IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Sinnundurayalage Somawathie,

Pethigammana.

Claimant-Petitioner-Appellant

C.A.No.559/93 (F)

D.C.Kegalle No.658/L.

Vs.

Talgaspitiye Galkaduwegedara Ranie,

Pethigammana. (now deceased)

Plaintiff-Respondent

-Respondent

Paranadurayalage Dharmadasa,

Pethigammana,

Hemmathagama,

Kegalle.

Substituted-Plaintiff- Respondent

Before : Hon. Justice A.L.Shiran Gooneratne

Hon. Justice Mahinda Samayawardhena

Counsel : Shantha Karunadhara for the Petitioner-Appellant.

Sunil Abeyratne with Lakmali Algama for the Respondent.

Argued and

Decided on : 20/11/2019

Hon. Justice Mahinda Samayawardhena

The learned Counsel for the Claimant - Petitioner - Appellant and the learned Counsel for the Substituted- Plaintiff- Respondent were heard.

This appeal has been filed by the Appellant against the order of the District Court dated 11/ 10/ 1993.

The Original Plaintiff has filed this action in the District Court against the Defendant seeking declaration of title to the land described in the schedule to the plaint, ejectment of the Defendant therefrom and damages. The Defendant has filed the answer seeking dismissal of the Plaintiff's action. After trial, the learned District Judge by Judgment dated 01/03/1990 held with the Plaintiff. The Defendant has not filed an appeal against the said Judgment.

The Appellant is the wife of the Defendant. The learned Counsel for the Appellant admits that they lived with their children as a family in the said land during the material time to this action.

When the fiscal went to the land to execute the writ on 11/09/1990, the Defendant being the Judgment – Debtor has given an undertaking to the fiscal that he would vacate the land on or before 11/10/1990.

Thereafter, the Appellant has made an application to the District Court dated 19/09/1990 seeking not to execute the writ.

However, writ has been executed on 23/11/1990.

The Appellant has made another application dated 26/11/1990 seeking again not to execute the writ and to allow the Appellant to continue in possession of the land.

Thereafter, the Plaintiff being the Judgment - Creditor has filed an application dated 30/11/1990 under Section 325 of the Civil Procedure Code seeking to restore the Plaintiff in possession on the basis that the Defendant together with his family forcibly re-entered the land soon after the execution of the writ.

Learned Counsel for both parties inform Court that both these applications were taken up together and an inquiry was held before the District Court.

After the inquiry, the impugned order dated 11/10/1993 has been made whereby predominantly the application of the Appellant has been dismissed.

It is not stated under which Section of the Civil Procedure Code, the Appellant made the application dated 26/11/1990 to the District Court. The reliefs prayed for in that application are also misleading. The reliefs have been sought on the basis that the decree had not been executed, whereas, by that time, admittedly, the writ had been executed and the Appellant had been ejected.

Upon inquiry, learned Counsel for the Appellant informs Court that the said application was made under Section 839 of the Civil Procedure Code. That argument cannot be accepted as that Section can be invoked provided there is no express provision in the Civil Procedure Code to remedy the situation. In any event, there is no at least a clue that the said application was made under Section 839 of the Civil Procedure Code. However, the learned Counsel for the appellant now admits that the correct Section under which the Appellant could have made that application was Section 328 of the Civil Procedure Code. Then it is clear that Section 839 has no application.

If that application should be considered as an application made under Section 328 of the Civil Procedure Code, there is no right of appeal in terms of Section 329 of the Civil Procedure Code against the impugned order dated 11/10/1993. Therefore, the final appeal filed against the impugned order is bad in law, and on that ground alone, this appeal shall be dismissed. No final appeal can be filed against an order made after such claim inquiry.

The learned District Judge has dismissed the Appellant's application on merits. The Appellant relies on two deeds marked at the inquiry as P1 and P2.

The learned Counsel for the Respondent points out that the Appellant's deed marked P1 has been executed about 15 years after the institution of this action.

The Counsel for both parties are in agreement that the predecessor in title of the Appellant is one Hatana , and the predecessor in title of the Plaintiff is one Kiriukkuwa.

The learned Counsel for the Respondent draws the attention of the Court to the evidence of the Appellant at page 154 of the original appeal brief wherein the Appellant in her evidence has admitted that the land in suit, is the land of Kiriukkuwa, and Hatana's land lies to the South of the land in suit.

The learned counsel for the Respondent informs Court that there appears to be two lands by the same name, Wagolle Hena.

The learned District Judge has dismissed the application of the Appellant on the basis that the deeds which were relied upon by the Appellant are not relevant to the land in suit.

If the Appellant had some rights to the land in suit, she could have either intervened in the main action or at least produced those deeds at the main trial through her husband who was the defendant in this case.

I must stress that the findings which the learned District Judge have made in the impugned order are not conclusive in so far as the substantive rights of the parties are

concerned. As it is stated in Section 329 of the Civil Procedure Code, the impugned order made after the claim inquiry shall not bar the right of the Appellant to institute an action to establish her right or title to the said land.

For the aforesaid reasons, the appeal is dismissed, but without costs.

The learned Counsel for the Respondent draws the attention of this Court to the journal entry No. 87 dated 15/10/1993 wherein the learned District Judge whilst dismissing the Appellant's application, has ordered to eject the Appellant, and to deliver possession of the land to the Plaintiff. The learned District Judge is directed to comply with the said order.

JUDGE OF THE COURT OF APPEAL

Hon. Justice A.L.Shiran Gooneratne

I agree.

JUDGE OF THE COURT OF APPEAL

WC/-