

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

Samuel Newton,  
No 31/A, Sumanarama Road,  
Mount Lavinia.  
Previously at No. 36/4, De Saram Road,  
Mount Lavinia.

C.A. No. 884 / 2000 F

Plaintiff

D.C. Mt.Lavinia No. 311/94/L

**Vs.**

Muriel Amarawathie Wickremanayake,  
appearing through her Attorney residing  
at 23A, Vacluse Road, Vacluse,  
Australia.

Defendant

Berjaya Mount Royal Beach Hotel  
Limited,  
No 36, College Avenue, Mount Lavinia.

Added Defendant,

**AND NOW BETWEEN**

Samuel Newton,  
No 31/A, Sumanarama Road,  
Mount Lavinia.  
Previously at No. 36/4, De Saram Road,  
Mount Lavinia.

Plaintiff Appellant

**Vs**

Muriel Amarawathie Wickremanayake,  
appearing through her Attorney residing  
at 23A, Vacluse Road, Vacluse,  
Australia.

Defendant Respondent

Berjaya Mount Royal Beach Hotel  
Limited,  
No 36, College Avenue,  
Mount Lavinia.

Added Defendant Respondent

BEFORE : UPALY ABEYRATHNE, J.  
COUNSEL : Udaya Bandara for the Plaintiff Appellant,  
N. Mahendra with S. Jayasundera for the  
Added Respondent  
ARGUED ON : 15.02.2013  
DECIDED ON : 28.05.2013

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) has instituted the said action against the Defendant Respondent (hereinafter referred to as the Respondent) in the District Court of Mt. Lavinia seeking for a declaration that the decree in case No 1694/L has been obtained by misrepresentation and dishonestly and also for a declaration that he is entitled to the possession of the land described in the schedule to the plaint which was the subject matter of the action bearing No 1694/L.

The Defendant Respondent filed answer denying the averments contained in the plaint and prayed for a dismissal of the Appellant's action. The Respondent has averred that the Appellant was barred from having and

maintaining the present action in view of the order made by the learned District Judge of Mt. Lavinia in Case No 1694/L and the orders made by the Court of Appeal in Revision Application No. 851/93 and by the Supreme Court in Special Leave to Appeal No 241/93.

It appears from the proceedings of the case that the Respondent had instituted an action bearing No 1694/L against one S. Danapala and the said action had been concluded in favour of the Respondent. Thereafter a writ of possession had been executed and the possession of the land in suit had been handed over to the Respondent. Thereafter the Appellant had forcibly re-taken the possession of the land in suit without recourse to the provisions contained in Section 328 of the Civil Procedure Code (CPC). Thereafter the Respondent had made an application under Section 325 of the CPC and after an inquiry an order has been delivered against the Appellant. Thereafter the Appellant had made an Application in Revision to the Court of Appeal from the said order and the Court of Appeal had dismissed the said Application of the Appellant. Thereafter the Appellant had sought special Leave to Appeal to the Supreme Court from the said order of the Court of Appeal. The Supreme Court had refused special leave to appeal. Accordingly the Appellant has been ejected from the land in suit.

Thereafter the Appellant had made an application under Section 328 of the CPC to the District Court of Mt. Lavinia. After an inquiry the learned District Judge by order dated 11.07.1994 had dismissed the said application of the Appellant. The Appellant had not appealed against the said order.

Whilst admitting the said proceedings of the case bearing No 1694/L the Appellant is now seeking for a declaration that the decree in case No 1694/L has been obtained by misrepresentation and dishonestly. Both parties have

raised issues and the learned District Judge after hearing the submissions made on the preliminary issues has dismissed the Appellant's action.

It was apparent from the said proceedings that in case No 1694/L the Appellant has sought the legal remedies available to him under Section 328 of the Civil Procedure Code. Section 328 of the Code 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. 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. Accordingly the learned District Judge had made an order on the said Application of the Appellant under Section 328 of the CPC. Since the Appellant had not appealed against the said order of the learned District Judge dated 11.07.1994 it had become a final order between the parties to the action and now it operates as *Res Judicata* between the parties and therefore no fresh action can be brought by the Appellant for the recovery of possession of the land in suit.

In the case of Arif Vs Kandasamipillai & Others [1982] 2 SLR 741 (SC) it was held that "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.

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.”

In the aforesaid circumstances I see no reason to interfere with the order of the learned District Judge dated 17.07.2000. Hence I dismiss the appeal of the Appellant with costs.

*Appeal dismissed.*

Judge of the Court of Appeal