FERNANDO

v.

FONSEKA

COURT OF APPEAL,
RANASINGHE, J AND H. A. G. DE SILVA, J.
C. A. APPLICATION NO. 529/81
D. C. COLOMBO B3229/RE
JUNE 25, 1981.

Rent and ejectment - reasonable requirement - consent judgment - execution - omission in decree renaming who should go into occupation — s.22(8) and (9) of the Rent Act — s.408 CPC impugning of consent decree.

The omission in a consent decree entered in a rent and ejectment case to direct that no person, other than the landlord or some member of his family whose name shall be specified in the decree shall enter into occupation of the premises upon vacation thereof or ejectment therefrom of the tenant can be rectified to give full effect to the intentions of the parties and make it capable of enforcement should the necessity arise. A tenant should not be permitted to take unconscionable advantage of the error in the decree.

Cases referred to:

(1) Swaris v Perera (1940) 41 NLR 562.
(2) Cornelius Perera v Leo Perera (1961) 62 NLR 413
(3) Nugera v. Richardson (1950) 51 NLR 116
(4) Hinnihamy v. Carolis (1948) 49 NLR 265.
(5) Newton v. Sinnadurai (1951) 54 NLR 4.

H. W. Jayewardena, Q. C. with T. B. Dillimuni for the petitioner.
P. A. D. Samarasekera with G. L. Geethananda for the respondent.

Cur adv vult

July 31, 1981

H. A. G. DE SILVA, J.

In this case the Plaintiff-Respondent as landlord instituted an action to eject the Defendant-Petitioner, the tenant, from the premises which were the subject-matter of this action, on the sole ground that the said premises were reasonably required for the occupation of one Mrs. Shiromini de Alwis, the daughter of the Plaintiff-Respondent.

On 12. 11. 1979 a consent judgment was entered in favour of the Plaintiff-Respondent, but the issue of the writ of execution for ejectment of the Defendant-petitioner was stayed until 30th – June, 1981. Decree was also entered in terms of the said judgment.

This application is now being made on the basis, that neither the judgment nor decree has directed, that no person other than the said Mrs. Shiromini de Alwis should enter into occupation of the said premises upon vacation thereof or ejectment therefrom, of the Defendant-Petitioner as required by the provision of Section 22 (8) of the Rent Act No. 7 of 1971. Section 22 (8) of the Rent Act No. 7 of 1972 enacts *inter alia* as follows:

> "Where a decree for the ejectment of the tenant of any premises is entered by any Court on the ground that the Court is of opinion –
>
> (a) that the premises are reasonably required for occupation as a residence for the landlord or any member of his family
>
> .....
>
> the Court shall in such decree direct that no person, other than the landlord or some member of his family whose name shall be specified in the decree, shall enter into occupation of the premises upon vacation thereof by the tenant or upon the ejectment therefrom of the tenant."

Mr. Jayewardane contends that Section 408 of the Civil Procedure Code contemplates a "lawful agreement or compromise" and that the consent decree entered in this case is not a "lawful agreement or compromise" in that it fails to comply with a mandatory provision of the Rent Restriction Act in that the said decree has failed to mention the name of Mrs. Shiromini de Alwis as the person who shall enter into occupation of the premises on its vacation by the tenant. He relies on the decision of *Swaris v. Perera*[1] where it was held that Section 615 of the Civil Procedure Code gives no right to a husband to apply for the modification of an order for the monthly payment of alimony when the order is accompanied by a direction that the payment should be secured by the hypothecation of property. Hearne, J. in the course of his judgment at page 563 states –

> "In the course of the argument on appeal the point was taken by Counsel for the Respondent that as the decree was a consent decree under section 408 of the C. P. C. it could, in no circumstances, be impugned. I expressly dissociate myself from this view. I do not think that a decree which gives effect to and embodies an agreement between parties is sacrosanct. It

is true that no appeal lies. That is the significance of the word "final" in the section. But such a decree may be set aside on any ground which would invalidate an agreement, as for instance, fraud, misrepresentation or mistake. The adjustment or settlement must be 'lawful.' If it is not, the Court will not perpetuate it."

Mr. Jayewardane further contends that the entering of a decree does not give validity to an agreement which is per se illegal. He cited the case of *Cornelius Perera v. Leo Perera*[2] where it was held that a consent order and the judgment based on it should be set aside on the ground of mistake. Basnayake C. J. dealing with Section 408 of the Civil Procedure Code states at page 419 –

"where a statute provides special machinery which if resorted to renders a decree final, the finality prescribed in the Act does not attach to a decree unless there is a clear manifestation of a conscious intention of the parties to resort to that machinery with a knowledge of the consequences it involves and there has been a strict compliance with the requirements of the statute."

It is therefore Mr. Jayewardane's position that though the agreement or compromise may purport to have been entered into under Section 408, due to the illegality complained of viz. the non-compliance with the mandatory provisions of Section 22 (8) of the Rent Restriction Act, the agreement or compromise is not lawful and hence no finality attaches to it and should be set aside.

Mr. Samarasekera for the Plaintiff – Respondent draws our attention to paragraph 3 of the plaint filed in this case, where it was averred that the premises in question were reasonably required for the use and occupation of the Plaintiff's daughter Mrs. Shiromini de Alwis and to paragraph 4 thereof which stated that the Defendant acknowledged the receipt of the notice to quit, did not dispute that the premises were reasonably required as aforesaid and promised the Plaintiff to make every endeavour to find suitable alternative accommodation. He further contends that neither the consent judgment, produced marked "D," nor the decree, based on it marked "E," had been impugned on the basis that it was tainted by mistake, fraud or misrepresentation. The plaint clearly stated the name of the person for whose occupation the premises were required.

Mr. Samarasekera submits that the purpose for the name of the person who is to go into occupation is stated in the decree is given in Section 22 (9) which states that –

"Where, in any case to which subsection (8) applies, the landlord or other person whose name is specified in the decree, without reasonable cause, does not enter into occupation of the premises before the expiration of a period of three months after the date of the vacation thereof by the tenant or of his ejectment therefrom, or having thus entered into occupation of the premises, vacates them without reasonable cause within three years of the entry into such occupation or lets such premises or part thereof within such period, the tenant may, at any time within fourteen days after the expiration of the said period of three months, or, as the case may be, at any time within fourteen days after the vacation of the premises by the landlord or the said other person, make application to the Court for an order restoring him into possession of the premises."

Mr. Samarasekera cited the case of *Nugera v. Richardson*[3] where in the course of his judgment Gratiaen, J. sets out the terms of the compromise embodied in the decree in that case and goes on to say –

"The resulting position was that the appellant did not put the respondent to the proof of the various facts which would otherwise have to be established before the Court could enter a decree for ejectment against an unwilling tenant, and in effect the Court was relieved of its duty to call for such proof. The appellant preferred instead to obtain from the respondent the concession of remaining in occupation of the premises for a further period of 13½ months provided that he made regular monthly payments of Rs. 53.83 to the respondent.

This eminently satisfactory arrangement was implemented by both parties until July 25, 1949. On that date the appellant, having now enjoyed on his part the full benefit of the terms of the compromise, looked for some means whereby he might deprive the respondent of the corresponding advantage which the latter was entitled to claim under the settlement arrived at in Court. Accordingly, barely a week before "D Day", the petitioner applied to the Court to set aside the consent decree of the previous year, alleging that notwithstanding the solemn agreement which had been entered into by them and sanctioned by the Court as a lawful compromise, that decree was *ultra vires* and made without jurisdiction. This very startling proposition was rejected by the learned Commissioner of Requests .

The Appellant now invites this Court to set aside the learned Commissionar's order refusing his application to vacate the decree. I decline to do so, and only regret that it has been possible for the

appellant, by resorting to the simple device of filing what I regard as a frivolous appeal, to obtain a further extension of time to remain in possession of the premises which he was bound to vacate not later than July 31, 1949.

It is not suggested that the compromise effected on June 15, 1948, was tainted with fraud, duress or any other circumstances which would vitiate an agreement of parties in accordance with the principles of the Roman-Dutch Law. The appellant does not suggest that the terms of the compromise were not very acceptable to him when he agreed to them, although the relentless approach of the date fixed for him to implement his part of the settlement must of course have caused him many misgivings.

In my opinion the limitations placed on the jurisdiction of a Court by the provisions of the Rent Restriction Ordinance of 1942 (and the subsequent Act of 1948) in actions between a landlord and a tenant who is unwilling to vacate the premises do not in any way fetter the right or the duty of the Court to give effect to lawful compromises willingly entered into in a pending action between a landlord and his tenant. The provisions of Section 408 of the Civil Procedure Code still remain intact. It is monstrous to contend that a defendant who, in a tenancy action, has entered into an unobjectionable bargain to give up an advantage in consideration of obtaining some other benefit should be relieved from his bargain after he has received in full measure the benefit accruing from the compromise. If a tenant is to be placed in a specially privileged position in such cases, the Legislature should say so in unambiguous terms.

Mr. Samarasekera submits that the consent order was entered into on 12.11.1979 and the terms thereof were explained to the Defendant who signed the record. In terms of the consent order the Defendant was to vacate the premises on or before the 30th June, 1981. The Defendant-Petitioner has taken full advantage of the agreeemnt and remained in occupation of the premises till now and only on 20th May, 1981 i.e. about 40 days before she is due to vacate the premises after nearly one and a half years occupation of the premises under the consent order, files this application in this Court to have the consent order set aside.

Mr. Samarasekera contends that this Court has the power to rectify any omission in the consent order and decree even to the extent of adding a fresh term to the decree to make it conform to Section 22 (8) of the Rent Restriction Act. In support he cites *Hinnihamy v. Carolis*[4] where it was held that a Court has power under Section 189 of the Civil Procedure Code, to correct an error in an order made by consent between the parties which has been

due to a slip on the part of Counsel in stating the terms of settlement to Court, and also the case of *Newton v. Sinnadurai*[5] where it was held that in a case where the terms of settlement in a compromise decree arrived at between the parties to an action were carelessly drawn up in such a manner that they were incapable of enforcement, the consent decree could be rectified so as to give effect to the real intention of the parties. If necessary the Court could substitute fresh terms which would be more in accordance with the substantial result which the parties had intended to achieve. Gratiaen, J. in the course of his judgment observes that –

> "Some responsibility attaches in such cases to the Trial Judge himself, whose duty it is to enter a decree in accordance with the terms of the settlement; that responsibility involves a duty to ensure that the decree so passed is embodied in language which, while giving full effect to the intentions of the litigants, is at the same time capable of enforcement should the necessity arise."

In the instance case as Mr. Samarasekera has submitted, the Defendant-Petitioner has taken advantage of the agreement arrived at in 1979, and on the eve of her having to fulfil her part of the agreement by vacating the premises on or before 31. 7. 81, she files this application in Court to have the compromise decree set aside on the ground of non-conformity with the provisions of the Rent Restriction Act. To allow her application would be tantamount to this Court permitting her to take unconscionable advantage of an error in the decree, which I do not think this Court could be a party to. This Court can, as has been held by Gratiaen, J. in *Newton v. Sinnadurai* (supra) rectify on equitable grounds this decree which has been in error entered omitting the name of Mrs. Shiromini de Alwis. In inserting her name in the decree, the Court would be doing nothing more than what is equitable.

I therefore would amend the decree passed in the lower Court by adding to it –

> "No person other than Mrs. Shiromini de Alwis shall enter into occupation of the said premises on vacation thereof by the Defendant or upon ejectment therefrom of the Defendant."

I further dismiss the defendant-petitioner's application. The Defendant-Petitioner shall pay to the Plaintiff-Respondent

Rs. 525/- as costs of this application.

Ranasinghe, J.

I agree

Application dismissed.