

**In The Supreme Court of the Democratic Socialist  
Republic of Sri Lanka**

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**SC Appeal 87/2008  
SC(HCCA)LA 78/2008  
SP/HCCALA 01/2007  
DC Ratnapura 2129/L**

In the matter of an appeal with  
leave to appeal granted by  
the Supreme Court.

Kodituwaku Arachchige Somapala,  
Karapincha, Hidallana.  
Petitioner-Respondent-Appellant

Vs.

Nanda Pethiyagoda Wanasundara,  
96/1, No.4, 5th Lane, Colombo 7.  
Substituted Plaintiff-Respondent-  
Petitioner-Respondent

1. K.A.Piyadasa,  
Karapincha Pahala Korale, Hidallana.
2. Kodituwakku Arachchige Podimahattaya.  
Karapincha, Hidellana.
3. O.B. Punchi Menike,  
Karapincha, Hidellana.  
Defendants-Respondents-  
Respondents

**Before** : Amaratunga J.  
Marsoof J.  
Ekanayake J.

**Counsel** : Wijeyadasa Rajapakshe P.C. with  
Rasika Dissanayake for the Petitioner-Respondent-Appellant.  
Gamini Marapana PC. with R.Y.D. Jayasekera for the  
Substituted Plaintiff-Respondent-Petitioner-Respondent.

**Argued on** : 18. 05. 2010

**Decided on** : 04. 11. 2010

## **Gamini Amaratunga J.**

This is an appeal, with leave to appeal granted by this Court, against the Judgment of the Civil Appellate High Court of the Sabaragamuwa Province dated 19.6.2008 in a leave to appeal application filed in that Court by the Substituted Plaintiff Respondent (hereinafter referred to as Substituted Plaintiff). Before I set out the questions of law on which leave to appeal was granted by this Court, it is relevant and necessary to set out in brief the factual background relevant to the present appeal and the matters this Court would eventually take into account in dealing with this appeal.

The original plaintiff (who died during the pendency of the action) in the District Court, Ratnapura case No.2129/L sought a declaration of title in his favour to an undivided 1/3 of the land described in the schedule to his amended plaint dated 24.2.1983 and an order to eject the defendants, their servants and agents from the said land. The land referred to in the said amended plaint was 7A-2R-30P in extent, depicted as lots 1, 2, 3 and 4 in Plan No. 388 dated 16th October 1978 made by D.W. Ranatunga Licensed Surveyor.

The plaintiff's action was finally decided by the Supreme Court by its judgment dated 28.03.2003 declaring that the substituted plaintiff is entitled to an undivided 1/3 share of the land described in the schedule to the amended plaint dated 24.02.1983 which is in extent A7-R2-P30, depicted in Plan No.388 of Surveyor D.W. Ranatunga.

Thereafter on the application made by the substituted plaintiff, the District Court issued writ to eject the defendants from the land in suit. The Fiscal in executing the writ obtained the services of a licensed surveyor to demarcate on the ground the boundaries of lots 1, 2, 3 and 4 depicted in plan No.388 of

Surveyor Ranatunga. After the Surveyor marked the boundaries of the land referred to in the writ the 1st and the 3rd defendants vacated the land and possession of the land was then handed over to the authorized representative of the substituted plaintiff.

At the time of handing over possession of the land, the petitioner-appellant, who is a son of 1st and 2nd defendants (but not a party to D.C. case No.2129/L) complained to the Fiscal that the Surveyor in marking the boundaries of the land in suit had included a part of the land belonging to him in the land to be delivered to the substituted plaintiff in terms of the writ. The fiscal had then informed him that he (Somapala, the appellant) could pursue his legal remedy to obtain relief. This is recorded in the Fiscal's Report.

Thereafter the petitioner-appellant filed an application in the District Court of Ratnapura under and in terms of section 328 of the Civil Procedure Code alleging that in executing the writ relating to the substituted plaintiff's land, he was dispossessed and evicted from the land he held and possessed on his own right. After filing the said application, the appellant moved for a commission to survey the land claimed by the appellant and the land described in the plaint of the substituted plaintiff's case. The learned District Judge allowed the application for the commission and decided to proceed with the inquiry into the 328 application filed by the appellant.

The substituted plaintiff then filed a leave to appeal application in the Civil Appellate High Court of the Sabaragamuwa Province against the order of the learned District Judge to issue a commission and to proceed with the inquiry into the 328 application of the appellant. The Civil Appellate High Court issued an interim order suspending the execution of the Commission and holding the inquiry into the 328 application. Thereafter having granted leave to appeal and

after hearing arguments, the Civil Appellate High Court allowed the substituted plaintiff's appeal and set aside the order of the learned District Judge issuing the commission and fixing the 328 application for inquiry.

The order of the Civil Appellate High Court dated 19.6.2008 allowing the substituted plaintiff's appeal indicates that the said court came to the conclusion that the appellant had failed to establish that he was dispossessed of or ejected from any land in executing the writ and that dispossession of or ejection from any land other than the land referred to in the writ did not fall within the purview of section 328 of the Civil Procedure Code and that the appellant's proper remedy is to file a separate action to vindicate his rights.

On 31st July 2008, the appellant filed a leave to appeal application in this Court seeking leave to appeal against the Order of the Civil Appellate High Court allowing the appeal of the substituted plaintiff.

On 01.08.2008 (the day after the filing of the leave to appeal application in the Supreme Court) the 328 application was called in the District Court of Ratnapura with notice to the parties to announce the order made by the Civil Appellate High Court on 19.06.2008. The certified copy of the journal entry of the District Court Record on 01.08.2008 (Document W2 filed by the substituted plaintiff) indicates that on 01.08.2008, the District Judge terminated the proceedings in the 328 inquiry on the basis that in terms of the order in appeal (of the Civil Appellate High Court) an inquiry under and in terms of section 328 is not relevant. There is nothing in the journal entry of 01.08.2008 to indicate that at the time the District Court made order terminating the proceedings in the 328 inquiry, the Court was informed that an application for leave to appeal against the order of the Civil Appellate High Court has already been filed in the Supreme Court on the previous day i.e.31.7.2008.

There is another journal entry dated 12.8.2008 which states that an Attorney-at-law filed the appellant Somapala's petition and affidavit and moved to have the case called on 14.8.2008 for support. There is nothing before this Court to indicate the purpose or the contents of the petition referred to in this journal entry.

According to the journal entry of 14.08.2008 when the case was called on that day the Court was informed by the Attorney-at-law for the appellant that an application had been made to the Supreme Court against the decision of the Provincial High Court. In the said journal entry there is no record of any order made by the District Court on that date.

The appellant thereafter filed in this Court an amended petition dated 21.8.2008. In paragraph 20 of the amended petition it is stated that "on 1st August 2008 the learned District Judge made order terminating the proceedings on the basis of the said judgment of the Civil Appellate High Court. The petitioner states that consequent upon the same, the petitioner lodged an application to the District Court under section 839 of the Civil Procedure Code but the same was not supported in view of this application pending before Your Lordships' Court."

From the above quoted averment in the amended leave to appeal application it is clear that the petition of the appellant referred to in the journal entry of 12.08.2008 was not supported in the District Court and as such the District Court has not made any order thereon.

The amended leave to appeal application contained a prayer "that the order made on 01.08.2008 by the learned District Judge be set aside".

The leave to appeal application was supported in this Court on 16.10.2008 and the journal entry of that date indicates that what was supported on that date was the original leave to appeal application dated 30.07.2008 and not the amended leave to appeal application filed subsequently which included a prayer to set aside the Order of the District Court dated 1.8.2007. This Court has granted leave to appeal on the following questions of law set out in the leave to appeal application dated 30.7.2008.

- (i) Whether the Honourable Judges of the Civil Appellate High Court have erred in law by failing to take into consideration that a commission can be issued in any action or proceeding in which the court deems a local investigation to be a requisite or proper for the purpose of elucidating any matter in dispute?
- (ii) Whether the Honourable Judges of the Civil Appellate High Court have erred in law when arriving at a conclusion that in an instance where a person is ejected at the time of executing a decree no need arises for a survey plan?
- (iii) Whether the Honourable Judges of the Civil Appellate High Court have misinterpreted the provisions of section 328 of the Civil Procedure Code?
- (iv) Whether the Honourable Judges of the Civil Appellate High Court have erred in law by arriving at a conclusion that the petitioner has not been dispossessed when the plan or the sketch submitted by the Commissioner clearly shows the fact that the respondent has been placed in possession in land in extent more than 9 acres instead of 7 acres 2 roods and 30 perches?

In addition to the above questions of law this Court has granted leave to appeal on the following additional questions of law.

- (v) In view of the amendment to section 328 of the Civil Procedure Code by omitting the words "that it was not comprised in the decree" and in view of the omission of the said words in the current section 328 of the Civil Procedure Code can a person claiming to be ejected from a land other than the land that was the subject matter of the decree come to court in terms of section 328 claiming that he was ejected from such land.
- (vi) In view of the fact that this leave to appeal application has been made in respect of an order made in a proceeding which is incidental to the main 328 application and since the main 328 application has now been terminated in the District Court can the petitioner maintain this appeal.

Both parties have filed written submissions on the aforesaid questions of law and at the hearing both learned President's Counsel made oral submissions.

The last question to be considered in this appeal is with regard to the maintainability of this appeal. As already stated, in view of the decision of the Provincial Appellate High Court that the appellant's remedy is not under section 328 of the Civil Procedure Code the District Court of Ratnapura on 01.08.2008 terminated the proceedings in the application filed by the appellant in terms of section 328 of the Civil Procedure Code. The appellant has not taken steps by way of an appeal or revision to get the order dated 01.08.2008 set aside and to have his application restored as a pending case. Thus for all intents and purposes, there is no pending application to which the decision of this appeal would be of any practical importance. Even if this Court allows the appellant's

appeal and restores the Order made by the District Court on 8.3.2007 (which was the subject matter of the leave to appeal application filed in the Provincial Appellate High Court) yet there is no application in the District Court which can be proceeded with as a result of the decision of this appeal.

This Court, in an appeal will not consider and pronounce its decision on a question of law unless such decision has a practical significance to a pending case or a concluded case. (Which in law is subject the decision of this Court in appeal) This Court will not decide a question of law merely as an academic exercise when such decision has no relevance to a legal proceeding pending in any other court as a live legal proceeding not deemed to have been finally concluded until the decision of this Court in appeal is delivered.

In the course of the argument this Court pointed out to the learned President's Counsel for the appellant that in view of the termination of the proceedings relating to the 328 application filed by the appellant in the District Court of Ratnapura, this appeal has become a mere academic exercise without any practical effect.

The learned President's Counsel agreed, that as the matters now stand there is no application pending in the District Court of Ratnapura. However the learned President's Counsel submitted that if the appeal is decided in favour of the appellant, then he moves this Court to make an order ( in order to prevent great prejudice that would otherwise result in to the detriment of the appellant) setting aside the order of the District Court of Ratnapura on 01.08.2008 terminating the proceedings in relation to the application filed by him in that Court under and in terms of section 328 of the Civil Procedure Code.



This Court is not in a position to consider the submission made by the learned President's Counsel for the appellant relating to the consequential order to set aside the order of the District Court of Ratnapura dated 01.08.2008 for several reasons. Firstly, it is not an order the appellant has sought from this Court. Even if the appellant has sought such an order from this Court, it is an order this Court cannot make in this appeal as the matter before this Court is the correctness of the decision of the Civil Appellate High Court and not the order made by the District Court of Ratnapura on 01.08.2008.

In the amended petition filed in this Court on 21.08.2008, there was a prayer, among other reliefs, to set aside the order of the District Court of Ratnapura on 01.08.2008. However this amended petition was not supported before this Court, perhaps for the reason that the appellant was aware that it was not a relief he could seek from this Court in these proceedings. Secondly the appellant has not moved the appropriate Court by way of appeal or revision to have the order of the District Court of Ratnapura dated 01.08.2008 set aside. He has not given any reason for his failure to exercise his right to have the Order of the District Court set aside. Without pursuing his legal remedies he cannot now urge that if that order is not set aside by this Court great prejudice would be caused to him. He himself is responsible for the consequences flowing from his own failure to assert his rights available to him under the law to have the order dated 1.8.2008 set aside.

In view of the appellant's failure to pursue his legal remedies to have the Order of the District Court of Ratnapura dated 01.08.2008 set aside, there is no legal proceeding now in existence and as such the appellant has no right to maintain this appeal as a mere academic exercise devoid of any practical result to flow from the decision of this appeal.

In view of this finding I answer question No.(VI) in the negative and in consequence the necessity to decide and pronounce upon questions No.(I) to (v) on which leave to appeal has been granted does not arise. Accordingly the appeal is dismissed without costs.

**Judge of the Supreme Court**

**Marsoof J.**

**I agree.**

**Judge of the Supreme Court**

**Ekanayake J.**

**I agree.**

**Judge of the Supreme Court**