GUNASINGHE
v
SAMARASUNDARA

COURT OF APPEAL.
DISSANAYAKE, J.
SOMAWANSA, J.
CA 246/95 (F).
DC KEGALLE 4059/L.
SEPTEMBER 11, 2002.
OCTOBER 17, 2002.
DECEMBER 10, 2002.
JULY 24, 2003

Leave and license – Is notice of termination necessary? – Evidence based on prescription – Permissibility? – validity – Landlord – tenant relationship sought – Change of scope of defence – Importance of issues – Civil Procedure Code – sections 41 and 545 – Applicability – Plea of estoppel – Evidence Ordinance section 116 – Scope of an action by a lessor against an overholding tenant Ingredients?

The petitioner-respondent instituted action seeking to evict the defendant-appellant, on the basis that the defendant-petitioner is an overholding tenant. The defendant-appellant in his answer took up the position, that he has prescribed to the land, but in evidence he testified to the fact that, there is landlord – tenant relationship between the parties. The defendant-petitioner also contended that section 41 and section 545 have not been complied with.

The trial Court held with the plaintiff.

Held:

(1) The defendant-appellant despite testifying in Court with regard to the existence of a landlord and tenant relationship, the answer and the issues are based on the legality of the plaintiff-respondent's action and the acquisition of prescriptive rights of ownership.

(2) The case enunciated by a party must reasonably accord with its pleadings. No party can be allowed to make at the trial a case materially different from that which he has placed on record and which his opponent is prepared to meet.

(3) Once issues are framed the case which the court has to hear and determine becomes crystallized in the issues and pleadings recede to the background.

Held further,

(4) The land that is featured in the schedule has been described by metes and bounds – there is sufficient compliance with section 41.

(5) The defendant-appellant has not elicited by cross examination of the plainfiff-respondent or by other means the value of the premises in suit, his failure to examine the plaintiff-respondent in detail on this matter has left it to be determined only by mere surmise and conjecture – the position that the plaintiff-respondent cannot maintain the action in view of section 545 is untenable.

(6) A licensee or a lessee is estopped from denying the title of the licensor or lessor. His duty in such a case is first to restore the property to the licensor or the lessor and then to litigate with him as to the ownership.

(7) While the licensee persists in conduct which is fundamentally inconsistent with a contract of tenancy or as in this case the contract of leave and license, it amounts to repudiation of tenancy and the occupier can be sued as a trespasser.

(8) The plaintiff-respondent in such instances, was entitled to institute action against the defendant-appellant without first giving notice of termination of the leave and license.

APPEAL from the District Court of Kegalle.

Cases referred to:

1. *Candappa v Ponnambalampillai* – Bar Journal Vol 5 - Part 2 - page 3.
2. *Hanaffi v Nallammah* – 1998 1 Sri LR 73.
3. *Pathirana v Jayasundera*– 58 NLR 169
4. *Alvar Pillai* v *Karuppan* – 4 NLR 321
5. *Mary Beatrice and others* v *Seneviratne* - 1991 1 Sri LR 97 at 202.
6. *Ruberu and Another* v *Wijesuriya* – 1998 1 Sri LR 58
7. *Gunasekera* v *Jinadasa* – 1996 2 Sri LR 115 (DB) SC
8. *Mansoor* v *Umma* – 1984 1 Sri LR 151.

Rohan Sahabandu for 1st defendant-appellant.

Nalinda Indatissa for plaintiff-respondent.

Cur. adv. vult.

October 10th, 2003.

DISSANAYAKE, J.

The plaintiff-respondent instituted this action seeking a declaration of title to the land morefully described in the schedule to the plaint, ejectment of the 1st defendant-appellant from the house thereon and damages.

The 1st defendant-appellant by his answer whilst denying the averments of the plaint, prayed for dismissal of the action.

The case proceeded to trial on 16 issues and at the conclusion of the trial, the learned District Judge by his Judgment dated 2nd of June 1995 granted the reliefs prayed for by the plaintiff-respondent.

It is from the aforesaid judgment that this appeal is preferred.

At the arguments of the appeal before this court, learned counsel appearing for the 1st defendant-appellant contended that the learned District Judge was in error when he entered judgment in favour of the plaintiff-respondent. The above contention of learned counsel for the 1st defendant-appellant was based on the grounds that the learned District Judge has misdirected himself when he failed to consider the following matters:-

a) the fact that no notice of termination of the leave and license granted by the 1st defendant-appellant by S.A. Charles Perera, the owner of the premises in suit, has been given.

b) failure on the part of plaintiff-respondent to identity the corpus with certainty;

c) to evaluate the evidence in the correct perspective;

The plaintiff-respondent presented his case at the District Court on the basis that M.M.R. Fernando who was the owner of the premises in suit, transferred the same to his father, S.A. Charles Perera by deed of sale bearing no. 4938 of 30.11.1946 (P1). On the death of his father S.A. Charles Perera on 10.02.1985 leaving property below administrable value the said premises devolved on his children, the plaintiff-respondent and the 2nd to 5th defendants-respondents.

The 1st defendant-appellant was in possession of the land as a licensee of the late S.A. Charles Perera, and was in possession of the old rubber plantation. Before the death of S.A. Charles Perera the father of the plaintiff-respondent was in possession of the land and was engaged in uprooting the old rubber trees.

Since the old plantation was in the process of being uprooted for the purpose of replanting, the hut that was used to manufacture sheet rubber, was temporally not being used by him.

On the 1st defendant-appellant making a request to allow him to occupy the said hut, free of rent for the purpose of making use of it as a tailor shop by him, until the next season when rubber was tapped to manufacture sheets, the 1st defendant-appellant undertook to restore possession to S.A. Charles Perera when it was required for processing of rubber.

S.A. Charles Perera had renovated the hut by thatching the roof with new cadjans and by cementing the floor. Letter P2 had been produced as proof of purchasing two cement bags for this purpose.

At the request of the 1st defendant-appellant, S.A. Charles Perera had handed over the said hut to the 1st defendant-appellant to occupy the said premises as a licencee free of rent.

After the death of S.A. Charles Perera the plaintiff-respondent entered into possession of the land and was engaged in replanting of the land with rubber.

The plaintiff-respondent had requested the 1st defendant-appellant to hand over the hut that had been converted into a residence and tailoring shop of the defendant-appellant. This was refused by the 1st defendant-appellant. The 1st defendant-appellant had further made an application to the Kegalle Rent Board (P4) for the purpose of determination of the rent, to effect repairs and to deposit the rent at Galigamuwa Rent Board, without success.

Since then, the 1st defendant-appellant had been disputing the title of the plaintiff-respondent and the 2nd to 5th defendant-respondents.

The 1st defendant-appellant's position was that he had constructed a house, after spending about Rs. 29000/=. He had

rented out the said premises from S.A. Charles Perera on document VI at a monthly rental of Rs. 5/- This rent had been paid regularly to S.A. Charles Perera. However after his demise, the plaintiff-respondent had refused to accept the rent and had sought his eviction. His statement made to the Kegalle Police Station was marked V3.

It is interesting to note that the defendant-appellant despite testifying in Court with regard to an existence of a landlord and tenant relationship, the answer filed by the defendant-appellant and issues framed by him are based on the legality of the plaintiff-respondent's action and the acquisition of prescriptive rights of ownership in respect of the premises in suit.

It is pertinent to observe that a case enunciated by a party must reasonably accord with its pleadings. No party can be allowed to make at the trial a case materially different from that which he has placed on record and which his opponent is prepared to meet. *Candappa* v *Ponnambalampillai.*(1)

Further it is settled law that once issues are framed the case which the Court has to hear and determine becomes crystallized in the issues and the pleadings recede to the background. *Hanaffi* v *Nallamma.*(2)

Therefore the District Court was obliged to decide on the matters that were put in issue by the parties.

The 1st defendant-appellant's issues have been based on the question of maintainability of the plaintiff-respondent's action, in view of the provisions of section 41 and 545 of the Civil Procedure Code. Therefore it has become necessary to examine the provisions of section 41 and section 545 of the Civil Procedure Code.

I set down below section 41 of the Civil Procedure Code.

Section 41

When the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds or by

reference to a sufficient sketch, map or plan to be appended to the plaint, and not by name only.

It is to be observed that the plaintiff-respondent had averred in paragraph 4 of the plaint, that the 1st defendant-appellant had with the leave and license of the father of the plaintiff-respondent been living in the house that is situated in the land described in the schedule to the plaint. The land that is featured in the schedule has been described by metes and bounds. Therefore it is manifest that there is sufficient compliance of section 41 of the Civil Procedure Code.

Let me now examine the question whether there is a breach of section 545 of the Civil Procedure Code. I set down section 545 of the Civil Procedure Code.

Section 545

No person shall -

a) maintain any action for the recovery of any property, or

b) effect transfer of any property,

movable or immovable, in Sri Lanka belonging to, or included in, the estate or effects of any person dying testate or intestate in or out of Sri Lanka within twenty years prior to the institution of action or the effecting of the transfer, unless grant of probate has been issued in the case of a person dying testate or letters of administration or certificates of heirship have been issued, in the case of a person dying intestate and leaving an estate amounting to, or exceeding, five hundred thousand rupees in value.

S. A. Charles Perera died on 10.02.1985 according to his death certificate produced marked P2. Therefore under section 545 of the Civil Procedure Code before the present amendment, estate of a deceased person which was valued more than Rs. 20000/- was required to be administered.

It is to be observed that according to the testimony of the plaintiff-respondent the premises in suit which is 3 acres and 2 roods in extent was purchased by his father on deed P1 for a consideration of Rs. 6000/- in 1946. Apart from this property he had owned a house in Kegalle.

The plaintiff-respondent had asserted that his father died leaving property below administrable value.

The 1st defendant-appellant who raised issue No. 12 on section 545 of the Civil Procedure Code has not elicited by cross examination of the plaintiff-respondent or by other means, the value of the premises in suit in 1985. He has also failed to cross-examine the plaintiff-respondent, in order to ascertain the nature of the house whether it is a small house or a palatial house that S. A. Perera allegedly owned in Kegalle, with a view to arriving at it's value in 1985. The 1st defendant-appellant's failure to examine the plaintiff-respondent in detail on this matter has left it to be determined only by mere surmise and conjecture. Since it was the 1st defendant-appellant who had raised issue No. 12 based on section 545, the burden was fairly and squarely on him to have established that S. A. Charles Perera when he died was in possession of property worth more than Rs. 20000/-.

Therefore, the contention that the plaintiff-respondent cannot have and maintain the action in view of the provisions of section 41 and 545 of the Civil Procedure Code, is untenable.

Be that, as it may, there is another important rule of law based on estoppel applicable to cases of this nature, in which licensor and licensee relationship occur.

This principle of estoppel is recognized by our law in section 116 of the Evidence Ordinance, which has provided that a licensee or a lessee is estopped from denying the title of the licensor or the lessor.

In *Pathirana* .v *Jayasundara*[3] Graetien, J. explained this principle at 173 as follows:-

"The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however is different. Privity of contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title, until he has first restored the property in fulfillment of his contractual obligation. The lessee (conductor) cannot plead the *exceptio*

dominic; although he may be able to prove easily his ownership, but he must by all means first surrender his possession and then litigate as to proprietorship....." Voet 19.2.32.

The legal position as stated vide Voet's Commentary on the Pandects translated by Percival Gane, Volume 3 Book 19.2.32, "Lessee cannot dispute lessors title though a third party can – Nor can the setting up of an exception of ownership by the lessee stay the restoration of the property leased even though perhaps the proof of ownership would be case for the lessee. He ought in every event give back the possession first and then litigate about the proprietorship.".

In the case of *Alvar Pillai* v *Karuppan* (4) where, the defendant was given a land on a non-notarially attested document Bonser, C. J., observed at 322, "It is not necessary for the purpose of this case, to state the devolution of the title, for even though the ownership of one half of this land was in the defendant, himself, it would seem that by our law, having been let into possession of the whole by the plaintiff, it is not open to him to refuse to give up possession to his lessor at the expiration of the lease. He must first give up possession and then it will be open to him to litigate about the ownership."

In the case of *Mary Beatrice and others* v *Seneviratne* (5) at 202, Senanayake, J. has observed "It is opportune at this moment to quote Maasdorp, Institutes of Cape Law 4 Edition Volume 3, page 248, "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 is himself the rightful owner of the same. His duty in such a case is first to restore the property to the lessor and then to litigate with him as to the ownership." Also Vide *Ruberu and another* v *Wijesuriya.*(6)

Applying the above principles I am of the view that in any event the 1st defendant-appellant cannot dispute the title of the plaintiff-respondent and if he so desires to dispute the title of the plaintiff-respondent he must first quit the land and then dispute the proprietorship of the land.

Therefore the 1st defendant-appellant cannot take the legal

issues provided for in section 41 and 545 of the Civil Procedure Code, against the plaintiff-respondent who is the heir of his licensor.

It is significant to observe that issues No. 15 and 16 have been raised by the 1st defendant-appellant on the question whether the plaintiff-respondent had established due cancellation of the leave and license given to the 1st defendant-appellant.

It was revealed in the testimony of the plaintiff-respondent that the 1st defendant-appellant was requested by the plaintiff-respondent to hand over the premises in suit, which had been refused by him.

The 1st defendant-appellant has denied the license of the plaintiff-respondent by claiming prescriptive title to the land in suit. In such a situation where the licensee persists in conduct which is fundamentally inconsistent with a contract of tenancy or as in this case the contract of leave and license, it amounts to a repudiation of tenancy and the occupier can be sued as a trespasser *Gunasekera* v *Jinadasa*(7) (5 Judge Bench) Vide also *Mansoor* v *Umma.*(8)

Thus it is pertinent to observe that the plaintiff-respondent was entitled to institute this action against the 1st defendant-appellant without first giving notice of termination of the leave and license.

The 1st defendant-appellant in his answer had not disputed the identity of the corpus. In paragraph 6 of the answer he had conceded the identity of the corpus and had averred that he had been in possession of the corpus for the last 26 years.

The 1st defendant-appellant had not framed any issue disputing the identity of the corpus. As a matter of fact by issue No. 9 the 1st defendant-appellant had conceded the identity of the land as "Monpolapiliya Watta" and had stated that at one stage S.A. Charles Perera, who is the father of the plaintiff-respondent and the 2nd to 5th defendant-respondents was it's owner.

Therefore I am of the view that the arguments of learned counsel appearing for the 1st defendant-appellant to the effect that the identity of the corpus had not been established cannot hold water.

The learned District Judge had after evaluation and analysis of the evidence and considering the legal principles involved had rightly entered judgment in favour of the plaintiff-respondent.

I am of the view that there is no ground for this Court to interfere with the Judgment of the learned District Judge. The 250
appeal of the 1st defendant-appellant is dismissed with costs fixed at Rs. 5000/-.

SOMAWANSA, J. – I agree.

Appeal dismissed.