

**PERERA**  
**v**  
**HALPITA**

COURT OF APPEAL  
AMARATUNGA, J.  
ABEYRATNE, J.  
CA 1172/2002  
D.C. MT. LAVINIA 495/99/98

*Civil Procedure Code – Ex parte Decree – Writ executed – Premises demolished – Application to have ex parte decree set aside and an order to restore possession – Can he be restored?*

**Held:**

- (i) When the subject matter of the tenancy Agreement is demolished or cease to exist, the tenancy comes to an end. In such a situation the tenant cannot be restored to possession as the subject matter is no longer in existence.

**AN APPLICATION** in Revision from the order of the District Court of Mt. Lavinia.

**Case referred to:**

1. *Abeyasinghe v Abeysekera* – 1995 2 Sri LR 104

*Daya Guruge* for plaintiff-petitioner.

Defendent-respondent absent and unrepresented.

*Cur. adv. vult*

September 3, 2003

**GAMINI AMARATUNGA, J.**

This is an application to revise an order made by the learned District Judge of Mt. Lavinia directing that the defendant-respondent be restored to possession of the premises from which she has been ejected by the fiscal in execution of an *ex parte* decree issued by Court. 01

The plaintiff filed action in the District Court of Mt. Lavinia to eject her tenant, the defendant, from premises No 13, Nawala Road, Nugegoda and to recover damages. When summons were issued to the fiscal, it was reported to Court that summons were served on the defendant. However, the defendant did not appear in Court on the summons returnable date. The plaintiff then filed an amended plaint and again summons were issued on the defendant and the fiscal again reported that summons were served on the defendant. Thereafter an *ex parte* trial was held and the *ex parte* decree was issued to the fiscal to be served on the defendant. The fiscal reported that the decree was served on the defendant but the latter did not appear to purge her default. Thereafter the writ was executed by the fiscal and the defendant was ejected from the premises in question and possession was delivered to the plaintiff. 10 20

The defendant thereafter made an application to Court to have the *ex parte* decree set aside and to get an order restoring possession of the property to her. Her position was that summons and the *ex parte* decree were not served on her. The Court held an inquiry into this application and at the conclusion of the inquiry held that there was no proper service of summons. In

view of this finding the Court set aside the *ex parte* decree and directed that the defendant be restored to possession of the property from which she was ejected in execution of the decree. This revision application is against that order. 30

At the inquiry before the learned District Judge, the plaintiff's position was that after delivery of possession of the premises in question to her the building was demolished and the bare land was thereafter sold to a third party and that there was no premises to which the defendant could be restored. However the learned District Judge held that as the procedure adopted was wholly irregular the defendant should be restored to possession. At the inquiry the plaintiff has produced a letter from the Grama Seva Niladari to the effect that at No 13, Nawala Road, Nugegoda there was no building but only a bare land. This letter has been countersigned by the Divisional Secretary. 40

The question to be decided in this application is whether the learned Judge's order to restore possession of premises No 13 to the defendant was correct. When the subject matter of a tenancy agreement is demolished or ceased to exist the tenancy comes to an end. In such a situation the tenant cannot be restored to possession as the subject matter of the tenancy is no longer in existence. Vide *Abeysinghe v Abeysekera*<sup>(1)</sup>. In such a situation, the remedy of the defendant, if at all, is an action for damages. Acting in revision I therefore set aside that part of the learned Judges order directing that the defendant be restored to the possession of the building situated in premises No 13, Nawala Road, Nugegoda. Since a tenant cannot be restored to possession of a premises where there is no building the order for restoration of the defendant to premises No 13 is quashed. Since the defendant – respondent did not appear at the stage of hearing of this application I make no order for costs. 50

ABEYRATNA, J. I agree.

*Application allowed*