

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

Court of Appeal No: CA 1908/2005 (Revision)

District Court of Marawila No: 897/SPL

In the matter of an
application in revision

S.De S. Wettasinghe

Respondent-Petitioner

Vs.

1. M.C. Thenuwara
(wrongly mentioned as
Tennakoon)

Petitioner-Respondent

Before: **Eric Basnayake J**

Counsel: Chula Bandara for the Respondent-Petitioner
Hiran De Alwis for the Petitioner-Respondent

Argued On: 9.6.2011

Written Submissions Tendered On: For the Respondent-Petitioner-1.10.2006 & 1.6.2009
For the Petitioner-Respondent-11.10.2006

Decided On: 20.6.2011

Eric Basnayake J

The respondent-petitioner (respondent) filed this revision application on 8.11.2005 *inter alia* to have the orders dated 12.2.2004, 18.11.2004, 4.10.2005 and 27.10.2005 of the learned District Judge of Marawila set aside. The petitioner-respondent (petitioner) instituted action in the District Court of Marawila praying *inter alia*, for an order cancelling a caveat registered by the respondent in the Land Registry of Marawila. The petitioner also claimed a sum of Rs.1187500 as damages.

The caveat was registered in respect of the land described in the 2nd schedule to the petition dated 21.1.2004. The extent of this land is 25.97 perches. This land is depicted in plan No 1297 prepared by K.G.G. C. Gunasekera, Licensed Surveyor. The petitioner stated in the petition that this land was allotted to the plaintiff in partition case No. 68/P filed in the District Court of Marawila. The respondent was the 2nd defendant. Pending the partition case the plaintiff had gifted whatever rights he would get from the final decree to the petitioner by deed No. 5038 of 20.1.1996 attested by Wckramarachchi Karunaratne Notary Public.

The final decree of the partition case was entered on 23.10.1999 and possession was handed over to the substituted plaintiff by the Fiscal on 2.10.2002. The petitioner states that she got possession from the substituted plaintiff. The petitioner states that she entered into a sales agreement No. 18772 on 29.11.2001 with one P. Benedict Fernando to sell this land for a sum of Rs.1187500. While the sales agreement was in force the respondent on 8.10.2002 filed a caveat under section 32 (1) of the Land Registration Ordinance for a period of two years. The petitioner states that as a result of this caveat the sale did not realise and the petitioner suffered a loss to the value of Rs1187500. This action was filed by the petitioner in the District Court to have the caveat cancelled and to recover this amount from the respondent.

Decree nisi was entered on 12.2.2004. The decree nisi was entered again on 3.6.2004 and as the court found later that the decree nisi was served on the respondent on 3.8.2004 it was made absolute on 18.11.2004. Writ of execution was issued on 28.2.2005. On 6.4.2005 the respondent filed application in the District Court under section 839 of the Civil Procedure Code to vacate the decrees nisi and absolute and to recall the writ. When this matter was supported the court made order to recall the writ and held an inquiry. At the inquiry submissions were made by counsel for both parties and the court made order on 4.10.2005 dismissing the respondent's application. The respondent complained that an appeal filed was rejected. Thereafter the respondent filed an application under section 389 of the Civil Procedure Code which too was rejected. The respondent is now seeking to have all these orders set aside.

When this application was taken up for argument the learned counsel for the petitioner raised a preliminary objection with regard to the maintainability of this application. The preliminary objection is that while the respondent has an alternative remedy, namely, to seek redress under section 389 of the Civil Procedure Code, the petitioner cannot invoke revisionary jurisdiction. In *W.K.M.D. Perera vs. People's Bank* (1994) 2 Sri L.R. 384 an order absolute was made on default of the petitioner appearing. Ranaraja J held that the petitioner should seek his remedy under section 389 of the Civil Procedure Code and not by way of revision.

Section 389 is as follows:-

389: No appeal by a respondent shall lie against any final order which has been made, in the case of respondent's non-appearance, on the footing of either an order nisi or an interlocutory order in the matter of a petition; but it shall be competent to the court, within a reasonable time after the passing of such order, to entertain an application in the way of summary procedure instituted by any respondent against whom such order has been made, to have such final order set aside upon the ground that the applicant had been prevented from appearing after notice of the order nisi or interlocutory order by reason of accident or misfortune, or such order nisi or interlocutory order had never been served upon him. And if the ground of such application is duly established to the satisfaction of the court, as against the original petitioner, the court may set aside the final order complained of upon such terms and conditions as the court shall consider it just and right to impose upon the applicant, and upon the final order being so set aside, the court shall proceed with the hearing and determination of the matter of the original petition as from the point at which the final order so set aside was made (emphasis added).

In *Ramanayake vs. Sampath bank Ltd.* (1993) 1 Sri L.R. 145 it was held that a decree absolute entered against a defendant for non-appearance cannot be challenged on merits, but could have been set aside by curing the default by taking steps under section 389 of the Civil Procedure Code by summary procedure within a reasonable time.

The learned counsel for the respondent submitted that when the respondent learnt about the decree absolute the appealable period had lapsed. Hence the petitioner was compelled

to file an application under section 839. It appears that the application under section 839 was filed after the issue of writ. With the filing of this application under section 839 the court recalled the writ and held an inquiry. The respondent had taken up the position in the body of the petition filed under section 839 that the decree nisi was not duly served on the respondent. However at this inquiry no attempt whatsoever was made to satisfy court on the ground that the decree nisi was not served on the respondent. No application was made to call the respondent or any other witnesses to prove that the order nisi was not served on the respondent. The inquiry was concluded with the submissions of counsel. After inquiry the court dismissed the respondent's application.

An appeal filed by the respondent was rejected. Thereafter the respondent filed an application under section 389 of the Civil Procedure Code. The application filed under section 389 appears to be identical to the application filed under section 839 which was dismissed. In this application section 389 was swapped in place of section 839. This too was rejected.

The learned Judge has stated in the order dated 4.10.2005 that she was satisfied with regard to the service of the decree nisi on the respondent. I do not see anything contrary to this position. Considering the legal position I uphold the objection that the respondent has no right of appeal. As the respondent does not aver any exceptional circumstances to invoke the jurisdiction of this court the respondent's application is dismissed with costs.

Judge of the court of Appeal