

SIRIMAWATHIE FERNANDO

v.

**WICKREMARATNE, OFFICER IN CHARGE,
POLICE STATION, DEHIWELA AND OTHERS**

SUPREME COURT
FERNANDO, J.
WEERASEKERA, J. AND
ISMAIL, J.
SC APPLICATION NO. 255/98
7TH DECEMBER, 1999

Fundamental rights - Lease of municipal market stalls - Forcible eviction of the lessee from a shop - Liability of the Mayor and police officers - Articles 11, 13(1) and 13(2) of the Constitution.

The petitioners' sister was the lessee of shop No. 2 Dehiwala Market belonging to the Dehiwala - Mt. Lavinia Municipal Council. The lessee was carrying on a grocery business in the premises. As the lessee was old and feeble, the petitioner assisted her to continue with the business. The 5th respondent the Mayor of the Council is said to have decided to build a new shopping area; and after the construction of new stalls on one side, a number of shop keepers including the petitioner were called upon to shift their business "temporarily" to new premises and to demolish the existing stalls where they were carrying on business. A number of shop keepers including the petitioner and her sister were not agreeable to this request. Instead, the petitioner's sister and four others filed a writ application in the Court of Appeal; and on 17.3.98 the court issued an *ex parte* stay order restraining the 5th respondent and the 6th respondent (Municipal Engineer) from ejecting the five petitioners in that case. Each of the petitioners obtained copies of that Order which was also notified to the 5th and 6th respondents by the Registrar, Court of Appeal by express telegram on 17.3.98. It was however not clear whether the telegram reached Dehiwala on the 17th, 18th or 19th.

On 18.3.98 employees of the Municipal Council led by one Ramyapala claiming to act on the order of the Mayor visited the market with about twelve police officers including the 1st respondent (O.I.C.). The 2nd respondent Sergeant Silva ordered the Council employees to fix barbed wire to the entrance of shops, including shop No. 2. The petitioner objected producing a certified copy of the stay order. The 1st respondent crumpled it and threw it away saying that he was there to carry out the Mayor's Order. The petitioner was abused and arrested by the 2nd and 3rd

respondents in the presence of the 1st respondent and taken to the Police Station in a jeep. She was assaulted whilst in the jeep and sustained injuries which required medical treatment.

Held :

1. There was no lawful order by the 5th respondent for the ejection of the petitioner's sister or the petitioner.

Per Fernando, J.,

"It may well be that the 5th respondent was motivated by the desire to complete the shopping area. But there was no suggestion that the petitioner's sister was under a legal obligation to vacate her shop, even temporarily; even if she was, that would have been a civil dispute. The 5th respondent should have resorted to his legal remedies, and there was no justification for setting the police in motion."

2. The fundamental rights of the petitioner under Articles 11, 13(1) and 13(2) have been violated by the 1st and 5th respondents.

APPLICATION for relief for infringement of fundamental rights.

Upul Jayasuriya with R. Radhakrishnan for petitioner.

Jayalath Hissella for 1st to 3rd respondents.

Mrs. B.J. Tillekeratne, S.S.C. for 4th, 7th respondents.

W. Dayaratne for 5th and 6th respondents.

Cur. adv. vult.

February 23, 2000.

FERNANDO, J.

The Petitioner complains that on 18.03.98 the 1st, 2nd, 3rd, 5th and 6th Respondents infringed her fundamental rights under Articles 11, 12(1) and 13(1), while evicting her from her sister's shop at the Dehiwela market.

The Petitioner averred that in or about 1967 her sister Mrs. K.B. Fernando had been given possession of shop No. 2, Market Place (small), Galle Road, Dehiwela, by the Dehiwela-Mount Lavinia Municipal Council; and that ever since then her sister had been carrying on a grocery business in those premises. The 5th and 6th Respondents (the Mayor and the Municipal Engineer, respectively, of that Council), denied those averments, pleading that they were unaware of them. However, in Court of Appeal Application No. 209/98 filed by Mrs. K.B. Fernando and four other Petitioners, the 5th Respondent had submitted an affidavit admitting:

“... the fact that I have leased out the said stalls to the Petitioners in 1967 but further states that the Municipal Council have entered into an agreement with the Petitioners in respect of the said transaction only in 1969...”

It is clear therefore, that Mrs. K.B. Fernando entered into possession of the shop, and remained in possession, lawfully.

According to the Petitioner, because her sister was old and feeble, she was assisting her sister to continue with the business.

The affidavits of the 5th and 6th Respondents were virtually identical. They stated that after the 5th Respondent became Mayor he decided to build a new shopping area for “*pavement hawkers*”; that after the construction of the new market complex side “*the shop keepers* including the Petitioner were requested to shift their businesses to the left side”, and that out of thirteen “*traders*”, including the Petitioner, who were carrying on business on the right side, eight had no objection to temporarily shifting from their stalls, and to the demolition thereof. This version shows that the Petitioner and her sister - whether she was a lessee, a pavement hawker, a shopkeeper, or a trader, or otherwise-had not agreed to vacate the premises.

The Petitioner averred that the 5th Respondent by letter dated 8.10.97 [not produced] “made an order ejecting her

sister... with immediate effect from her present place of business for the purported reason of building a new shopping area for pavement hawkers." In reply the 5th and 6th Respondents did not deny that such a letter had not been sent and admitted that the Petitioner had been requested to remove the goods from the premises. They further stated that "some of the Municipal Council officers went to the market place only on 11.3.1998 to inform the vendors that the Municipal Council want them to vacate the premises temporarily... until the construction of their side [the right side] is complete."

Thus it was not the Respondents' case that the Petitioner's sister's possession had become wrongful or unlawful. Nevertheless, from 8.10.97 upto 11.3.98 the 5th Respondent, and perhaps the Council, had been endeavouring to get the Petitioner's sister, and those holding under her, to leave the premises, at least temporarily. That they were unwilling to do.

It was in that background that the Petitioner's sister and four others filed CA Application No. 209/98 for writs of Certiorari, Prohibition and Mandamus. On 17.3.98 the Court issued an *ex parte* stay order restraining the 5th and 6th Respondents from ejecting the five petitioners in that case; and directed the Registrar to notify the Respondents of that order by telegram and to issue Counsel for the five Petitioners a certified copy of that order. The Petitioner pleaded that copies of that order were given to all five Petitioners that same day, and in proof of that fact she produced a photocopy which bears the Court of Appeal date stamp "17 MAR 1998."

The Petitioner also maintained that the Registrar did notify the 5th and 6th Respondents by express telegram on 17.3.98, and annexed a copy of the receipt issued by the Colombo Courts Post Office. In reply, each of them merely stated:

"... I have received a copy of the stay order issued by the Court of Appeal only on 19.3.98... In proof of the same I annex the document marked R1..."

R1 was a photocopy of the telegram. The original was never produced, not even at the hearing on 7.12.99 when we called for it. That photocopy shows the Municipal Engineer's date stamp clearly, as "19.3.98"; it also has the Sri Lanka Telecom Dehiwela date stamp, in which, unfortunately, the date is not clear. Hence we do not know whether the telegram actually reached Dehiwela on the 17th, or the 18th, or the 19th. It was the Respondents' duty to have produced the original telegram which was in their custody, and since they failed to do so it would not be fair to assume that it was received only on the 19th.

I now come to the events of 18.3.98. The Petitioner stated that at about 10.00 a.m. the other shopkeepers and she learnt that the Mayor was taking steps to eject them and to fix barbed wire right across the entrance to their shops. She claimed that they then contacted their Attorneys-at-Law, one of whom informed the 6th Respondent by telephone of the stay order issued the previous day: but in the absence of an affidavit from that Attorney-at-Law, that is only hearsay, and I cannot accept that allegation.

The Petitioner's position is that at 1.30 p.m. there came to the market some employees of the Council, led by one Ramyapala, a supervisor, in a vehicle belonging to the Council, as well as a group of about twelve Police Officers from the Dehiwela Police in two jeeps. The Police party included the 1st Respondent (the Officer-in-Charge) and the 2nd Respondent, Sergeant Silva, who ordered the Council employees to fix barbed wire to the entrance of the shops, including shop No. 2. The Petitioner objected, producing a certified copy of the stay order. Without listening to her or perusing the document, the 1st Respondent crumpled it and threw it away, saying in Sinhala:

"We are not bothered or bound [by] any Court order; we have come here to carry out an order made by the Mayor of this area. Therefore take all your things and get out of this place before we thrash and kick you'll out of this place."

The Petitioner claimed that she was abused in obscene language by the 2nd and 3rd Respondents; assaulted by the 2nd Respondent, and dragged to the Police jeep; and pushed on to the floor of the jeep. The 1st Respondent was watching all this. Thereafter, while being taken to the Police station the 2nd Respondent laid his booted foot on her hip, and assaulted and abused her when she attempted to get up. She was released on Police bail at 6.30 p.m., and obtained treatment at the Kalubowila Hospital, where she was found to have "multiple abrasions."

Thus her case is that she was arrested, not merely without valid reasons but in defiance of a Court order which protected her right to remain in possession of the shop; that she was assaulted and humiliated in the process; and that despite knowledge of the Court order she was unnecessarily and unreasonably taken to the Police station and kept there for several hours.

I must now turn to the Respondents' version. In so far as the Police are concerned, while the 1st and 2nd Respondents deny the Petitioner's account, they contradict each other in several material aspects.

According to the Information Book extracts, at 13.00 on 18.3.98 one J.M. Ramyapala requested Police assistance to implement a special order of the Mayor to eject the occupants of some old shops at the Dehiwela market; and Ramyapala was produced before the 1st Respondent, and his statement was recorded. He stated that he had been ordered by the Mayor, both orally and in writing, to effect such ejection. He requested Police assistance for such ejection and to erect a barbed-wire fence. He added that on a previous occasion a similar attempt (with the Mayor) with Police assistance, had been unsuccessful, and had been temporarily stayed, after a discussion with a local opposition politician.

It seems to me that the 1st Respondent and other police officers have much too readily accepted Ramyapala's assertion that the Mayor had made an order for the ejection of the Petitioner. They neither insisted on the production of that order, nor even attempted to verify from the Mayor whether he had made such an order. No such order has been produced in these proceedings. Further, whether such order was lawful does not seem to have troubled them at all. It is therefore probable that there was in fact no official or lawful order for the ejection of the Petitioner's sister or herself.

Without verification, and with otherwise commendable promptitude, at 13.10. S.I. Silva, and some other officers, proceeded in a Police jeep to the market, in accordance with an order from the 1st Respondent, in order to preserve the peace while Ramyapala carried out his task. At 13.15 the 1st Respondent received a message from S.I. Silva that there had been some obstruction, and at 13.20 he too set out for the market, with some more officers, in his official vehicle. The 2nd Respondent was on duty elsewhere; he heard about a disturbance at 13.15, and promptly came to the scene at 13.35. In his affidavit he said:

"... there was a lady sleeping on the ground with her face upward in manner of obstructing the duties of the officers and shouting and using filth against the said officers.

I heard that the persons obstructed the duties of the police and the Municipal officers in *say [sic] that there was stay order against the sealing of premises and therefore the 1st respondent unhesitatingly demanded the production of the stay order to support their rights of [sic] the premises to so obstruct, and in failing to produce any such document the 1st respondent ordered the arrest of the petitioner and remove her to Dehiwala Police station and advised the Municipal officers to carry on their duties.*

I specifically deny the production of any stay order by the petitioner staying the sealing of the premises..." [emphasis added throughout]

According to the 2nd Respondent's notes, the 1st Respondent ordered him to arrest the Petitioner, which he did at 13.45; he put her into a Police jeep, and handed her over to the 1st Respondent.

This is what the 1st Respondent said in his affidavit:

"... at no time during my presence of the scene of the incident, I was shown by the petitioner or any body else, an order from the Court of Appeal staying the ejection until one Susil Chandrasiri Fernando who came by 3.15 p.m. and produced a certified copy of an order issued by the Court of Appeal in pursuance of which I forthwith ordered to stop any act contravening the stay order and returned to the police station.

By the time the said order of the Court of Appeal was produced to me, the petitioner had been arrested and removed to the police station for conducting herself in a manner amounting to a breach of peace and also amounting to obstruction to carry out the official duties of Municipality and Police officers.

... until the certified copy of the said stay order was produced to me by the said Susil Chandrasiri Fernando, I was not aware of the existence of any application made to the Court of Appeal... nor any stay order issued by Their Lordships of the Court of Appeal...

...I directed the 2nd respondent to arrest the petitioner and removed her to the police station without knowing that there was a stay order issued by the Court of Appeal."

There is no note or entry among the Information Book extracts produced to the effect that the Petitioner was brought

to the Police station before 3.30 p.m., or by any officer other than the 1st Respondent.

The entry made by the 1st Respondent upon his return to the station at 3.30 p.m. records that it was he who arrested the Petitioner and handed her over to the Reserve. It states that a certified copy of the stay order was produced by Susil Fernando at 3.15 p.m. - which must therefore have been at the scene, and before the Petitioner was brought to the station. It does not state that that copy was returned, and therefore - if the 1st Respondent is truthful - it must have remained in his possession.

These affidavits and entries establish that the Petitioner did refer (in the presence of the 1st Respondent) to the fact that the Court of Appeal had issued a stay order, in support of her right to undisturbed possession; that a copy of that order was produced at the scene (and not later, at the Police station); that the Petitioner was taken away from the scene only after that document had been handed over to the 1st Respondent, and that was in defiance of the Court order; and that she was brought to the station only at 3.30 p.m.

The 1st Respondent's claim, in his affidavit, that by the time the stay order was produced [i.e. at 3.15 p.m.] the Petitioner had been arrested *and removed* to the Police Station is flatly contradicted by his own entry made at 3.30 p.m. Further, the Petitioner made a very serious allegation that he had crumpled and thrown away the certified copy of the stay order. If his story was true, that could have been rebutted, simply and conclusively, by the production of the document which he claimed that Susil Fernando handed to him: his failure to produce it makes the Petitioner's version more probable than his.

I have therefore no hesitation in accepting the Petitioner's affidavit in preference to those of the Police Respondents.

But even if I were to accept the Respondents' version, the inevitable conclusion is that, from and after 3.15 p.m., the 1st

Respondent deprived the Petitioner of her liberty by failing to release her immediately upon the production of the stay order, and, instead, by bringing her, quite unnecessarily, to the Police station. And this despite his claim that he had ordered the Municipal employees "to stop any act contravening the stay order."

In passing, I must note without comment the contrast between the ready acceptance by the Police of Ramyapala's claim of an alleged Mayoral directive to eject an ordinary citizen, and their summary refusal to delay such ejection, even for a little while, in order to verify that citizen's plea that her right to possession was protected by a Court order.

I hold that the 1st Respondent together with other Police officers assisted Ramyapala and other Municipal employees in their endeavours to eject the Petitioner from, and/or to prevent her having access to, her sister's shop No. 2; that they made no attempt to verify whether there was a lawful order for ejection; that the Petitioner did assert her rights under a stay order issued by the Court of Appeal, and in all probability tendered a certified copy of that order - which the 1st Respondent ignored; that the 1st Respondent either arrested her, or ordered her arrest, without the least effort to verify her claim; and that despite the production of the stay order he brought her, in custody, to the Police station at 3.30 p.m., and needlessly kept her there for another three hours. I accept her evidence that she had been subjected to degrading treatment both at the time of arrest and while being taken to the Police station. All this happened in the presence of the 1st Respondent and with his acquiescence if not approval. The Petitioner, however, is not consistent as to whether it was the 2nd Respondent *Sergeant* Silva or another officer *S.I.* Silva who ill-treated her, and I am therefore unable to come to a definite conclusion as to who was directly responsible for that treatment.

I turn to the responsibility of the 5th and 6th Respondents. It is not established that they knew of the stay order. Both Respondents stated:

“... the vendors including the petitioner have not agreed [to vacate the premises]... and therefore the Respondents have complained to the Officer-in-Charge of Dehiwela- Mt. Lavinia Police station and according to the said complaint the police went to the market place on 18.13.1998... only to inform the vendors to shift to the other side of the market place temporarily.”

The Police did not produce any such complaint, and it may be that the 5th Respondent made an oral complaint. If indeed a complaint was made, that shows that Ramyapala acted with the prior approval of the 5th Respondent. It may well be that the 5th Respondent was motivated by the desire to complete the shopping area. But there was no suggestion that the Petitioner's sister was under a legal obligation to vacate her shop, even temporarily: even if she was, that would have been a civil dispute. The 5th Respondent should have resorted to his legal remedies, and there was no justification for setting the Police in motion. He is therefore personally liable for the illegal acts of the Police.

I hold that the fundamental rights of the Petitioner under Articles 11, 13(1) and 13(2) have been violated by the 1st and 5th Respondents, and award her a sum of Rs. 60,000 as compensation and costs. There is no reason why the State or the Municipal Council should be ordered to pay this sum. I direct the 1st Respondent personally to pay a sum of Rs. 30,000 and the 5th Respondent personally to pay a sum of Rs. 30,000, before 30th April 2000.

WEERASEKERA, J. - I agree.

ISMAIL, J. - I agree.

Relief granted.