

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

Court of Appeal No: CALA 2/2006
District Court of Hambantota No: L/1021

In the matter of an
application for leave to
appeal

Dhanapala Hewavitharana
and another

Petitioner-Petitioners

Vs.

Amarasinghe Aratchige
Gardies Appu

Substituted-Plaintiff-
Judgment Creditor-
Petitioner-Respondent-
Respondent

1. Samawathie
Ramawickrama and three
others

Substituted Plaintiff-
Judgment Creditor-
Petitioner-Respondent-
Respondent

2. Nandina Hewa Wijepala

Defendant Judgment Debtor
Respondent-Respondent

Before: **Eric Basnayake J**

Counsel: Dr. Sunil Cooray with Ms. Sudhashini Cooray for the Petitioner-Petitioners
Vijaya Niranjan Perera with Shobani Karunatileke for the Substituted-Plaintiff-
Judgment Creditor-Petitioner-Respondent-Respondent

Argued on: 16.12.2010 & 3.3.2011

Written submissions tendered on: 20.5.2011

Decided on: 12.1.2012

Eric Basnayake J

The petitioner-petitioners (petitioners) filed this application *inter alia* to have the order dated 22.12.2005 of the learned District Judge of Hambantota issuing a writ of execution set aside.

The original plaintiff filed this action on 26.1.1988 to have the 1st, 2nd and 3rd defendants evicted from the premises described in the schedule and to have the plaintiff placed in possession. After trial, judgment was entered on 29.1.1996, in favour of the plaintiff. The 2nd defendant appealed against the said judgment. On 13.1.2005 this appeal was dismissed by the Court of Appeal and the record was sent back to the District Court. In the District Court an application was made for substitution of the substituted plaintiff who was deceased. The court substituted the substituted plaintiff's wife and children and thereafter writ of execution was issued.

At the time of executing this writ on 9.12.2005 the 1st petitioner who was in occupation had informed the Fiscal that he had purchased this property. However he had requested one weeks' time to vacate as his wife was hospitalized. On 14.12.2005 the two petitioners had filed an application under section 839 of the Civil Procedure Code moving to vacate the writ. The learned Judge after inquiry dismissed this application on the ground that it is not a matter under which one could invoke the inherent powers of the court and ordered to reissue the writ.

When the record was sent back to the District Court, the court had noticed the parties and pronounced the judgment of the Court of Appeal. Thereafter, on an application by the substituted plaintiffs, writ was issued. At the time of execution the petitioners had given an undertaking to vacate the premises in a weeks' time. As the petitioners had failed to

vacate the premises as agreed the court made order to reissue the writ. It is this order that the petitioners are seeking to vacate.

The petition

The petitioners stated in the petition that the substituted plaintiff had transferred all his rights on 1.10.1995 to P.D.D. Karunanayake. Thereafter by deed No. 71 of 5.12.1995 that he assigned all his rights and interests in the action to the said P.D.D. Karunanayake. Judgment was entered on 29.1.1996. The petitioners state that the substituted plaintiff (now deceased) made an application for execution of the decree pending appeal (on 3.3.1996) to which the 2nd defendant filed objections. P.D.D. Karunanayake too made an application to dismiss the application for writ. The petitioners state that the said P.D.D. Karunanayake by deed No. 289 of 18.8.1998 transferred the boutique (the plaint refers to 29 perches of land and it appears that the boutique contained only a portion of the land referred to in the schedule to the plaint). The petitioners were occupying only the boutique. The petitioners state that the said P.D.D. Karunanayake took possession from the 2nd defendant on 5.12.1998 and handed over possession to the petitioners.

The petitioners state that until the Fiscal came to take possession, and even thereafter, the petitioners were in possession of the boutique. The petitioners admit that they agreed to vacate the premises in a weeks' time. The substituted plaintiffs' having agreed to the extension of the time, the Fiscal had allowed one week for the petitioners to vacate the premises.

What is required to inquire in this case is whether under these circumstances the District Judge has inherent powers to inquire in to the petition filed by the petitioners. The petitioner admits in the petition filed on 6.1.2006 that on compulsion the petitioners gave an undertaking in writing to vacate the premises in a weeks' time. The petitioners had also agreed that in the event the petitioners fail to vacate, that the Fiscal would effect the execution by break opening the doors. However without leaving as agreed the petitioners

filed a petition and an affidavit in the District Court on 14.12.2005 under section 839 of the CPC.

Section 839 is as follows:-

Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court

“Under Section 839 of the CPC the court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. But the inherent power of the court cannot be invoked to violate the express provisions of the CPC” (MoonemalleJ in Stassen Exports Ltd. vs. Hebtulabhoy & Co. Ltd (1984) 1 Sri L.R. 129 at 143, Paulusz vs. Perera 34 NLR 438, Kamala vs. Andris 41 NLR 71, De Silva vs. De Silva 77 NLR 554). Are there any such express provisions? In the event the petitioners are dispossessed the remedy is under section 328 of the CPC which allows a person dispossessed to satisfy court that he was in possession on his own account. The section is as follows:-

328: Where any person other than judgment-debtor or a person in occupation under him is dispossessed of any property in execution of any decree, he may, within fifteen days of such dispossession, apply to the court by petition in which the judgment-creditor shall be named respondent complaining of such dispossession....Where the court is satisfied that the person disposed was in possession of the whole or part of such property on his own account or on account of some person other than the judgment debtor, it shall by order direct that the petitioner be put in to possession or part thereof, as the case may be.

I am of the view that the learned Judge rightly refused the application of the petitioners who sought the refuge of court under the inherent powers vested in court without following the specific procedure provided. Therefore leave to appeal is refused with costs.

Judge of the court of Appeal