DHARMAWARDENA

v.

WALWATTAGE

COURT OF APPEAL.
G. P. S. DE SILVA, J. (President, C/A) AND DHEERARATNE, J.
C.A. 462/79–D. C. MT. LAVINIA, 156/ZL.
SEPTEMBER 25, 1986.

Landlord and tenant–Contract of tenancy tainted with statutory illegality–Whether effective to create rights–Application of maxim in pari delicto potior est conditio defendentis.

The plaintiff instituted action for a declaration of title to the premises in suit, for ejectment of the defendant, for an order on the defendant to demolish the 'unauthorised shed' occupied by her and for damages. The defendant claimed that she was the lawful tenant of the premises in suit having first come into occupation under the plaintiff's father. The plaintiff's position was that the premises were unauthorised under the provisions of the Housing and Town Improvement Ordinance and that accordingly the contract of tenancy was illegal being in breach of statutory provisions.

Held–

One of the essential requisites of a contract of letting and hiring is that the thing should be capable of being let. A lease like any other contract must be legal; it must not be prohibited by statute. An illegal lease is invalid on account of its content. In the instant case there is an express statutory prohibition in the Housing and Town Improvement Ordinance against the occupation of a building in respect of which no certificate of conformity has been obtained. The premises in suit was such a building and the landlord could not have delivered to the tenant the use and occupation of the premises let as is required in a contract of letting and hiring. The contract of tenancy is tainted with statutory illegality and is ineffective to create rights.

The provisions of the Rent Act do not apply to a contract of tenancy rendered illegal by statute. The applicability of the maxim in pari delicto potior est conditio defendentis is considered.

Cases referred to:

(1) *Victorian Daylesford Syndicate Ltd. v. Dott–1905, 2 ch. 624 at 629.*

(2) *Fernando v. Ramanathan–(1916) 16 N. L. R. 337 at 343.*

(3) *Mohideen v. Saibo–(1917) 17 N. L. R. 17.*

(4) *In Re-Arbitration between Mahmoud and Ispahani–(1925) 2 K.B. 716.*

(5) *Theivendran v. Ramanathan Chettiar–(1986) 2 Sri L. R. 219.*

(6) *Jajbhay v. Cassim–S A.L.R. (1939) A. D. 537 at 550.*

APPEAL from a judgment of the District Court of Mount Lavinia.

M. S. M. Nazeem, P. C. with *M. Sivananthan* for the plaintiff-appellant.

G. G. Mendis with *P. V. E. Gunadasa* for the defendant-respondent.

Cur adv. vult.

October 31, 1986.

G. P. S. DE SILVA, J. (President, C/A)

The plaintiff instituted this action in 1976 for a declaration of title to the premises in suit, for ejectment of the defendant, for an order on the defendant to demolish the unauthorised shed occupied by her, and for damages. In her plaint she set out the devolution of title and averred that her mother who was the owner of the property transferred it to her in 1974. It was her case that the defendant is in occupation of an unauthorised shed and it was her deceased father who originally permitted her to temporarily occupy it. In short, her position was that the defendant was no more than a licencee and the permission given was withdrawn by a notice dated 19.7.1976 (P 14).

The defendant in her answer pleaded that she was a tenant who first came into occupation of the premises in suit in 1965 under the plaintiff's father. She denied that she was in occupation of a temporary shed and she produced six rent receipts issued by the plaintiff's father (D1 to D6). It transpired in evidence that the plaintiff's father had filed an action in March 1969 for the ejectment of the defendant from the premises in suit and for the recovery of arrears of rent (vide the plaint marked D7). Thereafter in August 1972 the plaintiff's mother sought to eject the defendant and recover arrears of rent (vide the plaint marked D8). Both actions were withdrawn.

At the trial, while the defendant took up the position that she was the tenant of the premises in suit since 1965, the plaintiff's position was that the defendant was not entitled to remain in occupation of premises since the premises were unauthorised under the provisions of the Housing and Town Improvement Ordinance (Chap. 268). In other words, the case for the plaintiff was that the contract of tenancy, relied on by the defendant for her right to continue in occupation, was illegal as it was in breach of the statutory provisions.

The District Judge held:

(1) that the plaintiff is the owner of the premises;

(2) that the defendant is in occupation not of a temporary shed but of a house with 3 rooms;

(3) that the construction of the said house was not in accordance with the provisions of the Housing and Town Improvement Ordinance;

(4) that the defendant entered into occupation of the premises as a tenant under the plaintiff's father; and

(5) that the contract of tenancy was lawful.

While granting the plaintiff a declaration that she is the owner of the premises, he refused the decree in ejectment prayed for by the plaintiff. Hence this appeal preferred by the plaintiff.

At the hearing before us it was not disputed that the plaintiff is the owner of the premises, nor did Mr. Mendis, counsel for the defendant-respondent, challenge the finding of the District Judge that the premises occupied by the defendant were not authorised in terms of the provisions of the Housing and Town Improvement Ordinance (hereinafter referred to as the Ordinance). The principal contention advanced by Mr. Nazeem for the plaintiff-appellant was that the alleged contract of tenancy was invalid for illegality inasmuch as it contravenes specific provisions of the Ordinance. Mr. Nazeem referred us to sections 5, 13, 15(1) and 15(3) of the Ordinance.

Section 5 reads thus:

"5. No person shall erect or re-erect any building within the limits administered by a local authority, except in accordance with plans, drawings, and specifications approved in writing by the Chairman."

Section 13(1)(*c*):

"Any person who shall execute any building operation in contravention of any of the provisions of this Ordinance.....shall be liable on summary conviction to a fine not exceeding Rs. 300 and to a daily fine of Rs. 25 for every day on which the offence is continued after conviction."

Section 15(1):

"No building constructed after the commencement of this Ordinance shall be occupied, except by a caretaker, until the Chairman has given a certificate that such building, as regards construction, drainage, and in all other respects, is in accordance with law."

Section 15(3):

"Any person who occupies or allows to be occupied any building in contravention of this section shall be guilty of an offence, and shall be liable to a penalty not exceeding twenty-five rupees for each day during which the contravention continues."

Dr. Tambiah in his "Landlord and Tenant in Ceylon" citing Vanderlinden and Maasdorp states that one of the essential requisites of a contract of letting and hiring is that "the thing should be capable of being let" (pages 2 and 3). Similarly, Cooper in his work entitled 'The South African Law of Landlord and Tenant' says:

"A lease like any other contract must be legal; it must not be prohibited by statute.....An illegal lease is invalid on account of its content, not its form.....Thus.....if the letting of the property requires the consent of an official and his consent has not been obtained.....the lease, because of its *content* is illegal" (pages 10 & 11).

In the instant case, be it noted, that both the person who occupies and the person who allows another to occupy a building in respect of which no certificate of conformity has been issued is guilty of an offence and is liable to a continuing penalty for each day during which the contravention continues. Thus it is clear that there is an express statutory prohibition against the occupation of such a building. Once a lease is entered into, it is the duty of the landlord to deliver to the tenant the use and occupation of the premises let. This could not have been lawfully done in the instant case.

Buckley, J. in *Victorian Daylesford Syndicate Limited v. Dott* (1) (a case dealing with the Money Lenders Act 1900) stated the principle thus:

"The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by

implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose statutes may be grouped under two heads—those in which a penalty is imposed against doing an act for the purpose only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public. That distinction will be found commented upon in numerous cases.....If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal. I desire to point out that the present case is one that is upon this point abundantly plain. There is no question of protection of the revenue here at all. The whole purpose is the protection of the public. The money-lender has to be registered, and has to trade in his registered name obviously and notoriously for the protection of those who deal with him. The purpose is a public purpose, and therefore upon all the authorities the act for the doing of which a penalty is imposed is an act which is impliedly prohibited by the statute and is consequently illegal."

Wood Renton, A.C.J. in *Fernando v. Ramanathan* (2) expressed himself in the following terms:

"Whether in any enactment the Legislature has prohibited a particular contract or act is a problem that has to be solved in the light of the letter and spirit of the provisions of that enactment viewed as a whole. Although a contract or act may be made illegal by a statute passed for the protection of revenue alone, the presumption of illegality will be greater where the statute is one embracing other important objects of public policy as well, and where it contains prohibitory language, besides imposing a penalty."

The ruling in the above case was followed in *Mohideen v. Saibo* (3).

The long title of the Ordinance we are here concerned with shows that the object is "to provide for the better housing of the people and the improvement of towns". The Ordinance read as a whole shows that it is primarily intended for the protection of the public and the imposition of the penalties is not for the purposes of revenue".....if an act is prohibited by Statute for the public benefit the court must enforce the prohibition, even though the person breaking the law relies upon his own illegality" (per Scrutton, L.J. In *Re-Arbitration between Mahmoud and Ispahani* (4)).

Having regard to the ambit and the intent of the Ordinance, I am of the opinion that the contract of tenancy upon which the defendant founds her claim to occupy the premises is tainted with statutory illegality and is therefore ineffective to create rights. The principle is that ".....when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession" (per Sharvananda, C.J. in *Theivandran v. Ramanathan Chettiar* (5). This the defendant has failed to do.

However, the conclusion that the contract of tenancy is illegal does not necessarily mean that the plaintiff is entitled to a decree in ejectment. There is a further matter to be considered, namely the applicability of the maxim, in pari delicto potior est conditio defendentis, (the defendant's position is superior if culpability is equal). In this connection the provisions of section 5, 13 and 15(3) of the Ordinance referred to above are relevant. It seems to me that the culpability of the "landlord" is no less than that of the "tenant". But the Roman-Dutch Law recognises that the general rule embodied in this maxim may be relaxed in cases "where it is necessary to prevent injustice or to promote public policy". (*Jajbhay v. Cassim)* (6).

The evidence reveals that the unauthorised structure was put up many years ago by the plaintiff's father (now deceased) who was not a predecessor in title of the plaintiff. The receipts for rent produced by the defendant were issued by the father and not by the plaintiff's mother or the plaintiff herself. The premises in suit having been constructed without the requisite authority is liable to demolition under the provisions of the Ordinance (section 13(2)). The plaintiff has given one month's notice to the defendant to vacate the premises (P14). Neither the interests of justice nor the requirements of public policy justify the continued occupation by the defendant of these unauthorised premises. Nor do the provisions of the Rent Act apply to a contract of tenancy rendered illegal by statute.

I would accordingly allow the appeal, set aside the judgment of the District Court and direct that decree be entered for the ejectment of the defendant, her servants, agents and all those holding under her from the premises in suit. However, in all the circumstances I further direct writ of ejectment not to issue till 2nd May 1988. The plaintiff is entitled to costs of appeal fixed at Rs. 210.

DHEERARATNE, J.—I agree.

Appeal allowed.