IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

Civil Appeal No. ABU 0063 of 2017
(High Court Civil Action No. HBM No. 51 of 2017)

BETWEEN	:	**SURESH KANT**
		Appellant
AND	:	**1. THE PROCEEDINGS OF THE COMMISSIONER ON BEHALF OF USENIA MAITAWACA MANAKIWAI**
		2. THE PROCEEDINGS OF THE COMMISSIONER ON BEHALF OF THE HUMAN RIGHTS & ANTI DISCRIMINATION COMMISSION
		Respondents
Coram	:	**Basnayake, JA** **Lecamwasam, JA** **Almeida Guneratne, JA**
Counsel	:	**Mr. S. Singh for the Appellant** **Mr. R. Vananalagi and Mr. J. Daurewa for the Respondents**
Date of Hearing	:	**12 November 2018**
Date of Judgment	:	**30 November 2018**

JUDGMENT

Basnayake, JA

[1] This is an appeal to set aside the judgment of the learned High Court Judge dated 2 June 2017. By this judgment inter alia the 1st respondent (1st applicant) was restored back in possession of lot 22, Flat 4 until she and her family are evicted by an order of court. She

was also awarded $25,000.00 as compensation. The appellant in the notice and grounds of appeal ground No. 12 claims that the amount of $25000.00 is manifestly harsh, excessive and unassessed.

[2] I have had the benefit of reading in draft the judgments of Lecamwasam JA and Guneratne JA. I agree with their conclusion that this appeal should be dismissed. However Lecamwasam JA with Guneratne JA concurring have reduced the amount of compensation to $7500.00 in their judgments. With utmost respect to my two noble brothers, I disagree. In my judgment the appeal is dismissed with costs in a sum of $5000.00 (FJD) payable to the 1st respondent (1st applicant) by the appellant within 28 days.

[3] The facts of this case are stated in the judgment of Lecamwasam JA. My judgment is only on the aspect of compensation awarded by the learned High Court Judge which I state should stand as it is and not be reduced.

[4] Human Rights Commission Act 2009 allows the High Court to award damages under section 41 (1) which states: "*In proceedings under section 38 for unfair discrimination or a contravention of human rights, the High Court may award damages against the defendant in respect of any one or more of the following-*

> *(a) Pecuniary loss suffered or expenses incurred by the complainant or the aggrieved person as a result of the conduct complained of;*
>
> *(b) expenses reasonably incurred by the complainant or the aggrieved person in seeking redress for the conduct complained of;*
>
> *(c) loss of any benefit, whether or not of a monetary kind which the complainant or the aggrieved person might reasonably have been expected to obtain but for the conduct complained of;*
>
> *(d) humiliation, loss of dignity and injury to feelings of the complainant or the aggrieved person.*

[5] The learned Judge has dealt on damages in the judgment as follows: (the numbering is mixed up)

> *48. "It is paramount importance that Child Rights are guaranteed and they are not subjected to inhuman and degrading treatment. In this case the child was alone in the house expecting a parent to return as others have gone for a funeral. The Respondent's caretaker had come to the house around 5-6 pm in the evening on a weekend and had locked that child out and left. This is not only inhuman and degrading but also exposed the child to danger as the child was left outside without any form of supervision. Father of the child had found that the child was loitering and inquired and came to know about the incident. Even after execution of the purported re-entry and or distress there was no concern about the safety of the child by informing an adult, by the caretaker and or Respondent.*
>
> *47. It should also be noted that physiological impact from such an incident cannot be measured and may be irreversible. The child would have been mentally tormented by the actions of the Respondent. So there is a violation of Section 41(1)(d) and (2) of the Constitution.*
>
> *48 The Applicants have sought damages for the alleged infringements. Neither party had submitted any cases in this regard. The counsel for the Applicant sought a damage of at least $50,000 on the basis that Constitutional Redress matters are tried in High Court, and also that these violations should be taken seriously. They also seek deterrent effect. The South African case that is mentioned in the written submission cannot be applied to present context as facts of that case are different.*
> *49. Considering the circumstances of the case there are aggravating factors. There was no basis to exercise re-entry or distress. No action was taken to terminate tenancy before eviction. In the guise of purported Distress for Rent the Respondent had evicted an entire family including 5 children. The eviction was executed on or around 5-6 pm while only one child was at home while others in the household were attending a funeral. So considering the mental trauma to the parent in front of child/children of such an incident is enormous. The Respondent had not heeded to the notices of the 2nd Respondent and even interim orders for repossession and staying of purported distress was not fully implemented. The actual deprivation of the applicant's home was more than 50 days. While the distress is being purportedly exercised for arrears, a claim was also made to the Small Claims Tribunal for the 5 identified sum, at the time of eviction. The fact that eviction occurred on Friday evening is also an aggravating factor.*

50. Considering all the circumstances of case I would award a compensation of $25,000 to the 1st Applicant. The Respondent is granted 28 days to pay the said sum to the 1st Applicant".

[6] I am of the view that the learned Judge had in awarding compensation addressed his mind to various aspects involved in this case. I see no dispute with regard to facts as stated in the judgment. I am of the view that the learned Judge had arrived at this figure of $25,000.00 by using his discretion. To what extent could an appellate court upset an amount awarded as compensation within the realm of the Act? Lord Diplock held in **Hadmor Productions Ltd v Hamilton** [1983] 1 A.C. 191 at 220 that; "*The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon misunderstanding of the law or of the evidence before him or upon an inference that particular facts exited or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it.*" (**Digicel (Fiji) Limited v Fiji Rugby Union** [2016] FJSC 40 (26 August 2016). I do not see anything that is referred to in the above statement of Lord Diplock present in this case. Considering the gravity of this case I see no reason to interfere with the amount awarded. Thus I dismiss the appeal with costs in a sum of $5000.00 payable to the 1st respondent (1st applicant) within 28 days.

Lecamwasam JA

[7] This appeal is preferred by the Appellant against the judgment of the learned High Court Judge at Suva dated 2nd June 2017. The learned Judge made the following orders against the appellant:-

a. The 1st Applicant is granted possession of premises at Lot 22, Flat 4, Kings Road, Nakasi until she and her family is evicted by an order of Court.

b. *The Respondent is prevented from interfering, preventing in any way hindering the safe enjoyment of the said premises in pursuant to above order.*

c. *The said orders are granted without prejudice to the Respondent's right to institute an action for eviction*

d. *The purported distress for rent is stayed permanently.*

e. *The respondent to pay a compensation of $25,000.00 to the first applicant within 28 days.*

f. *No order as to costs.*

[8] Being aggrieved by the above orders, the appellant filed this appeal on the following grounds of appeal:-

1. *The learned Judge erred in law in finding that the respondents (original applicants) were not precluded from seeking constitutional redress by way of originating summons when Rule 3 (1) of the High Court (Constitutional Redress) Rules 2015 requires than an application for Constitutional Redress be made by way of motion.*

2. *The learned Judge erred in law when he accepted that the respondents (original applicants) could have included the concise nature of their claim in terms of Rule 4(3)(a) of the High Court c(Constitutional Redress) Rule 2015 in the originating summons but instead that it was acceptable that they had detailed the description of the claim in their Affidavit in support.*

3. *The learned Judge erred in law when he accepted that the respondents (original applicants) had correctly stated all their reliefs in the originating summons which included damages although such relief cannot be assessed and awarded by way of affidavit evidence.*

4. *The learned Judge erred in law and in fact in finding that the Appellant (original respondents) had breached Section 39(1) & (2) of the Constitution.*

5. *The learned Judge erred in law in finding that it was irrelevant that the 'Memorandum of Agreement to Lease' between the parties did not have the consent of the Director of Lands.*

6. *The learned Judge erred in law in finding that re-entry could not be enforced although the learned Judge accepted that monthly rentals were payable and accepted between the parties.*

7. *The learned Judge erred in law and in fact that there was no basis for re-entry and distress wholly failed to consider that the first respondent (original first applicant) was residing at the Appellant's with rental arrears of $2,200.00.*

8. *The learned Judge erred in law and in fact in contextually interpreting Section 7(1) –(5) of the Constitution in favour of the first respondent (original first applicant) when it failed to take into consideration the impact of the area of the first respondent (original first applicant) in the sum of $2,200.00 on the respondent. The learned Judge failed to consider the distress of the Respondent, a private property owner who was being of the usage of his property by the first respondent (original first applicant) who had the choice of finding all the native residents at the property where she could have afforded to pay rent.*

9. *The learned Judge erred in law and in fact in finding that the respondent had violated Section 41(1) (d) and (2) of the Constitution when it was the first respondent (original first applicant) and the rest of her family who were negligent in leaving their own child home alone and unsupervised and the child was not the party to the action.*

10. *The learned Judge erred in law and in fact in finding that the appellant (original respondent) had violated section 41(1)(d) and (2) of the Constitution when no such declaration or relief was sought by the Respondents(original applicants) in their originating summons.*

11. *The learned Judge erred in law and in fact in finding that the property of the appellant (original respondent) constituted a 'home for the first respondent (original first applicant) when it failed to consider that the first respondent (original first applicant) had not paid her rent for the property and was in arrears in the sum of $2,200.00. The first respondent (original first applicant) had no legal right to reside at the property.*

12. *The amount of damages awarded being $25,000.00 is manifestly harsh, excessive and un-assessed.*

13. *The learned Judge erred in awarding damages without referring to any case authorities to justify the award.*

14. *The learned Judge erred in awarding damages without there being any application for assessment of damages.*

[9] As the material facts of this case are cogently stated by the learned High Court Judge in paragraphs 1 – 5 of the judgment of the High Court, I can do no better than repeat those *in verbatim* below:-

INTRODUCTION

1. *This proceeding is instituted by Human Rights and Anti-Discrimination Commission (2nd Applicant), on behalf of the 1st Applicant, who was a tenant under a purported agreement of tenancy with the Respondent-landlord. Admittedly there were arrears of rent to the value of $2,200. The tenancy had commenced in May, 2015, according to the purported 'Memorandum of Agreement to Lease'. 1st Applicant, her husband, their 5 children and her elderly parents totaling 9 persons lived in the said premises, since May, 2015. Though the period stated in the said memorandum, was for one year the tenancy continued after that period and the Respondent had accepted $500 as rental, even as late as 20th April, 2017. (See annexed WT1 to affidavit in response)*

2. *On 7th of April, 2017 between 5-6 pm, while only one child was in the premises the Respondent through an agent had locked the house, and the child was left alone outside the house at dusk without any form of supervision, completely disregarding the safety of the child. The Respondent in the affidavit in opposition stated that premises subject to purported tenancy agreement was a Crown Lease No 1859 and no consent was obtained from the Director of Lands, but in the letter written to the 2nd Applicant, on 21st April, 2017 he had admitted that the 1st Applicant was a tenant in Wainibuku Flats in Nakasi.*

3. *The issue of the validity of the 'Memorandum of Agreement to Lease' will be irrelevant as it had lapsed more than a year ago and Respondent had accepted rental payments after expiration of said period, and had also expressly admitted tenancy of the 2nd Applicant. According to his own statement of accounts provided to the 1st Applicant, by the Respondent had provided details of payments as well as the arrears this statement was annexed to the affidavit in support as UMM2. 1st Applicant had complained to 2nd Applicant about the eviction of her family of 9 including 5 children and two elderly parents. The 2nd Applicant had informed the Respondent that he had breached Section 39 (1) and 39(2) of the Constitution of Republic of Fiji (the constitution) through an arbitrary eviction and had also breached Section 41 of the Constitution as children's rights are also infringed by the actions of the Respondent. He*

had replied to the said letter and stated that he had lawfully exercised distress of rent and 'Under Distress of Rent their caretaker' had closed the flat in issue and had stated that the landlord has nothing to do 'to tenant's family being deprived of food, clothes and shelter', due to the said action. So, in other words the Respondent is admitting that he had exercised distress of rent through the caretaker. It is not clear whether the caretaker was a bailiff appointed generally or specifically under the law. No evidence of such appointment was attached to the affidavit in opposition.

4. *When this matter came up before on the first day on 5th May, 2017 more than a month had lapsed from the eviction of the 1st Applicant. So considering the urgency of the interim orders sought, an oral hearing was conducted though there was no affidavit in opposition filed at that time. Interim orders were granted and the 1st Applicant was restored to the possession and a stay was ordered regarding the execution of purported distress by the agents of the Respondent.*

5. *At the hearing it was revealed that 1st Applicant's all the household items were removed before she was given possession, and this was done after interim order for possession was granted. Despite the order for stay of process of distress and not to change the status quo till the conclusion of this matter, it was revealed and the goods were removed to unknown location and even a list of items under distress was not given . When this was inquired, counsel for the Respondent said there was no intention to violate the orders of the court and assured return of all the items forthwith. Since the 1st Applicant was given possession of the premises without her household items, it cannot be considered as restoring possession specially considering that she was a person who could not afford to pay rent and would not be in a position to purchase new household items. So even at the time of the hearing 1st Applicant was denied 'actual' possession of her household items for more than 50 days, despite interim order stalling all the proceedings of distress.*

[10] Against that background, the learned High Court Judge had made the finding that there was an unlawful eviction by the Appellant (hereafter referred to as the Appellant) and therefore had ordered restoration of possession to the first applicant (hereinafter referred to as the first respondent). In addition to that, the learned High Court Judge found, *inter alia,* that the Appellant had violated the constitutional rights of the 1st Respondent through the act of locking up the house, leaving the 13 year old son outside which

prevented him from entering the house after dusk thereby endangering the safety of the child.

[11] In view of the above findings, it is pertinent to consider the judgment of the learned High Court Judge in sequential order. The learned Judge in paragraph 7 of the judgment (containing his analysis), has concluded that the question of validity of the 'Memorandum of Agreement to Lease' due to the absence of consent from the Director of Lands is irrelevant to the matter at hand as the duration of the same had lapsed. I cannot but agree with the said finding. The said *'Memorandum of Agreement to Lease'* is no longer enforceable as it was meant only for a period of one year from 8 May 2015 onwards. Therefore it justifies the learned Judge's conclusion that it was irrelevant to consider the clauses of the said memorandum after the validity period had elapsed.

[12] I now advert my attention in the same manner, to the conclusion of the learned High Court Judge regarding the application of section 91(b) & (c) of the Property Law Act. The learned Judge held that since no valid agreement for lease existed between the landlord and tenant, the respondent cannot resort to the above section. I quote the above provisions of the Property Law Act below, as the content therein is relevant for the present analysis.

Section 91(b) and (c) of the Property Law Act (Cap 131) :-

Powers in lessor

> *"91. In every lease of land there shall be implied the following powers in the lessor, his personal representatives and transferees:*
>
> > *(b) that whenever the rent reserved is in arrear he or they may levy the same by distress:*
> > *(c) that whenever the rent or any part thereof, whether legally demanded or not, is in arrear for the space of one month, or whenever the lessee has failed to perform or observe any of the covenants, conditions or stipulation contained or implied in the*

lease, and on the part of the lessee to be performed or observed, he or they may re-enter upon the demised premises (or any part thereof in the name of the whole) and thereby determined the estate of the lessee, his personal representatives, transferees or assigns, therein but without releasing him or them from liability in respect of the breach or non-observance of any such covenant, condition or stipulation".

[13] The applicability of the above provision extends to every lease of land whether there is a formal agreement of lease or otherwise. It does not exclude leases with no written agreements. To presume otherwise is an aberration which is contrary to natural rights of ownership. In the instant case initially there had been a valid written agreement under which the first respondent had entered the premises. Later it had lapsed due to non-renewal of the agreement. As such, the character in which the respondent entered the premises was that of a tenant. A person who enters in one character is presumed to continue to hold on the same footing unless there is strong evidence to the contrary, which is absent in the present case. However, this presumption is not an endorsement to the continued applicability of the written agreement, which correctly lapsed due to non-renewal, but merely an acknowledgement of the fact that the respondent had not changed the character of tenancy.

[14] Therefore, I hold that the provisions of Section 91(b) & (c) of the Property Law Act (Cap 131) do apply to the instant case, despite there being no written agreement in force. The Appellant is not debarred from resorting to Section 91(b) & (c) to protect his rights of ownership as it is not disputed that the first respondent was in arrears of rent for a period exceeding one month. Hence, I do not fault the conduct of the Appellant in exercising his right of distress through a Bailiff.

[15] Although the learned High Court Judge too ruled in favour of the Appellant exercising his right of distress, the issue is with regards to the steps he adopted thereafter, that is by seeking entry into the house. As per Annexure 'B' (the Affidavit of the Appellant), the notice of distress issued under the Distress of Rent Act is proof that the person who

issued the notice, Anil Chandra has signed the notice of distress as Bailiff and not as a Caretaker. The learned Judge had commented on this, stating in paragraph 28 that a Caretaker had affixed the notice of distress. However, as per the affidavit in Annexure 'B' referred to above, the person who issued the notice is a Bailiff and not a Caretaker as had been perceived by the learned High Court Judge. Therefore he had every right to issue the notice of distress, although the manner of execution was incorrect.

[16] The learned judge made an erroneous observation in paragraph 3 of his judgment in the following manner "*it is not clear whether the caretaker was a bailiff appointed generally or specifically under the law. No evidence of such appointment was attached to the affidavit in opposition*". This remark points to the fact that the learned judge had failed to scrutinize the contents of annexure B which was issued by a bailiff and not a caretaker. As there was no oral examination of witnesses it was not possible for the learned judge to ascertain the correct position.

[17] It is pertinent to mention that although the Appellant made an application to convert the 'originating summons' to a writ application, the learned Judge had not made any order on that application. Had it been allowed, the court would have been in a better position to ascertain whether Anil Chandra was in fact a Bailiff or not. Refusal of or the silence maintained on the application by the court prevented the parties from examining Anil Chandra to ascertain the truth.

[18] This failure on the part of Court to convert the action to a writ action has severely affected the outcome of the case in relation to various other aspects as well, such as;

(a) To find out the value of the articles and belongings of the first respondent;

(b) Whether the 13 year old son was in fact prevented from entering the house or not;

(c) Factual accuracy as to the date of affixing the distress notice and eviction;

(d) Whether the situation was serious enough to be treated as a violation of constitutional rights.

[19] While the actual entry into the premises may have been arbitrary, as opined by the learned Judge, in that the house was locked-up in an unreasonably high-handed manner, preventing the 13 year old child from entering the house, this conclusion is made solely on affidavit evidence, which has not been subject to cross examination to determine the veracity. The learned Judge had proceeded only on affidavit evidence of the respondents without affording an opportunity for the appellant to file an affidavit in opposition.

[20] It is only logical not to find any provision addressing the circumstance of 'Locking a house' in the Distress for Rent Act. The Act could not have catered for all conceivable situations, which therefore necessitates the court to examine the facts of every case separately and individually before coming to a finding. The learned High Court Judge is correct in finding that locking the house was illegal. Whether it was locked on the 6th or 11th of April does not make any material difference because in either case I do not observe a '*notice to quit*' having being issued by the Appellant.

[21] There is no doubt that the Appellant has every right to have recourse to assert his right legally, especially in view of the fact that the first respondent was in arrears of rent at least for a period of 5 months. On a perusal of affidavits and other documents before court, it is apparent that the first respondent (or her husband) had not made reasonable attempts in settling the dues despite overtures by the Appellant to arrive at a settlement. Heavily relying on the sympathy of the court, the respondent had been singularly unaccommodating, as is evident by her own affidavit (as per para 21 of the affidavit), when she had refused to enter in to a possible settlement by paying $400 for one week.

[22] While it is not for this court to delve into every aspect of factual evidence, it is however relevant to draw attention to annexure marked "UMM3", which is a list of groceries the first respondent had purchased. It is especially germane to the matter at hand for the

simple fact that it provides contrary evidence to the first respondent's claim of economic hardship as a reason for defaulting rent. The list of groceries she had bought is ample proof that, in spite of being indebted to the appellant, the family had continued to enjoy purchasing items such as peanut butter, chocolates, and above all air-fresheners, which goes beyond essential consumer items and into the realm of luxuries.

[23] Evidence also reveals that the husband of the first respondent was paid more than $350.00 per week whereas the rental for the whole month was a mere $350.00. The original Court had failed to advert to evidence such as UMM3, which may have given the court an opportunity to morefully assess the veracity of economic hardship claimed by the first respondent in garnering the sympathy of the court to her perceived plight, which would have had a material bearing on the outcome of the matter.

[24] In addressing the claim by the first respondent that the 13 year old child's safety was imperiled by the fact of him not being able to enter the rented premises, it is pertinent to revisit the attendant circumstances of him being on his own in the first place. The members of the house had left the child alone at home having gone to attend a funeral and for employment. There is no evidence to show that leaving the child in charge of the house was not an everyday occurrence, or that it was a rare occurrence done out of necessity. This is an indication that the child (despite his age) is able and used to taking care of himself in the absence of his parents.

[25] Therefore, the court could have ascertained whether the safety of the child was in fact endangered and the extent to which this occurred, justifying a finding of trauma if cross-examination had been allowed.

[26] Be that as it may, the learned judge has further observed that the appellant failed to follow the correct procedure, especially the procedure laid down in Section 89 (1) of the Property Law Act by issuing a notice. At this stage it is pertinent to advert to Section 105 of the said Act which reads thus "***Restriction on and relief against forfeiture of leases***

Section 105 (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition, express or implied, in the lease shall not be enforceable, by action of otherwise, unless and until the lessor serves on the lessee a notice –

a) Specifying the particular breach complained of; and

b) If the breach is capable of remedy, requiring the lessee to remedy the breach; and

c) In any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach

(2) Where the lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in or any action brought by himself or herself, apply to the court for relief and the court may..."

[27] It is apparent from the above that it is mandatory to serve a notice on the lessee before seeking relief. In the instant case the respondent had not taken steps to serve a notice on the lessee before seeking entry. As procedure requires the service of the notice as being mandatory, a lessor cannot file action in court in the exercise of the right of entry without having served notice first. Therefore, even assuming that the Memorandum of Agreement to Lease is still in force, the lessor could not have enforced the right of re-entry without following that procedure contain in the said Section 105 of the Property Law Act. In short, whether the memorandum of agreement to lease in 2015 between the parties is valid or not, steps had to be taken under Section 105.

[28] In the instant case, although the lessor had the right to issue a notice of distress he had no right to enter the house or to lock the house from outside without an order of court. His conduct therefore amounts to an arbitrary act, which cannot be allowed despite his reasonable grievance that he was not able to recover the rent for a long period of time. The accepted course of action for him should have been to have resorted to legal action without taking the law into his own hands. Therefore I hold that the steps taken by the

lessor up to the time of affixing the notice of distress is correct. However, the re-entry and the locking of the house from outside are illegal and therefore cannot be allowed to sustain. It is unfortunate that the lessor had preferred to take illegal steps when he could have had recourse to the procedure laid out in Section 105 above.

[29] In the light of my reasoning above I hold that the re-entry was illegal. Considering the overall facts I agree with the learned High Court Judge in his conclusion in that regard. Hence I do not wish to interfere with the judgment of the High Court judge. I affirm the High Court judgment, however subject to few variations and I dismiss the appeal.

[30] The learned High Court Judge ordered $25,000.00 as compensation payable by the Appellant to the first respondent for the violation of Constitutional rights.

[31] The learned Judge has not adverted to the fact that the Appellant has lost rent for at least 5 months. He has also failed to consider the magnanimity of the appellant displayed towards the first respondent in not having taken action against her after the first month of defaulting payment of rent and executing a writ of distress only after the lapse of 5 months. In ordering $25,000.00 as compensation, the court had not adequately examined the circumstances surrounding the child being left behind at home and the lack of medical evidence to support a finding of trauma. The judge merely proceeded on affidavit evidence.

[32] Without having to say more on that aspect, for the reasons I have recounted at paragraph 31 above constituting relevant factors which the learned Judge had not taken into consideration.

[33] Those are matters that required to be gone into by way of oral evidence. Repeated applications made by the Appellant to convert the action to a writ action instead of it being by way of originating summons were not dealt with by the learned Judge. It is also of relevance that the 1st Respondent has been restored to possession of the premises in

question. I felt that it necessitated pruning down the compensation of $25,000.00 awarded by him. To what extent that should be done I shall keep on hold, in as much as I feel it necessary to address another aspect which impacts on the amounts so awarded.

[34] The learned Judge in awarding the said sum of $25,000.00 as compensation proceeded on the twin criteria based on Section 39(1) and 44(1) of the Constitution (read with Section 41 thereof). Section 44(1) read with Section 41 pre-supposes "*a detention*" which in law means "*wrongful confinement*" for which I do not think it is necessary to cite authorities.

[35] In the result there being no detention (or wrongful confinement) the first Respondent's lament related back to Section 39(1) as being a cause of action to seek Constitutional redress constituting deprivation of access to the house in question.

[36] Consequently as I perceived the matter, there was a duplication in awarding compensation by the learned Judge. Removing the basis in regard to Section 44(1) (read with Section 41) for the reasons articulated above, the compensation of $25,000.00 had to be halved reducing it to $12,500.00 at the least while hastening to say that in alleged Constitutional rights violation cases neither qualitative nor quantitative criteria could be employed conclusively.

[37] Thus, having reduced the compensation awarded by the learned High Court Judge to $12,500.00 now I return to where I paused at paragraph 32 above in that regard, while I reiterate what I have said therein, I think it is reasonable to reduce the compensation so awarded by another sum of $5,000.00.

[38] Before concluding I wish to say and I do say that I am conscious that an appellate court should be slow in interfering with the exercise of the trial judge's discretion. In the instant case however, the learned trial Judge had dealt with the physiological impact of which there is no evidence at all.

[39] For the reasons articulated above I see reason to alter/change or reduce the amount of compensation awarded by the learned High Court Judge from $25,000.00 to $7,500.00.

[40] For the reasons I have stated I dismiss the appeal subject however that the amount of $25,000.00 ordered as compensation be reduced to F$7,500.00.

[41] In view of the above findings I answer the grounds of appeal as follows;

1) The finding of the Judge is correct and therefore stands.
2) not erred
3) not erred
4) not erred
5) Not relevant
6) not erred
7) not erred
8) not erred
9) not erred.
10) not erred
11) not erred
12) I too agree that the amount of $25,000.00 is harsh and excessive.
13) The learned Judge had the discretion of awarding damages without citing authorities.
14) The learned Judge has not erred

Guneratne, JA

[42] I agree that the appeal be dismissed and that the compensation be reduced to $7,500.00.

Orders of the Court: (by majority)

1) *Appeal dismissed.*
2) *Amount of compensation payable by the Appellant to the 1st Respondent is reduced to $7,500.00.*
3) *Appellant to pay $2,500.00 as costs to the 1st Respondent.*

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL