza v. Jayasinghe* - 1986 - 1 CALR 109
6. *Hotel Galaxy (Pvt) Ltd. v. Mercantile Hotel Management Ltd.* - 1987 - 1 SLR 5
7. *Vanik Incorporation Ltd. v. Jayasekera* - 1997 2 SLR 365
8. *Wijesinghe v. Thamaratnam* - Sri Skantha Law Reports Vol. 12. p.47.
9. *Rasheed Ali v. Mohamed Ali* - 1981 - 2 SLR 29
10. *Sithambaram Subramaniam v. Ceylon Development Engineering Co. Ltd.*, - SC 227/76 - at 3
11. *Ms. Sirimavo Bandaranaike v. Times of Ceylon Ltd.*, - 1995 1 SLR 22
12. *Beebe v. Mohamed* (1969) 68 NLR 36 at 38
13. *Sabapathy v. Dunlop* - (1935) 37 NLR 113
14. *Kanagasabai v. Kirupamoorthy* 62 NLR 54

Nihal Fernando with Rajendra Jayasinghe for Petitioner.

Wijedasa Rajapakse P. C., with G. G. Arulpragasam and Kapila Liyanagamage for Respondent.

Cur. adv. vult.

June 29, 2001.

NANAYAKKARA, J.

The petitioner - respondent instituted action (5386/8 PC) in the District Court of Colombo on the 20th July 1999 by way of summary procedure. In terms of the Provisions of the Registration of Documents Ordinance, seeking cancellation of certain caveats filed by the respondents - petitioners and also for the recovery of a sum of Rupees One hundred million as damages together with continuing damages of Rupees one million per annum.

Thereafter the learned District Judge acting in pursuance of section 377 of the Civil Procedure Code had issued an order Nisi which was conditioned to take effect in the event of the petitioner not showing cause on a day appointed for that purpose.

When on the appointed date the case was called in open court, as the petitioner was not present nor represented, court had in terms of section 383(1) of the Civil Procedure Code made the order Nisi absolute.

Subsequently the petitioner had made an application to have his default purged, and when the inquiry in respect of this application was taken up as petitioner had not been present, the court dismissed his application. Thereafter petitioner had made another attempt to purge his default which also proved unsuccessful and the petitioner thereafter had filed an appeal against the final order of the learned District Judge and that appeal is still pending in this court.

Thereafter the respondent had applied for execution of the decree pending appeal under section 763 of the Civil Procedure Code.

The petitioner then made an attempt by way of leave to appeal application No. 136/2000 dated 9th May 2001 to set aside the order of the learned District Judge and to obtain

interim relief in the form of a stay of execution of writ. This application of the petitioner was dismissed by this court on 22. 05. 2001 for noncompliance with the Rules of the Supreme Court. Having failed in all his attempts the petitioner thereafter had filed this revisionary application dated 25. 05. 2001 praying for the same reliefs that the petitioner had claimed in his leave to appeal application.

When this matter was taken up for inquiry on the 31th May 2001, the respondent's counsel raised some preliminary objections in regard to the maintainability of this action and prayed that the application be dismissed in limine. Counsel also submitted that the petitioner should not be permitted to canvass the same issues which he canvassed in his leave to appeal application by invoking the revisionary jurisdiction, as the petitioner had also preferred an appeal against the judgment of the District Court and the said appeal is still pending in this court. The petitioner should not be permitted to canvass the merits and demerits by way of revision at this stage when a final appeal is pending in this court. Arguing further, learned counsel submitted the petitioner by this revisionary application is seeking to set aside same orders made by the learned District Judge nearly two years ago and the inordinate delay has not been explained by the petitioner. Counsel has made reference to the following cases in support of his argument.

Perera v. Agidahamy⁽¹⁾,

Marimuttu v. Sivapakyan⁽²⁾,

Rustom v. Hapangama and Co. Ltd.,⁽³⁾

Thilangaratnam v. Edirisinghe⁽⁴⁾, 1

Iynul Kareeza v. Jayasinghe⁽⁵⁾,

Hotel Galaxy (Pvt) Ltd. v. Mercantile Hotel Management Ltd.⁽⁶⁾.

Vanik Incorporation Ltd. v. Jayasekera⁽⁷⁾.

Wijesinghe v. Thamaratnam⁽⁸⁾

Learned counsel for the petitioner in reply to the respondent's preliminary objections argued that the Court of Appeal has power to reverse or vary any order of a lower court whether an appeal lies or not, whether an appeal has been preferred or not. He also submitted that the powers of revision conferred on this court under Article 138 and 145 of the Constitution and section 753 of the Civil Procedure Code are very wide, and revisionary powers of the court are not limited to cases in which appeal has been taken, but also extends to situation where appeal has not been taken, but also extends to situations where appeals are pending against the final orders made by lower courts. In support of counsel's argument the attention of this court has been drawn to the following cases:-

Rasheed Ali v. Mohammed Ali⁽⁹⁾, *Sithambaram Subramatam v. Ceylon Development Engineering Company Limited*⁽¹⁰⁾, S. C. Application at 3. *Mrs. Sirimavo Bandaranaike v. Times of Ceylon Limited*⁽¹¹⁾,

Beebee v. Mohamed⁽¹²⁾,
Sabapathy v. Dunlop⁽¹³⁾,

At this stage it is important to consider submissions and relevant authorities cited before us by counsel on both side. Learned counsel for both the petitioner and the respondent have drawn our attention to a number of authorities in which this extraordinary powers of revision have been exercised by this court in support of their arguments. When the decided cases cited before us are carefully examined, it becomes evident in almost all the cases cited, that powers of revision have been exercised only in a limited category of situations. The existence of exceptional circumstances is a precondition for the exercise of the powers of revision and the absence of exceptional circumstances in any given situation results in refusal of remedies. It is evident that revisionary powers being a discretionary remedy, the court has exercised that right where there are exceptional circumstances warranting the intervention of court, as far as the facts of the instant case are

concerned, the petitioner has not shown such exceptional circumstances to warrant the intervention of this court. When the petitioner in this case was served with order Nisi, and was asked to show cause why order Nisi should not be made absolute, he not only defaulted to appear in court on the appointed date, but also defaulted to appear subsequently at the inquiry held to purge his default, consequent to his own application.

When the reliefs claimed by the petitioner in this application are considered, it becomes apparent that the petitioner has claimed the same reliefs which he has claimed in his leave to appeal application. In other words, petitioner in trying to achieve in this application what he could not achieve in his leave to appeal application, in a devious manner, after a lapse of nearly two years from the original order delivered by the learned District Judge. This inordinate delay has not been explained away by the petitioner to the satisfaction of this court. Moreover the petitioner has not disclosed exceptional circumstances why his application for revisionary relief should be entertained by this court after a lapse of nearly two years from the original District Court order.

The petitioner has also not sufficiently explained away his absence from court, but merely states that he became aware of the order Nisi later without disclosing his source of information. His callous disregard and disobedience of the orders of the court is clearly evident from the fact that he failed to appear in court on both occasions.

Learned Counsel for the petitioner's argument that the affidavit of the Process Server is false and should not be relied upon cannot be accepted as it is *prima facie* evidence of the fact that summons was duly served and there is a presumption of due service of summons. Accordingly an obligation is cast on the petitioner to prove the non service of summons, which obligation he has failed to perform.

The petitioner himself admits that he was not able to be present in time when his application to purge his default

was taken up for inquiry on the 28th October 1999. If the petitioner was unable to be present on time, he must face the consequences of his default. In this regard case of *Kanagasabai v. Kirupamoorthy(Supra)*, will be relevant, wherein it was held in an application of a summary procedure, the petitioner who fails to appear in person as required by the interlocutory order served on him under section 377 (b) of the Civil Procedure Code, must suffer the consequences of his non appearance. Although this case deals with an interlocutory order made under section 377(b) of the Civil Procedure Code, the principle and the reasoning given in this case will be equally applicable to section 377 (a) of the Code. Unlike in an ordinary regular action section 377 of the Civil Procedure Code casts a burden on the defendant to show sufficient cause against the order Nisi and if he fails to do so he must face the consequences. Summary procedure has been designed with a view to expeditious and quick disposal of action. Therefore a defendant in a summary procedure action is expected to act without delay, if he to obtain relief from court.

For the above reasons notice is refused.

UDALAGAMA, J. - I agree.

Notice refused.