

MARY BEATRICE AND OTHERS
v.
SENEVIRATNE

COURT OF APPEAL.
SENANAYAKE, J.,
EDUSSURIYA, J.
C.A 307/87
D.C. NEGOMBO 778/RE
SEPTEMBER 10, 1996.

Lease – Expiry of the period – License – Lessee cannot dispute lessors Title – Rei Vindicatio Action.

The plaintiff-respondent instituted action to eject the original defendant from the house in question. It was the position of the plaintiff that the house was leased out to the original defendant's husband by a Deed of lease (P6) and on his death, the widow and children were permitted to reside in the house. The original defendant died after the institution of the action. The substituted defendants-appellants denied the Deed of lease, and claimed title to the premises by prescription. The District Court held with the plaintiff. On appeal –

Held:

1. The leases (P5 and P6) were established and proved. The defendants are estopped from asserting title in view of the fact that the substituted defendants' father had acquiesced in the rights of the plaintiff as owner of the subject matter. The predecessor of the defendants was the lessee of the thatched house only, if he had any claim or title to the land and the trees there was no necessity for them to enter into P5 and P6.
2. Even assuming that the defendant had become owner of the entire premises, it was not open to him to refuse to surrender possession. He must first give up possession and then it would be open to him to litigate about the ownership.
3. The defendants are not entitled to dispute the title of the plaintiff. The plaintiff need not institute an action *in rem*.

APPEAL from the judgment of the District Court of Negombo.

Cases referred to:

1. *Visvalingam v. Gajaweera* 56 N.L.R. 111.
2. *Alvar Pillar v. Karuppan* 4 N.L.R. 321.
3. *Senanayake v. Peter de Silva* – 1986 2 S.L.R. 405, 412.
4. *Hameed alias Abdul Rahuman v. Weerasinghe and Others.* – 1989 1 S.L.R. 217.
5. *Queen v. Leathem* (H.L.) 1901 at 495.

A. K. Premadasa, P.C., with C.E. de Silva for Substituted-defendants-appellants.

P. A. D. Samarasekera, P.C., with K. S. Gunawardane for plaintiff-respondents.

Cur. adv. vult.

December 03, 1996

SENANAYAKE, J.

This is an appeal from the judgment of the learned District Judge of Negombo. The plaintiff-respondent (hereinafter referred to as the plaintiff) instituted this action on 18.09.1979 against Warnakulasuriya Agnes Fernando the original defendant (the mother of the substituted-defendants-appellants) to eject the defendant and others from the house described in the schedule to the plaint and also claiming a sum of Rs. 60/- as damages from 1st August 1969 until vacant possession is restored to the plaintiff.

The defendant, Agnes Fernando was present to Court on 04.12.1979 and a proxy was filed and though three dates were granted to file answer it was not filed. Thereafter, the plaintiff's Attorney-at-Law had filed papers for substituting the defendants-appellants as the original defendant, Agnes Fernando had died.

The plaintiff in her amended plaint stated that she became entitled to the land by P-1 deed No. 9177 of 1959 being a Deed of Gift from her mother. Her mother by P-2 a Deed of Lease No. 4253 dated 06.02.1951 granted a lease for a period of 1 year and by P-3 a Deed

of Lease No. 4755 of 1954 granted a lease for a five year period commencing from 19.05.1954 to Justina, the subject of the lease was only the thatched house standing there on, Justina's son, Paul had come to live in this house with his family and Justina had to leave the house due to differences that she had with her son's family. Thereafter, the plaintiff had leased out the thatched house standing on the Eastern half portion by lease bond 5825 dated 20.04.1960 marked P-4 to Paul and subsequently by lease No. 14448 dated 16.09.1961 (P-5) the plaintiff gave a lease of the thatched house for 1 year commencing from 16.09.1961 and at the expiry of the lease, she gave a fresh lease on 03.04.1965 to Paul. The said Paul died in 1966 and on his death his widow Agnes Fernando and the children continued to live in the thatched house during the unexpired period of the lease after the expiry of the terms of the lease P-6, the plaintiff permitted Agnes Fernando and her children to live in the house on compassionate grounds as she had no other place to go. The plaintiff's version was till 09.08.1988 the plaintiff and on her behalf her mother got the produce of the coconut trees situated in the Eastern portion of the land which the substituted defendants were disputing.

The substituted-defendants-appellants (hereinafter referred to as the defendants) in their first answer dated 10.03.1981 admitted residence in the said premises, but denied the deed of lease P-6 and denied that they were occupying the house described in the schedule to the plaint with the plaintiff's approval and permission. That after the expiry of the terms in P-6 which ended in 1967 that they had over 10 years title by prescription and denied that their grand mother Justina Fernando and their father Don Paul had taken leases from time and they were 4 orphan children and had no place to go if they were evicted and prayed that plaintiff's action be dismissed in the alternative that they be given the house standing on the premises together a portion of the land.

The defendants amended the answer on 30.07.1981 and denied P-6 and stated that their father, their mother and the defendants had possessed the house and the land described in the schedule to the plaint adversely and independently for over 10 years preceding the

action and acquired title by prescription, that they had constructed a house worth Rs. 3000/- and planted 10 Coconut trees and certain other specified plantation worth Rs. 2000/-. That the plaintiff had not given due notice to terminate the license. During the course of the evidence, it transpired that the thatched house had collapsed and the defendants were occupying the kitchen and extended the kitchen and the plaintiff filed an amended complaint on 13.12.1984 seeking eviction of the defendants from the said kitchen and the land described in the schedule to the amended complaint.

The contention of the learned Counsel for the defendants was solely that the plaintiff could not maintain this action as the plaintiff had not filed a *rei vindicatio* action for declaration that she was the owner of the property. His submission was that in view of the answer filed by the defendant that they were in possession of the land and had acquired prescriptive title and as there was a denial that they were overholding licences of the plaintiff. There was no evidence to establish that Paul or Agnes Fernando shed the character of a lessee and they had given up possession and was contesting the proprietorship of the plaintiff or did so at any stage. On the other hand after the expiry of the terms in P-6 Agnes Fernando and her children (the defendants) were occupying the house with leave and license. His contention was since there was a denial of title the plaintiff cannot maintain this action as presently constituted.

The leases were established and especially P-5 and P-6 the lease bonds between the plaintiff and Don Paul was proved by calling the plaintiff and the Notary who attested them. The lessee Don Paul the defendants' father had admitted the title of the plaintiff and by entering into P-6 after an expiry of three years of P-5 clearly establish that Don Paul entering into further two years lease commencing from May 1965 only for the thatched house situated in the land described in the schedule to the complaint cannot deny the title of plaintiff. The defendants are estopped from asserting title in view of the defendants father Paul had acquiesced the rights of the plaintiff as owner of the subject matter in dispute. If Paul was asserting title there was no necessity to enter into lease P-6 when there was no subsisting lease for a period of nearly three years.

The legal position as stated vide Voet commentary on the Pandects Translated by Percival Gane Volume 3 Book 19.2:32 **“Lessee cannot dispute lessors title though third party can – Nor can the setting up of an exception of ownership by the lessee stay this restoration of the property leased even though perhaps the proof of ownership would be ease for the lessee. He ought in every event to give back the possession first and then litigate about the proprietorship”**.

The evidence of the plaintiff was that after the death of the lessee, Don Paul during the pendency of the lease P-6 her thatched house and after the expiry of the period, she gave permission to Agnes Fernando and the children to occupy the house and at no stage they had disputed to the coconut trees in the eastern portion of the land till April 1985. It was common ground that the thatched house had collapsed during the pendency of the action and the defendants had occupied the cadjan kitchen which adjoined the thatched house and enlarged it and occupied it. The defendant, Mary Malkanthie admitted that there was no fence to divide the eastern portion with the western portion (vide page 261 of the record). Subsequently, she stated the fence was removed after Don Paul's death in 1966 by the plaintiff. (vide page 262) But no complaint was made to any person in authority about this misdemeanour.

The contention of the learned Counsel for the appellant that the plaintiff cannot maintain this action has no merit. As to procedure section 35 of Code of Civil Procedure permits the joinder of certain forms of relief in an action one could file an action in *personam* or an action *in rem*. One based on a privity of contract on a lease against an over holding tenant and the other for declaration based on proof of ownership. In the case of a former a lessee he is not entitled in law to litigate about the proprietorship without first handing over possession. In this case, Don Paul, the predecessor of the defendants was the lessee of the thatched house only situated in the eastern half. If Don Paul had any claim or title to the land and the trees there was no necessity for him to enter to P5 and P6. There was no independent evidence to indicate after the death of Don Paul the

original defendant, Agnes Fernando was possessing adversely against the interest of the plaintiff. In fact there was not even a denial to the two letters sent to her by the plaintiff's Attorney-at-Law when the original defendant, Agnes was an overholding licensee whose licensee to remain had been terminated by P7 and P9. Vide *Visvalingam v. Gajaweera*⁽¹⁾ – Where the Court held that even assuming that the defendant had become owner of the entire premises, it was not open to him to refuse to surrender possession to his landlord. He must first give up possession and then it would be open to him to litigate about the ownership – The facts of the instant case stand on a stronger premise – Here the defendants, predecessor, Don Paul had taken only the thatched house on lease and after the expiry of the terms of the lease, Agnes Fernando, the original defendants and her minor children was permitted to occupy with permission of the plaintiff. There was no evidence to prove that Agnes Fernando and her children were possessing the house adversely to the right of the plaintiff.

The Case of *Alvar Pillar v. Karuppan*⁽²⁾ where the defendant was given a land on a non notarially attested document. Bonser, C.J., observed at page 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 were 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 his lease. He must first give up possession and then it will be open to him to litigate about the ownership**". In my opinion the defendant has no defense to this action. He must give up possession to the plaintiff also vide *Senanayake v. Peter de Silva*⁽³⁾.

It is opportune at this moment to quote Maasdorf, Institutes of Cape Law 4th 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."

I am of the view, that the defendants original answer and subsequent answer are inconsistent. The defendants are not entitled to dispute the title of the plaintiff. The plaintiff need not institute an action *in rem* and he could maintain this action on the amended plaint as instituted. The learned Counsel for the appellant relied on the authority of *Hameed alias Abdul Rahuman v. Weerasinghe and Others*⁽⁴⁾. I am of the view this authority has no relevance to the facts of this instant case. I am surprised that a senior counsel of such wide experience relying on an authority which has no bearing to the facts of the instant case.

It is appropriate to quote Lord Halsbury's observation in the case of *Queen v. Leatham*⁽⁵⁾ **"that every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions which may be found they are not intended to the expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all"**.

It is my view, that the learned District Judge had come to a determination on question of fact. He had preferred to accept the evidence of the plaintiff and her witnesses to that of the defendants. The learned counsel for the appellants did not submit that the determination was contrary to the evidence nor that it was perverse. In the circumstances, this Court has no reason to interfere with the judgment. I affirm the judgment and decree and dismiss the appeal with costs fixed at Rs. 5,250/-.

EDUSSURIYA, J. – I agree.

Appeal dismissed.