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Present : Bertram C.J. and Garvin A.J.

SILVA *v.* ARUMUGAM.

413—D. C. Colombo, 1,402.

House let by plaintiff acting as executor—Action by plaintiff in his personal capacity—Is tenant estopped from denying that plaintiff was owner.

A person who enters into an agreement with another person in a representative capacity cannot sue upon that agreement in his personal capacity.

Where plaintiff acting as executor let a house to the defendant,—

Held, that the defendant was not estopped from denying that plaintiff was the owner in his personal capacity.

THE facts appear from the judgment.

H. J. C. Pereira, K.C. (with him *A. St. V. Jayawardene, K.C.*, and *E. G. P. Jayatileke*), for plaintiff, appellant.

Bawa, K.C. (with him *H. V. Perera*), for defendant, respondent.

Cur. adv. vult.

December 7, 1921. BERTRAM C.J.—

The subject of this appeal is the tenancy of a house, No. 18B, Fourth Cross street, Pettah, part of the property of the late C. S. Perera of Negombo. The estate of Mr. C. S. Perera appears never to have been administered, but by a family arrangement this and other houses in Colombo were taken over, and the rents collected, by his son, Mr. C. E. Perera, on behalf of the family ; other arrangements being made with respect to certain other houses in Colombo

and Negombo. In April, 1919, Mr. C. E. Perera died, leaving a will, under which the plaintiff, Mr. Arthur de Silva, was appointed his sole executor. One of the Colombo houses referred to, No. 57C, Fifth Cross street, Pettah (with which was incorporated a portion of No. 18B), had been for many years in the occupation of the defendant. At the end of April plaintiff saw defendant and told him that he was Mr. C. E. Perera's executor. He went into accounts with him, and on June 3, 1919, received a cheque for rent.

There can be no question that the defendant knew that Mr. C. E. Perera was only a part owner of the property, and that he was in possession of it, and collecting rents as managing part owner. This question was discussed in a partition action, to which both plaintiff and defendant were parties, and it was declared by the District Judge in that action, in the course of his judgment, that both before and at the time of the execution of a lease subsequently referred to defendant knew the true state of the title to the property. This must be taken as *res adjudicata*, and though the learned District Judge did not define the point from which defendant's knowledge must be supposed to date, I think it may be taken as *res adjudicata* that the defendant was aware of the true state of affairs at least at the time of Mr. C. E. Perera's death. At any rate both parties in this case have acted on the supposition that Mr. C. E. Perera was managing part owner of No. 57C and No. 18B, and also on the supposition that on the death of Mr. C. E. Perera his executor would be the appropriate person to succeed him in the management. It was on this supposition that plaintiff, when he first approached defendant, informed him that under Mr. Perera's will he (plaintiff) had been appointed executor.

As a matter of fact, plaintiff never ultimately obtained probate. The will was disputed; the claim to probate was never insisted on, and on August 19, 1919, the case was settled by the application for probate being withdrawn, the costs of the application being paid by plaintiff personally. An earlier will was produced, under which plaintiff was a co-executor, but here, too, he stood out, and ultimately on October 10, 1919, he formally renounced his executorship. At this point, however, he seems to have conceived a curious scheme, namely, that though he would no longer have control of these houses as C. E. Perera's executor, he would, nevertheless, assume control of these houses in another capacity, that it to say, he should purport to act on behalf of himself and all the other co-owners, including the executor of Mr. Perera, whose assent for this purpose he made no effort to obtain, and which was, in any event, in the circumstances of the case, not likely to be accorded.

Acting in pursuance of this new assumed capacity, he proceeded, in the course of the month of August, to give notice to the tenant of No. 18B, Fourth Cross street, Mr. Carrimjee Jafferjee, terminating his tenancy from September 30. This tenant had hitherto been

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paying rent to plaintiff as the supposed executor of Mr. C. E. Perera. Thus, a cheque dated June 3, 1919, in favour of the tenant, was endorsed to the order of the executor of the last will of the late Mr. C. E. Perera, and was further endorsed by the plaintiff in that capacity. The notice to quit describes plaintiff as acting on behalf of himself and the other co-owners. Though nothing appears to have been said with reference to this change of capacity, the tenant accepted the notice and vacated possession on September 30. Next door to No. 18B was No. 57C in the possession of defendant. Defendant at this time was desirous of enlarging his holding and taking in No. 18B. Plaintiff offered the tenancy to defendant, and after the execution of certain repairs, defendant assumed possession in the course of the month of October, paying Rs. 500 in advance. Plaintiff gave defendant a receipt (D 3) signed in his own name, making no reference either to the co-owners or to the estate of Mr. C. E. Perera. This receipt was given on October 3, after the settlement in the probate case on August 19 and before the renunciation of the executorship under the earlier will.

On concluding this agreement of tenancy, plaintiff thus said nothing about the change of capacity in which, in his own mind at any rate, he purported to act. He himself does not say that, either directly or indirectly, he gave the defendant any intimation of this change, except in so far as his personal signature of the receipt might be construed as implying such an intimation. Early in the year 1920 he settled accounts with the defendant up to the end of 1919, signing a memorandum for this purpose in his own name. He collected the rents for the whole of the premises now in the occupation of the defendant, that is to say, for both No. 57C and No. 18B.

On February 5, 1920, defendant received a letter from Mr. J. A. Perera, Proctor, for the executor of the will of Mr. C. E. Perera, demanding the immediate payment of Rs. 1,250, being rent due in respect of No. 57C from April, 1919, to January 31, 1920. Defendant replied on the 6th through his proctor that he had paid the rent to Mr. Arthur de Silva, on his representation that he was the executor of the estate of the late Mr. C. E. Perera. Mr. J. A. Perera wrote him a reply on the 8th that his client was unable to recognize this payment, and finally defendant on March 2, 1920, took a notarial lease of the whole premises from the executor. Nevertheless, with a duplicity and unscrupulousness which deserves the severest reprehension, he concealed this fact from the plaintiff. He had some trouble with a sub-tenant; in certain proceedings that ensued he professed that the property belonged to plaintiff, and said that he had not taken a lease from plaintiff because it was not customary so to do. What is more, in the partition action subsequently brought, he explained that he was influenced in his decision to attorn as tenant to the executor of the late Mr. C. E. Perera by what can only be described as personal resentment

and spite against the plaintiff by reason of his interference with the sub-tenant. On May 11, 1920, defendant obtained judgment against his sub-tenant and evicted him from the premises, and on June 7 by a proctor's letter he disclosed the change in his position to plaintiff, and demanded the repayment of the rent already paid to him "on the representation made by you to me that you were the executor of the last will of the late Mr. C. E. Perera." Plaintiff, thereupon, brought the present action claiming arrears of rent and ejection of the defendant from the premises, and damages until plaintiff should be restored to peaceful possession.

That there was an agreement of tenancy there can be no doubt, but what we have to consider is, in what capacity plaintiff concluded that agreement. It seems to me clear that that he did not expressly purport to let the premises as executor. As he had taken care to give the previous tenant notice in the new capacity which he had assumed, it is not likely that he would have purported to have let the premises to the new tenant in his old capacity. But did he by his previous conduct give defendant to understand that he was doing so ? Defendant says that he acted upon that understanding, but in view of the conduct of the defendant, which I have criticised above, no one would pay any attention to his word on the subject. It seems to me clear, however, from his answer to the letter of Mr. J. A. Perera, that this was, in fact, the case, and that he conceived himself to be taking the tenancy from defendant as executor. It seems to me clear also that he would not have entered upon the new tenancy without some definite explanation on the point, if he had had any idea that plaintiff was dealing with him in a changed capacity. It was argued on behalf of plaintiff that this was entirely a new tenancy unaffected by the old agreement. Plaintiff, in fact, let in his own name ; defendant, therefore (so it is contended), being his tenant, is estopped from disputing his title, though, in fact, plaintiff was only one of several co-owners. Mr. A. St. V. Jayawardene cites in this connection the case of *Weekes v. Burge*,[1] but the truth is that the two tenancies—the old tenancy of No. 57c and the new tenancy of No. 18B—were so intimately connected that the transactions must be considered as continuous. Defendant, as I have above pointed out, was, in fact, enlarging his holding by taking in the adjoining premises. Plaintiff had expressly and explicitly dealt with defendant with regard to the tenancy of No. 57c on the footing that he was the executor of Mr. C. E. Perera. Silence by the plaintiff under such circumstances must be construed as a continuing representation, and defendant having altered his position on the faith of that representation, plaintiff is estopped from averring that he dealt with him in any capacity other than that of executor of Mr. C. E. Perera. He must be treated as though he had dealt with him in that capacity.

[1] *69 L.T. 78.*

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Now, a person who has entered into an agreement with another person in a representative capacity cannot sue upon that agreement in his personal capacity. Even if he could, the plaintiff in this case would be confronted with another difficulty. He has no title to the whole of the property, the rent of which he seeks to recover; he can only rely upon a tenancy by estoppel. But a landlord granting a tenancy in a representative capacity cannot set up the estoppel in a personal capacity. The tenant by taking the tenancy from him in a representative capacity did not in any way admit that he was the personal owner of the property. He admitted ownership in the estate of which plaintiff purported to be the executor, and it is only the true executor or administrator of that estate who could rely upon the estoppel.

It must be admitted that the legal position of the executor in the present case is far from clear. He also has no legal title to the whole of the property, but has only title to a share. It may be difficult to establish that the managing ownership, which Mr. C. E. Perera exercised in his lifetime, was a legal right which descended to his executor. Moreover, the effect of contracts made by one of two executors, who subsequently renounces his executorship, is far from clear. The law does not seem to contemplate that a person who in any way has acted as an executor should be allowed to renounce his executorship. It is probable that a co-executor would be allowed to ratify and adopt any such contract made on behalf of the estate. Mr. Bawa cited to us the case of *Foster v. Bates*,[1] where an administrator was held entitled to ratify and adopt such a contract made by a person purporting to act as agent on behalf of the intestate's estate before the appointment of the administrator, but in this case the executor had no more right to adopt the contract than he had to make it. And, as I have said, it is not clear that he had any better legal right to make it than the plaintiff himself. It is not necessary, however, for us to consider these difficulties. The question we have to decide is not whether the executor had the right either to grant this tenancy or to adopt it, but whether the plaintiff has a right in his personal capacity to sue upon an agreement of tenancy which he must be taken to have entered into in a representative capacity, and to that question the answer is in the negative.

With regard to any claim which the executor may have against the defendant, it is quite sufficient for his purpose that as the defendant has taken a notarial lease from the executor in that capacity, the defendant is estopped from disputing his title. As to what may be the position of the parties with respect to sums paid by the defendant to the plaintiff and the executor respectively, it is not necessary for the purpose of this case to express any opinion. It is

[1] (*1843*) *12 M. & W. 226.*

much to be desired that all parties to this family litigation would refer the matter to arbitration, and have a general account taken. So far as the present appeal is concerned, I am of opinion that it must be dismissed, with costs.

GARVIN A.J. delivered a separate judgment, in which he discussed the facts at length, and concurred in the dismissal of the appeal.

Appeal dismissed.