DIVISIONAL SECRETARY, MANIKHINNA

Vs.

BUHARDEEN

COURT OF APPEAL
WICKREMASINGHE, J.
SAMAYAWARDHENA, J.
CA/PHC/140/2013
PHC KANDY 23/2010/REV
MC TELDENIYA 92159

State Lands (Recovery of Possession) Act, No. 7 of 1979, sections 5, 6, 7, 8, 9, 10, 18— — Encroachment upon state land—Unauthorised possession—Written authority—Scope of the inquiry—Competent authority

The petitioner divisional secretary filed an application in the Magistrate's Court under section 5 of the State Lands (Recovery of Possession) Act, No. 7 of 1979, to eject the respondent from the land in suit. The respondent resisted the application on the basis that the land is a private land and not a state land. As the respondent did not produce a valid permit or other written authority of the State, the Magistrate's Court made the order of ejectment under section 10 of the Act. In revision, the High Court set aside the order relying on *Senanayake v. Damunupola [1982] 2 Sri LR 621.* The petitioner moved the Court of Appeal to revise the order of the High Court.

Held:

1. There is a difference between challenging a decision of the competent authority under section 3 of the Act by way of a writ

of certiorari and challenging an order of ejectment made by a Magistrate under section 10 of the Act.

2. After the Judgment in *Senanayake v. Damunupola*, the legislature amended the principal Act by Act No. 29 of 1983 to encapsulate encroachment upon State land also within the meaning of unauthorised possession or occupation. The High Court erred in relying on *Senanayake v. Damunupola* to set aside the order of the Magistrate's Court.

3. In terms of section 21 of the Survey Act, No. 17 of 2012 and section 83 of the Evidence Ordinance, the Surveyor General's plan relied upon by the petitioner is prima facie evidence, and identification of the land is established by the petitioner.

4. According to section 9 of the State Lands (Recovery of Possession) Act, the only defence the respondent can rely on is that he has *"a valid permit or other written authority of the State granted in accordance with any written law"*. A decree entered by a Court where the State was not a party is not a written authority within the meaning of section 9.

5. When sections 6- 10 are read contextually, it is clear that the use of the word "inquiry" in section 8 does not suggest a full-blown formal inquiry but affording a fair opportunity to the respondent to satisfy the court that the respondent has a valid permit or other written authority of the State granted in accordance with any written law.

6. In terms of the Transfer of Powers (Divisional Secretaries) Act, No. 58 of 1992, the divisional secretary is a competent authority to file the application in the Magistrate's Court.

Cases referred to:

1. Senanayake v. Damunupola [1982] 2 Sri LR 621
2. Gunaratne Menike v. Jayatilaka Banda [1995] 1 Sri LR 152 at 157
3. Mary Beatrice v. Seneviratne [1997] 1 Sri LR 197 at 203
4. Quinn v. Leathern [1901] AC 495 at 506.
5. Urban Development Authority v. Wijayaluxmi [2006] 3 Sri LR 62
6. Aravindakumar v. Alwis [2007] 1 Sri LR 316 at 319
7. Muthuvelu v. Dias [2004] 2 Sri LR 335 at 339
8. Nirmal Paper Converters (Pvt) Ltd v. Sri Lanka Ports Authority [1993] 1 Sri LR 219 at 223

9. Gunaratne v. Abeysinghe [1988] 1 Sri LR 255 at 262.

10. Banda v. President, M. P. C. S. Ltd, Medirigiriya [2003) 1 Sri LR 193

APPEAL from the Judgment of the High Court of Kandy.

Anusha Fernando, D. S. G., for the Applicant-Respondent-Petitioner.

Anura Meddegoda, P. C., with Jayani Jayasundara for the Substituted Petitioner-Respondent.

cur. adv. vult.

October 10, 2019

SAMAYAWARDHENA, J.

The Petitioner Divisional Secretary of Kundasale filed this application in the Magistrate's Court of Teldeniya under section 5 of the State Lands (Recovery of Possession) Act, No. 7 of 1979, as amended, to eject the Respondent from Lots 15 and 16 of the Preliminary Plan No. 2381 prepared by the Surveyor General.

The Respondent took up the position that his predecessor in title became the owner of the land depicted in Plan 879 prepared by Surveyor H. Panabokke by virtue of the Decree entered in the District Court Kandy Case No. 6007/L in 1964, and thereafter the judgment-creditor in that case gifted the land to his children by Deed No. 5319 in 1965, and they in turn transferred the land by Deed No. 12149 in 1970 to the Respondent (Jenudeen Buhardeen), and therefore this is not a State Land but a private land from which he cannot be ejected under the said Act.

As the Respondent did not produce a valid permit or other written authority of the State, in terms of section 9 of the Act, which allows the Respondent to be in possession or occupation of the land, which, in the opinion of the Petitioner being the Competent Authority, is a State Land, the learned Magistrate made the order for ejectment under section 10 of the Act. (Vide Act No. 29 of 1983 whereby inter alia section 5(1)(a)(ii) and (iv) of the Principal Act was amended by substitution for the words "application is State land", of the words "application isin his opinionState land", and by substitution for the words "application is in unauthorised possession or occupation" of the words "application isin his opinionin unauthorised possession or occupation".) Being dissatisfied with the said order, the Respondent filed a revision application before the High Court of Kandy.

The High Court set aside the order of the learned Magistrate relying on the Judgment of the Supreme Court in *Senanayake v. Damunupola,1* which was a writ application originally filed before this Court challenging a Quit Notice issued under section 3 of the Act.

Being aggrieved by the said Judgment of the High Court, the Divisional Secretary filed this revision application before this Court.

Let me begin with the following general observation. There is a difference between (a) challenging a decision of the Competent Authority under section 3 of the Act by way of a writ of certiorari and (b) challenging an order of ejectment made by a Magistrate under section 10 of the Act. As I will explain later, the scope of the inquiry before the Magistrate is circumscribed strictly to two matters, and he has no jurisdiction to go beyond what has been mandated by the Act. The Act particularly states that the Magistrate shall not call for any evidence in support of the Application, which shall be made in the Form prescribed by the Act. Hence, in my view, it is unfair to set aside the order of the Magistrate on totally different grounds. Then the Act should be amended to widen the scope of inquiry by the Magistrate. In my view, if the Respondent wants to challenge the decision of the Petitioner (Competent Authority), that shall be done in a properly constituted writ application and not by way of an appeal filed against the decision of the Magistrate.

Be that as it may, the central issue in this case revolves around the Judgment in *Senanayake v. Damunupola (supra)* wherein it was held:

The State Lands (Recovery of Possession) Act was not meant to obtain possession of land which the State had lost possession of by encroachment or ouster for a considerable period of time by ejecting a person in such possession.

Section 3 should not be used by a competent authority to eject a person who has been found by him to be in possession of a land where there is doubt whether the State had title or where the possessor relies on a long period of possession.

Let me first emphasise that a case is only an authority for what it actually decides in the unique facts and circumstances of that case. The facts in each case differ and so do the decisions.

In *Gunaratne Menikev. JayatilakaBanda,2* G. P. S. de Silva, C. J. remarked:

The principle laid down in a decision must be read and understood in the light of the nature of the action, and the facts and circumstances the Court was dealing with.

In *Mary Beatrice v. Seneviratne,3* Senanayake J. quoted with approval the following pertinent observation of Lord Halsbury in the *House of Lords case of Quinn v. Leathem.4*

[T] hat every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found they are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

Coming back to the main matter under review, I will first deal with the first part of what was held in *Senanayake v. Damunupola.*

It was the firm view of the Supreme Court that the State Lands (Recovery Possession) Act *"was not meant to obtain possession of land which the State had lost possession of by encroachment or ouster for a considerable period of time by ejecting a person in such possession."* (at page 628)

It was enacted to make provision for the recovery of possession of 'State lands' as defined in the Act from persons in unauthorised possession or occupation thereof and matters connected therewith or incidental thereto. It is clear that this Act was intended to obtain an order of ejectment from the Magistrate's Court where the occupation or possession was unauthorised. Where a person is authorised to occupy or possess State Land which includes buildings, and where the authorisation has come to an end or has ceased to be of any force or effect, his occupation or possession becomes unauthorised. (at page 627)

A purposive examination and interpretation of this Law shows that it was enacted to get back possession of State land which had been given to a person on a contractual footing and where there was an obligation to vacate and give up possession or occupation

on the happening of some event as a necessary consequence. (at page 628)

Accordingly, the Supreme Court stated that if a person has encroached upon State Land without permission or authorisation and has continued such possession for a long time, the State shall resort to the Crown Lands Encroachments Ordinance (Chapter 465 of the Legislative Enactments of Ceylon (1956)) and not to the State Lands (Recovery of Possession) Act, as the latter is meant to summarily get back possession of State Land from an overholding licensee. If I may quote the very words used by the Supreme Court *"to get back possession of State land which had been given to a person on a contractual footing".* (at page 628)

The Supreme Court explained the point in this manner:

The Crown Lands Encroachments Ordinance (Chap. 465) as amended by Act No. 7 of 1954 has clearly provided for situations of this nature. Section 2 provided that where there is an alleged encroachment of land where persons who having entered upon or taken possession of land which belong to the Crown or which prior to entry or taking possession, was in the possession of the Crown, information of such encroachment could be laid before the District Court. The District Court if satisfied that the persons against whom the information had been laid had entered upon or taken possession of the land without the permission of the Government, could make an order for delivery of possession. This Ordinance has provided a very summary or speedy procedure to eject such persons. However, section 7(c) of this Ordinance permitted the rebuttal of the presumption that the land belongs to the State on proof inter alia of uninterrupted possession for not less than 30 years. The State had not chosen to proceed under this Ordinance, to obtain a summary order from the District Court for delivery of possession of the land on the basis that the land belonged to the State and had been encroached upon. The Respondent had decided to proceed under the newly enacted State Lands (Recovery of Possession) Act No. 7 of 1979 without considering its applicability or otherwise to the facts established at the end of his inquiries. (at pages 626- 627)

It is significant to note that after this Judgment, the legislature amended the principal Act to remove any lingering doubts and to make it clear

that encroachment upon State Land is also covered by " *unauthorised possession or occupation* " as stated in the Act, which the Supreme Court in *Senanayake v. Damunupola* thought would not have been the intention of the legislature. By Act No. 29 of 1983, section 18 of the Principal Act, which is the interpretation section, was amended to include the following:

"unauthorised possession or occupation" except possession or occupation upon a valid permit or other written authority of the State granted in accordance with any written law, and includespossession or occupation by encroachment upon state land.

Then it is clear that the first part of what was held in *Senanayake v. Damunupola*, i. e. *"The State Lands (Recovery of Possession) Act was not meant to obtain possession of land which the State had lost possession of by encroachment or ouster for a considerable period of time by ejecting a person in such possession"* is no longer binding, as the law was amended subsequent to the Judgment.

Hence I hold that the learned High Court Judge erred in relying on *Senanayake v. Damunupola* to set aside the order of the learned Magistrate.

This leads me to consider the second part of what was held in *Senanayake v. Damunupola*, which is *"Section 3 should not be used by a competent authority to eject a person who has been found by him to be in possession of a land where there is a doubt whether the State had title or where the possessor relies on a long period of possession."*

In *Senanayake v. Damunupola*, there was *"a serious doubt whether the said land belonged to the State or whether it had vested in the Municipal Council of Kandy"* (at page 626), and the learned Deputy Solicitor General who appeared for the State had conceded that the Plan did not establish that the Lots *"in dispute were road reservations or/ands belonging to the State"* (at page 625). The Supreme Court therefore held *"This procedure [laid down in the Act] could not be availed of where it is not clear that the land in respect of which the right or title of the State was doubtful or in dispute"* (at page 628).

However, in the present case, there is no doubt, as far as the State is concerned, that the land in dispute is State land.

The Divisional Secretary has tendered a true copy of the Surveyor General's Plan No. 2381 and the Tenement List compendiously marked

P9 to show that Lots 15 and 16 of that Plan, which is the land described in the Schedule to the application for ejectment, is State land. A true copy of the Surveyor General's Plan No. 2714 mentioned in Plan No. 2381 with the Tenement List has been tendered as P10. The Petitioner Divisional Secretary has also tendered to the High Court with his Statement of Objections a letter sent to the Divisional Secretary by the Senior Superintendent of Survey to say that upon resurveying the land with the aid of the old fixations, it was confirmed that Lot 16 in the Surveyor General's Plan No. 2381, which is in the possession of the Respondent, is State land.

Section 21 of the Survey Act, No. 17 of 2012, enacts:

Any cadastral map, plan or any other plan or map prepared in accordance with the provisions of this act or any written law purported to be signed by the surveyor general or officer acting on his behalf and offered in evidence in any suit shall be received in evidence and shall be taken to be prima facie proof of the facts stated there in and shall not be necessary to prove that it was in fact signed by the Surveyor General or an officer acting on his behalf, nor that it was made by his authority, nor that the same is accurate until the evidence to the contrary shall have first been given.

Section 83 of the Evidence Ordinance is to the same effect:

The Court shall presume that maps, plans, or surveys purporting to be signed by the Surveyor-General or officer acting on his behalf were duly made by his authority and are accurate; but maps, plans, or surveys not so signed must be proved to be accurate.

Conversely, the Respondent has not taken any steps to superimpose his Plan No. 879 on Lots 15 and 16 in the Surveyor General's Plan No. 2381 to convince the court, for whatever it is worth, that the land depicted in both Plans is the same.

Hence the direction of the learned High Court Judge that, if the Divisional Secretary wants to eject the Respondent from the subject land on the basis that it is a State land, he shall get the Surveyor General to survey the land with notice to the Respondent in order to distinguish State land from the Respondent's private land, and to then file a case in the Magistrate's Court under the State Lands (Recovery of Possession) Act to eject the Respondent from the State Land is, in my view, indefensible.

The learned President's Counsel for the Respondent took up three new positions before this Court in challenging the order of the Magistrate's Court and defending the Judgment of the High Court.

(a) The Decree entered by the District Court constitutes "written authority of the State"

(b) Failure to hold an inquiry by the learned Magistrate vitiates the entire proceedings

(c) The Divisional Secretary is not a "Competent Authority"

I will now deal with the above in order.

Section 9 of the Act reads as follows:

9(1) At such inquiry the person on whom summons under section 6 has been served shall not be entitled to contest any of the matters stated in the application under section 5 except that such person may establish that he is in possession or occupation of the land upon avalid permitorother written authority of the Stategranted in accordance with any written law and that such permit or authority is in force and not revoked or otherwise rendered invalid.

(2) Itshall notbe competent to the Magistrate's Court tocall for any evidence from the competent authorityin support of the application under section 5.

According to section 9, the only defence the Respondent can rely on is that he has *"a valid permit or other written authority of the State granted in accordance with any written law''*. The learned President's Counsel strenuously submits that the Decree entered by the District Court of Kandy in Case No. 6007/L in favour of the Respondent's predecessor is a *"written authority of the State granted in accordance with any written law''* as *"the District Court being an institution established by law and thus an authority of the State exercising the Judicial power of the people including adjudication of disputes"*.

I regret my inability to agree with this argument. Notwithstanding the District Court has been established in accordance with the law, the Judgments handed down by such Court cannot be encapsulated within the meaning of *"written authority of the State granted in accordance with any written law''*. (*Cf. Urban Development Authority v. Wijayaluxmi5* where a List of Persons selected for allotment of lands by the Divisional

Secretary was considered not to be a written authority of the State as contemplated in section 9 of the Act.)

In any event, there cannot be any dispute that the persons bound by a Judgment delivered by a District Court in a land case are the parties to the case and their privies. No third parties are bound by it. According to the copy of the Decree tendered marked X relied upon by the Respondent to claim ownership of the land, the litigation was between two individual private parties, and the State had not been a party to that case. Hence the State is not bound by the said Judgment. Therefore the Judgment cannot be used to say that the Respondent is the rightful owner of the land against the State.

The next argument of the learned President's Counsel is that, in terms of sections 8- 10 of the Act. it is mandatory for the Magistrate to fix the matter for inquiry, and, as this has not happened in this case, the proceedings are a nullity.

In the first place, there was no such application made before the Magistrate's Court asking for the matter to be formally fixed for inquiry in order to lead oral evidence.

Section 6 of the Act requires the Magistrate to issue summons on the person named in the application *"to appear and show cause"* why such person shall not be ejected from the land in suit. lf the person so named fails to appear, according to section 7, the Court shall forthwith issue an order of ejectment. According to section 8, if he appears and states that he has cause to show, *"the Magistrate's Court may proceed forthwith to hear and determine the matter or may set the case for inquiry on a later date."* At such inquiry, in terms of section 9, he can only show that he has a valid permit or other written authority of the State granted in accordance with any written law (*Aravindakumar v. Alwis6*). Section 10 explains when the Magistrate can make an order of ejectment after such inquiry.

When the relevant sections are read in context, it is clear that the use of the word "inquiry" does not envisage a full trial being conducted. If that was the intention, the Magistrate cannot proceed to hear and determine the matter forthwith, as stated in section 8. It is not mandatory that the Magistrate shall fix the matter for inquiry for oral evidence to be led. What the Magistrate shall do is to give the person summoned a fair opportunity to satisfy the Court that he has a valid permit or other written authority of the State granted in accordance with any written law. The person so

summoned cannot be allowed to convert that opportunity into a full fledged trial, which will defeat the intention of the legislature.

As the Supreme Court stated in *Senanayake v. Damunupofa*, *"The scope of the State Land (Recovery Possession) Act was to provide a speedy or summary mode of getting back possession or occupation of 'State land' as defined in the Act (at page 628). Vide also Muthuvelu v. Dias,7Nirmaf Paper Converters (Pvt) Ltd v. Sri Lanka Ports Authority,8Gunaratne v. Abeysinghe.9*

The Respondent in the present case, without any complaint, has shown cause against an order for ejectment made on an affidavit supported by the documents marked X1- X8. No prejudice whatsoever has been caused to the Respondent by not fixing the matter for inquiry. The inquiry has been disposed of by way of affidavit evidence, which is entirely in consonance with the scheme and purpose of the Act. Accordingly, I reject this argument.

The last argument of the learned President's Counsel is, in terms of section 18 "competent authority" used in relation to any land means the Government Agent, an Additional Government Agent or an Assistant Government Agent of the District in which the land is situated, and therefore the Divisional Secretary Kundasale has no locus standi to file this application. In terms of the Transfer of Powers (Divisional Secretaries) Act, No. 58 of 1992, in any law where the expression *"Government Agent"* occurs, it shall be substituted by *"Divisional Secretary''* and the functions of Government Agents are required to be exercised by *Divisional Secretaries (Banda v. President, M. P. C. S. Ltd, Medirigiriya10)*. Therefore, I see no merit in that argument.

For the aforesaid reasons, the Judgment of the High Court is set aside and the order of the Magistrate's Court is restored. In the circumstances of this case, no order is made as to costs.

WICKREMASINGHE, J. - *I agree.*

Appeal allowed.

Judgment by: Mahinda Samayawardhena, J.

This PDF was produced by paralegal.lk