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

In the matter of an application for a Revision and Restitutio-in-Integrum under Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/RII/04/2020
D.C. Bandarawela No. 2038/L

Basnayake Mudiyanselage
Ranasinghe Bandara,
No.387, Badulla Road, Main Street,
Bandarawela.

Defendant – Petitioner

-Vs-

Warusa Hennedige Gamini De Silva,
No.270, Punagala Road,
Bandarawela.

Plaintiff-Respondent

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

Counsel: Chandana Wijesooriya instructed by wathsala Dulanjani for Defendant Petitioner.
Rohan Sahabandu P. C. with natasha Fernando and Senanayake for Plaintiff Respondent.

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Argued on: 26.09.2022

Written submission tendered on: 21.02.2022 Plaintiff Respondent
21.02.2022 Defendant Petitioner

Decided on: 30.11.2023

D.N. Samarakoon, J

In respect of Restitutio in Integrum it was said in **Kusumawathie vs. Wijesinghe, 2001 (3) SLR 238,** that, a judgment obtained by fraud by the production of false evidence and non discloser of material facts can be set aside.

The plaintiff instituted action against the defendant for ejectment on 14th December 2010.

The defendant pleaded that his father was the tenant under plaintiff's father, then under plaintiff's mother and then the statutory tenant.

The plaintiff's position was, that, the premises was unauthorized and hence no statutory tenancy arises. It is submitted in the written submissions of the plaintiff respondent dated 21st February 2022, at paragraph 08(b) et. Seq., that,

> "(b) there was no approved Building Plan issued by the Bandarawela Municipal Council in respect of the premises in suit,
>
> (c) the Bandarawela Municipal Council had not issued a Certificate of Conformity in respect of the premises in suit,

(d) for the reasons given above (b and c) the premises in suit was not an authorized premises under and in terms of the Housing and Town Improvement Ordinance No. 19 of 1915 (as amended)

(e) accordingly the provisions of the Rent Act No. 07 of 1972 (as amended) did not apply to the premises in suit…"

At the trial before the District Court, the defendant called a witness from the Municipal Council to say it is authorized. But it was revealed that it was in respect of another premises.

The main issue, as admitted for the plaintiff respondent too was whether the defendant is the statutory tenant and whether he has the protection of the Rent Act No. 07 of 1972.

The case for the defendant before the learned district judge was closed on 26th February 2017. Thereafter, however, the defendant obtained the correct evidence and moved court to lead that evidence. There was the application submitted to the Municipal Council by the father of the plaintiff, to construct the premises and the certificate of conformity.

The defendant made an application to the District Court on 07th March 2017 to lead that evidence. The plaintiff respondent objected and the application was rejected by the order of the learned district judge dated 29th May 2017. The defendant went on leave to appeal to Provincial Civil Appellate Court but it was also dismissed.

The district court on 30th June 2017 gave judgment in favour of the plaintiff on the basis, that, the premises is unauthorized and hence no statutory tenancy.

Issue No. 07(b) suggested for the defendant was whether he is the protected tenant of the premises under Rent Act No. 07 of 1972.

The answer given was in the negative.

The defendant made a final appeal to the Provincial Civil Appellate Court.

The plaintiff then made an application to the district court under section 763 of the Civil Procedure Code to execute the writ pending appeal. The matter was fixed for inquiry. At that inquiry the defendant led evidence to show that the premises was authorized.

At page 151 of the document "X.3", (in Volume II) there is a building plan submitted by one W. H. Nonis Silva, the father of the plaintiff. This was marked as "Waga" (Res) 03. The Certificate of Conformity at page 144 for premises No. 261 Bandarawela was marked as "Waga" (Res) 04. It is admitted between the parties, that, during the period between 1957 – 1961, the assessment Number was 261. It was later changed to 265, 265/1/1 and 267 and later became No. 387.

"Waga"(Res) 04, the Certificate of Conformity is dated 04th November 1957.

At page 146 is the ledger which indicates that a Certificate of Conformity has been issued as above which was marked as "Waga" (Res) 6a. The column 18 of that ledger also states the date of the issue of the Certificate of Conformity as 04th November 1957.

The district court at page 103 of "X.3" inquired from the witness from the Municipality Council about the document D.51 marked by the defendant at the main trial. The witness categorically said,

> "I was giving evidence on the documents previously available. That is not in respect of this building. I was not aware then. This was found later…"

While that inquiry was pending, the Provincial Civil Appellate Court dismissed the final appeal of the defendant.

The plaintiff then withdrew the application to execute the writ pending appeal, because the appeal was no longer pending. **Hence that material evidence led by the defendant in that inquiry could not be used.**

The defendant went before the Supreme Court seeking leave against the judgment of the Provincial Civil Appellate Court.

Pending Leave to appeal application to the Supreme Court, the plaintiff executed the writ. The defendant then withdrew the application before the Supreme Court.

But, the defendant now comes on Restitutio in Integrum on the basis, as said earlier, that, the judgment is on production of false evidence and non disclosure of material facts.

It has been held in **Manchinahamy vs. Muniweera, 1951,** by Dias S. P. J., that in exercising the jurisdiction of restitutio in integrum, the court can even set aside its own judgment and restore status quo ante. In that case, the Supreme Court of Ceylon (which then had the power of restitutio) set aside its own judgment.

Among other things, it was said, in Menchinahamy vs. Miniweera, 1951,

> "'In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. **We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of natural justice which makes it incumbent on this Court, despite technical objections to the contrary, to do justice.** "

The non production of material evidence, because the court did not allow its production, is a violation of the principles of natural justice.

The learned district judge, as it is envisaged at page 468 of Volume I in this case thought that the application of the defendant to lead in evidence the above documents which he found after the closure of his evidence was a waste of time. Had the learned district judge allowed that application on the basis of audi

alteram partem, the district court's decision and its answer to issue No. 07(b) would have been otherwise.

In any event, in this matter, there is no judgment or order of the Supreme Court.

In **Perera vs. Avishamy et al., 24th September 1908,** Mr. Justice Wood Renton sitting with Mr. Justice Wendt observed, that,

> "The irregular manner in which the proceedings were conducted in the Court below renders it difficult to do justice to the parties in this case.…They directly tend to encourage appeals from the learned Judge's decisions, and make the task of the Appeal Court, in endeavouring to arrive at a sound conclusion, needlessly laborious".

Although the context in which His Lordship said above is not similar in all fours to the present case, had the learned district judge the patience and magnanimity to allow the defendant to bring that one document before he ventured to give judgment; the defendant need not have gone from pillar to post and finally to this Court to show what he says is correct. A large part of natural justice, which Dias S. P. J., too referred to in the case of Menchinahamy vs. Muniweera is nothing but common courtesy.

As the District Court's judgment and Provincial Civil Appellate Court's judgment are based on the premise, that, the premises is not authorized and there is no statutory tenancy, which is an incorrect position, as shown by evidence later found by the defendant, which he could not earlier find due to no fault of him, the remedy restitutio in integrum should be granted. The preliminary objections of the plaintiff respondent have no merit because this Court in this case does not exercise the appellate jurisdiction, but the power of Restitutio in Integrum, which arose in Roman Dutch common law, as then exercised by the Supreme Court of Ceylon and presently under the 1978 Constitution by the Court of Appeal. This Court has discussed this matter at length in its order in C. A. RII 11 2023 dated 23rd October 2023.

Therefore this Court sets aside the judgment of the district court and also the judgment delivered by the High Court in appeal on the basis that they amount to nullity and judgments obtained by fraud as per **Kusumawathie vs. Wijesinghe, 2001 (3) SLR 238** which was referred to at the commencement.

The defendant petitioner is entitled to be restored in to the possession of the premises. On 08th of March 2021, this Court has issued an interim order as per paragraph (v) of the prayer to the petition, that is,

> "Grant interim relief restraining the plaintiff respondent from demolishing and or making alterations and or changing the nature of the premises in suit in the District Court of Bandarawela case No. 2038/L pending the final determination of this application by Your Lordships Court".

The violation of this interim order amounts to contempt of this Court.

In addition it was held in **M/S SHAHA RATANSI KHIMJI & SONS ... APPELLANTS VERSUS PROPOSED KUMBHAR SONS HOTEL P. LTD. & ORS. ... RESPONDENTS,** by the Supreme Court of India, that,

> "31. It is apt to note here that when there is a lease of a house or a shop it cannot be treated as a lease of structure but also a lease of site. The Court referred to the decision in **D.G. Gose & Co. (Agents) (P) Ltd. v. State of Kerala (1980) 2 SCC 410** wherein this Court held that the site of the building is a component part of the building and, therefore, inheres in it the concept or ordinary meaning of the expression "building". The Court also placed reliance on **Corpn. of the city of Victoria v. Bishop of Vancouver Island AIR 1921 PC 240. 32.** It has been further opined that once a tenancy is created in respect of a building standing on the land it is the building and the land which are both components of the subject-matter of demise and the destruction of the building alone does not determine the tenancy when the land which is the site of the building

continues to exist. This interpretation, as we find, is in accord with Section 108 of the Act. It is reflectible that in **Vannattankandy Ibrayi's** case, the two-Judge Bench observed that the rights stand extinguished as on the distinction of the demise, for there is destruction of the superstructure and in its non-existence there is no subject matter. Thus, the land has been kept out of the concept of subject matter. In our considered opinion, the Court in the said case failed to appreciate that there are two categories of subject-matters, combined in a singular capsule, which is the essence of provision under the Transfer of Property Act and not restricted to a singular one, that is, the superstructure. In **T. Lakshmipathi (supra)** the Court took note of the fact that the land and superstructure standing on it as a singular component for the purpose of tenancy. It is in tune with the statutory provision. Therefore, we agree with the proposition stated therein to the affect that "in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of the subject-matter of demise and the destruction of the building alone does not determine the tenancy when the land which was the site of the building continues to exist". On the touchstone of this analysis, we respectfully opine that the decision rendered in **Vannattankandy Ibrayi (supra)** does not correctly lay down the law and it is, accordingly, overruled".

The Supreme Court of India also decided in **T.Lakshmipathi & Ors vs P.Nithyananda Reddy & Ors on 31 March, 2003, that,**

"We are, therefore, of the opinion that in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of subject matter of demise and the destruction of the building alone does not determine the tenancy when the land which was site of the building continues to exist; more so when the building has been destroyed or demolished neither by the landlord nor

by an act of nature but solely by the act of the tenant or the person claiming under him. Ample judicial authority is available in support of this proposition and illustratively we refer to George J. Ovungal Vs. Peter, AIR 1991 Kerala 55, Rahim Bux & Ors. Vs. Mohammad Shafi, AIR 1971 Allahabad 16, Hind Rubber Industries Pvt. Ltd. Vs. Tayebhai Mohammedbhai Bagasarwalla & Ors., AIR 1996 Bombay 389 and Jiwanlal & Co. & Ors. Vs. Manot & Co., Ltd., 64 CWN 932. The Division Bench decision of Kerala High Court in Dr. V. Sidharthan Vs. Pattiori Ramadasan, AIR 1984 Kerala 181, appears to take a view to the contrary. But that was a case where the building was totally destroyed by fire by negligence of the tenant. It is a case which proceeds on very peculiar facts of its own and was rightly dissented from by Bombay High Court in Hind Rubber Industries Pvt. Ltd. Vs. Tayebhai Mohammedbhai Bagasarwalla & Ors., (supra)".

Therefore, the aforesaid issue No. 07(b) is answered in favour of the defendant and the judgment is entered in favour of the defendant. The learned district judge of Bandarawela is directed to execute the writ and to restore the possession of the defendant. The defendant petitioner is entitled to the cost in this application and in the district court.

Judge of the Court of Appeal.

Hon. Sasi Mahendran,
I agree.

Judge of the Court of Appeal.