

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

In the matter of an Appeal

Kusuma Sri Wanasinghe
No.4B/6/7, Mattegoda Hosing Scheme,
Mattegoda.

Plaintiff

SC Appeal 176/2016
SC/HCCA LA 23/2016
WP/HCCA/AV305/2013(Rev)
DC Homagama Case No.7621/RE

Vs

Princymala

Abey Suriya.
No.9A/79/5, Mattegoda Hosing Scheme,
Mattegoda.

Defendant

IN THE MATTER OF AN APPLICATION
UNDER SECTION 328 OF
THE CIVIL PROCEDURE CODE.

Appuhannadige Kotahewage Lesly
Ariyasinghe.
No.125, Kirulapana Mawatha, Colombo 5.

Petitioner

Vs

Kusuma Sri Wanasinghe

No.4B/6/7, Mattegoda Hosing Scheme,
Mattegoda.

Plaintiff Judgment Creditor Respondent

Princymala

Abeyasuriya.

No.9A/79/5, Mattegoda Hosing Scheme,
Mattegoda.

Defendant Judgment Debtor Respondent

AND BEWEEN

Appuhannadige Kotahewage Lesly
Ariyasinghe.

No.125, Kirulapana Mawatha, Colombo 5.

Petitioner-Petitioner

Vs

1. Kusuma Sri Wanasinghe

No.4B/6/7, Mattegoda Hosing Scheme,
Mattegoda.

**Plaintiff Judgment Creditor
Respondent-Respondent**

2. Princymala Abeyasuriya.

No.9A/79/5, Mattegoda Hosing Scheme,
Mattegoda.

**Defendant Judgment Debtor
Respondent-Respondent**

AND NOW BEWEEN

Appuhannadige Kotahewage Lesly
Ariyasinghe.

No.125, Kirulapana Mawatha, Colombo 5.

**Petitioner-Petitioner-
Petitioner-Appellant.**

Vs

1. Kusuma Sri Wanasinghe
No.4B/6/7, Mattegoda Hosing Scheme,
Mattegoda.

**Plaintiff Judgment Creditor
Respondent-Respondent-
Respondent-Respondent**

2. Princymala Abeysuriya.
No.9A/79/5, Mattegoda Hosing Scheme,
Mattegoda.

**Defendant Judgment Debtor
Respondent-Respondent-
Respondent-Respondent**

Before : Sisira J De Abrew J
NalinPerera J
Prasanna Jayawardena PC J

Counsel : Seevali Amithirigala for the Petitioner-Petitioner- Petitioner-Appellant.
Rohana Deshapriya with C Liyanage for the Plaintiff Judgment Creditor
Respondent-Respondent- Respondent-Respondent

Argued on : 26.1.2018

Written Submission

Tendered on : 11.11.2016 by the Petitioner-Petitioner- Petitioner-Appellant.

Decided on : 23.3.2018

Sisira J De Abrew J

Plaintiff Judgment Creditor Respondent-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action against the Defendant Judgment Debtor Respondent-Respondent-Respondent (hereinafter referred to as the Defendant-Respondent) to get a declaration that the Defendant-Respondent was holding property in dispute in trust for the Plaintiff-Respondent; that in the event of the Defendant-Respondent failing to execute a deed in favour of the Plaintiff-Respondent to direct the Registrar of the court to execute the deed in favour of the Plaintiff-Respondent; and to eject the Defendant-Respondent and her agents from the property in dispute. The case was decided ex-parte since the Defendant-Respondent did not respond to the summons. The ex-parte judgment was delivered on 13.6.2015. The writ against the defendant-Respondent was executed on 21.6.2006. The fiscal broke open the house (the property in dispute) which had been padlocked and handed over the possession of the property to the Plaintiff-Respondent. Thereafter on 4.7.2006 the Petitioner-Petitioner-Petitioner-Appellant (hereinafter referred to as the Petitioner-Appellant) filed a petition under Section 328 of the Civil Procedure Code (hereinafter referred to as the CPC) to restore him in possession. The learned District Judge by order dated 23.9.2013 refused the application of the Petitioner-Appellant. Being aggrieved by the said order of the learned District Judge the Petitioner-Appellant filed an appeal in the Civil Appellate High Court. The Civil Appellate High Court by its judgment dated 7.12.2015 dismissed the appeal. Being aggrieved by the said judgment of the Civil Appellate High Court, the Petitioner-Appellant has filed this appeal in this court. This court by its order dated 29.9.2016 granted leave to appeal on question of law set out in paragraph 24(iii) of the petition of appeal dated 14.1.2016 which is stated below.

Have the Honourable Judges of the Civil Appellate High Court not considered the possession of the Petitioner-Appellant in the form of constructive trust?

Facts of this case may be briefly summarized as follows:

The Defendant-Respondent by Deed No.186 attested by Gallage Indika Jayanth Perera Notary Public marked P9 sold the property in dispute to Wilfred Rohan Senaratne on 6.5.2004. Wilfred Rohan Senaratne by Deed No.228 attested by RD Attanayake marked P5 sold the property in dispute to Suresh Danial and Chandrika Bernard on 30.6.2004. Suresh Danial and Chandrika Bernard on the same day (30.6.2004) mortgaged it to a Finance Company. After redeeming the mortgage, said Suresh Danial and Chandrika Bernard by Deed No.235 attested by ND Hirimuthugala marked P1 sold the property in dispute to the Petitioner-Appellant on 20.3.2006. The Complaint was filed in the District Court on **6.7.2004** against the Defendant-Respondent Princy Mala Abeysooriya. Therefore it is seen that when the complaint was filed, the Defendant-Respondent (Princy Mala Abeysooriya) was not the owner of the property. As I pointed out earlier, the Defendant-Respondent Princy Mala Abeysooriya on **6.5.2004** had sold the property in dispute to Wilfred Rohan Senaratne. The writ issued by the District Court was executed on 21.6.2006. When the writ was executed the owner of the property was the Petitioner-Appellant by virtue of Deed No.235 dated 20.3.2006. The learned District Judge dismissed the application of the Petitioner-Appellant filed under Section 328 of the CPC. The most important question that must be decided in this case is whether the above conclusion reached by the learned District Judge is correct or not. Section 328 of the CPC 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 dispossessed 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.”

In order to succeed in an application under Section 328 of the CPC, the person dispossessed must prove that he was in possession of the property when the writ was executed. The Petitioner-Appellant who was dispossessed from the property in dispute filed an application under Section 328 of the CPC. The learned District Judge dismissed the said application of the Petitioner-Appellant. The basis of the conclusion of the learned District Judge appears to be that the Petitioner-Appellant was not occupying the property in dispute at the time of execution of the writ (21.6.2006). The learned District Judge in his judgment has also observed that the Petitioner-Appellant was not in possession of the property in dispute. But the learned District Judge has, on the basis of the evidence of the Petitioner-Appellant, observed that the Petitioner-Appellant had received the keys of the property in dispute on 30.4.2006. The writ issued by the District Court was executed on 21.6.2006. This shows that he had obtained possession of the property in dispute

before the execution of the writ. It is an undisputed fact that on 21.6.2006 (the day of the execution of the writ) the Petitioner-Appellant was not in the country as he had gone abroad. If a person does not occupy a property, does it mean that he does not possess the property? In my view, occupation and possession are two different things. One can possess a property without occupying the same. To prove possession it is not necessary to prove that he or she lives in the property or occupies the property. In the present case, the Petitioner-Appellant purchased the property on 20.3.2006. The Petitioner-Appellant after purchasing the property, had made an application to the Ceylon Electricity Board (CEB) to convert electricity in his name. In the said application marked P14, the Grama Niladhari has made an endorsement on 11.5.2006 to the effect that the Petitioner-Appellant was the present occupier of the property in question. He has also made an endorsement to the effect that 'not in occupation'. The Grama Niladhari in her evidence has stated that she certified the said application marked P14 on the basis that the Petitioner-Appellant is the owner of the property and that she did so after examining the relevant deed. The CEB has after examining the said application P14 has converted the electricity in the name of the Petitioner-Appellant on 11.5.2006. The writ was executed on 21.6.2006 when keys of the property were with the Petitioner-Appellant. The Petitioner-Appellant in his evidence has clearly stated that when he purchased the property in dispute he received the keys from the previous owner; that thereafter repaired the house; that when the carpenters were repairing the house the doors of the house were opened; that he possessed the property in dispute on his own title; that he purchased the property after studying advertisement published in Silumina News Paper; that he purchased the property as an investment; and that when the Plaint was filed by the Plaintiff-Respondent, the Defendant-Respondent was not even the owner of the property. When I consider the above material, it is clear that the Petitioner-Appellant

was in possession of the property in dispute when the writ was executed and that he was dispossessed. The Petitioner-Appellant was not the judgment debtor or is not a person in occupation under the judgment debtor. When I consider all the aforementioned matters, I am of the view that the Petitioner-Appellant has no connection whatsoever with the judgment debtor in this case.

In order to succeed an application under Section 328 of the CPC the following matters must be established.

1. The person making the application is not the judgment debtor or is not a person holding the property under the judgment debtor.
2. The person making the application was in possession of the property at the time of execution of the writ.
3. The person making the application was dispossessed of the property as a result of the execution of the writ.

When I consider all the aforementioned matters, I hold that the Petitioner-Appellant has proved that he is not the judgment debtor or not a person occupying the property in dispute under him; that he was in possession of the property in dispute at the time of execution of the writ; that he was dispossessed of the property in dispute as a result of the execution of the writ; and that he was possessing the property at the time of dispossession on his own title derived from deed No.235 dated 20.3.2006 attested by ND Hirimuthugoda Notary Public. I therefore hold that the Petitioner-Appellant has satisfied the requirements under Section 328 of the CPC. Considering the all the aforementioned matters, I hold that the learned District Judge erred when he refused the application of the Petitioner-Appellant made under Section 328 of the CPC. The learned Judges of the Civil Appellate High Court have failed to consider

the above matters and have affirmed the order of the learned District Judge. I hold that the judges of the Civil Appellate High Court too misdirected themselves on facts and law when they affirmed the order of the learned District Judge. For the above reasons, I answer the above question of law as follows. ‘The Petitioner-Appellant was in possession of the land on his own title and was not a judgment debtor or not a person holding the property under the judgment debtor.’

For the aforementioned reasons, I set aside the order of the learned District Judge dated 23.9.2013 and the judgment of the Civil Appellate High Court dated 7.12.2015. I hold that the Petitioner-Appellant has succeeded in the application under Section 328 of the CPC and that he should be restored in possession of the property in dispute forthwith. The learned District Judge is hereby directed to take all necessary legal steps to restore the Petitioner-Appellant in possession of the property in dispute. The Petitioner-Appellant is entitled to the costs from the Plaintiff-Respondent in all three courts.

The Petitioner-Appellant is restored in possession of the property.

Judge of the Supreme Court.

Nalin Perera J

I agree.

Judge of the Supreme Court

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court.

