FAUZ
v.
GYI AND OTHERS

COURT OF APPEAL.
WIGNESWARAN, J.,
JAYAWICKREMA, J.
C.A. NO. 126/98.
CALA NO. 27/98.
D.C. COLOMBO NO. 5251/ZL.
SEPTEMBER 10, 1998.

Civil Procedure Code – S. 763, s. 763 (1) – Judicature Act s. 23 – Writ pending appeal – Substantial loss – Substantial questions of Law.

Held:

(1) Lack of material before Court regarding monetary or economic loss enures to the benefit of the plaintiff-respondent.

(2) Questions of law arising for determination must be substantial in relation to the facts of the case at hand.

(3) A prospective purchaser placed in possession of a premises was at best a licensee or a permissive occupier and cannot be equated to that of a tenant. Once the defendant-petitioner refused to accept Thaha as his landlord he forfeited his right to be called a tenant.

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

1. *Perera v. Gunawardene* – Bar Association Law Journal – 1991 v. IV parts 1-7.
2. *Mack v. Shanmugam* – Sri Lanka Law Report vol. III – part 8 page 89.
3. *Saleem v. Balakumar* – [1981] 2 Sri L.R. 74.
4. *Kandasamy v. Gnanasekaram* – CALA No. 78/81 – CAM 17.7.81.
5. *Cassim Hadjiar v. Umamlevve* – 67 NLR 22.
6. *Imbuldeniya v. D. De Silva* – [1987] 1 Sri L.R. 367.
7. *Swami Sivagnananda v. The Bishop of Kandy* – 35 NLR 130.

P. Nagendra, PC with *S. H. M. Saheedu* for defendant-petitioner.

S. Mahenthiran with *Ms. P. Narendran* for plaintiff-respondents

Cur. adv. vult.

April 29, 1999.

WIGNESWARAN, J.

The original plaintiff's father, one Mohamed Naina Marikar Mohamed Thaha was, *inter alia,* declared entitled to premises No. 328, Old Moor Street, Colombo 12, the subject-matter of this action, in DC Colombo case No. 8207/L. The defendant to the said case was Abdul Majeed Mohamed Zaneek. While declaring title in M. N. M. M. Thaha the payment of a sum of Rs. 27,308 was ordered to be paid to the said A. M. M. Zaneek which was duly paid to the latter by the former.

It appears that M. N. M. M. Thaha was thereafter given constructive possession of the abovesaid premises. M. N. M. M. Thaha died on 09.05.1978 and his estate was administered in Testamentary Proceedings bearing No. 27498/T.

Admittedly, (vide admission 7 recorded on 20.08.1990) the defendant in this case, M. L. M. Fauz, came into occupation of the premises in suit (No. 328, Old Moor Street, Colombo 12 abovesaid) as a tenant under the abovesaid A. M. M. Zaneek.

Before his death, M. N. M. M. Thaha after A. M. M. Zaneek's appeal to the Supreme Court was dismissed on 21.01.1976, by letter dated 01.07.1977 sent by his Attorney-at-law called upon the defendant, M. L. M. Fauz, to attorn to him and pay rents to him.

By letter dated 11.07.1977 M. L. M. Fauz replied that he had entered into a contract of tenancy with the abovesaid A. M. M. Zaneek.

By letter dated 19.07.1977 M. N. M. M. Thaha's Attorney-at-law replied notifying M. L. M. Fauz that he remained in occupation (of the premises in suit) at his own peril.

Thereafter, this action (DC Colombo case No. 5251/ZL) was filed by the heirs of the late M. N. M. M. Thaha on the basis that defendant M. L. M. Fauz failed to attorn and pay rents to their father and therefore, there was no privity of contract between the defendant and the plaintiffs. The defendant was described as a trespasser. The amended plaint dated 20.10.1988 prayed for a declaration that the original plaintiffs in this case were the lawful owners of the premises in suit, for ejectment of the defendant and all holding under him, for damages and costs.

The Additional District Judge, Colombo, delivered judgment on 25.07.1996 in favour of the original plaintiffs.

Appeal No. 599/96 (F) was filed by the defendant on 20.09.1996 and it is pending before this Court.

On 14.10.1996 the original plaintiffs made an application to the District Court for writ pending appeal. Objections were filed by the defendant and after inquiry the Additional District Judge, Colombo, made order dated 17.02.1998 allowing writ pending appeal. CA Revision 126/98 and CA Leave to appeal No. 27/98 were filed by the defendant M. L. M. Fauz to set aside the said order dated 17.02.98.

Of consent, writ was not to be taken until both applications referred to above were determined by this Court.

Pending order by this Court after hearing the 1st plaintiff-respondent Noorul Masaina Gyi died on 16.01.1999 and Illiyas Arthur Gyi was substituted as 1A plaintiff-respondent.

This order will deal with both applications.

The learned President's Counsel appearing for the defendant-petitioner has taken up the following matters before us :

(i) Substantial loss to the business of sanitaryware carried on by the defendant had not been taken into consideration by the learned Additional District Judge, Colombo.

(ii) "Substantial questions of law" would amount to "substantial loss" in terms of section 763 (2) of the Civil Procedure Code. Thus, attornment in fact or by operation of law was an important question of law to be considered (case law cited).

(iii) Rents were in fact paid. But, even if not paid, the proper legal remedy was an action for rent and ejectment and not a declaratory action.

The learned President's Counsel has submitted that complicated questions of facts and law arise in this case and therefore writ should be stayed on security being furnished by the defendent-petitioner.

These submissions would presently be examined.

(i) **Substantial loss – Sanitaryware business :**

According to section 763 (1) of the Civil Procedure Code a judgment-creditor is entitled to apply for execution of a decree in his favour in the normal course despite an appeal pending. According to section 23 of the Judicature Act an appeal shall not have the effect of staying the execution of a decree unless the District Judge deems fit otherwise.

The burden is on the appellant to show sufficient cause if security is to be ordered while allowing execution of a decree for the restitution of any property which may be taken in execution of such decree and for the due performance of any contrary order that may be made by the Court of Appeal.

No doubt a discretionary right has been vested in Court under section 763 (2) of the Civil Procedure Code to stay execution pending appeal. The circumstances contemplated for such stay are – (i) that

the judgment-debtor must satisfy that substantial loss may result to him unless an order for stay of execution is made *and* (ii) he must give security for due performance of the ultimate order that may be made in appeal.

The question whether "substantial questions of law" to be adjudicated upon at the hearing of the appeal amounts to "substantial loss" would be considered under heading No. (ii) hereinafter.

But, presently the question of the monetary or economic connotation of the phrase "substantial loss" in relation to the facts of this case would be discussed.

The learned President's Counsel submitted that the defendant was running a successful business in sanitaryware. Value of his stock in trade was said to be Rs. 550,000, value of furniture Rs. 49,000 and it was observed that he had an overdraft facility of Rs. 40,000.

Justice Mark Fernando stated in the case of *Perera v. Gunawardene*[1] as follows :

> ". . . In any event mere assertions of the judgment-debtor's opinion that serious loss would result, unsupported by averments of fact in regard to the nature of the business, its turnover and profits (or losses), the difficulties and expenses which relocation would occasion, and similar matters are insufficient. *The material upon which such assertions are based should have been made available to the Court to assess the loss,* and to determine, in relation to the judgment-debtor, whether such loss was substantial; and also to determine the security."

The defendant-petitioner in this instance did not place any material before Court to support his assertions. Further, it is difficult to believe that the defendant-petitioner who bases his tenancy on a pure question of law (viz attornment by operation of law), fully aware of the fact that his previous landlord (A. M. M. Zaneek) had lost his rights to the father of the original plaintiffs, with no rent receipts to prove

tenancy, would invest substantial sums of money to run a lucrative business in the premises in suit. Of course, according to the learned counsel for the plaintiff-respondents the premises are virtually closed.

Therefore, the lack of material before Court regarding substantial monetary or economic loss enures to the benefit of the plaintiff-respondents.

(ii) **Substantial questions of law arise :**

The learned President's Counsel has placed much reliance on the "substantial questions of law" that arise in this case, to support his application for the stay of writ.

Number of decisions have held that substantial questions of law awaiting determination by the Appellate Courts be classified as amounting to substantial loss, (*vide Mack v. Shanmugam*[2]; *Saleem v. Balakumar*[3]; *Kandasamy v. Gnanasekaram*[4]).

But, questions of law arising for determination must be substantial in relation to the facts of the case at hand. One of the meanings of the word "substantial" is "actually existing".

The person who had entered into a contract of tenancy with the defendant-petitioner had been held to have no rights to the property in suit in DC Colombo case No. 8207/L. As far back as on 21.01.1976 A. M. M. Zaneek's appeal to the Supreme Court [SC case No. 67/68 (F)] had been dismissed with costs. Even constructive possession of the premises in suit had been given to the father of the plaintiff-respondents. Interlocutory appeal against the issue of writ (viz SC case No. 33/77 Inty.] had been dismissed on 24.09.1987. So too DC Colombo case No. 1219/L had been determined against the said A. M. M. Zaneek. Thus, the defendant-petitioner's claim to tenancy under A. M. M. Zaneek terminated with Zaneek being held a trespasser having no manner of title to the premises in suit.

The only basis, therefore, for the defendant-petitioner to stay on in the premises in suit became proof of tenancy under M. N. M. M.

Thaha, the father of the plaintiff-respondents. There was no evidence of any letting by the said Thaha. In fact, it had been admitted (vide admission 7 dated 20. 08. 1990) that the defendant-petitioner came into the premises as a tenant of A. M. M. Zaneek. There had been no evidence of the payment of rent to the said Thaha. The only payment to the said Thaha was a payment of an advance to purchase the premises in suit. This payment would not amount to rent.

The said Thaha was not a successor to Zaneek as landlord. The transactions between Zaneek and the defendant-petitioner did not bind the said Thaha in any way nor did they fetter his proprietary rights. Furthermore, at the inquiry into the application for execution of writ pending appeal on 25.09.1997 the defendant-petitioner admitted that damages for 135 months amounting to Rs. 345,000 was due.

Under these circumstances let us examine whether there is any "substantial question of law" that needs determination in appeal.

The argument of the defendant-petitioner is that he had not at any stage denied the title of the late M. N. M. M. Thaha or that of his children. (vide paragraph 13 of the original answer dated 22.07.1987). The contents of this paragraph is missing in the amended answer dated 11.01.1989. Paragraph 14 of the amended answer is a mere denial of paragraph 14 of the amended plaint which was the same as paragraph 12 of the original plaint dated 27.06.1986. In fact, the position of the defendant-petitioner was that there was a dispute with regard to title as between A. M. M. Zaneek and M. N. M. M. Thaha and therefore he had withheld attornment. (vide paragraph 17 of the amended answer dated 11.01.1989). By 11.01.1989 Zaneek's appeal to the Supreme Court had been dismissed. The interlocutory appeal against the issue of writ had been dismissed (SC No. 33/77 Inty). Yet, he continued to dispute the said Thaha's title.

The learned Additional District Judge pointed out in his order dated 25.07.1996 that by denying in paragraph 3 of the amended answer the averments in paragraph 2 of the amended plaint, the defendant had rejected all rights of the said Thaha, father of the plaintiffs. The learned Judge next went on to examine P18 and P20. He aptly pointed

out that it was difficult to accept the argument that the defendant who rejected the title of the plaintiff's father when filing his first answer on 22.07.1987, had accepted 10 years previously in around 1977 by P18 or P20 the title of the plaintiff's father.

P18 shows defendant-petitioner was not interested in paying rents to the plaintiff's father, until money allegedly paid to Zaneek was set off. Thus, the defendant-petitioner did not accept the said Thaha as his landlord. In *Cassim Hadjiar v. Umamlevve*[5] it was held that such a right of set off was not available.

Even P20 was a conditional document. If the arrears of assessment rates in a sum of Rs. 6,894 was paid, the defendant-petitioner was prepared to *consider* payment of rent to the *actual owner.*

Thus, it would be seen that the defendant-petitioner never accepted either expressly or impliedly that the said Thaha was the owner of the premises in suit nor did he positively inform that he would pay rent in the future at least to the said Thaha.

The learned Additional District Judge quite rightly has pointed out that by informing of his condescension to consider not of payment of rents to the said Thaha, but payment to the "actual owner", there was no acceptance that the said Thaha was the actual owner. On the contrary on 28.01.1987 and 24.01.1989 the defendant-petitioner had mentioned in P24 and P25 respectively, that he was the owner of the premises in suit though the learned President's Counsel tried to make out that the recording was wrong.

There is no doubt that the defendant-petitioner never wished to attorn to the said Thaha.

Neither the plaintiff-respondents nor their father the said Thaha were bound by the tenancy agreement that existed between defendant-petitioner and Zaneek. (vide *Imbuldeniya v. D. de Silva*[6].) There is no evidence that even subsequently the defendant-petitioner did accept the said Thaha as his landlord.

It is not necessary in this order to examine whether the law imputed attornment on the basis of the facts of this case. That would be done elsewere. But, even if this Court were to hold so, the sum of Rs. 200,000 ordered as security should be amply adequate for the restitution of the premises in suit taken in execution of the decree.

We, therefore, find that even though a question of law may be alleged to arise, the question is not substantial and under the circumstances of this case seems doomed to fail.

(iii) **This action cannot be maintained, only a "rent and ejectment" action is the proper remedy:**

In *Swami Sivagnananda* v. *The Bishop of Kandy*[7] it was held that a prospective purchaser placed in possession of a premises was at best a licensee or a permissive occupier and cannot be equated to that of a tenant. Once the defendant-petitioner refused to accept the said Thaha as his landlord he forfeited his right to be called a tenant. There have been no evidence placed to prove that a valid contract of tenancy or statutory tenancy did exist between the said Thaha and the defendant-petitioner. Under the circumstances the argument that a "rent and ejectment" case was the appropriate remedy, is not tenable.

We, therefore, find that the arguments put forward by the learned President's Counsel on behalf of the defendant-petitioner cannot be accepted and we are not, therefore, inclined to interfere with the order of the learned Additional District Judge dated 17.02.1998.

We dismiss both applications CA No. 126/98 Revision and CA Leave to Appeal application No. 27/98 with *incurred costs* payable in respect of each of these cases by the defendant-petitioner to the plaintiff-respondents including the substituted 1A plaintiff-respondent.

JAYAWICKREMA, J. – I agree.

Applications dismissed.