PADMINI
v
JAYASEELI

COURT OF APPEAL.
BALAPATABENDI, J. AND
IMMAM, J.
CA 1246/2002 (F).
DC MATUGAMA 10/13.
JULY 6 AND 26, 2004.
SEPTEMBER 22, 2004

Action to evict alleged licensee – Defendant claiming co-ownership – In appeal taking a different position that the alleged license was not terminated – Is it permissible ? – Doctrine of Approbation and Reprobation.

Held:

Per Balapatabendi, J.

> "it is clear that the defendant-appellant had claimed to possess the said property as a co-owner against the plaintiff-respondent but not one under the plaintiff respondent. Therefore, I am inclined to agree that the doctrine of "approbate and reprobate" forbids the assertion of the defendant-appellant," when the defendant-appellant failed to establish that she was a co-owner how could she now insist – on termination of the leave and licence – which never existed according to her."

APPEAL from the District Court of Matugama.

Cases referred to:

1. *Ponnupulle* v *Odoowerre Tea Company Limited* – CLW Vol. LXV 20
2. *Coranelis* v *Urban Council Dehiwala - Mt. Lavinia*, 59 NLR 158
3. *Eliyathamby* v *Kandiah* – 47 NLR 201
4. *Ashriff* v *Razeek* 1985 1 Sri LR 162
5. *Muthu Nachchiya* v *Pathuma Nachchiya* – 1899 1 NLR 21
6. *Ranasinghe* v *Premawardene* – 1985 1 Sri LR 63

Dr. Jayantha Almeida – Gunaratne with *Dr. Mangala Ratnayake* for defendant-appellant.

M. H. B. Morais with *S Arachchige* for plaintiff-respondent.

Cur. adv. vult.

October 18th, 2004

JAGATH BALAPATABENDI, J.

The plaintiff-respondent instituted an action in the District Court against the defendant-appellant seeking *inter alia* a declaration that she is a co-owner of the land morefully described in the schedule to the plaint, for an order of ejectment of the defendant-appellant from the said property, and for damages as prayed for in the plaint.

The case for the plaintiff-respondent was, the defendant-appellant and her deceased husband were given leave and licence to put up a temporary structure in the land in question in June 1982 on a promise to vacate the said premises removing the temporary structure when requested by the plaintiff-respondent. As the defendant-appellant commenced to erect a permanent building in the said land in August 1982 without her permission the action was instituted, to eject her from the said property as she was in unlawful possession of the land, and also sought an interim injunction to prevent her from further construction of the building.

The defendant-appellant had filed Answer, denying that she was a licensee, and had claimed that she was in possession of the said land for more than 10 years as a co-owner, thus had prayed for a dismissal of the action and sought a declaration that she is a co-owner of the said land.

The trial had proceeded on 13 issues raised, the plaintiff-respondent had given evidence marking documents P1 to P11 to establish the devolution of title and the co-ownership, the Surveyor and another witness had given evidence in support of the plaintiff-respondent's case. The defendant-appellant had closed his case without leading any evidence to establish his case.

The Learned District Judge after trial, in his Judgment had answered the issues in favour of the plaintiff-respondent.

At the hearing of the appeal, firstly, it was contended by the Counsel for the Defendant-appellant, that the plaintiff-respondent could not have sought an ejectment of the defendant-appellant without termination of the leave and license as required in law, and the possession of the said land by the defendant-appellant becomes unlawful only upon the date of expiry in the notice to quit,

he alleged that the plaintiff-respondent in her evidence had not specified any date as to when the leave and license had been terminated. The counsel drew the attention of Court to the following item of evidence given by the plaintiff-respondent.

"මම කීවා තාවකාලිකව ගෙයක් හදා ගෙන ඉන්ඩ කියා. දෙවනුව යන්න කීවා. එහෙම ආවේ 1982 තාවකාලිකව. ඒ අය ගඩොලින් බැන්දා ගෙයක්. අපි විරුද්ධ වුනා. මෙයා යන්නේ නෑ ඉඩම ගත්තා, යන්නේ නැති නිසා 1986 දෙසැම්බර් මාසේ නඩු දැම්මා. මම 1984 දී යන්ඩ කීවා ගියේ නෑ."

In support of his contention he has cited the decisions of the cases *Ponnupulle* v *Odoowerre Tea Co. Ltd.*(1) *Coranelis* v *The Urban Council Dehiwela - Mt. Lavinia*(2) *Eliyathambi* v *Kandiah*(3)

I am of the opinion that the decisions of the above mentioned cases were based on different facts to that of the instant case and thus not relevant.

In reply to the above issue, the counsel for the plaintiff-respondent contended that in the answer filed by the defendant-appellant, she had totally denied that she was in possession of the said land with the leave and license of the plaintiff-respondent, but had stated that she was a co-owner of the said property and was in possession since 1982 August (over 10 years), and constructed a house in the said land on the basis of her co-owned right to the said land.

Upon the facts stated above, the Counsel for the plaintiff-respondent raised a question as follows:- "Could the defendant-appellant now take up the stance that the plaintiff-respondent had not duly terminated the leave and license by giving her notice to quit, when she had totally denied that she was a licensee, and had claimed a co-ownership." As such " Can the defendant-appellant approbate and reprobate at the same time." Even at the trial no issue had been raised in regard to the termination of the leave and license of the defendant-appellant.

In support of his contention the case of *Ashriff* v *Razik*(4) was cited. In the case of *Ashriff* v *Razik* (*supra*) - "The defendant claimed a joint tenancy with the plaintiff and alternatively that he was the sub-tenant under the plaintiff. He never denied tenancy. The defendant never claimed right of occupation against the

plaintiff, whether it be in the capacity of a licensee or a sub tenant, *his claim to occupy the premises was always one under the plaintiff,* and not against him. Therefore the defendant was entitled to notice of the revocation of his licence."

In the case of *Muttu Natchia* v *Patuma Natchia* (5) Browne, J. observed that "The plaint in the case sufficiently averred that the defendant, after entering and holding as tenant of the plaintiff, had disclaimed to hold of him and put him at defiance. It was unnecessary therefore that the plaintiff, as he did should have averred or have sought to prove any notice to quit given by him to the defendant, and the defendant was not entitled to have the action dismissed because no valid notice was given."

In the instant case, the defendant-appellant claimed that she was a co-owner of the said property and totally denied that she was a licensee. When the defendant-appellant failed to establish that she was a co-owner, how could she now insist on termination of the leave and license which license never existed according to her.

Thus it was obviously clear the defendant-appellant had claimed to possess the said property as a co-owner against the plaintiff-respondent but not one under the plaintiff-respondent. Therefore, I am inclined to agree with the contention of the Counsel for the plaintiff-respondent that the doctrine of 'approbate and reprobate' forbids the assertion of the defendant-appellant.

In case of *Ranasinghe* v *Premadharma*(6) Sharvananda. CJ., observed that "The rationale of the principle appears to be that a defendant cannot approbate and reprobate. In cases where the doctrine of 'approbation and reprobation' applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts one he cannot afterwards assert the other, he cannot affirm and disaffirm."

Secondly, the counsel for the defendant-appellant contended that the Deed bearing No 22313 executed on 13.03.1982 marked as (P2) on which the plaintiff-respondent based her claim for co-ownership, was not proved either by calling the Notary Public who executed the deed, or at least one of the witnesses to the deed.

It was an admitted fact that K.Don Thepanis Appu was a co-owner of the land described in the schedule to the plaint. The said Thepanis Appu on 14.06.1910 by the deed bearing No.342 marked as (P1) transferred a (1/2) half share to the plaintiff's father Jamis Appu. (P1 is over 30 years old).

The said Jamis Appu separated a portion of the said land and was in possession. The said Jamis Appu died leaving as his heirs the widow Mary Nona and two daughters plaintiff-respondent and her sister Gunaseeli.

Mary Nona's 1/2 share devolved on the plaintiff-respondent and Gunaseeli after her demise, the said Gunaseeli (sister of the plaintiff-respondent) gifted her share by the deed (P2) to the plaintiff-respondent. Thus all the rights of Jamis Appu were devolved on the plaintiff-respondent.

The deed (P2) is a deed of gift, by the sister of the plaintiff-respondent. At the trial the plaintiff-respondent had identified her sister's signature as the donor and her signature as the donee in the deed P2. The plaintiff-respondent was a party to the deed P2.

In addition, the defendant-appellant in her Answer at paragraph Six (6) had admitted that Jamis Appu's rights devolved on Mary Nona (wife) and the two daughters the plaintiff-respondent and her sister Gunaseeli.

In view of the aforesaid reasons, it could not be said that the deed (P2) had not been proved as alleged by the defendant-appellant.

Thirdly, the Counsel for the defendant-appellant contended that the Learned District Judge had failed to consider to award compensation for improvements effected on the land by the defendant-appellant.

On a perusal of the Judgment of the Learned District Judge it is clear that the learned District Judge in her Judgment had correctly referred to the fact that there was no evidence placed before Court as to what were the improvements effected on the land by the defendant-appellant, and as to the quantum of compensation claimed by the defendant-appellant: as such she was unable to make any order on compensation.

In the above mentioned circumstances, I am of the view that the findings of the Learned District Judge were correct in law. The appeal is dismissed with costs of Rs. 10,000/-.

IMAM, J. – I agree.

Appeal dismissed.

Editors Note: The Supreme Court in SC (SPLA) 289 (4) on 13th July 2005 refused special leave to appeal to the Supreme Court.