

ARIYANANDA
v.
PREMACHANDRA

COURT OF APPEAL.
WIGNESWARAN, J.
JAYAWICKREMA, J.
CA (REV) 20/97.
CALA 6/97.
DC COLOMBO 6086/ZL
08TH JUNE, 1998.
06TH JULY, 1998.

Ex-parte judgment - Eviction - Ex-parte Order vacated and Defendant directed to file answer - No order on the application for restoration of possession - Civil Procedure Code S.839 - Duty of Court to correct the wrong committed by Court - Fraud - Status quo ante.

The Plaintiff Respondent obtained an ex-parte judgment and the Defendant Petitioner was subsequently evicted. At the default inquiry court held that summons and decree had not been served on the Defendant-Petitioner and therefore vacated the ex-parte judgment entered, but did not make any order on the Application for restoration of possession. The Defendant Petitioner sought to revise the said Order.

Held :

Per Wigneswaran, J.

“When a District Court finds that summons/Decree have not been served on the Defendant and yet an ex-parte judgment had been illegally made and thereafter writ issued and executed, what must be the character of the legal order that should be made? It was the duty of the Court *ex mere motu* to have restored possession to the Defendant even if such a relief had not been asked for.

(i) It is the duty of Court to restore *status quo ante* where a fraud had been perpetrated and an abuse of the process of court had been committed.

(ii) Application is under S.839 Civil Procedure Code, invoking the inherent powers of Court to make order as may be necessary to meet the ends of justice or to prevent abuse of process of Court.

APPLICATION in Revision from the Order of the District Court of Colombo.

Cases referred to :

1. *Sivapathalingam vs Sivasubramaniam* [1996] 1 Sri L.R. 378 at 392
2. *Sirinivasa Thero vs Sudassi Thero* 63 NLR 31 at 34
3. *Roger vs Comptoir D Escompte de Paris* (1871) LR 3 PC 465
4. *Wickremanayake vs Simon Appu* 76 NLR 166 at 167
5. *Moujood vs Pussadeniya* [1987] 2 Sri L.R. 287 at 298

Ananda Kasturtarachchi with Ms Medini de Silva for Defendant-Petitioner.

P. Nagendran P.C., with C.W. Pannila and H.S. Perera for Plaintiff-Respondent.

Cur. adv. vult.

October 4, 1999.

WIGNESWARAN, J.

The Plaintiff-Respondent filed this action No. 6086/ZL on 24. 05. 1989 against the Defendant-Petitioner for declaration of title, ejectment, damages and costs in respect of premises No. 64, Maha Vidyala Mawatha, Colombo 13 containing in extent A0 R2 P11. 12.

An exparte judgment was entered on 25. 05. 90. On 21. 05. 91 the Defendant-Petitioner was evicted from the premises in suit by the Fiscal. The Defendant-petitioner applied to set aside the exparte Order and Decree and to order restoration of possession.

On 31. 12. 1996 the Additional District Judge, Colombo held that summons and Decree had not been served on the Petitioner in this case and therefore vacated the exparte judgement entered against the Petitioner and directed the petitioner to file answer on 06. 02. 1997. She did not make any order on the application for restoration of possession.

This Application for Revision No. 20/97 and Leave to Appeal application No. 6/97 were filed by the Defendant-

Petitioner to obtain an order for restoration of possession and to bring back the *status quo ante* between parties.

The learned President's Counsel for Plaintiff-Respondent has objected to the restoration of possession on the following grounds:

- (a) The order dated 31. 12. 1996 is already under appeal by the Plaintiff-Respondent (X2).
- (b) Another action D.C. Colombo Case No. 15598/L is pending before the District Court praying for the restoration of premises in suit and for damages.
- (c) An interlocutory appeal is pending as regards disallowing the production of a document in Case No. 15598/L before the Court of Appeal in C.A.L.A. Application No. 315/97.
- (d) On the same matter stated at 'c' above Revision Application 854/96 is also pending.
- (e) The answer filed in case No. 6086/ZL (this case) also claims relief for the same matter.

Under the circumstances this Court cannot be called upon to invoke its inherent power under Section 839 of the Civil Procedure Code.

2. Since the Defendant-Petitioner has invoked the jurisdiction of the District Court in the same case and also collaterally, the Defendant-Petitioner is estopped from inviting the Court of Appeal to exercise its inherent powers under Section 839 of the Civil Procedure Code.
3. Ends of Justice would be affected if this Court at this stage intervenes when the same matter is being decided by the District Court.
4. The Defendant-Petitioner has not disclosed the filing of Case No. 15598/L and C.A.L.A. 315/96 and Revision Application No. 854/96. Therefore this application must be refused.

These observations would now be examined.

Basically all the submissions made by the learned President's Counsel on behalf of the Plaintiff-Respondent boil down to the question whether this Court could determine this matter while applications for relief with regard to the same matter are pending else where.

The applications pending are not before a higher Court. They are either in the District Court or in this same Court on an interlocutory matter concerning the disallowing of a document.

What is before this Court in the present applications, both Revision (20/97) as well as Leave to Appeal (96/97), is a very basic question. Technically it is irrelevant to the prejudice or hardship that may have been caused to the Defendant-Petitioner. It is a more fundamental question of law. When a District Court finds that Summons/Decree have not been served on the Defendant and yet an *ex parte* judgment had been obtained illegally and thereafter Writ issued and executed to eject the Defendant, what must be the character of the legal order that should be made? Mere setting aside of the Decree would have been sufficient if writ had not been issued. But when it was pointed out to Court that the Defendant had been dispossessed consequent to the issue of a writ *ab initio* void it was the duty of the Court *ex mere motu* to have restored possession to the Defendant even if such a relief had not been asked for. The reason being that the process of court had been abused and it is the duty of Court to restore *status quo ante* where a fraud had been perpetrated and an abuse of the process of Court had been committed.

In this instance despite the application for restoration of possession the learned District Judge had been either indifferent, callous or ignorant of her primary duty-to put right a wrong committed in the name of the Court. No other considerations need have been examined unless restoration was impossible.

The applications filed by the Defendant-petitioner are to obtain relief for the wrong committed to him. The duty of the Court in this instance is to correct the wrong committed by Court consequent to a fraud perpetrated on it and ensure *status quo ante*, prior to the wrong done. Justice S.B. Gunawardana in *Sivapathalingam vs Sivasubramaniam*⁽¹⁾ at 392 stated as follows:

"It is the duty of the Courts and it is in their interests to ensure that public confidence in them and in the orders and judgment made by them is maintained and remains undamaged. If an Order of the Court, which ultimately has standing behind it the coercive power of the State, causes damage without justification, it becomes the duty of the Court itself to undo that damage, if for no other reason, at least in the interest of the credibility of the Courts as an Institution."

Considering this case in the same spirit it becomes necessary for us to view what has taken place in this case very seriously and grant the Defendant-Respondent his relief regardless of whether other applications are available or pending before the District Court or not. Those cases would automatically resolve themselves the moment the correct step that should have been taken by the Learned District Judge on 31. 12. 1996, is taken. An appeal against the order of the learned Additional District Judge before this Court need not deter this Court from taking the necessary step to complete and fulfil the order already made. If such order dated 31. 12. 1996 has to be set aside in the future a fresh writ could issue. We need not postpone taking a step in the correct direction on account of an undetermined appeal.

The application before this Court now is one under section 839 of the Civil Procedure Code invoking the inherent power of this court to make order as may be necessary to meet the ends of justice or to prevent abuse of process of Court.

Already the process of court has been abused and corrective measures have not been taken by the District Judge though thereto prayed for. There is no doubt that the person affected by the illegal writ must be put back in possession. Not to do so would be to perpetuate a fraud committed on Court.

Sansoni, J. in *Sirinivasa Thero vs Sudassi Thero*,⁽²⁾ at 34 stated as follows:

"Justice requires that he should be restored to the possession he occupied before the invalid Order was made, for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act. The Court will, so far as possible, put him in the position which he would have occupied if the wrong Order had not been made. It is a power which is inherent in the Court itself, and rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act. See Roger vs Comptoir D'Escompte de Paris⁽³⁾. The duty of the Court under these circumstances can be carried out under its inherent powers"

So too Chief Justice H. N. G. Fernando, in *Wickremanayake vs Simon Appu*⁽⁴⁾ at 167 stated as follows:

"Justice therefore requires that the Plaintiff, who had been placed in possession in execution of a Decree which had turned out to be invalid, should no longer be allowed to continue in possession of the land"

Chief Justice Sharvananda in *Maujood vs Pussadeniya*⁽⁵⁾ at 298 stated as follows:

"In as much as the Court acted without jurisdiction in issuing the Writ, the Appellant who was dispossessed of the premises in suit in consequence of the execution of the writ is entitled to be restored to possession. Hence, I direct the District Court to restore the Appellant to vacant possession of the premises."

In any event we find that D. C. Colombo No. 15598/L had been filed in order to obtain a declaration that Deed No 9834 dated 26/10/1988 attested by K. Rasanathan, Notary Public, Colombo is a nullity and to set it aside. The remedies sought therefore in this case and case No. 15598/L are different.

We therefore find that the order made by the Learned Additional District Judge, Colombo on 31. 12. 1996 is incomplete and therefore we allow the appeal. We make in addition to the order already made by the learned Additional District Judge, a further order in terms of prayer (b) of the Application restoring possession to the Defendant-Petitioner.

The Plaintiff-Respondent shall pay incurred costs in both applications (Revision No. 20/97 and C.A.L.A. No. 6/97) to the Defendant-Petitioner.

JAYAWICKRAMA, J. - I agree.

Application allowed.