

BANDARATILAKE
v
GAMAGE AND ANOTHER

SUPREME COURT
FERNANDO, J.
ISMAIL, J. AND
WEERASURIYA, J.
S.C. APPEAL 83/97
C.A. NO.269/89
D.C. COLOMBO NO.4147/ZL
16 JUNE , 2003

Vindictory Action – Whether the plaintiff's claim may be defeated by a settlement made by the plaintiff's father with the defendant in a previous action for ejection of the defendant.

The plaintiff-appellant (the plaintiff) sued the defendant for a declaration of title to the land and premises in suit. The defendant was the tenant of the said premises under the plaintiff's father as landlord from 1958. The land and premises were owned by the plaintiff's mother N.B. from 1937 until 1981 when N.B. gifted it to the plaintiff in 1981. Previously the premises was in the possession of L.B. the plaintiff's father who let it to the original defendant.

L.B. sued the original defendant in DC Colombo case No 2280/RE for ejection on the ground of arrears of rent.

In 1975 that action was settled before the District Judge on terms according to which the arrears of rent would be paid by the defendant; and L.B. undertook to sell the property to the defendant for Rs.70,000/-. The defendant paid the arrears of rent and deposited Rs.70,000/- in court. However, the property was not sold to the defendant until the plaintiff's mother gifted it to the plaintiff, in

1981. Consequently, the defendant remained in possession of the property until 1982 when the plaintiff sued the defendant for a declaration of title and ejectment. In his answer the defendant took up the position that he was in lawful occupation of the premises having made payments in terms of the settlement in case No.2280/RE.

The District Judge decided in favour of the plaintiff but the Court of Appeal reversed that judgment.

Held :

The father of the plaintiff acted as the agent of the mother in giving an undertaking to the District Court in case No.2280/RE, the tenancy case. The settlement was binding on the father, and the mother as principal.

In the circumstances the plaintiff was not entitled to judgment against the defendant in the vindicatory action.

APPEAL from the judgment of the Court of Appeal.

L.C. Seneviratne, P.C. with Laxman Perera and Ranil Prematilake for plaintiff-appellant.

P.A.D. Samarasekera, P.C. with Manohara de Silva for substituted defendants-respondents.

Cur.adv.vult

October 21, 2003

ISMAIL, J.

The land and premises in suit bearing assessment No.480, Nawala Road, Rajagiriya were owned by Mrs. N.M. Bandaratilake, the mother of the plaintiff-respondent-appellant (hereinafter referred to as the plaintiff-appellant) under and by virtue of deed No.2204 dated 28.7.1937. The defendant-appellant-respondent (hereinafter referred to as the defendant-respondent) was in occupation of the said premises since 1958 as the tenant under her husband C.O.L.B. Bandaratilake. He instituted an action as the landlord against the defendant-respondent in District Court, Colombo, Case No.2280/RE, seeking to eject him and claiming arrears of rent and damages.

The case was settled by the parties on 15th August 1975. According to the terms of settlement, in addition to the payment of arrears of rent and damages, the plaintiff-appellant's father agreed to sell and the defendant-respondent agreed to purchase the

premises for a sum of Rs. 70,000/- and, if the said sum of money was deposited on or before 31.12.77, he was entitled to remain in possession without making any further payment until a deed of transfer was executed in his favour. The plaintiff-appellant's father represented to court and to the defendant-respondent that although his wife was the lawful owner of the premises, he had the authority to enter into the said terms of settlement and he signed the record after the terms were recorded.

It is common ground that the defendant-respondent has paid the arrears of rent and has deposited the sum of money agreed upon in court on 9.6.77 and has continued to occupy the premises without making any payment thereafter. The deed of transfer has not yet been executed in his favour.

The attorney-at-law for C.O.L.B. Bandaratilake informed the defendant-respondent by a letter dated 19.7.77 (D7) that, although he is the landlord of the premises, his wife Mrs. N.M. Bandaratilake who is the owner of the premises is not willing to sell the property.

Thereafter, the landlord C.O.L.B. Bandaratilake instituted another action bearing No. 3004/RE in the same court seeking to eject the defendant-respondent. That action was dismissed by a judgment dated 20.11.1980 in which it was held that the parties were bound by the terms of settlement and decree entered in the previous action No. 2280/RE referred to above.

Mrs. N.M. Bandaratilake has thereafter conveyed the property to her son, the plaintiff-appellant in this action, by a deed of gift No.931 dated 25.6.1981. His parents have by a letter dated 23.11.1981 (D2) called upon the defendant-respondent to attorn to him and to pay him the rent of the premises from 1.12.1981.

The plaintiff-appellant gave the defendant-respondent notice to quit on 22.3.1982 and instituted the present action against him, by a plaint dated 9th May 1982, seeking a declaration of title, ejectment and damages at Rs.3,000/- per mensem from 1.5.1982 on the ground of his wrongful and unlawful occupation of the premises. The defendant-respondent filed answer on 2.2.83 maintaining that he is in lawful occupation of the premises having complied with the terms of settlement entered into by him with the plaintiff-appellant's father in DC Colombo case No.2280/RE and that he has thus

become entitled to a transfer of the said property. However, the District Court held with the plaintiff-appellant and after trial granted him relief as prayed for by its judgment dated 27.4.89.

The defendant-respondent appealed to the Court of Appeal which reversed the said judgment of the District Court by its judgment delivered on 20.12.96.

The present appeal is with leave granted by this Court on 5.6.97. from the judgment of the Court of Appeal, on the principal question of law as to whether the father of the plaintiff-appellant acted as the agent of his wife in entering into the said terms of settlement in DC Colombo Case 2280/RE with the defendant-respondent and, if so, whether the said terms are now binding upon the plaintiff-appellant. 60

Meanwhile, the defendant-respondent died on 14.7.1998 while this appeal was pending and steps have been taken to substitute the present defendants-respondents as parties.

It was submitted on behalf of the plaintiff-appellant that his mother who was the title holder was not a signatory to the settlement and that there was no oral or written evidence which expressly authorised his father to act as her agent. It was also contended that the letter dated 19th July '77(D7) by which the defendant-respondent was informed that she was not prepared to sell the property was an indication that she never undertook to do so, and that she has not ratified the executory agreement embodied in the settlement. 70

Learned counsel for the defendant-respondent pointed out that the plaintiff-appellant's father had expressly stated in D.C. Colombo Case No.2280/RE that he had the authority of his wife to enter into the settlement and that the binding nature of that settlement was reaffirmed in the second action D.C. Colombo Case No. 3004/RE instituted by the plaintiff-appellant's father. This judgment was delivered on 25.11.80 more than five years after the settlement was entered into by the parties. 80

The Court of Appeal has held that the District Court was in error in holding that the father of the plaintiff-appellant acted without the knowledge of his wife, who was the title holder, in entering into a

settlement in regard to the property in the previous case No.2280/RE. It affirmed the right of the deceased defendant-respondent to continue to be in occupation of the premises without making any payment until the plaintiff-appellant's mother executed a deed of transfer in his favour. 90

The deceased defendant-respondent was admittedly the lawful tenant when the father of the plaintiff-appellant instituted action No.2280/RE as the landlord of the premises for ejectment and arrears of rent. He had agreed to sell and the tenant had agreed to purchase the premises for a sum of Rs.70,000/- payable before 31.12.77. and, admittedly, the consideration has been deposited in court on 09.06.77. The tenant has also paid arrears of rent and in terms of the settlement, he had the right to be in occupation without making any further payment until a deed of sale was executed in his favour. 100

Although the father of the plaintiff-appellant had represented to court that he had the authority of his wife, the title holder, to enter into the said terms of settlement, a distinction must be drawn between possession and title when considering the terms of settlement. While the authority of the plaintiff-appellant's father extended to dealing with the possession of the property, it did not extend to disposing of the title thereto. 110

Where a settlement deals with a subject matter different to or more extensive than the subject matter of the suit and affects the rights of a third party, it is desirable that the court should obtain an unequivocal manifestation of that third party's consent if the parties are to be bound by the settlement.

Although the plaintiff-appellant's father was not the agent of his mother in relation to the alienation of the property, he was nevertheless her agent in relation to the possession of the property. Thus the settlement was binding on the father and the mother, as the principal, in relation to the payment of the arrears of rent and damages and the right to remain in possession. Having complied with the terms of settlement in regard to the deposit of the money, the defendant-respondent and his successors in title became entitled to remain in possession of the premises indefinitely and he was no longer a tenant. His refusal to attorn to the plaintiff-appellant is 120

therefore irrelevant. Further, the plaintiff-appellant's mother had the paper title to the property subject to the right of the defendant-respondent to remain in occupation indefinitely without making any further payment. The gift of the property to the plaintiff-appellant from his mother did not give him greater rights than that which his mother had. 130

We, therefore, affirm the judgment of the Court of Appeal and hold that the father of the plaintiff-appellant acted as the agent of his mother to the limited extent as explained above in relation to the possession of the property.

The appeal is dismissed. We award the substituted defendants-respondents costs in a sum of Rs.30,000/- in all three courts payable on or before 1.3.2004. However, if the substituted defendants-respondents tender a deed of transfer at their expense on or before 31.12.2003 reciting as consideration the sum of Rs.70,000/- already deposited – the draft deed to be approved by court if disputed by the plaintiff-appellant – and if the plaintiff-appellant executes the deed of transfer on or before 28.2.2004, no costs would be payable. 140

FERNANDO, J. - I agree

WEERASURIYA, J. - I agree

Appeal dismissed .