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

In the matter of a Leave to Appeal in terms of Article 127, 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 5 (C) of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006.

SC Appeal No: 91/2020

SC/HCCA/LA No: 93/2019

WP/HCCA/MT No.01/2016/RA

D.C. Moratuwa Case No: 647/L

Muthuthantrige Rienzie alias Riyenze Jagath Cooray,
No. 10, Uyana Road,
Moratuwa.

Plaintiff

Vs.

Sellapperumage Anne Elizabeth Fernando, No. 78/1,
Koralawella North,
Moratuwa.

Defendant

Application under Section 328 of the Civil Procedure Code

1. Mahamendige Ranjan Mendis
2. Werahennedige Mary Claris Shyamalie both of No.550, 3rd Lane, Koralawella, Moratuwa

Petitioners

Vs.

Muthuthantrige Rienzie alias Riyenze Jagath Cooray,
No. 10, Uyana Road,
Moratuwa.

Plaintiff- Judgment Creditor Respondent

And Between

Muthuthantrige Rienzie alias Riyenze Jagath Cooray,
No. 10, Uyana Road,
Moratuwa.

Plaintiff- Judgment Creditor Respondent-Petitioner

Vs.

1.Sellapperumage Anne Elizabeth Fernando, No. 78/1,
Koralawella North,
Moratuwa.

Defendant- Respondent

1. Mahamendige Ranjan Mendis
2. Werahennedige Mary Claris Shyamalie both of No.550, 3rd Lane, Koralawella, Moratuwa

Petitioners-Respondents

And Now Between

Muthuthantrige Rienzie alias Riyenze Jagath Cooray,
No. 10, Uyana Road,
Moratuwa.

Plaintiff- Judgment Creditor Respondent-Petitioner-Appellant

Vs.

1.Sellapperumage Anne Elizabeth Fernando, No. 78/1,
Koralawella North,
Moratuwa.

Defendant-Respondent-Respondent

1. Mahamendige Ranjan Mendis
2. Werahennedige Mary Claris Shyamalie both of No.550, 3rd Lane, Koralawella, Moratuwa

Petitioners-Respondents-Respondents

BEFORE: **MURDU N.B.FERNANDO, PC, J.**
K.KUMUDINI WICKREMASINGHE, J.
MAHINDA SAMAYAWARDHENA, J.

COUNSEL: Rohan Sahabandu, PC with Sachini Senanayake For Plaintiff-Appellant.

Thilan Liyanage with Shehan De Vas Gunawardhena for the Petitioner- Respondent.

WRITTEN SUBMISSIONS: By the Plaintiff-Judgment Creditor Respondent-Petitioner-Appellant on 24th of September 2020 and 2nd of December 2021.

By the Petitioners- Respondents-Respondents on 1st of November 2021.

ARGUED ON: 08.11.2021.

DECIDED ON: 22.02.2024.

K. KUMUDINI WICKREMASINGHE, J.

This is an appeal to set aside the judgment of the Provincial High Court of the Western Province holden in Mount Lavinia dated 06.02.2019 which affirmed the order of the District Court of Moratuwa dated 08.03.2016.

The Plaintiff- Judgment Creditor Respondent- Petitioner -Appellant (hereinafter referred to as the "Appellant") instituted an action in the District Court of Moratuwa against the Defendant-Respondent-Respondent (hereinafter referred to as the "Defendant") based on an agreement to sell bearing No. 682 dated 15.11. 2007 with regard to the land and premises morefully described in the schedule to the Plaint. The Defendant was absent and unrepresented when the case came up in open court. The Appellant gave *ex-parte* evidence and the District Court delivered the Judgment dated 24.08.2009 in favour of the Appellant.

The decree was served on the Defendant and she did not take any steps to get the said *ex-parte* judgment and the decree vacated. The Appellant thereafter made an application for the execution of the decree. On 08.07.2010, the Fiscal Officer of the District Court of Moratuwa proceeded to the premises in suit and executed the writ of possession by handing over the peaceful and vacant possession of the premises to the Appellant. The Fiscal had reported to the Court by her report dated 08.07.2010 that the Petitioners-Respondents-Respondents (hereinafter referred to as the "Respondents") were in the occupation of the premises in suit and vacant possession had been handed over peacefully and voluntarily by them.

Thereafter, the Respondents made an application under Section 328 of the Civil Procedure Code to the District Court of Moratuwa seeking restoration of the Respondent's possession of a part of the premises in suit. After the conclusion of the inquiry, the Learned Additional Judge of the District Court of Moratuwa delivered the order dated 08.03.2016 in favour of the Respondents.

The Appellant made a Revision application before the Civil Appellate High Court of Mount Lavinia against the said order. The High Court dismissed the Revision application on the basis that the Appellant has failed to plead the existence of exceptional circumstances. In the Judgment of the High Court, it was held that the Respondents were in possession of the premises in suit on their own right and not under the leave and license of the Defendant. Thus, the Respondents were not a party to the District Court action bearing No. 647/L and the application under Section 328 of the Civil Procedure Code is made when a person who is not a party to an action is dispossessed in the execution of a decree.

The Appellant is before this Court challenging the said Judgment. This Court by Order dated 19.06.2020 granted Leave to Appeal on the questions of law stated in paragraph 34 (a) and (b) of the Petition dated 15.03.2019, as set out below,

(a) Did the Learned High Court Judges as well as the Additional District Court Judge err in law and fact in not considering that there are exceptional circumstances?

(b) Did the Learned High Court Judge as well as the Additional District Court Judge err in law and fact in not considering the documents V1 and V2 as admissible evidence in the correct perspective?

My analysis hereafter will be confined to examine the aforesaid question of law based on which leave was granted.

The first matter for consideration by this court is whether there are exceptional circumstances to file a revision application against the Order of the District Court dated 08.03.2016.

It is a trite law that the revisionary powers of the courts are exercised only if exceptional circumstances are shown by the party filing such an application.

In **Dharmaratne and another vs Palm Paradise Cabanas Ltd and others [2003] 3 SLR 24**, Amaratunga J. stated that,
"existence of exceptional circumstances is the process by which courts select the cases in respect of which the extraordinary method of rectification should be adopted. ***If such a selection process is not there, revisionary jurisdiction of this Court will become a gateway of every litigant to make a second appeal in the garb of a Revisionary Application*** *or to make an appeal in situations where the legislature has not given a right of appeal.*

The practice of court to insist in the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which would not be lightly disturbed." [emphasis added]

In **Wijesinghe vs Tharmaratnam, Srikantha's LR (IV) at page 49**, the court held that,
"Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of court."

In the present case, the Respondents have argued that the Appellant failed to provide exceptional circumstances at the High Court and therefore, the application should be rejected *in limine.*

On the other hand, the counsel for the Appellant stated that the grounds of appeal relied upon by the Appellant in paragraph 14 of the revision application filed before the High Court dated 08.04.20016 constitute exceptional circumstances.

The Appellant has submitted following questions of law when pleading exceptional circumstances.

" (g) the said judgment is contrary to law and against the weight of evidence led at the said inquiry.

(h) the Learned Additional District Judge misdirected himself in holding that the petitioners were not holding a part of the premises in suit occupied by them under the defendant.

(i) the Learned Additional District Judge misdirected himself on the said deed of declaration and the said plan produced by the petitioners.

(j) the Learned Additional District Judge failed to properly evaluate the evidence adduced at the inquiry by me.

(k) the petitioners were in occupation of the said land under the defendant, and the Learned Additional District Judge erred grossly in arriving at the contrary.

(l) the Learned Additional District Judge erred and misdirected himself both on the law and facts of this case. .."

The above grounds set out in the revision application by the Appellant are merely grounds of appeal which are centered on the issues framed in the trial **and not exceptional circumstances**.

Section 329 of the Civil Procedure code sets out the following; "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."

In light of the abovementioned section the Appellant has no right of appeal against the order of the District Judge however, this does not prevent him

from invoking revisionary jurisdiction of the High Court. However, invoking such revisionary jurisdiction is subject to the Appellant proving the existence of exceptional circumstances.

It is an obvious fact that revisionary jurisdiction of this court is exercised if and when only exceptional circumstances are proved by the Appellant which is an extraordinary power vested in court. This power is vested in court in order to prevent miscarriage of justice being done to a person and also for due administration of justice **as discussed below**.

In **Rustom vs. Hapangama and Co., 1978-79 Sri LR 225**, Ismail J. stated that,
"the powers by way of revision conferred on the Appellate Court are very wide and can be exercised whether an appeal has been taken against an order of the original Court or not. However, such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptional circumstances are is dependant on the facts of each case."

In the case of **A. R. G. Fernando vs. W. S. C. Fernando 72 NLR 549** availability of revision where the appeal lies has been considered and it was held that;
"Where a right of appeal lies, an application in revision will not be entertained unless there are exceptional circumstances which require the intervention of the Court by way of revision."

In **Bank of Ceylon vs Kaleel and others [2004] 1 SLR 284**, it was stated that,
"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it; ***the order complained of is of such a nature which would have shocked the conscience of court****."[emphasis added]*

From the above case laws, it is evident that our courts have consistently held that the revisionary power of Courts is an extraordinary power. The Courts must exercise revisionary jurisdiction only if there are exceptional circumstances, when the law has expressly provided the aggrieved party a right of appeal.

Some examples for exceptional circumstances were given in **Attorney General vs. Podi Singho (1950) 51 NLR 381** where Dias J. held that the revisionary powers should be exercised only in circumstances such as:
(a) Miscarriage of justice;
(b) Where a strong case for interference by the Supreme Court is made out;
(c) Where the applicant was unaware of the order.

In **Caroline Nona and Others vs. Pedrick Singho and Others, (2005) 3 Sri L.R 176**, it was stated that,
"This Court possesses the power to set aside in revision an erroneous decision of the District Court which amounts to a miscarriage of justice in an appropriate case even though an appeal against such decision has been available to the petitioner and he has not resorted to that remedy."

The above case laws elucidates that the court can allow revision application even when the right of appeal has not been wielded when such decision amounts to a miscarriage of justice.

The argument of the Appellant is that the said order of the District Court under Section 328 of the Civil Procedure Code amounts to a miscarriage of justice, and therefore, the revision application filed should be allowed. In support of this argument, the counsel for the Appellant has referred to **Bengamuwa Dhammaloka Thero vs. Dr. Cyril Anton Balasuriya 2010 1 S.L.R 195** where Dr. Shirani A. Bandaranayake, J stated at 206 that,
"It is apparent that the decision of the District Court was not only erroneous but also amounts to a miscarriage of justice. In such circumstances, notwithstanding the provisions contained in Section 329 of the Civil Procedure

Code, the Court of Appeal is empowered to set right an erroneous decision of the District Court for the purpose of exercising due administration of justice and for such purpose could exercise its power of revision."

In the above case, the Respondent was displaced and his application in the District Court under Section 328 of the Civil Procedure Code was dismissed. The Respondent thereafter filed a Revision Application in the Court of Appeal against the District Court order instead of filing an appeal. The Court of Appeal allowed the application on the basis that the Respondent had been dispossessed consequent to an invalid decree. The Supreme Court in upholding the above position stated that the Respondent's revision application should be allowed as the dismissal of Respondent's application amounts to a miscarriage of justice.

Nevertheless, it is noteworthy that the facts and the circumstances in the above case differ from that of the case at hand as the basis of the former is an invalid District Court action whereas, the District Court action in the present case is a valid one.

However, in order to ascertain whether the order of the District Court in the present case amounts to a miscarriage of justice, it is pivotal to analyze Section 328 of the Civil Procedure Code which states as follows,

"Where any person other than the judgment-debtor or a person in occupation under him is disposed 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....."

Accordingly, a person making a claim under section 328 must prove that,
i. he or she was not a party to the initial action,
ii. the possession of the subject matter on his own account, or on account of some person other than the judgment-debtor,

iii. he or she was dispossessed of the property in question in execution of a decree.

The first argument of the Appellant in this regard is that the Petitioner-Respondents- Respondents did not resist the Fiscal Officer who came to the said property on 08.07.2010 to execute the writ of possession granted by the District Court. Hence, the Respondents cannot institute an action under section 328 of the Civil Procedure Code as they were not 'dispossessed' of the property in execution of the decree but rather the vacant possession had been handed over peacefully and voluntarily by them.

In defining the term 'dispossession' in **Edirisuriya vs. Edirisuriya (1975) 45 NLR 288,** Vythialingam J. held that neither force or fraud is necessary in dispossession as it can be *"by force or by not allowing the possessor to use at his discretion what he possesses".*

In **Perera vs. Wijesuriya, (1957) 59 NLR 529, Basnayake, C.J** at page 532 stated that, *"Any act which deprives a person from exercising his rights of possession would be deprivation of his possession or an ouster of him."*

In the present case, the Fiscal Officer has admitted in the cross-examination that two lawyers arrived on behalf of the Respondents at the time of executing the writ even though such incident was not mentioned in her report. (page 246 to 248 of the brief) Thus, the Fiscal Officer admitted that the Defendant was not present at the subject matter of this case when executing the writ. (page 249 of the brief) This elucidates that the Respondents resisted and were dispossessed of the property even though no force was involved.

In the recent case of **Fawsan v Majeed Mohamed and Others (SC/APPEAL/135/2017 decided on 31.03.2023)** Justice Mahinda Samayawardhena held that, "*In terms of section 328, 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 15 days of such dispossession, apply to Court by way of a petition in which the judgment creditor shall be named as the respondent, complaining of such dispossession. The Court shall thereupon serve a copy of the petition on the respondent and require such respondent to file objections, if any, within 15 days of service. Upon objections being filed or after the lapse of the period in which objections were directed to be filed, the Court shall hold an inquiry. The present section is different from the previous one. Section 328 cannot be invoked by the judgment-debtor or a person under him. According to the literal interpretation of this section, if after the inquiry the Court is satisfied that the person dispossessed was in possession of the whole or part of the property on his own account or on account of some person other than the judgment-debtor, the petitioner shall be restored to possession. However, this section shall be given purposive interpretation. It may be recalled that under section 324(1), the fiscal can remove any person bound by the decree who refuses to vacate the property. Mere proof of possession on his own account or on account of some person other than the judgment-debtor cannot and should not, in my view, entitle such petitioner to be restored to possession. In addition, he shall prove that he was in possession in good faith and by virtue of any right or interest. This is not to say that he shall prove title to such property, which is not possible given the time frame for the conclusion of the inquiry. As I stated earlier, those are the requirements of a claimant who is or claims to be in possession under sections 325-327, and a claimant under section 328 need not or cannot be placed at a more advantageous position."

The aim of this court is to ensure that justice has been done to all parties concerned. The question of law that is before this court is the existence of exceptional circumstances where the court's revisionary powers are exercised. Therefore, based on the circumstances of the case, it can be distinguished from the above mentioned case as the questions of law for which leave has been granted revolves around the existence of exceptional

circumstances for invoking revisionary jurisdiction and not on whether the right of invoking revisionary jurisdiction existed.

As the second argument, the Appellant contends that the order of the District Court amounts to a miscarriage of justice which considered as exceptional circumstance by the Appellant as the Learned District Court judge has failed to recognize V1 and V2 and this is the second question of law for which leave was granted by this court. The Appellant contends that the Respondents were in possession of the land on leave and license of the Defendant and their possession was not independent. In order to support this position, the Appellant has produced the documents marked V1 and V2.

The document marked V1 is a letter signed by the 1st Respondent dated 08.10.2010 addressing the Learned District Court Judge. In this letter, the 1st Respondent has admitted that he has been in possession of the premises in the suit under the leave and license of the Defendant and he has vacated the premises with consent. The letter further states that the 1st Respondent intends to withdraw the petition and affidavit dated 22.07.2010 and he is going to revoke the proxy filed on his behalf in the District Court.

The document marked V2 is a complaint made to the Police dated 07.09.2010 by the 1st Respondent stating that he has been in possession of the premises in the suit under leave and license of the Defendant and he has given his consent to vacate the same.

When these documents were formally produced at the inquiry before the District Court, the 2nd Respondent who is the wife of the 1st Respondent admitted the signature of the 1st Respondent in the said two documents. However, the 2nd Respondent has rejected the position taken in the above two documents. In cross-examination, the 2nd Respondent stated that subsequent to the dispossession the 1st Respondent started wandering from place to place consuming alcohol excessively and the above two documents

have been signed by him under the influence of alcohol. (page 232 of the brief)

Further, it is noteworthy that the letter marked V1 had been forwarded to the court by the 1st Respondent himself without sending such through the Attorney-at-Law representing him in the District Court on the same matter. The 1st Respondent has never revoked the proxy filed on behalf of him. Hence, this elucidates that both Respondents are continued to be represented by the same Attorney-at-Law since the commencement of this action and the content of said documents does not represent the position of both Respondents.

Accordingly, the Respondents only have to prove that they were in the possession of the subject matter of their own right and not under the license of the Defendant. In order to prove the independent possession of the subject matter, the Petitioner-Respondents- Respondents have produced an Electricity Bill (X3), Water Bill (X4), and the Notice of Assessment (X7) sent by the Municipal Council of Moratuwa in the name of the 1st Petitioner-Respondent-Respondent.

Further, the Petitioners-Respondents- Respondents have presented a Deed of Declaration No. N137 (X1) dated 08.03.2007 executed by L.P. Weerakkodi Notary Public with regard to the disputed land. It is important to note that the above Deed of Declaration had been executed one year prior to the institution of the initial action in the District Court by the Appellant and the Petitioners-Respondents- Respondents were not made a party to this case. According to this deed, the father of the 1st Respondent had been in independent possession of the property in dispute for more than four decades. Hence, if the Appellant had done an initial investigation in the relevant land registry before entering into the agreement with the Defendant, this matter could have been avoided.

The Petitioners-Respondents-Respondents have also produced a certificate issued by the Grama Niladhari (X5) to the 2nd Petitioner-Respondent-Respondent dated 14.09.2000 as proof of residency. Furthermore, the Respondents have produced a reply letter sent by a lawyer on behalf of the 1st Respondent dated 31.05.2004 in answer to a Letter of Demand sent by the lawyer of the Defendant. In this letter (X6), the 1st Respondent has specifically stated that he does not admit the alleged entitlement of the Defendant to the premises in suit.

In addition to these documents, the 2nd Respondent has given evidence stating that she came to the property in the suit on 25.03.1981 after getting married to the 1st Respondent and she had been in uninterrupted possession of the same with the 1st Respondent until July 2010. (page 217 of the brief) The above facts have been verified by the oral evidence adduced by the Grama Sewaka of the relevant division. (pages 234 and 235 of the brief)

From the above oral and documentary evidence, it is clear that the Respondents have successfully proved the independent and bona fide possession of the property in question. Hence, I am of the opinion that the Respondents have fulfilled the requirements of an application under section 328 of the Civil Procedure Code and the order of the District Court does not constitute a miscarriage of justice.

The above analysis elucidates that the both questions of law in the present case are based on the existence of exceptional circumstances and the Appellant failed to plead 'exceptional' grounds which shock the conscience of the court. In the absence of exceptional grounds, my considered view is that revisionary jurisdiction will not lie in the present case.

In the case of **Ameen vs. Rasheed (1936) 38 NLR 288,** the revision application was dismissed for not having exceptional circumstances in an appealable order and it was held that,

"It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have discretion to act in revision. It has been said in this Court often enough that revision of an appealable order is an exceptional proceeding, and ***in the petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal****." [emphasis added]*

In **Attorney General v Gunawardena [1996] 2 SLR 149**, it was held that,

"Revision like an appeal is directed towards the correction of errors but it is supervisory in nature and its object is the due administration of justice and ***not primarily or solely the relieving of grievances of a party****." [emphasis added]*

In the present case, the Appellant has not been successful in convincing the Court that the grounds he had urged have any exceptional nature which is sufficient to move the Court to exercise its discretionary revisionary power. Therefore, this Court has no reason to disagree with the conclusion of the Provincial High Court.

In these circumstances and for the foregoing reasons, the appeal is hereby dismissed without costs.

JUDGE OF THE SUPREME COURT

MURDU N. B. FERNANDO, PC., J.

I agree.

JUDGE OF THE SUPREME COURT

MAHINDA SAMAYAWARDHENA, J.

I agree.

JUDGE OF THE SUPREME COURT