194/99(F)

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

Walpitagamage Samie,

No. 59/2, Kandy Road, Kiribathgoda,

Kelaniya.

Plaintiff

1. C.A.Case No:-194/99(F)
2. D.C.Colombo Case No:-4084/ZL

1. V.

1.Winifrida Nanayakkara

2.Shelton Nanayakkara,

Both of No:-213, Pamunuwila Road,

Galadanda, Gonawala, Kelaniya.

Defendants

AND

Walpitagamage Samie, (deceased)

59/2, Kandy Road, Kiribathgoda,

Kelaniya.

Plaintiff

Thanthirige Mureen Perera,

59/2, Kandy Road, Kiribathgoda,

Kelaniya.

Substituted-Plaintiff-Respondent- Appellant

V.

1.Winifrida Nanayakkara,

2.Shelton Nanayakkara,

Both of No:-213, Pamunuwila Road,

Galadanda, Gonawala, Kelaniya.

Defendant-Petitioner-Respondents

Before:- H.N.J.Perera, J.

Counsel:-Ikram Mohamed P.C. with A.T Shayama Fernando for the Substituted-plaintiff-appellant

Respondent absent and unrepresented.

Argued On:-17.06.2014

Written Submissions:-27.08.2014

Decided On:-27.05.2015

H.N.J.Perera,J.

The plaintiff-respondent-appellant has filed this appeal seeking to set aside the order made by the learned District judge of Colombo on 02.03.1999 holding that the defendants be restored to possession after the lapse of the lease granted by the substituted-plaintiff which would end on 06.06.2000.

The deceased plaintiff instituted action against the defendants for declaration of title and ejectment from the premises in suit. Ex-parte decree was entered against the said defendants as prayed for in the plaint on 22.08.1983 on the basis of default of appearance of the said defendants after due service of summons. The said decree was executed on 02.11.1983 and possession of the premises delivered to

plaintiff as the defendants had not filed papers to purge their default upon the service of the decree.

The 1st defendant-petitioner–respondent thereafter made an application to have the said decree vacated and for an order for the restoration of possession. The said application was inquired into by the court and an order was made on 10.10.1989 vacating the said ex-parte decree without an order for the restoration of possession of the 1st defendant. The substituted-plaintiff-appellant appealed against the said order to Court of Appeal which was dismissed on 20.01.1997.

Thereafter the 1st defendant filed another application in June 1997 for the restoration of possession of the said premises to which the substituted-plaintiff filed objections. The said application of the 1st defendant for restoration of possession was taken up for inquiry and the learned District Judge made order on 02.03.1999 holding that the 1st defendant should be restored to possession after the 06.06.2000 as the tenancy of the present tenant ends on 06.06.2000 as per the tenancy agreement produced in evidence. The present appeal is against the said order made for the restoration of possession.

The main contention of the Counsel for the substituted plaintiff-appellants is that the learned District Judge has not considered the legal submissions made to the court that the earlier order made on 10.10.1989 in which no order for the restoration had been made, had become final between the parties in the absence of an appeal being made and thus the same matter cannot be re-inquired once again and no order could be made in their favour.

In the application made by the defendants to the court 30.12.1983 the defendants have in their prayer to the petition has clearly prayed that:-

1. that the decree and all proceedings and orders made n pursuance thereof be declared null and void;

2. the defendant-petitioners be permitted to file their answer and the case do thereafter proceed to trial;
3. that pending the final judgment in this case the defendant-petitioners be restored to possession of the said property in suit.

The court after inquiry has very clearly held that the said order has been made by the court without jurisdiction and has set aside the decree entered against the defendants.

The substituted-plaintiff-appellant has appealed from this order to Court of Appeal and the said appeal has been dismissed by the Court of Appeal on 20.01.1997.Therafter after five months of the said decision of the Court of Appeal the defendants has made this application to the District Court seeking restoration of possession.

Sansoni, J. in Sirinivasa Thero 63 N.L.R 31 at 34 stated as follows:-

"Justice requires that he should be restored to the possession he occupied before the invalid order was made, for it is a rule that the court will not permit a suitor to suffer by reason of its wrongful act. The court will, so far as possible, put him in the position which he would have occupied if the wrong order had not been made. It is a power which is inherent in the court itself, and rests on the principle that a court of justice is under a duty to repair the injury done to a party by its act. The duty of the court under these circumstances can be carried out under its inherent power."

In Ariyananda V. Premachandra 2000 (2) SLR 218, it was held:-

Per Wigneswaran, J.

"When a District Court finds that summons /Decree have not been served on the defendant and yet an ex-parte judgment had been illegally made and thereafter writ issued and executed, what must be the character of the legal order that should be made? It was the duty of the Court ex mere motu to have restored possession to the defendant even if such a relief had not been asked for."

(1)It is the duty of court to restore status quo ante where a fraud had been perpetrated and an abuse of the process of court had been committed.

(2)Application is under S 839 Civil Procedure Code, invoking the inherent powers of court to make order as may be necessary to meet the ends of justice or to prevent abuse of process of court.

It was further held in that case that mere setting aside of the decree would have been sufficient if writ had not been issued. But when it is pointed out to court that the defendant had been dispossessed consequent to the issue of a writ ab initio void it was the duty of the court ex-mere motu to have restored possession to the defendant even if such a relief had not been asked for. The reason being that the process of court had been abused and it is the duty of court to restore status quo ante where a fraud had been perpetrated and an abuse of the process of court had been committed. In this instance despite the application for restoration of possession the learned District Judge had inadvertently made no order for the restoration of possession. The substituted-plaintiff had appealed from this order to the court of appeal, and the said appeal too had been dismissed by the said court.

The fact that the defendant had appealed from the said order of the District Judge and the said appeal had been dismissed and the fact that the plaintiff has not appeal to the court of appeal from the order of the District Judge for failing to order re-possession to the defendants are not reasons to deny the right of the defendants for the re-possession of the said premises. The present application was made by the defendants are to obtain relief for the wrong committed on them.

In Wickremanayake V.Simon Appu 76 N.L.R 166 at 167 Chief Justice H.N.G.Fernando too stated as follows:-

"Justice therefore requires that the plaintiff, who had been placed in possession in execution of a decree which had turned out to be invalid, should no longer be allowed to continue in possession of the land."

I see no reason to interfere with the order of the learned District Judge; on the contrary, I see every reason to uphold it. The appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL