SALEE AND ANOTHER
v.
VISHVANATHAN

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.
CA NO. 104/93 (F)
DC MT. LAVINIA NO. 438/SPL
FEBRUARY 01, 2000
MARCH 30, 2000
JUNE 07, 2000
OCTOBER 16, 2000 AND
NOVEMBER 7, 2000

Public Security Ordinance s. 5 – Emergency (Rehabilitation of Affected Property Business or Industrial) Regulation No. 1 of 1983 – s. 9 (2) and 14 (1) – Is property vested in the REPIA? – Premises "not affected property" – To be declared a tenant – Maintainability of action – Abandonment of tenancy raised for first time in appeal – Termination of tenancy.

The plaintiff-respondent instituted action seeking a declaration that he is the tenant of the premises and ejectment of the defendant-respondent. The defendant-appellant denied the averments in the plaint and sought the dismissal of the action. District Court entered judgment in favour of the plaintiff.

On appeal it was contended that –

(i) the premises were vested in the REPIA and, therefore, action is not maintainable.

(ii) possession in fact has been handed over to the defendant-appellant by REPIA.

(iii) there was an abandonment of tenancy.

(iv) there was a termination of tenancy.

Held :

(1) Documents P1 and P2 relied upon by the defendant-appellant cannot be construed as divesting orders in respect of the affected property, but it was merely a binding statutory declaration to the effect that the premises were not an affected property. The tenancy, therefore, remains unaffected.

(2) As the said property was not affected property by virtue of the declaration (P1) reference to divesting order has no significance. The question whether, on the strength of P1, the defendants took over possession and therefore that action is misconceived is not tenable.

(3) The plea of abandonment being a question of fact and law wherein the surrounding circumstances and the intention of parties are material the defendant-appellants are precluded from raising it for the first time in appeal.

(4) Trial Judge upon the evidence had come to a finding that the premises were not destroyed to the extent of being rendered incapable for use for the purpose for which it was let, to cause a termination of tenancy.

APPEAL from the judgment of the District Court of Mt. Lavinia.

Cases referred to :

1. *Rajapakse v. Madathi* – 1994 – 2 SRI LR 161.
2. *Dona Podinona Ranaweera v. Rohini Senanayake* – 1992 – 2 SRI LR 180.
3. *Hameeda v. Arasakularatne* – 1999 3 SLR 271.

Faisz Muthapa, PC with *H. Withanachchi* for defendant-appellants.

Gamini Jayasinghe for plaintiff-respondent.

Cur. adv. vult.

March 12, 2001

WEERASURIYA, J.

The plaintiff-respondent by his plaint dated 24. 04. 1985, instituted 1
action against the defendant-appellants, seeking, *inter alia,* a declaration that he is the tenant of premises bearing No. 421, Galle Road, Wellawatte and ejectment of the defendant-appellants therefrom and damages.

The defendant-appellants in their answer whilst denying averments in the plaint, prayed for dismissal of the action.

This case proceeded to trial on 14 issues and the learned District Judge at the conclusion of the case, by his judgment dated 20. 04. 1993, entered judgment for the plaintiff-respondent. This appeal has been lodged against the aforesaid judgment.

At the hearing of this appeal, learned President's Counsel appearing for the defendant-appellants submitted –

(*a*) that the premises were vested in the Rehabilitation of Property and Industries Authority (hereinafter referred to as REPIA) and therefore the action is not maintainable;

(*b*) that in any event the action was misconceived as possession had been handed over to the defendant-appellants by REPIA.

(*c*) that there was an abandonment of tenancy by the plaintiff-respondent;

(*d*) that there was a termination of tenancy by operation of law; and

(*e*) that in any event damages awarded on account of loss of tenancy was excessive.

At the outset it is necessary to mention that the first two grounds referred to above were raised for the first time at the hearing of this appeal on the basis that they are questions of law.

Learned President's Counsel emphasized that the case of the plaintiff-respondent was presented in the lower Court on the footing that the premises had been damaged in the communal disturbances and had vested in REPIA and thereafter it was divested.

It was submitted that a divesting order can be made only in terms of regulation 14 (1) by an order published in the *Government Gazette* and in the instant case the property was never divested by recourse to regulation 14 and therefore the property remain vested in REPIA when the action was instituted.

It is to be observed that this is not a ground on which the defendant-appellants relied in the lower Court for their contention that the tenancy had terminated. Their plea that the termination of tenancy had occurred was founded solely on the common law principle of the destruction of the subject-matter. This position of the defendant-appellants was clearly manifested in issues 11 to 14 formulated at the trial.

The submission that the plaintiff-respondent presented his case in the lower Court on the footing that premises had vested in the REPIA and thereafter it was divested was disputed by learned counsel appearing for the plaintiff-respondent.

It is vital to note that in paragraph 9 of the plaint the plaintiff-respondent has not made any reference to a vesting of the premises and all the matters referred to in paragraph 9 were bare facts sequentially relating to the occurrence of events. To appreciate this position a reference to the salient features set out in paragraph 9 of the plaint would be relevant.

(*a*) that shortly after the damage the defendant-appellants had wrongfully secured possession of the said premises;

(*b*) that even after the cessation of the hostilities the plaintiff-respondent's Attorney had failed to obtain possession of the premises for the reason set out in paragraph 9; and

(*c*) that the defendant-appellants undertook to take necessary steps under REPIA law and deliver possession of the premises to the Attorney of the plaintiff-respondent, but wrongfully failed to do so.

It is significant to note that in paragraph 6 of the plaint reference has been made to the fact that damage was caused to the said premises in the communal disturbances that occurred on 25. 07. 1983 that the plaintiff-respondent's son Subramaniam had to flee for protection for safety of his life.

Paragraph 7 of the plaint has made reference to the fact that despite some damage being caused to the said premises, particularly to the fittings and doors, building was capable of being repaired and restored.

Before proceeding further to examine the matters in issue, it is necessary to set down the following facts:

(*a*) That the action relates to business premises bearing No. 421, Galle Road, Colombo 6.

(*b*) That plaintiff-respondent was the tenant of the premises.

(*c*) That on 09. 07. 1983, plaintiff-respondent left for India temporarily handing over the business to his son Subramaniam.

(*d*) That the said premises were damaged during the period of communal disturbances.

(*e*) That the defendant-appellants had represented to REPIA that they would repair the premises and restore possession thereof to the plaintiff-respondent and had secured an order described as a 'divesting order' by the defendant-appellants.

(*f*) That the defendant-appellants in breach of the undertaking had come into possession of the said premises.

It would appear that the right decision of this appeal depends entirely upon the interpretation and application of the Emergency (Rehabilitation of Affected Property, Business or Industries) Regulations No. 1 of 1983 made under section 5 of the Public Security Ordinance (chapter 40). The following are the relevant regulations:

9 *(1) – Every affected property, industry or business shall with effect from the date these regulations come into force, vest absolutely in the State free from all encumbrances.*

9 *(2) – Where any question arises as to whether any property, industry or business is an affected property, industry or business such question shall be decided by REPIA by a declaration in writing and such declaration be final and conclusive and shall not be called in question in any Court in any proceedings whatsoever.*

10 *(1) – Any person authorised in that behalf by REPIA may take possession of any affected property, industry or business vested in the State under regulation 9.*

12 *– No person shall after the date of coming into force of these regulations alienate affected property, industry or business and accordingly any alienation made in contravention of this regulation shall be deemed for all purposes to be null and void.*

13 *(1) – No person shall unless he has been authorised in writing by REPIA, enter, remain in or occupy any affected property.*

14 *(1) – Notwithstanding that any affected property, industry or business has vested in the State by reason of the operation of these regulations, REPIA may at any time by order published in the Government Gazette divest such property, industry or business.*

19 – *In these regulations "affected property" means any immovable property damaged or destroyed on or after July 24, 1983 by riot or civil commotion and includes any immovable property used for the purposes of an affected business or industry.*

The correspondence the defendant-appellants and the plaintiff-respondent had with REPIA in chronological order would be helpful on this issue.

(*a*) On 02. 09. 1983 the 2nd defendant-appellant made an application to REPIA (P1) to seek permission to repair the premises in suit from her own resources and to hand over premises to the plaintiff-respondent after effecting repairs.

(*b*) On 05. 09. 1983 REPIA made a declaration that premises No. 421 were not affected property (D2).

(*c*) On 25. 04. 1984 Vishvanathan by way of an affidavit made an application to REPIA (P5).

(*d*) On 15. 06. 1984 REPIA called upon the defendant-appellants to restore tenancy to Vishvanathan (P4).

(*e*) On 25. 06. 1984 1st defendant-appellant by his letter informed REPIA his inability to restore tenancy to Vishvanathan (D3).

(*f*) On 05. 07. 1984 REPIA informed Vishvanathan that assistance cannot be given with regard to the restoration of the tenancy of the premises (P3), with a copy to the defendant-appellants stating that divesting order dated 05. 09. 1983 is valid authorising him to do whatever he desires.

(*g*) On representation made by Subramaniam by his letter dated 13. 09. 1984 and REPIA by its letter dated 09. 01. 1985 (P6) called upon the defendant-appellants to effect repairs and restore the tenancy to the plaintiff-respondent.

(*h*) Nevertheless, 1st defendant-appellant by letter dated 01. 02. 1985 (D4) made representation to REPIA and REPIA by letter dated 09. 09. 1987 (P7) declared that premises No. 421 were not affected property.

It is to be appreciated that the purported authorization in terms of letter D2 dated 05. 09. 1983 referred to in P3, could only have been issued on the basis that the premises were affected property.

In terms of section 9 (2) of the REPIA regulations where any question arises as to whether any property, industry or business is an affected property, such question shall be decided by REPIA by a declaration in writing and such declaration shall be final and conclusive and shall not be called in question in any Court in any proceedings whatsoever.

However, P1 and D2 cannot be construed as divesting orders in respect of the affected property, but it was merely a binding statutory declaration to the effect that the premises were not an affected property (*vide Rajapaksa v. Madathi*)[1].

In the circumstances, it could be rightly asserted that the tenancy of the plaintiff-respondent remains unaffected.

The second legal submission that the action is misconceived as the possession had been handed over by REPIA has to be viewed *vis-a-vis* the application to REPIA by P1 seeking to effect repairs using her own resources with the undertaking that the premises would be handed over to the plaintiff-respondent after effecting such repairs.

If the said property was not affected property by virtue of the declaration referred to above the authorisation by P1 and reference to divesting order has no significance. Therefore, the question whether on the strength of authorisation by REPIA the defendants took over the possession of the property and thus the action is misconceived does not arise.

The contention of the learned President's Counsel that there was an abandonment of tenancy is a question of fact and law. The issue abandonment has neither been pleaded nor has been put in issue. The plea of abandonment being a question of fact and law wherein the surrounding circumstances and the intention of parties are material, the defendant-appellants are precluded from raising it for the first time in appeal. (*vide Dona Podinona Ranaweera v. Rohini Senanayake*[2]).

The contention of learned President's Counsel that by operation of law the termination of tenancy has occurred has to be dealt with next. The submission of learned President's Counsel that the learned trial Judge had applied wrong test in deciding this question is totally unacceptable. It would be clear on a careful examination of the evidence, that learned trial Judge had not decided on the basis that total destruction was necessary for the termination of tenancy. Learned trial Judge upon the evidence had come to a finding that the premises were not destroyed to the extent of being rendered incapable for use for the purpose, for which it was let, to cause a termination of tenancy.

Learned President's Counsel appearing for the defendant-appellants placed much reliance on the complaint made by the plaintiff-respondent marked P13. It was highlighted that in this complaint there was reference that business had been destroyed by setting fire and the goods been looted by unknown people on 24. 07. 1983 during the communal riots. However, the evidence revealed that nearly two weeks after the damage was caused he had been able to go pass

the premises in a bus and had only a glimpse of the damage being unable to enter the premises due to prevailing conditions. In the complaint he made (P13) he gave an estimate of what he thought was the value of the business without including the loss to the building due to his inability to make a correct assessment. However, it is relevant to note that the photographs marked P14 – P17, he had taken in 1983 when the conditions were conducive for him to enter the premises, showed that the premises were intact and that damage had been to the fittings and the door. Learned trial Judge having examined the relevant material placed before him had rejected the evidence of the 1st defendant-appellant and accepted the version of the plaintiff-respondent in regard to the manner in which the damage had been caused to the building.

Learned President's Counsel appearing for the defendant-appellants cited the case of *Hameeda v. Arsakularatne.*[3] That case relates to a building between 75 – 100 years old built with cabbock and plastered with lime and the Engineer who testified at the trial made the observation that the premises were not worth repairing.

The building in the instant case appear to be a two-storeyed building each floor comprising several units and the building itself was intact. It is desirable to remind ourselves that the damage in the present case had been caused during communal riots and a special authority was appointed in terms of Emergency Regulations object of which was to repair, restore and rehabilitate immovable property which were damaged or destroyed. Therefore, the whole aim and object of the Emergency Regulations had been the preservation of *status quo.* In the circumstances, the facts of the present case are clearly distinguishable from the facts in *Hameeda v. Arskularatna (supra).*

The question whether the assessment of damages is excessive has to be examined next. The submission that the finding of the

learned District Judge relating to the quantum of damages is not supported by acceptable evidence is untenable. Learned trial Judge having examined that there was a running business and a subsisting agency of Lever Brothers estimated the damages at Rs. 18,000 per month. It is significant that a representative of Lever Brothers gave evidence giving facts and figures from the company reports. In the absence of evidence to the contrary, one is justified in accepting such evidence. However, learned District Judge proceeded to award Rs. 8,000 a month which was much lower than the assessment found to be acceptable. In the absence of evidence to the contrary relating to the actual damages resulting from the loss yet on a modest calculation, learned District Judge cannot be faulted for holding that Rs. 8,000 a month as a reasonable assessment.

For the above reasons, I dismiss this appeal with costs.

DISSANAYAKE, J. – I agree.

Appeal dismissed.