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

In the matter of an Application for restitutio in integrum or revision in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Gonapinuwalage Suguna Manjula,

Of No: 52/2, Wajirawansha Mawatha,
Obeysekerapura, Rajagiriya.

And Now No. 104/12, Cooray Place,
Stanley Thilakaratne Mawatha, Nugegoda

Defendant Petitioner

C. A. RII 11 2021

D. C. Nugegoda case No. RE 193/20

Vs.

1. Yasarathne de Silva Pinnaduwage,
No. 181/15, Polhengoda Road,
Kirulapone.

Plaintiff Respondent

And another

Before: Hon. D.N. Samarakoon J.,

Hon. Sasi Mahendran J.,

Counsel: Sudharma K. Gamage with for the Defendant Petitioner.

Pradeep Fernando instructed by G. G. S. Maheshika for Plaintiff Respondents.

Written Submissions on: 12.10.2022 by the Petitioner

12.10.2022 by the Respondents

Date: 14.07.2023

D.N. Samarakoon, J.

JUDGMENT

The defendant petitioner appears to be the tenant and the plaintiff respondent, the landlord. Plaintiff instituted action for ejectment. Defendant claimed a claim in reconvention. On the day for replication, the plaintiff withdrew the action with liberty to file a fresh action, as sufficient notice has not been given. The defendant asked for taxed cost to be deposited in the event of filing a fresh action. He also asked for permission to go on with the claim in reconvention.

The learned district judge on that date, 30.04.2021, allowed the application for withdrawal. She did not impose the condition of depositing taxed costs of that case, if a fresh action is filed but no reason was given for not doing it. It appears that she wanted time to consider the application to go on with the claim in reconvention. Hence she asked parties to file written submissions.

It was at that stage the defendant petitioner came to this Court in this application on 25.11.2021.

The plaintiff respondent objected to the issuing of notice. Hence this Court by order dated 31.03.2022, issued notice and a stay order staying further proceedings of the District Court.

On that day, viz., 31.03.2022 itself, pursuant to parties filing written submissions in the District Court, the learned district judge has dismissed the claim in reconvention without costs, on the basis that it is not a claim that could be joined in reconvention.

The defendant petitioner took up the position that he is entitled to reliefs in respect of the earlier order dated 30.04.2021, whereas, the plaintiff respondents claim that in view of the order of the district court dated 31.03.2022, this application should be dismissed.

The plaintiff respondent has tendered to Court a decided case somewhat similar in circumstances to this case. That is *Gunasekera vs. Dias et al., (1920) 22 NLR 86*.

It was decided by Sir Anton Bertram, Chief Justice with Schneider A. J. and especially due to the stature and eminence of the learned Chief Justice, that judgment is quoted in full.

> "August 5, 1920 . BERTRAM C. J.- This is an appeal against the order of the District Judge of the Galle District Court refusing an application to set aside a confirmation of a sale of property sold in execution. The application was made by the third defendant in the action. Judgment had been recovered against her and the other two defendants, and an appeal was taken to this Court. So far as the third defendant was concerned, the ground of her appeal was that judgment had been recovered upon a promissory note, that she was a married woman, that she had executed this note without the consent of her husband, and that her husband had not been joined as a party in the action. ***The Supreme Court did not set aside the decree, but directed that execution under the writ in her***

case should be stayed. A formal order to that effect was duly made out and reached the District Court on July 5, 1919. By the time the judgment of the Supreme Court reached the District Court, a sale in pursuance of the execution had already taken place, but had not yet been confirmed. Notwithstanding the judgment of the Supreme Court, the plaintiff, who was the purchaser under the sale, on July 18, applied to the Court for the confirmation of the sale without bringing to the notice of the Court the terms of the judgment of this Court. ***The District Court, in spite of the fact that there was an entry in the journal of the case showing that the judgment of the Court had been varied by the Supreme Court, allowed the application for the confirmation of the sale.*** The motion for the confirmation was made ex parte, and the present appellant is said to have known nothing of this proceeding. Later, an order for delivery of possession was applied for, also ex parte, which is in itself an irregularity (see Abeydere v. Marikar), and possession was formally delivered. The appellant then applied to the District Judge for relief, but the District Judge was of opinion that matters had now gone to such a stage that he had no power to grant relief, and that her only means of obtaining relief would be by a substantive action. I think the District Judge has acted under an imperfect appreciation of his powers.

It seems to me that the confirmation of the sale in the circumstances was an irregularity. There is no question, not only that the District Judge could refuse to confirm the sale, but that in the circumstances he ought to have refused to confirm the sale. With regard to his powers in such circumstances, I may refer to the cases of De Mel v. Dharmaralne and Appuhamy v. Appuhamy, and the case cited to us by Mr. Keuneman (Gunawardene v. Yosoof). The order of the Supreme Court directing a stay of execution, so far as it related to the present appellant, was in effect, but not in form, a setting aside of the decree of the District Court, and ***it was held in De Mel v. Dharmaralne above cited, that if a District Court,***

after its decree has been set aside by the Supreme Court, confirms a sale held in execution of the decree, that order can be vacated. It would also clearly be a gross injustice that, whether by the default of the Court or by the default of the plaintiff in applying for confirmation of the sale, property which the Supreme Court intended to preserve for the appellant should be taken away from her. In my opinion the case should be remitted to the District Judge in order that he may cite all parties before him and determine on what terms the application of the appellant for relief should be granted. It is necessary, I think, in this case, as the sale has been completed, that notice should be given to the Fiscal, and that the Court should determine who should be responsible for paying the fees which the Fiscal has already received. The order confirming the sale, and the further order for delivery of possession, should be set aside. The appellant is entitled to the costs of this appeal, and in the Court below.

SCHNEIDER A.J.—I agree.

Set aside".

In that case, there was an entry in the District Court case that the Supreme Court has varied the judgment. In this case there was no such communication to the District Court before or on 31.03.2022.

In *De Mel vs. Dharmarathne, (1903) 7 NLR 275* too, the sale by the Fiscal was on 14.11.1902. The Supreme Court set aside the decree on 25.11.1902. The sale was confirmed by the district court on 20.01.1903.

The order of the learned Additional District Judge vacating the order confirming the case was affirmed by the Supreme Court.

But that case too is not similar to this case because, the Supreme Court had set aside the decree, before the date of confirmation. In this case, there was no order

by this Court before the learned district judge made her order on 31.03.2022. In fact, this Court too, issued the stay order on the same date.

In the other case followed by Bertram C. J., *Appuhamy vs. Apphuhamy (1910) 14 NLR 08*, it was held, among other things, that,

> "A Court has power to set aside a sale for reasons other than those specified in section 282, if the application is made before the confirmation of the sale".

Therefore none of the cases cited for the plaintiff respondent is similar to the circumstances in this case.

In paragraph 25 of the written submissions, the defendant petitioner makes the application, that, this Court may direct the learned district judge to commence the trial on the claim on reconvention.

If this Court issues such an order, it confronts with the order of the learned district judge dated 31.03.2022 dismissing the claim in reconvention.

This Court has no power to alter the learned district judge's order dated 31.03.2022 since that is not subject to revision before this Court.

What is questioned before this Court is the order of the learned district judge dated 30.04.2021, by which she allowed the withdrawal of the plaintiff's action.

This Court in its interim order dated 31.03.2022 said, that, according to *Fernando vs. Ceylon Brewerys Ltd., 1997* decided by U. de Z. Gunewardane J., it was decided that the former section 753 of the Civil Procedure Code on revisionary jurisdiction granted the Court of Appeal only the power to "***make the same order which it might have made had the case been brought before it by way of an appeal***", whereas, the present section 753 grants the power "***to make any order as the interest of justice may require***".

It was also said, that, although the above judgment was set aside by the Supreme Court (Mark Fernando J.,) in *Ceylon Breweries Ltd. vs. Jax Fernando*, it was

specifically said that the setting aside is only on the part of the decision which said that a defendant who has been served with an ex parte decree can make a valid application on the 15th day after service but not on what Gunewardane J., said about the enlarged scope of the revisionary jurisdiction.

Hence what Gunewardane J., said about the Court having the ability to be more flexible and less legalistic to exalt not so much the rigour of the law but unalloyed justice, in the sense of good sense and fairness is in force.

Both parties admit that an application was made by the defendant on 30.04.2021, that, the dismissal of the plaint be subject to depositing of taxed costs of case No. RE 193/20 in Court before the filing of a fresh action. This application could and should have been allowed by the learned district judge as it is justifiable and there was no reason not to do it. But she has just allowed the withdrawal of the plaintiff's action without any condition and fixed the matter for written submissions on the question of the claim in reconvention.

Hence, exercising the revisionary jurisdiction of this Court, the said order is varied that the plaintiffs may be permitted to withdraw their action subject to the depositing of taxed cost of case No. RE 193/20 in Court, in the event they or one of them filing a fresh action on the said cause of action.

Subject to that the application of the defendant petitioner is dismissed with no costs.

Judge of the Court of Appeal

Sasi Mahendran, J.

I agree.

Judge of the Court of Appeal