1946 *Present:* **Soertsz A.C.J. and Cannon J.**

THE ATTORNEY-GENERAL, Appellant, *and* WIJESURIYA, Respondent.

205—D. C. Colombo, 15,380.

Crown land—Lease of—Must conform to Land Sales Regulations—Land Commissioner's right to bind Crown.

The plaintiff pleaded that by a contract between him and an agent of the Land Commissioner the Land Commissioner was bound to lease to him for a period of four years and two and a half months the right to occupy certain allotments of Crown land and tap and take the produce of all the plantations on them. There were no plantations other than rubber on the allotments.

Held, (i.) that the transaction contemplated in the contract was a lease of land;

(ii.) that, whether the transaction be regarded as a lease or something less than a lease, the Land Commissioner had not the power, under the Regulations relating to dispositions of Crown lands, to render the Crown liable by entering into that contract.

APPEAL from a judgment and decree of the District Court of Colombo. The plaintiff sought, in this action, to recover from the Crown the sum of Rs. 75,000 as damages alleging that the Government Agent of Uva had failed to fulfil a contract which that officer had entered into with him on March 4/5, 1943, undertaking to "lease to him for a period of four years and two and a half months the right to tap and take the produce of the rubber trees on certain allotments of land . . . . referred to as the Keenapitiya Crown rubber lands . . . . and to place the plaintiff in possession of the said allotments of land on March 15, 1943".

H. H. Basnayake, Acting Attorney-General (with him *H. W. R. Weerasooriya, C.C.*), for the Crown, appellant.—There was no concluded lease to the plaintiff, Wijesuriya. It was only an agreement to give a lease if Sabapathipillai vacated the land. There was no obligation on the part of the Crown to give a lease to Wijesuriya.

Further, neither the Government Agent nor the Assistant Government Agent had an authority to give a lease. The officer who purported to act on behalf of the Crown had no authority to act in that way and therefore the Crown is not bound. The whole transaction is not according to the Land Sales Regulations. See *Collector of Masulapatam v. Cavaly Vencata Narainappah*[1]; *Prosunno Coomer Roy v. The Secretary of State for India*[2]. *Deen v. Attorney-General*[3]; *Ekanayake Mudiyanselagedere Keerale Arachchille v. Galkadullegedere Kira*[4]. The distinction between a licence and a lease is dealt with in *Cader Lebbe v. Punchi Naide*[5]; *Bootha v. Soocher*[6].

H. V. Perera, K.C. (with him *F. C. W. Van Geyzel*), for the plaintiff, respondent.—The right to tap is analogous to a licence together with a

[1] (*1860*) *8 Moore's I. A. 500 at p. 554.*
[2] (*1899*) *26 I.L.R., Calcutta, 792 at p. 807.*
[3] (*1923*) *25 N. L. R. 334.*
[4] (*1884*) *6 S. C. C. 22.*
[5] (*1917*) *4 C. W. R. 140.*
[6] *S. A. L. R.* (*1941*) *T. P. D. 245.*

grant to remove the latex. It is submitted that the decision in *Cader Lebbe v. Punchi Naide* is incorrect. The agreement in the present case created an interest in land not amounting to a lease or a disposition of land. The Land Sales Regulations are therefore inapplicable. Further, the instructions regarding procedure in sales and leases of Crown land are only directive. If the rules are not obeyed the act is not necessarily "*ultra vires*". At the most there is an irregularity, but the act itself is not void. The issue of the permit is not the essence of the contract. There was a completed contract and the parties contemplated putting it into a certain form. See *Rossither v. Miller* [1]. Departmental instructions cannot limit the scope of the Government Agent's authority.

H. H. Basnayake, in reply.—The parties contemplated a lease of land. All the essentials of a lease are present in the transaction—*Wille: Landlord and Tenant, 3rd. Ed., p. 1.*

Cur. adv. vult.

August 22, 1946. SOERTSZ A.C.J.—

The plaintiff brought this action against the Attorney-General, in virtue of section 456 of the Civil Procedure Code, to recover from the Crown two sums of money, Rs. 75,000 and Rs. 6,000, with interest on the latter sum. He claimed the first sum as damages the Crown was liable to pay to him in consequence of the failure of the Government Agent of Uva, who, he averred, was "acting for and on behalf of the Crown" to fulfil a contract which that officer had entered into with him on March 4/5, 1943, undertaking to "lease to him for a period of four years and two and a half months the right to tap and take the produce of the rubber trees on certain allotments of land . . . . referred to as the Keenapitiya Crown Rubber lands . . . . and to place the plaintiff in possession of the said allotments of land on March 15, 1943". These allotments comprised an area of about 280 acres. The second sum the plaintiff claimed as due to be refunded to him with interest because he had deposited the Rs. 6,000 at the request of the Government Agent, as part of the consideration for the lease, and the lease failed owing to the default of the Government Agent.

The question now is whether the Crown was so involved in all that took place between the plaintiff on the one side and the Land Commissioner and the Government Agent on the other as to be liable to make amends to the plaintiff by paying him the damages he claimed or any damages at all, and refunding the deposit the plaintiff had made together with interest. The Attorney-General, in the answer he filed on behalf of the Crown, repudiated the claim for damages on the ground that there was "no agreement whether oral or otherwise" as alleged in paragraph 3 of the plaint. In regard to the Rs. 6,000 claimed, his answer was that the plaintiff deposited that sum "in anticipation of his obtaining a lease of the lands referred to . . . . if and when they were vacated by one Sabapathipillai who had been given notice . . . . to quit the lands on March 15, 1943", but that when that notice was cancelled and the contemplated lease fell through, the plaintiff could have withdrawn this sum at any time but did not choose to do so. The Crown was not,

[1] *(1878) 3 A. C. 1124.*

therefore, liable to pay interest and he accordingly brought the sum of Rs. 6,000 *into* Court. The Attorney-General further pleaded that, even assuming such a contract, in fact, as the plaintiff set up, the plaintiff could not maintain his action upon it, in law, by reason of the provisions of the Land Sales Regulations, and of the Frauds and Perjuries Ordinance.

In regard to the question of fact, that is to say whether there was such an agreement as is pleaded in paragraph 3 of the plaint, with which I propose to deal first, a brief statement of the facts from which this litigation arose is necessary. In January, 1942, the Land Commissioner advertised that he would, on March 7, 1942, put up to auction " the lease of the right to tap and take the produce of the rubber trees " on the Crown lands referred to in the advertisement for a period of five years. At the sale, the plaintiff and one Sabapathipillai were the final bidders, and the latter was declared the purchaser on his bid of Rs. 44,000 as against the plaintiff's bid of Rs. 43,950, and a " permit " was issued to him. Sabapathipillai, however, found himself in difficulties in regard to the payment of the first annual instalment of rent, and in consequence of negotiations between the Government Agent and the Land Commissioner on the one side, and the plaintiff on the other, the plaintiff offered to take the lease for Rs. 30,000 if Sabapathipillai made default. This offer did not materialise, because these Government officers came to some arrangement with Sabapathipillai in regard to the first instalment. But, Sabapathipillai was soon involved in other difficulties. He violated, or it was said that he had violated another term of his contract by entering into an agreement with a third party, one Karunatileke, concerning the subject matter of his lease, and the Land Commissioner and the Government Agent in consultation with each other, decided to cancel his permit. The Land Commissioner wrote letter P9 of January 28, 1943, to the Government Agent, saying—

> " The conditions of the Permit dated August 10, 1942, have been flagrantly violated. You should cancel the Permit forthwith and take possession of the land on behalf of the Crown. You may, thereafter, issue a Permit to Mr. H. E. Wijesuriya to take the produce of the plantations on the land for the balance period of five years at the rental approved by my letter . . . . of April 25, 1942 ".

Accordingly, on March 2, 1943, the Assistant Government Agent wrote P10 informing Sabapathipillai that his lease was cancelled and requesting him " to deliver peaceful possession *to the Divisional Revenue Officer* on March 15, 1943, and to vacate the land immediately thereafter ".

It was in this state of things that the plaintiff says he saw the Land Clerk, Attanayake, and the Assistant Government Agent on March 4, 1943. The plaintiff's version of what happened on March 4 is that on that day he first saw the Land Clerk, Attanayake, who told him that if he deposited Rs. 6,000 he would be placed in possession on March 15, and that he then went and saw the Assistant Government Agent in his office room and that the Assistant Government Agent repeated or confirmed what the Land Clerk had told him. The Assistant Government Agent denies that the plaintiff saw him on that day in his office room or elsewhere in regard to this matter and he denies that he told

the plaintiff that if he deposited Rs. 6,000 he would be placed in possession on March 15. Attanayake admits that the plaintiff saw him on that date but he says that what he told the plaintiff was that there were instructions from the Land Commissioner to issue notice of cancellation to Sabapathipillai and to offer the lease to him and that notice of cancellation had been issued to Sabapathipillai, and that if the plaintiff would agree to deposit the first year's rent he would be put in possession of the land in the event of Sabapathipillai vacating the land. He says he told the plaintiff that the money would be placed in deposit and it would be refunded to him if he is not put in possession of the land. Attanayake says that he pointed out to the plaintiff that according to a rule of the Government such a deposit is necessary before possession could be given. The plaintiff, on his part, would, I suppose, agree gladly to make the deposit in order to consolidate his position. He feared, for instance, that one Weerasekere was endeavouring to get the lease as Sabapathipillai's nominee.

In this conflict of evidence the questions that arise are whether the plaintiff saw the Assistant Government Agent on that day or only Attanayake, and whether the plaintiff was given an assurance amounting to a warranty that if he deposited the full year's rent he would be given possession on March 15, or only a promise dependent on the resumption of possession of these lands. I would say at once that, after careful consideration, I prefer the evidence of the Assistant Government Agent and of Attanayake to that of the plaintiff. I feel the less deterred from expressing disagreement with the trial Judge's findings on facts because, as he says, his findings are not based on matters like the demeanour and reliability of these witnesses but on their testimony, " viewed in the light of the circumstances of the case." It is precisely in that way that I myself have examined their evidence and reached the conclusions to which I have come. As far as the Assistant Government Agent is concerned his denial that he met the plaintiff or spoke to him in his office on March 4, is, in my opinion, strongly supported by the terms of the document D1. Attanayake after his meeting with the plaintiff put up to the Assistant Government Agent as follows :—

> " We may accept a year's rent and place it in deposit until Mr. W. is put in possession of the land. When he is put in possession the money can be credited to revenue ".

and the Assistant Government Agent's minute is—

> " Please request Mr. W. to let me know whether he will agree ".

This document, I regard as clinching the point in dispute. If, as the plaintiff says, Attanayake had told him definitely that if he paid the first year's rent he would be placed in possession on March 15 and, if again as the plaintiff says the Assistant Government Agent had repeated or confirmed what Attanayake had already told him, it is difficult to understand why the Assistant Government Agent should want to know whether the plaintiff agrees to his money being placed in deposit, the Assistant Government Agent himself having already told him if he deposited the first year's rent, he would be placed in possession on March

15, and the plaintiff not having demurred to that in any way at all. If the plaintiff's version is the true one, the answer one would have expected from the Assistant Government Agent to Attanayake's query would have been either " Yes " or " the lease having now been given to Mr. W., let the deposit be credited to revenue," depending on the view the Assistant Government Agent took of the transaction that is to say whether a lease had been warranted, or a conditional one promised. Likewise, so far as Attanayake is concerned, if, as the plaintiff states, the lease was given him on March 4 to take effect on March 15 and he was requested to pay the first year's rent, it is as difficult to understand why Attanayake should suggest a temporary deposit in the Kachcheri and a crediting to revenue after possession has been given. The trial Judge says that on March 4, Mr. Chandrasoma (that is the Assistant Government Agent) " believed that on March 15, 1943, that land would be vacated by Sabapathipillai and his Manager, Karunatileke. The idea that Karunatileke would not leave the land never for an instant crossed Mr. Chandrasoma's mind ", but if the Assistant Government Agent entertained such a sanguine expectation that everything would go according to plan, that would be precisely the case in which I should have thought he would have regarded the lease as good as given, and would have directed the Rs. 6,000 to be credited to revenue without being held in suspense at all. It appears to me to be abundantly clear that the Government Officers were by no means certain that they would be able to deliver possession on March 15 and it was quite natural that Attanayake fully aware as he was of the Land Commissioner's instructions in P9 written a fortnight earlier would have explained to the plaintiff, as he says he did, that the money would lie in deposit and would be credited to revenue or refunded to him according as he was put in possession or not. Attanayake's evidence receives support from the qualified terms of the receipt P2 given to the plaintiff by the Kachcheri Shroff, acknowledging the receipt of rent " pending issue of lease ". Much importance cannot be attached to the Assistant Government Agent's statement in P13 that " the lease is now given to Mr. E. Wijesuriya ", especially as that is followed by the statement " You should put him in possession as soon as the present lessee vacates ". On a proper interpretation in its true context this statement means that the Land Commissioner had *decided* to put the plaintiff in possession on Sabapathipillai vacating the land, and not that he had *agreed* unconditionally to do so. Not only do the documents bear out the Assistant Government Agent's and Attanayake's evidence but also, in my view, their evidence gives what I think is the more probable version. The plaintiff says that it was well known that Sabapathipillai and Karunatilleke had fallen out and it was quite a serious question whether even if Sabapathipillai vacated the lands, Karunatilleke would not create trouble, and it was most improbable that, in those circumstances, the Assistant Government Agent or Attanayake would give the plaintiff an unconditional undertaking. If these findings of mine are correct, the plaintiff's action fails for the reason that there was no contract between the Government Agent and him as alleged in paragraph 3. But. the trial Judge, for reasons which are not too clear to me, preferred the plaintiff's evidence

and he held that the plaintiff saw the Assistant Government Agent and that that officer confirmed what Attanayake had told the plaintiff, according to the plaintiff's version, namely, that if he paid the first year's rent, he would be given the lease of these lands on March 15. I would, therefore, examine this case to see how it stands on the finding of the trial Judge.

On that finding, we have an agreement by the Assistant Government Agent with the plaintiff, by which the Assistant Government Agent offered to give him a lease and to put him in possession on March 15, if he paid down a year's rent, and an acceptance of that offer by the plaintiff when he paid in the year's rent. It might have been necessary to consider whether, in the circumstances of the case, this contract, although apparently unconditional, should not be construed as containing an implied condition that its fulfilment would depend on the Government officers concerned being able to recover possession of the lands leased. That question might have arisen if those officers had persisted with the proposed cancellation of Sabapathipillai's lease, and found it impossible to recover possession, for in that event, the question of frustration of the contract would have arisen. But as things turned out, before March 15, the Land Commissioner decided to cancel the notice to quit given to Sabapathipillai and there was no attempt made to recover possession from him and to deliver it to the plaintiff. The question of frustration does not, therefore, arise. The question that does arise in these circumstances is whether the Assistant Government Agent was competent by entering into the agreement found by the trial Judge, to bind the Crown, or perhaps I should say, to bind the Land Commissioner and through him the Crown. The plaintiff's case is that it was competent for the Land Commissioner to lease the right to take the produce of the plantations on these lands for the period for which and in the manner in which it was proposed to lease that right, and that the Land Commissioner constituted the Government Agent and Assistant Government Agent his agents for that purpose. Assuming that to be so, P9 shows the scope of the authority the Land Commissioner entrusted to his agent was " To take possession of the land on behalf of the Crown " ; and " *thereafter*, issue a permit to Mr. Wijesuriya to take the produce of the plantations . . . . for the balance period of five years . . . ." It is clear from these terms that the resumption of possession on behalf of the Crown was made a condition precedent to the issue of a permit. I imagine that it would have been quite open to the Land Commissioner at any time before the permit was issued to the plaintiff to repent of the decision to issue it and to direct that no such permit shall issue, for the Land Commissioner made no promise to the plaintiff to issue a permit to him nor did he authorise his agent to make such a promise. He was only instructing his agent in regard to the course of action he should take. But, it is contended that the plaintiff was not aware of this limitation of the agent's authority and that the agent who had been held out to the plaintiff as the Land Commissioner's agent bound the Land Commissioner although he acted in excess of his authority. As I have already observed, I have no doubt myself that the plaintiff was fully aware of the true state of things, but here again I will assume that,

as found by the trial Judge, the plaintiff was not aware of any limitation of authority imposed on the Government Agent or Assistant Government Agent and I will examine the case on that footing. The plaintiff's case then stands at this: he is able to plead a contract between him and the Land Commissioner's agent by which the Land Commissioner was bound, in fact, to give him a lease and to put him in possession on March 15, and a default by the Land Commissioner in that he did not even make an attempt to fulfil the contract. The question then arises whether the Land Commissioner was himself competent to involve the Crown in liability by entering into that contract. To answer that question it is necessary to ascertain what in reality this contract amounted to in law. In my view, it was a lease of land for four years and two and a half months. It was in vain that the officers concerned sought, by a play upon words and by describing the transaction as a " permit " or " a licence " to take the produce of the plantations on these lands or " a lease of the right " to tap and take the produce of the plantations, to pret nd that the resulting transaction was what they called it and not what, in essence, it was. Exhibit P1 read with P6 discloses a lease of land and nothing but a lease of land. Occupation of the lands is to be given along with the right to tap and take the produce of *all* the plantations on them for there were no plantations other than rubber. That occupation and that right are to be in force and to continue for the period of four years and two and a half months provided, of course, the other party performed his covenants. On the expiry of the period or the earlier determination of the contract, he is to surrender possession of the lands. Pending the expiry or determination of the right of occupation, any unauthorised person going on the land would undoubtedly be liable, at the instance of the occupier, as a trespasser. What does all this connote but a lease ? It is true that the party who is to have occupation is prohibited from doing certain things on these lands, but prohibitions like those are very familiar features in deeds of lease. I, therefore, hold that the transaction contemplated in the contract pleaded by the plaintiff was a lease of land. If I am right, as I venture to think I am, then by regulation 2 of the " Regulations relating to sales and leases of Crown lands approved by the Secretary of State's despatch of June 5, 1926 " it is laid down that—

> " every grant and every lease of land shall be under the signature of the Governor and the public seal of the Colony, except (*a*) leases of small lots leased annually, which may be signed by the Revenue Officer ; and (*b*) leases of road reservations which may be signed by the Controller of Revenue ".

The transaction cannot be brought within exception (*a*) and the Revenue Officer, the Land Commissioner in this case, was not competent to enter into this contract or to bind the Crown by issuing such a permit as was admittedly contemplated. The regulation I have referred to reappears in the Letters Patent dated April 22, 1931, with the word " disposition " substituted for the word " lease ". Paragraph 6 says—

> " The Governor in Our name or on Our behalf may make and execute, under the public seal of the Island, grants and dispositions of

any lands which may lawfully be granted or disposed of within the Island . . . . ."

But, in the Ceylon Government Manual of Procedure (1940 Ed.) is published a statement of administrative procedure prescribed for transactions with which Officers of State are concerned, and in that statement we find on page 12 that the grant of licences for produce is vested in the Executive Committee. It is that, probably, that inspired the officers in this case to attempt to grant a lease by calling it a "licence for produce". But as I have already observed this is much more than a licence. Mr. H. V. Perera for the respondent to this appeal sought to surmount the difficulty created by regulation 2 quoted above by contending that the agreement contemplated by the parties in this instance at most created an interest in land not amounting to a lease or a disposition of land and he went on to argue that it was only a grant or a lease or a disposition of land that required the Governor's intervention, and that it was competent for the Land Commissioner to enter into an agreement creating an interest in land other than a lease. I am unable to entertain that contention as I have already ventured to say I find the contemplated transaction to be, in reality, a lease and as such, a disposition of land and not any lesser interest in land. But even assuming that what was being created was an "interest in land" less than a lease, even so I have not been referred to any rule or regulation empowering the Land Commissioner to create such an interest in land in the manner in which he proposed to act in this instance. The provisions of the Land Development Ordinance in my view have no application whatever here. Another difficulty in the way of the plaintiff is that the Land Commissioner had no power, in the event of a default such as was alleged on the part of Sabapathipillai rendering his permit or licence to take the produce liable to cancellation, to enter into an agreement, to give that right to the next highest bidder. He was bound in such an event by regulation 29 of the regulations to offer the right for sale again in open competition. D5 shows that the Land Commissioner realised that the action contemplated by him, that is to say to choose the plaintiff for the giving of the right to tap, was *ultra vires*. He writes to the Government Agent "an issue of a preferential lease now to the second highest bidder at an auction held an year ago at a reduced rent does not appear to be in order. If the order of cancellation of the existing permit is not varied after consideration by me on the representations received, the proper course would be to sell the right by auction or public tender". The result is that whether the transaction be regarded as a lease or something less than a lease, the Land Commissioner had not the power to render the Crown liable by acting as he did. If he had not that power he could not, of course, delegate such power to his agent.

As was stated in the opinion delivered in the Privy Council in the case of the *Collector of Masulapatam v. Cavaly Vencata Narainappah* [1].—

> "The acts of a Government Officer bind the Government only when he is acting in the discharge of a duty within the limits of his authority, or, if he exceeds that authority, when the Government, in fact or in law, directly or by implication ratifies the excess".

[1] *(1860) 8 Moore's Indian Appeals 554.*

That is not, at all, the case here.

For these reasons, I hold that the Crown is not liable and I would set aside the decree entered in the Court below and dismiss the plaintiff's action for damages. In regard to the claim for Rs. 6,000 with interest, logically, that amount having been paid to a Government officer who had no power, in the circumstances already stated, to bind the Crown, the plaintiff's proper course would have been to sue that officer, for recovery of that amount. But, in view of the fact that, in such an action too, the Attorney-General would have been the nominal defendant I would disregard technicality, and as the Attorney-General has brought the money into Court, I would direct that judgment be entered for the plaintiff for Rs. 6,000 with legal interest from March 10, 1943, till December 15, 1943, the former date being that on which the notice given to Sabapathipillai was ordered to be cancelled, the latter being the date on which the plaintiff could have, if he had chosen to do so, withdrawn this sum. (See P 30). The plaintiff will pay the costs of the defendant here and below.

The cross-appeal does not arise. It is dismissed but without costs.

I would add a word to express my regret that this judgment has been delayed so long, and a word of explanation to say that this delay was, mainly, due to the fact that soon after judgment had been reserved I came to be engaged on other public duties which devolved on me in pursuance of a Commission issued by His Excellency the Governor.

CANNON J.—I agree.

Appeal allowed.
Cross-appeal dismissed.