1931

Present: **Lyall Grant and Drieberg JJ.**

SUMANGALA THERO *v.* CALEDONIAN TEA AND RUBBER ESTATES CO., LTD.

12—(Inty.) D. C. Kandy, 36,064.

Registration—Deed of lease—Agreement to renew lease—Notice—Trusts Ordinance, No. 9 of 1917, s. 93.

Where a person acquires property with respect to which there is an existing lease, which has been registered, and where the deed of lease contained a provision for the renewal of the lease for a further term,—

Held, that the registration of the deed constituted sufficient notice to the purchaser of the agreement for renewal.

THIS was an action for declaration of title to a half-share of land called Nitulmulahena.

One Dingiri Banda, by lease D1 of 1894, leased, for 30 years, the land in dispute in this case (*inter alia*) to one Dickinson, whose rights ultimately devolved by various assignments on the defendant company.

By D1 Dingiri Banda undertook to grant, at the expiration of the term, a renewal of the lease for the same term or to sell the leased lands to the lessee on the expiration of the lease, or on the lessor's minor son Tikiri Banda attaining majority.

The lease D1 was duly registered.

The defendant company in 1919 purported to purchase the entirety of the land in dispute from one M. W. Loku Banda, on the footing that Tikiri Banda, already referred to, was the only heir of the original lessor, Dingiri Banda.

The plaintiff, alleging that Dingiri Banda had another son besides Tikiri Banda and claiming title through him, purported to purchase a one-half share of the land in 1927.

The plaintiff then instituted this action for declaration of title to a half share of the land against the defendant company. The defendant company filed answer denying the existence of any son of Dingiri Banda other than Tikiri Banda and denying the plaintiff's title to any share of the land, and prayed for the dismissal of the plaintiff's action. It further prayed, in reconvention, that in the event of the plaintiff being declared entitled to any share of the land in dispute, the plaintiff be ordered to execute a lease of such share in favour of the defendant company in terms of the covenant for renewal, contained in D1, granted by plaintiff's predecessor in title. At the trial the defendant company conceded the plaintiff's title to half share of the land, and the District Judge allowed the defendant company's prayer in reconvention and ordered the plaintiff to execute a lease of his half share in favour of the defendant company in terms of D1.

The plaintiff appealed.

H. V. Perera, for the plaintiff, appellant.—The option contained in D1 is vague, and it is not clear who is to exercise the option.

The agreement for renewal or sale is not enforceable by the defendant company against the plaintiff. The defendant company cannot claim the benefit of section 93 of the Trusts Ordinance, 1917, as, though D1 was registered, the entry in the register does not amount to notice of the covenant for renewal or conveyance at the termination of the lease.

[DRIEBERG J. referred to *Suwaris Silva v. Omerihamy*[1].]

The entry in the register in the case referred to specifically mentioned the agreement to sell and therefore there was full notice of the agreement. In the present case, no mention is made in the register of any covenant for renewal or conveyance. When the company purported to purchase the entirety of the land in 1919, it must be taken to have exercised its option under D1 once and for all, and it cannot now ask for a lease of the remaining half share which it finds it has not purchased. An option cannot be exercised piecemeal.

Further, if the defendant was asking in reconvention for specific performance, it should have specifically alleged and proved notice. There has been no allegation and no evidence of notice.

The lease D1 would have expired in 1924 and it is now too late to ask for a renewal of the lease after the lapse of so many years.

The District Judge's judgment is wrong and the defendant's prayer in reconvention should have been dismissed.

Wendt, for defendant, respondent.—The option in D1 though awkwardly worded is clear in its intention. An option is always to be exercised by the tenant (*Doe d. Webb v. Dixon*[2]).

Section 93 of the Trusts Ordinance applies in this case. The mere registration of D1 ought to have put the plaintiff on the inquiry and amounts to notice of all the covenants in D1, though they are not specifically mentioned in the register. The plaintiff's conduct amounts to wilful abstention from inquiry or gross negligence. The case in 11 *Ceylon Law Recorder* is in point.

When the plaintiff purchased, the defendant company was in possession of the whole land. This fact must be taken to be notice to the plaintiff of the actual interest the defendant company had (*Daniels v. Davison*[3]).

In the circumstances, there has been no undue delay in the exercise of the company's option. The company has asked for the renewal as soon as it discovered that it had not purchased the entirety of the land. In *Moss v. Baston*[4] specific performance of a renewal of a lease was allowed 4 years after the expiry of the original term of 3 years. No authority has been cited to show that the option cannot be exercised, as it has been in this case.

April 30, 1931. LYALL GRANT J.—

The plaintiff-appellant sued the defendant-respondent for a declaration of title to an undivided half share of a land called Nitulmulahena. The defendant-respondent pleaded in his answer that the plaintiff was not entitled to a half share or to any share and in reconvention claimed that if the plaintiff were declared entitled to the premises, he should be granted a renewal of the lease from the plaintiff in terms of a certain lease bond of September 29, 1894.

[1] *11 Cey. Law Rec. 50.*
[2] *(1807) 9 East. 15.*
[3] *16 Vesey 249.*
[4] *(1866) L. R. 1 Equity 474.*

After trial the learned District Judge held that the plaintiff-appellant was entitled to a half share of the land and that the defendant was entitled to a renewal of the lease. From this finding the plaintiff appeals.

The lease in question was granted by one Dingiri Banda in 1894 and was for a period of 30 years. The lease was originally granted to a Mr. Dickinson, but was assigned by him to a Mr. Ross, and by Mr. Ross to the defendant company in 1896. The lease itself and these two assignments were duly registered. The indenture of lease contained the following clause:—

"And it is hereby further agreed by and between the parties hereto that, after the expiration of the said term of 30 years, the said lessor doth hereby further agree to secure a renewal of this lease on the same conditions as these presents by obtaining the consent and concurrence of the said minor or effect an absolute sale of the said lands either at the expiration of these presents or as soon as the said minor attains the age of majority for a price not exceeding Rs. 100."

The reference to the "said minor" is accounted for by the fact that the lessor purports to transfer not only land which was his own property, but also two other lands which belonged to his minor son Tikiri Banda.

The defendant company asserted that on the death of Dingiri Banda, all his property including the lands leased devolved upon his two children, Tikiri Banda and Dingiri Amma Kumarihamy, as his sole heirs.

On October 21, 1919, the company bought all the lands leased from one Loku Banda. In its defence to the present action the company alleged that this Loku Banda was the sole representative of Dingiri Amma Kumarihamy and Tikiri Banda. The company asserted that Tikiri Banda died intestate and issueless many years ago leaving an estate below Rs. 1,000 in value and leaving him surviving as his sole heir his sister, the said Dingiri Amma Kumarihamy; that Dingiri Amma Kumarihamy died some years ago leaving as her sole heir her son Kalugahakumbura Walauwa Heena Banda, who by deed No. 1,519 dated April 23, 1919, sold and conveyed the land to Ratnayake Mudiyanseralahamillage Walauwa Loku Banda, and that the said Loku Banda sold and conveyed to the defendant company as above set forth.

The plaintiff denied that Dingiri Banda left only the children mentioned by the defendant. He said that by the first marriage there were three children, not two (the number is immaterial), but that Dingiri Banda contracted a second marriage, the issue of which is one Loku Banda, not the Loku Banda previously mentioned, and that this Loku Banda became entitled on the death of Dingiri Banda to a half share of his property. It is admitted that, by Kandyan law, that is the share to which he would become entitled assuming that he was the only child of the second marriage.

On July 8, 1927, Loku Banda transferred his share of the lands in question to the plaintiff. At least that is the plaintiff's averment. The defendant company said that it was unaware of this and put the plaintiff to the proof of this averment. In spite of this, however, the deed does not seem to be produced and the question of its existence is

not made mention of in the case. The defendants appear to have acquiesced in the position and to have accepted the fact of this transfer.

The issues in the case were first:—Whether Loku Banda was a son of Dingiri Banda, the lessor to Mr. Dickinson ? After further investigation this point was conceded by the defendant. On the other hand the plaintiff conceded that he was liable to pay to the defendant company compensation for improvements in the amount actually expended by them in such improvements. The second issue was:—What sum the defendant company was entitled to by way of compensation ? It was admitted that Dingiri Banda leased the entirety of the land to Mr. Dickinson for a period of 30 years commencing from September 29, 1894. The third issue was:—Is the defendant company entitled to a lease or a transfer of the lease No. 2,559 of 1894 ? The fourth issue was:—In any circumstances is the defendant entitled to ask for a lease or a transfer from the plaintiff ? In his judgment the learned District Judge states that at the trial the defendant's counsel admitted the plaintiff's title to a half share of land, and the only issues remaining for trial were the two last issues.

The learned District Judge found that there was a definite undertaking by the lessor to renew the lease on the same conditions and he found that the company was entitled to a renewal of the lease from the plaintiff.

On the appeal it was argued that, in any view of the clause, it could have no effect after the termination of the lease, or at any rate after so long a period as three years from its expiry. It was also argued very strongly that it was impossible to treat the agreement otherwise than as a whole.

It is admitted that, as regards two of the lands mentioned in the lease and also as regards the half share claimed in this action, the defendants had acquired absolute property by purchase and Mr. Perera strenuously argued that it was not open to them now to ask for a renewal of the lease in regard to a mere fraction of the land. I do not think that, in the circumstances of this case, there is anything to prevent the defendants exercising this option, as soon as it is brought to their notice that the absolute title upon which they thought they held the land as owner was defective.

More detailed examination is perhaps required of the renewal clause.

I agree with the view taken by the learned District Judge, that this clause refers not only to the minor's lands but also to Dingiri Banda's own land, the land now in question.

The first part of the clause allows the tenant to claim renewal after the expiry of the lease. This at once distinguishes the right from a right exercisable during the currency of the lease, and the only question for decision is now how long this right is to continue. In the circumstances of the present case it does not seem unreasonable to say that nothing has happened, either effluxion of time or anything else, to bar the defendant company from now exercising the option.

In *Daniels v. Davison* (*supra*) it is laid down that the possession of a tenant is notice to the purchaser of the actual interest he may have, either as tenant, or farther, by an agreement to purchase the premises.

Nothing has been cited to us to show that a different rule obtains in our law. The principle is clear. By the mere fact of the defendant's possession the purchaser is put upon inquiry. In the present case inquiry would have revealed the option to purchase.

The fact that the option was not disclosed *ex facie* of the register cannot help the buyer. The existence of the lease was disclosed to him and if he took the risk of not examining the registered lease he cannot, to my mind, afterwards plead ignorance.

The argument would at any rate, I think, be conclusive in a question between the company and Loku Banda. The position of Loku Banda was that from Dingiri Banda's death he was entitled to a half share of the rent from the lease. He however put in no claim. There is nothing to show that at any time he got any money from the defendant company as rent, and in particular he made no claim after the defendant company ceased to pay rent in 1919. Clearly he would not be in a position now to come forward and resist the company's claim, inasmuch as by his own laches he let the company believe that they were absolute owners after the lease had expired. It remains to be considered whether the case is different where a third party is concerned. According to his own case circumstances point to the plaintiff having bought on a speculative title. The company was in possession of the land and had been in possession for many years, and no doubt planted it with tea. The defendants registered their deed of 1919, which strengthens their position against any such claim as is now made.

Their lease was also registered, and I think the plaintiff was put upon his guard, by these facts and by the fact that the company was in possession of the land after the expiry of the lease, to inquire by what title the company remained in possession. The result of such inquiry would have been to show that the company remained in possession on a deed from Heen Banda's transferee. That would not bar the claim of the plaintiff to the land, but it would have necessarily warned him of the obligation under which Dingiri Banda put himself when he granted the lease.

I do not think that the plaintiff can obtain possession of this land except by fulfilling the conditions which Dingiri Banda entered into. The existence of the lease was known to him and it is not at all unusual for a long lease, especially a planting lease, to contain a purchase or renewal clause. I think it is not too much to ask that the plaintiff should have made himself acquainted with the terms of the lease. If he had done so he would have found that the defendant company were entitled to a renewal of the lease. I do not think that anything that has happened since can be held to disentitle the company to that renewal.

I accordingly dismiss the appeal with costs.

DRIEBERG J.—

The appellant appeals from a judgment ordering him to execute in favour of the respondent company a lease for a period of 30 years from September 28, 1924, of his undivided half share of Nitulmulahena which he bought on July 8, 1927, from P. M. Loku Banda, one of the heirs of Dingiri Banda; Dingiri Banda leased this and two other lands on indenture D1 of September 29, 1894, for 30 years to Lawrence Dickinson,

whose rights under it ultimately passed by D3 of January 1, 1898, to the respondent company. D1 contained a clause by which the lessor undertook to grant at the expiration of the term a renewal of the lease for the same term or to sell the leased lands to the lessee for Rs. 100 on the expiration of the lease or on the lessor's minor son, Tikiri Banda, attaining majority.

By D1 Dingiri Banda leased this land, which was his, and also two lands belonging to his minor son, Tikiri Banda. Tikiri Banda died before 1919, but it is not known whether he had then attained majority. The respondent company says that Dingiri Banda died leaving as his sole heirs Dingiri Amma and Tikiri Banda; Tikiri Banda died intestate and without issue and Dingiri Amma became solely entitled to the land; Dingiri Amma died leaving as heir, Heen Banda, who sold to M. W. Loku Banda on April 23, 1919, and M. W. Loku Banda on October 21, 1919, sold it to the respondent company.

But Dingiri Banda had contracted another marriage by which he had a son named P. M. Loku Banda, not the vendor to the respondent company, who on Dingiri Banda's death succeeded to a half share of this land, and the respondent company on their purchase of 1919 could only have become entitled to a half share. P. M. Loku Banda on July 8, 1927, sold his half share to the appellant, who brought this action to vindicate this share.

The respondent company denied his right to a half share, alleging that P. M. Loku Banda was not a heir of Dingiri Banda, and they asked in the alternative that, if the appellant was held to be entitled to a half share, he and P. M. Loku Banda be ordered to execute in their favour a renewal of the lease or to convey to them his half share.

At the trial, the appellant produced the certificate of the second marriage of Dingiri Banda and the birth certificate of P. M. Loku Banda, and the respondent company admitted P. M. Loku Banda's title. The deed by P. M. Loku Banda to the appellant was not put in evidence but its execution was apparently accepted as P. M. Loku Banda had filed answer admitting having executed it. The respondent company put in evidence the lease D1 and the assignments D2 and D3 by which rights under it passed to the company. The transfer to the company by M. W. Loku Banda was not produced. The respondent company also put in evidence the extract of encumbrances in which appear all the transactions to which I refer.

I agree with my brother that the agreement for a renewal lease or a conveyance was enforceable by the respondent company against P. M. Loku Banda. Whether it is enforceable against the appellant depends on whether the conditions required by section 93 of the Trusts Ordinance exist. The respondent company rely solely on the registration of the deed of lease, D1, prior to the appellant's purchase.

It was held in *Suwaris Silva v. Omerihamy* [1] that " no form of notice other than due registration will suffice to admit a contract to the privileges of section 93 "; the agreement there sought to be enforced was one by which the purchasers at a sale under the Partition Ordinance

[1] *(1930) 11 Cey. Law Rec. 50.*

undertook to transfer the property to the plaintiff; they subsequently sold the land to another; registration of the agreement had not been specially pleaded by the plaintiff and the case was sent back for inquiry whether the agreement was duly registered with a direction that if this was so found judgment should be entered for the plaintiff.

I have examined the extract of encumbrances filed in the case and I find that the deed in question was registered as an " agreement to sell the above on a valid deed of transfer on or before September 30, 1928, subject to the conditions in the deed and in consideration of Rs. 700 paid in advance ". The registration of the deed therefore gave full notice of the agreement.

In this case the deed was registered as " a lease of the above for 30 years commencing from the date of the deed, yearly rental Rs. 2 per acre ". It is not registered as a deed agreeing to grant a new lease or to sell the land to the lessor. It is interesting to note the words in the proviso to section 93, " provided that in the case of a contract affecting immovable property such contract shall have been duly registered before such acquisition ". It is, of course, not possible to register a contract relating to land, but the deed embodying that contract; was it intended that the form of registration of the deed should be such as to give notice of the contract sought to be enforced?

There is a difference to my mind between the contract to renew the lease and the contract to sell to the lessor.

It is not necessary for the purposes of this appeal to decide whether the contract to sell to the lessees is enforceable against the appellant. I have much doubt whether it is. It is not easy to see how the registration of the deed as a lease is a registration of it as an agreement to sell; such an agreement is separate and distinct from the contract of lease, and is not a covenant or condition one would expect to find in a lease: under the Stamps Ordinance it would need stamp duty additional to that paid on the deed as a lease.

As regards the agreement to grant a new lease, I agree that this is enforceable against the appellant. Provision for renewal is a common condition in leases and cannot be regarded as a separate or distinct agreement; knowledge of the lease necessarily called for inquiry regarding its conditions. While this would be so in any case, there were circumstances here which pointed strongly to the necessity for examining the deed of lease. The register shows that in 1903 the respondent company has registered this land together with 151 other lots as forming Kahawatta estate and dealt with it as such in mortgage debentures; this should have indicated to a purchaser that the company was not dealing with it on a tenure which it was likely they intended to terminate with the existing lease.

Failure to examine the deed of lease under these circumstances can only be attributed to wilful abstention from inquiry or gross negligence, and under section 3 of the Ordinance this amounts to notice.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.