

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

In the matter of an application
for leave to appeal

Court of Appeal No: CALA 169/2006

District Court of Mawanella No: 635/L

M.S.M. Musthafa

3rd Respondent-Petitioner

Vs.

1. S.L.S. Umma

Plaintiff-Petitioner-
Respondent

2. S.H.M. Yasean

Defendant-Respondent-
Respondent

3. Z.A.M. Alaufer

2nd Defendant-Respondent-
Respondent

Before: Eric Basnayake J

Counsel: M.S.A. Saheed for the 3rd Respondent-Petitioner

**S.N. Vijithsingh with Chitrananda Liyanage for the Plaintiff-Petitioner-
Respondent**

Argued on: 7.3.2011 & 8.7.2011

Written submissions tendered on: For the Plaintiff-Petitioner-Respondent:

7.10.2011

For the 3rd Respondent-Petitioner: 13.2.2012

Decided on: 7.8.2012

Eric Basnayake J

1. The 3rd respondent-petitioner (petitioner) had filed this leave to appeal application to have the order dated 27.4.2006 of the learned District Judge of Mawenella set aside. The petitioner is also seeking to have the application of the plaintiff-petitioner-respondent (plaintiff) dismissed. Leave to appeal was granted by this court on 24.9.2009.
2. The plaintiff filed this action against the defendant-respondent-respondent (defendant) to have the deed No. 165 of 5.5.1995 declared void and for ejection. Judgment was entered in favour of the plaintiff and a writ was issued. On 19.9.2005 when the Fiscal went to the premises to execute the writ the petitioner objected. The writ returned unexecuted. On 20.10.2005 the plaintiff

made an application under section 325 of the Civil Procedure Code. The plaintiff sought an order to reissue the writ. The petitioner filed objections to this application. One of the objections raised was that the application was out of time and cannot be maintained.

3. The learned Judge on 27.4.2006 overruled the objection and permitted the plaintiff to proceed with the Section 325 application by taking further steps under section 325 (2) of the CPC. The petitioner is seeking to have this order vacated.
4. In terms of section 325 of the CPC an application under this section should be made within a period of one month. Section 325 is as follows:-

(1): Where in the execution of a decree for the possession of movable or immovable property the Fiscal is resisted or obstructed by the judgment-debtor or any other person,.....**the judgment creditor may at any time within one month from the date of such resistance** or obstruction or hindrance or ouster, complain thereof to the court by a petition.....

Sub sections (2), (3) & (4) are not reproduced.

Submission of the learned counsel for the petitioner

5. The learned counsel for the petitioner submitted that in terms of the Interpretation Ordinance a month shall mean a calendar month. The learned counsel submitted that a calendar month is defined in Law Lexicon by Ramanatha Aiyer as “one calendar month imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding in the following month less one”. By following this interpretation this application is out of time by two days.

The resistance was on 19.9.2005. One month period ends on 18.10.2005. The application was made on 20.10.2005.

6. Oxford Advanced Learners Dictionary of Current English, seventh edition (2005) describes a calendar month as “a period of time from a particular date in one month to the same date in the next one”. By following the above definition the application should have been filed on 19.10.2005 (the resistance was on 19.9.2005).

Submission of the learned counsel for the plaintiff

7. The learned counsel for the plaintiff submits that the date of resistance should be excluded while calculating the period of one month. Accordingly the 19th should be excluded and the 20th considered as the first day. This application being filed on 20.10.2005 therefore falls within time. The learned counsel relied on the following judgments in support of his submission, namely; Sivapadasundaram vs. Pathmanandan (2004) B.A.L.J. 89 at 90, Sitamparanatha vs. Premaratne (1990) 2 Sri L.R. 202, Jinnadasa vs. Hemamali (2006) 2 Sri L.R. 300.
8. The calculation of dates on the above three cases are in connection with judgments. The court excluded the date of judgment while calculating the period

of prescription in filing an appeal. The present case is concerning resistance and therefore the judgments mentioned are not relevant.

9. The learned counsel mentioned two other cases namely D.L.S.L. Silva vs. Senanayake (S.C. 472/96 S.C. Minutes 27.5.1997) and Upasena & Hewakuruppu vs. Tea Commissioner S.C. 118/84 S.C. Minutes of 30.11.1984 (reported in Fundamental Rights by Jayampathy Wickramaratne at pg. 842). However these two cases have not excluded the date of the alleged violation. Therefore these two cases cannot be considered as supporting the submission of the learned counsel. Considering the fact that these two cases reckon the date of violation while counting the 30 day period, it would support the submissions of the learned counsel for the petitioner.

10. In terms of the Interpretation Ordinance one month means one calendar month. By following the explanation in the Oxford Dictionary with regard to a calendar month where the learned counsel for the plaintiff concedes, one month is computed from a particular date of the previous month to the corresponding date of the current month i.e. 19th September to 19th October. 20th October would therefore be out of time.

11. The learned Judge himself has considered that this application was filed one day outside one month. However the learned Judge has conceded that by allowing this application to remain it would not cause prejudice to anyone.

12. I am of the view that the learned Judge has erred in not upholding the objection and therefore the order dated 27.4.2006 is set aside. Considering the fact that this application of the plaintiff was filed out of time, the same is dismissed. The petitioner's appeal is allowed with costs.

Judge of the court of Appeal