

TALAGUNE
v.
DE LIVERA

COURT OF APPEAL.
SENANAYAKE J.,
EDUSSURIYA, J.
C.A. 10/89
D.C. CASE NO. 4925/ZL
OCTOBER 21, 1996.

Rei Vindicatio Action – Ceiling on Housing Property Law 1 of 1973, Section 15 (2) – Property vested in the Commissioner of National Housing – Appeal to Board of Review – Finality – Title paramount.

The plaintiff-respondent instituted action as the Executrix of the Last Will of late Mrs. Crowther for a declaration of title and for a ejectment of the defendant-appellant from the premises in suit.

The defendant-appellant's position was that the property was vested in the Commissioner by operation of Law under S. 15(2) of the CHP Law, and that by title paramount the plaintiff-respondent's title has been wiped out by statute.

The District Court held in favour of the plaintiff-respondent.

Held:

(i) Plaintiff was filed on 18.3.85, and under the Civil Procedure Code, there is no provision which permits a defendant to plead by way of defence, matter arising subsequent to the institution of action, the judgment must determine the rights of the parties as on the date of the institution of action.

At the time of the institution of the action the matter had not vested in the Commissioner.

(ii) The owner had appealed against the vesting and the appeal is pending before the Board of Review, the Court of Appeal had also restrained the Commissioner from proceeding to vest or to take further steps. Therefore there is no finality and the plaintiff-respondent's title remains unimpeached.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *Silva v. Fernando* (P.C.) 15 NLR 499
2. *A. C. Hettiarachchi v. Mary Nona* – C.A 1329/82 with C.A.L.A. 141/82

S. Mahenthrian for defendant-appellant.

A. K. Premadasa, P.C. with T. B. Dilimuni and C. E. de Silva for plaintiff-respondent.

Cur. adv. vult.

December 20, 1996.

SENANAYAKE, J.

This is an appeal from the judgment of the learned District Judge of Colombo. The plaintiff-respondent instituted this action as the Executrix of the Last Will of late Mrs. Pearl Elain Crowther for a declaration of title and for ejection of the defendant-appellant from the ground floor of premises No: 53/7 Gregory's Road, Colombo 7.

The learned Counsel for the appellant's only contention was that the property in dispute was vested in the Commissioner of National Housing in terms of Section 15(2) of Ceiling on Housing Property Law. Section 15(2) reads as "where any house is vested in the Commissioner under the law the Commissioner shall have absolute title to such house and free from all encumbrances, and such vesting shall be final and conclusive for all purposes against all persons whomsoever whatever right or interest they have or claim to have to or in such house. Therefore the learned Counsel contended that by a title paramount the respondent's title has been wiped out by statute. He relied on 'X1' letter dated 22.04.1993 and 'X2' the Gazette Notification.

But one must remember that an aggrieved party can appeal against the decision of Commissioner in terms of Section 39(1) of Ceiling on Housing Property Law. Finality will arise only after the conclusion of the appeal.

The plaint was filed 18.03.85 and under our Code, there is no provisions which permits a defendant to plead by way of defence, matter arising subsequent to the institution of action, the judgment must determine the rights of the parties as on the date of the institution of the action. This was the position as held in 2 Times Report 192. It was also held in the case of *Silva v. Fernando*⁽¹⁾.

The rights of the parties to an action have to be ascertained at the commencement of the action. This is well settled law.

At the time the action was instituted the subject matter had not vested and according to the defendant-appellant's petition and affidavit dated 17.10.96. The said premises was vested by operation of law and the said vesting was duly gazetted on 28.05.1993 and the owner. The Superior Regular has filed an appeal to the Board of Review on 19.05.93 and assigned a number 2480. In C/A Application marked 'X4' The Court of Appeal had allowed the application of the petitioner for a writ of prohibition restraining the Commissioner from proceeding to vest or to take further steps in this regard under the Ceiling on Housing Property Law in respect of premises bearing No. 53/7, Gregory's Road, Colombo 7 until the aforesaid appeals before the Board of Review are concluded. Therefore there is no finality and the plaintiff-respondent's title remains unimpeached.

The learned Counsel for the appellant relied on the unreported judgment of the Court of Appeal *A.C. Hettiarachchi v. Mary Nona* ⁽²⁾. I am of the view that the facts of that case has no application to the instant case. The property of the plaintiff was factually taken over by the Urban Development Authority and the defendant-petitioner who was enjoying the property then applied to the Urban Development Authority and obtained permission to cultivate it and permission was granted on 24.02.81. The defendant-petitioner filed objections to the application for writ of execution and informed Court that the land was acquired by Government and consequently the plaintiff has lost title therefore the plaintiff's title now stands extinguished by title paramount and therefore the plaintiff cannot get possession or status to make an application for execution of writ.

In my view the application vesting the subject matter is pending before the Board of Review and there is a prohibition restraining the vesting with the Commissioner of National Housing. Therefore the contention of the learned Counsel has no merit and furthermore the authority cited has no bearing to the instant case.

I am of the view that the learned District Judge has come to a correct finding on facts and law. For the above mentioned reasons and for the reasons given by the learned District Judge, I affirm the judgment and dismiss the appeal with costs fixed at Rs. 4,200/-.

EDUSSURIYA, J. – I agree.

Appeal dismissed.

Note by Ed: The Supreme Court in SC Spla refused leave to the Supreme Court.
