1974 *Present :* **Tennekoon, C.J., Tittawella, J., and Walpita, J.**

P. BEATRICE PERERA, Petitioner, *and* THE COMMISSIONER OF NATIONAL HOUSING and 3 others, Respondents

S. C. 521/73—In the matter of an Application for a Writ of Certiorari and a Writ of Prohibition

*Jurisdiction—Non-service of summons on defendant—*Ex parte *judgment against him—Liability to be set aside as void* ab initio*—Lack of competency in a Court—Difference in effect between patent want of jurisdiction and latent want of jurisdiction—Rule of estoppel—Scope—Civil Procedure Code, ss. 60, 207, 808, 823 (3)—Evidence Ordinance, s. 44—Protection of Tenants (Special Provisions) Act, No. 28 of 1970—Section 5 (1)—Prohibition of ejectment of a tenant other than on an order of a competent Court—"Competent Court".*

Where summons has not been served at all, an *ex parte* judgment against the defendant is void *ab initio* and the defendant can challenge its validity at any time when the judgment so obtained is sought to be used against him either in the same proceedings or collaterally, provided always that he has not by subsequent conduct estopped himself by acquiescence, waiver or inaction.

Difference in effect between patent want of jurisdiction and latent want of jurisdiction discussed.

The 3rd respondent was a tenant of the petitioner. She was summarily ejected from the rented premises under a writ of possession issued by the Court of Requests, Colombo, following an *ex parte* decree entered against her in an action in ejectment instituted by the petitioner. Soon afterwards she filed petition and affidavit praying that the judgment and decree entered *ex parte* against her be vacated on the ground that no summons had been served on her either personally or by means of substituted service and that she had been quite unaware of the action. After inquiry the Commissioner of Requests found that the Fiscal's Officer who gave evidence of his efforts to serve summons and of the substituted service on the 3rd respondent was totally unworthy of credit. The default judgment and decree were therefore vacated and the 3rd respondent was granted an opportunity to file answer and defend the action. The Court, however, omitted to make a consequential order that the 3rd respondent be restored to possession of the premises immediately, pending the action, even though it was the fraud of the Court's own officer—the Fiscal's Officer—that had led to her summary ejectment. The 3rd respondent then applied to the Commissioner of National Housing for immediate restoration of possession of the premises to her under section 5 (2) (c) of the Protection of Tenants (Special Provisions) Act, No. 28 of 1970 on the ground that she had been lawfully ejected "otherwise than on an order of a competent Court". The Assistant Commissioner of National Housing, after holding an inquiry, made order in favour of the 3rd respondent. The present application by the petitioner was for a Writ of *Certiorari* quashing the order of the Assistant Commissioner of National Housing.

Held, that the Assistant Commissioner of National Housing made no error in law in holding that the *ex parte* order of ejectment on the basis of which the 3rd respondent was ejected was the order of a Court not competent to make it. The order of ejectment which had been made by the Court of Requests was void *ab initio*. The expression "competent Court" is used in section 5 of the Protection of Tenants (Special Provisions) Act in the sense in which it is used in section 44 of the Evidence Ordinance.

"The method provided by law for service of process had not been followed by the Court (albeit the failure was that of an agent of the Court) and the Court was without competence to

1*—A 10954—3,000 (74/11)

proceed further in the action. A judgment delivered under such circumstances is void and can be challenged both in the very Court and in the proceedings in which it was had and also collaterally, and it also follows that where such an attack is made on a judgment, if the lack of jurisdiction or competence in the Court is not apparent on the record, extrinsic evidence would be admissible to show that in fact the Court did not at the time it gave judgment have jurisdiction to do so—even to the extent of contradicting the record."

APPLICATION for a Writ of *Certiorari* and a Writ of Prohibition.

E. R. S. R. Coomaraswamy, with *S. C. B. Walgampaya*, for the petitioner.

C. Chakradaran, for the 4th respondent.

C. Ranganathan, with *K. Sivananthan*, (*Miss*) *H. M. T. Panditha-Gunawardena* and *S. Sri Rajan*, for the 3rd respondent.

N. Sinnetamby, Senior State Counsel, as *Amicus Curiae*.

Cur. adv. vult.

August 28, 1974. TENNEKOON, C.J.—

The 3rd respondent, Saraswathi Narayanan, was occupying premises No. 108, Galle Road, Wellawatte, and running a business there as a tenant of the petitioner, Beatrice Perera. Whilst she was so in occupation she was summarily ejected on the 10th of July 1970 under a Writ of Possession issued by the Court of Requests, Colombo in Case No. 759/E.D. of the said Court. The 3rd respondent thereafter discovered that her landlady, the petitioner, had on the 13th of August, 1969, instituted action in the Court of Requests praying that she be ejected from the premises on the ground that she had while occupying the premises caused wilful damage and wanton destruction to her premises. In return to the summons, the Fiscal's Officer made a report supported by an affidavit to the effect that the defendant, in that case, that is, the 3rd respondent was evading summons. The Court had then ordered substituted service of summons on the defendant ; such service was reported by the Fiscal's Officer as having been effected ; as the 3rd respondent did not appear on the date fixed in the summons for her appearance the case was fixed for *ex parte* hearing ; after *ex parte* trial, judgment and decree were entered for the plaintiff, that is the petitioner in these proceedings. It was this decree that had been executed on the 10th of July 1970. On the 14th of July, the 3rd respondent

filed petition and affidavit in the Court of Requests in case No. 759/ED and prayed that the judgment and decree entered *ex parte* against her be vacated as there was no service of summons on her, no attempt to serve it on her, nor any substituted service effected.

After inquiry the Commissioner of Requests found the Fiscal's Officer who gave evidence of his efforts to serve summons and of the substituted service on the 3rd respondent to be totally unworthy of credit ; he held that no summons had been served nor any substituted service effected and he made order on the 25th of February, 1971, vacating the default judgment and decree and granted the defendant an opportunity to file answer and defend the action. Learned Commissioner, however, made no consequential order to see that the 3rd respondent was restored to possession of the premises even though it had now become perfectly clear that it was the fraud of the Court's own officer—the Fiscal's Officer—that had led to the making of the order of ejectment. It seems to me that the inherent powers of the Court are wide enough to have enabled the Court to order the plaintiff in that case to vacate the premises and to restore possession to the 3rd respondent, so that the status *quo ante* the institution of the action in the Court of Requests might have been restored and the action which had now been reinstated might proceed meaningfully. See in this connexion the case of *Sirinivasa Thero v. Sudassi Thero* [1].

On the 29th of May, 1971, the 3rd respondent applied to the Commissioner of National Housing for an order under section 5 (2) (c) of the Protection of Tenants (Special Provisions) Act, No. 28 of 1970.

Section 5 of that Act reads as follows :—

"5 (1) No landlord of any premises or other person shall, by himself or through any other person, eject or cause to be ejected from such premises, otherwise than on an order of a competent Court, the tenant of, or the person in occupation of, such premises notwithstanding anything to the contrary in any oral or written agreement by which such premises were let.

(2) (*a*) Where the tenant of, or the person in occupation of, any premises notifies the Commissioner that he has been ejected from such premises in contravention of the provisions of sub-section (1), the Commissioner may hold an inquiry for the purpose

[1] *(1960) 63 N. L. R. 31 at 34.*

of deciding the question whether or not such tenant or person has been ejected from such premises.

(b) .....

(c) Where the Commissioner decides that such tenant or person has been ejected, then,—

(i) such tenant or person shall be entitled to have the use and occupation of such premises restored to him ; and

(ii) the Commissioner shall in writing order that every person in occupation of such premises shall, on such date as shall be specified in the order, vacate such premises and deliver possession thereof to the person ejected, and if any person ordered to vacate and deliver possession fails to comply with such order, he shall be ejected from such premises in accordance with the provisions of section 6.

Every order made under this paragraph shall be communicated by registered post to every person in occupation of such premises."

After holding an inquiry, at which the landlady, the present petitioner was present and was given an opportunity of being heard, the 2nd respondent, the Assistant Commissioner of National Housing, made order dated 6th June, 1973, in terms of section 5 (2) (c) (ii) of the Protection of Tenants (Special Provisions) Act ordering the person in occupation of the premises on that date, that is, A. Jamaldeen, the 4th respondent (who had rented out the premises from the petitioner after the 3rd respondent was ejected) and all others in occupation of the premises to vacate the premises and to deliver possession thereof to the 3rd respondent Saraswathie Narayanan. The present application is for a Mandate in the nature of a Writ of Certiorari quashing the order of the 2nd respondent.

From a perusal of the order of the 2nd respondent, it is evident that he proceeded on the basis that the 3rd respondent had been ejected by the petitioner "otherwise than on an order of a competent Court".

It is submitted by Counsel for the petitioner that the 2nd respondent was mistaken in law in taking the view that the order of ejectment was made by a Court which was not competent

to make such an order. He refers to the provisions of the Civil Procedure Code relating to actions in the Court of Requests and submits that the Commissioner of Requests in giving *ex parte* judgment for the petitioner, as plaintiff in the C. R. action, acted completely within the law and that he could not indeed have acted otherwise, for the Commissioner of Requests had before him a report supported by an affidavit from the Fiscal's Officer that substituted service had been effected on the defendant. He submits that the order of ejectment under which the 3rd respondent was ejected was not a nullity or an order void *ab initio* but only voidable and that the order not having been yet set aside when the 3rd respondent was ejected by the Fiscal, the petitioner in taking out Writ of Possession and the Fiscal's Officer acting thereunder were acting under the order of a competent Court.

The contention for the 1st, 2nd and 3rd respondents is that that order is not merely voidable but one that was void *ab initio*.

The distinction between an order which is a nullity and one which is voidable at the instance of the party affected on the ground of irregularity is difficult to define. But before proceeding to examine that question it is necessary to determine what the powers of the Commissioner of National Housing are when in an enquiry under section 5 of the Act he is faced with an order of a Court under which the landlord seeks to justify the ejectment and it is contended for the other side that the order was one made by a Court not 'competent' to make it. I cannot think of any sense in which the word 'Competent' is used in section 5 than that in which it is used in section 44 of the Evidence Ordinance ; that provision reads :—

> "Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not *competent* to deliver it or was obtained by fraud or collusion."

There is no doubt that what is postulated in section 44 of the Evidence Ordinance is a jurisdictional test. The purpose of giving a party against whom a judgment is produced the right to show that it was delivered by a Court not competent to deliver it is to give that party the opportunity of showing that the judgment is one that can be ignored on the ground that it is a nullity or void *ab initio*. Where in an inquiry under section 5 of the Protection of Tenants (Special Provisions) Act, the question arises as to whether the order of the Court under which a tenant

was ejected was the order of a "competent" Court, the question for the Commissioner of National Housing (or the Assistant Commissioner as the case may be) will be the same ; it is for him to decide whether the judgment or order under which the tenant was ejected was or was not void *ab initio* by reason of want of competence in the Court.'

Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A Court may lack jurisdiction over the cause or matter or over the parties ; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects ; the first mentioned of these is commonly known in the law as a 'patent' or 'total' want of jurisdiction or a *defectus jurisdictionis* and the second a 'latent' or 'contingent' want of jurisdiction or a *defectus triationis*. Both classes of jurisdictional defect result in judgments or orders which are void. But an important difference must also be noted. In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction ; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature ; the proceedings in cases within this category are *non coram judice* and the want of jurisdiction is incurable. In the other class of case, where the want of jurisdiction is contingent only, the judgment or order of the Court will be void only against the party on whom it operates but acquiescence, waiver or inaction on the part of such person may estop him from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction. This distinction is brought out in certain passage which I quote from Shortt on Mandamus (1887) and Spencer Bower on Estoppel by Representation. Shortt says at page 447 :—

> " But where the want of jurisdiction does not appear upon the face of the proceedings if the defendant will lie back and suffer that Court to go on under an apparent jurisdiction it would be unreasonable that this party, who when defendant below has thus lain by and concealed from the Court below a collateral matter, should come hither on after sentence against him there and suggest that collateral matter

as a cause of prohibition and obtain prohibition upon it, after all this acquiescence in the jurisdiction of the Court below."

Spencer Bower at page 308 of his work on Estoppel by Representation 1966 (2nd Edition) says this :—

> "So, too, when a party litigant, being in a position to object that the matter in difference is outside the local, pecuniary, or other limits of jurisdiction of the tribunal to which his adversary has resorted, deliberately elects to waive the objection, and to proceed to the end as if no such objection existed, in the expectation of obtaining a decision in his favour, he cannot be allowed, when this expectation is not realized, to set up that the tribunal had no jurisdiction over the cause or parties, except in that class of case, already noticed, where the allowance of the estoppel would result in a totally new jurisdiction being created. The like estoppel is raised by a party's attendance at the hearing and taking part in the proceedings without raising any objection to the personal disqualification of a member of the tribunal, or to the non-compliance of any notice, summons, or service of process, with statutory requirements or rules of Court, or to the informality of a Writ."

No doubt section 207 of the Civil Procedure Code enacts that :—

> "All decrees passed by a Court shall subject to appeal when an appeal is allowed be final between the parties."

This provision does not stand in the way of an attack on the judgment on the ground of lack of competence in the Court which pronounced it. Indeed that is the very purpose for which section 44 of the Evidence Ordinance exists.

Under section 60 of the Civil Procedure Code (which is also applicable to actions in Court of Requests—see section 808) summons must be served personally or if the Court so orders by a mode of substituted service. The finding of the Commissioner of Requests was that there was neither personal service nor service in the substituted mode and the failure to do so was the failure of an officer of Court—the Fiscal's Officer. Thus the method provided by law for service of process had not been followed by the Court (albeit the failure was that of an agent of the Court) and the Court was without competence to proceed further in the action. A judgment delivered under such circumstances is void and can

be challenged both in the very Court and in the proceedings in which it was had and also collaterally, and it also follows that where such an attack is made on a judgment, if the lack of jurisdiction or competence in the Court is not apparent on the record, extrinsic evidence would be admissible to show that in fact the Court did not at the time it gave judgment have jurisdiction to do so—even to the extent of contradicting the record. It is only the rule of estoppel adverted to by me earlier that can deprive a party of the right of attacking a judgment or order as void *ab initio* ; but when a party is not in the position of being deprived of his right to attack the judgment or order by the estoppel, what he claims would be that the Court had no jurisdiction to make the decision or order and that it is therefore void *ab initio*.

In *Manomani v. Velupillai* [1] the question arose whether a person who had purchased property at a sale in execution of a decree obtained against a defendant on whom summons had not been served had valid title to the property. Justice Canekeratne in the course of his judgment said :

> " Thus in the present case there was no foundation for the exercise of jurisdiction by the Court of Requests of Point Pedro against the plaintiff who was not in Ceylon at the time of the institution of the action ; the decree as against her was void. "

Again in *Jamis v. Dochinona* [2] case in which facts similar to those under consideration in relation to C. R. Colombo Case No. 759/ED were present Jayatillake, J. said :

> " The appellant does not ask for indulgence under section 823 (3) of the Civil Procedure Code. He says that summons was not served on him and that the Court acted without jurisdiction in entering judgment against him under section 823 (2). I think he is right. "

Another illustration of void judgment is seen in the case of *Mohamadu Cassim v. Perianan Chetty* [3]. Chief Justice Lascelles said, the power of a Judge to inquire into the validity of a judgment debt where there is evidence that the judgment has been obtained by fraud or collusion or that there has been some miscarriage of justice is unquestionable. He went on to hold in that case that any action brought after the dissolution of a co-partnership against a former partner's nomination, service of summons on one of the defendants is not good service on the

[1] *(1949) 50 N. L. R. 289.* [2] *(1942) 43 N. L. R. 527.*

[3] *(1911) 14 N.L. R. 385.*

others. The Chief Justice went on to hold that a judgment is null and void, and cannot be executed against a person who is not served with summons.

The application of this principle by English Courts is seen in the case of *Craig v. Kanseen*[1]. It was held in this case that failure to serve summons upon which the order in that case is made was not a mere irregularity, but a defect which made the order a nullity.

It was contended by counsel for the respondent that the provisions of section 823 (3) necessarily imply that a judgment obtained by default in a Court of Requests is merely voidable and not void. I do not think that a defendant who never had notice of the action and against whom a default judgment or order has been entered need proceed under section 823 (3) ; as was held by Jayatilleke, J. in *Jamis v. Dochinona,* referred to earlier, a defendant in such a situation need not ask the indulgence of Court under section 823 (3) ; where summons has not been served at all, an *ex parte* judgment against the defendant is void and the defendant can challenge its validity at any time when the judgment so obtained is sought to be used against him either in the same proceedings or collaterally, provided always that he has not by subsequent conduct estopped himself. In this context the words ' void ' and ' voidable ' must be used with caution. Where there is a want of jurisdiction whether patent or latent the result is a void judgment ; the only question that then emerges is whether such a ' judgment ' is—to use a word that is unattractive but sufficient to convey my meaning—' validateable '. Where the judgment is void for want of ' patent ' jurisdiction it cannot, for reasons which have been noted earlier, be validated by an acquiescence or waiver or inaction ; it is a nullity which cannot be given legal status by the parties to the action. Where the judgment is void for want of ' latent ' jurisdiction it can be validated by acquiescence, waiver or inaction and if not so validated, it continues void ; a party against whom such a judgment operates may elect to treat it as valid and binding on him ; where he elects to treat it as not binding he cannot be described as seeking to invalidate a valid judgment ; he would only be seeking to expose its latent invalidity and to show that *ab initio* it was void.

A useful comment on the use of the words ' void ' and ' void *ab initio* ' and ' nullity ' in relation to judicial and quasi judicial decisions is to be found in the judgment of the Privy Council in *Durayappa v. Fernando*[2]. In this case the Minister of Local

[1] *(1943) 1 A. E. R. 108.*

[2] *(1966) 69 N. L. R. 265 at 272 et seq.*

Government had dissolved the Colombo Municipal Council without giving the Council an opportunity of being heard in its defence. Lord Upjohn having discussed some of the views expressed on this same question in *Ridge v. Baldwin* [1] goes on to say—

> "Lord Morris of Borth-y-Gest also considered the question and reached the conclusion that the order of the Watch Committee was voidable and not a nullity. He examined the question as to the nature of the relief that the party aggrieved (Ridge) would apply for, which would be that the decision was invalid and of no effect and null and void. Their Lordships entirely agree with that and with the conclusions which he drew from it, namely that if the decision is challenged by the person aggrieved on the grounds that the principle (*audi alteram partem*) has not been obeyed, he is entitled to claim that as against him it is void *ab initio* and has never been of any effect. But it cannot possibly be right in the type of case which their Lordships are considering to suppose that if challenged successfully by the person entitled to avoid the Order yet nevertheless it has some limited effect even against him until set aside by a Court of competent jurisdiction. While in this case their Lordships have no doubt that in an action by the Council the Court should have held that the Order was void *ab initio* and never had any effect, that is quite a different matter from saying that the Order was a nullity of which advantage could be taken by any other person having a legitimate interest in the matter."

On the facts that have transpired in the instant case, it is clear that no summons had been served either personally or by means of substituted service on the 3rd respondent who was the defendant in the action for ejectment in the Court of Requests; the order for ejectment made by the Commissioner of Requests is void *ab initio*; no material was placed by the petitioner before the Commissioner of Requests or before the Assistant Commissioner of National Housing or even before us sufficient to raise a plea of estoppel against the 3rd respondent; indeed the facts show that the 3rd respondent far from waiving the objection to the validity of the order of the Commissioner of Requests or acquiescing in it, at the first available opportunity attacked the order on the ground of non-service of summons; the order of the Commissioner of Requests setting aside his order of ejectment proceeded—though he did not spell it out in so many words—on the basis that the order was void *ab initio* and not on the basis

[1] (1964) *A. C. 40.*

that events subsequent to the order or supervening circumstances rendered it void.

For the reasons stated above I am of opinion that the Assistant Commissioner of National Housing made no error of law in holding that the *ex parte* order of ejectment on the basis of which the 3rd respondent was ejected was the order of a Court not competent to make it. This application accordingly fails. I would dismiss it with costs payable to the 2nd and 3rd respondents.

TITTAWELLA, J.—I agree.

WALPITA, J.—I agree.

Application dismissed.