

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

Bulathgama Wedalage Nirasha,
No. 106, Ranwala, Kegalle.

By way of her Power of Attorney
Holder Bulathgama Wedalage
Shamith Shiwantha Bulathgama
Weerasinghe,
68/3, Attanagalla Road,
Dangolla Watta, Nittambuwa.
Petitioner-Respondent-Appellant

SC APPEAL NO: SC/APPEAL/04/2023

SC LA NO: SC/HCCA/LA/222/2020

HCCA KEGALLE NO: SP/HCCA/KAG/05/2019/LA

DC KEGALLE NO: 148/C

Vs.

Rathna Bhushana Acharige
Wimalasena,
No. 290, Ranwala, Kegalle.
1st Defendant-Petitioner-
Respondent

Bulathgama Wedalage Piyasena,
No. 106, Ranwala, Kegalle.
Plaintiff-Respondent-Respondent

Seylan Bank Limited,
Ceylon Seylan Towers,
No. 90, Galle Road, Colombo 03.

2nd Defendant-Respondent-
Respondent

Before: Hon. Justice S. Thurairaja, P.C.
Hon. Justice Mahinda Samayawardhena
Hon. Justice K. Priyantha Fernando

Counsel: Jagath Wickramanayake P.C. with Pujanee De Alwis for the
Petitioner-Respondent-Appellant.
Sapumal Bandara with Gangulali De Silva Dayarathna for
the 1st Defendant-Petitioner-Respondent.
Lahiru Welgama for the Plaintiff-Respondent-Respondent.
Chamath Jayasekera for the 2nd Defendant-Respondent-
Respondent.

Written Submissions:

By the Petitioner-Respondent-Appellant on 27.02.2023
By the 1st Defendant-Petitioner-Respondent on 09.05.2023
and 02.08.2023

Argued on: 27.06.2023

Decided on: 13.02.2024

Samayawardhena, J.

In the execution of the decree in Case No. 6482/L of the District Court of Kegalle, the appellant together with her family was ejected by the fiscal on 07.12.2016. The appellant filed a separate application in the District Court of Kegalle (148/C) under section 328 of the Civil Procedure Code

within fifteen days of dispossession by way of petition and affidavit with supporting documents seeking to restore her to possession. At the inquiry into this application, the judgment-creditor (the 1st defendant-petitioner-respondent) raised a preliminary objection to the maintainability of the application on the basis that the appellant ought to have made the application in the main case (6482/L) rather than in a separate case. The learned District Judge by order dated 31.01.2019 overruled this preliminary objection emphasizing that there is a serious matter to be looked into (which I will advert to later) and fixed the main application for inquiry.

The judgment-creditor filed an appeal with leave obtained in the High Court of Civil Appeal of Kegalle against the said order of the District Court. The High Court by its judgment dated 10.07.2020 set aside the order of the District Court on the basis that a separate action cannot be filed seeking relief under section 328 of the Civil Procedure Code.

This Court granted leave to appeal against the judgment of the High Court on the following two questions of law as formulated by the appellant:

- (a) Did the Provincial High Court of Civil Appeal err in law by failing to appreciate that the petitioner's application under section 328 of the Civil Procedure Code is in compliance with all the requirements of the provisions of law?
- (b) Did the Provincial High Court err in law in deciding that the application by the petitioner under section 328 of the Civil Procedure Code being registered as a separate action of claim without being registered under the main action where the decree has been entered, is not a mere technicality but a fundamental error of procedure on the part of the petitioner,

when in fact the petitioner had sufficiently complied with all the requirements in section 328 of the Civil Procedure Code?

In the first place, the High Court could not have entertained the leave to appeal application in view of the positive bar in section 329 of the Civil Procedure Code which states:

No appeal shall lie from any order made under section 326 or section 327 or section 328 against any party other than the judgment-debtor. Any such order shall not bar the right of such party to institute an action to establish his right or title to such property.

If there is no right of appeal, there is no right for leave to appeal. However, the invocation of revisionary jurisdiction remains unaffected.

As the learned District Judge has stated, a serious miscarriage of justice appears to have occurred in the execution of the decree.

Section 328 of the Civil Procedure Code 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 case the appellant by her petition tendered to the District Court *prima facie* established that she has been in possession of the property on her own account by virtue of a deed from an independent source. Her possession had nothing to do with the judgment-debtor. In Case No. 6482/L, the judgment-creditor was declared the owner of the property. Before this declaration was made, the judgment-creditor had obtained a loan from Seylan Bank mortgaging this property. Due to his failure to pay the loan, the Bank had sold the property by a public auction in terms of the provisions of the Recovery of Loans by Banks (Special Provisions) Act, No. 4 of 1990 and issued the Certificate of Sale marked P4 with the section 328 application. Thereafter the Bank sold the property to the appellant by deed marked P2.

As seen from the first paragraph of page 13 and the second paragraph of page 14 of the judgment in Case No. 6482/L, the District Court refused to stop the said public auction and expressly stated that the judgment has no effect on the rights of the Bank. At the time the fiscal ejected the appellant and handed over the property to the judgment-creditor, the latter was not the owner of the property. In point of fact, the judgment-creditor lost ownership to the property long before the judgment in Case No. 6482/L.

Section 328 does not expressly state that an application under that section must be filed in the main case, although it would have been prudent to make the application in the main case itself given the nature of the inquiry contemplated under this section.

Section 344 quoted below is applicable to “the parties to the action”. The appellant was not a party to Case No. 6482/L.

All questions arising between the parties to the action in which the decree was passed, or their legal representatives, and relating to the execution of the decree, shall be determined by order of the court executing the decree, and not by separate action.

In any event, a blatant miscarriage of justice cannot be suppressed by technicalities. The procedural laws are there not to thwart justice but to facilitate justice.

The two questions of law on which leave was granted are answered in the affirmative.

I set aside the judgment of the High Court and restore the order of the District Court dated 31.01.2019.

The District Court is directed to conclude the inquiry within sixty days of the receipt of this judgment.

The judgment-creditor shall pay Rs. 200,000 to the appellant as costs of this appeal and the appeal of the court below.

Judge of the Supreme Court

S. Thuraiaraja, P.C., J.

I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court