

ABEYSINGHE
v.
ABEYSEKERA

COURT OF APPEAL
SILVA, J. (P/CA)
RANARAJA, J.
C. A. APPLICATIONS 205/94
43/94
D.C. COLOMBO 15878/L
MARCH 13, 1995.

Rei Vindicatio – Ex parte – Execution of a Decree – Proceedings under S. 328 S. 662 Civil Procedure Code – Premises demolished – Restoration – Is it possible? – Defendant dead at the time of Institution of Action – Proceedings a nullity – Void – Coram non iudice – Contract of Tenancy – Ex debito iustitiae – Inherent Jurisdiction of Court – S 839.

The Respondent as the owner of the premises in suit instituted *Rei Vindicatio* action against the father of the Petitioner. After *Ex parte* trial, the Fiscal ejected the power of attorney holder of the petitioner, who is the son of the original Defendant. The petitioner instituted proceedings under s. 328 of the Civil Procedure code. The Learned District Judge dismissed the application as he found that the premises in suit had been demolished in the interim and further held that as the Defendant was dead at the time of the institution of the action the entire proceedings were Null and Void.

Held:

(1) When there is no 'live' Defendant before Court it has no jurisdiction to hear and determine, the action. If the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted for they are coram Non-Judice. The judgment entered is void and a nullity.

(2) The proceedings being void, the person affected can apply to have same set aside *ex debito – iustitiae* – in the exercise of the inherent jurisdiction of the court.

(3) The Tenancy of an Urban Tenement relates to the existence of a building, when the leased tenement is extensively damaged it is impossible to say that the premises are still in existence for the tenancy to continue.

(4) Where the building perished, the statutory tenancy also ceased to exist, there cannot be a statutory tenancy in respect of bare land.

(5) Restitution will be effected only when such a course is legally and physically possible.

Upon a consideration of earlier authorities on the subject. It is not possible to accede to the submissions made by Learned President's Counsel for the petitioner that the possession of the bare land on which the building originally stood should be handed over to the petitioner. The tenancy of an urban tenement relates to the existence of a building. When the leased tenement is so extensively damaged that it can no longer be used for the purpose for which it was leased, it is impossible to say that the premises are still in existence for the tenancy to continue. (*Samuel v. Mohideen*⁽⁷⁾). In a contract of tenancy, the tenant is entitled to the use and occupation of the building, and if there is no building to use and occupy, there is no contract. If the building is completely destroyed the contract comes to an end even though the land remains. (**Wille – Landlord & Tenant 4th Ed. 249**).

The petitioner claims restoration to the premises as statutory tenant. The position is no different in the case of statutory tenancy. When the building perished the statutory tenancy also ceased to exist. There cannot be a statutory tenancy in respect of bare land. The rent Laws do not inhere in the land after demolition of the building but remain so long as it is there. (*Giffry v. Silva*⁽⁸⁾). A statutory tenancy endures so long as the building exists. So it does not survive the destruction of it. (**Woodfall – Landlord & Tenant Pg. 1217**). In the circumstances of the instant case, even if Court exercised its inherent powers to effect restoration, it would have compounded its earlier mistakes, by doing what the law does not recognise, namely to declare a tenancy where none existed.

Learned President's Counsel submitted his client had the right to be restored to possession of the bare land and thereafter he could call upon the respondent to erect a new building for him to occupy, or in the alternative the petitioner could himself erect a building with the approval of the Rent Board. This submission is made firstly, on the premise that there is a continuing statutory tenancy in respect of the premises. As seen, the law is all one way, that is, against the petitioner. Secondly, it is assumed that the Rent Board has such wide powers to order a landlord to erect buildings for a tenant's occupation, or order the landlord to suffer the erection of a building on his land by the tenant. Neither Section 13 nor any other provision in the Rent Act vests the Rent Board with such powers. This submission therefore cannot succeed.

Learned President's Counsel submitted that the respondent had by fraud, obtained a decree against a dead man. "When there is no live defendant before Court, the Court has no jurisdiction to hear and determine the action. If the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted, for they are *coram non judge*. A judgment entered by such Court is void and mere nullity. **Black-on Judgments. – P. 261.** "When Court is made aware of the defect in its jurisdiction, the question of rescinding or otherwise altering the judgment does not arise, since the judgment is a nullity. When there is no act, there can be no question of the power to revoke or rescind. One cannot alter that which does not exist. The exercise of power to declare such proceedings or judgment a nullity is in fact an original exercise of the power of the Court and not an exercise of the power of revocation or alteration. The proceedings being void, the person affected by them can apply to have them set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the Court. Section 839 of the Civil Procedure Code preserves the inherent powers of the Court "to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court." This Section embodies a legislative recognition of the inherent powers of the Court to make such orders as may be necessary for the ends of justice. The inherent power is exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone Court exists. Sharvananda, J. *in Ittapan v. Hemawathie* ⁽⁹⁾.

The petitioner has moved Court under Sections 328 and 662 of the Code. No application has been made for the Court to exercise its inherent jurisdiction under Section 839 of the Code. As seen, when Court acts without jurisdiction, the entire proceedings are a nullity. Making an application under Section 328 or for that matter under any Section except Section 839 is inappropriate and futile. Even when Court acts on its inherent power under Section 839 of the Code to make any order to meet the ends of justice. Court will, **so far as possible**, put the aggrieved party in the position he would have occupied if the wrong order had not been made. *Sirinivasa Thero v. Sudassi Thero* (*supra*) Section 839 cannot be invoked to obtain complete reparation for the wrong done. Restitution will be effected only when such a course is legally and physically possible. When

complete reparation is not possible, it is open to the aggrieved party to seek appropriate relief by instituting a regular action for damages for loss wrongfully caused to him. In the event, the petitioner cannot as of right claim to be restored to the bare land, on which the building he occupied earlier stood.

For the reasons given the applications of the petitioner are dismissed with costs.

S. N. SILVA, J. – I agree.

Applications dismissed.
