# ARIFF
v.
# KANDASAMIPILLAI & OTHERS

SUPREME COURT
WANASUNDERA, J., WIMALARATNE, J., AND VICTOR PERERA, J.
S.C. APPEAL NO. 87/81.
C.A. NO. 1142/78.
D.C. COLOMBO 2433/RE.
OCTOBER 4 and 15, 1982.

*Execution – Civil Procedure Code, sections 325-328 - Difference of section 328 petition from proceedings under ss. 325 - 327 – Court's powers of revision – Right of person not a party to proceedings against whom no order has been made to apply for revision.*

The premises No. 7, Hospital Street, Colombo were owned by plaintiff's wife and sister-in-law. Plaintiff was the landlord having rented out the premises to one Nadesan the defendant. The plaintiff also entered into a tenancy agreement with Nadesan in 1961 and retained a sum of Rs. 1,000/- as deposit to be refunded on the termination of the tenancy. This money had not been refunded at time of trial. The defendant along with three others carried on in the premises in partnership the business called Letchmi Vilas. On 7.5.75 the defendant retired from the partnership and left the premises. The rent for the premises was paid by Kandasamipillai one of the partners and the 1st appellant from 1955 to 1973 and from 1973 to date of his retirement the defendant paid rent on behalf of Kandasamipillai.

However, in terms of a consent decree defendant Nadesan agreed to vacate the premises in August 1978. As he failed to do so Writ was executed by Fiscal who stated that the defendant's son was in the premises that day carrying on business as usual and that he surrendered possession on being shown the writ on 21.8.78. On 23.8.78 the 1st–4th appellants who were the partners filed a petition in the District Court in terms of section 328 of the Civil Procedure Code alleging that they were the tenants and that they were wrongfully dispossessed.

The District Judge made order on 22.11.1978 directing that appellants be restored to possession.

On 22.1.78 when the Fiscal proceeded to the premises to put the appellants in possession he found one Ranjit Nanayakkara and B.G. Sugathapala in occupation and a name board 'Ratne Hotel' fixed to the entrance of the premises. Nevertheless the appellants were put in possession but on the next day they were ousted by Nanayakkara and Sugathapala. On 27.1.78 the plaintiff who had earlier stated that on ejecting the defendant Nadesan he handed over the premises to his wife and sister-in-law's daughter filed application No. 1141/78 in the Court of Appeal praying that the order dated 22.11.78 be quashed. On 27.11.78 the petitioner-1st respondent Sugathapala who was no party to the proceedings also filed action No. 1142/78 to have the order of 22.11.78 set aside. The Court of Appeal refused application in No. 1141/78 but in 1142/78 acting in revision set aside the District Judge's order. The plaintiff appealed to the Supreme Court against the order in 1141/78 but the appeal was dismissed. The appellants appealed against the order

No. in No. 1142/78 and a preliminary question that was raised was whether it was open to the Court of Appeal to exercise its powers of revision on the application of a person who was at no time a party to the action or against whom no order had been made by the original Court even during the course of execution proceedings.

**Held** –

1. Section 323 provides that when a decree or order is for the recovery of immovable property or if it directs a judgment - debtor to yield up or deliver possession an application for execution shall be made in the prescribed form. The Court then has only to be satisfied that the judgment - creditor is entitled to obtain execution of the decree by being placed in possession. Once the court is so satisfied, it will issue the writ.

2. Sections 325–327 are confined to the execution of proprietary decrees which a judgment creditor may invoke when there is resistance or obstruction to execution or the judgment creditor is hindered (or ousted) from taking complete and effectual possession within a year and a day whereupon complaint must be made to court within one month of the resistance, obstruction, hindrance or ouster. These sections have no bearing on section 328.

3. Section 328 provides for the investigation of a petition by any person other than a judgment-debtor or person in occupation under him, who seeks to be put in or restored to possession. Such a person does not become a judgment-creditor who applies for writ under section 323 and therefore cannot avail himself of the provisions of sections 325, 326 and 327. The Court is obliged to restore him to possession of which he was deprived by the Fiscal in the execution of a decree which did not authorize his dispossession.

4. The petitioner in No. 1145/78 was not an aggrieved person entitled to invoke the revisionary powers of Court against an order under s.328.

5. The appellants were not entitled to invoke the provisions of sections 325-327 when the Fiscal was prevented from enforcing the Order of Court under section 328. The appellants however were entitled to be restored to possession.

**Cases referred to:**

(1) ***Atukorale v. Samyanathan (1939) 41 N.L.R. 169***

(2) *Ranasinghe v. Henry (1896) 1 N.L.R. 303*

(3) *Perera v. Silva et. al. (1907) 2 A.C.R. 172*

(4) *Appuhamy v. Weeratunga (1921) 23 N.L.R. 467*

(5) *Velupillai v. Ponnambalam (1924) 2 Times Law Reports 136*

(6) *Zahir v. Charles Perera (1970) 73 N.L.R. 424*

(7) *Sirinivasa Thero v. Sudassi Thero (1960) 63 N.L.R. 31*

(8) *De Silva v. Bastia[illegible] (1933) 35 N.L.R. 277*

(9) *Silva v. de Mel (1915) 18 N.L.R. 164*

APPEAL from judgment of the Court of Appeal.

*Nimal Senanayake*, S.A. with *S. Mahenthiran* and *Miss. S.M. Senaratne* for the appellant.

*K.N. Choksy*, S.A. with *N.S.A. Gunatilake; Harsha Soza; Miss. I.R. Rajapakse, V. Thenasenathipathy* and *E.N. Fernando* for the respondents.

*Cur. adv. vult.*

November 9, 1982.

**VICTOR PERERA, J.**

The petitioner-1st respondent in this case had filed a petition dated 27th November 1978 in the Court of Appeal seeking by way of revision to have an order dated 22nd November 1978 made by the District Court of Colombo in case No. 2433/RE in the course of execution proceedings under section 328 of the Civil Procedure Code set aside.

The plaintiff-2nd respondent (hereinafter referred to as the plaintiff) had filed the said action on the 10th February 1977 to have one M. Nadesan, the defendant, ejected from the premises No. 7, Hospital Street, Colombo, on the basis that the said defendant was his tenant of the premises and that the tenancy had been duly terminated on the ground of arrears of rent. The said defendant had filed answer pleading that the 1st and 2nd petitioners-appellants (hereinafter referred to as the appellants), two others and he had been carrying on business of an eating house in partnership with the 1st appellant and others under the registered name of "Letchumi Bhawan", that Kandasamipillai, the 1st appellant had been paying the rent from 1955 up to October 1973, that thereafter he, the defendant, paid rent on behalf of the 1st appellant, that he retired from the partnership on 7th May 1975 and that he had since left the said premises. Notwithstanding this defence that was set up, a consent motion was filed on 19th December 1977 according to which the defendant consented to judgment being entered in favour of the plaintiff for ejectment (writ of ejectment being issued only after 31st March 1978). Decree was accordingly entered without arrears of rent, damages and costs. In August 1978 writ of execution was issued in terms of the decree to the Fiscal. When the Fiscal, repaired to the premises the 1st appellant's son was present and business was being carried on

under the registered business name of "Letchumi Bhawan". At the request of the Fiscal, this person removed his goods and left the premises according to the Fiscal's report dated 21st August 1978.

On the 23rd August 1978 the 1st to 4th appellants filed a petition in the District Court in the said case No. 2433/RE in terms of section 328 of the Civil Procedure Code alleging that they were the tenants and that they had been wrongfully dispossessed from the said premises in the execution of the decree. The plaintiff filed objections admitting that the 1st appellant had been his tenant and had been paying rent up to October 1973. He stated that after he obtained a decree against Nadesan, the defendant, in execution of the writ he got possession on 21st August 1978 . He pleaded that on that very date he handed over the premises to the owners, namely his wife and sister-in-law's daughter and that he had ceased to be the landlord. At the inquiry the plaintiff produced a tenancy agreement dated 1961 signed by the 1st appellant with the plaintiff, according to which the plaintiff still held Rs.1000/- as an advance deposit of rent to be refunded on the termination of the tenancy. The plaintiff stated in evidence that the premises were subsequently rented out by his wife and sister-in-law's daughter, the 3rd and 4th respondents, on the 22nd August 1978, though he did not disclose the name of the alleged tenant and also stated that he had no interest in the premises thereafter. At the conclusion of the inquiry the Court held that the 1st to 4th appellants were in actual occupation of the said premises without any interruption on their own account as the tenants when the Fiscal dispossessed them on 21st August 1978. The District Court accordingly made order dated 22nd November 1978 directing that the appellants be put in possession of the premises in terms of section 328 of the Civil Procedure Code.

In pursuance of this order the Fiscal repaired to premises No. 7, Hospital Street, Colombo, with the appellants on the 22nd November 1978. According to the Report of the Fiscal (2R14), he saw a name board "Ratne Hotel" and found two persons, Ranjit Nanayakkara and B.G. Sugathapala, the petitioner 1st respondent, in occupation. When the Fiscal explained the contents of the writ, the said persons had agreed to vacate the premises and removed all their belongings except two large counters. At this stage one Samad who introduced himself as an Attorney-at-law had interfered and had asserted that the petitioner-1st respondent had a right to stay in the premises, though no document whatsoever was produced. Thereafter there had been an assault and after the Police intervened the two counters

were also removed. According to the Fiscal he handed over the possession of the premises to the appellants. The petitioner-1st respondent however maintains that he continued to remain in occupation.

On the next day, namely the 23rd November 1978, the Attorney-at-law for the appellants had filed a motion in the District Court to the effect that no sooner the Fiscal left they were dispossessed from the premises and that they were thus prevented from taking effectual and complete possession of the premises, and moved that the Fiscal be directed to put the appellants in possession. When the Fiscal went to the premises on the 24th November 1978 he found the front door closed. He had repeatedly knocked on the door but there was no answer from inside. On the 24th November 1978, the Court, on receipt of this Report, directed the Fiscal to break open the door and give over possession to the appellants.

On 27th November 1978 before the Fiscal could carry out the directions of Court, the plaintiff filed an application No. 1141/78 in the Court of Appeal naming the appellants and the petitioner-1st respondent and the alleged owners as respondents seeking in revision to have the order dated *22nd November 1978* set aside and to have the application made by the appellants to the District Court dismissed. This was curious conduct on the part of the plaintiff as according to him he had no interest whatsoever in the premises after 23rd August 1978. The Court of Appeal stayed the order for possession pending the hearing of this application.

On the same date the petitioner-1st respondent who was no party to the proceedings also filed an application No. 1142/78 in the Court of Appeal to have the identical order of the District Court dated 22nd November 1978, set aside and for a dismissal of the application made by the appellants to the District Court against the plaintiff.

The Court of Appeal had simultaneously taken up for hearing the application No. 1141/78 and the application No. 1142/78 and made two separate orders. In application No. 1141/78 the Court refused the application of the plaintiff and affirmed the order of the District Court dated 22nd November 1978. But in application 1142/78 the Court of Appeal acting in revision set aside the very same order of the District Court, namely the order under section 328 directing the Fiscal to put the appellants in possession. There was therefore no consistency in the two orders made by the Court of Appeal in C.A.1141/78 and in the present application 1142/78 and to say the least, the order in the latter application was illogical. The plaintiff

appealed to this Court against the order of the Court of Appeal in application 1141/78 and after hearing this Court dismissed the appeal with costs.

The present appeal before us is the appeal of the appellants against the latter order of the Court of Appeal in application 1142/78. At the argument of this appeal the question that was raised as a preliminary matter was, whether it was open to the Court of Appeal to exercise its powers of revision on the application of a person who was at no time a party to the action or against whom no order had been made by the original Court even during the course of the execution proceedings.

Admittedly the petitioner-1st respondent was not a party to the proceedings in the District Court and the order dated 22nd November 1978 was made before the Court was made aware that the petitioner-1st respondent was claiming to be in occupation of the premises. It was an order made under section 328 in a dispute between the appellants and the plaintiff and in proceedings in which the petitioner-1st respondent was not even disclosed.

It is therefore necessary to consider the powers of the Court of Appeal in revision in a situation such as this. Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka (1978) provides that the Court of Appeal shall have and exercise an appellate jurisdiction for the correction of all errors which shall be committed by a Court of first instance, tribunal or other institution and sole and exclusive cognizance *by way of appeal, revision* and *restitutio in integrum* of all suits, actions, prosecutions and matters and things which such Court of first instance, tribunal or other institution may take cognizance of. Section 753 of the Civil Procedure Code provides that the Court may call for and examine the Record of any case whether already tried or pending trial for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein or as to the regularity of the proceedings of such case and may upon revision of the case so brought before it pass any judgment or make any order that might have been made had the case been brought before it in due course of appeal instead of by way of revision.

The powers of revision originally given to the then Supreme Court were by sections 21 and 40 of the Courts Ordinance and by Section 753 of the Civil Procedure Code. The exercise of these powers had been considered in numerous cases. Thus in the case of *Atukorale v. Samynathan* (1) Soertsz, J. held that the powers are very wide

and that clearly the Court had a right to revise any order made by an original Court, whether an appeal has been taken or not. The Supreme Court had exercised this power when an order of a District Court which is wrong ex facie where there was no appeal available to a party against the order in the case of *Ranasinghe v. Henry* (2). In all these cases, the power was exercised as it affected the rights of a party to the action. In the case of *Perera v. Silva et al* (3), where the applicant had another remedy, in rejecting the application for revision Hutchinson, C.J. said, "I do not think that the power ought to be exercised or that the Legislature could have intended that it should be exercised, so as to give the right of appeal practically in every case large or small, simple or difficult". However, the Supreme Court held that the discretionary remedy could be invoked on the application of a party when there are exceptional circumstances warranting an intervention of the Court. There too the applicant was a party to the action.

In the instant case, the petitioner-1st respondent was not a party to the proceedings in the District Court nor was any order made against him. Under these circumstances it was contended that he could not be heard in a revision application. Mr. Choksy, Senior Attorney-at-law for the appellant, however, contended that the petitioner-1st respondent was *an aggrieved person* and as such he was entitled to make this application. In support he cited the case of *Appuhamy v. Weeratunga* (4). In that case the petitioner for relief was not a party to the action. The action was a partition action and the decree entered in the case operated as a decree in rem whether a person was a party or not. Bertram, C.J. in that case stated as follows:

> "We have to consider in the first instance whether it is open to us to exercise these powers on the application of an aggrieved person not a party on record. There seems to be no doubt that we may exercise these powers on our own notion. If that is so, I think we can justly exercise them when an *aggrieved person* brings to our notice the fact that unless the decree is amended he will suffer injustice."

Having proceeded to examine the facts and circumstances in that case, the Court came to the conclusion that it appeared that the decree was at variance with the intention in the judgment and that the petitioner was an aggrieved person in that the judgment would adversely affect his rights which he claimed through a person who had claimed before the Surveyor and was not made a party to the

partition action. The Supreme Court acting in revision remitted the case to the District Court to make the necessary amendments. Similarly in partition actions the Supreme Court had exercised its powers of revision at the instance of persons who sought to intervene or persons who should have been made parties but not had notice of the action. As these cases were partition actions the Supreme Court had acted on a liberal interpretation of section 48 of the Partition Act No. 16 of 1951. In all these partition actions the Supreme Court dealt with the applications on the basis that the applicants were aggrieved persons whose rights would otherwise be wiped out by virtue of a decree in rem.

In the case of *Vellupillai v. Ponnambalam* (5), where the finding in a testamentary suit affected prejudicially the rights of a party to another suit and where that party applied to the Supreme Court to have the finding in the testamentary suit revised, it was held that he, not being a party to the testamentary suit, could not maintain such an application. The case of *Appuhamy v. Weeratunga* (4) earlier referred to was considered and differentiated. Ennis, J. stated as follows:

> "In the present case a third party has applied to agitate against a matter which was properly decided in the testamentary proceedings. To allow such an application would be to introduce a principle which might affect decisions in testamentary suits by hundreds of persons. It would seriously affect the finality of the decision at the instance of parties who have a very slight interest in the real subject of the decision. I would accordingly refuse the application."

I am therefore of the view that the petitioner-1st respondent was not an aggrieved person entitled to invoke the powers of revision of the Court of Appeal as his claim if any was irrelevant to the inquiry under section 328.

However, Mr. Choksy for the petitioner-1st respondent claimed that he was entiteld to this relief on the ground that there were exceptional circumstances in this case as he contended that the petitioner-1st respondent was in occupation as a tenant of the premises from the 22nd August 1978 before the order was made by the District Court on the 22nd November 1978 and that he was entitled to be heard before he could be dispossessed by an order of the District Court. He also contended that a person who obtains an order to be put in possession under section 328 of the Civil Procedure Code must first invoke the provisions of sections 325 to 327 when there

is resistance or obstruction. The Court of Appeal had accepted these two contentions as grounds justifying its intervention by way of revision at the instance of the petitioner-1st respondent. The Court of Appeal mis-directed itself in regard to these matters and I therefore propose to examine these sections in detail.

Exceptional circumstances are taken into account in applications for revision at the instance of parties entitled to make such applications. The Supreme Court has refused to allow its powers of revision to be invoked by a person against whom an order had been made except in the most exceptional circumstances. In the case of *Zahir v. Charles Perera* (6) where in consequence of resistance to the execution of a proprietory decree an application was made by the judgment-creditor under section 325 of the Civil Procedure Code and where he was directed to be put in possession of the premises in question in terms of section 327A, the Supreme Court refused an application for revision as the affected party had an alternative remedy and as there were no exceptional circumstances. A fortiori a person like the petitioner-1st respondent in the present case could not rely on any exceptional circumstances.

In regard to the applicability of sections 325 to 327 when proceedings have been initiated under section 328, it will be necessary to examine the provisions of these sections more closely.

These sections when properly analysed show that when proceedings are initiated under section 325 relating to the execution of a decree the District Court is empowered to make alternate orders in accordance with findings of fact at the inquiry. The comprehensive amendments to sections 325, 326 and 327 effected by Laws Nos. 20 of 1977 and 53 of 1980 have been intended by the Legislature to deal with situations that arises in the execution of writs for possession issued in terms of decrees or orders entered under section 217 *(c)* commanding a person against whom there is a decree or order to yield up possession of immovable property. Section 323 provides that when a decree or order is for the recovery of immovable property or if it directs a judgment debtor to yield up or deliver possession an application for execution shall be made in the prescribed form.

When this application is made the Court has only to be satisfied that the judgment-creditor is entitled to obtain execution of the decree by being placed in possession. Once the Court is satisfied in this regard it shall direct the writ of execution to issue to the Fiscal.

By the amendments Nos. 20 of 1977 and 53 of 1980, section 325 was amended as follows:

Where in the execution of a decree for possession of immovable property –

*(a)* A Fiscal is resisted or obstructed by the judgment-debtor or any other person

or

*(b)* when after the Fiscal has delivered possession, the judgment-creditor is hindered or ousted by the judgment-debtor or any other person from taking complete and effectual possession thereof

within a period of one year and a day the judgment-creditor, may at any time within a month of such resistance, obstruction, hindrance or ouster complain to Court.

On receipt of such a complaint the Court directs the Fiscal to give public notice calling upon all persons claiming to be in possession by virtue of any right or interest and who object to possession being delivered to the judgment-creditor to notify their claims to Court. Any claimant is obliged to set out his right or interest entitling him to the present possession of the property.

Section 326 contemplates the inquiry into the complaint and the claim made, narrowing down the ambit or scope of the inquiry to the matters thus placed before Court. The Court has to determine whether –

*(a)* the matters complained of were occasioned by the judgment-debtor,

*(b)* whether the claim is frivolous or vexatious, or

*(c)* that the claim made if any has not been established.

The consideration of any other matter becomes irrelevant. If the Court is satisfied in regard to any one of these matters, it shall by order direct the judgment-creditor to be put or restored to possession and deal with the judgment-debtor or other person as for contempt of Court.

Section 327 provides that if the resistance is made by a bona fide claimant, the Court will dismiss the petition of the judgment-creditor.

It is thus very clear that sections 325, 326 and 327 as amended are confined to the execution of a proprietary decree which a judgment-creditor may or may not invoke, as section 325 at his discretion is only permissive and not mandatory. They deal with the

execution of a decree at the instance of the decree holder who has not been able to get the full benefit of the decree in his favour. These sections have no bearing whatsoever on section 328.

Section 328 on the other hand as amended, provides for the investigation of a petition by any person other than the judgment-debtor or person in occupation under him, if he is dispossessed of any property in execution of the decree complaining of his dispossession. At the end of the inquiry if the Court is satisfied that the person dispossessed was in possession of the premises on his own account or on account of some person other than the judgment-debtor, the Court shall direct the petitioner to be put in possession of the property.

It is clear from an analysis of these provisions, that under section 328 the Court is making an order independent of or even ignoring the decree for ejectment already entered, treating the decree as of no legal effect as against the petitioner who seeks the intervention of Court to be restored to the status quo. Such a petitioner does not become judgment-creditor who applies for a writ under section 323. Such a person therefore could not avail himself of the provisions of sections 325, 326 and 327. The Court in making this order is obliged to restore such petitioner to possession which he was deprived of by the Fiscal in the execution of a decree which did not authorize his dispossession.

It is analogous to a situation where a plaintiff who obtains a declaration of title to immovable property without at the same time also obtaining a declaration of his right to the immediate possession of that property against the party in possession, applies for and obtains a writ of possession. In the case of *Sirinivasa Thero v. Sudassi Thero* (7), the Supreme Court held that the person who was dispossessed in consequence of the execution of a writ in such a case was entitled to be restored to possession. The principles that were discussed in that case would apply with equal force here where an order was made under section 328 on the basis that the petitioner was not liable to be ejected. Under section 328 the Court is putting the petitioner who was dispossessed in the position he would have occupied if the Fiscal had not wrongly dispossessed him in the purported exercise of the writ issued by Court. The Court under these circumstances is merely carrying out its inherent powers.

The order made by the District Court in this case under section 328 on the 22nd November 1978 had to be enforced by Court and in doing so it was not ordering the execution of a decree at the

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instance of a decree holder. Such an order is similar to an order made under section 287 of the Civil Procedure Code, where a Court orders the Fiscal to place a purchaser of a land sold in execution of a money decree. In such a case the person to be placed in possession is not a decree holder. In the case of *De Silva v. Bastian et al* (8) the Supreme Court after examining several authorities cited before it, held that a purchaser who had been placed in possession in terms of an order under section 287 and was soon after dispossessed should be restored to possession. The Supreme Court endorsed the view expressed by de Sampayo, J. in the Full Bench case of *Silva v. de Mel* (9) that the order for delivery of possession was to be "enforced" and not merely "executed". In the present case the District Court after a full inquiry into the relevant matters, was satisfied that the petitioners-appellants were in occupation of the premises on the relevant dates. Namely the date of the plaint, the date of the decree and the 22nd August 1978 when they were dispossessed by the Fiscal and that their possession had to be restored at all costs. Any other person dispossessed in the enforcement of this order will have to seek his remedy elsewhere.

Taking into consideration all these matters, I hold that the petitioner-1st respondent was not a person entitled to invoke the powers of the Court of Appeal to act in revision in respect of an order made under section 328. I also hold that the appellants were not entitled to invoke the provisions of sections 325, 326 and 327 of the Civil Procedure Code when the Fiscal is prevented from enforcing an order made by Court under section 328 and that they are entitled to be restored to possession.

I accordingly allow the appeal and set aside the order of the Court of Appeal with costs payable by the petitioner-1st respondent to the appellants in this Court and in the Court of Appeal. The stay order is set aside and the District Court is directed to enforce its order dated 22nd November 1978 through the Fiscal forthwith.

**WANASUNDERA, J.** – I agree.

**WIMALARATNE, J.** – I agree.

*Appeal allowed.*