**REGINALD FERNANDO**

**vs**

**PABILINAHAMY AND OTHERS (SUBSTITUTED)**

SUPREME COURT
BANDARANAYAKE, J.
DE SILVA, J. AND
JAYASINGHE, J.
S. C. APPEAL NO. 156/97
C. A. APPEAL, NO. 363/91(F)
D. C. NEGOMBO NO. 3746/L
10th FEBRUARY, 30th MARCH AND 1st APRIL, 2004

*Occupation of land by licensee - Right of licensee to occupy the land after termination of the license - Right of licensor to eject licensee - Claim of licensee to prescriptive title of the land.*

The plaintiff – appellant ("the plaintiff") instituted action against the original defendant ("the defendant") for ejectment from a *cajan* shed where the defendant and his father had resided for four decades. The evidence proved that the defendant's father J was the carter under the plaintiff's father. After the death of J the defendant continued to reside in the shed as a licensee.

On 22.03.1981 the plaintiff had the land surveyed by a surveyor ; and on 06.01.1987 sent a letter to the defendant through an attorney-at-law calling upon the defendant to hand over the vacant possession of the shed which as per the said letter the defendant had been occupying as a licensee. The defendant failed to reply that letter without good reason for the default. The defendant also falsely claimed not to have been aware of the survey of the land. In the meantime the plaintiff had been regularly collecting the produce of the land.

The defendant claimed prescriptive title to the land. The District Judge gave judgment for the plaintiff. This was reversed by the Court of Appeal.

**Held :**

1. The defendant failed to establish prescriptive title to the land as required by section 3 of the Prescription Ordinance.

2. The Court of Appeal failed to consider all the relevant evidence.

3. Where the plaintiff (licensor) established that the defendant was a licensee, the plaintiff is entitled to take steps for ejectment of the defendant whether or not the plaintiff was the owner of the land.

*Per* Bandaranayake, J.

"The Court of Appeal erred in holding that the District Court had entered judgment in favour of the plaintiff in the absence of sufficient evidence to prove that the plaintiff was either the owner or that the defendant was his licensee"

**Cases referred to :**

1. *Fernando* v *Wijesooriya* 48 NLR 320
2. *De Alwis* v *Perera* 52 NLR 433

**APPEAL** from the judgment of the Court of Aoppeal.

*Romesh de Silva*, P.C. with *Sunil Cooray* and *Sugath Caldera* for plaintiff-appellant

*K. S. Tilakaratne* for substituted defendants-respondents.

*Cur.adv.vult*

July 15, 2004
**SHIRANI BANDARANAYAKE, J.**

This is an appeal from the judgment of the Court of Appeal dated 06.05.1997. By that judgment the Court of Appeal set aside the judgment of the District Court of Negombo dated 01.08.1991 and dismissed the plaintiff-respondent-appellant's (hereinafter referred to as the plaintiff) action. The plaintiff appealed to this Court where Special Leave to Appeal was granted on the following questions :

1. did the Court of Appeal misdirect itself by rejecting the adverse inference drawn by the learned District Judge from the failure of the defendant to reply the notice to quit produced marked P3 ;

2. did the Court of Appeal misdirect itself on the primary facts by holding that the learned District Judge had determind that the deed produced marked P1 did not refer to the land in dispute ;

3. did the Court of Appeal err by failing to take into account the correct inference which can be drawn from the acquiescence of the defendant in the survey of the land in 1981 which was effected at the instance of the plaintiff;

4. did the Court of Appeal err in rejecting the plan produced marked P2 inasmuch as it had been read in evidence at the conclusion of the plaintiff's case without objection by the defendant ;

5. did the Court of Appeal err in not property evaluating the evidence led by the plaintiff to establish the fact that the plaintiff had appropriated the produce of the said land ;

6. did the Court of Appeal misdirect itself by failing to properly evaluate the evidence led by the plaintiff to establish possession of the land by him ;

7. did the Court of Appeal misdirect itself by failing to take into account the proper inference to be drawn on the evidence led on behalf of the plaintiff, which clearly established that the defendant and his predecessors had been placed in possession by the plaintiff and his predecessors in title on the latter's leave and license.

The facts in this appeal, *albeit* brief, are as follows :–

The plaintiff filed action against the defendant-appellant-respondent, now deceased and substituted (hereinafter referred to as the defendant) on the basis that it was with the leave and license of the plaintiff that the defendant was in occupation of the thatched house which is described in the schedule to the plaint. The defendant by his answer denied this position taken by the plaintiff and claimed title to the land by prescriptive possession. The District Court of Negombo held that the defendant was occupying the thatched house with the leave and license of the plaintiff and the issues were answered in favour of the plaintiff. The Court of Appeal set aside the judgment of the District Court of Negombo, dismissed the plaintiff's action and allowed the defendant's appeal.

It is not disputed that although Special Leave to Appeal was granted on several questions of law, the main matter in issue is "whether the Court of Appeal erred in holding that the District Court has entered judgment in favour of the plaintiff in the absence of sufficient evidence to prove that he was either the owner or that the defendant was his licensee".

Learned Counsel for the defendant strenuously argued that the defendant and his previous generations of family had undisturbed and uninterrupted possession and they had been living in the land in question for well over four decades. The defendant therefore vehemently denied the fact that he had entered the house in question with the leave and license of the plaintiff and contended that he had acquired prescriptive title to the land, which is a defined portion, by having for over four generations undisturbed and uninterrupted possession.

The plaintiff, as referred to earlier, had filed action against the defendant on the ground that the latter had entered the land in question on leave and license of the plaintiff. In support of his position the plaintiff had called three witnesses, namely the Grama Niladhari of the area, one Solomon Appuhamy, who was a neighbour for 53 years and one Jamis Appuhamy, who used to pluck coconuts of the estate. The plaintiff had stated in his evidence that the defendant's father was a carter who served his father. The carter was thus permitted to remain in the land as his licensee and that on his death the defendant, being the son of the carter, became the plaintiff's licensee. The Grama Niladhari had stated in his evidence that the plaintiff used to visit the land, pluck coconuts once a month and take all the produce. He specifically stated that there had been no objection from the defendant. Solomon Appuhamy, who had been a neighbour for over 5 decades, stated in his evidence that the plaintiff took all the prjoduce of the land. Moreover he emphasised the fact that the defendant's father was the carter of the plaintiff's father and thereby came into occupation with leave and license of the plaintiff's father. Jamis Appuhamy, giving evidence had stated that he had been plucking accounts in the land in question dating from 1948 until 1983 on the instructions of the plaintiff and that all the produce was given to him.

The defendant had not called any one to give evidence on his behalf and as opposed to the plaintiff's evidence the only evidence was that of the defendant.

The plaintiff it is to be noted, had not produced any evidence either oral or written, to show that the defendant had entered the land and had occupied the house in question with the leave and license of the plaintiff. Nevertheless, on 06.01.1987, the plaintiff had sent a quit notice through his Attorney-at-

Law to the defendant, informing him that he has to hand over the vacant possession of the cadjan hut on or before 28.02.1987 (P3). The defendant, though claimed that he has a prescriptive right to the land, waited without replying the notice to quit.

Admittedly, the defendant has not produced any document to show that he is the owner of the land and the house in question. As referred to earlier his position is that he has prescriptive right to the land. In such a situation the behaviour of a normal person would be to reply the notice to quit querying the plaintiff's right to send him a notice to quit and denying that he was the licensee of the plaintiff. However, it is an admitted fact that the defendant, after receiving the notice to quit took no action to reply the plaintiff. In his reply to the question as to the reason for not replying the notice to quit, the defendant stated that he was not aware that it is necessary to reply such a letter. The notice to quit, which is reproduced below, was written in simple language which could be understood easily by any average person (P3).

" මීගමුවේදීය.
1987 ජනවාරි මස 6 දින දීය.

පබිලිස් තිසේරා මහතා,
කටාන මිරිස්වත්ත පාර හරහා,
නැගෙනහිර කලුවාරිප්පුව,
කටාන.

මහත්මයාණෙනි,

කටාන නැගෙනහිර කලුවාරිප්පුව පදිංචි ඇල් පැට්‍රික් රෙජිනෝල්ඩ් ප්‍රනාන්දු මහතා වන මාගේ සේවාදායකගේ උපදෙස් පරිදි ඔබට මෙයින් දන්වා එවන්නේ නැගෙනහිර කලුවාරිප්පුව පිහිටා තිබෙන නේනගෙවත්ත නමැති ඉඩමේ මාගේ සේවාදායකගේ අවසරය, බලය සහ කැමැත්ත මත ඔබ පදිංචිව සිටින පොල් අතු සෙවිලි ගෙයින් 1987 පෙබරවාරි මස 28 දින හෝ ඊට පෙර අස්වී එහි හිස් බුක්තිය මාගේ සේවාදායකට බාර දෙන ලෙසටය.

ඉහත සඳහන් පරිදි ඔබ ක්‍රියා කිරීමට අපොහොසත් වුවහොත් ඔබ මතු කිසිඳු ස්ථානයෙන් නෙරපා දමා පිටමන් කිරීමට, එහි හිස් බුක්තිය, අලාබය සහ නඩු ගාස්තු ලබා ගැනීමට ඔබට විරුද්ධව අධිකරණයේ නඩු පැවරීමට මට වැඩිදුරටත් උපදෙස් දී ඇත.

මෙයට විශ්වාස,

අත්සන/ඊ. බී. කේ. ද සොයිසා."

Notwithstanding the above. the behaviour of the defendant with regard to the surveying of the land, also has brought in a situation where the defendant has portrayed himself as a person who cannot be believed. According to the plaintiff the land in question was surveyed by Surveyor T.S.S. Fernando on 22.03.1981. On this issue the defendant took up the position that he was not aware of such a surveying being carried out as he and his family were in Kataragama at the point of time of the survey. The defendant contended that he became aware of.the surveying only after the instant case was instituted in 1987, approximately after six years of the surveying was carried out. When the defendant gave evidence on 29.11.1990, (at pg. 119) he has stated as follows :

"ප්‍ර : පැමිණිලිකරු මේ ඉඩම මැන්න බව ඔබ දැන ගත්තේ කවදා ද?

උ : මගේ නිතිඥ මහත්තයාට නඩුව භාර දෙන්න ගිය වෙලාවේ කිව්වා මේ ඉඩම මැනලා තියෙනව කියල. මෙ නඩුව දැම්මට පස්සේ නිතිඥ මහතා කිව්ව පැමිණිලිකරු දීල තියෙන උත්තරවල හැටියට මේ ඉඩම මැනල තියෙනව කියල. එතැනදි තමා මම දැන ගත්තේ."

However, on 19.07.1990, he had taken a different stance and stated as follows (pg. 109)

"මම නැති අවස්ථාවක මගේ ඉඩම මාතකාචරයෙක් ඇවිත් මැන්න කියල මට දැනගන්න ලැබුනා. ඒ අවස්ථාවේදි මමත් මගේ බිරිඳත් කතරගම ගිහින් හිටියේ. ඊට පස්සෙන් මගේ හුක්තියට කිපිම බාධාවක් තිබුනේ නැහැ. මම ඒ ගැන වැඩිදුර විපරම් කරන්න ගියේ නැහැ."

Considering the evidence given by the defendant, it appears that either the defendant was not aware that the land he was in occupation was surveyed until 1987 or that although he was aware that he did not think it is necessary to make inquiries on such surveying. Both these positions appear to question the credibility of the defendant. It is unbelievable to be heard to say that in a village of this country one would not be aware of a survey that was carried out in the absence of the owner or the licensee for a period of 6 years. Further the behaviour of the defendant in not taking any steps when he became aware of the surveying in my view would be inexplicable.

On a consideration of the totality of the aforementioned circumstances and evidence and on a balance of probability I am inclined to accept the

position taken by the plaintiff that the defendant came into the land in question with the leave and license of the plaintiff.

The defendant further took up to position that he has prescribed to the property. The legal position which governs prescription for immovable property is contained in Section 3 of Ordinance, No. 22 of 1871. In fact in *Fernando* v. *Wijesooriya*.[1], Canekeratne, J., stated that,

"The whole law of prescription is to be found in Ordinance, No. 22 of 1871"

Section 3 of Ordinance, No. 22 of 1871, as amended by Ordinance, No. 2 of 1889 states as follows :

"Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor from which an acknowledgment of a right existing in another person would be faulty and naturally be inferred) for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs ..."

Although the defendant is claiming prescriptive rights on the property in question, he has not demonstrated as to the date when he began his adverse possession and how such adverse possession commenced. Without adducing any evidence as to the date of commencement of adverse possession, the defendant will not be in a position to make a claim on prescription to the property in question. Accordingly, the defendant has not established the requirement of uninterrupted and undisturbed possession which are explicitly adverted to in Section 3 of the Prescription Ordinance. In such circumstances it is quite apparent that the petitioner cannot base any claim on prescription.

On a consideration of the totality of the evidence and the circumstances of this case, it is clear that the learned District Judge has correctly analysed the evidence given by the plaintiff, defendant as well as the witnesses summoned by the plaintiff and has carefully considered the submissions

made on defendant's entry to the property in question on leave and license of the plaintiff as well as the defendant's claim on prescription. Therefore it would not be correct for the Court of Appeal to come to the conclusion where it is stated by the learned Judge that,

> "The main ground on which the learned District Judge has held in favour of the plaintiff is that the defendant failed to reply notice to quit dated 06.01.1987 (P3) sent by the Attorney-at-Law to the defendant."

The judgment of the Court of Appeal further stated that,

> "...the mere fact that the defendant failed to reply P3 does not entitle the plaintiff to judgment prayed for."

It is to be noted that the position taken up by the Court of Appeal is not correct as on an examination of the judgment of the District Court it is extremely clear that the failure to reply the notice to quit was only one of the aspects taken into consideration by the learned District Judge.

There is one other aspect, which I wish to pursue before I depart from this judgment. Learned President's Counsel for the plaintiff submitted that in a case where action has been instituted on the basis of leave and license and/or landlord and tenant and if the plaintiff proves that he is the licensor and/or the landlord and that the defendant is his licensee and/or tenant, the plaintiff is entitled to ejectment notwithstanding the fact that he is not the owner of the premises.

A long line of cases had considered this matter and the ruling by the majority decision in *de Alwis* v *Perera(2)* has been consistently followed in subsequent decisions. Discussing the question of lack of any *'ius in re'* in the landlord, Prof. G. L. Peiris (Landlord and Tenant, Lake House Publishers pg. 215–223) states that 'no real right in the premises need be claimed by the landlord'.

In *de Alwis* v *Perera* (Supra) the premises belonged to the plaintiff's wife and it was let to the defendant on the basis of a monthly tenancy by her husband. Accordingly the principal parties to the contract were the plaintiff as landlord and the defendant as tenant. It is to be noted that as far as the

tenancy and the tenant was concerned, all his dealings were with the plaintiff.

Gratiaen, J. referring to the plaintiff stated that,

> "He was the original landlord under the contract of tenancy, and his right under the common law to claim ejectment has been clearly established. The fact that he was not the owner of the premises is irrelevant, because his rights are founded on contract and not on ownership."

In the circumstances, the plaintiff as the licensor and/or the landlord is entitled to eject the defendant who is his licensee from the premises in question.

Considering the totality of the evidence and circumstances before this Court the main question in issue is answered in the affirmative and reads as follows :

> "Yes.
>
> The Court of Appeal erred in holding that the District Court has entered judgment in favour of the plaintiff in the absence of sufficient evidence to prove that he was either the owner or that the defendant was his licensee."

For the aforementioned reasons, the appeal is allowed, the judgment of the Court of Appeal dated 06.05.1997 is set aside and the judgment of the District Court of Negombo dated 01.08.1991 is affirmed.

In all the circumstances of this case, there will be no costs.

**J. A. N. DE SILVA J.** – I agree.

**JAYASINGHE J.** – I agree.

*Appeal allowed.*