EDIRISINGHE
v.
CHARLIS SINGHO

COURT OF APPEAL
HECTOR YAPA, J. (P/CA)
U. DE Z. GUNAWARDANE, J.
CA PHC 13/94
HC KEGALLA 184/90
18TH JUNE, 1999

Agrarian Services Act 58 of 1979 - S.5(6) - Eviction - Restoration of a person who had surrendered tenancy Rights - Ultra vires - Waiver or abandonment of tenancy - Surrender of Rights - Doctrine of Estoppel.

The Commissioner after Inquiry, directed that the Respondent, who claimed to be the tenant cultivator be restored to possession on the basis that he had been evicted by the Appellant who became the owner of the field under Deed No. 2469. This Order was affirmed by the High Court. On Appeal.

Held :

(i) The Deed shows unmistakably that the sale of the land was not subject to any ande rights; but the ande rights have been transferred to the Appellant.

(ii) From the conduct of the Respondent (tenant) in consenting to be an attesting witness to such a transaction which purports to transfer ande rights, active assent on the part of the Respondent to the waiver or surrender of his rights may be inferred.

(iii) As the Respondent was the one who acted as the intermediary an inference that there was a waiver or abandonment of tenancy rights, if not a surrender of such rights by the Respondent is irresistible in the light of the fact that the Respondent had acquiesced in the act of the previous owner of selling the land with the tenancy rights.

(iv) It is reasonable to assume that the Respondent consented to be a signatory to the deed, as an attesting witness, as a manifestation of the willingness to sell the land to the Petitioner free of ande rights;

(v) Eviction cannot take place subsequent to a surrender of the right to persons. The Commissioner in ordering the restoration of the

Respondent had acted without legal power to do so. Prior surrender negates an eviction.

Per Gunawardena, J.

> "Surrender would be the act of law and would prevail inspite of the intention of parties. Surrender occurs by operation of law, when parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the Surrender is made.

(ii) Surrender differs from abandonment. Abandonment of rights is simply an act on the part of a lessee/tenant. Surrender is a contractual act and occurs by mutual consent.

Surrender must be reflected in a consensual act where as abandonment is a unilateral act on the part of the tenant.

(iii) The act of the Respondent (tenant - signing such a deed) (as an attesting witness) is tantamount to a representation or holding out by the Respondent, that the Appellant obtains title free from tenancy rights which works an estoppel as against the Respondent (tenant).

APPEAL from the Provincial High Court of Kegalle.

Cases referred to :

1. *R v. Fulham Rent Tribunal* (1950) 2 All ER 211
2. *Appuhamy and another v. Menike and others* (2000) 2 SLR 40
3. *Lyon v. Reed* (1844) 13 M & W 285
4. *Foster v. Robinson* (1950) 2 All ER 341

Raja Bandaranayake for the Appellant.

J.C. Boange for Respondent.

Cur. adv. vult.

November 16, 2000.

U. DE Z. GUNAWARDENA, J.

This is an appeal from an order made by the High Court, Kegalle, on 30. 10. 1992 dismissing an appeal against an order dated 26. 10. 1990 made by the Commissioner of Agrarian Services directing that the respondent, who claims to be the tenant-cultivator in respect of the paddy field in question viz. Muttetuwe Kumbura be restored to possession on the basis that he had been evicted by the Appellant who is admittedly the

owner thereof - the appellant having purchased the same on deed No. 2469 dated 16. 07. 1988.

The learned Counsel for the respondent had pointed out in his written submissions that there being a reference to the tenancy rights in the aforesaid deed (Whereby the appellant became the owner of the land in question) it is not open to the appellant who is the owner of the land in question to contend that he (the appellant) purchased the land free from tenancy rights. But, in the circumstances of this case, that submission has somewhat recoiled on its propounder. It is not clear from the said deed as to who the tenant had been. But the deed (No. 2469) places one matter beyond controversy, that is, that the land had been sold not subject to, but with the tenancy rights, if that were possible in law. To quote the relevant excerpt from the deed : . . .

" වී ලාස් අටක වපසරිය ඇති කුඹුර සහ ඊට අයිති සියලු දේ අඳ අයිතියක් සමග වේ."

What calls for special remark in this regard is the fact that the respondent who claims to be the tenant had been one of the attesting witnesses to the execution of the deed of transfer in favour of the appellant. The deed shows unmistakably that the sale of the land was not subject to any Ande rights, as contended by the learned Counsel for the respondent (tenant), but that Ande rights had also been transferred to the appellant. I do not think that it is possible in law to transfer Ande rights in that manner, but from the conduct of the respondent in consenting to be an attesting witness to such a transaction, whereby or which purports to transfer Ande rights, active assent on the part of the respondent to the waiver or surrender of his rights (assuming that he was, in fact, a tenant cultivator prior to the date of the sale) may legitimately be inferred. It is also not without significance that it was the respondent who acted as the intermediary or the broker between the appellant and the former owner in the matter of the sale of the land in question to the appellant. In the

circumstances an inference that there was a waiver or abandonment of tenancy rights if not a surrender of such rights by the respondent (assuming that the respondent was a tenant under the previous owner) is almost irresistible in the light of the fact that the respondent had acquiesced in the act of the previous owner, of selling the land with the tenancy rights - an act of which the respondent had knowledge, but to which he made no demur - so to say. On the contrary by signing the deed of transfer as a witness, as explained above, the respondent had formally consented to such a transfer and given his imprimatur to the transaction, so to speak, that is, a transfer of his rights as well, which in the circumstances would constitute evidence of abandonment or waiver or surrender of tenancy rights - if, in fact, the respondent had been a tenant previously. I think it would be more correct to say that there was a surrender, regarding which aspect more will be said later on.

As the respondent ought to be held to have parted with or surrendered his Ande rights, of his own free will, if, in fact, he had any, it is illogical to conclude that he was ousted on 11. 04. 1990, as alleged by the respondent - a date which is nine months subsequent to the date of the executing of the deed of transfer (of ownership of the relevant land) in favour of the appellant. For the respondent to be ousted on 11. 04. 1990 - he should have continued to exercise Ande rights even after he surrendered them - a conclusion which would be unwarranted and unrealistic in that it would not be marked by good practical sense in everyday matters. It is reasonable to assume that the respondent consented to be a signatory to the deed (as an attesting witness) as a manifestation of his willingness to sell the land to the petitioner free of Ande - rights which Ande rights the respondent now claims. That the respondent did not exercise Ande rights, after he surrendered such rights, to which his signing of the aforesaid deed on 16. 07. 1988 as an attesting witness almost un-erringly points, is vindicated, in some degree, also by the fact that the respondent's name does not appear as a tenant cultivator in

the cultivation committee register in respect of the years 1988 and 1989. It is impossible to establish an ouster or eviction on 11. 04. 1990, as alleged by the respondent when, in fact, the evidence strongly, if not conclusively, suggests the inference that the respondent had surrendered Ande rights if, in fact, he had had any such rights, prior to 16. 07. 1988 - that being the date of the purchase of the land by the appellant, on the aforesaid deed to which deed of transfer the respondent had been a signatory and by which deed the appellant had bought, or rather purported to buy, the land free from Ande rights.

THE CRUCIAL AND DECISIVE QUESTION ARISING IN THIS CASE IS NOT SO MUCH AS TO WHETHER THE ACT OF THE RESPONDENT IN SIGNING THE DEED OF TRANSFER (IN FAVOUR OF THE APPELLANT) WHEREBY THE PREVIOUS OWNER HAD PURPORTED TO SELL THE LAND FREE FROM ANDE RIGHTS HAD WORKED A FORFEITURE OF THE TENANCY RIGHTS, IF ANY, OF THE RESPONDENT, BUT WHETHER IT COULD RATIONALLY BE THOUGHT THAT THE RESPONDENT CONTINUED TO BE IN POSSESSION OF THE ANDE RIGHTS NOTWITHSTANDING THE RELINQUISHMENT OF SUCH RIGHTS AS EVIDENCED BY THE ACQUIESCENCE, IF NOT, THE CONSENT OF THE RESPONDENT TO SUCH TRANSFER (OF ANDE RIGHTS) ON 16. 07. 1988 as evidenced by the respondent's signing the deed of transfer, as explained above. It is on that date, that is, on 16. 07. 1988 that the deed purporting to transfer Ande rights was executed. And it is on that date, therefore, that the relinquishment or surrender by the respondent of Ande rights must be held to have occurred. But as the ouster complained of by the respondent had taken place allegedly on a very much later date i.e. on 11. 04. 1990, it is difficult, if not, impossible to say that the respondent had been wrongfully dispossessed, which is what eviction means, in the context, when, in fact, he had surrendered his rights previously i.e. on 16. 07. 1988.

It is only if it had been established that the respondent (tenant) had been evicted by the landlord that the

Commissioner could, under Section 5 of the Agrarian Services Act, have ordered that the respondent be restored to possession and not otherwise. It is regrettable that neither the Commissioner, nor the High Court Judge, nor the learned Counsel who argued the matter before us, most laboriously, had appreciated or had been even conscious of the overwhelming significance of this fact i.e. that an eviction cannot take place, in point of time, subsequent to a surrender of the right to possess - this case is being a singular example of such relinquishment or handing over of the right.

The main ground on which the learned High Court Judge, Kegalle, had dismissed the appeal against the order of the Commissioner of Agrarian Services seems to be that the appeal to the High Court was not on a question of law. It is true that in terms of Section 5(6) of the Agrarian Services Act. No. 58 of 1979 an appeal against an order made by the Commissioner, either restoring to possession or refusing such restoration of the tenant, is appealable solely on a question of law. The learned High Court Judge had been of the view that finding by the Commissioner that the respondent was tenant - cultivator and the consequent order restoring the respondent to possession on that footing was one based on a factual basis. Both the learned High Court Judge and the Commissioner had made an error with respect to the precondition to the exercise of the power to restore a tenant - precondition, being, as explained above, eviction by the landlord. For the Commissioner to exercise the power of restoration, as he had, in fact, done in this case, the precedent fact of eviction of the tenant by the landlord must exist or must be proved. This aspect or question had been wholly overlooked or glossed over, both by the learned High Court Judge and by the Commissioner - for both of them had been wholly impervious to the overwhelming significance of the fact that the respondent had signed the deed of transfer (in favour of the Appellant) thereby evincing his willingness to part with or surrender his rights of tenancy - if, in fact, he had had any. The learned High Court Judge had failed to appreciate that the

legislature had conferred the decision - making power on the Commissioner on the basis, or assumption that such power would be exercised on the correct legal basis. As I myself had explained, quoting Lord Goddard C.J., in my judgment in another case i.e. C.A. 14/99 : "if a certain state of facts has to exist before an inferior tribunal have jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them."

The Commissioner in ordering the restoration of the respondent to possession had clearly acted without the legal power to do so. The Commissioner would have had the legal power to restore a tenant to possession only if there had been a dispossession by the landlord. The ground for this is the ultra vires doctrine, for the Parliament had never intended to confer on the Commissioner a power to reinstate a tenant who had NOT been evicted and who had on his own surrendered possession. In order for the power of restoration to be exercised by the Commissioner there must be a factual precondition, which is: that the tenant ought to have suffered eviction. The Commissioner made a serious error in regard to that precondition and thereby acted without jurisdiction. This is a classic example of a case where the Commissioner had acted ultra vires, that is, without statutory backing. But the error that both the Commissioner and the learned High Court Judge made was with respect to a precondition to the exercise of the power - precondition, as explained above, being that there should have been an eviction of the respondent (tenant). It is the error that the Commissioner made with respect to that precondition (viz. eviction) to the exercise of power (of restoration) that had led to Commissioner acting without jurisdiction in making an order of restoration. As the order made by the Commissioner re-instating the respondent (tenant) is ex facie bad, inasmuch as it had been made without the legal power to do so, an appeal against such an order must be treated as one on a question of law - MORE SO AS THERE WAS NO DISPUTE OR CONTROVERSY AS TO THE FACT THAT

THE RESPONDENT HAD, IN FACT, SIGNED THE DEED OF TRANSFER AS AN ATTESTING WITNESS. As pointed out by Brian Thompson in his textbook on Constitutional and Administrative law : "Perhaps we can say that reasons of principle and pragmatism are combined by the Courts when they distinguish law from fact, Where matters are serious then the law category is more likely to be applied but where extensive examination of evidence is required or differing views may reasonably be arrived at, or the court is happy with the expertise of the body whose decision is challenged, matters are more likely to be designated as questions of fact."

The relevant order of the Commissioner has to be set aside because on its face it is clearly made without jurisdiction for the Commissioner has ordered the restoration of a person (the respondent) who had surrendered his rights of tenancy and had thereby not only ceased to be a tenant but had also ceased to possess in the capacity when, in fact, for the commissioner to have the jurisdiction to restore a person to possession, that person ought not only to be a tenant but ought also to have been wrongfully evicted. As such, the order of the commissioner dated 10. 11. 1990 restoring the respondent to possession on the basis that the respondent (tenant) had been wrongfully evicted or dispossessed is clearly wrong or illegal - as one made in excess of jurisdiction. The respondent's act of signing the deed of transfer (as explained above) clearly evinced or indicated the surrender by the respondent of his tenancy rights.

It is to be observed that "eviction" of the tenant is a jurisdictional fact-in that it is on that fact that the jurisdiction of the Commissioner to restore the tenant depends. As explained in Wade : "as to those jurisdictional facts the tribunal's decision cannot be conclusive, for otherwise it could by its own error give itself powers which were never conferred upon it by parliament". In the case in hand, too, the Commissioner had given himself the power to restore a tenant, rather a person, to possession by making an error himself-the

error that Commissioner made being to hold that there had been an eviction of the tenant (respondent) when, in truth, the respondent himself had surrendered or had agreed to forgo his rights of tenancy. Prior surrender negates an eviction.

In this regard, it would be instructive to advert to a case Viz. *R. v. Fulham Rent Tribunal*[1]. It is worth reproducing the observation made with regard to the above-mentioned case in Wade and Forsyth (7th edition) Page 287. "For example, a rent tribunal had power to reduce a rent where it appear that a premium had been paid; but where the payment had, in fact, been made in respect of work done by landlord and not in respect of the grant of the lease, it was not in law a premium. By treating it as such the tribunal made a mistake of law and acted in excess of its powers . . ."

In the instant case too, the Commissioner by erroneously holding that the respondent (tenant) had been evicted had given himself a power which was never conferred upon him by the Parliament which had resulted in the usurpation of a jurisdiction which he (the Commissioner) had not; for the Parliament conferred upon the Commissioner the power to restore a tenant, as has been repeatedly stated in this order, only in one situation, that is, when the latter had been wrongfully evicted.

The learned High Court Judge's order is as wrong as wrong can be for he had erred by holding that the appeal relates to a question of fact and not of law and so dismissing it on that basis. One had very often to encounter this problem of distinguishing between "law" and "fact" in relation to section 147 of the Civil procedure Code, when one functions as a District Judge which section states that when issues both of law and of fact arise-issues of law shall be tried first when the Court is of opinion that the case may be disposed of on issues of law only. A question of fact involves the resolution of a factual dispute whereas a question of law involves the application of the law to preliminary facts, which have to be

established before the law can be applied, or the interpretation of a law. To quote from Wade : "Whether these facts once established satisfy some legal definition or requirement must be a question of law, for the question then is how to interpret and apply the law to those established facts. If the question is whether, some building is a "house" within the meaning of the Housing Act - its location, condition, purpose of use, and so forth are questions of fact. But once these facts are established, the question whether it counts as a house withing the meaning of the Act is a question of law. The fact themselves not being in dispute, the conclusion is a matter of legal inference."

In this case, too, one has to apply the law to the established facts, or rather to the established fact viz. that the respondent (tenant) had, be it noted, admittedly, been a signatory, as explained above, to the relevant deed of transfer in favour of the appellant. The inferences to be drawn from that fact are matters of legal inferences : (a) does the fact that the respondent had signed the relevant deed, wherein it is stated that the relevant land is sold inclusive of Ande rights, involve a surrender or more accurately, a surrender of tenancy by operation by law; (b) if so, that is, if, in fact, the respondent had previously surrendered his Ande rights, can, it ever be said that there was an eviction of the respondent (tenant) within the meaning of Section 5(7) of the Agrarian Services Act No:. 58 of 1979. It cannot be too strongly emphasized that it is only when such eviction or dispossession is "established" that the Commissioner has the jurisdiction or the power to restore the tenant to possession and not otherwise for it is ludicrous to order the restoration of a tenant who is, in fact, in possession and had not been evicted or had surrendered possession as the respondent, in fact, had done.

The act of the respondent in being a signatory to the said deed of transfer wherein it is stated that the land is sold to the appellant with or inclusive of tenancy rights, when viewed in a realistic perspective, is incompatible and cannot be

integrated with a continuing or subsisting relation of landlord and tenant. On the contrary such an act on the part of the respondent (tenant), not only forcibly points to a mutual understanding between the erstwhile landlord (who was the vendor to the appellant) and the respondent (tenant) that both of them had "mutually agreed to consider the surrender as made" but also to a holding out or offering of inducement by the respondent (tenant) to the appellant to believe that he (the appellant) gets an unfettered title to the land in question - free from the encumbrance of tenancy rights.

This is an appropriate context in which to explain the legal concept of surrender or how the surrender, by operation of law, works. As I had explained in my own judgment in *Appuhamy and another v. Menike and others*[2] "surrender would be the act of law and would prevail inspite of the intention of parties". As Parke B. had stated in *Lyon v. Reed*[3] (referred to at page 205 in Spencer Bower) it is the act itself that amounts to surrender. To quote : "In such a case there can be no question of intention. The surrender is not the result of intention. It takes places independently of and even inspite of intention."

Thus it would not avail or the help the respondent (tenant) to say that he did not intend to surrender Ande rights although he signed the deed wherein it is stated that the land is transferred inclusive of Ande rights for, as stated above, it is the act of the party that matters. (of course, in this case, the respondent had not said, at least, for the sake of formality, that although he signed the deed, he did not intend to part with Ande rights. This is quite understandable and the explanation for that is obvious for everybody had been oblivious to this aspect of the case as to whether or not the act on the part of the respondent in signing the deed of transfer, above - mentioned, is tantamount, in law, to a surrender). It would be instructive to refer to case of *Foster v. Robinson*[4] where the statutory tenancy was held to have been surrendered by operation of law as it had been verbally agreed, in that case, between the defendant's father and the Landlord - that the

defendant's father owing to his old age and infirmity need not pay any further rent but could continue to live in the cottage for the rest of his life, rent free. Thereafter rent was neither demanded nor tendered and the defendant's father continued to live in the cottage without making any payment till he died. Earlier the defendant's father had worked for the landlord on the farm and paid an annual rent to the landlord who was the owner of both the farm and the cottage. It was held that the agreement between the defendant's father and the landlord that the former could occupy the cottage rent free was effectual to produce a surrender of tenancy by operation of law and the defendant was estopped from asserting that the old tenancy still existed.

Surrender occurs by operation of law "when parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made. "(Black's Law Dictionary - page 1295 - 5th edition). Surrender differs from abandonment. Abandonment of rights is simply an act on the part of a lessee or tenant. Surrender is a contractual act and occurs by mutual consent. Surrender must be reflected in a consensual act whereas abandonment is a unilateral act on the part of the tenant.

In a way, there is even justification for saying that the private law doctrine of estoppel comes into play for the circumstances of this case even warrants a finding that the act of the respondent (tenant) in signing such a deed, in the state of things or facts obtaining in this case, is tantamount to a representation or holding out by the respondent, that the appellant obtains title free from tenancy rights, which works an estoppel as against the respondent (tenant). Estoppel serves to stop the respondent (tenant) benefiting from the strict legal rights of the situation. When the respondent signed the relevant deed the appellant was entitled to think that the respondent will not assert his rights of tenancy as against him. Such an act on the part of the respondent - tenant would

undoubtedly have operated as an inducement to the appellant to buy the land - because the appellant was getting the land freed from Ande rights or, at least, he was persuaded to think so.

From what has been stated above it would be abundantly clear that one was justified in drawing the legal inference that the respondent had given up, or, to use the lawyer's jargon, surrendered his rights of tenancy which bars or precludes the Court from holding that there was an eviction of the respondent (tenant) as contemplated by law, that is, section 5(7) of the Agrarian Services Act No: 58 of 1979.

For the aforesaid reasons the order dated 30. 11. 1992 made by the Learned High Court Judge upholding the Commissioner's order restoring the respondent to possession is hereby set aside. And it goes without saying that the aforesaid order of the Commissioner, too, will automatically, as it were, stand vacated.

HECTOR YAPA, J. (P/CA) - I agree.

Appeal allowed. Order of the Commissioner stand vacated.