IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal against the Judgement dated 26th June 2014 of the Civil Appellate High Court of the Western Province Holden in Kalutara in terms of section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC Appeal 106/2016
SC(HCCA)LA No.367/14
WP/HCCA/KAL/102/2012(f)
DC Panadura No. 17914/L

1. Waduge Adlin Fernando(Deceased)
2. Waduge Anni Fernando(deceased)
   both of
   No. 432, Nalluruwa, Panadura.
   Plaintiffs

Waduge Buddhini Manel Fernando
No. 24, Dibbede Road , Nalluruwa,
Panadura

1.A and 2A substituted Plaintiff

Vs.

1. Waduge Lionel Fernando(Deceased)
1(a) Waduge Jeewani Priya Fernando
1(b) Waduge Wasantha Kalyana Fernando
1 (c) Waduge Vijith Vishvanath Fernando
1(d) Waduge Suhaas Surendra Fernando
All of "Gimhana" Nalluruwa
Panadura.

2. Waduge Vijith Vishvanath Fernando
"Gimhana" Nalluruwa, Panadura.

3. Waduge Suhaas Surendra Fernando
"Gimhana" Nalluruwa, Panadura

4. Waduge Palitha Piyasiri Fernando
No. 434, Nalluruwa, Panadura.

Defendants

AND NOW BETWEEN

Waduge Vijih Vishvanath Fernando
"Gimhana" Nalluruwa, Panadura

1A(C) and 2 Defendant-Respondent-Appellant-Appellant

Vs.

Waduge Buddhini Manel Fernando
No. 24, Dibbede Road , Nalluruwa, Panadura

1A and 2A Substituted Plaintiff-Petitioner-Respondent-Respondent-

Before	:	Jayantha Jayasuriya, PC, CJ S. Thurairaja, PC, J. A.L. Shiran Gooneratne, J.
Counsel	:	Rohan Sahabandu, PC. with Ms. Sachini Senanayake for the 1A(C) and 2 Defendant-Respondent- Appellant-Appellant. Dr. Romesh de Silva, PC, with Harsha Soza, PC for the 1A and 2A Substituted Plaintiff-Petitioner-Respondent-Respondent.
Written submissions	:	2nd Defendant-Appellant-Petitioner on 27.06.2019 1A(C) and 2nd Defendant- Respondent- Petitioner-Appellant on 24.08.2023 1A and 2A Substituted Plaintiff-Petitioner-Respondent-Respondent 05.07.2016, 07.08.2023
Argued on	:	14.07.2023
Decided on	:	19.02.2024

Jayantha Jayasuriya, PC, CJ

This appeal is in relation to an order of the Civil Appellate High Court of Kalutara dated 26th June 2014. The Civil Appellate High Court by the impugned order dismissed an appeal against an order of the District Court. The learned judge of the District Court of Panadura by his order dated 19th March 2012 had allowed an application of the substituted plaintiffs to execute the decree and restore possession of the property in question. This impugned order was made by the learned District Judge having heard submissions of all relevant parties.

The impugned orders referred to above relate to the legal proceedings that were initiated by two sisters in the District Court of Panadura in the year 1982. One of the two plaintiff sisters was

deaf and dumb by birth. Plaintiffs invoked the jurisdiction of the District Court naming four defendants. The first defendant is the elder brother of the two plaintiffs. Second and the third defendants are children of the first defendant. The fourth defendant's father is a brother of the two plaintiffs and the first defendant. The two plaintiffs *inter alia* whilst invoking jurisdiction of the District Court sought a declaration that four deeds of gift that are described in the plaint are null and void. Plaintiffs claimed that the said deeds were fraudulently executed. Plaintiffs pleaded that all four properties described in the four schedules belonged to them. The first defendant and his children – the second and third defendants contested the claim of the two plaintiffs. However, the fourth defendant did not contest the claim of the plaintiffs. Furthermore, he contended that he came to know about the existence of a deed of gift by which the first plaintiff had donated the property described therein to him (subject to the life interest of the said plaintiff) only after the proceedings were initiated by the two plaintiffs in the District Court. According to this impugned deed, the first defendant had accepted the said gift on behalf of the fourth defendant. The fourth defendant pleaded that he does not expect such a gift from the two plaintiffs and therefore has no objection for the court granting relief to the plaintiffs.

A brief description of the four impugned deeds is as follows. Deed No 335 (P2) - the first plaintiff purports to gift a land in the extent of 1R 20P and the house situated thereon (corpus described in the second schedule of the plaint) to the fourth defendant; Deed No. 336 (P3) - the second plaintiff purports to gift a land in the extent of 2R (corpus described in the first schedule of the plaint) to the third defendant; Deed No 337 (P4) – the first plaintiff purports to gift a land in the extent of 15P (corpus described in the third schedule of the plaint) to the second defendant; Deed No 338 (P5) – the first and the second plaintiffs purports to gift a land in the extent of 2R and the buildings situated thereon (corpus described in the fourth schedule of the plaint) to the first defendant.

The District Court by its judgment dated 15th September 2003 held in favour of the plaintiffs and declared that the four impugned deeds are null and void. Furthermore, the court proceeded to cancel those four deeds. In addition, the District Court ordered damages against first to the third defendants. The court ordered the decree be entered accordingly. While the trial is in progress the two plaintiffs had passed away and the respondent had been substituted in the room and place

of the two plaintiffs as 1A and 2A substituted plaintiffs. Second defendant, third defendant and two others were substituted as 1A(C), 1A(D), 1A(A), and 1A(B) substituted defendants, in the room and place of the deceased first defendant.

The second defendant (who was also the 1A(C) substituted defendant) appealed against the judgment of the District Court and the said appeal was dismissed by the Civil Appellate High Court by its judgment dated 4th August 2009. On 22nd February 2010 the judgment of the Civil Appellate High Court was pronounced in the District Court. The Supreme Court refused Special Leave to Appeal on 01st September 2010. The said order of the Supreme Court was pronounced in the District Court on 8th February 2011.

Thereafter, the 1A & 2A substituted plaintiffs-respondent had sought a writ to eject the 1A(C) and second defendant - appellant and restore the respondent in possession in the corpus described in the fourth schedule to the plaint. The District Court issued a writ of possession dated 30th January 2012 as prayed for by the plaintiffs-respondent. The 1A(C) and 2nd defendant – appellant thereafter objected to the issuance of the writ of possession and moved the District Court to recall the writ. The District Court by its Order dated 19th March 2012 overruled the objections of the 1A(C) and second defendant appellant and granted the application of the 1A and 2A substituted plaintiffs – respondent and issued the writ to execute the decree and restore the 1A & 2A substituted plaintiffs - respondent in possession.

The said order of the District Court was unsuccessfully challenged by the 1A(C) substituted defendant who is also the second defendant in the Civil Appellate High Court. He is impugning the aforesaid orders of the District Court and the judgment of the Civil Appellate High Court in these proceedings.

The main contention of the appellant is that the District Court had no power to issue the writ of possession as no such relief was prayed for by the plaintiffs in their plaint. He contended that the relief granted by the judgment in the main matter as discussed hereinbefore is confined to the cancellation of the four impugned deeds of gift and awarding damages. Examination of all the

material filed in the District Court shows that the plaintiffs – respondent invoked section 777 of the Civil Procedure Code when seeking the writ of possession.

When this Court granted Special Leave to Appeal the following two questions of law had been identified.

1. Could a court grant relief not prayed for, either by the plaintiff or the defendant?

2. Even if the question No.01 above is answered in the affirmative, taking into account the facts and circumstances of the instant case, would Section 777 of the Civil Procedure Code apply to the execution proceedings of this case?

The learned President's Counsel for the respondent submitted that the unique facts in the instant case justifies the course of action adopted by the District Court even though, there was no prayer to restore possession in the plaint. It is his contention that the two plaintiffs were in the possession of the property described in the fourth schedule of the plaint, which was the subject matter in the impugned deed of gift No 338. Furthermore, there is no contest that the two plaintiffs became the owners of the corpus described in the fourth schedule of the plaint from 11th May 1963, by the deed no. 3361. Therefore, he contended that there was no necessity for the plaintiffs to have sought specific reliefs of declaration of title or ejectment as they were already in the possession of the corpus as rightful owners when the jurisdiction of the District Court was invoked in 1982. The only basis on which the first to the third defendants claimed title to the lands and buildings described in the plaint was that the two plaintiffs transferred the title and all other interests by the impugned four deeds of gift. Whereas, the plaintiffs sought that the said four deeds be declared null and void. In these circumstances there was no necessity to have sought an additional relief of declaration of title as they were continuing in the possession of the relevant properties as lawful owners. The learned President's Counsel for the respondents further submitted that the conduct of the second defendant while the appellate proceedings were in progress warranted the District Court to issue the writ of possession to enabling the plaintiffs enjoying the benefit of the judgment and the decree entered in the case.

The contention of the learned President's Counsel for the second defendant-appellant is that a court could grant relief only when it is prayed for. He submitted, that the claim in the plaint and relief prayed for is setting aside the deeds, and the absence of any prayer for declaration of title and eviction of the defendants precludes the plaintiffs obtaining a writ of possession for the execution of the decree based on the judgment by which the four impugned deeds were declared null and void.

However, as set out hereinbefore, the two plaintiffs obtained the judgment cancelling the four impugned deeds, from the District Court after the lapse of twenty-two years from the time the jurisdiction of the said court was invoked. Thereafter, the contesting defendant (appellant) unsuccessfully invoked the jurisdiction of both the Civil Appellate High Court and the Supreme Court which took another eight years for the conclusion of the judicial proceedings. Accordingly, the decree was entered after the lapse of eight years from the delivery of the judgment by the trial court. Yet the conduct of the appellant while the appeal proceedings were in progress had prevented the plaintiffs from enjoying their lawful rights to the properties concerned despite the judgment of the District Court which declared all deeds null and void. The appellant having lost their claim to the property had illegally gained possession after ejecting the plaintiffs forcibly. This conduct of the appellant cannot be condoned but should be condemned. The injustice caused to the plaintiffs who had been unlawfully deprived of the fruits of the judicial process should be remedied. It is also pertinent to observe that this is not the only instance in which the appellant had attempted to disturb the rights of the plaintiffs by unlawful means while the judicial process was in progress. Examination of the docket in the District Court reveals that on 10th March 2003 the District Court while the trial was in progress had issued an enjoining order preventing the appellant from causing any damage to the property and the building situated thereon. On 21st April 2003, the appellant had undertaken that he would not construct any buildings or would not cause any damage to the property. Based on this undertaking the learned trial judge had ordered the appellant not to construct any new buildings or cause any damage to the plantation until the conclusion of the trial. Two months thereafter, the defence case was closed and the judgment was reserved. The appellant by his conduct has demonstrated his propensity to secure possession of the relevant properties by illegal means and deprive the

plaintiffs their right to possession even if the court declares the impugned deeds through which the first to the third defendants were claiming rights, null and void. It is through a similar process the second defendant appellant gained possession of the land and the building concerned while the appeal process was on and deprived the plaintiffs from enjoying the fruits of the judicial process. The appellant should not be permitted to take advantage of his wrongful conduct.

When all the circumstances relating to this case are considered it is apparent that the two plaintiffs invoked the jurisdiction of the District Court to preserve and secure their rights interests and entitlements to the four properties described in the schedules to the plaint. It is their claim that the defendants had caused disturbance to the peaceful enjoyment of their rights to the properties by their fraudulent conduct – the execution of the four impugned deeds. When the plaintiffs secured their lawful rights and entitlements to the properties through judicial process, the appellant had deprived the plaintiffs from the full enjoyment of benefits derived from the rights secured through such process by resorting to unlawful means.

The District Court after the conclusion of the appeal process issued the decree confirming the cancellation of the four impugned deeds that adversely affected rights and title of the plaintiffs to the lands described in the four schedules in the plaint. Thereafter the plaintiffs sought the assistance of court to execute the decree by way of writ of possession. Plaintiffs had to seek this relief from court due to the change of circumstances caused by the unlawful conduct of the appellant. If this relief is not granted, the plaintiffs are denied of the benefit of a lawful order of a court due to deplorable and unlawful conduct of the appellant while the judicial process was in progress. If this situation is not effectively remedied, such failure would cause irreparable harm to the effectiveness of the entire judicial process. The District Court having heard the plaintiff-respondents and the contesting defendant-appellant exercising jurisdiction vested on it by the Civil Procedure Code allowed the application for the writ of possession and ordered that the plaintiffs be restored in possession.

By this process the learned District judge - by his order dated 19th March 2012 - had given effect to the judgment and the decree of the court. The learned President's Counsel for the appellant claims that the respondent could not have invoked the jurisdiction of the District Court under

section 777 of the Civil procedure Code in the absence of any order by an appellate court. The learned Counsel contends that the respondent should have obtained an order from the appellate court first and thereafter moved the trial court for a writ of possession under section 777. However, it is pertinent to note that section 839 of the Civil Procedure Code recognizes the power of the court to make "such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

Right to possession and right to be restored in possession inter alia are two attributes of the ownership as recognized by the general principles of law. The Privy Council in ***The Attorney-General v Herath*** 62 NLR 145 at 148 cited with approval Volume 2 of Maasdorp which described that the rights of an owner "comprised under three heads *"namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment '; and (3) the right of disposition".* A rightful owner of a property who was dispossessed by illegal means has the right to obtain an order from court for eviction and restoration.

In my view, if the court fails to remedy the injustice caused to the respondents (two plaintiffs in the District Court) who sought the protection of the judicial process in an effective manner it facilitates the illegal conduct of a wrongdoer who acted with utmost disrespect to the judicial process and gained possession by forcibly displacing the lawful owners from the property, while the judicial process was in progress. Such unlawful conduct of the appellant is an abuse of process of court. Permitting the appellant to continue enjoying the benefit secured through an abuse of process of court causes grave injustice to the respondent who had placed full faith in the justice system and sought assistance to remedy the injustice caused due to the wrongful conduct of the appellant. The appellant with total disrespect to the judicial process resorted to a conduct that completely negates the effects of the judgment of court.

The District Court when made the impugned order based on an application made under section 777 of the Civil Procedure Code had not acted without authority. Section 839 of the Civil Procedure Code empowers the court to make orders that are necessary for the end of justice or to prevent abuse of process. In ***Seneviratne v Abeykoon*** [1986] 2 SLR 1 the Supreme Court did not hold with the proposition that section 839 was intended to repair errors committed by the court

itself and not by the parties. The Supreme Court further held that *"Not only have our courts used their inherent powers to repair injuries done to a party …… they have also used their inherent powers where a party was in error…"* (at page 6)

In ***Peiris v The Commissioner of Inland Revenue*** 65 NLR 457 at 458 held *that "It is well-settled that an exercise of power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory…".*

Considering the facts and circumstances of this case as discussed hereinbefore, I am of the view that there is no basis to interfere with the aforesaid order (impugned order) of the District Court. The first question of law is therefore answered in the affirmative. In view of my aforesaid findings, I do not proceed to examine the second question of law as it will be just an academic exercise.

The appeal is dismissed with costs.

Chief Justice

S. Thurairaja,, PC, J.

I agree.

Judge of the Supreme Court

A.L.Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court