SENEVIRATNE

v.

FRANCIS FONSEKA ABEYKOON

SUPREME COURT.
RANASINGHE, J., TAMBIAH, J. AND L. H. DE. ALWIS, J.
S.C. APPEAL No. 40/84.
C.A. APPLICATION No. 1098/82.
D.C. PANADURA No. 18067/CR.
JANUARY 17 AND FEBRUARY 02, 1986.

Landlord and Tenant–Plaintiff landlord taking possession of premises alleging abandonment after his appeal from judgment against him in a suit for ejectment was abated–Application by defendant to be restored to possession–Can Court restore the premises to the defendant tenant in the absence of a decree under s. 217 (c) C.P.C. on being satisfied of forcible eviction by landlord?–Revision–Inherent powers of Court–Civil Procedure Code, section 839.

The plaintiff landlord after his appeal from a judgment dismissing his action for eviction of his tenant the defendant was abated, forcibly took possession of the premises let alleging abandonment and consequential deterioration of the premises. The defendant-tenant denied abandonment and applied to the Trial Court to restore him to possession. The Court granted the application.

The plaintiff then filed an application for revision of this order. The question was whether in the absence of a decree restoring possession of the premises to the defendant-tenant, the Court still had the power to make an order that possession be restored to the defendant which the Fiscal could execute.

Held–
The conduct of the plaintiff (failure to make full disclosure of the material facts in his application for revision, delaying tactics when the defendant sought restoration of possession in the District Court, forcibly evicting the tenant and leaving the island after installing another tenant in the premises) disentitled him to revisionary relief.

Since the plaintiff had taken the law into his hands and forcibly evicted the defendant alleging abandonment and deterioration of the premises, the Court could in the interests of justice resort to its inherent powers saved under s. 839 of the Civil Procedure Code and make order of restoration of possession for the Fiscal to execute even though the Civil Procedure Code provided for such restoration to possession only on a decree to that end entered under s. 217 (c) of the Civil Procedure Code.

Cases referred to:

(1) *Palaniappa Chetty v. Goonehamy–(1909) 12 NLR 301.*
(2) *Vangadasalem v. Chettiyar–(1928) 29 NLR 446.*
(3) *De Silva v. Wijeyesekera–(1934) 36 NLR 287.*

APPEAL from judgment of Court of Appeal.

P. A. D. Samarasekera, P.C. with *W. P. Gunatilleke,* and *Jayantha de Almeida Gunaratne* for the plaintiff-petitioner-petitioner.

E. D. Wickramanayake with *Sri Lal Perera* for the defendant-respondent-respondent.

Cur. adv. vult.

March 6, 1986.

TAMBIAH, J.

The defendant-respondent came into occupation of premises No. 9, Kulatunga Road, Panadura in 1957. His landlord, then, was one Jayawardena. On the latter's death in 1968, his son-in-law, the plaintiff-petitioner, became the defendant-respondent's landlord. On 20.9.1970, the plaintiff-petitioner filed action for ejectment against the defendant-respondent and obtained judgment in his favour on 9.3.1973. The defendant-respondent appealed and the Supreme Court set aside the judgment and a re-trial was ordered. At the re-trial judgment was entered on 11.3.1977 in favour of the defendant-respondent and the action was dismissed. The plaintiff-petitioner, then, appealed against the said judgment and this appeal was abated by the Court of Appeal on 3.3.1981.

In October 1980, while the appeal was pending, the Rent Board of Panadura was inquiring into an application made by the defendant-respondent to have repairs effected to the premises. At these proceedings, the plaintiff-petitioner's position was that the defendant-respondent had abandoned the premises several years ago, and in consequence the condition of the premises had deteriorated. The defendant-respondent maintained that all along he was resident on the premises and its bad condition was due to his landlord's failure to effect repairs. The members of the Rent Board inspected the premises and concluded its inquiry on 21.10.1980. Its decision was sent to the parties on 10.12.1980. The Rent Board rejected the plaintiff-petitioner's position and authorised the defendant-respondent to effect the repairs to the value of Rs. 4,820 which represented ten years' rent.

The same month, i.e., December 1980, while his appeal was still pending before the Court of Appeal, the plaintiff-petitioner, who was away in Australia, returned to this Island. On 30.12.1980, twenty

days after the decision of the Rent Board was conveyed to the parties, the plaintiff-petitioner took possession of the premises. According to him, he did so as the defendant-respondent had abandoned the premises and it was in a state of collapse. The defendant-petitioner vehemently denied this; he maintained that the plaintiff-petitioner employed thugs and forcibly ejected him from the premises. Having regard to the Rent Board proceedings, its inspection of the premises and its order delivered only 20 days earlier, the Court of Appeal in its judgment, which is now appealed from, correctly concluded that the contention of the plaintiff-petitioner that he took possession on 30.12.1980 because the premises was abandoned and was collapsing seems altogether unacceptable.

Having taken possession, the plaintiff-petitioner installed a new tenant and left for Australia. On 9.1.1981, the defendant-respondent applied to the District Court of Panadura, and sought restoration of possession. According to the defendant-respondent, having learnt that the plaintiff-petitioner had appointed Prof. Kannangara as his attorney, notice of the application for restoration of possession was served on the latter and he appeared in Court and denied that he was ever given a power of attorney. After inquiry, on 8.3.1981, the learned District Judge, by his order dated 30.1.1981 held that Prof. Kannangara was the lawful attorney of the plaintiff-petitioner. Prof. Kannangara, then, applied for leave to appeal from the said order to the Court of Appeal. On 6.5.1982, the Court of Appeal refused leave, but, left it open to him to re-agitate the matter, if it became necessary, in any final appeal in the case.

While the application for leave to appeal was pending, the case was called several times in the District Court of Panadura for objections of Prof. Kannangara to the application for restoration of possession, and dates were obtained for the filing of objections on the ground that the application to the Court of Appeal was pending. After the Court of Appeal's order of dismissal on 6.5.1981, the case was called on 21.5.1982 for objections. On that day, Miss Liyanage, attorney-at-law, appeared for the plaintiff-petitioner and tendered to Court a letter dated 18.3.1981, signed by the plaintiff-petitioner revoking the power of attorney granted to Prof. Kannangara. She also moved for a date to file proxy and objections of the plaintiff-petitioner to the application for restoration of possession. She held no proxy from the plaintiff-petitioner and, therefore was not entitled to participate in that day's proceedings. The defendant-respondent's

counsel objected to the application for a further date. The learned District Judge refused to grant a further date. He observed that as the power of attorney was revoked on 18.3.1981, the plaintiff-petitioner had ample time to file his objections; that the plaintiff-petitioner was trying to delay the final disposal of the application for relief. He also made an order that the defendant-respondent be restored to possession of the premises. Writ was issued on the same day and was executed by the Fiscal on 24.5.1982, ejecting the persons in occupation of the premises. It would appear that the purported tenant who was ejected has filed action against the defendant-respondent in the District Court of Panadura, and has asked that he be restored to possession, as he was a lawful tenant of the premises.

The plaintiff-petitioner did not appeal from the learned District Judge's order dated 21.5.1982; instead he moved the Court of Appeal by way of Revision to have the order set aside. The Court of Appeal dismissed the application. It was argued for the plaintiff-petitioner that the existence of an executable decree in favour of a party is an essential pre-requisite for the issue of a Writ of possession under the Civil Procedure Code, and, therefore, the writ issued by the District Court was bad in law. Much the same argument was addressed to this Court and learned President's Counsel for the petitioner cited the cases of *Palaniappa Chetty v. Goonehamy* (1), *Vangadasalem v. Chettiyar* (2) and *De Silva v. Wijeyesekera* (3) and submitted that a writ of execution which is not founded on a decree for possession under s. 217 (*c*) of the Civil Procedure Code is a nullity, and the proceedings thereunder are void ab initio.

The Court of Appeal took the view that the instant case is eminently one in which the circumstances called for the exercise of the inherent powers under s. 839 of the Civil Procedure Code, and the order by the learned District Judge was one that was absolutely necessary to meet the ends of justice. It held the order was a valid and lawful order. The Court of Appeal considered the conduct of the petitioner and his attorney Prof. Kannangara, their efforts to frustrate and defeat the final disposal of the application of the defendant-respondent to have himself restored to possession. It also considered the failure of the petitioner to make a full and frank disclosure of all material facts in his revision application – the failure to mention that his action was dismissed and his appeal was pending when he took possession, the Rent Board proceedings and its decision and the petitioner's installation of a new tenant who had filed an action to eject the

defendant-respondent. Having regard to the plaintiff-petitioner's conduct and his non-disclosures of material facts, the Court of Appeal decided that this was not an appropriate case for the exercise of its powers in revision.

The plaintiff-petitioner's action for ejectment of the defendant-respondent was dismissed; therefore no executable decree could have been entered by the trial Court. The only decree that could have been entered was a decree of dismissal of the action. If learned President's Counsel's submissions are accepted, the resulting position would be: the plaintiff-petitioner could have filed an action for ejectment of the defendant-respondent on the ground of non-occupation, but he chose not to do so; the plaintiff-petitioner, though he had filed an appeal against the judgment in favour of the defendant-respondent which assured to him the continuance of his tenancy rights, need not await its results; the plaintiff-petitioner could disregard such judgment, take forcible possession of the premises and achieve by extra-legal means what he failed to achieve through the Courts; the defendant-respondent, on the other hand, who has been deprived of the enjoyment of the fruits of the judgment must obey the law and have recourse to due process of law; the defendant-respondent must file a suit for recovery of possession, obtain a decree for possession and then apply for a writ of possession. Does it lie in the mouth of the plaintiff-petitioner to say this and preach the law to others? If he desires to obtain possession on the ground of non-occupation he himself must resort to due process of law.

An extraordinary situation had arisen and to deal with it, there was no express provision in the Civil Procedure Code. It is to meet such a case that s. 839 was enacted. It empowered a Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. Dealing with the corresponding section in the Indian Civil Procedure Code (s. 151) which is identical with s. 839, *Chitaley and Rao* state (*Code of Civil Procedure, 3rd Ed., Vol. 1*)–

> "Every Court, whether a Civil Court or otherwise, must therefore, in the absence of express provision in the Code for that purpose, be deemed to possess, as inherent in its very Constitution, all such powers as are necessary to do the right and to undo a wrong in the course of the administration of justice (p. 1199).
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> It is in the ends of justice that an injury should be remedied and needless expense and inconvenience to parties avoided (p. 1212).

> The jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands it. (p. 1155)".

and Sarker in his "Code of Civil Procedure" (Vol. 1, at p. 842) says:

> "where a contingency happens which has not been anticipated by the framer of the Civil Procedure Code, and therefore no express provision has been made in that behalf, the Court has inherent power to adopt such procedure, if necessary to invent a procedure, as may do substantial justice, and shorten needless litigation."

A contingency arose for which there was no remedy in the Civil Procedure Code. Undoubtedly what the plaintiff-petitioner did was an enormous wrong. Both the Rent Act (s. 17 (1) read with s. 42) and the Protection of Tenants (Special Provisions) Act. No. 26 of 1970 (s. 4 read with s. 9) make interference with the occupation of a tenant a punishable offence. The latter Act also makes ejectment of a tenant, otherwise than on an order of Court, a punishable offence (s. 5 read with s. 9). The judgment of the District Court gave the defendant-respondent the right to stay on in the premises. He had been deprived of this right by illegal means resorted to by the plaintiff-petitioner. Justice of the case demanded that the wrong be righted. The remedy pointed out by learned President's counsel is a regular action instituted by the tenant for recovery of possession. That would have put the tenant into needless expense and involved him in protracted litigation particularly having regard to the fact that soon after dispossessing the tenant, the plaintiff-petitioner left the shores of this country. In the circumstances of this case, the learned District Judge was justified in making an order for restitution and restoring the status quo ante between the parties. The only way the order for restoration of possession could be effected is by the issue of a writ of execution to the Fiscal.

Learned President's counsel submitted that s. 839 was intended to repair errors committed by the court itself and not by the parties. There is no merit in this submission. Not only have our Courts used their inherent powers to repair injuries done to a party by their own acts (see *Sirinivasa Thero v. Sudassi Thero* (63 NLR 31), *Salim v. Santhiya* (69 NLR 490)), they have also used their inherent powers where a party was in error, e.g. to stay further proceedings, where the husband failed to comply with an order for payment of alimony pendente lite (see *Asilin Nona v. Perera* (46 NLR 109)).

Revision is a discretionary remedy. The conduct of a petitioner is a relevant consideration when he asks for relief by invoking a discretionary remedy such as Revision. He must come to Court with clean hands. In this case, the plaintiff-petitioner's action for ejectment of his tenant failed; what he failed to achieve through due legal process, he achieved by taking the law into his own hands. He took forcible possession, and having obtained possession he installed a new tenant and then fled to Australia and thus put himself beyond the reach of the District Court of Panadura, which had local jurisdiction in the matter.

By contrast, soon after forcible dispossession, on 09.01.1981, the defendant-respondent applied to court to be restored to possession. Every attempt to frustrate and delay the final disposal of this application was made by the petitioner and his attorney, Prof. Kannangara. The attorney first denied he was ever granted a power of attorney. When the court held that he was the duly appointed attorney, he took the matter to the Court of Appeal, which refused him leave to appeal on 06.05.1982. On 21.05.1982, the date on which the attorney's objections were due, an attorney-at-law, who had no authority to represent the petitioner, announced to Court that the power of attorney had been revoked on 18.03.1981, a position which cannot be reconciled with the earlier position that he was not appointed attorney. Postponement was refused and an order for possession was made on 21.05.1962. It had taken over one year and five months for the application to be finally disposed of.

Revision will also be refused where a petitioner is guilty of suppression of material facts. The Court of Appeal's judgment sets out the material facts that were deliberately suppressed by the plaintiff-petitioner, and the Court has correctly refused to exercise its powers in Revision, on this ground also.

I see no reason to interfere with the judgment of the Court of Appeal; on the contrary, I see every reason to uphold it. The appeal is dismissed with costs.

RANASINGHE, J. – I agree.

L. H. DE ALWIS, J. – I agree.

Appeal dismissed.