

GUNAWARDANA
v.
DR. DE ZOYSA AND ANOTHER

COURT OF APPEAL
SILVA, J. P/CA WITH
DR. RANARAJA, J.
C. A.599/92
D.C. MOUNT LAVINIA CASE NO. 593/ZL
MARCH 06, 20, APRIL 03, 1995.

Declaration of Title – Execution of a Proprietary Decree – Civil Procedure Code S. 325 – An Appeal from Order under Sec. 326-329 Civil Procedure Code – Revision – Exceptional circumstances.

Petitioner instituted action against the 1st respondent for a declaration of Title. When the Fiscal sought to execute the Decree, he was resisted by the 2nd respondent, the estranged wife of the 1st respondent. At the ensuing S. 325 inquiry, the Court upheld the claim of the 2nd respondent that she is in possession of the premises in suit on her own account as tenant. The petitioner moved in Revision against the said Order.

Held:

(1) There are precedents which circumscribe the exercise of Revisionary power in the context of resistance to the execution of proprietary Decrees under Section 325-329.

(2) Petitioner must show that he would suffer a denial of justice or irremediable harm.

(3) An inquiry held pursuant to a resistance to the execution of a proprietary Decree is a Summary Inquiry; if the person resisting, establishes a right to be in possession on his own account or on account of a person other than the judgment Debtor, that does not itself preclude the Judgment Creditor proving otherwise in a regular action.

(4) The petitioner has an alternative remedy and this Court cannot stultify the proceedings in a future regular action.

Cases referred to:

1. *Rashid Ali v. Mohamed Ali* – 1981 – 1 SLR 262.
2. *Gunaratne v. De Silva* – 58 N.L.R. 542.
3. *Zahir v. Perera* – 73 N.L.R. 424.

AN APPLICATION in Revision against the Order of the District Court of Colombo

Maureen Seneviratne P.C. with *R. Gooneratne* for Petitioner.

P. A. D. Samarasekera P.C. with *K. Gunawardena* for 2nd Respondent.

Cur. adv. vult.

May 16, 1995.

RANARAJA, J.

The Petitioner instituted action against the 1st Respondent for declaration of title to premises No. 34 Dickman's Road, Colombo 5, ejectment and damages. The 1st respondent consented to judgment when the fiscal sought to execute the decree, he was resisted by the 2nd respondent who is the estranged wife of the 1st respondent. The petitioner complained to Court under section 325 of the Civil Procedure Code. After inquiry, Court upheld the claim of the 2nd respondent that she was in possession of the premises in suit on her

own account as tenant and dismissed the petition. This application in Revision is from that order.

Learned President's Counsel for the 2nd respondent took a preliminary objection that Section 329 of the Code denies the petitioner the right to appeal from an order made under Sections 326 to 328 of the Code, but does not debar him from instituting an action to establish his right or title to the property as against the 2nd respondent, and as he has an alternative remedy, he is precluded from invoking the Revisionary powers of this court. He submitted further, that this court will act in Revision only if the petitioner can show "exceptional circumstances", which he has failed to do, and therefore his application should be dismissed in limine.

Section 753 as amended by Act, No. 79 of 1988 provides:

The Court of Appeal may, of its own motion or on application made, call for and examine the record of any case, whether already tried or pending trial, in any Court, Tribunal, or other Institution for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein, or as to the regularity of the proceedings of such Court, Tribunal, or other Institution, and may upon revision of the case brought before it pass any judgment or make any order thereon, as the interests of justice may require."

It is to be noted that the words, "of its own motion or on application made" have been added and the words "thereon as the interests of justice may require" have replaced the words "which it might have made had the case been brought before it in due course of appeal instead of by way of revision", in the amended section. The Court of Appeal has the power under this Section to act on its own motion/or upon the application of any party. It is also no longer necessary that the relevant order or judgment of the inferior Court, Tribunal or Institution should be appealable. However, there are certain limits within which this Court may exercise its Revisionary powers. For instance, the judgment or order sought to be revised should be made

during proceedings to which the Civil Procedure Code is applicable. There are also precedents of the Supreme Court as well as this court, which circumscribe the exercise of Revisionary powers in the context of resistance, to the execution of proprietary decrees under Sections 325 to 329 of the Code. As Wanasundera, J. observed in *Rashid Ali v Mohamed Ali* ⁽¹⁾.

“When however the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstances. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternate remedy such as the right to file a separate action, except when non-interference will cause a denial of justice or irremediable harm ... It would be sufficient in the present context also to state that the fact a judge’s order may be merely wrong should not be a sufficient ground for the powers of revision ... In an application for revision of this nature, the threshold is much higher than that required for an appellant exercising a mere right of appeal.”

A similar view was expressed by H. N. G. Fernando, J. In *Gunaratne v. De Silva* ⁽²⁾ on a consideration of the earlier section 327 and 327A of the Code:

“I would hold also that the provision in Section 327A that the order is final means that it is not appealable. A perfectly reasonable alternative is provided to the claimant in that he can bring within one month an action to establish his right to possession and if successful in that action, be restored to possession. Just as what appears to be a *bona fide* claim “keeps out” the judgment-creditor until the claim is regularly investigated (S. 327), so also what appears to be a frivolous and vexatious claim is insufficient to entitle the claimant to continue in possession and he is compelled to seek a remedy by regular action. In each case the powers of this Court in appeal cannot be invoked until the regular action is tried.”

This dictum was followed with approval by De Kretser, J. in *Zahir v. Perera*⁽³⁾ – who added:

"Mutatis mutandis these appear to be cogent reasons why this Court should not allow its powers of revision to be invoked in respect of such an order except in most exceptional circumstances."

In the light of the above judgments the petitioner had to satisfy this Court that he would suffer a denial of justice or irremediable harm, or that they were the most exceptional circumstances, which called for the exercise of its Revisionary powers.

Learned President's Counsel for the petitioner submitted that since the Additional District Judge had come to a finding that the 2nd respondent was the tenant of the premises, it is not possible to contest this decision except in this Court. This submission is made on the premise that a finding at an inquiry under section 327 of the Code is binding on the parties. but as explained very clearly by H. N. G. Fernando, J. this is not a correct view of the law. An inquiry held pursuant to a resistance by any party to the execution of a proprietary decree is a summary inquiry, which has to be completed within 60 days of the publication of the notice under Section 325(2), for the purpose of terminating the execution proceedings by deciding whether the resistance was occasioned by the judgment-debtor, or by some person at his instigation, or by a person claiming in good faith, to be in possession on his own account or on account of a person other than the judgment-debtor. If the person resisting establishes such a right, for instance, as in the present action *qua tenant*, such a finding by itself does not preclude the judgment-creditor proving otherwise in a regular action. The petitioner thus has an alternative remedy available. Where such alternative relief is available this Court will not exercise its Revisionary powers.

Learned President's Counsel then submitted that there are exceptional circumstances which call for the exercise of the revisionary powers in that the order of the Additional District Judge is wrong. As observed by Wanasundera, J., in *Rashid Ali*, (*supra*) the

judge's order being merely wrong is an insufficient ground for this court to exercise its revisionary powers.

It is to be noted that the petitioner has not even pleaded exceptional circumstances in his petition. The Additional District Judge has come to a finding that the landlord of the premises had issued receipts for rents paid in the name of the 2nd respondent. The petitioner has been unable to give a satisfactory explanation as to how this has occurred. The Judge has held that the 2nd respondent had thus established a *prima facie* right to remain in occupation of the premises in suit on her own account. The petitioner has the right to institute a regular action and vindicate his right to possession of the premises by proving that if the 2nd respondent was in fact a tenant during the period for which she holds receipts, she had ceased to be a tenant at a later date and she has no right to continue in occupation of the premises. This Court cannot stultify the proceedings in a future regular action in the District Court, by either setting aside or affirming the decision of the Additional District Judge, made after a summary inquiry in execution proceedings. As H. N. G. Fernando, J., stated in *Gunaratne v. De Silva*, (*supra*) the proper stage to invoke the appellate or revisionary jurisdiction of this Court is at the conclusion of such regular action. Therefore, the petitioner will not suffer a denial of justice or irremediable harm.

For the reasons given the application is dismissed but without costs.

S. N. SILVA, J. – I agree.

Application dismissed.