ESABELLA PERERA HAMINE
v.
EMALIA PERERA HAMINE

COURT OF APPEAL,
S.N. SILVA, J. AND SENANAYAKE, J.
C.A. APPLICATION No. (C.A.) LA 112/88 -D.C. COLOMBO 9407/P
OCTOBER 25, 1989.

Civil procedure - Execution Proceedings - Eviction under s. 52 (1) of Partition Law - Restoration of Possession - Inherent power - Applicability of Civil Procedure to execution procedure on eviction under Partition Decree - Lack of competence not apparent on face of record – Civil Procedure Code s. 328.

The defendant, a tenant of the house on the Lot allotted to the plaintiff by the decree of a partition case was evicted from this Lot on an application made by the plaintiff under s. 52(1) of the Partition Law. The defendant (tenant) - respondent moved for restoration of possession and order was made restoring the respondent to possession.

Held :

(1) Ordinarily in an application for execution in terms of s. 224 CPC, or in an application in terms of s. 52 (1) of the Partition Law for delivery of possession of a particular allotment decreed or sold in a partition action it is not necessary that a respondent be named. But there are exceptional circumstances when a respondent has to be named e.g. where s. 334 or s. 347 or s. 763 (1) CPC. Section 52 (2) of the Partition Law falls into the category requiring naming of the respondent. Section 52 (2) (*a*) provides that when it is sought to evict a person in occupation of land or house as a monthly tenant he should be made a respondent and the application has to disclose the material facts that entitle the applicant to secure such eviction. Section 52 (2) (*b*) requires that the respondent be heard before order is made - the principle of *audi alteram partem* applies but was breached. There was a failure to comply with s. 52 (2) of the Partition Law. This makes the order a nullity as the Court had no jurisdiction. Hence the order restoring the respondent was correct and recourse to s. 328 CPC to recover possession was not necessary.

(2) A void order resulting from latent or contingent want of jurisdiction can be challenged in the very court that made it or also in collateral proceedings. Where the lack of competence is not apparent on the face of the record extrinsic evidence could be adduced even to the extent of contradicting the record to establish such lack of competence.

(3) Where an order that is void for a latent or contingent want of jurisdiction is challenged in that Court itself and in the same proceeding, except in the few instances in which a specific procedure is laid down in the Civil Procedure Code or in any other law for that purpose, it has to be done by invoking the inherent jurisdiction of that Court. The inherent power of the Court is preserved by section 839 of the Civil Procedure Code.

(4) The final decree in the Partition case was entered on 29.01.1964 and the order for delivery of possession under s. 52 (1) was obtained 23 years later. In the meantime the olaintiff had accepted rent. These facts were not disclosed. There was an abuse of the process of Court.

(5) Where there is a specific provision in the Civil Procedure Code inherent power cannot be invoked. Section 328 CPC is a specific remedy provided by law to a person who is in possession of property on a right independent of the judgment debtor to complain of a wrongful dispossession upon execution of writ. This section does not empower a person who has been dispossessed by a writ or order issued contrary to the procedure provided by law to address his grievance to Court. It is not a means to challenge the antecedent validity of the writ of execution itself. Therefore a complaint in terms of s. 328 CPC could not have been addressed to the Court by the respondents. The only means available to the respondents was to invoke the inherent power of the Court.

Cases referred to :

(1) *Mohamadu Cassim v. Perianam Chetty 14 NLR 385.*
(2) *James v. Dochinona 43 NLR 527.*
(3) *Manomani v. Velupillai 30 NLR 229.*
(4) *Perera v. The Commissioner of National Housing 77 NLR 361, 367, 368.*
(5) *Gunapala v. Somawathie SC. No. 74/80 - SC Minutes of 7.12.81*
(6) *Seneviratne v. Abeykoon 1986 2 Sri LR 1.*
(7) *Kamala v. Andiris 41 NLR 71.*
(8) *Nallakaruppan Chettiar v. Hepponstall 52 NLR 394.*
(9) *Silva v. Perera 55 NLR 378.*
(10) *In re Jayatilleke 63 NLR 202.*
(11) *Leechman & Co. Ltd. v. Rangalla Consolidated Ltd. 1981 2 Sri LR 373.*

APPEAL with leave of Court from order of the District Court of Colombo.

D.R.P. Gunatilake -for the plaintiff - petitioner.

K. Balapatabendi for petitioner - respondents.

Cur. adv. vult.

December 15, 1989.

S.N. SILVA. J.

This application for leave to appeal was filed by the plaintiff in D.C. Colombo case No. 9407/P in respect of the order dated 30.08.1988, made by the learned Additional District Judge of Colombo. By the said order the learned Additional District Judge directed that the respondent to this application (Edward Perera), who was evicted from premises bearing number 105 (formerly No. 85), Telengapatha Road, Wattala on 27.03.1988 by the Fiscal in execution of an order for delivery of possession

issued by the District Court, be restored to possession. On notice being issued of the application for leave to appeal the Respondent objected to leave being granted. Subsequently, it was agreed by Counsel for the plaintiff - petitioner and the respondent that leave may be granted and that the appeal be heard early. Accordingly the Court granted leave to appeal and the appeal itself was heard on 25.10.1989.

By final decree dated 29.01.1964 entered in the above partition action, the plaintiff - petitioner was declared entitled to lot 1 of the corpus as depicted in final Plan bearing number 381B dated 06.12.1963. It is not disputed that the premises number 105 referred to above is situated in lot 1. By the said final decree the plaintiff - petitioner was ordered to pay a sum of Rs. 377/ 05 as compensation for improvements to the 5th defendant in the partition action. At the hearing before us, Counsel for the plaintiff - petitioner submitted that this amount ordered as compensation was paid to the 5th defendant on 26.01.1965. Although compensation was paid, the 5th defendant continued to be in occupation of the premises referred above. It appears that the respondent entered the premises as a tenant of the 5th defendant in about 1965. On 10.08.1975 the 5th defendant died whilst still in occupation of the premises. It was sought by the Petitioner to dispute the death certificate marked 'X1' in the proceedings before the District Court. However, at the hearing before us the death certificate was not contested by Counsel for the plaintiff - petitioner. It is clear that the Respondent who was in occupation of the premises under the 5th defendant continued in occupation after the death of the 5th defendant. From April, 1981 to February, 1987 the respondent deposited a sum of Rs. 70/= per mensem as rent at the Wattala - Mabole Urban Council. The certificate issued by the Chairman of the Council marked 'X2' states that this money has been withdrawn by the plaintiff - petitioner up to August 1986. This matter was not disputed by Counsel for the plaintiff - petitioner.

On 03.03.1987 the plaintiff - petitioner sold the premises to the 6th respondent (B.S. Fernando) by deed number 2647 attested by Henry Peiris, Notary Public. Thereafter, on 27.03.1987 the plaintiff - petitioner caused the respondent to be evicted from the premises pursuant to an order for delivery of possession made in terms of section 52 (1) of the Partition Law. The plaintiff - petitioner also caused the 6th respondent, being the new owner to be placed in possession of the premises.

The respondent filed petition and affidavit dated 21.04.1987 in the District Court stating inter alia that he was the tenant of the premises under the plaintiff - petitioner and that the plaintiff - petitioner fraudulently and by suppression of material facts secured his eviction in terms of section 52 (1) of the Partition Law. The respondent moved that he be restored to possession of the premises from which he was wrongfully evicted. The plaintiff - petitioner filed objections to this application and the learned Additional District Judge duly inquired into the matter. By his order dated 30.08.1988 the learned Additional District Judge held with the respondent and directed that he be restored to possession.

The learned Additional District Judge has carefully considered the several aspects of the dispute and has come to the following findings, that are relevant to the hearing of this appeal. They are :

(i) that the respondent was the tenant of the premises on a monthly tenancy under the plaintiff - petitioner at the time he was evicted upon the order for the delivery of possession made under section 52 (1) ;

(ii) that the respondent had no notice of the application for the order of delivery of possession, as required by section 52 (2) (*a*) of the Partition Law ;

(iii) that the respondent was evicted by the Fiscal of the Court in execution of the order for delivery of possession ;

(iv) that the application of the respondent for restoration of possession was made after the lapse of 15 days from the date of dispossession and as such the application is not referrable to section 328 of the Civil Procedure Code ;

(v) that the plaintiff - petitioner had fraudulently caused the eviction of the respondent from the premises by suppressing the fact that he was a tenant. Since the respondent suffered from that illegal act he should be restored to possession by an order of Court.

It appears that the order is based upon the exercise of the inherent jurisdiction of the Court preserved by section 839 of the Civil Procedure Code.

At the hearing before us Counsel for the plaintiff - petitioner did not dispute the finding of the learned Additional District Judge that the respondent was a tenant of the premises on a monthly tenancy under the plaintiff - petitioner. In fact, except for the finding with regard to fraud the plaintiff - petitioner did not dispute any of the other findings of the learned Additional District Judge. It was Counsel's submission that the provisions of the Civil Proceedure Code apply in relation to the execution of the order for delivery of possession. That a person complaining of wrongful dispossession has to come by means of section 328 of the Code to secure an order that he be put back into possession. Counsel submitted that admittedly the respondent made his application outside the period of 15 days within which an application can be made under section 328. In the circumstances, the respondent was precluded from securing relief under section 328 and the learned Additional District Judge could not have had recourse to the inherent jurisdiction of Court, to grant him relief since there was specific provision in law for that purpose.

Counsel for the respondent submitted that section 328 of the Civil Procedure Code was not applicable in a situation in which the validity of the order for execution is disputed and that there was a proper exercise of the inherent jurisdiction of the Court by the learned Additional District Judge.

In view of the foregoing submissions we have to consider the validity of the order for delivery of possession upon which the respondent was evicted and whether restoration of the respondent to the premises could be justified upon an exercise of the inherent juridiction of the District Court.

The validity of the order for delivery of possession :

Ordinarily, in an application for the execution of a decree to pay money, made in terms of section 224 of the Civil Procedure Code or, a decree for the delivery of movable property, made in terms of section 320 or, a decree for the delivery of possession of immovable property, made in terms of section 323, it is not required that the judgment - debtor be made a respondant to the application. Similarly, in an application made in terms of section 52 (1) of the Partition Law for the delivery of possession of a particular allotment decreed or sold in a partition action, it is not required that a person be made a respondent. However, there are certain

exceptional instances in the Civil Procedure Code where a person has to be made a respondent to an application for execution. Some of these instances are contained in section 334 which relates to an enforcement of a mandatory and restraining decree, in section 347 where the application for execution is made after the lapse of more than one year from the date of the decree or decree in appeal and in section 763 (1), which relates to the execution of a decree appealed against. Section 52 (2) of the Partition Law falls into the latter category of instances where a person has to be made a respondent to an application for execution. Subsection 2 (*a*) of that section provides that when by the order for delivery of possession, it is sought to evict a person in occupation of a land or house as a monthly tenant, that person should be made a Respondent to the application. It is also required that the application should disclose material facts that entitle the applicant to secure such eviction. Subsection (2) (*b*) required that the respondent be heard with regard to the application and it lays down the matters to be considered by Court at such hearing.

The principle of *audi alteram partem* is a cardinal principle of natural justice that postulates two elements :

(i) that a person who will be affected by an order should have prior notice of the matters against him, and

(ii) that such person be heard in opposition to the order that is sought, before it is made.

We thus see that section 52 (2) is a classic instance where the principle of *audi alteram partem* is given full statutory effect, at the stage of execution of a decree.

The respondent has been in occupation of the house in question as a tenant and he was evicted upon the impugned order for the delivery of possession. Therefore his case comes squarely within the ambit of section 52 (2). He should have been made a respondent to the application for the order for delivery of possession in terms of subsection 2 (*a*) and be heard on the matters stated in subsection 2 (*b*) before the order for delivery of possession was issued. This has not happened. Therefore we are of the view that there has been a failure to comply with the principle of *audi alteram partem* as embodied in section 52 (2) of the Partition Law.

In considering the effect of such failure, it is necessary to bear in mind the nature of the requirement that is violated and whether the requirement is mandatory in nature so as to affect the competence of the Court itself. There may be instances where a provision that is only directory is contravened where the failure does not affect the competence of the Court . In our view, the failure to comply with the provisions of section 52 (2) of the Partition Law should produce the same effect as a failure to serve summons on a defendant. Because, in both instances what is violated is the principle of *audi alteram partem.* The Supreme Court has repeatedly held that decree obtained without service of summons on the defendant is void because the Court lacks competence or jurisdiction at the time the decree is entered. The rationale underlying the decisions of the Supreme Court in the cases of *Mohamadu Cassim v. Perianam Chetti* (1) ; *Jamis v. Dochinona* (2) ; *Manomani v. Velupillai* (3) ; *Perera v. the Commissioner for National Housing* (4) ; *Gunapala v. Hemawathie* (5) ; is that the failure to serve summons on the defendant and the attendent contravention of the principle of *audi alteram partem* denudes the jurisdiction of the Court and that the decree entered in those circumstances is void.

In the case of *Perera v. the Commissioner for National Housing (Supra)* Tennekoon, C.J. drew a distinction between two classes of jurisdictional defects. The first class consists of instances where there is a " patent" or " total" want of jurisdiction. In this class, there is a " defectus jurisdictionis " and the Court lacks jurisdiction over the " cause or matter or over the parties. In the second class of cases the Court has jurisdiction in the respects referred to above but is denuded of competence or jurisdiction " because of a failure to comply with such procedural requirements as are necessary for the exercise of power by the Court ". Here, the lack of competance is described as a "latent" or " contingent" want of jurisdiction or a "defectus triationis". Tennekoon C.J. held that both classes constitute jurisdictional defects that result in judgments or orders that are void. The difference being, that in the latter class of cases the judgments or orders will be void only against the party on whom it operates and have some effect until they are set aside by a Court of competent jurisdiction. They may be validated as a result of waiver, acquiescence or inaction on the part of the party on whom it operates.

In the case of *Perera v. the Commissioner for National Housing (Supra)* it was held that the failure to serve summons on the defendant

resulted in a jurisdictional defect of the latter class, in relation to the decree that is entered against such defendant. A fortiori, a non - compliance with the requirements of section 52 of the Partition Law should also result in a similar jurisdictional defect because the procedural basis of the requirement to serve summons on a defendant and of the requirements in section 52 (2) of the Partition Law (although limited in scope) are the same, namely, the due compliance with the principle of *audi alteram partem*.

For the reasons stated above and upon a consideration of the provisions of section 52 of the Partition Law, we hold that when an application is made in terms of section 52 (1) of the Partition Law for an order of delivery of possession of an allotment of land decreed or sold in a partition action and the applicants seek by that order to evict any person in occupation of a land or a house standing on such allotment, as a monthly tenant and who is liable to be evicted by such applicant, it is mandatory that the following requirements of section 52 (2) be complied with -

(i) The application for the order for delivery of possession be by petition to which the person in occupation as a monthly tenant is made a respondent ;

(ii) The petition to set out the material facts that entitle the applicant to obtain an order of eviction ;

(iii) The respondent to be heard by Court on the matters to be stated in section 52 (2) (*b*) before the order is issued.

The failure to comply with the foregoing requirements will result in the order for delivery of possession that is issued being void as against the person in occupation of the land or house as monthly tenant. Such order may however be validated by waiver, acquiescence or inaction on the part of the monthly tenant.

On the facts as set out in the preceding sections of this judgment, it is clear that there has been a non - compliance with the foregoing requirements in relation to the order for delivery of possession upon which the respondent was evicted from the house he was in occupation of as a monthly tenant. The respondent has filed a petition and affidavit in the District Court within about a month, complaining of wrongful eviction.

Hence the respondent is not guilty of waiver, acquiescence or inaction. In the circumstances we are of the view that the order for delivery of possession upon which the respondent was evicted was void as against him and that the learned Additional District Judge correctly acted on that basis.

Does Inherent Jurisdiction Lie To Make An Order For Restoration ?

In the case of *Perera v. the Commissioner for National Housing (Supra)* it was held (page 367 and 368) that a void order resulting from a latent or contingent want of jurisdiction can be challenged both in the very Court and in the same proceedings in which it was made and also in collateral proceedings. It was also held that where the lack of competence is not apparent on the face of the record extrinsic evidence could be adduced, even to the extent of contradicting the record, to establish such lack of competence. In that case a tenant had been evicted by an order of the Court of Requests based upon a decree that was void for non - service of summons on the defendant. It was held that in a collateral proceeding, i.e., an application made against such eviction under the Protection of Tenants (Special Provisions) Act, No. 28 of 1970, the Commissioner for National Housing could act on the basis that the eviction was not upon an order of a competent Court.

Where an order that is void for a latent or contingent want of jurisdiction is challenged in that Court itself and in the same proceeding, except in the few instances in which a specific procedure is laid down in the Civil Procedure Code or in any other law for that purpose, it has to be done by invoking the inherent jurisdiction of that Court. J.F.A. Soza, a retired Judge of the Supreme Court in an illuminating article titled " The inherent powers of the Court" , published in (1988) Volume II Part II page 42 of the Bar Association Law Journal has stated as follows :

> " The Courts are often faced with situations where they are obliged to act in debite justitiae to do that real and substantial justice for the administration of which alone the Courts exist. A Judge will not fold his hands and allow rank injustice to be done just because no rule of procedure is available.....".

The inherent power of the Court is preserved by section 839 of the Civil Procedure Code. This section, introduced by an amendment of 1921, is a verbetim reproduction of section 151 of the Indian Code of Civil

Procedure of 1908. This section preserved the power of the Court to make orders "as may be necessary for the ends of justice or to prevent an abuse of the process of Court". A survey of the case law in India and here show that Inherent power has been used by courts to meet a wide variety of situations. The case of *Seneviratne v. Abeykoon* (6) is a clear instance where inherent power was used by a Court to order the restoration to possession of a tenant who had been evicted by a landlord, taking the law into his own hands. In that case the landlord instituted action for ejectment of the tenant in the District Court. This action was dismissed after a re-trial that was ordered by the Supreme Court, and judgment was entered in favour of the defendant - tenant. An appeal was filed against this judgment by the plaintiff - landlord. Whilst this appeal was pending before the Court of Appeal the plaintiff took possession of the premises, forcibly on the basis that the tenant had abandoned the premises. Thereupon, the tenant made an application that he be restored to possession and the District Court made order on this application that the tenant be restored to possession. In an appeal filed by the plaintiff to this court and later to the Supreme Court it was held that the facts stated above were such that the District Court could have invoked the inherent power to make the order of restoration. Tambiah, J. in his judgement stated as follows, (at page 6) : " 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 section 839 was enacted. It empowers the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court ".

The facts referred to above reveal clearly that the plaintiff - petitioner in this case received rent from the respondent from April, 1981 to August, 1986. He refrained from withdrawing the rent that was deposited as usual from September, 1986 upto February, 1987. In March, 1987 he sold the premises to the 6th respondent, and thereafter obtained the order for the delivery of possession. The final decree upon which the order for delivery of possession was issued had been made on 29.01.1964, over 23 years before the application for the order for delivery of possession was made. The plaintiff - petitioner suppressed these facts from the District Court and obtained the order for delivery of possession contrary to section 52 (2) of the Partition Law. These facts represent a clear abuse of the process of Court by the plaintiff - petitioner. Therefore upon an application of the ratio in the case of *Seneviratne v. Abeykoon (Supra)* the respondent could be restored to possession by means of the inherent power of the Court.

Counsel for the plaintiff - petitioner submitted that recourse could not be had to the inherent power of Court since the respondent had an express remedy provided for in section 328 of the Civil Procedure Code. In this regard Counsel relied on the well accepted exception to the use of inherent power of Court, namely that it will not be used for the benefit of a person who has a remedy under the Civil Procedure Code or any other law. The judgements of the Supreme Court in the cases of *Kamala v. Andiris* (7) , *Nallakaruppan Chettiar v. Hepponstall* (8) , *Silva v. Perera* (9) and In re *Jayatillake* (10) reveal that recourse cannot be had to inherent power where there is specific provision contained in the law. In the case of *Laechman & Co. Ltd. v. Rangalla Consolidated Ltd.* (11) , it was held that where there is specific provision in the Civil Procedure Code, inherent power cannot be invoked to apply the Roman Dutch Law which had been superseded by the Civil Procedure Code.

Section 328 of the Civil Procedure Code empowers a person other than a judgement - debtor, or a person in occupation under him, who is dispossessed of any property in execution of a decree, to petition the Court complaining of such dispossession within a period of 15 days from the date of dispossession. Admittedly, the respondent did not make his complaint within this period of 15 days. However the question is whether the procedure in section 328 could be availed of by the respondent.

The ambit of section 328 is best revealed by an examination of the matters to be considered by Court upon a complaint being made in terms of that section. The Court has to consider whether " the person dispossessed was in possession of the whole or part of such property on his own account or on account of some other person other than the judgment - debtor ". It is only if the Court is satisfied on this matter that it can order restoration to possession of that person. Therefore it is clear that section 328 is a specific remedy provided by law to a person who is in possession of property on an independent right, (that is a right independent of the judgement - debtor) to complain of a wrongful dispossession upon the execution of the writ. This section does not empower a person who has been dispossessed by a writ or order issued contrary to the procedure provided by law to address his grievence to Court. It is not a means to challenge the antecedent validity of the writ of execution itself. It is a means to challenge the manner in which the writ was executed and to be availed of by a person who is not liable to be dispossessed of the property.

Therefore we are of the view that the respondent whose complaint regarding dispossession, is based on a procedural lapse affecting the competence of the Court itself to issue the order of delivery of possession, could not have addressed a complaint in terms of section 328 of the Civil Procedure Code. The only means available to the respondent was to invoke the inherent power of the Court. As stated earlier the facts reveal a case that eminently befits the use of inherent power to remedy the abuse of the process of Court committed by the plaintiff - petitioner. Therefore we affirm the order made by the learned Additional District Judge on 30.08.1988 and dismiss this appeal with costs fixed at Rs. 1,050/=.

SENANAYAKE, J. - I agree.

Appeal dismissed.