

RUPASINGHE
v.
MADATTI

SUPREME COURT.
FERNANDO, J.
DHEERARATNE, J. AND
PERERA, J.
S.C. APPEAL NO. 62/94
C.A. NO. 550/88 F
D.C. KALUTARA NO. 3316/L
SEPTEMBER 12, 1994.

Emergency (Rehabilitation of Affected Property, Business or Industries) Regulations No. 2 of 1984 (the REPIA Regulations) made under section 5 of the Public Security Ordinance - REPIA Regulations 9(1), 9(2), 10(1), 12, 13(1), 14 (1), 14(2) (a) and (b), and 19.

The defendant purchased the premises in suit on 15.7.82 for Rs.13,000/-; on 6.12.82 he sold the premises to one Jane Nona for the same amount subject to the condition that she would re-transfer it to him if he repaid that sum within one year. The defendant remained in occupation but was compelled to leave the premises because of the July 1983 riots. He did not tender the agreed sum to Jane Nona within the year or at any time thereafter. On 29.12.83 Jane Nona sold the premises for Rs. 20,000/- to the plaintiff-appellant who entered into

possession. The defendant submitted an undated declaration to REPIA stating, *inter alia*, that he had been the sole owner of the premises since 1982. The conditional transfer to Jane Nona and his failure to fulfil the condition were not disclosed. He thereby obtained from REPIA an authorisation dated 2.3.84 issued under Regulation 13(1) of the REPIA regulations, which entitled him to enter, remain in and occupy "the aforementioned affected property".

With this authorisation and Police assistance, the plaintiff was remanded and the defendant took possession of the premises.

The plaintiff thereafter sued the defendant for declaration of title. The defendant died pending action and his widow was substituted in his place. The substituted defendant's contention was that the premises vested in the State and continued to be so vested until divested on 12.3.84 and the divesting did not revalidate the December 1983 alienation. The plaintiff's case was that the premises were not affected property and therefore never vested in the State. There was no divesting on 12.3.84, but only a binding statutory declaration.

Held:

- (1) There was no admission that the premises were affected property.
- (2) The authorisation of 2.3.84 under regulation 13(1) was issued on the basis that the premises were affected property but this did not give it the effect of a declaration under regulation 9(2). The authorisation was issued upon a deliberate and material misrepresentation and the *audi alteram partem* rule was applicable. This authorisation under Regulation 13 was not also a declaration under regulation 9(2). The mere statement that "the aforementioned affected property vests absolutely in the State" does not show that a serious question was being decided. Only a fact was being assumed. The authorization was not issued upon a decision made under regulation 9(2).

On an affidavit submitted by Jane Nona to REPIA that authority issued a document to her which amounts to a decision that the premises were not affected property and does not purport to divest property. Hence it is unnecessary to decide, whether the effect of divesting was to revalidate the alienation to which regulation 12 applies.

Appeal from judgment of the Court of Appeal.

Champaka Ladduwahetty for plaintiff-appellant.

Rohana Jayawardene for substituted defendant-respondent.

October 14, 1994.

M. D. H. FERNANDO, J.

The right decision of this appeal depends entirely upon the interpretation and application of the Emergency (Rehabilitation of Affected Property, Business or Industries) Regulations, No. 2 of 1984 ("the REPIA Regulations"), made under section 5 of the Public Security Ordinance (Cap. 40). The following are the relevant regulations:

"9(1) Every affected property, industry or business shall, with effect from the date these regulations come into force, vest absolutely in the State free from all encumbrances.

9(2) Where any question arises as to whether any property, industry or business is an affected property, industry or business, such question shall be decided by REPIA by a declaration in writing, and such declaration shall be final and conclusive and shall not be called in question in any court in any proceedings whatsoever.

10(1) Any person authorised in that behalf by REPIA may take possession of any affected property, industry or business vested in the State under regulation 9.

12. No person shall, after the date of coming into force of these regulations, alienate any affected property, industry or business, and accordingly any alienation made in contravention of this regulation shall be deemed for all purposes to be null and void.

13.(1) No person shall, unless he has been authorised in writing by REPIA, enter, remain in, or occupy any affected property.

14(1) Notwithstanding that any affected property, or industry or business has vested in the State by reason of the operation of these regulations, REPIA may at any time by Order published in the Gazette divest such property, industry or business.

14(2) The following provisions shall apply to a divesting Order made under paragraph (1):

(a) the property, industry or business shall be deemed never to have vested in the State by reason of the operation of these regulations, and any question which may arise as to any right, title or interest in or over such property, industry or business shall be determined accordingly.

(b) the divesting Order shall have the effect of reviving any arrangement, agreement or other notarially executed instrument in and over that property, industry or business subsisting on the date on which such property, industry or business vested in the State.

19. In these regulations, "affected property" means any immovable property damaged or destroyed on or after July 24, 1983, by riot or civil commotion, and includes any immovable property used for the purposes of an affected business or industry."

(I have quoted from the REPIA Regulations, No. 1 of 1983, which was produced at the trial, and both Counsel have assured us that the relevant provisions in the 1984 Regulations are identical.)

The Defendant purchased the premises in suit on 15.7.82 for Rs. 13,000/-; on 6.12.82 he sold the premises to one Jane Nona for the same amount, subject to the condition that she would retransfer it to him if he repaid that sum within one year. The Defendant remained in occupation, but was compelled to leave the premises because of the July 1983 riots. He did not tender the agreed sum to Jane Nona within the year (or even at any time thereafter). On 29.12.83, Jane Nona sold the premises for Rs. 20,000/- to the Plaintiff-Respondent-Appellant ("the Plaintiff"), who entered into possession. The Defendant submitted an undated declaration to the Rehabilitation of Property and Industries Authority ("REPIA"), which was established by the REPIA Regulations, stating, *inter alia*, that he had been the sole owner of the premises since 1982; the conditional transfer to Jane Nona, and his failure to fulfil the condition, were not disclosed. He thereby obtained from REPIA an authorisation (D2) dated 2.3.84, issued under regulation 13(1) of the REPIA regulations, which entitled him to enter, remain in, and occupy "the aforementioned affected property"; this also stated:

"It is to be noted that in accordance with regulation 9(1) ... the aforementioned affected property vests absolutely in the State, free from all encumbrances."

With this authorisation and Police assistance, the Plaintiff was remanded, and the Defendant took possession of the premises.

Defence Counsel elicited in cross-examination, from a REPIA witness called by the Plaintiff, that Jane Nona had submitted an affidavit to REPIA; this was not produced. However, the Plaintiff produced a document (P1) dated 12.3.84, issued to Jane Nona by the Chairman of REPIA, declaring "in terms of" the REPIA regulations (but without reference to a specific regulation) that:

"the above property is not an affected property for the purpose of these regulations."

Later, a similar document (D3) dated 14.9.84 was issued to the Defendant.

By letter dated 16.5.84 the Plaintiff's Attorney-at-law called upon the Defendant to deliver vacant possession to the Plaintiff, stating that REPIA had declared that the premises were not an affected property, that the conditional transfer to Jane Nona had become absolute, and that Jane Nona had transferred the premises to the Plaintiff. The Defendant's Attorney-at-law replied on 7.6.84, claiming that REPIA had decided that the premises were affected property; but it was not suggested that the Defendant had tendered, or attempted to tender, the sum due to Jane Nona for a re-transfer.

On 4.9.85, the Plaintiff instituted this action for a declaration of title relying on the conveyance from Jane Nona, and pleading that the Defendant had wrongfully entered into, and remained in, possession of the premises upon the REPIA authorisation dated 2.3.84. The Defendant having died thereafter, his widow was substituted in his place. The substituted Defendant-Appellant-Respondent (the substituted Defendant") filed answer on 17.12.86 admitting the

conditional transfer to Jane Nona, and claiming that the Defendant had written to her giving notice of his intention to repay the money and obtain a re-transfer; but no attempt was made at the trial to produce any such document. It was further pleaded that the premises had been damaged during the July 1983 riots; that it had been decided under the REPIA regulations that the premises were affected property; that accordingly the transfer of the premises by Jane Nona on 29.12.83 was unlawful; that the Plaintiff's possession of affected property, without an authorisation from REPIA, was therefore unlawful; that accordingly she had been kept in remand until possession was delivered to the Defendant (and released on bail only thereafter); that the Defendant and his family had been in lawful possession of the premises since 2.3.84; and that the Plaintiff was not entitled to question the REPIA order and decision dated 2.3.84.

No issues were raised at the trial as to whether (a) the premises had in fact been damaged, (b) the premises were "affected property" within the meaning of regulation 19, (c) REPIA had made a declaration in terms of regulation 9(2) that the premises were "affected property", and (d) such declaration was immune from challenge as provided in regulation 9(2). The only issues relating to the REPIA regulations were answered as follows:

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| 4. Have the premises been divested by REPIA? | Yes |
| 6. Are the premises subject to the REPIA regulations? | No, according to P1 |
| 11. In terms of the REPIA regulations could the Plaintiff or her predecessor in title Jane Nona acquire any right to the premises? | Yes |

The learned trial Judge's answer to issue (6) might have been construed as meaning that P1 was a declaration under regulation 9(2), that the premises were not affected property; however, scrutiny of the judgment reveals beyond any doubt that the real reason for his decision was his view that the property had been divested by P1. It

was on that basis that he gave judgment for the Plaintiff; in so doing, he failed to consider the effect of regulation 12.

On appeal by the substituted Defendant, the Court of Appeal held that every affected property (including the premises in suit) vested absolutely in the State; that the premises alienated by Jane Nona on 29.12.83 being affected property, that alienation was void because of regulation 12; that P1 dated 12.3.84 was a divesting order under regulation 14, and that such divesting did not revalidate the alienation to the Plaintiff, because regulation 14 only revived agreements and instruments which were subsisting at the time of vesting, and not those invalidated by regulation 12. Accordingly, the Court of Appeal held that the Plaintiff did not acquire title on 29.12.83, or on 12.3.84. The appeal was allowed, and the Plaintiff's action was dismissed with costs, whereupon the Plaintiff appealed to this Court with special leave.

The substituted Defendant contends that the premises vested in the State; that they continued to be so vested until divested by P1 on 12.3.84, and that such divesting did not revalidate the December 1983 alienation. Since it was her case that Jane Nona had no title to convey to the Plaintiff, because the premises had vested in the State, in order to succeed she had to discharge the burden of proving that the premises were affected property. If she failed to do so, her attack on the Plaintiff's title necessarily failed.

The Plaintiff's case is that the premises were not affected property, and therefore never vested in the State, P1 not being a divesting order but only a binding statutory declaration to that effect that the premises were not affected property; and, alternatively, that the premises were divested by P1, and that consequently the December 1983 alienation was revived.

There are thus two matters for consideration:

- (1) Did the Court of Appeal err in holding that the premises were affected property within the meaning of regulation 19, because—

- (a) the issues and the evidence led at the trial did not warrant such a finding, or
- (b) there was a binding decision, under and in terms of the REPIA Regulations, to the contrary?
- (2) If the Court of Appeal was right in concluding that the premises were affected property (in which event, admittedly, the premises vested in the State under regulation 9(1), and the December 1983 alienation was void), yet nevertheless—
- (a) were the premises divested by P1 of 12.3.84, and
- (b) did such divesting revalidate or revive the December 1983 alienation?

“AFFECTED PROPERTY”

Despite reference in the answer to damage to the premises, the substituted Defendant framed no issue and led no evidence in regard to such damage. Learned Counsel seized on an averment in the plaint that she had spent Rs. 22,000/- on repairs as being an admission of damage during the riots. However, that is not a clear and unambiguous admission of damage covered by regulation 19: that averment may well have referred to repairs necessitated by normal wear and tear. In any event, if that was how Counsel for the substituted Defendant understood the Plaintiff's pleadings, he should have insisted upon an admission being formally recorded at the commencement of the trial. I hold that upon the pleadings, issues and evidence, there was no admission that the premises were affected property, and a finding of fact to that effect was not possible.

It is true that the authorisation (D2) under regulation 13(1) could only have been issued on the basis that the premises were affected property; and, in fact, the authorisation so stated. However, this did not give it the effect of a declaration under regulation 9(2). For one thing, it was issued upon a deliberate and material misrepresentation by the Defendant that he was the owner at the relevant time: he had

no excuse for concealing the fact that he had not been the owner when the premises became affected property (if indeed they ever did), and that it was Jane Nona who had been the owner since 6.12.82. More important, the *audi alteram partem* rule was applicable: even assuming that the Plaintiff's possession could have been temporarily disturbed by means of an *ex parte* order, yet if that authorisation was to be regarded as being also a declaration under regulation 9(2) it would affect the title of a third party, and hence it could not have been made without prior notice to that party. The purported restriction of the right of challenge makes this position even clearer. Finally, I cannot treat this authorisation under regulation 13 as being also a declaration under regulation 9(9). Not only is there no express reference to regulation 9(2), but there is not even an indication of a conscious intention to exercise the powers vested by that regulation, by deciding a question which had arisen. The mere statement that "the aforementioned affected property vests absolutely in the State" does not show that a serious question was being decided: only that a fact was being assumed. I therefore hold that D2 was only an authorisation issued under regulation 13 upon an **assumption** resulting from the Defendant's *ex parte* representations, and was not consequent upon a **decision** made under regulation 9(2) in respect of a question which arose for consideration.

This conclusion is perfectly consistent with the scheme of the REPIA regulations. Although an authorisation under regulation 13 affects possession, an aggrieved person was allowed an opportunity to question such authorisation. There was evidence that after the authorisation dated 2.3.84 was issued, Jane Nona submitted an affidavit to REPIA, whereupon P1 was issued to her. Although P1 made no reference to regulation 9(2), it was clearly referable to that regulation, and to no other. It is not clear whether the Defendant was heard before P1 was issued, but no complaint has been made on that score; and obviously he suffered no prejudice as he himself obtained a similar document (D3) on 14.9.84. I hold that, by P1 REPIA decided that the premises were not affected property, and since there was no evidence whatever to the contrary, the only possible conclusion was that the premises were not affected property. It is necessary to decide whether that declaration was immune from challenge in legal proceedings.

DIVESTING

The Court of Appeal, the learned trial Judge, and learned Counsel for the substituted Defendant, were clearly in error in regarding P1 and D3 as divesting orders under regulation 14. They are *ex facie* **declarations**, and do not purport to be **orders**; they declare that certain property is not "affected property", and do not purport to **divest** property; and they have not been gazetted, which was essential had they been divesting orders. It is true that issue (4), raised by the Plaintiff, contributed to the confusion, by suggesting that the premises had been divested, but it was for the substituted Defendant to establish that the premises had vested in the state, and it was for her to obtain the necessary admissions, and to suggest the appropriate issues, upon which the success of her case depended.

I hold that P1 and D3 were not divesting orders. It is therefore unnecessary to decide whether the effect of divesting was to revalidate an alienation to which regulation 12 applied.

I allow the appeal, set aside the judgment of the Court of Appeal, and affirm the judgment of the District Court, for the reasons I have set out. The Plaintiff will be entitled to a sum of Rs. 15,000/- as costs in this Court and in the Court of Appeal.

DHEERARATNE, J. – I agree.

PERERA, J. – I agree.

Appeal allowed.