

ENSO NONA
v.
SOMAWATHIE AND OTHERS

COURT OF APPEAL
JAYASURIYA, J.,
C.A NOS. 300/82, 301/82
A.T. KURUNEGALA NO. 229/C
NOVEMBER 20TH, 1996
FEBRUARY 26TH, 1997
MARCH 26TH, 1997

Agrarian Services Act – S. 5 – S. 8 (1) – S. 68 – Eviction – Rights of wife to succeed – Operation of law – Cultivator cultivating through her sons.

The original applicant-respondent and the fourth respondent-appellant (son in law) preferred competing claims in respect of a paddy field. It was considered that the original *Ande* cultivator was William Singho the husband of the original

applicant-respondent. After the death of William Singho his unmarried son who lived with his mother has cultivated the field up to the date of his premature death. Thereafter the wife of his original *Ande* cultivator has permitted her two daughters, her son and son in-laws to cultivate on her behalf.

Held:

- (1) An *Ande* cultivator could lawfully cultivate the paddy field through the agency of the members of his family.
- (2) The law in its wisdom views the conferment of *Ande* rights as a privilege reposed in the *Ande* cultivator for the sustenance of the members of his family and if the *Ande* cultivator engaged the services of the members of his family to cultivate the paddy field the cultivation of the paddy field was deemed to have been performed by the *Ande* cultivator himself. The second legal fiction is manifested in the law.
- (3) Where the original *Ande* cultivator died there was a transmission of his *Ande* rights by operation of law to his lawful widow (S. 8 (1)).

Per Jayasuriya, J.

"when there is a transmission of rights by operation of law such transmission becomes effective irrespective of what the parties may actually do by their own positive acts, such transmission of rights by operation of law is not dependent on the acts of parties".

Per Jayasuriya, J.

"If a *Ande* Cultivator dies and on his death there had to be actual cultivation of the field by the widow soon after death, an imposter spoliator would be induced to enter the field in the event of death taking place and thereafter contend successfully that as he had prevented the widow from engaging in actual cultivation that there was no transmission of rights by operation of law to the widow and the widow was not entitled to institute an application to have him ejected from this field soon after the death of her husband, if such a interpretation is adopted by courts it would nullify the Roman Dutch Law principal. *Spolitus Ante Omina vestituendus est ad-a-wrong doer spoliator* would be entitled to benefit by his wrongful act."

APPEALS from the order of the Assistant Commissioner of Agrarian Services, Kurunegala.

Cases referred to:

1. *Haddy v. Clerk* 8 Times Report – 259 at 267.
2. *Eaquer v. Furniwall* – 17 Chanary Division 115, 121.
3. *Ibrahim Saibo v. Oriental Bank Corporation* – 3 NLR 148, 150.
4. *Jonga v. Nanduwa* 45 NLR 128, 132 (DB).
5. *Alice Nona v. Ranasinghe* 1986 Colombo Appellate Law vol.1 page 133, 135.
6. *Kulasinghe v. Abeyratne* – 1996 1 SLR 330, 332.
7. *C. F. Kaluwa v. Silva* – 70 NLR 479.
8. *Babaris v. Jemma* – 1989 – 2 SLR 345.

Cur. adv. vult.

Sanath Jayatilake with S. Tepalangoda and Ms. Priyanthi Guneratne for respondent-appellant in CA 300/82 for plaintiff-respondent-applicant CA 301/82.

T. B. Dillimuni with Ms. N. Jayawardane and T. D. P. Dassanayake for original applicant-respondent after substituted applicant-respondent.

Rohan Sahabandu with Athula Perera and Dilhani Perera for intervenient respondent.

August 26, 1997.

JAYASURIYA, J.

In these two appeals which were amalgamated and consolidated with the consent of the parties and counsel appearing for the parties, the original applicant-respondent W. K. Punchi Nona and the fourth respondent-appellant in appeal No. CA 300/82. S. A. Dissanayake preferred competing claims to the position and rights of an *ande* cultivator in respect of a paddy field known as Tuttiriyakotuwe Kumbura in extent two acres of paddy sowing, situated at Morugama village in Polgahawela. The aforesaid Punchi Nona is the mother-in-law of the said S. A. Dissanayake and the said S. A. Dissanayake is the son-in-law of the aforesaid Punchi Nona. It was conceded and accepted by all parties that the original *ande* cultivator of this extent of paddy land was Ranasinghage William Singho, who was also known

by the *alias* Punchi Singho *alias* Podi Singho. The aforesaid W. K. Punchi Nona, the original applicant-respondent is undoubtedly the lawful wife and legal widow of the aforesaid William Singho, the undisputed tenant cultivator of the paddy field in question. The aforesaid W. K. Punchi Nona, in her unchallenged evidence, testified to the effect that during the lifetime of her husband she jointly cultivated this paddy field with her husband and that she did so till she was 70 years of age. At the time when she gave evidence she was 95 years of age and she was afflicted with ill-health and sickness which prevented her from personally cultivating the paddy field. The law in its wisdom does not compel a person to do what is physically impossible *Lex non cogit ad impossibilia*. Even where the law imposes a duty and the party is disabled from performing it, without any default in him and has no remedy over it, then the law will in general excuse him. Vide dicta of Justice Lawrence in the case of *Hadley v. Clarke*⁽¹⁾ at 267 quoting the decision in *Paradine v. Jane. Impotentia excusat legem*. Also note the dicta of Jessel Master of *Rolls in Eager v. Furniwall*⁽²⁾ at 121.

After the death of the aforesaid William Singho, his unmarried son, who lived with his mother, Punchi Nona, has cultivated this paddy field up to the date of his premature death. Thereafter, the aforesaid Punchi Nona has permitted her two daughters, her son and her son-in-law to cultivate this paddy field on her behalf. In this setting of the background facts, it is relevant to give one's mind to a concept which is implicit in the provisions of the Agrarian Services Act the interpretation clause in section 68 of the said Act. Even under the provisions of the Paddy Lands Act when the engagement of hired labour resulted in a forfeiture of the rights of the *ande* cultivator, it was recognised that the *ande* cultivator could lawfully cultivate the paddy field through the agency of the members of the *ande* cultivator's family. The law in its wisdom views the conferment of *ande* rights as a privilege reposed in the *ande* cultivator for the sustenance of the members of his family and if the *ande* cultivator engaged the services of the members of his family to cultivate the paddy field, the cultivation of the paddy field was deemed to have been performed

by the *ande* cultivator himself. The said legal fiction is manifested in the law right to the present day, despite the several amendments effected to the Agrarian Services Act. Thus, the actual process of cultivation of the paddy field performed by Dharmaratne, the unmarried son of Punchi Nona, who lived with Punchi Nona in the same household, is deemed in law to be a cultivation effected on behalf of the aforesaid Punchi Nona and operates in law as a cultivation effected by Punchi Nona, the *ande* cultivator. Even after the death of Dharmaratne when she permitted her two daughters, her son and her son-in-law to cultivate the paddy field, they carried on the acts of cultivation on her behalf and in view of the legal fiction, it is deemed to be a cultivation effected by her.

When the original tenant cultivator William Singho died, there was a transmission of his *ande* rights *by operation of law* to his lawful widow, the original applicant-respondent. Vide section 8 (1) of the Agrarian Services Act. In situations where there is a transmission of rights *by operation of law*, such transmission becomes effective *irrespective* of what the parties may actually do by their own positive acts. Such transmission of rights by operation of law *is not dependent* on the acts of parties. The judgment of District Judge Berwick laying down this principle was upheld and adopted *in toto* by the Supreme Court in *Ibrahim Saibo v. Oriental Bank Corporation*⁽³⁾ at 150. In that judgment Berwick, DJ. emphasized that where there is a transmission of rights by operation of law, such transmission does not depend for its efficacy or validity on the acts of the parties. The principle laid down by Justice Berwick which was upheld by the Supreme Court in this judgment was also later followed in the decision in *Jonga v. Nanduwa*,⁽⁴⁾ at 132 (D. B.) Justice Keuneman remarked: "I am of opinion that where a constructive trust (ie the creation of rights by operation of law arises) can be held to exist under our law, then the operation of section 2 of the Prevention of Frauds Ordinance has no application" (what acts the parties may or may not do are irrelevant to the transmission of such rights). Thus, on the death of William Singho, there was a transmission of his *ande* rights by operation of law to Punchi Nona as the lawful widow and the provisions of section

8 (1) of the Agrarian Services Act lays down merely one condition as a stipulation to the effect that such successor deriving rights by operation of law ought to have as his main occupation cultivation and whose only source of income should be derived from such extent of paddy land. The undisputed evidence in this case discloses that during the lifetime of William Singho, Punchi Nona jointly cultivated the paddy field till she reached the age of seventy years: At the time she was giving evidence she was 95 years of age and stated that due to her present ill-health she was unable to cultivate the paddy field personally and that she had permitted her son, Dharmaratne, to cultivate the paddy field and that she had no other employment. The rationale behind the above statement of the law enshrined in section 8 (1) is clearly manifest. If an *ande* cultivator dies and on his death there had to be actual cultivation of the paddy field by a widow *soon after death*, an imposter-spoliator would be induced to enter the paddy field on the event of death taking place and thereafter contend successfully that as he had prevented the widow from engaging in actual cultivation, that there was no transmission of rights by operation of law to the widow and the widow was not entitled to institute an application to have him ejected from the paddy field, as she ceased to be an *ande* cultivator by failing to cultivate the paddy field soon after the death of her husband. If such an interpretation is adopted by the courts, it would nullify the Roman-Dutch Law principle *spoliatus ante omnia Vestituendus est* and a wrongdoer spoliator would be entitled to benefit by his wrongful act. The law in its wisdom would not countenance such a contention.

In regard to this issue of law I wish to refer to two judgments of the Court of Appeal and the Supreme Court pronounced in *Alice Nona v. Ranasinghe*⁽⁵⁾ at 135 and the judgment pronounced by Justice Kulatunga in *Appuhamy alias Kulasinghe v. Abeyratne*⁽⁶⁾ at 332. Justice Kulatunga in the Supreme Court judgment has referred to the judgment pronounced by Justice Tudor Alwis in *Alice Nona v. Ranasinghe* (*supra*) and has observed that in that decision the Court of Appeal held that a wife claiming to succeed to her husband as tenant cultivator must herself continue to be a "cultivator" as defined in section 68 of

the Agrarian Services Act. In both the aforesaid decisions, there was circumstantial evidence to establish that the widow had by her acts abandoned her rights as an *ande* cultivator after her husband's death, and that the widow had neither claimed nor exercised the rights of a person who had become a tenant cultivator by operation of law. The facts in the instant case are clearly distinguishable from those in the above-mentioned decisions. The unimpugned evidence in these two appeals is that the aforesaid W. K. Punchi Nona cultivated the paddy field with her husband, William Singho, till she was seventy years of age and at the time she was giving evidence she was ninety-five years of age and afflicted with grave ill-health and on account of her ill-health she had permitted her unmarried son who lived with her to cultivate the paddy field on her behalf. The acts of cultivation performed by her son, (Dharmaratne), in those circumstances enures to her benefit and in view of the legal fiction recognised in the definition of an *ande* "cultivator" in the Agrarian Services Act, those acts of cultivation are deemed to be acts of cultivation performed by her. Thus, on the death of her husband, his rights as an *ande* cultivator were transmitted to her by operation of law and from that date she has cultivated the paddy field through the agency of her unmarried son, her two daughters, her second son and her sons-in-law. Thus, there was no failure on her part to perform the functions assigned to a "cultivator" under section 68 of the Agrarian Services Act and the cultivation of the paddy field by the members of her family, enures in law to her benefit. I hold that the two decisions cited by me are clearly distinguishable and have no application to the facts of the present appeals.

It is pertinent to consider the correlative and competing claim of appellant S. A. Dissanayake that he is an *ande* cultivator of the paddy field in dispute. He has testified to the following effect: "I state that I have cultivated this paddy field as an *ande* cultivator from 1976 to the present day". There has been no evidence of any acts on the part of W. K. Punchi Nona which would transmit to the said Dissanayake during her lifetime *ande* rights by adopting any of the modes of transmission of the rights of an *ande* cultivator [who is alive] provided for in the law. Vide *C. F. Kaluwa v. Silva*,⁽⁷⁾. The manner of determination of the rights of a living *ande* cultivator are clearly prescribed

in the provisions of the Agrarian Services. Act and there could be no lawful determination of such rights except as provided for by the law. The said Dissanayake has not testified in his evidence that he has entered into any contractual relations with the owners of the paddy field and that by entering into a contract of *locatio conductio rei* that he had ever become a tenant of the paddy field under its owners. He merely asserted that his mother-in-law, the aforesaid Punchi Nona, permitted him to cultivate the paddy field in question. He has merely stated thus in his evidence:

ධර්මරත්නගේ සහෝදර සහෝදරියන් හා මවක් ජූලිය් සිංඤ්ඤෝ යන සියළු දෙනාම කුඹුර වැඩ කරන හැටියට මව භාර දුන්නා. . . . මගේ තම කුඹුරු නාම ලේඛනයට ඇතුලත් කර ගැනීමට මා ත්‍රියාමාර්ගයක් ගත්තේ නැත. ඒ සඳහා අවශ්‍යකමක් නොතිබුණු නිසාය. අදගොවිකම මට ඕනෑ කියා අම්මා ගෙන් ලිපියක් ගත්තේ නැත. එවැනි ලිපියක් මට දුන්නේද නැත. . . . මට කුඹුර භාරදුන්න නිසා මම වැඩකළා. මා කුඹුරට බැස වැඩ කරන ගොවියෙක් නොවේය. මගේ ගෙදරට කිට්ටුවෙන් කුඹුර පිහිටා තිබුණ නිසා සියලු දෙනාගේ කැමැත්තෙන් භාර දුන්නා.

On an analysis of his evidence it is clear that he has not entered into any contractual relation of *locatio conductio rei* with the owners of the paddy field and thus he has never become a contractual tenant of the paddy field in question. Having regard to the effect of the evidence given by him there has been no legal transmission of the rights of *ande* cultivatorship of Punchi Nona during her lifetime on to the said Dissanayake. In the circumstances I hold, as has been found by the Inquiring Officer, that his competing claim to *ande* rights in respect of the said paddy field is misconceived and unsustainable. The Inquiring Officer has arrived at the following findings:

එස්. ඒ. දිසානායක සම්පූර්ණ කුඹුර බුක්කි විදීමට පටන් ගෙන තිබේ. ඔහු අදකරුගේ අවසරය ඇතිව හෝ උවමනාව උඩ කුඹුර වැඩ කරන කෙනෙක් පමණි. පැමිණිලිකාරිය තවමත් අදකරුවෙකි. ඇගේ අද අයිතිය අහිමි වී නැත. අදකරුවෙකු වීසින් අද අයිතිය පැවරිය හැක්කේ තමා හවුල් හෝ තව්ටු මාරු අදගොවියෙක් තම එවැනි ගොවියාටය. එසේ නොමැතිනම් අයිතිකරුටද පමණි. පැමිණිලිකාරියගේ අයිතිය අහිමි වී නැති අතර, 'අනවසර වුදිතට' (එස්. දිසානායකට) එවැනි පැවරීමක් නිකානුකුලට සිදුවිය නොහැක.

These findings are legal and lawful findings which are based on the evidence adduced at this inquiry. In as much as Dissanayake, the second appellant has taken complete, control over the entirety of the paddy field excluding all others wrongfully advanced competing claims to *ande* rights on his own behalf and has failed to give any share of the produce to his mother-in-law, who is the present *ande* cultivator of the paddy field, the Inquiring Officer has held that there has been an eviction of the original applicant-respondent from the paddy field. I agree with the findings reached by the Inquiring Officer. There is no substantial misdirection in point of fact or law in regard to the relevant matters spotlighted by me in this judgment. There is no failure on the part of the Inquiring Officer to take into account the effect of the totality of the evidence placed before him and there is no improper evaluation of evidence, on a consideration of the order and the totality of the evidence placed at the inquiry. In the circumstances, I hold that no error of law arises on this appeal and this court is not entitled to interfere with the findings arrived at by the *Inquiring Officer – Babanis v. Jemma*⁽⁶⁾. In the result, I proceed to dismiss the appeals of the first and second appellants with costs in a sum of Rs. 3,150 payable by each of the appellants to the substituted applicant-respondents Ranasinghe Arachchige Somawathie and Ranasinghe Arachchige Sirisena.

Appeal dismissed.