

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

CA Case No: CA 909 /97(F)
DC Embilipitiya Case No.3946/L

Ven. Thanamalvila Gunaratna Thero
Sri Kawantissa Raja Maha Viharaya
Pallegama, Embilipitiya.

PLAINTIFF

- Vs -

Sisira Wijesiriwardena
Monaraketiya Road
Pallegama
Embilipitiya.

DEFENDANT

AND

Ven. Thanamalvila Gunaratna Thero
Sri Kawantissa Raja Maha Viharaya
Pallegama, Embilipitiya.

SUBSTITUTED-PLAINTIFF-APPELLANT

- Vs -

Sisira Wijesiriwardena
Monaraketiya Road
Pallegama
Embilipitiya.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Ven. Thanamalvila Gunaratna Thero
Sri Kawantissa Raja Maha Viharaya
Pallegama, Embilipitiya.

SUBSTITUTED -PLAINTIFF-APPELLANT-PETITIONER

- Vs-

1. Bajjama Kankanamlage Wimalawathie
 2. Pradeepa Wijesiriwardena
 3. Dinusha Wijesiriwardena
 4. Danusha Wijesiriwardena
- All are of No.2209
"Sisira"
Kotalawala Handiya
Embilipitiya.

RESPONDENTS

Before: Janak De Silva J.

&

N. Bandula Karunarathna J.

Counsel: P.L. Gunawardena with K.C.Perera for the Substituted-Plaintiff-Appellant-Petitioner.

Argued on: 24/01/2020

Written Submissions: By the Substituted-Plaintiff-Appellant on 20.02.2020
By the Substituted-Defendant-Respondent (not Filed)

Judgment on: 25/11/2020.

N. Bandula Karunarathna J.

The Plaintiff –Appellant (hereinafter called and referred to as the Appellant) preferred this appeal against the Judgment dated 09.07.1997, of the Learned District Judge of Embilipitiya in Case No. L/3946.

The Defendant-Respondent (hereinafter called and referred to as the Defendant) died while this action was pending in the Court of Appeal. Substitution was done on the request of the Appellant but the heirs never appeared before this court even after the notices were properly served on them, through Registered Post as well as through the fiscal of Embilipitiya District Court.

The Plaintiff-Appellant Priest also passed away on 26.02.2002 and substitution was done. Thereafter the substituted- Plaintiff- Appellant too, was passed away on 31.07.2013 and again another substitution was effected for the second time.

The Plaintiff- Appellant (now deceased) had instituted action in the District Court of Embilipitiya by Plaint dated 25.03.1991 (later amended by the Amended Plaint dated 11.05.1994) seeking for;

- a. a Judgment in declaration of title to the property described in the Schedule to the said Plaint,
- b. ejectment of the Defendant therefrom
- c. damages in a sum of Rs.31,800/- at the rate of Rs.600- per month from January 1990, to the date of institution of the action

The Defendant had filed answer on 03.02.1992. The Learned Counsel for the Defendant had informed Court that he would not file an amended answer and would proceed on the answer already filed.

The Learned Trial Judge had taken up this case for trial on the following issues.

Plaintiff's Issues

1. Is the Plaintiff the Viharadhipathi (Chief Incumbent) of Sri, Kawantissa Raja Maha Vihara?
2. Has the said property governed under Section 4 (1) of the Buddhist Temporalities Ordinance?
3. Has the property mentioned in paragraph 4 of the Plaint been leased out to the Defendant?
4. Was the period of the said lease ended on 31.12.1989?
5. Does the Defendant remain in the said property forcibly from 01.01.1990?
6. (a) If the above issues are answered as "Yes" is the Plaintiff entitled to the relief claimed in the prayer to the Plaint?
(b) What is the amount of damaged recoverable to the Plaintiff?
7. Has the Defendant proved by his answer that he had claimed the property of the Plaintiff after having taken in the same, for a lease?
8. If the foregoing issues were answered as "Yes", whether the Plaintiff entitled to a Judgment for ejectment, notwithstanding other facts?

Defendant's Issues

9. Does the allotment of land presently occupied by the Defendant belong to the state?
10. What is the value of the improvements effected by the Defendant in the said property?
11. Does the Plaintiff priest have any right for this land?
12. If the aforesaid issues are answered in favor of the Defendant should the Plaint of the Plaintiff of the Plaintiff be dismissed?
13. Is the Defendant entitled for the relief claimed in his answer?

The Original Plaintiff was Ven. Thalawe Sumanathissa Thero of Sri Kawantissa Raja Maha Viharaya at Embilipitiya. At the trial the Plaintiff had given evidence on his own behalf, he had produced the Deed of Lease marked "P1" and stated that the said Lease was for a period of one year commencing from 01.01.1989 to 31.12.1989, the monthly lease rental being Rs.500/-. Although this amount was not disputed by the Defendant, the amount of lease rental mentioned in document "P1" was Rs.250/- per month.

Plaintiff had stated that the Defendant had failed to give back possession after the expiry of the said lease and was in occupation of the subject matter without making payments and prayed for the relief claimed in his Plaint.

The Counsel for the Defendant had cross examined the Plaintiff on the issue of ownership since a certain portion of the land belonging to the temple had been acquired by the Government. The Defendant's position was that he did not give back the possession to the temple since the said land was no longer the property of the Plaintiff

As opposed to this argument of the Plaintiff, the Defendant stated that on the issue of ownership, a certain portion of the land belonging to the temple had been acquired by the Government. The Defendant's position was that he did not give back the possession to the temple as it is now belonging to the government.

The Defendant had prayed for a dismissal of the action and alternatively prayed that, if the Court decided that the subject matter belongs to the temple, he likes to continue possession on a reasonable rent.

The Defendant had called W.P. Abeyratne, Land Acquisition Officer in Ratnapura to give evidence. He had stated in his evidence that the Defendant was residing in the subject matter of this case and indicated that the Priest was given compensation by the government for acquiring the temple property.

But under cross examination of this state witness, it was revealed that the compensation does not directly pay for the acquiring of this subject matter. Various other lands belong to the said Kawanthissa Raja Maha Viharaya at Embilipitiya were acquired by the government for some other purposes, including road widening project. Although the Compensation had been paid to the Plaintiff Priest, it is not clear whether it was paid for the same land in question. The evidence of the state witness cannot be considered as accurate. It was not proved by the Defendant that the compensation which was paid directly related to the subject matter of this case.

The Plaintiff argued that, on the admission of the fact that, the Defendant had taken the lease from the Plaintiff and that he is in occupation of the said leasehold land, it is sufficient to deliver the judgment in favor of the Plaintiff.

It was held in Ranasinghe Vs Premawardena 1985 (1) SLR 63 that, "It does not appear to me to be sound law to permit a Defendant to repudiate a contract and thereupon specifically to rely upon a statutory defence arising on the contract which he repudiates. How can a person who denies the tenancy be entitled to insist on a proper termination of the tenancy which, according to him, never existed? A Defendant cannot be allowed to deny the existence of the contract of tenancy and in the same breath claim the benefits of that contract; the doctrine of "approbate and reprobate" forbids this. It is only when the defendant admits "the contract that he can claim the benefits of the contract."

When the Defendant disclaims the tenancy pleaded by the Plaintiff he states definitely and unequivocally that there is no relationship of landlord and tenant between the Plaintiff and him to be protected.

The rationale of the above principle appears to be that a Defendant cannot approbate and reprobate. In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one, he cannot afterwards assert the other. He cannot affirm and disaffirm. Hence a Defendant who denies tenancy cannot consistently claim the benefit of the tenancy. For the protection to be invoked, the relationship of landlord and tenant, between the Plaintiff and him, should not be disputed by the Defendant

In Subramaniam Vs Padmanadan 1984 (1) SLR 252 decided that; "It recites the ownership by reference to the Deed of Transfer. No devolution of title has been pleaded. It recites the fact that the appellant declined to pay rents to the respondent and that the appellant by his conduct repudiated the contract of tenancy between himself and the Appellant and therefore was not entitled to any relief".

The Plaintiff introduces the case of Mary Beatrice and others Vs Seneviratna 1997 (1) SLR 197, where it was held that a Lessee is not entitled to dispute the title of the Lessor.

In Pathirana Vs. Jayawardena 58 NLR 169 His Lordship Justice Gratien stated that, "a decree for a declaration of title may of course, be obtained by way of additional relief either as a *Rei Vindicatio* action, which is in truth an action in *rem* or in a Lessor's action against his over holding tenant, which is an action in *personam*".

The rights of a Lessee under a duly Registered Lease have been protected under Sri Lankan Law, as it was held in Goonawardane Vs. Rajapakse 1 NLR 217. His Lordships the Chief Justice Bonser stated "In my opinion we ought to regard a notarial lease as a *pro tante* alienation, and we ought to give the Lessee, under such a lease, during his term, the legal remedies of an owner and possessor."

In Carron Vs. Fernando 35 NLR 352 the Supreme Court held "Every Lease which is executed before a Notary and is duly registered in Ceylon, is placed upon the same footing as the law in South Africa places a duly registered lease for more than ten years and every notarial attested lease is regarded as an alienation for the term of the lease as creating a real right as distinct from a purely personal right."

Thus, the Lease Agreements extending for lengthy periods, such as 10 years have been recognized as creating real rights during the period of continuance of the lease. However, the rights of a Lessee are conditioned upon the terms of the lease. Therefore, the obligations created by a lease are contractual in nature.

In Mary Beatrice and other Vs. Seneviratne (supra) in the District Court, the Lessee had died before filing the answer and the Substituted –Defendants had sought to claim prescriptive title. The Learned Trial Judge had disallowed their claim. In appeal it was held that the Defendant (Lessee) is not entitled to dispute the title of the Plaintiff (Lessor). It was held that, "a Lessee as already stated, is not entitled to dispute his Landlord's title and consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he himself is the rightful owner".

In Ruberu and Another Vs. Wijesooriya 1 SLR 58 court held that,

"whether it is a licensee or a Lessee, the question of title is foreign to a suit in ejectment against either".

As the Substituted Defendant Respondent was not interested to appear before this court and make submission, I went through the District Court case record, to identify the main points argued by the Defendant. It was the view of the Defendant that, when the landlord's title has

been superseded by title paramount, then the lessee has an advantage for his claim against the Plaintiff.

It was decided in Wahab Vs Jayah 1985(1) SLR 121 that, the Defendant can plead as an answer to landlord's claim for ejectment that, the landlord's title has been superseded by title paramount and therefore the tenant cannot be evicted.

This same principle was applied even in Tillekaratne Vs Cumarasingham 28 NLR 186.

As the facts are completely different in the present case, the Defendant cannot use the said principle to be applied for his benefit. Thus, eviction by title paramount does not apply in this case.

Whether it is a licensee or a lessee, the question of title is foreign to a unit in ejectment against either. The licensee (Defendant - Respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of the Plaintiff-Appellant without whose permission he would not have got it.

The effect of Section 116 of the Evidence Ordinance is that, if a licensee desires to challenge the title under which he is in occupation he must first quit the land. The fact that the licensee or the lessee obtained possession from the Plaintiff-Appellant is perforce an admission of the fact that the title resides in the Plaintiff.

On the admission of the Defendant that he had taken the lease from the Plaintiff and that he is in occupation of the said leasehold land, the Defendant Appellant is not entitled to dispute the title of the Plaintiff Respondent.

In the light of the above applicable law and considering the above-mentioned circumstances I set aside the Judgment of the Learned District judge dated 09.07.1997.

The Plaintiff is entitled to Judgment as prayed for. The Defendant Respondent will pay the costs of the Plaintiff in the District Court as well as in the Court of Appeal.

Appeal allowed

Judge of the Court of Appeal

Janak De Silva , J

I agree.

Judge of the Court of Appeal