

**WILBERT**  
v  
**JAYASIRIWARDENA AND OTHERS**

COURT OF APPEAL  
AMARATUNGA, J.  
C.A.L.A 28/2001 (LG)  
D.C.KANDY 10476/L  
OCTOBER 30, 2003

*Civil Procedure Code – Sections 325, 325 (1) and 325(4) – Writ of Execution for delivery of immovable property – Forms 62, 63 of the Code – Writ to contain a description of property to be delivered under the Writ – Conflict of Claims – re-identification of land – Who should begin?*

The Trial court held that the petitioner who resisted the Fiscal should begin, in an section 325 Inquiry.

**Held:**

- (i) To deliver possession the Fiscal has to go to the land *described in the Writ*. Recourse to section 325 is possible if and only if resistance is offered to the Fiscal's attempt to deliver property *described in the Writ*.
- (ii) The identification of the property to which the Fiscal went to execute the *Writ* is the first thing to be considered in deciding who shall begin in any inquiry under section 325 when there is a *clear conflict between the claims of the contending parties* about the land to which the Fiscal went.
- (iii) It was the duty of the plaintiff to begin by calling the Fiscal to prove the identity of the property to which he went to execute the *Writ* as even if the Fiscal's Report is accepted in toto, it does not contain sufficient material to *prima facie* indicate that he went to the land *described in the Writ*.

Application for Leave to Appeal from an order of the District Court of Kandy with leave being granted.

**Case referred to:**

1. *Thuraisingham v Kanagaratnam* – 61 NLR 80

*N.R.M. Daluwatte, P.C.*, with *Gamini Silva* for 3rd respondent-petitioner.

*D.P.Mendis, P.C.*, with *Nandeera Gunawardena* for plaintiff-respondent.

Other respondents absent and unrepresented.

January 20, 2004

**GAMINI AMARATUNGA, J.**

This is an appeal with leave to appeal granted by this Court against the order of the learned Additional District Judge of Kandy with regard to the duty to begin in an inquiry under section 325 of the Civil Procedure Code. The facts relevant are briefly as follows. 01

The plaintiff filed action against the defendant claiming that the defendant failed to deliver possession of the land he purchased from her and praying for the delivery of possession of the relevant property to him. The description of the property given in the schedule was a long description divided into four paragraphs. The defendant did not appear in Court and the Court entered *ex parte* judgment and decree in favour of the plaintiff. When the *Writ* of execution was issued for the delivery of possession to the plaintiff the fiscal went to execute the *Writ* on 12/8/1985. 10

In his report dated 13/8/1985 the Fiscal has stated what happened when he went to the land situated at Cuda Ratwatte Mawatha to execute the *Writ*. A person called Dhanapala was present in the property. He claimed that he was the watcher looking after the property on behalf of Wilbert (petitioner) who has taken the land on lease from Rev.Vipassi, the 4th respondent. The defendant who was present said that Wilbert was not a person who possessed the property on her behalf. The fiscal thereafter returned to court and reported that since the property was in possession of Wilbert who did not possess it on behalf of the defendant, he could not deliver possession to the plaintiff. 20

The plaintiff thereafter by petition dated 9/9/1985, filed in terms of section 325(1) of the Civil Procedure Code, complained to court about the resistance offered to the Fiscal and moved Court to issue notice on the petitioner, Dhanapala and Rev.Vipassi and to make an order to the Fiscal to execute the writ and deliver possession to him.

Appearing in Court upon notice issued on them, the petitioner and the 3rd respondent filed their objections/ claim on 7/11/1985. They stated that the land to which the Fiscal came was a land the petitioner took on lease from the 4th respondent Rev.Vipassi. They have described in the schedule to the petition the land possessed by them. They have further stated that they knew nothing about the land described in the schedule to the plaintiff's petition. 30

When the description of the land given in the schedule to the plaintiff's application under section 325(1) (and also in his plaint) is compared with the land described in the schedule to the petitioner's objections a significant difference between the two descriptions at once becomes apparent. The western boundary of the land described in the petitioner's objections is the Mahaweli Ganga. There was no reference to the Mahaweli Ganga as one boundary to the land claimed by the plaintiff. Therefore it is clear that on the face of those documents there were two conflicting claims before Court. While the plaintiff claimed that the petitioner and the 3rd respondent offered resistance to the Fiscal and prevented him from delivering possession of the property to which the *Writ* related, the petitioner claimed that he knew nothing about that property and the Fiscal came to the land possessed by him upon a lease obtained from an independent source and that land is different to the land claimed by the plaintiff. In terms of section 325(4) both claims must be decided in one inquiry. Who has the duty to begin at the inquiry?

*Writ of execution* for the delivery of immovable property is issued in Form 63 of the 1st Schedule to the Civil Procedure Code. When that form is read with Form 62, it is clear that the *Writ* should contain a description of the property to be delivered under the *Writ* and this description given in the decree is based on the description given in the schedule to the plaint. To deliver possession the Fiscal has to go to the land described in the *Writ*. Recourse to the provisions of section 325 of the Civil Procedure Code is possible if, and only if, resistance is offered to the Fiscal's attempt to deliver the property described in the *Writ*. Therefore the identification of the property to which the Fiscal went to execute the *Writ*, is the first thing to be considered in deciding who shall begin in an inquiry under section 325 when there is a clear conflict between the claims of the contending parties about the land to which the Fiscal went. Thus the positive identification of the land to which the Fiscal went is a matter which goes to the Court's jurisdiction as well.

The learned President's Counsel for the petitioner therefore contended that it was the duty of the plaintiff to begin by calling the Fiscal to prove the identity of the property to which he went to execute the *Writ*. On the other hand the learned President's Counsel for the plaintiff contended that the Fiscal's report, made to Court after a ministerial

act, forms a part of the record and therefore it constitutes evidence relating to the identity of the property to which the Fiscal went and therefore, on the face of this evidence the burden to begin was on the petitioner. This contention is sound in principle. But the question is whether the Fiscal's report contains *prima facie* evidence to satisfy a Court that he went to the land *described in the Writ*?

The Fiscal's report says that he went to the land to execute the *Writ*. 80  
 He has not stated that he went to the land described in the *Writ* but I take it that he meant to say so. When one looks at the schedule of the plaint it is very clear that one cannot identify the land described therein physically, I mean on the ground, unless it is clearly demarcated and depicted in a survey plan or demarcated and pointed out by surveyor. In this case there is no material to show that the Fiscal had such a survey plan. The report shows that a surveyor was also in the Fiscal's party. However the report does not say that the surveyor identified and pointed out the boundaries of the property described in the *Writ*. 90  
 Therefore the question is how did the Fiscal identify and decide the land to which he went was the specific land described in the *Writ*? The Fiscal's report does not provide an answer to this.

The Fiscal's report also indicates that when he went to the land the plaintiff was there. Usually the Fiscal is led to the property by the judgment creditor. How did the Fiscal find the property without any assistance from the plaintiff judgment creditor? This question also remains unanswered.

The schedule to the plaint refers to assessment numbers – former 197 present 9/1 to 9/6. The description given in the schedule to the petitioner's objections refer to the land as former 197 present No 27. 100  
 The Fiscal's report does not give the assessment number of the property to which he went. The descriptions of the lands given in the schedule to the plaint and in the schedule to the petitioner's objections indicate that both lands were situated in the same vicinity, but this fact was not enough. It is therefore clear that even if the Fiscal's report is accepted in toto, it does not contain sufficient material to *prima facie* indicate that he went to the land *described in the Writ*. The Fiscal has to explain and establish the manner in which he identified the land in question. Until it is first established that the Fiscal went to the land described in the *Writ*, the learned Judge has no power in law to call upon the petitioner to begin. 110

This is the principle to be extracted from the decision in *Thuraisingham v Kangaratnam*<sup>(1)</sup>. Section 325(4) of the Civil Procedure Code, as it presently stands, has no bearing on the burden of proof. For the reasons set out above, I hold that, on the facts of this case, the learned Judge was in error when he ordered the petitioner to establish his claim. The appeal is therefore allowed and the order of the learned judge is set aside.

I note that proceedings under section 325 have commenced in 1985 and the impugned order had been made in 2002. This Court has no material to ascertain the cause for this delay, but it is a blatant violation of the provisions of section 325(4) of the Civil Procedure Code. The plaintiff shall pay a sum of Rupees.5000/- to the petitioner as costs of this appeal. 120

*Appeal allowed.*