JALALDEEN

v.

RAJARATNAM

COURT OF APPEAL.
SIVA SELLIAH, J. AND P. R. P. PERERA, J.
C. A. 07/86 – D. C. MT. LAVINIA No. 1071/RE.
MARCH 6 AND 7, 1986.

Landlord and tenant – Execution of decree – Section 22 (1C) of Rent Act – Application for stay pending disposal of application for revision – Title by inheritance from grandparent – Ss. 33(7), 22(1D) of Rent Act – Objection to jurisdiction.

Judgment was entered on 16.5.84 for plaintiff in a rent and ejectment suit on the ground of reasonable requirement – writ of execution not to issue until the Commissioner of National Housing notifies the District Judge that he is able to provide alternative accommodation to the defendant as provided in s. 22(1C) of the Rent Act. An appeal (notice of appeal and petition) was filed. The Commissioner of National Housing notified the District Judge of alternate accommodation for the defendant and plaintiff filed application for execution of decree. The defendant then filed application for revision. The District Court stayed proceedings. At the hearing for the first time the jurisdiction of the District Court to entertain the action was attacked as the plaintiff was alleged to be not entitled to institute action as his was a landlordship by inheritance or gift and must stem from a parent or spouse and not as in his case from a grandparent – s. 22(7) of the Rent Act.

Held –

(1) An objection to jurisdiction must be taken at the earliest opportunity. Further, issues relating to the fundamental jurisdiction of the court cannot be raised in an oblique or veiled manner but must be expressly set out. The action was within the general and local jurisdiction of the District Court. Hence its decision will stand until the wronged party has matters set right by taking the course prescribed by law.

(2) The plaintiff having got judgment and the Commissioner of National Housing, having notified the District Judge of his ability to provide alternate accommodation the condition for the issue of writ was satisfied and even if there is an appeal pending the plaintiff cannot be restrained from having the benefit of s 22(1D) of the Rent Act. Writ of execution must therefore issue and cannot be stayed.

Cases referred to:

(1) *Ibrahim Saibo v. Mansoor – (1953) 54 N.L.R. 217.*

(2) *Walsh v. Nagy – [1949] 2 All E.R. 86.*

(3) *Wimalasuriya v. Jayaweerasingham – (1976)-79 N.L.R. (1)90.*

(4) *Jayaweera Bandara v. C. G. Weerasinghe – S. C. 11/82 and 35/82 S. C. Minutes of 24.3.83.*

APPLICATION for revision and continuance of stay order entered by the District Court, Mount Lavinia.

H. L. de Silva, P.C., with *M. S. M. Nazeem, P.C.* and *D. Mohamed* for petitioner.

A. K. Premadasa, P.C. with *D. P. Mendis* and *J. Kanagasabai* for plaintiff-respondent.

Cur. adv. vult.

April 4, 1986.

SIVA SELLIAH, J.

This is an application for revision made by the defendant-petitioner seeking principally the stay of execution of Decree in DC Mt. Lavinia Case No. 1071/RE until the hearing and determination of appeal and staying further proceedings in the said case until the hearing and determination of this application.

The facts material for the determination of this application are as follows:

The plaintiff filed action against the defendant in case No. 1071/RE in DC Mt. Lavinia for the ejectment of the defendant from No. 23A, Muhandiram Lane, Dehiwela, on the ground of reasonable requirement and arrears of rent. This was resisted by the defendant. The case proceeded to trial on the issues framed and after hearing evidence judgment was entered in favour of the plaintiff on the ground of reasonable requirement on 16.05.84. It was however stipulated that no writ of execution would issue until the Commissioner of National Housing notified the District Judge that he is able to provide alternate accommodation to the defendant as provided in section 22 (1C) of the Rent Act. The defendant has given notice of appeal on 29.05.84 and thereafter filed appeal on 16.07.84. The Commissioner of National Housing has notified the District Judge of alternate accommodation for the defendant. The plaintiff has thereafter filed application for execution of decree in the District Court consequent to which this present application for stay has been filed.

The contention of learned President's Counsel who appeared for the petitioner was that there was a statutory bar to the institution of the action by section 22 (7) of the Rent Restriction Act and therefore the court could not have proceeded to hear and determine the action. For it was his contention that title to the premises from which ejectment

was sought was not acquired on a date subsequent to the specified date, i.e. the date when the tenant came into occupation of the premises. He also contended that title by inheritance or gift in section 22 (7) must stem from a parent or spouse and not from a grandparent as in this case and therefore the condition precedent to institution of action was not satisfied. His contention further was that the decree was a complete nullity in the circumstances and that consequently no Writ could issue. In other words he assailed the competency of the court and claimed that it had no jurisdiction. He further stated where the decree was a nullity and Writ could not be executed, the amending provision of the Rent Act stipulating that court shall not stay execution pending appeal, cannot apply. He also contended that even if the court had jurisdiction, nonetheless the correctness of its decision on the merits is in question in appeal and on that ground too execution should not issue.

Section 22 (7) of Rent Act 7 of 72 which was the main basis of the contention of learned counsel for petitioner and on which he contended the action could not have been instituted and that therefore the decree entered was a nullity states as follows: (vide section 22 (7)).

(7) Notwithstanding anything in the preceding provisions of this section, no action or proceedings for the ejectment of the tenant of any premises referred to in sub-section (1) or sub-section (2)(i) shall be instituted on the ground that such premises are reasonably required for occupation as a residence for the landlord or any member of the family of the landlord or for the purposes of the trade, business, profession, vocation or employment of the landlord, where the ownership of such premises was acquired by the landlord on a date susbsequent to the specified date, by purchase or by inheritance or gift other than inheritance or gift from a parent or spouse who had acquired ownership of such premises on a date prior to the specified date:

Provided, however, that the preceding provisions of this sub-section shall not apply to the institution of any action or proceedings for the ejectment of the tenant of any premises the annual value of which exceeds one hundred and fifty per centum of the relevant amount where such tenant had come into occupation thereof prior to the date of commencement of this Act.

In this sub-section, "specified date" means the date on which the tenant for the time being of the premises, or the tenant upon whose death the tenant for the time being succeeded to the tenancy under section 36 of this Act or section 18 of the Rent Restriction Act (Chapter 274), came into occupation of the premises.

Section 22 of the Rent Act 7 of 1972 was amended by Rent Law 10 of 77 which by section 2 (2) 1 D (s.22 (1D)) enacted that–

> "Notwithstanding anything in any other law, where a Writ in execution of a decree for the ejectment of the tenant of any premises referred to in paragraph(*bb*)of sub-section (1) is issued by any court, the execution of such writ shall not be stayed in any manner by reason of any steps taken or proposed to be commenced in any court with a view to questioning, varying or setting aside such Writ."

The learned counsel for plaintiff-respondent relied very strongly on this provision and maintained that no stay order can accordingly issue or be permitted to remain in contravention of this provision which was expressly formulated to prevent a landlord being deprived of the benefit of the decree lawfully obtained by him.

In this case the defendant's landlord became the tenant of the plaintiff's wife's grandfather in 1959 of the premises in suit. The wife's grandfather donated the premises to the plaintiff's wife in March 1970 and the defendant's husband died in October 70. Thereafter the defendant succeeded to the tenancy under the plaintiff, attorned to him and paid him rent. These facts are not disputed (vide para 7 (*e*) of the Petition). A perusal of the issues framed by the defendant as set out in para 6 of the petition in this application reveal that no objection was taken to the jurisdiction of the court and indeed there was no issue raised regarding the valid jurisdiction of the court to hear and determine the action. Indeed it is only at this hearing that such an objection is taken. Indeed if the objection to the decree is so fundamental as involving the competence of the court and the validity of the decree which the learned counsel for petitioner contends was a nullity, it is not easy to understand why it was not taken at the earliest opportunity and why even in the prayer to this petition for Revision there is no prayer to set aside the decree on the ground that it was entered by a court without competent jurisdiction and therefore a nullity. Manifestly this application for Revision has been filed, after the

appeal in the case was filed, to obtain a stay order against the execution of the decree entered–the very thing that was prohibited by the amending legislation set out above in section 2 (2) of Act 10 of 77–a step which cannot be encouraged by this court.

The learned counsel for petitioner has quoted the case of *Ibrahim Saibo v. Mansoor* (1) where the collective court held that–

> "Section 13 of the Rent Restriction Act says that no action or proceedings for ejectment of the tenant of any premises to which this Act applies shall be instituted in or entertained by a court unless the Board, on the application of the landlord, has in writing authorized the institution of such order or proceedings except in certain specified cases. Any decree entered in an action in which such authority, being necessary, has not been obtained would be a nullity because a court acting without such authority would be acting without jurisdiction. It has to be noted that it is not competent for a defendant to contract out of such a requirement or by waiver, tacit or express, to obviate the necessity for compliance with it."

In my view that case can be distinguished because authority has to be obtained in writing from the Board before institution of action; kindred provisions existed in the Conciliation Board Act where too a certificate from the Conciliation Board stating that conciliation was not possible has to be filed; in the instant case this is not so and section 22(7) has to be properly interpreted on the facts in the case. It is this interpretation and the answers to issues 6 – 11 (defendant's issues) that are being canvassed in appeal by the defendant and this court in these proceedings cannot pronounce on matters which are pending in appeal nor act in disregard of the provision of section 2(2) 1 D of Rent Law No. 10 of 1977. Counsel for petitioner stated that section 22 (7) of the Rent Act imposed a statutory bar to the institution of action by a landlord; if so why was this not raised as a preliminary issue of law? Counsel contended that in effect this is what issues 6 and 7 sought to say. Issues relating to the fundamental jurisdiction of the court cannot be raised in an oblique or veiled manner but must be expressly set out. The learned District Judge has held that section 22(7) has no application and this is in appeal.

I have also considered the case of *Walsh v. Nagy* (2) and am of the view it has no proper application to the facts of this case.

Furthermore the proceedings in case No. 1071/RE DC Mt. Lavinia from which an appeal has been filed are not before this court in this application and this court accordingly cannot properly make any order to stay further proceedings in the said case without being in a position to properly advise itself with reference to the proceedings, the nature of the evidence led at the trial, etc. There can be little doubt that upon the hearing certain questions of fact had to be decided as well as certain mixed questions of fact and law upon which the judge has determined the case and which were being canvassed in appeal.

It would be singularly inappropriate in an application for Revision which has as its main object the obtaining of a stay order, for this court to express any view on the matters determined by the trial judge and from which there is an appeal pending. The trial judge has in fact held that–

> "In the instant case the donation took place on 22.3.70 on which date the Act had not come into operation. Furthermore when the donation took place Mohideen Jalaldeen was the tenant. This is reflected in P16; somewhere in June before the death of Mohideen Jalaldeen his wife attorned to the plaintiff as reflected in P15."

Thus all these are findings of fact which are being canvassed in appeal. It will thus be seen that parties had submitted to the jurisdiction of court, raised issues (which did not contest the jurisdiction of the court) and sought findings on the issues which were posed before the learned trial judge. If there is to be a challenge to that jurisdiction it should properly be in appeal. In *Wimalasuriya v. Jayaweerasingham* (3) Sharvananda, J. (as he then was) held:

> "There is a fundamental difference between the existence of jurisdiction and the exercise of jurisdiction. A challenge to the method of the exercise of jurisdiction of a court can never in law, justify a denial of the existence of such jurisdiction. If a court which has general jurisdiction and has in addition local and personal jurisdiction, exercises such jurisdiction in an unauthorized manner, the wronged parties can only take the course prescribed by law for setting such matters right, and if the course is not taken, the decision, however wrong, cannot be disturbed."

It cannot be denied in this case that the District Court of Mt. Lavinia had the jurisdiction generally and locally to hear a case for rent and ejectment. If its decision at the outcome of the trial is wrong it must be

reversed according to law in appeal, and the plaintiff having got judgment and having the benefit of section 2 (2) 1 D of Rent Law 10 of 77 cannot be restrained from the benefit of the decree in his favour.

The learned counsel for defendant-petitioner also urged that considerable hardship will be caused to the defendant if he is ejected pending appeal. In this connection it is necessary to bear in mind the fact that as provided by law the Commissioner of Housing has informed the District Judge that he has provided alternate accommodation to the defendant. In *Jayaweera Bandara v. C. G. Weerasinghe* (4) Wanasundara, J. held with Sharvananda, J. (as he then was) and Wimalaratne, J. agreeing that:

> "In regard to the issue of Writ, the only fetter on this power, as far as the action is concerned, is to be found in section 22 1(*c*) of Rent Act 7 of 1972 no Writ in execution of such decree shall be issued by such court until after the Commissioner of National Housing has notified to such court that he is able to provide alternate accommodation for such tenant and that if this is done, (as in this case) that condition has been satisfied."

He further held that:

> "Where a tenant by his own act has disabled himself from accepting the offer made by the Commissioner, Writ can lawfully issue, because it is a case where the Commissioner has notified the court that he is able to provide alternate accommodation for such tenant within the meaning of section 22 1 (*c*)."

Thus in this case, alternate accommodation having been provided to the defendant as enjoined by law, the defendant is not entitled to the continuance of the stay order. The order staying further proceedings is accordingly vacated and the orders sought in paras (*b*) and (*c*) of the prayer to the petition are refused.

The prayer regarding admission of Documents X1-X5 to be read along with the pending appeal was not seriously canvassed in this application as it will be urged at the main hearing of the appeal.

The defendant-petitioner will pay the plaintiff-respondent costs of this application fixed at Rs. 525

P. R. P. PERERA, J.—I agree.

Application dismissed.