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

In the matter of an Appeal from the Judgment of the Civil Appellate High Court of Uva Province holden in Badulla.

M.P.S. Wijesinghe,
Dambulamure Walawwa,
"Diyoguvilla", Ella Road,
Wellawaya.
Plaintiff

SC Appeal 159/2015
SC/HCCA/LA/638/14
Uva Province
Civil Appeal No. UVA/HCCA/BDL/ LA/02/14
District Court of Wellawaya
Case No. L / 2073

Vs

T.K.J. Chandrasekera,
Paragasmankada,
Ella Road, Wellawaya.
Defendant

AND

1. M.S.M. Sijaudeen
2. M.H.M. Insaaf
3. H.M.F. Mohamed
4. M.U.M. Vufraan
5. M.U.M. Rilwaan
6. M.H.M. Initiyas
7. S.H.J. Aabdeen
   (The present Board of Trustees of

Wellawaya Mohideen Jumma Mosque)

All of Monaragala Road,
Wellawaya.

Intervenient Petitioners

Vs

M.P.S. Wijesinghe,
Dambulamure Walawwa,
“Diyoguvilla”, Ella Road,
Wellawaya.

Plaintiff Respondent

T.K.J. Chandrasekera,
Paragasmankada,
Ella Road, Wellawaya.

Defendant Respondent

AND THEN

M.P.S. Wijesinghe,
Dambulamure Walawwa,
Diyoguvilla, Ella Road,
Wellawaya.

Plaintiff Respondent
Petitioner

Vs

1. M.S.M. Sijaudeen
2. M.H.M. Insaaf
3. H.M.F. Mohamed
4. M.U.M. Vufraan
5. M.U.M. Rilwaan
6. M.H.M. Initiyas
7. S.H.J. Aabdeen
   (The present Board of Trustees of Wellawaya Mohideen Jumma Mosque)

   All of Monaragala Road,
   Wellawaya.

Intervenient Petitioner
Respondents

T.K.J. Chandrasekera,
Paragasmankada,
Ella Road, Wellawaya.

Defendant Respondent
Respondent

AND NOW BY AND BETWEEN

1. M.S.M. Sijaudeen
2. M.H.M. Insaaf
3. H.M.F. Mohamed
4. M.U.M. Vufraan
5. M.U.M. Rilwaan
6. M.H.M. Initiyas
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Wellawaya Mohideen Jumma Mosque)

All of Monaragala Road,
Wellawaya.

Intervenient Petitioner
Respondent Petitioners

Vs

M.P.S. Wijesinghe,
Dambulamure Walawwa,
" Diyoguvilla", Ella Road,
Wellawaya.

Plaintiff Respondent
Petitioner Respondent

&

T.K.J. Chandrasekera,
Paragasmankada,
Ella Road, Wellawaya.

Defendant Respondent
Respondent Respondent

BEFORE : **S. EVA WANASUNDERA PCJ.**
UPALY ABEYRATHNE J &
H.N.J. PERERA J.

COUNSEL : M.U.M. Ali Sabry PC with Hazzan Hameed and Samhan Munzir for the Intervenient Petitioner Respondent Appellants

Vijaya Niranjan Perera PC with Mrs. Jeevani Perera and Ms. Oshadee Perera for the Plaintiff Respondent Petitioner Respondent.

The Defendant Respondent Respondent Respondent was not represented.

ARGUED ON : 30. 05. 2017.
DECIDED ON : 30. 06. 2017.

S. EVA WANASUNDERA PCJ.

In this matter, the District Court heard the case between the Plaintiff Respondent Petitioner Respondent (hereinafter referred to as the Plaintiff) and the Defendant Respondent Respondent Respondent (hereinafter referred to as the Defendant). It was a case where the Plaintiff had filed action **to eject the Defendant** from the land belonging to the Plaintiff. The land was a paddy field in which the Defendant's father had been working as the Ande Cultivator and when the father died the Defendant had continued to be in possession. The District Judge after hearing the case had entered judgment in favour of the Plaintiff. The Defendant had appealed against that judgment. The Plaintiff proceeded to file decree and **execute writ to eject the Defendant.**

It is **alleged** that the Fiscal officer of the District Court of Wellawaya, at the time of executing the writ against the Defendant, **had also ejected** the Intervenient Petitioner Respondent Petitioners (hereinafter referred to as the **Intervenient Petitioners)** from the property **adjoining the decreed property**.

The Intervenient Petitioners submit that they had made an application to the District Court under **Section 328 of the Civil Procedure Code** seeking for relief regarding their claim. The Plaintiff had objected to the said application. The matter was fixed for inquiry and later the District Judge had delivered order directing to **re – survey the land in dispute** and to **hand over the extent of land the Intervenient Petioners' claim** to the Intervenient Petitioners, which they had **alleged** to have been deprived of, by the execution of the writ.

The Plaintiff being dissatisfied with that order of the District Judge dated 19.12.2013 had preferred an Appeal to the Civil Appellate High Court. After hearing the Appeal**, the said High Court had delivered judgment on 29.10.2014 setting aside the order of the District Judge dated 19.12.2013**.

Being aggrieved by the High Court Judgment, the Intervenient Petitioners have filed a Leave to Appeal Application to this Court and leave to appeal was granted on the grounds set out in paragraphs 13(i) to (v) of the Petition.

The said questions of law are as follows:

i. Is the said order contrary to law and evidence placed before Court?
ii. Have the High Court Judges failed to understand the fact that the Plaintiff Respondent is not entitled to execute writ in respect of a property larger than the property granted by the judgment dated 08.11. 2012?
iii. Have the High Court Judges erred in law in failing to realize that under the pretext of executing the writ against the Defendant Respondent , the Plaintiff Respondent is not entitled to eject the Petitioners from their property and/or take over the possession of the property belonging to the Petitioners?
iv. Has the High Court failed to understand the real nature of the case in which an abuse of process of the law had occasioned a serious miscarriage of justice in which the Petitioners have been deprived of their property without a hearing?
v. Have the Judges of the High Court got misdirected in law in dabbling in technicalities when the facts placed before the Court established a severe miscarriage of justice which need to be rectified?

The Plaint in the District Court dated 16.08.2005 bears a Schedule of the paddy field which the Plaintiff claims, of an extent of 3 Acres 0 Roods and 31 Perches. The Answer of the Defendant has a Schedule with the same boundaries and almost of the same extent meaning only 3 Acres. The body of the Plaint explains how the Plaintiff became the owner of the paddy field. Paragraph 3 of the Plaint specifically narrates that the Plaintiff became the owner of the paddy field named Waduwela Hinna by Deed of Transfer No. 2319 dated 08.11.1979 from Steven Samarakoon Wijesinghe. That Deed is marked as P2 at the trial. The Schedule 4 to

that Deed describes the paddy field named Waduwela Hinna of an extent of 01 Acre 03 Roods and 13 Perches. That is the title deed through which the Plaintiff claims title to the said paddy field. Plan No. 1799 dated 25.04.2005 done by the surveyor Wilmot Silva and filed of record by the Plaintiff has stated that the land is of an extent of 3 Acres and 31 Perches. The District Judge had made a note that the Plan 1799 shows an extent in excess of the entitlement of the Plaintiff as per his title Deed. **Due to this reason, even though the identity of the corpus and the extent of the corpus was admitted by both the Plaintiff and the Defendant, the District Judge had directed a Court Commissioner to survey the corpus.**

The **Court Commissioner, Amarasekera made Plan No. 2933 according to the survey done on 09.12.2010** and filed the same in Court which was marked as P11 with a report which was marked as P11(a). He had found that there were certain portions of land which belonged to the State within this corpus. He had marked them as **Lot 119** in Final Village Plan 663, **Lot 118** of Final Village Plan 663 which is the Reservation to the Radapola Ara (water course) and **Lot 18** which is the Reservation kept along the Old Ella Road to the West of the corpus.

This Court Commissioner had specifically submitted to Court in his report, that the Plaintiff and the Defendant were informed of this survey through the Grama Niladari and at the time of the survey, the Plaintiff was present; the Defendant was absent (the excuse being that he goes to work as a regular office worker and is unable to be present on a working day); the Divisional Secretary's representative the Janapada Niladari , D.M.Chandradasa was present; and that the Grama Niladari of Division 151 Wellawaya , Jagath M. Hettiarachchi was present. **The Court Commissioner concludes that the corpus identified is of an extent of 2 Acres 2 Roods and 23 Perches.** It is interesting to note that the corpus is bounded on the North by the Magistrates Court of Wellawaya, East by the Radapola Ara, South by the Mala Ara and West by the Old Ella Road. On the day of the survey, i.e. on 09.12.2010, with all the state officials present, **no other person were found to be on the said property.**

The District Judge had delivered judgment on 08.11.2012. He had answered all the questions of law. In the body of the judgment he had analyzed the evidence referring to documents and oral evidence. He had mentioned that the Plaintiff had got title by deeds to an extent of 1 Acre 3 Roods and 13 Perches **but this**

extent is not according to any specific plan. There is no plan referred to in the title deeds of the Plaintiff. There is no explanation as to how that extent was calculated and mentioned in the title deed without referring to any plan done by any surveyor. It is stated by the District Judge that within the boundaries as specifically stated in the Plaint and the Answer, (which boundaries are not contested by the parties to the case and which land is identified as the land in question by both parties to the case) the **extent of land contained**, according to the Court Commissioner's **Plan 2933 marked as P11**, which the District Judge has been impressed to take as one hundred percent correct, **is of an extent of 2 Acres 2 Roods and 23 Perches**. The Court Commissioner specifically had mentioned that this land is equal to the **addition of Lots 69 and 70** of Title Plan 326322 Final Village Plan 663. The District Judge has analyzed the matters put forward by this Court Commissioner **without any challenge by either party to the case.** (write in Sinhala pgs. 17 & 18 of the judgment) Therefore I hold that the corpus which is the subject matter of the action before the District Court was **the block of land within the boundaries mentioned in the Schedule to the Plaint and also the boundaries mentioned in the Schedule to the Answer which are similar** and of the extent of **2A 2R 23P** according to the **Court Commissioner who had surveyed the land when the District Judge saw the discrepancy in the extent mentioned in the title deed** and on his own **directed** that a commission be issued to the Court Commissioner and Surveyor.

The District Judge held further, that the Plaintiff was entitled to eject the Defendant from the land. The Defendant appealed to the Civil Appellate High Court from the judgment of the District Court. This Appeal had been dismissed by the High Court. However prior to the aforementioned Appeal being heard, the Plaintiff sought to execute the writ. Execution of writ pending appeal was ordered by the District Judge on the application of the Plaintiff , by order dated 03.06.2013. **The writ was executed on 30.07.2013 by the Fiscal of Court and possession was handed over to the Plaintiff.**

The Intervenient Petitioner Respondent **Appellants** (hereinafter referred to as the Intervenient Petitioners) had come before the District Court after the execution of writ, by way of a **motion dated 01.08.2013** filed by an Attorney at Law. The District Judge had ordered that a proper application be made. Thereafter an Application under **Sec. 839** of the Civil Procedure Code had been filed. Later on, it is alleged that it was changed into an application under **Sec. 328**

of the Civil Procedure Code. After an inquiry under Sec. 328, the District Judge had held on 09.12.2013, **that "the extent of property claimed by the Intervenient Petitioners be surveyed and be granted** to them".

The Plaintiff had then appealed to the Civil Appellate High Court and **the High Court Judges had set aside the order of the District Judge**. Being aggrieved by the said High Court Judgment, the Intervenient Petitioners had appealed to this Court. **The impugned High Court Judgment is dated 29.10.2014.**

I observe that the order of the District Court at the end of the inquiry does not make **any mention of any specific extent** of land claimed by the Intervenient Petitioners be given to them. How can any surveyor survey and divide any property without any specific directions as to how much to be surveyed and the land be divided when there is no order as to the extent? Anyway, even if we take the extent that is claimed by the Intervenient Petitioners in their Petition, as the correct extent, the said extent being 2 Acres 2 Roods and 39.5 Perches, I do not understand how **that much of land , which is bigger than the decreed extent of the land in this case, can be carved out and given**, out of the corpus of the case which is decreed as 2 Acres 2 Roods and 23 Perches. In simple language, there is no way to carve out a bigger extent of land from and out of a smaller extent of land.

On the other hand, the land which is the subject matter of the trial that was concluded before the District Judge between the Plaintiff and the Defendant is correctly in place as decreed and had been handed over to the Plaintiff by the Fiscal of the District Court. The **name of the said land is Waduwelahinna**. It is situated in the village called **Wewalagama**. The **name of the land** that is claimed by the Intervenient Petitioners in their application is **"Weerasekeragama**". That land as described in the Schedule to the application before the District Court is situated in the **'town of Wellawaya**'. On the face of the application, it is evident that the two lands are not one and the same. It looks like that they are two different lands in two different areas in the District of Wellawaya.

The application before the District Court was under Sec. 839 of the Civil Procedure Code as evident from P5 at page 142 of the Civil Appellate High Court brief. P5 is dated 05.08.2013. The prayer reads as follows:

(අ) මෙම නඩුවේ පැමිනිලිකරුට නොතීසි නිකුත් කරන ලෙසටත්ද,

(ආ) **පැමිනිලිකාර වගඋත්තරකරුට පක්ෂව දි ඇති තීන්දුව " පරි ඉන්කියුරියාම් " සිද්ධාන්තය යටතේ වෙන් කරන ලෙසටත්,**

(ඇ) පෙත්සම්කරුවන්ගේ අයිතිය තහවුරු කිරීමට ගරු අධිකරණයෙන් දි ඇති අයිතිවාසිකම් ලබා දෙන ලෙසටත්,

(ඈ) ඉන් පසුව මෙහි උප ලේඛණයේ දක්වා ඇති ඉඩමේ අයිතිය තහවුරු කර දෙන ලසටත්,

(ඉ) කෙසේ වෙතත්, ඉඩම නිශ්චිතව හඳුවා ගැනීමට කොමිෂමක් නිකුත් කරන ලෙසටත්ද

(ඊ) ගරු අධිකරණයට සුදුසු යැයි හැගෙන වෙනත් සහ වැඩිමනත් සහන සලසා දෙන ලෙසටත් වේ.

The Schedule to the application of the Intervenient Petitioners under Sec. 328 describes the land of an extent of 2Acres 2Roods and 39.5 Perches according to a Plan done by surveyor G.E.M. Ratnayake. There is no date mentioned of the Plan even though there is a plan number and the name of a surveyor. However the four boundaries are **totally different** to the boundaries of the corpus of the case in hand regarding which the writ of execution was executed **in accordance with the decree in the D.C. Case No. L/ 2073**. I also observe that the Intervenient Petitioners claim the land in the Schedule to the application **on a title deed which is a Deed of Declaration No. 380 dated 11.01.2013.** Within this declaration they have referred to certain partition action and decrees of court in 1953. This Deed has been written as late as in the year 2013.

The Intervenient Petitioner's application had read as an Application under Sec. 839 of the Civil Procedure Code.
Section 839 of the Civil Procedure Code reads as follows:
" Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. "

Later on, the said application was captioned as one under Sec. 328 of the Civil Procedure Code by striking off 839 and writing 328 in its place.

Section 328 of the Civil Procedure Code reads as follows:
" Where any person other than 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 dispossesd 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. "

At the inquiry even though evidence was lead on behalf of the Intervenient Petitioners, there was **no proof of them getting dispossessed** from part of the land on which writ of execution was taken out. In fact at the time the writ was executed, the grama niladhari, the Plaintiff and the Janapada Niladari were present. As ordered by the District Judge, the state land and road reservation and the reservation of the water course were surveyed and separated from the corpus before handing over possession of the land decreed which was 2Acres 2Roods and 23 perches. **Nobody from any mosque were on the land alleged to have been dispossessed**. The land was surveyed **twice during the course of the case** and none of the Intervenient Petitioners were within sight of the land and nor did any person object to such a survey done by the court commissioner. **Dispossession of the Intervenient Petitioners was not proven.**

In ***Podi Menika Vs Gunasekera 2005, 2 SLR 207*** it was held that "An application under section 328 requires **only the proof of possession** and not title. All that had to be established is that the possession of the disputed land was bona fide on his own account or on account of some person other than the judgment debtor and that he was not a party to the action in which the decree was passed. "

At the inquiry, even though the Intervenient Petitioners produced documents to prove title to the land in the schedule to their application, claiming that the said property was an adjoining land to the property claimed by the Plaintiff, **they did not produce evidence of dispossession.** Instead, they kept on harping on one point, i.e. that the decree in the main case, L/2073 , was for a lesser extent than what was granted by the Fiscal at the execution of the decree and therefore court should order that the said lesser amount be separated and be given to the Plaintiff , leaving the other extent of the land as mosque property claimed by the Intervenient Petitioners.

The application of the Intervenient Petitioners had got initiated in the District Court in this way. The writ of execution was taken out on 30th July,2013 and without any objection of any other person or the Defendant, the land was handed over to the Plaintiff. On 05.08.2013 a motion was filed in Court by Attorney at Law , Farook with an application under Sec.839. This application was not submitted or filed in Court by the Intervenient Petitioners themselves under their signatures. It was through an Attorney at Law, namely Mr. Farook. There was no proxy filed along with the application either. According to the established law, as no proxy was filed along with the papers which were filed, there is no validity of those papers in law before the District Court. **On record, there was an order of court dated 01.08.2013 to make an application in the proper manner.** That was prior to filing the application on 05.08.2013. In spite of the order of the District Judge, **again papers had been filed without a proxy.** If it was an application signed by all the Petitioners alone, then there is, according to law , a valid application. Anyway later on, a proxy had been filed on 21.08.2013. Now, this date is later than the time allowed in law to file an application under Sec. 328. Further more, the proxy had not been stamped properly and the correct amount of stamps were submitted only on 26.08.2013. The professionals in law who had handled the matter on behalf of the Intervenient Petitioners had been quite negligent with regard to the way they had come before court.

However, even though the Plaintiff had objected to accepting the papers filed , the District Judge had commenced the inquiry under Sec. 328, after the caption of the papers under Sec.839 was struck off and Sec.328 written above that space in the application. The District Judge had quoted an authority in his order, namely ***Paul Coir (Pvt.) Ltd. Vs Waas 2002, 1SLR 13***. This is a case where it was held that **a defect** in a proxy can be subsequently cured. In this application the Intervenient

Petitioners had not filed a proxy until 21.08.2013 and that also stamped properly only on the 26.08.2013. So there was **no proxy** on record and no application filed under Sec. 328 within the legally stipulated time of 15 days from 01.08.2013. The case quoted by the District Judge does not apply in this instance.

However the District Judge had taken it up for inquiry under Sec. 328 and held the inquiry and had made order that ' the surveyor should survey the land and separate the extent of land claimed by the Intervenient Petitioners and grant the same to them. ' **The Plaintiff appealed to the Civil Appellate High Court against the order of the District Judge and the High Court reversed that order.**

I observe that in page 5 of the order of the District Judge dated 19.12.2013, it reads thus:

" මෙම නඩුවේ 328 වන වගන්තිය යටතේ කරන ලද ඉල්ලීම සඳහා බෙදුම් නඩුවට අදාළ විෂය වස්තුව වූ ඉඩම සහ මෙම නඩුවට අදාළ ඉඩමේ විෂය වස්තුව අතර **පැහැදිලිව කිසිදු සම්බන්ධතාවයක් නොමැති බව පෙනී යයි.** එකී ඉඩම් දෙක බැලු බැල්මට වෙනස් වන අතර මායිම සළකා බැලිමේදි,**දෙකෙහි මායිම් අතර ද වෙනස්කම් දක්නට ලැබේ.** මෙම ඉඩමට විෂය වස්තුව වූ ඉඩම " **වඩුවේලහින්න කුඹුර**" නැමැති ඉඩමට බලයලත් මානක විල්මට සිල්වා විසින් මැන සකස් කරන ලද 2005.04.25 දිනැති අංක 1799 පිඹුරෙහි අක්කර: 3 රූඩ: 8 පර්චස් 31 ක් විශාල ඉඩම වේ. ඉහතකි බෙදුම් නඩුවට විෂය **වූ ඉඩම වැල්ලවාය විරසේකර ගම** නැමැති අක්කර: 2 පර්චස්: 39.05 ක් විශාල ඉඩම වේ.

ඒ අනුවද මෙම ඉඩම් දෙත අතර පැහැදිලි වෙනසක් දැකිය හැකිය. "

It is crystal clear from this statement of the District Judge that the Judge did not see any resemblance of the two lands, i.e. the land which is the corpus of the main case 2037/L and the land which is in the Schedule to the Application under Sec.328. In spite of the fact that the judge had seen quite well and also recorded the same in the order, that the lands are different , she had concluded that the Intervenient Petitioners be given the portion of land they claim from and out of the corpus. It is incredible to see **that the reasons are different from the conclusion arrived at**, by the District Judge.

The Civil Appellate High Court Judges went into the matter and had firstly concluded that there was **no valid application under Sec.328** of the CPC for the District Judge to have inquired into. Thereafter they held that the District Judge had granted **relief which was not prayed for by the Intervenient Petitioners** because the prayer to the application was **' to set aside the judgement given in favour of the Plaintiff as per incuriam '.** The District Judge had granted what was not prayed for by the Intervenient Petitioners. The High Court had followed the authorities , namely, ***Surangi Vs Rodrigo 2003, 3 SLR 35 and Padmawathie Vs Jayasekera 1997, 1 SLR 248 .*** I am in agreement with this reasoning of the Civil Appellate High Court.

The main contention of the Intervenient Petitioners was that the judgment given by the District Judge was per incuriam. The reason behind that contention was that the Plaintiff was entitled only to a lesser extent of the land which was the subject matter of the case and the writ was executed on a larger amount of land than the entitlement of the Plaintiff. So, what the Intervenient Petitioners contend is precisely that the District Judge's Judgment given at the end of the trial between the Plaintiff and the Defendant was wrong. The question arises as to whether an outsider who was not a party to the case can legally complain against the judgment in that manner.

The Intervenient Petitioners **did not make an application to recall the writ** of possession at any time either. All that they prayed for is to set aside the judgement alleging that it is per incuriam. They also argued at the hearing as the second argument that the **decree was not in conformity with the judgment**. Neither the Defendant nor any other person or persons such as the Intervenient Petitioners made any application to the District Court under **Sec. 189 of the Civil Procedure Code to correct the decree to be in conformity with the judgment.**
Sec. 189 reads as follows:

(1) The Court may at any time, either on its own motion or on that of any of the parties, correct any clerical or arithmetical mistake in any judgment or order or any error arising therein from any accidental slip or omission, or may make any amendment which is necessary to bring a decree into conformity with the judgment.
(2) Reasonable notice of any proposed amendment under this section shall in all cases be given to parties or their registered attorneys.

The Intervenient Petitioners on the one hand argued that the **judgment** of the District Judge **was per incuriam** and on the other hand argued that the **decree was not in conformity with the judgment.** It is difficult to understand how one party take up these two arguments together. I am of the view that the Intevenient Petitioners were not quite sure what they wanted to challenge. In law one has to be certain of the facts regarding the matter in question as well as the law pertinent to what one claims. I opine that the arguments of the Intervenient Petitioners are untenable.

For the reasons I have explained above, I answer the questions of law raised at the commencement of this Judgment in favour of the Plaintiff Respondent Petitioner Respondent. I make order dismissing this Appeal. However I am not inclined to grant costs.

Judge of the Supreme Court

Upaly Abeyrathne J.
I agree.

Judge of the Supreme Court

H.N.J. Perera J.
I agree.

Judge of the Supreme Court.