

**LETCHUMI**  
**v.**  
**PERERA AND ANOTHER**

COURT OF APPEAL  
EDUSSURIYA, J. (P/CA)  
UDALAGAMA, J.  
CA 336/99  
DC COLOMBO 17518/L  
24<sup>TH</sup> JULY, 2000

*Civil Procedure Code - S.328 - S.329 - Dispossession on Execution of Decree - Rights to be established - Does Revision lie? - Alternative remedy.*

**Held :**

- (i) Where a party who has been dispossessed on the execution of a decree claims a right to the subject matter from which he had been dispossessed, it is that party who must establish that he has been in possession in his own right and not under or on a right flowing from the Judgment Debtor.
- (ii) S.329 gives an alternative remedy to an aggrieved party "It is the duty of Court to carry out effectually the object of the statute. It must be so construed as to defeat all attempts to do so or avoid doing in a direct or circuitous manner that which has been prohibited or enjoined."

**APPLICATION** in Revision from an Order of District Court of Colombo.

**Case referred to :**

1. C. A. 141/90 - D. C. Colombo No. 5557/ZL. C. A. M. 15.10.1990.  
*S. Mandeswaran* with *P. Peramunagama* for Plaintiff-Petitioner.  
*Kuwera de Zoysa* with *Ms. Medani de Silva* for Petitioner-Respondent.

*Cur. adv. vult.*

July 24, 2000.

**EDUSSURIYA, J. (P/CA)**

This application in revision has been filed to set aside the order made after inquiry into the application under Section

328 of the Civil Procedure Code by a person who had been dispossessed on the execution of the decree.

It is well settled law that where a party who has been dispossessed on the execution of the decree claims a right to the subject matter from which he had been dispossessed it is that party who must establish that he has been in possession in his own right and not under or on a right flowing from the judgment debtor.

In this case we have a peculiar set of circumstances wherein the judgment creditor claims title from the defendant judgment debtor who in turn claims title by inheritance on the death of her husband one Sonny Perera. The Petitioner, on the other hand, to the application under Section 328 claims to be the brother of the judgment debtor's husband and claims that he has been put in possession of the subject matter of this action by his brother who as hereinbefore mentioned was the alleged husband of the judgment debtor.

It is the position of the Petitioner in the application made under Section 328 who is the Respondent to the present application before us, that the judgment debtor was never the owner of the premises in suit, in view of the fact that the judgment debtor was not married to her so called husband Sonny Perera who also happened to be the brother of the Petitioner in the application under Section 328. Towards this end the Petitioner in the application under Section 328 produced the marriage certificate of Padma Ranjani the judgment debtor and a person named Nalaka, according to which the marriage had taken place on 09.12.1974 as opposed to which the Petitioner to the present application before this Court had produced a marriage certificate of Sonny Perera and Padma Ranjani, according to which parties were married on 18.04.1988, 14 years after the original marriage of Padma Ranjani. There is no evidence whatsoever to establish that either the first husband of Padma Ranjani departed this world or that the marriage had been dissolved. In these

circumstances Court must necessarily accept that the second marriage of Padma Ranjani is not a lawful marriage and therefore no rights flow to Padma Ranjani the judgment debtor from Sonny Perera and therefore the Petitioner to the application under Section 328 was in possession of the subject matter of this action on a right which flows from Sonny Perera.

It has also been argued by Counsel for the Respondent that the Petitioner cannot maintain this application in view of the fact that an alternative remedy has been provided by Section 329 of the Civil Procedure Code to a party who is dispossessed or aggrieved by an order made under Section 328 and as such the Petitioner is not entitled to come by way of revision. The alternative remedy provided by Section 329 is that any party aggrieved by an order under Section 328 being entitled to institute an action.

Mr. Zoysa in order to substantiate his argument has drawn our attention to the decision of this Court in CA application No. 141/90(1) that a person aggrieved with an order made under Section 328 of the Civil Procedure Code is not entitled to come by way of revision.

Justice Senanayake in the course of his judgment commenting on the language used under Section 329 stated, "in my view this Section gives an alternative remedy to an aggrieved party in such a situation. It is the duty of the Court to carry out effectually the object of the statute. It must be so construed as to defeat all attempts to do so or avoid doing in a direct or circuitous manner that which has been prohibited or enjoined (Maxwell Interpretation of Statutes) 12<sup>th</sup> Edition Page 137.

Further the Petitioner to the application under Section 328 has produced in evidence receipts issued on the payment

of electricity bills in respect of the premises in suit. This application is therefore dismissed with costs fixed at Rs. 2100/-.

**UDALAGAMA, J.** - I agree.

*Application dismissed.*