

**PODI MENIKA
VS
GUNASEKERA**

COURT OF APPEAL
WIJAYARATNE J,
C. A. 696/2003,
DC, WELIMADA No. L/486,
(FORMALLY DC, BANDARAWELA)
JULY 5, 2004.

Civil Procedure Code - Section 328 - Resistance - Is the claimant obliged to prove her title? - in Sec. 328 inquiry what is required to be proved?

HELD

- (1) 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.

Per Wijayaratne J,

"In this application made under Section 328 there is a legal obligation to prove title only to establish that she was in *bona fide* possession of the same"

APPLICATION in Revision from an Order of the District Court of Welimada.

Cases referred to :

- (1) *Pathirana vs. Aahangama* 1982 1 Sri LR 392
- (2) *Abdul Cadar vs. Nagaratnam* 1985 2 Sri LR 1
- (3) *Ariff vs. Kandasamy Pille* 1982 2 Sri LR 741

F. C. Perera for Applicant Petitioner.

Parakrama Agalawatte for Defendant Respondent.

July, 5th 2005

WIJEYARATNE, J

This is an application to revise the order of the learned District Judge dated 03.04.2003 made after an inquiry under Section 328 of the Civil Procedure Code. The inquiry commenced on the application of the present Petitioner to this application H. M. Premalatha Podimenika who was the Petitioner-Claimant in that application claiming that the fiscal of the District Court of Bandarawela on 12.09.98 attempted to eject her and members of the her family from the land they are in occupation and where they have constructed the house, on the pretext of execution of the decree entered in favour of the defendant in case No. L/486 of that Court.

The Defendant has prayed for the issue of writ of possession and the Petitioner-Claimant has claimed that she had improved the land she had put up the house, and she along with her mentally affected husband and children are living in that house on the land in suit.

The application was resisted by the Defendant on the strength of the decree entered in the District Court of Bandarawela, action No. L/486.

A perusal of the decree disclosed that the defendant, D. M. Gunasekera was declared entitled to lot 02 in Plan No. 274 dated 27.2.1945 drawn by W. B. W. Welgolla Licensed Surveyor, and that was by way of settlement between the Plaintiff and the Defendant whereby the Plaintiff was declared entitled to lot 1 in the said plan.

The learned District Judge having inquired into this application has recorded the evidence of the Intervenant claimant P. Podimenika and Surveyor who has prepared the plan No. 208 which was marked X in the proceedings.

The learned District Judge having heard the evidence rejected the Petitioner-claimant's claim on the grounds that he did not believe the evidence of surveyor Nandasena because of discrepancies of his evidence and the Claimant Podimenika did not establish the prescriptive title to the land which was described as State land.

In his order the learned District Judge has clearly stated that the decree had been entered on the strength of Plan No. 208 marked X which is factually wrong. A perusal of the decree shows that it is on the strength of

Plan No. 274 drawn by the Surveyor W. B. W. Welgolla in the year 1945 only.

The learned District Judge has clearly mistaken that he is entitled to issue writ of execution of decree in respect of land described in a plan and depicting the lot bearing same number but on a plan bearing different number from the number referred to in the decree.

Secondly the learned District Judge has erred in law when he looked for the proof of claimant's title to the land, she was in possession and from where she was to be ejected from. He has categorically stated that "as claimed by the petitioner claimant, she is obliged to prove that she has title to the same."

This is a clear misdirection of himself with regard to the relevant provisions of law. The application under Section 328 requires only the proof of possession and not title.

In *Pathirana Vs Ahangama*⁽¹⁾ it was held in an action under Section 328 of the Civil Procedure Code only question that arises is that of possession and not title.

Again in *Abdul Cadar vs Nagaratnam*⁽²⁾ it was held that "under Section 328 of the CPC all that had to be established was that the possession of the disputed land was *bona fide* on his own account or 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.

According to the evidence of Claimant the plot of land which she herself claimed and put up the house of 03 bed rooms, Hall and kitchen. It was specifically mentioned that after the illness of her husband with a head injury her husband Ganethirala could not do any work and it was the claimant who has cleared this land developed it and put up the house and there is nothing to suggest that she did so under any parties to this action L/846. It is also in evidence according to her own statement, the report of Surveyor, and the report of fiscal and the very application of the Defendant-Respondent that the claimant Podimenika was in possession of this land as at the date the writ of execution was issued.

However, according to the fiscal report her husband is said to have undertaken to remove the house within 02 weeks ; whether that is done is

not known but the Court has issued this writ of execution of decree after rejecting the claimant's claim on the basis that she had not proved title in terms of the above decisions that the Claimant Podimenika is not obliged in law to prove. In this application made under Section 328 of the CPC there is legal obligation to prove her title but only to establish that she was in *bona fide* possession of the same, which she has done. Even the Learned District Judge who rejected her application accepted the evidence to the effect that she has put up the house, she is resident there by being in possession of the same.

However, by reason of execution of the decree entered between the two parties under any one of whom the claimant was not claiming possession, the decree was executed by ejecting the Claimant.

In *Ariff vs. Kandasamy Pille* ¹³⁾ it was held that the "..... the Court is obliged to restore him to possession of which he was deprived by the fiscal in the execution of decree which did not authorize his dispossession".

In the instant case, the Defendant-Respondent who obtained writ of execution did not establish that the Claimant was one claiming under the other party to the decree. On the contrary the evidence of the Claimant was that she was in independent *bona fide* possession of the land which is not identified as lot 2 in Plan No. 274 which the Defendant-Respondent was declared entitled to.

Following the said decisions in *Ariff vs. Kandasamy Pillai* (Supra), this Court is obliged to restore the Claimant to possession after setting aside the order of the Learned District Judge who refused the application and dismiss the claim of the Claimant who had already been dispossessed.

The application for revision is allowed with costs fixed at Rs. 5,000/-

The Claimant is free to seek legal remedy by way of compensation if advised.

Application allowed.