
SITHY MAKEENA AND OTHERS
vs.
KURAISHA AND OTHERS

COURT OF APPEAL.
IMAM, J.
SRISKANDRAJAH, J.
CA 2009/2002.
DC KANDY 16369/L.
FEBRUARY 24, 25, 2005.
MAY 02, 2005.

Civil Procedure Code - section 18(1) - Addition of parties - Who is a necessary party ? - Issue whether the defendant is a statutory tenant under the plaintiff or a trespasser - Estoppel - Rei Vindicatio action - Land Acquisition Act, 7(1), 38, 38(a) - When does title vest in the State ?- Revision - Exceptional circumstances.

The plaintiff-petitioners in the Rei Vindicatio action instituted against the defendants sought a declaration of title to the land in question and eviction of the defendants. The defendants-respondents in their first answer took up the position that they are tenants and in their amended answer that they have become statutory tenants. The defendants made an application under Section 18(1) and sought to add the Urban Development Authority (UDA) as a necessary party to the action as the ownership had been vested in the UDA. The Court allowed the application.

HELD:

- (1) The question to be decided by Court was whether the defendants-respondents were the statutory tenants under the plaintiffs or not - If the defendants were unsuccessful in establishing their statutory tenancy then they would be trespassers and hence liable to be ejected.
- (2) The defendants-respondents having admitted that they came into possession under the plaintiffs' predecessor in title and having subsequently taken up the position that they were statutory tenants under the plaintiffs they are estopped from claiming title under the UDA.
- (3) The Gazette referred to by the defendant-respondents is a notification published under 7(1) of the Land Acquisition Act - This is only the publication of the intention of the State and not evidence of title in the State. Evidence of title in the State can only be inferred from a publication

in terms of section 38. In any event, there is no evidence that the plaintiffs' houses were vested in the UDA due to the absence of a section 38(1) Gazette Publication.

Held further :

- (4) As the 2nd plaintiff-petitioners- the next friend of the 3rd, 4th, 5th plaintiff-petitioners was ill and confined to bed for a period beyond 14 days - That would constitute exceptional circumstances. The failure to lodge a leave to appeal application has been satisfactorily explained to Court.

APPLICATION in revision from an order of the District Court of Kandy.

Cases referred to :

1. *Thalagune vs. De Livera* - 1997 - 1 Sri LR 253
2. *Robert Dissanayake and Others vs. People's Bank* - 1991 2 Sri LR 320
3. *Arumugam Coomaraswamy vs. Andiris Appu* - 1985 2 Sri LR 219
4. *Silva vs. Fernando* - 15 NLR 499 (P. C.)
5. *Najim Udeen vs. Nageswari* - 1999 3 Sri LR 123
6. *Selliah Marimuttu vs. Sivapakkiyam* - 1986 1 CIR 264

Riza Muzni with David Weeraratne for 2nd, 3rd and 5th plaintiffs-respondents-petitioners.

Sunil Cooray with D. H. Siriwardane for 1A and 2nd defendant-petitioner-respondents.

Cur. adv. vult.

March 16th, 2006.

IMAM, J.

This is a Revision Application tendered by the 2nd, 3rd, 4th and 5th Plaintiff-Respondent-Petitioners (hereinafter referred to as the 'Petitioners') seeking to set aside the order of the Learned Additional District Judge of Kandy dated 30.08.2002 (P10) in case No. 16369/L, to dismiss the application of the Defendant-Petitioner-Respondents (hereinafter referred to as the Respondents') to add the parties sought to be added, inter-alia other reliefs sought for in the aforesaid application.

The facts of the case are briefly as follows : The 'Petitioners' together with the 1st Plaintiff instituted action bearing No. 16369/L in the District

Court of Kandy against the 'Respondents' seeking a Declaration of Title to the land described in the 2nd Schedule to the plaint, for the ejectment of the 'Respondents' therefrom and for other relief as prayed for in the plaint (P1). The 1st and 2nd Respondents filed Answer and subsequently amended the answer. (P2, P3 and P4 respectively). The 2nd Respondent in his answer and amended answer took up the position that he was the statutory tenant of the plaintiff's predecessor in title namely Kalyani Kumari. Meanwhile the 1st defendant died, and 1A Defendant-Respondent was substituted in place of the deceased 1st Defendant. The Defendants-Respondents (Respondents) by petition dated 05.03.2002 made an application under section 18(1) of the Civil Procedure Code seeking to add the Urban Development Authority, Battaramulla and Kandy respectively as necessary parties to the action, the aforesaid petition and Affidavit being marked as 'P5' and 'P6' respectively. The Petitioners tendered their objection with regard to the addition of parties (P7). Consequently the parties agreed to dispose of the matter by way of written submissions with those of the Petitioners and Respondents being marked as P8 and P9 respectively. The learned Additional District Judge delivered order (P10) on 30.08.2002, having permitted the application to add the parties as party Defendants. It is to set aside this order that the petitioners have tendered this Revision Application.

The Petitioners contend that the Respondents have sought to add the Urban Development Authority on the basis of the Gazette Publication marked as '3 & 1'. The Petitioners further aver that on a perusal of the Gazette No. 612/20 dated 31.05.1990, it is a publication under section 38(a) of the Land Acquisition Act, which section vests title in the State to any property duly acquired. It is pointed out that the Gazette Notification has been published by the Minister for Lands, Highways and Mahaweli Development, and the schedule refers to part of the premises in suit, namely No. 955/4, and also to part of the plaintiff's premises No. 955/3. The Respondents aver that what is significant here is that the word used in the said gazette is "කොටස" which means part of the garden of both premises to construct "William Gopallawa Mawatha" which runs parallel to Peradeniya Road in anticipation of the "Gam Udawa" fair which was held during that period at Pallekelle. The respondents further contend that this explains as to why the Acquisition Notice was published by the Minister of Highways and also as to why the Plaintiffs are still in occupation of premises No. 955/3 and the 2nd Defendant is wrongfully in occupation of the premises in suit. The Respondents further contend that the position taken up by the UDA that the said land was utilized for the construction of

the New Kandy Court complex is false as the entire process for the construction of the aforesaid court complex commenced only after 1997, whereas the Gazette is dated 31.05.1990.

The Respondents contend that by way of a preliminary objection they have taken up that there are no 'Exceptional Circumstances' set out for the petitioners to succeed in this Revision Application, and that although the order of the learned Additional District Judge dated 30.08.2002 is an appealable order that no Leave to Appeal application has been tendered by the Petitioners within 14 days of the order. It is submitted by the Respondents that with regard to the application of the Respondents made on 01.04.2002, the UDA should have been added as a necessary party to this action as the ownership of the corpus had been vested in the UDA. The Respondents assert that the main question for determination is whether the plaintiffs (Petitioners) are the owners of the corpus or whether it is the UDA, and the Respondents contend that the UDA is the owner of the corpus, and should thus be added as a necessary party to this action. It is the view of the Respondents that this action being a *Rei Vindicatio* action title has to be examined, that the UDA is the owner of the corpus, that the order of the learned Additional District Judge of Kandy is correct in fact and law and hence that the Revision application of the Petitioner's be dismissed with costs.

I have examined the Revision application of the Petitioners and the position taken up by the Respondents. This is a *Rei Vindicatio* action instituted by the Plaintiffs (Petitioners) against 1A and 2 Defendants (Respondents) seeking a declaration of title to the land described in the 2nd schedule to the plaint together with the buildings and plantations thereon. The Plaint has been filed on the basis that the Defendants (Respondents) are trespassers while that answer and amended answer disclose that the Defendants initially claimed to be tenants of the Plaintiffs predecessor in title, and subsequently by an amendment took up the position that they were statutory tenants. Thus the question to be decided by Court was whether the Defendants (Respondents) were the statutory tenants under the Plaintiffs or not. If the Defendants were unsuccessful in establishing their Statutory Tenancy then they would be trespassers and hence liable to be ejected, It is well settled law that only the parties to a *Rei Vindicatio* action are bound by the decision in such a case, as a *Rei Vindicatio* action is an action in *Personam* and not an action in *Rem*.

It is settled law that a case must be decided as at the date of the institution of the action, as held in *Thalagune vs. De Livera*⁽¹⁾. Thus the addition of parties must necessarily have a bearing on the dispute that existed between the parties on 17.05.1990 in this case.

Although the Government Gazette No. 612/20 dated 31.05.1990 referred to part of the premises, in my view it referred to part of the premises in suit namely 955/4 and also to part of the Plaintiff's (Petitioner's) premises No. 955/3, which was part of the garden of both premises acquired to construct the William Gopallawa Mawatha" in view of the "Gam Udawa" fair held at Pallekelle in 1990. As the New Court Complex in Kandy commenced only after 1997, the aforesaid Government Gazette Notification in my view did not apply to the New Court Complex in Kandy. On a perusal of Government Gazette No. 1008/7 dated 31.12.1997 (R1) it is a notification published under section 7(1) of the Land Acquisition Act informing the public that the State intends to acquire the lands mentioned therein. This is only the publication of the intention of the State and not evidence of title in the State. Evidence of title in the State can only be inferred from a publication in terms of section 38 of the Land Acquisition Act. 'R1' set out the lands the State intended to acquire to construct the New Kandy Court Complex. However the said premises Nos 955/3 and 955/4 were NOT acquired, and the New Kandy Court Complex has reached completion without such acquisition.

In my view the dispute between the plaintiffs and the defendants in this case is confined to whether the 2nd Defendant in particular is a statutory tenant under the Plaintiffs or a Trespasser. Such a decision would not affect the UDA in any manner whatsoever, The Plaintiffs can obtain complete relief against the Defendants (Respondents) without having the UDA added as a party to this action. This is in conformity with the decisions in *Robert Dissanayake and Others vs. Peoples Bank*⁽²⁾ and *Arumugam Coomaraswamy vs. Andiris Appu*⁽³⁾.

The Plaintiffs do not have any cause of action against the UDA, and thus in my view the UDA is not a necessary party to this action.

The principle in *Talagune vs. Livera* (*Supra*) was followed in *Silva vs. Fernando*⁽⁴⁾ and *Najimudeen vs. Nageswari*⁽⁵⁾.

The Defendants (Respondents) having admitted that they came into possession under the Plaintiffs predecessor in title namely Kalyani Kumari, and having subsequently taken up the position that they were the statutory tenants under the plaintiffs are estopped from claiming title under the UDA, which the Defendants (Respondents) in any case do not have. Furthermore with regard to 'R1' there is no evidence that the Plaintiffs houses were vested in the UDA, due to the absence of a section 38(1) Gazette publication. Thus for the aforesaid reasons there was no need to add the UDA as a necessary party to this action.

The Respondent took up a preliminary objection that the Petitioners did not file a leave to appeal application within 14 days of 30.08.2002. The petitioners have explained their difficulty in paragraphs 8 and 9 of the petition, which was due to the 2nd Petitioners having fallen ill in Colombo as borne out by the medical certificate of Dr. Mawjood (P 11) and the 1st Plaintiff-Petitioner being an elderly person was unable to take the necessary steps to canvass the order dated 30.08.2002. Furthermore the 3rd, 4th and 5th plaintiff-petitioners who are minors appeared in this case by their duly appointed next friend the 2nd plaintiff-petitioners. Hence as the 2nd Plaintiff-petitioner was ill and confined to bed for a period beyond 14 days this would in my view constitute Exceptional Circumstances.

In *Selliah Marimuttu vs. Sivapakkiyam*⁽⁶⁾ it was held that an application for revision is available where the failure to exercise the right of appeal is explained to the satisfaction of the Court.

Hence, I dismiss the preliminary objection of the Respondents and hold that the Petitioners could act in revision in this case.

For the aforesaid reasons I permit the Revision Application of the Petitioners to set aside the order of the learned Additional District Judge of Kandy dated 30.08.2002, and further dismiss the application of the Defendant-Respondent to add the Urban Development Authority as a necessary party to the action. I make no order with regard to costs

SRISKANDARAJAH, J. — *I agree.*

Application allowed.