
SOMAWATHIE

Vs.

SIRIPALA AND OTHERS

COURT OF APPEAL
DE SILVA, J.
WENGAPPULI, J.
CA/PHC/APN/78/2018 (REV)
PHC HAMBANTHOTA 47/2000
JUNE 2, 2018, DECEMBER 13, 2018

Article 138 and 154P(4)(b) of the Constitution—Revision—Retrospective applicability of a judgment of the Supreme Court

The petitioner invoked the revisionary jurisdiction of the Court of Appeal seeking to nullify an order made by the Provincial High Court on the basis that the High Court had no jurisdiction to make an order on a dispute in relation to state land that had been brought before the court under Article 154P(4)(b) of the Constitution. The petitioner founded her contention on the reasoning contained in the judgment of the Supreme Court in Superintendent, *Stafford Estate and two others v. Solaimathu Rasu (2013/ 1 Sri LR 25* and on the basis that the said judgment which laid down procedural law ought to be retrospectively applied in her favour. The order of the Provincial High Court is dated 11. 12. 2002 and the Rasu judgment was pronounced on 17. 07. 2013.

Held:

1. Even if changes were made to the procedural laws where a “vested right” is affected, such instances have been treated as an exception to the applicability of amended statutory provisions retrospectively. Section 48 of the Land Development Ordinance confers certain “vested rights” in parties in respect of their succession rights, upon the death of the permit holder. The dispute in this case is on succession rights. As such, the petitioner is not entitled to relief since the “vested rights” of the other respondents are adversely affected by a retrospective application of the Rasu judgment.
2. The issue before the court is the retrospective applicability of a judgment as opposed to the retrospective applicability of a statutory amendment. None of the parties to the instant application were parties to the *Rasu* judgment. A judgment of court, when it

lays down its view differently at a subsequent stage, will have retrospective effect of the change it brings about only among parties to that litigation.

Cases referred to:

1. Superintendent, Stafford Estate and two others v. Solaimuthu Rasu [2013] 1 Sri LR 25
2. De Silva v. Weersinghe [1979] 1 Sri LR 334
3. Sendiris v. Assistant Commissioner of Agrarian Services and Another [1991] 1 Sri LR 212
4. Gunatilake v. Walker Sons & Co Ltd 79 (2) NLR 563
5. Rajadurai v. Emerson (1995) 2 Sri LR 30
6. Mulgirigala Co-operative Stores Society Ltd v. Chariis 52 NLR 567
7. Ram Banda v. River Valleys Development Board 71 NLR 25
8. National Westminster Bank PLC (Respondents) v. Spectrum Plus Ltd and others and others (Appellants) (2005) UKHL 41
9. Siebe Gorman & Co Ltd v. Barclays Bank Ltd (1979] 2 Lloyd's Rep 142

APPLICATION in Revision from the Order of the High Court of Hambantota.

Dr. Sunil Coorey with Heshan Pietersz for the Petitioner.

Ravindra Sumapathipala for the Petitioner Respondent.

Ganga Wakishta Arachchi, S. S. C., for the 1st Respondent and Respondent-Respondent.

cur. adv. vult.

October 14, 2019

WENGAPPULI, J.

The Petitioner, with her petition addressed to this Court, invokes its revisionary jurisdiction and seeks to nullify an order made by the Provincial High Court of the Southern Province holden in Hambantota in case No. HCA 47/2000, on the basis that it had no jurisdiction to make an order on a dispute in relation to State land that had been brought before Court under Article 154P(4)(b) of the Constitution. The Petitioner founded said contention on the reasoning contained in the judgment of the Supreme Court in Superintendent, *Stafford Estate and two others v. Sofaimuthu Rasu*.1

It is stated that the Petitioner is the eldest female child in her family whereas the Petitioner-Respondent is the eldest of the males. The State land in respect of which the dispute arose was developed by the father of the Petitioner, who had been issued with a permit under the provisions of Mahaweli Authority Act read with Land Development Ordinance. With the death of the Petitioner's father N. S. P. John, in 1990 a dispute arose between her and the 4th Respondent. After an inquiry held by the 1st Respondent, Divisional Manager of Mahaweli Authority, it was decided that the western portion of the land was to be given to Petitioner whilst the eastern portion was given to the 4th Respondent.

Said determination by the 1st Respondent was given effect to by the parties who divided the land with fencing. They were advised to "*obtain their grants under the Land Development Ordinance for their respective portions of the land.*"

This determination by the 1st Respondent was disputed by the Petitioner-Respondent who sought to challenge its validity in the Provincial High Court in Application No. 47/2000, seeking inter alia a Writ of Mandamus. This application was filed on the basis that the Petitioner Respondent is the eldest male child of the family of the deceased permit holder. On 11. 12. 2000, the Provincial High Court granted relief to the Petitioner-Respondent with the issuance of a Writ of Mandamus.

The Petitioner had then filed an application No. 5/2003, also seeking Writ of Mandamus from the Provincial High Court over the same allotment of State land. The Provincial High Court, by its order dated 26. 01. 2008, dismissed her application as already it had decided the dispute over the same land. The appeal No. CA (PHC) 56/06 filed by the Petitioner against the said order of dismissal was subsequently withdrawn by her on 16. 10. 2015.

With the pronouncement of the judgement in Superintendent, *Stafford Estate and two others v. Solaimuthu Rasu (supra)*, the Petitioner now claims that the order of Court which granted the Writ of Mandamus in favour of the Petitioner-Respondent, is a nullity since the Provincial High Court had no Writ jurisdiction over State lands.

At the inquiry of the instant application of the Petitioner, the parties indicated that the matter could be decided on their written submissions already tendered.

It is the contention of the Petitioner that when the judgment of Superintendent, *Stafford Estate and two others v. Solaimuthu Rasu* was delivered “. . . the judiciary laid down ‘procedural Law’ and not ‘Substantive Law’. As it is procedural Law, the Law was to be applicable for all times for all purposes and can be applied retrospectively”. Hence the Petitioner further contends that “. . . the entire result of the above judgment is that ‘the Provincial High Courts’ never had power to hear and determine cases with respect to recovery/dispossession of State lands, encroachment or its alienation”.

The attempt by the Petitioner to apply the determination of the Supreme Court in *Rasu’s* case on the order of the Provincial High Court in HCA 47/2000 is, in effect, to have its applicability in retrospectivity in her favour. The order of the Provincial High Court is dated 11. 12. 2002 and *Rasu* judgment was pronounced on 17. 07. 2013. The Petitioner seeks to avoid the apparent conflict of her application with the presumption against the retrospective application of law by terming the *Rasu* judgment as a judgment which had laid down the applicable “procedural law”.

It is to be noted that the Petitioner did not substantiate her claim that the *Rasu* judgement has laid down the “procedural law” applicable to litigation involving State land. She simply made a reference to the contents of the said judgment. She also failed to place reliance upon a binding judicial precedent which had recognised that a determination of the scope of jurisdiction of an inferior Court by the apex Court as an instance of laying down procedural law which binds not only its parties but all such other disputes which had reached finality, retrospectively. Since there were no submissions made by the parties on this important point of law to assist this Court, it deliberately desists in making any ruling on that issue.

However, even if the Petitioner’s contention that the determination by the Supreme Court in *Rasu* had in fact laid down the applicable procedural law, she is not entitled to any relief. The reasons for this conclusion are as set out below.

The principle of presumption against retrospective legislation has been described by the Supreme Court in the judgment of *De Silva v. Weersinghe*,² by reproduction of the relevant portions from several authoritative texts. The Supreme Court also reproduced the following segment of the text from Craies’ Statute Law, 7th edition, p. 387, where it is stated:

A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. But a statute 'is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing'.

Their Lordships have quoted Maxwell on Interpretation of Statutes (12th edition, p. 222) in order to highlight the position that the presumption has no application to procedural laws and Rules of Court as the following portion reproduced from the text reflects:

The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of the courts.

In *Sendiris v. Assistant Commissioner of Agrarian Services and Another*,³ is a case where the question of arrears of rent was sought to be determined upon provisions of an amended legislation. This Court had, in the body of the said judgment, quoted the judgment of *Gunatilake v. Walker Sons & Co Ltd.*,⁴ where it was stated:

The presumption against retrospective operation has no application to enactments which affect only the procedure and practice of the Courts. There is no presumption that a change in procedure is intended to be prospective and not retrospective. Alterations in the form of procedure are always retrospective unless there is some good reason why they should not be, Gardner vs. Lucas Blackburn. No person has a vested right in any course of procedure, and he is bound to follow such modes of seeking redress as the law may enjoin from time to time. When a new remedy is granted or a defective remedy is rectified . . . it cannot be said that the rights of any one are injuriously affected by the reforms . . .

and decided the issue presented before it for determination as follows:

Therefore, the mere fact that the provisions of the Agricultural Lands Law were not favourable to a tenant cultivator does not mean that he has a vested right in the continuance of the former procedure. Indeed, the Agricultural Lands Law and even the Paddy Lands Act No. 1 of 1958, which was previously in force, imposed as a requirement on every tenant cultivator the obligation

to pay rent to the landlord as provided for by law. Hence; a tenant cultivator who fails to pay the rent as provided for by law is in the category of a person who has violated a duty cast upon him by law and he could not be heard to say that he has a vested right to continue with his tenancy. The provisions of section 28 of the Agricultural Lands Law and section 18 of the Agrarian Services Act are procedural in nature. They provide the means for the recovery and enforcement of the requirement imposed by law on a tenant cultivator to pay rent to the landlord. The provisions of section 18 should thus be applicable wherever a tenant cultivator is in arrears of rent irrespective of the time when such arrears accrued.

Thus, it is clear that even if changes were made to procedural laws or to Rules, where a “vested right” is affected, such instances have been treated as an exception to the applicability of the amended statutory provisions retrospectively. The judgment of *Rajadurai v. Emerson*,⁵ reflect this position clearly. This Court, in determining the applicability of the changes that were brought to the statutory provisions contained in section 337(1) of the Civil Procedure Code, with the amendment Act No. 53 of 1993, decided that:

The question whether the ten-year bar introduced in respect of all decrees by the amendment of 1980 which came into force on 11. 12. 80, will apply retrospectively to decrees entered prior to that day was considered by the Supreme Court in the case of Haji Omar v. M. H. Bodidasa (S. C. 48/93- S. C. Minutes 6. 12. 94). Upon an exhaustive analysis of the relevant provisions and the applicable case law, Dheeraratne, J. held that the amendment would not apply in relation to decrees for immovable property entered prior to 11. 12. 1980 being the date on which the amendment came into operation. It was held by Their Lordships that the judgment creditor’s right to enforce the decree in his favour is a substantive right and is not a matter of procedure. On that basis it was held that the amendment of 1980 “cannot be regarded as purely procedural legislation insofar as it purports to affect (or rather to destroy) the vested right of the judgment creditor.

In *Mulgirigala Co-operative Stores Society Ltd v. Charlis*,⁶ the then Supreme Court, considered the question “. . . whether the amendment to section 45 effected by the Act of 1949 dealt with a mere matter of procedure or practice.”

Having considered the above quoted the said pivotal issue in the light of the applicable principles, the Court declares that:

The answer is clearly in the negative. The right of the plaintiffs to prosecute the suit filed by them in the District Court was a substantial vested right. The Act is silent in regard to pending actions and, therefore, the principle that should be applied is that it ought not to be given a retrospective operation so as to interfere with a vested right unless one could say that it was retrospective by necessary intendment, of which there is no-indication whatever.

The principle laid down in the case cited above was applied to a pending case by the Divisional Bench in Guneratne v. Appuhami [(1906) 9 N. L. R. 90]. This was an action instituted in 1900 for declaration of title to land and the defendant took the plea that it was not maintainable inasmuch as the estate of one of the plaintiffs predecessors in title had not been administered. The plaintiff sought to rely on the first proviso to section 547 of the Civil Procedure Code, which came into operation in 1904 during the pendency of the suit. Lascelles, A. C. J., stated:

“Nothing is to be found in section 2. of Ordinance No. 12 of 1904 which shows any intention on the part of the Legislature that the enactment should be retrospective in the sense of affecting pending suits. It was however contended that the enactment was a matter of procedure only and as such would extend to the present action . . . In my opinion the question is concluded by the judgment of the privy Council in the Colonial Sugar Refining Company v. Irving [(1905) A. C. 369.]”.

Later at page 95 the learned Acting Chief Justice stated:

“If the Ordinance is given a retrospective effect the defendant will be deprived of this defence. It is clear to me that this is not merely a matter of procedure, it touches a right which was in existence when the Ordinance was enacted”.

It can equally well be stated in the present case that if the amending Act is given retrospective effect, the plaintiff would be deprived of the substantive right of prosecuting his suit before the tribunal which he had selected as of right before the Act was passed.

The Supreme Court was also mindful of the disproportionate consequences the affected party would suffer, if the contention advanced before their Lordships, similar to the one that had been advanced by the Petitioner in the instant application before this Court, is adopted. The Court states thus:

If the contention on behalf of the appellants is accepted it would mean that, whatever be the stage of the pending action at the time the amending Act came into operation, the jurisdiction came to an end and the parties had to bear the inconvenience and expense of litigating afresh before the Registrar or an arbitrator appointed by him. A far-reaching consequence of this kind could not have been intended by the Legislature and the amending Act cannot bear a construction that would lead to this result.

Weeramantry J. held a similar view in *Ram Banda v. River Valleys Development Board*.⁷ This is a matter where the one of the questions that arose for determination was “. . . whether the Statute can operate retrospectively in regard to this termination without violence to the principle that vested rights should not be interfered with by later legislation” in relation to termination of services of an employee. In such circumstances, the Court should “. . . approach the problem of retrospective operation on the basis that the provision of law” under its consideration is a provision “. . . which had a real impact on legal rights and duties”.

The Court had therefore decided:

In Akilandanayaki v. Sothinagaratnam (1952) 53 N. L. R. 385, the Court was considering an amendment of the Matrimonial Rights and Inheritance Ordinance changing the definition of the diathettam prevailing under Ordinance No. 9 of 1911. It was held that no retrospective effect could in the absence of express words or necessary implication be given to new laws which affect rights acquired under the former law.

The Court reproduced the statement of law by Gratiaen J. in said case where his Lordship pronounced that:

Section 6 (3) of the Interpretation Ordinance was there described by as giving statutory recognition to the rule of judicial interpretation adopted in all civilised countries that the courts should not lightly assume an intent on the part of Parliament to introduce legislation

prejudicially affecting vested rights which have already been acquired.

The real dispute among the Petitioner and her siblings is the succession rights over the parcel of State land possessed by their father upon a permit issued under Land Development Ordinance. Chapter VII of the said Ordinance with the title “SUCCESSION” governs the statutory regime relating “. . . to any land alienated on a permit or a holding.” *It also deals with the entitlement of” . . . a person who is entitled under this Chapter to succeed to the land or holding upon the death of the permit holder or owner thereof.”*

Clearly these words, as they appear in Section 48 of the Land Development Ordinance, seem to reflect that it had conferred certain “vested rights” over parties in respect of their succession rights, upon the death of a permit holder. As such, even if the position advanced by the Petitioner that the *Rasu* judgment had laid down the applicable procedural law to her application as well and is therefore applicable to the instant application with retrospective effect, is accepted as a legally valid proposition, she is not entitled to any relief since the “vested rights” of other Respondents are adversely affected by such retrospective application of the *Rasu* judgment.

The Petitioner is not a party in the *Rasu* judgment. She merely relies on the interpretation of the Supreme Court of the relevant Constitutional articles to reach its determination that “*Provincial High Courts never had power to hear and determine cases with respect to recovery/dispossession of State lands, encroachment or its alienation.*”

The judicial precedents cited above are in relation to situations which dealt with amendments to statutory provisions and the applicability of such amendments retrospectively. The issue before this Court is about the applicability of a judgment retrospectively

This discussion brings up an interesting question in the form that whether the said determination of the Supreme Court has retrospective effect on the Respondent Petitioner’s application before the Provincial High Court in HCA47/2000. Clearly none of the parties in the instant application were parties to *Rasu* judgment. Then what is the effect on such a judgment on other litigants who already had their rights determined by the law as stood at that time?

In *National Westminster Bank plc (Respondents) v. Spectrum Plus Limited and others and others (Appellants)*,⁸ the House of Lords have decided that its judgment of *Siebe Gorman & Co Ltd v. Barclays Bank Ltd*⁹ was wrong and should be overruled. Then the appellant bank made an application to limit the applicability of the new judgment only “prospectively” due to the hardships that the change of law would result in since the appellant and its clients have transacted over the years acting on the legal principles that are now overruled by the House of Lords. Their Lordships have considered the reasons for and against the question of prospective application of this ruling.

Having discussed the relevant considerations at length, Lord Nicholls, observed that:

A Court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned, as occurred with the manufacturer of the ginger beer in Donoghue v. Stevenson [1932] AC 562. (emphasis added)

In view of this approach, that a judgment of Court, when it lays down its view differently at a subsequent stage, will have retrospective effect of the change it had brought about only among parties to that litigation. Hence, the Petitioner’s contention does not seem to be a plausible one, when considered with the limitation of applicability of the retrospective application imposed by the House of Lords.

It should also be noted that Section 48 qualifies its application to “. . . to any land alienated on a permit or a holding. “Thus, if the dispute arose as to the proper succession, then that land had already been” . . . alienated on a permit”. *Rasu confines the limitation of the of the writ jurisdiction of the Provincial High Court only in respect of” . . . powers relating to Recovery/dispossession of State Lands, encroachment or alienation of State Lands.”*

None of these powers were exercised by the Provincial High Court when it granted a Writ of Mandamus on the Petitioner-Respondent with its order in case No. HCA47/2000.

Hence, it is the considered view of this Court that the Petitioner is not entitled to any relief she had prayed for in the instant application. Her application for revision is therefore refused.

The petition of the Petitioner is dismissed with costs fixed at Rs. 50, 000. 00.

DE SILVA, J. - *I agree.*

Application dismissed.

Judgment by: Achala Wengappuli, J.

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