MALWATTAGE
V.
DHARMAWARDENA

SUPREME COURT.
BANDARANAYAKE J., KULATUNGE J. AND
WADUGODAPITIYA J.
S. C. APPEAL NO. 8/87.
C. A. NO. 462/79.
D. C. MOUNT LAVINIA NO. 156/ZL.
25 JANUARY, 26 MARCH, 27 AND 30 SEPTEMBER 1991.

Landlord and Tenant - Rent and Ejectment - Building constructed and leased in contravention of Housing and Town Improvement Ordinance - Is contract of tenancy in respect of such building illegal? - Applicability of Rent Act to such contracts – In pari delicto potior est conditio defendentis. – Vindicatory action.

The respondent's father had constructed an unauthorised house on the premises in suit. The respondent's mother who was the owner of the premises transferred same to the respondent. The respondent's father had placed the appellant in possession and levied a rent. As the building was unauthorised it was liable to be demolished as an illegal structure in terms of the Housing and Town Improvement Ordinance.

Held:

(1) The maxim *in pari delicto potior est conditio defendentis* does not apply as the respondent had nothing to do with the alleged contract of tenancy, being in no way party to it.

(2) The contract was illegal as the building being an unauthorised one, was incapable of being let. An illegality cannot give rise to tenancy rights nor can the Rent Act be used to cover up and rectify an illegality under the Housing and Town Improvement Ordinance.

(3) There is an express statutory prohibition against occupying a building which is unauthorised and built in contravention of the provisions of the Housing and Town Improvement Ordinance (sections 56(1), 7(1) and 13(1)] and liable to be demolished (sections 12 and 13(2).

Cases referred to:

1. *Jajbhay v. Cassim*, (1939) SALR AD 537, 550
2. *Theivandram v. Ramanathan Chettiar* S.C. 40/83; C.A. 485/74(F) ; S.C. Minutes of 7.5.1986.

APPEAL from the judgment of the Court of Appeal.

Faiz Mustapha P.C., with *Rauf Hakeem, H. Witanachchi, A. Panditharatne* and *Sanaka de Silva* for Defendant-Appellant.

H. L. De Silva P.C. with *M. Sivanathan, Miss. Sivamalar Sivanathan* and *P.M. Ratnawardena* for respondents.

Cur. adv. vult.

October 28, 1991.

WADUGODAPITIYA, J.

This appeal arises from an action instituted in the District Court of Mount Lavinia on the 9th of November, 1976 by the Plaintiff-Appellant-Respondent (hereinafter referred to as the Respondent) against the Defendant-Respondent-Appellant (hereinafter referred to as the Appellant), for a declaration of

title to the premises in suit viz., premises No. 164, Anderson Road, Nedimala, Dehiwela; for the ejectment of the Appellant; for an order directing the Appellant to demolish the unauthorised structure standing on the said land and for damages.

The Respondent averred in her plaint that her mother Dona Sandaseeli, the former owner of the land and premises transferred it to her in 1974. The Respondent's case was that it was her father who had put up the unauthorised structure on the said land, which structure was now being occupied by the Appellant, and that it was her father who had permitted the Appellant to occupy it on a temporary basis. The Respondent's position was that the Appellant was a mere licencee and that the permission given was withdrawn by notice dated 19.7.1976 (marked P14).

The Respondent's position then, was that despite the notice to quit, the Appellant was continuing to occupy the said unauthorised structure which did not come within the provisions of the Rent Act, and further, that her occupation was contrary to the provisions of the Housing and Town Improvement Ordinance (Cap. 268).

In her answer the Appellant stated that she was in fact the tenant of a house and that she originally came into occupation of the premises in suit in 1965 under the Respondent's father. She denied that she was in occupation of an unauthorised structure and produced in evidence, six rent receipts (marked D1 to D6) issued by the Respondent's father acknowledging the payment of rent by the Appellant in respect of the said premises.

At the trial, it also transpired that the Respondent's father had instituted action in March, 1969 for the ejectment of the Appellant from the premises in suit and for the recovery of arrears of rent (plaint marked P7). Thereafter, the Respondent's mother had sought, in 1972, to eject the Appellant and recover arrears of rent (plaint marked P8). It appears that both these actions were subsequently withdrawn.

At the conclusion of the trial, the Learned District Judge held:—

(i) that the Respondent is the owner of the premises;

(ii) that the Appellant is in occupation of a house with three rooms and not of a temporary shed;

(iii) that the construction of the said house was not in accordance with the provisions of the Housing and Town Improvement Ordinance;

(iv) that the Appellant entered into occupation of the premises as a tenant under the Respondents father, and

(v) that the contract of tenancy was lawful.

The Learned District Judge granted the Respondent a declaration that she is the owner of the premises, but refused to eject the Appellant from the premises.

The Respondent thereupon appealed against the said judgement to the Court of Appeal which allowed the appeal and set aside the judgement of the District Court, and directed that decree be entered for the ejectment of the Appellant, her servants, agents, and all those holding under her, from the premises in suit. The writ of ejectment, however, was not to issue till 2nd May, 1988.

The main point of contention in the appeal before the Court of Appeal on behalf of the Respondent was that the alleged contract of tenancy was invalid for illegality in as much as it contravened specific provisions of the Housing and Town Improvement Ordinance.

The Court of Appeal held:—

(i) that having regard to the ambit and intent of the Housing and Town Improvement Ordinance, the contract of tenancy upon which the Appellant seeks to found her claim to occupy the premises is tainted with statutory

illegality and is therefore ineffective to create rights. As such, the contract of tenancy is illegal, and the provisions of the Rent Act do not apply to a contract of tenancy rendered illegal by statute;

(ii) that the premises in suit having been constructed without the requisite authority, is liable for demolition under the provisions of the said Ordinance, and,

(iii) that even though the culpability of the Respondent is no less than that of the Appellant, the Roman Dutch Law recognises that the general rule embodied in the maxim *in pari delicto potior est conditio defendentis* (the defendant's position is superior if culpability is equal) may be relaxed in cases "where it is necessary to prevent injustice or to promote public policy" *Jajbhay v. Cassim* (1). The Court of Appeal held on this point that, "Neither the interests of justice nor the requirements of public policy justify the continued occupation by the defendant of these unauthorised premises".

The Appellant appeals from this judgment.

At the hearing before us, the finding of the Learned District Judge that the Respondent was the owner of the premises in suit was not disputed; nor was it disputed that the structure occupied by the Appellant, by whatever name called, was not an authorised structure in terms of the provisions of the Housing and Town Improvement Ordinance. The assessment registers do not refer to a building as such (P8, P9, P10, P11 and P16). Further, there has been no payment of rates in respect of "a house". There was also no dispute that the appellant had not come into occupation under the Respondent's predecessor in title; namely, her mother, who had herself been charged in the Magistrates' Court of Mount Lavinia for breach of the provisions of the Housing and Town Improvement Ordinance in connection with the said unauthorised structure. It was common ground that the unauthorised structure in question

was put up by the Respondent's father (now deceased) who was not the Respondent's predecessor in title and that it was he who allowed the Appellant to occupy the premises and, further, that it was he (the Respondent's father) and not either the Respondent or her mother who issued receipts for rent. It was also not disputed that the Appellant never attorned either to the Respondent or to her mother.

Learned President's Counsel for the Appellant, whilst conceding that the structure in question was constructed without an approved plan and was not in conformity with the provisions of the Ordinance submitted before us that this penalises only the person who allows the occupation and not the person who occupies the unauthorised premises. Learned President's Counsel for the Appellant submitted secondly that the Appellant was in occupation on a contract of tenancy and that the illegality with regard to the unauthorised structure she occupied, did not affect the contract itself. The Ordinance only regulated housing and did not affect contracts entered into in respect of premises. He therefore submitted that the Court of Appeal misdirected itself when it held that the Ordinance rendered illegal, collateral contracts in respect of the premises. He submitted, thirdly, that both on the facts and the law, the Court of Appeal misapplied the principles of the maxim, *in pari delicto potior est conditio defendentis.* His submission was that far from the culpability of the two parties being equal, the culpability of the Respondent was the greater, and therefore the maxim did not apply at all to this case. I am unable to agree with Learned Counsel on the first and second matters urged by him above. On his third submission, my own view is that the maxim indeed does not apply to this case at all; but not for the reason urged by Learned Counsel for the Appellant. My view is that the Respondent is not *in pari delicto,* in as much as she had nothing to do with the alleged contract of tenancy, being in no way a party to it and that therefore there is no culpability whatsoever on her part. The maxim thus does not apply for this reason.

Learned President's Counsel for the Appellant made a final submission introducing a new ground without notice to the Respondent; to which Learned President's Counsel for the Respondent objected. The new point was that this was not a tenancy action at all, but a *rei vindicatio* action based on the ground that the tenant (the Appellant) was a trespasser for the reason that her contract of tenancy was illegal. Therefore, even conceding that the contract of letting was illegal, the Respondent was not entitled to judgment in ejectment. I find myself unable to agree with this submission, in as much as, in any event, this cannot be said to be a *rei vindicatio* action based on the ground that the Appellant is a trespasser. It is not possible to hold that the Respondent is not entitled to judgment in ejectment.

Learned President's Counsel for the Respondent on the other hand, referred us to documents marked P6, P9 and P10 which are extracts from the Assessment Registers in respect of the premises in suit covering the years 1951 to 1969, wherein the property is described as a "garden", and no building of any sort is mentioned. He also referred us to documents marked D1 to D6 which are rent receipts issued to the Appellant by the Respondent's father who was at no time the predecessor in title of the Respondent. These receipts are for July, 1965, August 1965, September 1965, April 1967, March 1967 respectively. Counsel submitted that after 1967, no rent was given by the Appellant either to the Respondent's father or mother. He pointed out that the Appellant herself had stated in evidence that she stopped paying rent to the Respondent's father and thereafter deposited the money with the Municipal Council. There is no evidence whatsoever, that the Respondent's predecessor in title, viz., her mother, either received or accepted rent from the Appellant at any stage. In 1974, the Respondent acquired title to the property in question from her mother, who transferred it to her upon a Deed.

Thereafter, there was no attornment to the new owner, viz., the Respondent, either. Learned President's Counsel for the

Respondent submitted that therefore there was no illegal contract in which the Respondent and the Appellant participated. In fact there was no contract at all between them. On the other hand, what the Respondent did (when she become owner of the premises in 1974) was to serve the quit notice P14 on the Appellant.

Learned President's Counsel for the Respondent submitted further, that, on the question of the applicability of the maxim, *in pari delicto potior est conditio defendentis,* the Respondent's father might be said to have been *in pari delicto,* but not the Respondent, for the reason that the Respondent did not receive any rent from the Appellant in respect of the premises in suit; nor did the Respondent ask the Appellant to attorn to her, nor did the Appellant ever attorn to the Respondent at any stage.

He next made submissions on the question of illegality, and urged that the alleged contract of tenancy was invalid for illegality, in as much as it contravened certain statutory provisions. He referred us to the following provisions in the Housing and Town Improvement Ordinance:

Section 5 states:

> "No person shall erect or re-erect any building within the limits administered by a local authority, except in accordance with plans, drawings, and specifications approved in writing by the Chairman"

Section 6 (1) states:

> "No person shall make any alterations in any building within the limits administered by a local authority without the written consent of the Chairman".

Section 7 (1) states:

> The Chairman shall not—
>
> (a) approve any plan or specification of any building; or

(b) consent to any alteration in any building,

which shall conflict, or cause such building to conflict, with the provisions of this Ordinance or any other enactment".

Section 12 sets out the Chairman's powers to demolish unauthorised structures.

Section 13 (1) states:

"Any person who shall—

(a) commence, continue or resume building operations in contravention of any provisions of this Chapter;

(c) execute any building operation in contravention of any of the provisions of this Ordinance or of any local by-law.....shall be liable on summary conviction to a fine not exceeding Rs. 300/- and to a daily fine of Rs. 25/- for every day on which the offence is continued after conviction"

Section 15 (1) states:

"No building constructed after the commencement of this Ordinance shall be occupied, except by a caretaker, until the Chairman has given a certificate that such building, as regards construction, drainage, and in all other respects, is in accordance with law".

Section 15 (3) states:

"Any person who occupies or allows to be occupied any building in contravention of this Section shall be guilty of an offence, and shall be liable to a penalty not exceeding twenty-five rupees for each day during which the contravention continues".

Learned Counsel submitted that the contract spoken of was quite clearly illegal, and cited the following passage from Wille's "Landlord and Tennant in South Africa", (4th Edition) at page 7, under the heading, "Illegality of Lease" : —

> A lease, like any other contract, must not be illegal; if the making of the lease, or the performance agreed upon, or the ultimate purpose of both parties in contracting is prohibited by legislation, or is contrary to public policy, or is *contra bonos mores*, the lease is void of legal effect".

At page 28, the following passage appears:—

> "The property to be let must not be *extra commercium*- i.e., the letting of which is prohibited by the common law on the grounds of public policy or morality or by statute".

Learned Counsel for the Respondent submitted, therefore, that in as much as section 15(3) of the Ordinance prohibited any person from occupying or allowing to be occupied any building without a certificate of conformity, the alleged contract of letting was illegal. He added that the Respondent (daughter) should, not be saddled with an illegal tenancy created by her father. It is in evidence that the Respondent's mother was prosecuted in respect of the illegal occupation and that she was fined Rs. 50/-.

I am in entire agreement with the submissions of Learned Counsel for the Respondent. I must state here that in the circumstances, the Appellant's claim to protection under the Rent Act has no merit and must fail. An illegality cannot give rise to any such rights; nor can the Rent Act be used to cover up and rectify an illegality under the Housing and Town Improvement Ordinance.

It is pertinent to observe that in the instant case no one disputed the fact that the structure in question was an unauth-

orised one and that there was no certificate of conformity in respect of the said structure, which is the subject matter of the alleged tenancy. Thus, in terms of Section 15(3) of the Ordinance, both the person who actually occupies such a structure as well as the person who allows another to occupy it, will be guilty of an offence and will be liable to a continuing penalty not exceeding Rs. 25/- for each day during which the contravention continues. There can be no doubt therefore, that there is an express statutory prohibition against occupying such a building, which in turn means that the structure in question is not one which is "capable of being let" under our law. According to Dr. H. W. Thambiah ("Landlord and Tenant in Ceylon," citing Vanderlinden and Maasdorp), this is one of the essential requisites of a contract of letting and hiring. (pages 2 and 3). Cooper in "The South African Law of Landlord and Tenant' agrees when he says:" A lease like any other contract must be legal; it must not be prohibited by statute....." (page 10).

In the Court of Appeal judgment., G. P. S. de Silva J. (President of the Court of Appeal) as he then was, said:—

> "Having regard to the ambit and the intent of the Ordinance, I am of the opinion that the contract of tenancy upon which the defendent (i.e. the Appellant in this appeal) founds her claim to occupy the premises is tainted with statutory illegality and is therefore ineffective to create rights. The principle is that..... when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession. (per Sharvananda C. J. in *Theivandran vs. Ramanathan Chettiar* (2) S.C. 40/83; C.A. 485/74 (F); S.C. Minutes of 7.5.86). This the Defendant has failed to do..... The premises in suit having been constructed without the requisite authority is liable to demolition under the

provisions of the Ordinance (Section 13(2). The plaintiff has given one month's notice to the defendant to vacate the premises (P14). Neither the interests of justice, nor the requirements of public policy justify the continued occupation by the defendant (i.e. Appellant in this appeal) of these unauthorised premises. Nor do the provisions of the Rent Act apply to a contract of tenancy rendered illegal by statute.

I would accordingly allow the appeal, set aside the judgement of the District Court, and direct that Decree be entered for the ejectment of the defendant, her servants, agents and all those holding under her, from the premises in suit".

In accordance with the reasoning set out earlier in this judgment : I have to state that I see no reason to interfere with the judgment of the Court of Appeal.

I would therefore dismiss this appeal, with the direction that writ of ejectment will issue forthwith.

The Respondent will be entitled to costs of appeal fixed at Rs. 500/-.

Bandaranayake J. — I agree.

Kulatunge J. — I agree.

Appeal dismissed.