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

K.V.Tatty De Silva,
Batticaloa Road,
Bibile.

Plaintiff-Petitioner

C.A.REVISION APPLICATION NO. 25/2005

D.C.MONARAGALA CASE NO.RE/1325

VS

Pakeer Saibo Adam Lebbe,
Suhara Stores,
Opposite Bibile Rest House,
Bibile.

Defendant-Respondent

BEFORE : **ERIC BASNAYAKE, J.**

K.T.CHITRASIRI, J.

COUNSEL : Vijayan Perera, Attorney-at-Law for the Plaintiff-Petitioner

Malaka Herath, Attorney-at-Law for the Defendant-Respondent

ARGUED ON : 15.01.2010

WRITTEN SUBMISSIONS FILED ON : 04.03.2009 by the Defendant-Respondent
22.07.2009 by the Plaintiff-Petitioner

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DECIDED ON : 30.04.2010.

K. T. CHITRASIRI,J.

The Plaintiff-Petitioner (hereinafter referred to as the plaintiff) filed plaint against the defendant-respondent (hereinafter referred to as the defendant) in the District Court of Monaragala seeking *inter-alia* that the defendant, his servants and all others who claim rights derive from the defendant, be ejected from the premises referred to in the schedule to the plaint and to place the plaintiff in possession thereof. (A copy of the plaint is filed marked õXö with the written submissions of the defendant). The defendant, though the summons was served on him, did not turn up in the District Court. Consequently, the case was fixed for trial *ex-parte* and the same was taken up for trial on the 22nd of August 1990 by the then learned District Judge. At the said trial, the plaintiff gave evidence and the judgment was delivered on that date itself. Accordingly, the decree was entered in terms of the judgment delivered. Those proceedings and the decree marked õP1ö had been annexed to the petition to this Court. Journal entry dated 12th December 1990 shows that the aforesaid decree had been served on the defendant. Admittedly, no application had been made within a period of two weeks from the date of service of the decree by the defendant to purge the default.

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Subsequently, the plaintiff upon filing a motion moved Court on the 27th of September 2000 to obtain writ of execution in order to obtain possession of the premises in suit. Consequently, learned District Judge issued notice of this application of the plaintiff on the defendant. Defendant upon receiving the said notice, appeared in Court and objected to the issue of writ on the basis that a period of ten years have lapsed by the time the application for writ was made from the date of the decree. However, the learned District Judge made order refusing the application of the plaintiff on the basis that the land in question had been acquired by the State after entering the decree.

Having dissatisfied with this order of the learned District Judge, plaintiff made another application, relying upon Section 839 of the Civil Procedure Code. In that application plaintiff sought to set aside the earlier order of the learned District Judge dated 12th July 2004 and renewed his application to obtain the writ of possession. This application of the plaintiff was also rejected by the learned District Judge by his order dated 24th November 2004. The plaintiff, being aggrieved by the said order, made this application invoking revisionary jurisdiction of this Court.

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In these circumstances, it is clear that the contention of the plaintiff is to obtain writ of possession of the premises referred to in the schedule to the plaint dated 4th October 1989 filed in the District Court of Monaragala in accordance with the decree that had already been entered. This is clearly evident by the averments and most importantly by the prayer in the petition dated 18th August 2004 marked õP6ö filed in the District Court of Monaragala. This application of the plaintiff was refused and accordingly the learned Judge made the impugned order dated 24th November 2004. Therefore, it is clear that the issue in this case is whether the plaintiff is entitled to obtain writ of execution in terms of the decree that had been entered.

Learned Counsel for the defendant referring to section 337 of the Civil Procedure Code has argued that the plaintiff is not entitled to obtain writ of execution for a decree that had been entered ten years before the date of the application for same. Hence, I will now examine the way in which the said Section 337 of the Civil Procedure Code should be interpreted.

Section 337 of the Civil Procedure Code reads thus:

(1) õ**No** ***application*** *(whether it be the first or a subsequent application)* ***to execute a decree****, not being a decree granting an injunction,* ***shall be granted after the expiration of ten years from –***

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*(a) **the date of the decree sought to be executed** or of the decree, if any, on appeal affirming the same; or*

(b) where the decree or any subsequent order directs the payment of money or the delivery of property to be made on a specified date or at recurring periods, the date of the default in making the payment or delivering the property in respect of which the applicant seeks to execute decree."

(2) *" Nothing in this section shall prevent the court from granting an application for execution of a decree after the expiration of the said term of ten years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within ten years immediately before the date of the application."*

(3) *"Subject to the provisions contained in subsection (2), a writ of execution, if unexecuted, shall remain in force for one year only from its issue, but -*

(a) such writ may at any time before its expiration, be renewed by the judgment-creditor for one year from the date of such renewal, and so on from time to time; or

(b) fresh writ may at any time after the expiration of an earlier writ be issued, till satisfaction of the decree is obtained.

The Section mentioned herein before states that no application to execute a decree shall be granted after the expiration of ten years from the date of the decree unless any evidence is established to prove matters mentioned in sub paragraph (2) above.

Admittedly, the judgment in this case had been delivered on the 22nd of August 1990. Thereafter, as required by law, a decree also had been entered even though it was filed on a date subsequent to the date of the judgment. At this stage, it must be noted that the decrees are necessarily filed after the date of the judgment since it takes time to prepare the decree to have a concise statement of the judgment. Thus, the decree in this case also had been filed subsequent to the date of the judgment. However, the decree found in the case record that had been signed by the learned District Judge bears the same date as of the judgment namely 22nd August 1990. Therefore, on the face of the decree filed of record shows that the date of the decree is the said date 22nd August 1990.

Relevant provision in law as to the date of the decree is the **Section 188** of the Civil Procedure Code. It stipulates:

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> *" As soon as may be after the judgment is pronounced,* ***a formal decree bearing the same date as the judgment shall be drawn up by the court*** *in the form No.41 in the First Schedule or to the like effect, specifying in precise words the order which is made by the judgment in regard to the relief granted or other determination of the action. The decree shall also state by what parties and in what proportions costs are to be paid, and in cases in the Primary Courts shall state the amount of such costs. The decree shall be signed by the Judge".*

The aforesaid section describes the way in which a decree of court should be prepared. Accordingly, a duty is cast upon the Court, and not on the parties to the action, to draw up the decree in the manner described therein. Section 188 further states that õdecree should bear the same date as of the judgmentö. This section does not envisage to have a date in the decree, different to the date of the judgment even if the judgment had been delivered after a trial taken up *ex-parte*.

However, the learned Counsel for the plaintiff referring to the authorities mentioned herein below has contended that the judgment in this case being an *ex-parte* judgment, **the ten year period referred to in Section 377 of the Civil Procedure Code would commence to operate only from the date on which the judgment-creditor (Plaintiff in this instance) became entitled to make the application for writ of execution**. Hence, I will now consider the authorities

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referred to by the learned Counsel for the plaintiff since it is the sole issue in this instance. He has referred to the cases of:

- **Appuhamy Vs Fonseka and another**[1] **and**
- **Brooke Bond (Ceylon) Ltd. Vs. Gunasekera**[2]**.**

Both these authorities are in relation to the issue of a writ pending a final appeal filed against the judgments in those two cases. Nothing had been discussed in these judgments as to the date that should appear in a decree. Therefore, those two judgments have no relevance to the issue at hand.

However, the learned Counsel for the plaintiff basically relied upon the case of **Jayasekera Vs Herath and another**[3]**.** Justice Jayawickrama who pronounced the said judgment had relied upon the decision in the case of **Haji Omar vs. Bodhidasa**[4] wherein it was held that the period of ten years referred to in Section 337(1) of the Civil Procedure Code commences to operate only from the date on which the **judgment-creditor becomes entitled** to make an application for writ. Following this rule **Jayawickrama J. in jayasekara vs. Herath and another** (supra) has held thus:

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[1] **(1996) 2 SLR at page 130**
[2] **(1990) 1 SLR 71.**
[3] **(1999) B.L, R, Volume 8 at page 56**
[4] **1994 (2) S L R 191**

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"Learned Counsel for the substituted-plaintiff-respondent-petitioner submitted that once an application is made under Section 86(2), the exparte decree is unenforceable until the Court dismisses the application of the defendant and if the defendant lodged an appeal against the said dismissal until a decree in an appeal is passed under Section 776 of the Civil Procedure Code and therefore, the period of ten years should be calculated in an exparte decree from the date the said decree becomes enforceable. In the instant case, the 2nd defendant-respondent who was served with the exparte decree, filed petition and affidavit on 24.06.1985 to vacate the said exparte order. On receipt of the same the Court fixed the inquiry into the said application on 28.07.1987. On that date, the 2nd defendant-respondent agreed to pay Rs.500/= to the plaintiff.

Learned Counsel contended that therefore the exparte decree entered in this case becomes enforceable only on 28.07.1987. However, in terms of Section 88 of the Civil Procedure Code amended by Act No. 53 of 1980, the plaintiff is not entitled to apply for writ until the appealable period of 14 days is passed in terms under Section 88(3) of the Civil Procedure Code.

Therefore the learned Counsel argued that in the instant case, the plaintiff-petitioner became entitled to make an application for execution of writ only on 11.08.1987 and the period of ten years referred to in Section 337(1) commenced to operate from 12.08.1987 and expired on 11.08.1997 and the last application for the execution of writ was made by the plaintiff-petitioner on 28.06.1996 within the period of ten years.

I agree with the submissions of the learned Counsel for the substituted-plaintiff-respondent-petitioner in this regard."

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The above mentioned authorities clearly state that the period of ten years referred to in Section 377(1) of the Civil Procedure Code commences to operate only from the date on which the judgment-creditor becomes entitled to make an application for the writ of execution in respect of the cases where the decree had been entered upon an *ex parte* trial. In the case at hand, the date of the decree had been the 22nd August 1990 and it was served on the defendant on the 27th November 1990. (Journal entry dated 12.12.1990) Plaintiff made the application for writ by way of a motion on the 27th September 2000. (Journal entry dated 27.09.2000) Thus, it is clear that the plaintiff had made the application for writ, well within the period of ten years from the date that he became entitled to make the said application. Therefore, it is my considered view that the plaintiff in this instance is not barred from obtaining the writ of possession despite the fact that the application for same had been made after 10 years from the date of the decree.

For the aforesaid reasons, I set aside the orders of the learned District Judge dated12.07.2004 and 24.11.2004. Learned District Judge is directed to issue the writ of possession as moved by the plaintiff.

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Circumstances of this case do not warrant ordering the costs for making this application.

JUDGE OF THE COURT OF APPEAL

ERIC BASNAYAKE,J.

I agree

JUDGE OF THE COURT OF APPEAL