

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

In the matter of an application by way of
Leave to Appeal.

C.A.L.A. No. 493/06

DC Kandy 20456/L

Manel Dissanayake
1/38, Heerassagala Road,
Kandy.

2nd Defendant-Petitioner.

Vs

Hettiarachchige Manel alias Manel
Hettiarachchi
2/38, Heerassagala Road
Kandy.

Planintiff-Respondent.

1. Victor Seneviratne
1/38, Heerassagala Road
Kandy.
- 3 Seetha Chandrasekara
32, Heerassaga.a Road
Kandy. (Now Deceased)

1st and 3rd Defendant-Respondent

AND

3A. Indrani Dissanayake
32, Heerassagala Road
Kandy.

3A Defendant-Respondent

BEFORE

: Deepali Wijesundera J.

M.M.A. Gaffoor J.

COUNSEL

: H. Withanachchi for the
2nd Defendant-Petitioner.

M. Premachandra for the
Plaintiff-Respondent.

ARGUED ON

: 10th March, 2015.

DECIDED ON

: 05th October, 2015.

Deepali Wijesundera J.

The plaintiff Respondent has instituted an action against the 1st, 2nd and 3Ard defendant petitioners in the District Court of Kandy for a declaration of title and for ejectment and vacant possession of the portion of land they are alleged to have encroached. At the trial the 1st and 2nd defendant petitioners have agreed to a judgment to be given after

inspection and court had inspected the land in issue and a consent judgment was entered in terms of the settlement (P4). The 3A defendant petitioner has never come to court and an ex parte decree was entered after recording the plaintiff's and the surveyor's evidence. When the fiscal had gone to execute the decree the 1st and 2nd defendant respondents have objected and an inquiry was held by the District Judge and an order was given refusing their objections. The instant application had been filed against the said order of the District Judge of Kandy delivered on 18/12/2006.

The petitioner's argument is that the ex parte order given against the 3rd defendant has affected the rights of the 1st and 2nd defendants by part of their house getting included in the carpus mentioned in the order given. The petitioners stated that the ex parte judgment can only be executed against the 3A defendant and not against the 1st and 2nd defendants. Petitioners further stated the settlement judgment and the ex parte judgment are in conflict and to permit the plaintiff respondent to execute writ against 3A defendant would amount to an abuse of the process of court. Petitioner stated the ex parte judgment against the 3A defendant can only be executed against the 3A defendant without causing prejudice to the judgment entered after inspection.

The plaintiff respondent stated that the 1st and 2nd defendant petitioners claimed to be the tenants of the 3A defendant petitioner and the exparte judgment given against the 3A defendant was entered on the same day the settlement judgment was entered, after the plaintiff's and the surveyor's evidence was recorded. The surveyor has stated that an extent of about two perches of land has been encroached on to from the plaintiff's land to Lot 3 which is owned by the 3A defendant which the 1st and 2nd defendants are occupying as tenants. This is state in plan No. 2003-40 and the surveyor in his evidence to court also has stated this.

The defendant respondent stated that **P5** decree was entered based on these judgments and subsequently amended on 25/11/2004 which is marked as **P6**. According to the amended decree writ of possession was to be executed for ejection of the defendants and all those who are holding under them from the southern boundary of the land described in the schedule.

The plaintiff respondent has filed contempt papers in court for obstruction caused by 1st and 2nd defendant petitioners while the contempt case was pending the 2nd defendant petitioner had filed the instant application.

The plaintiff respondent stated since the 1st and 2nd respondents are 3A defendant's tenants and that they are residing in the house and that the judgment against the 3A defendant gave right to the plaintiff respondent to a judgment as prayed for in the plaint against all the defendants. The plaintiff respondent further stated the said judgment allowed the ejectment of the defendant and all those who are holding under the defendant. The plaintiff respondent further stated that the 1st and 2nd defendants have not claimed or proved an independent title from the 3A defendant but admitted and prayed from a declaration to be the tenant of the 3A defendant and they are bound by any judgment against the 3A defendant as the undisputed lawful owner of the said land.

All parties have not disputed the fact that the 1st and 2nd defendant petitioners are tenants of the 3A defendant and is in occupation of the house belonging to the 3A defendant according to the plant No. 2003-40 a strip of two perches of land belonging to the plaintiff's land had been encroached by 3A defendant, the land shown as Lot 3 is occupied by 1st and 2nd defendants. The exparte judgment given against the 3A defendant petitioner on this issue have not been challenged by the 3A defendant. The prayer to the plaintiff respondent's plaint to evict the defendants which includes the 1st and 2nd defendants as well has not been challenged in appeal by the 3A defendant. The exparte judgment stands unchallenged.

The learned District Judge has carefully analysed the documents and evidence placed before him and quite correctly refused the objections of the 1st and 2nd defendant petitioners and allowed the plaintiff to execute decree of the District Court.

For the afore stated reasons I decide to refuse the application of the petitioner respondent. The application of the petitioner is dismissed with costs fixed at Rs. 50,000/=.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor J.

I agree

JUDGE OF THE COURT OF APPEAL