SENANAYAKE

v.

DAMUNUPOLA

SUPREME COURT
SHARVANANDA, J., RATWATTE, J., AND VICTOR PERERA, J.
S.C. 10/82.
C.A. 2160/79.
AUGUST 8, 1982.

Writ of Certiorari – State Lands (Recovery of Possession) Act 7 of 1979, sections 3(1), 9 – Land Survey Ordinance, section 6 – Crown Lands Encroachment Ordinance, section 2, 7(c).

The petitioner was the owner of premises No.23/8 Pansalawatta Mulgampola Road, Kandy, having inherited the property from one Reeves who owned and possessed the property by virtue of a Deed of Transfer No.369 of 19.5.1908.

A small portion of land in extent 4 perches and bearing Lot No. 8104 in Plan No. PP 2544 by the Surveyor-General appears to have belonged to the State.

Two neighbours complained to the Government Agent who was the competent authority under the State Lands (Recovery of Possession) Act No. 7 of 1979 that the petitioner had encroached on the land by building on it.

The respondent issued notice on the petitioner requiring him to quit. The petitioner applied for a Writ of Certiorari to the Court of Appeal, which they refused. On appeal to the Supreme Court –

Held –

That the State Lands (Recovery of Possession) Act was not meant to obtain possession of land which the State had lost possession of by encroachment or ouster for a considerable period of time by ejecting a person in such possession. Section 3 should not be used by a competent authority to eject a person who has been found by him to be in possession of a land where there is doubt whether the State had title or where the possessor relies on a long period of possession.

Case referred to:

(1) *Kiri Mudiyanse v. Attorney General (1947) 48 N.L.R. 438*

APPEAL from judgment of the Court of Appeal.—

Faiz Mustapha for the appellant.

Douglas Premaratne, D.S.G., for the respondent.

Cur.adv.vult.

September 21, 1982.

VICTOR PERERA, J.

The appellant in this case had filed an application on the 31st December 1979 in the Court of Appeal for a Mandate in the nature of a Writ of Certiorari to quash a Notice dated 29th November 1979 issued by the Government Agent, Kandy, the respondent, purporting to act as the Competent Authority under section 3(1) of the State Lands (Recovery of Possession) Act No.7 of 1979 requiring the appellant to quit an extent of land in extent 4 perches described in the Schedule to the Notice on or before the 31st December 1979. The Court of Appeal by its order dated 12. 2. 1982 refused to issue the Writ and ordered the appellant to pay costs to the respondent.

The appellant having obtained leave from the Court of Appeal has preferred this appeal to this Court against the said order.

At the hearing before us, it was submitted on behalf of the appellant that the extent of land covered by the notice to quit included part of his residential house and land called Pansalwatte bearing assessment No. 23/8, Mulgampola Road, Kandy. It was his case that the said portion was part and parcel of a land called Pansalwatte at one time owned and possessed by one M.H. Reeves by right of purchase on Deed No. 369 dated 19th May 1908, that he had succeeded to the interests of the said M.H. Reeves by inheritance and that he had been living in the house on that land from the date of his birth (10th March 1924). He produced with his application the original of a Plan dated 14th March 1912 made by R. Spencer, Licensed Surveyor (P1) in which the house that existed on that date is depicted. He also produced the original of a Plan No. 1288 dated 1st September 1940 made by J.C.S. Misso, Licensed Surveyor, (P2) for the same land called Pansalwatte in which is depicted the said house with the extensions made thereafter. He also produced the original of a Plan No. 1951 dated 31st May 1967 (P3) which shows the same land and building. In his application he has pleaded that he had obtained the requisite approval under the provisions of the Housing and Town Improvement Ordinance and effected the necessary additions and renovations to the building. He alleged that though he and his predecessors in title had possessed the same for over 65 years this Notice had been issued on him at the instance of the adjoining owners who had brought pressure on the Government Agent and not in furtherance of any specific requirement of the State.

The respondent has filed an affidavit dated 12th June 1980 in opposition to this application. He admitted that in or about 1971 complaints had been received by the then Government Agent from L.B. Kalugamana and E.S. Reeves that the petitioner *had encroached upon State land* and had erected buildings thereon. This was evidenced by a letter sent by them to the then Government Agent dated 2nd November 1971 (R2). The contents of that letter support the claim of the appellant that he had constructed the house with the permission obtained from the Municipal Council, Kandy. It is therefore evident that the inquiry was initiated on the receipt of this letter and that the Government Agent took steps to ascertain whether State land had been encroached upon. The Government Agent referred this letter to a Kachcheri Surveyor and the latter had submitted a report dated 6.01.72 (R3) and a Sketch (R4). According to his Report he

has stated that Lot 8104 in P.P. 2544 was a Crown land in the possession of M.B. Senanayake the appellant and that *it appeared that the house had encroached upon* the land and that a retaining wall too had been built on this land. The sketch shows the location of the house, the parapet wall and a stream. He had also superimposed on Plan No. 2147 filed in the District Court case No. 737, Kandy, the reference to that Plan being suggestive of some litigation in the District Court of Kandy. The Divisional Revenue Officer too had made a report dated 8.02.72 (R5). This Report purports to state that Lot 8104 in P.P. 2544 was a *reservation for a public road,* that M.B. Senanayake the present appellant had put up a large house consisting of three rooms 10 feet by 8 feet and a retaining wall 5 feet high, 1 foot wide and 20 feet long with the approval of the Municipal Council, Kandy. It would appear from the document (R6) that the Government Agent had informed the appellant that *he had encroached upon this land* and called upon him to vacate the same within a month as far back as January 1972.

Thereafter this matter had been in abeyance for nearly 5 years. In 1977 a surveyor from the Survey General's Department had made a Plan No.1614 dated 26.01.77 (R7) showing the location of the building occupied by the appellant according to the information supplied to him by the Grama Sevaka of the area. He had not surveyed the entire land claimed by the appellant but had shown a portion of Lot 8104 in his Plan in dotted lines. In a tenement list attached to this Plan (R8) he described the land as Pansalwatta being premises No. 23/8, Mulgampola Road, containing part of a permanent building, with a note in the remarks column 'to be vested in the Municipal Council.' This was followed up by a letter dated 26.07.78 (R6) from the respondent which reads as follows:-

> "Lot 8104 in Plan bearing No.P.P. 2544 is a Crown Land. *The Mulgampola Road runs over this land.* According to inquiries it has been revealed that you have constructed a retaining wall with a view to construct a house across this land thereby obstructing this road.
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> In this regard I have notified you by my letter L/7/1/1925 dated 12.01.72 to hand over peaceful possession of the land within a calendar month of my letter but you have failed to do so.
>
> In these circumstances, you are hereby informed again to remove all the improvements you have effected on the land to peacefully hand over the land within one month. Should you fail to hand over this land to the State, legal action will be taken against you."

It is quite clear from all the documents produced that the Mulgampola Road does not run over the land, that no road had been in fact obstructed and that there is no road reservation. The Government Agent took no action in regard to this complaint of encroachment on a land claimed to be State land.

The respondent also relied on and produced a copy of Preliminary Plan No. 2544 dated 10th November 1880 made by the Surveyor General (R1). It shows 15 allotments of land bearing serial Nos. 8091 - 8106. There is no statement in this Plan that these lots formed parts of any road reservation or that it was land that belonged to the Crown at that date. No Tenement Sheet or Gazette showing that these lands were road reservations or State land have been produced.

The Plan (R) purports to have been signed by the Surveyor General but on the plan apart from the numbers given to each lot, there is no entry made in regard to any other fact. The provisions of section 6 of the Land Survey Ordinance (Chap. 316) are as follows:-

> "(6) If any Plan or survey offered in evidence in any suit shall purport to be signed by the Survey-General or officer acting on his behalf, such Plan or survey shall be received in evidence and may be taken to be prima facie proof of the facts exhibited therein, and it shall not be necessary to prove that it was in fact signed by the Survey General or Officer acting on his behalf, nor that it was made by his authority, nor that the same is accurate, until evidence to the contrary shall have first been given."

The Plan would be prima facie proof of the facts established therein and nothing more. This is as clearly set out in the judgment of the Supreme Court in *Kiri Mudiyanse vs. The Attorney-General* (1). At the argument before us the Deputy Solicitor General frankly conceded that this document did not prove or establish that the lots including lot 8014 now in dispute were road reservations or lands belonging to the State.

However, on a closer examination of this Plan (R1) there are endorsements made against all the lots except Lot 8014 that they had been sold from time to time between 1888 and 1895. This Plan was produced from the respondent's custody and these entries must be presumed to have been officially made. It has to be noted also that in particular lots 8105 and 8106 which adjoin lot 8104 on the South-East and lot 8103 which adjoins Lot 8104 on the North-East had been sold. The fact that all the lots except Lot 8014 had been

sold at the time those entries were made indicated that all the lots shown in Plan (R1) were not road reservations. There is no indication in any of the Plans produced that the Mulgampola Road passes through this land or that any road had been obstructed.

In the light of the above facts it is quite clear that this action by the respondent initiated as a sequel to the letter sent by E.S. Reeves and others on 2nd November 1971 (R2) was not for any State purpose. The observations of the Kachcheri Surveyor and the Divisional Revenue Officer and the contents of the letters of the Government Agent dated 27.06.78 (R3 -R8) do not conclusively establish that the land belonged to the State. There is a serious doubt whether the said land belonged to the State or whether it had vested in the Municipal Council of Kandy by virtue of section 35 of the Municipal Councils Ordinance (Chap. 252). To be regarded as a road reservation the requirements in section 55 of the Crown Lands Ordinance (Chap. 454) have to be established, and in the absence of the proof of such the respondent's assertion that this was a road reservation does not merit consideration.

However, the inquiries by the respondent in regard to the complaint made by his predecessor in office or by him had been concluded in 1978. The inquiries disclosed that the appellant *had encroached upon the land* that was thought to be State land. A decision had been taken to take legal action against the appellant in respect of the alleged encroachment. There was nothing to indicate that the appellant had at any time been permitted or authorised to occupy this land. If anything the inquiries revealed an alleged encroachment of State land.

The Crown Lands Encroachments Ordinance (Chap. 465) as amended by Act No. 7 of 1954 has clearly provided for situations of this nature. Section 2 provided that where there is an alleged encroachment of land where persons who having entered upon or taken possession of land which belong to the Crown or which prior to entry or taking possession, was in the possession of the Crown, information of such encroachment could be laid before the District Court. The District Court if satisfied that the persons against whom the information had been laid had *entered upon or taken possession of the land without the permission of the Government*, could make an order for delivery of possession. This Ordinance has provided a very summary or speedy procedure to eject such persons. However, section 7(c) of this Ordinance permitted the rebuttal of the presumption that the land belongs to the State on proof inter alia of uninterrupted possession

for not less than 30 years. The State had not chosen to proceed under this Ordinance to obtain a summary order from the District Court for delivery of possession of the land on the basis that the land belonged to the State and had been encroached upon. The respondent had decided to proceed under the newly enacted State Lands (Recovery of Possession) Act No. 7 of 1979 without considering its applicability or otherwise to the facts established at the end of his inquiries.

The State Lands (Recovery of Possession) Act No. 7 of 1979 came into force on 25th January 1979. It was amended by Act No. 58 of 1981. This Act has not repealed the Crown Lands Encroachment Ordinance (Chap.465). It was enacted to make provision for the recovery of possesion of "State lands" as defined in the Act from persons in *unauthorised possession or occupation* thereof and matters connected therewith or incidental thereto. It is clear that this Act was intended to obtain an order of ejectment from the Magistrate's Court where the *occupation or possession was unauthorised.* Where a person is authorised to occupy or possess State Land which includes buildings, and where the authorisation has come to an end or has ceased to be of any force or effect, his occupation or possession becomes unauthorised. This position is made clear by section 9 which provides for the scope of the inquiry before the Magistrate and the only plea a person summoned could urge in defence:

> "9(1) At such inquiry the person on whom summons under section 6 has been served shall not be entitled to contest any of the matters stated in the application under section 5 except that such person *may establish that he is in possession or occupation of the land upon a valid permit or other written authority of the State* granted in accordance with any written law and that such permit or authority is in force and not revoked or otherwise rendered invalid.
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> (2) It shall not be competent to the Magistrate's Court to call for any evidence from the competent authority in support of the application under section 5".

It is therefore necessary to examine the provisions of section 3 to determine under what circumstances a competent authority could serve a quit notice. It provides that when a *competent authority is of opinion that any person is in unauthorised possession or occupation* of State land he may serve a notice. The opinion to be formed is not whether the property is "State land", but whether the occupation or possession of such "State land" as defined in the Act is

"State land" has been defined in the Act as *'land to which the State is lawfully entitled or which may be disposed of by the State together with any buildings.* A Competent Authority could form such an opinion of such unauthorised possession or occupation on the basis that an antecedent valid permit or written authority given had ceased or had deemed to have ceased to be in force or had been revoked. The Act No.7 of 1979 as amended by Act No.58 of 1981 was intended to recover or to get back the possession or occupation of such State land by initiating action under section 3. A purposive examination and interpretation of this Law shows that it was enacted to get back possession of State land which had been given to a person on a contractual footing and where there was an obligation to vacate and give up possession or occupation on the happening of some event as a necessary consequence. This procedure could not be availed of where it is not clear that the land in respect of which the right or title of the State was doubtful or in dispute. The provisions of sections 12 and 13 no doubt provide that an action in vindication or compensation could be filed against the State by a person ejected claiming to be the owner thereof. But this does not mean that the State could act under this law in the circumstances such as have been established in this case. The provisions of section 17 of this Act have protected the rights of the State as follows:-

> "Provided that this Act shall not prejudice the State to proceed under the provisions of any other law to *recover possession* of any State land or to *establish title* thereto or to claim any relief in respect of such land."

The Court of Appeal was in error in taking the view that under the Act No 7 of 1979 what a Competent Authority was required to do under section 3(1) *was merely to form an opinion that the land is State land,* that once it forms that opinion it is his duty to take necessary steps under the Act to have a person in 'unauthorised occupation' ejected and to recover possession. Having formed this view the Court of Appeal came to the erroneous finding that the respondent was justified in the course of action he had adopted.

The scope of the State Land (Recovery Possession) Act was to provide a speedy or summary mode of getting back possession or occupation of 'State land' as defined in the Act, where there was not subsisting at the relevant date, in the opinion of the Competent Authority, a valid permit or authority. It was not meant to obtain possession of land which the State had lost possession of by encroachment

or ouster for a considerable period of time by ejecting a person in such possession. Section 3 of this Law should not be used by a Competent Authority to eject a person who has been found by him to be in possession of a land in circumstances such as have transpired in this case.

I therefore set aside the order of the Court of Appeal and direct that the Writ applied for be issued. The appellant will be entitled to costs in this Court and in the Court of Appeal.

SHARVANANDA, J. — I agree.
RATWATTE, J. — I agree.

Appeal allowed.