

HUSSAIN AND OTHERS
v.
THE LAND REFORM COMMISSION

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J.
CALA NO. 172/2001
DC COLOMBO NO. 4682/ZL
SEPTEMBER 05, 2001

Civil Procedure Code, section 343 – Should an application under section 343 for stay of execution of decree be accompanied by an affidavit? – Bona fides.

Held:

- (1) It is clear that the section does not stipulate a petition preferred under section 343 should be accompanied by an affidavit; what is required under section 343 is only a petition.
- (2) The act of filing of an affidavit – albeit a defective affidavit – makes it only a redundant act on the part of the respondent which does not invalidate the application.
- (3) Whether a particular application is made *mala fide* and with the objective of delaying the execution proceedings is a question of fact and should be best left to the discretion of the trial Judge.

APPLICATION for leave to appeal from an order of the District Court of Colombo.

Case referred to :

1. *Wijewardene v. Raymond* – 39 NLR 169.

S. Kanagasingham for petitioners.

Nihal Jayamanne, PC for respondent.

February 06, 2002

NANAYAKKARA, J.

An order given in respect of an application made under section 343 ⁰¹ of the Civil Procedure Code by the defendant-respondent for the stay of execution of decree obtained by the plaintiffs-petitioners has given rise to this application by way of leave to appeal.

The said decree according to the petitioners consists of two parts, one for the possession of land and the other for recovery of money by way of compensation, damages and costs. While the decree for the recovery of money has been partly satisfied the decree for possession of land remains unsatisfied.

Consequent to the service of the seizure notice on the respondent ¹⁰ following the failure of the petitioners to obtain full satisfaction of decree, the respondent made an application under section 343 of the Civil Procedure Code for the stay of execution of the decree. At the inquiry held in respect of this application for the stay of execution, it was contended on behalf of the petitioners that there was no proper application under section 343, in that there was no proper and valid affidavit and that the application lacked *bona fides*, as it has been made with malicious intention and the objective of delaying the execution proceedings.

The learned District Judge made an order on 15. 03. 2000 overruling ²⁰ the objections raised by the petitioners to this application.

It is from this order that the petitioners have sought relief from this court by way of leave to appeal.

The fundamental question that has to be determined in this case is whether there is any validity in the objections taken in regard to the affidavit and that the respondent's application under section 343

of the Civil Procedure Code has been *mala fide* and made with the objective of delaying the execution of proceedings. For the purpose of determination of the questions at issue, reference to section 343 (2) of the Civil Procedure Code will be pertinent. The section reads thus: 30

"The application to the 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."

A cursory reading of this section makes it amply clear that the section does not stipulate, a petition preferred under section 343 of the Civil Procedure Code should be accompanied by an affidavit as has been contended by the petitioners in this case. What is required under section 343 is only a petition, and if there is such a requirement for an affidavit the section would have made express and explicit stipulation to that effect in the section itself. In the absence of such express stipulation, it cannot be presumed that the legislature intended that an affidavit should accompany a petition filed under section 343 of the Civil Procedure Code. As counsel for the respondent has pointed out in his submissions, in situations where affidavits are necessary the Civil Procedure Code has expressly made provision for those situations and absence of provisions for an affidavit under section 343 does not render the application invalid, even if the affidavit filed is defective. Therefore, the act of filing an affidavit albeit a defective affidavit makes it only a redundant act on the part of the respondent which does not invalidate the application. 40 50

Learned counsel has referred us to the decision arrived at in the case of *Wijewardena v. Raymond*⁽¹⁾ in support of his argument that there is no requirement for an affidavit to be filed under section 343 of the Civil Procedure Code. It was held in this case that there is no requirement for an application for execution of decree to be supported by an affidavit. As suggested by counsel this authority will be helpful in resolving the question in issue.

I am of the view that the reasoning adopted by Justice Soertsz in the case of *Wijewardena v. Raymond (supra)* in regard to an application for execution of decree applies with equal force to an application made under section 343 for stay of execution. It was held in this case that there is no requirement for an application for execution of decree to be supported by an affidavit. 60

Therefore, a consideration of the alleged defects and infirmities in the affidavit is not warranted in this case.

In regard to the objection that the respondent's application under section 343 lacked *bona fide* and made with the objective of delaying the execution proceedings, it should be observed that whether a particular application is made *mala fide* and with the objective of delaying the execution proceedings is a question of fact which has to be determined depending on the circumstances of each case and a determination in regard to a factual position therefore should be best left to the discretion of the trial Judge. 70

Therefore, the District Judge's decisions in regard to a finding of fact cannot be supplanted by a determination of this court which the petitioners request this court to make on facts unless a patent and manifest injustice has been caused to the petitioner.

In view of the foregoing reasons, I refuse leave to appeal from the order of the learned District Judge made on 18. 05. 2001 and cast the plaintiffs-petitioners in costs in a sum of Rs. 5,000 each. 80

UDALAGAMA, J. – I agree.

Application dismissed.