

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

In the matter of an Appeal

P.S. Kodithuwakkuarachchi  
No.615/1, Peradeniya Road,  
Kandy.

**Plaintiff**

SC Appeal 09/2014  
SC/HC/CALA 60/2010  
CP/HCCA/867/2002  
DC Kandy No.19479/L

Vs-

Dr. Hema Bandara Jayasinghe  
No 23/4, Dalada Veediya,  
Kandy.  
Presently of  
No.72/32, Sri Pushpadana Road,  
Kandy.

**Defendants**

AND THEN BETWEEN  
P.S. Kodithuwakkuarachchi  
No.615/1, Peradeniya Road,  
Kandy.

**Plaintiff-Appellant**

Vs

Dr. Hema Bandara Jayasinghe  
No 23/4, Dalada Veediya,  
Kandy.

Presently of  
No.72/32, Sri Pushpadana Road,  
Kandy.

**Defendant-Respondent**

AND NOW BETWEEN

Dr. Hema Bandara Jayasinghe  
No 23/4, Dalada Veediya,  
Kandy.

Presently of  
No.72/32, Sri Pushpadana Road,  
Kandy.

**Defendant-Respondent-Appellant**

Vs

P.S. Kodithuwakkuarachchi  
No.615/1, Peradeniya Road,  
Kandy.

**Plaintiff-Appellant-  
Respondent[Deceased]**

- 1A. Pandith Sekera Arachchige Premawathi
- 1B. Latha Kodithuwakku Arachchi
- 1C. Gamini Kodithuwakku Arachchi
- 1D. Ubahaya Kodithuwakku Arachchi
- 1E. Ramani Kodithuwakku Arachchi
- 1F. Sarath Kodithuwakku Arachchi

Before: Sisira J de Abrew J  
Murdu Fernando PC, J &  
P.Padman Surasena J

Counsel: Nihal Jayamanne PC with Noorani Amarasinghe for the  
Defendant-Respondent-Appellant  
Kamran Aziz with Ershan Ariaratnam for the Substituted  
Plaintiff-Appellant-Respondent

Written submission

tendered on : 10.6.2019 and 24.2.2014 by the Defendant-Respondent-Appellant  
3.6.2019 by the Plaintiff-Appellant-Respondent

Argued on : 27.5.2019

Decided on: 28.6.2019

Sisira J. de Abrew, J

The Plaintiff-Appellant-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action in the District Court of Kandy against the Defendant-Respondent-Appellant (hereinafter referred to as the Defendant-Appellant) seeking a declaration that he is the owner of the property in dispute. The learned District Judge by his order dated 8.3.2002 decided the case on issues No.16 to 21 raised by the Defendant-Appellant and dismissed the case of the Plaintiff-Respondent without recording any evidence. Being aggrieved by the said order of the learned District Judge the Plaintiff-Respondent appealed to the Civil Appellate High Court and the learned Judges of Civil Appellate High Court by judgment dated 28.1.2010, set aside the said order of the learned District Judge and directed the learned District Judge to hear the case from the beginning. Being aggrieved by the said judgment of the Civil Appellate High Court, the Defendant-Appellant has

appealed to this court. This court by its order dated 27.1.2014 granted leave to appeal on questions of law set out in paragraphs 13 (a),(b),(c),(d),(e),(f),(g),(h),(i) of the petition of appeal dated 10.3.2010 which are set out below.

1. Did the Honourable High Court of Kandy fail to take into consideration the admissions recorded on behalf of the parties in the District Court of Kandy?
2. Did the Honourable High Court of Kandy fail to consider the fact that the order made by the District Court under Section 328 of the Civil Procedure Code in DC Kandy Case No.2315/RE and confirmed by the order of the Court of Appeal and by the order of the Supreme Court is res-judicata and/or binding between the parties in respect of the finding of facts and of law?
3. Did the Honourable High Court of Kandy fail to take into consideration the fact that there is a finding in the order referred to above that the owner of the premises is the Municipal Council of Kandy and that the Plaintiff-Respondent was aware of the said fact?
4. Did the Honourable High Court misdirect itself in concluding that the Defendant-Petitioner was holding under Dr. Rajendra the Defendant in Case No.2315/RE which in fact the order given in respect of Section 328 inquiry by the District Court, the Court of Appeal and the Supreme Court had come to the definite finding that the Defendant-Petitioner was not liable to be ejected in the execution of writ as he was not a person bound by the decree and he was not a person holding under the Judgment-Debtor (Dr.Rajendra-the Defendant in case No.2315/RE)?
5. Did the Honourable High Court of Kandy fail to take into consideration the finding of the District Court, the Court of Appeal and the Supreme Court the

orders made in respect of the 328 inquiry that the premises belong to the Municipal Council Kandy and that the Defendant-Petitioner was the lawful tenant of the premises under the lawful owner the Kandy Municipal Council?

6. Did the Honourable High Court of Kandy fail to consider the fact that the Plaintiff-Respondent's action is an action for declaration of title (rei vindicatio action) and ejectment and admittedly Municipal Council Kandy is the lawful owner and that the Plaintiff-Respondent has admittedly no title and that Plaintiff had deliberately failed to disclose the fact and make the Municipal Council Kandy a party?
7. Did the Honourable High Court of Kandy fail to consider the fact that the Plaintiff-Respondent had sought only a declaration of title to the 2<sup>nd</sup> Schedule to the Plaint whereas the title pleaded is to the 1<sup>st</sup> Schedule and no determination of title was sought in respect of the land described in the 1<sup>st</sup> Schedule?
8. Did the Honourable High Court of Kandy fail to consider the fact that the Plaintiff-Respondent could not have and maintain this action without a declaration of title to the land described in the 1<sup>st</sup> Schedule?
9. Did the Honourable High Court of Kandy come to a wrong finding in setting aside the judgment of the learned District Judge in the teeth of the admitted factual and legal positions relating to this action established and determined by the order of the District Judge in the 328 inquiry in case No.2315/RE and in view of the orders of the Court of Appeal and the Supreme Court confirming the conclusions of the District Judge?

The facts of this case may be briefly summarized as follows.

The Plaintiff-Respondent filed a case bearing Number 2315/RE in the District Court of Kandy against one Dr.Rajendra who was his tenant and after trial the learned District Judge decided the case in favour of the Plaintiff-Respondent. The Plaintiff-Respondent executed the writ against Dr.Rajendra. As a result of the execution of the said writ Dr. Jayasinghe who is the Defendant-Appellant in the present case too was ejected. The Plaintiff-Respondent alleged that Dr.Rajendra had sub-let the premises to Dr. Jayasinghe. Later Dr. Jayasinghe who is the the Defendant-Appellant in the present case filed a petition in the District Court under Section 328 of the Civil Procedure Code (CPC) moving that he be restored in possession of the premises in suit. After an inquiry the learned District Judge restored Dr.Jaysinghe, the Defendant-Appellant in the present case in possession of the property in suit. The appeal (CA 555/98-DC Kandy 2315/RE) filed by the Plaintiff-Respondent against the said order was dismissed by the Court of Appeal by its judgment dated 7.9.1998 and this court refused to grant leave to appeal against the judgment. The Court of Appeal in the said judgment (CA 555/98-DC Kandy 2315/RE) has stated that the Municipal Council Kandy is the owner of the property in dispute. However the Plaintiff-Respondent filed the present case [case No. 19479/L] against Dr. Jayasinghe seeking a declaration that he is the owner of the property in dispute. In the present case [case No. 19479/L] the learned District Judge by order dated 8.3.2002 dismissed the case of the Plaintiff-Respondent on the basis that the Court of Appeal in case No. CA 555/98-DC Kandy 2315/RE had stated that the owner of the property in dispute was Municipal Council Kandy.

Learned President's Counsel for the Defendant-Appellant contended that the Plaintiff-Respondent could not maintain the present case as the Court of Appeal in

case No. CA 555/98-DC Kandy 2315/RE had decided that the owner of the property was Municipal Council Kandy. I now advert to this contention.

It has to be noted here that the learned District Judge in DC Kandy 2315/RE case restored Dr. Jayasinghe who is the Defendant-Appellant in the present case in possession on an application made under Section 328 of the CPC. The Court of Appeal stated that the owner the property in dispute was the Municipal Council Kandy in an appeal filed against the said order of the learned District Judge. In an inquiry under Section 328 of the CPC, can the court declare that a party or any other person is the owner of the property? It has to be noted here that the Municipal Council Kandy was not even a party in the inquiry under Section 328 of the CPC. At this stage it is necessary to consider Section 328 of the CPC which reads as follows.

*Where any person other than the judgment-debtor or a person in occupation under him is dispossessed of any property in execution of a 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. The court shall thereupon serve a copy of such petition on such respondent and require such respondent to file objections, if any, within fifteen days of the service of the petition on him. Upon such objections being filed or after the expiry of the date on which such objections were directed to be filed, the court shall, after notice to all parties concerned, hold an inquiry. Where the court is satisfied that the person dispossessed 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 into possession of the property or part thereof, as the case may be. Every inquiry under this section shall be concluded within sixty days of the date fixed for the filing of objections.*

In this connection it is important to consider the judgment of Bonser CJ in the case of Rosahamy Vs Diago 3 NLR 203 wherein His Lordship held as follows.

*“The investigation on an application numbered and registered as a plaint under section 328 of the Civil Procedure Code should be limited to the question as to whether the applicant is entitled to be restored to possession of the property claimed by him. The question of title to the property should not be gone into.*

*The final order on such application should not be in the form of a decree in a regular suit, but one merely directing that the applicant be restored to possession.”*

In the case of Pathirana Vs Ahangama [1982] 1 SLR 392 Court of Appeal held as follows.

*“in an action under Section 328 of Civil Procedure Code the only question that arises is that of possession and not title.”*

After studying Section 328 of the CPC, I hold that in an inquiry under Section 328 of the CPC, court cannot declare that a party or any other person is the owner of the property; and that the court cannot make a declaration regarding the title of the property in suit. I further hold that in an inquiry under Section 328 of the Civil Procedure Code there is no title investigation regarding the ownership of the property; and that it is an inquiry on the question whether or not the claimant should be restored in possession of the property in suit.

Considering all the above matters, I hold that an order made in an inquiry under Section 328 of the CPC cannot operate as res-judicata in a case of declaration of title. This view is supported by the judicial decision in the case of Ponnampalam Vs Murugasar 4 NLR 296 wherein Bonser CJ held as follows.

*“M., being a decree-holder in D. C. case No. 24,475 against G., caused a certain land to be seized in execution as the property of G. P. claimed the land. On the District Judge rejecting his claim, he sued M. and G. to have it declared that the land Was not liable to be seized by M., and that it may be declared P.'s property.*

*M. pleaded the judgment in D. C. case No. 288 as res judicata, Whereby P.'s claim to part of the same land, upon a seizure made by another judgment-creditor of G., was rejected.*

*Held, that such judgment was not res judicata, though it may serve as evidence against P.”*

Considering all the above matters, I hold that when the learned District Judge decided to dismiss the action of the Plaintiff-Respondent on the basis of the findings of the inquiry under Section 328 of the CPC, he was wrong and that the said decision cannot be permitted to stand.

It was also submitted that the Plaintiff-Respondent could not maintain this action since he had failed to make Municipal Council Kandy a party. When considering this contention it is important to consider section 17 of the CPC which reads as follows.

*"No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*

*Nothing in this Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action.*

*If the consent of anyone who ought to be joined as a plaintiff cannot be obtained, he may be made a defendant, the reasons therefor being stated in the plaint.”*

In the case of Dingiri Appuhamy Vs Talakolawewa Pangananda Thero 67 NLR 89 His Lordship Justice Abeysundera at page 90 held as follows.

*“There is no provision in the Civil Procedure Code or any other law requiring an action to be dismissed where there is a misjoinder of causes of action. It was improper for the learned District Judge to have dismissed the action of the plaintiffs on the ground of misjoinder of defendants and causes of action without giving an opportunity to the plaintiffs to amend their plaint.*

When I consider Section 17 of the CPC and the above legal literature, I hold that

no action can be dismissed by the District Court on the ground of non-joinder or misjoinder of parties without giving an opportunity for the plaintiff to amend the plaint.

The learned Judges of the Civil Appellate High Court by judgment dated 28.1.2010, have set aside the order of the learned District Judge dated 8.3.2002. For the above reasons, I hold that the learned Judges of the Civil Appellate High Court were correct when they set aside the above order of the learned District Judge. In view of the conclusion reached above, I answer the above questions of law in the negative.

For the above reasons, I affirm the judgment of the Civil Appellate High Court and dismiss this appeal with costs.

*Appeal dismissed.*

Judge of the Supreme Court.

Murdu Fernando PC J

I agree.

Judge of the Supreme Court.

P.Padman Surasena J

I agree.

Judge of the Supreme Court.

