

MAJUBUDEEN AND OTHERS
v
SIMON PERERA

COURT OF APPEAL
FERNANDO, J. AND
EDIRISURIYA, J.
CA 829/92 (F)
D.C. AVISSAWELLA 16623/L
MAY 19, 2003
JUNE 4 AND 16, 2003 AND
JULY 4, 2003

Rei vindicatio action – Action by a lessor against over holding lessee for restoration and ejectment – Difference – Importance of proving title – Statutory tenant – Rent Act, No 7 of 1972 – Estoppel – Privity of contract – Evidence Ordinance, section 116.

The plaintiff-appellants instituted action seeking a declaration of title to a certain land together with two boutique rooms and ejectment of the defendant-respondent from same. The plaintiff-appellant averred that the said boutique rooms were leased to the defendant for 3 years and that after the expiry of the period, the defendant-respondent continued to be in possession.

The defendant-respondent in his last amended answer averred that after the expiry of the period in the lease bond he became a statutory tenant. In his earlier answer he claimed that he had acquired prescriptive rights by adverse possession. The trial court dismissed the plaintiff-appellant's action.

On Appeal

Held:

- (i) Privity of contract is the foundation of the right to relief in an action by a lessor against an overholding lessee for restoration and ejectment and issues as to title are irrelevant. A lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligations.
- (ii) The plaintiff who claims *qua* landlord to eject his tenant in occupation, must establish that privity of contract between himself and the tenant exists at the relevant date, and if it does exist the tenant is precluded by provisions of section 116 of the Evidence Ordinance from disputing the plaintiff's title to the premises.

APPEAL from the Judgment of the District Court of Avissawella.

Case referred to:

1. *Pararajasekaram v C. Vijayaratnam* – 76 NLR 470 at 472
2. *Pathirana v Jayasundera* – 58 NLR 159 at 172
3. *De Alwis v Perera* – 52 NLR 433 at 447
4. *Gunasekera v Jinadasa* – (1996) 2 Sri LR 115 (DB)
5. *David Silva v Madanayake* – 69 NLR 396

Hemasiri Withanachchi for plaintiff-appellant.
Lakshman Perera for defendant-respondent.

Cur. adv. vult.

July 31, 2003

EDIRISURIYA, J.

The plaintiffs in this case filed action for declaration of title for the allotment of land called “Linadamulle Kella” together with boutique rooms bearing no. 122 and 124, ejectment of the defendant-respondent and damages. 01

The plaintiffs-appellants both in their original plaint and the amended plaint averred that they inherited the said land from their father. They also averred that by Indenture (Lease) No. 477 dated 28.03.1969 the said boutique rooms were leased to the defendant-respondent for three years. The plaintiffs-appellants further averred that after the expiry of the said lease the defendant-respondent continued to be in possession of the said boutique rooms as a licensee of the plaintiffs-appellants, that he commenced disputing the rights of the plaintiffs-appellants to the said premises; that the defendant-respondent claimed ownership to the said land and buildings; that he is unlawfully occupying the said land and building. The defendant-respondent filed answers denying the plaintiffs title. He has stated that the said Indenture (Lease) was obtained by undue influence and fraud; that he had acquired rights to the land in dispute by a deed dated 24.04.1969; that he had acquired prescriptive rights by adverse possession; that a partition action No. 15389/P is pending in the District Court. 10 20

In the last amended answer the defendant has taken up an additional position that after the expiry of the Lease Bond of 472 he

became a statutory tenant and therefore he was protected by the provisions of the Rent act.

At the trial following admissions were recorded.

(i) Lease of the property by Indenture No. 472 dated 28.03.1969.

(ii) Situation of the property is in an area governed by the provisions of the Rent Act. 30

(iii) Proceedings and the Judgment in Ruwanwelle Rural Court Case No. 1930.

At the trial the defendant raised the following issues:

1. Is the premises in suit governed by the provisions of the Rent Act?
2. Did the defendant who was the lessee become the statutory tenant after the expiry of the Lease No. 472?
3. If the above issue is answered in the affirmative can the plaintiffs have and maintain this action as presently constituted without terminating the defendant's tenancy? 40
4. If the answer is yes to one or more of above issues are the plaintiffs entitled to the reliefs prayed for?

The plaintiffs raised the following issues:

5. Did the defendant before and after this action was instituted
 - (a) Dispute the plaintiff's rights to the premises in dispute and claim to be the owner of the said premises?
 - (b) If so is the defendant entitled to the protection of the Rent Act?
6. (a) If the defendant has disputed the rights of the plaintiffs on the basis that he is the owner of the premises in dispute is he entitled to receive notice in terms of the Rent Act? 50

(b) If so are the plaintiffs entitled without notice to institute action for ejectment of the defendant?

7. If one or more of the above 5,6 issues are answered in favour the plaintiffs are they entitled to the reliefs prayed for in the plaint?

Neither the plaintiffs nor the defendant led evidence at the trial. However the plaintiffs closed their case producing P1 (a copy of the plaint in case No. 15398/P), P2 (the preliminary plan No. 853 filed in the said case), P3 (the report attached to the said plan), P4 (Deed No. 472 referred to in admission number one), P5 (the proceedings and the Judgment in the Ruwanwella Rural Court Case No. 1390).

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The learned District Judge has expressed the view that the plaintiffs in this case have not proved their title to the premises in suit. He has also expressed the view that in the admissions recorded the defendant has not admitted that the premises in suit belongs to the plaintiffs.

The learned trial judge goes on to say that in a case where the plaintiffs are seeking a declaration of title the burden of proof is on them to show that they are entitled to the premises in suit.

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Having referred to the submission made on behalf of the plaintiffs that since the defendant has admitted the lease agreement the defendant is estopped from denying the plaintiffs' title and therefore there is no burden of proof on the plaintiffs to prove their title he states that he is bound to follow the decision of Justice Weeramantry in *Pararajasekaram v Vijayaratnam*⁽¹⁾ at 472.

In the above case His Lordship Justice Weeramantry has observed that estoppel of any variety may afford a defence against the enforcement of otherwise enforceable rights but it cannot create a cause of action. In other words it may only be used as a shield and not as a sword. It is clear what Weeramantry, J. has dealt with above is promissory estoppel which is not an issue before us.

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However the learned District Judge in my opinion has failed to apply the legal principle that privity of contract is the foundation of the right to relief in an action by a lessor against an over holding lessee for restoration and ejectment.

Gratiaen, J. in *Pathirana v. Jayasundare* (2) at 172 states thus:
 "I agree. In a *rei vindicatio* action proper the owner of immovable
 property is entitled, on proof of his title, to a decree in his favour for
 the recovery of the property and for the ejectment of the person in
 wrongful occupation." "The plaintiff's ownership of the thing is of the
 very essence of the action. Maasdorp's Institutes (7th Ed.) Vol.2,
 96".

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"The scope of an action by a lessor against an overholding
 lessee for restoration and ejectment, however, is different. Privity of
 contract (whether it be by original agreement or by attornment) is
 the foundation of the right to relief and issues as to title are irrele-
 vant to the proceedings. Indeed, a lessee who has entered into
 occupation is precluded from disputing his lessor's title until he has
 first restored the property in fulfilment of his contractual obligation."

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He states that the lessee (conductor) cannot plead the *exceptio dominii*, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship. He further states that both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation; that a decree for a declaration of title may, of course, be obtained by way of additional relief either in a *rei vindication* action proper (which is in truth an action in *rem*) or in a lessor's action against his overholding tenant (which is an action in *personam*). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.

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Also in *de Alwis v Perera* (3) at 447 he states that whether the plaintiff who claims *qua* landlord to eject the tenant in occupation be the tenant's original landlord or a subsequent purchaser or a lessee of the premises, his right to a decree for ejectment is in the first instance regulated by the principles of the common law affecting the relationship of landlord and tenant, and in accordance with those principles, he must in every case establish that privity of contract between himself and the tenant exists at the relevant date and that if privity of contract does exist between the plaintiff and the ten-

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ant, the latter is precluded by the provisions of section 116 of the Evidence Ordinance from disputing the plaintiff's title to the premises.

In the instant case there is no doubt that the defendant has 130
disputed the plaintiff's title. In his 2nd amended answer too he
states that he filed case No. 15389/P in the District Court claiming
rights in the subject matter of the action.

It is useful to consider how Mark Fernando, J. has examined
the law with regard to a person who is in unlawful occupation of a
rented premises. In the Divisional Bench case of *Gunasekara v*
Jinadasa⁽⁴⁾ the plaintiff-respondent-appellant was granted special
leave to appeal to the Supreme Court on the question whether ten-
ant who is notified by his Landlord and the Landlord's successor in
title that the rented premises had been transferred and that the 140
rent should be paid to the transferee but who ignores that request
and continues to deposit rent to the credit of the landlord (with the
authorized person) is in law the tenant of the transferee and is
liable to be ejected only upon a properly constituted tenancy action.
In this case Mark Fernando, J. at page 122 says. "It seems to me
that while it is legitimate initially to infer attornment from continued
occupation thus establishing privity of contract between the parties,
another principle of the law of contract comes into play in such
circumstances to which the presumption of attornment must some-
times yield. When the occupier persists in conduct which is funda- 150
mentally inconsistent with a contract of tenancy and amounts to a
repudiation of that presumed contract, the transferee has the option
either to treat the tenancy as subsisting and to sue for arrears of rent
and ejection as in *David Silva v Madanayake*⁽⁵⁾ (*supra*) or to
accept the occupier's repudiation of the tenancy, and to proceed
against him as a trespasser."

He goes on to say "This interpretation commends itself to me
as being consistent also with equity and fairness. The Court must
not apply the presumption of attornment as a trap for the transfer-
ee, allowing the occupier who fails to fulfill the obligations of a ten- 160
ant, if sued on the tenancy, to disclaim tenancy and assert that he
can only be sued for ejection and damages in a vindicatory
action; but if faced with an action based on title, to claim that not-
withstanding his conduct he is a tenant and can only be sued in a

tenancy action. Since it is the occupier's conduct which gives rise to such uncertainty equitable considerations confirm the option which the law of contract gives to the transferee."

It is noted that in the instant case the defendant has taken up an additional position that after the expiry of the said lease he became a statutory tenant and therefore he was protected by the provisions of the Rent Act. 170

The other facts support the contention of the counsel for the plaintiffs-appellants that the defendant-respondent is disputing the title of the plaintiffs and are in unlawful occupation of the premises in suit. Following the authorities cited above I hold that the defendant is in unlawful occupation of the said premises.

Accordingly I set aside the judgement of the learned District Judge and grant the reliefs prayed for in the amended plaint, I order no costs.

FERNANDO, J. - I agree

Appeal allowed.

Editor's Note: The Supreme Court in SC Spl A 205/03 on 23.6.04 refused special leave to appeal to the Supreme Court.