

HEENBANDA AND ANOTHER
v.
TIKIRI BANDA

COURT OF APPEAL
SENEVIRATNE, J. and G. P. S. DE SILVA, J.
C.A (S.C) 137/77-M.C.(CIVIL) TELDENIYA 8803
DECEMBER 7, 1983.

Declaration of Title – Tenant-cultivator – Mixed question of fact and law raised for first time in appeal.

The plaintiff instituted action against the first and second defendants for declaration of title in respect of certain lands and for ejection and damages. The plaintiff produced the original of the deed by which he claimed title to the land whereas the defendants were unable to produce the original of the deed on which they relied nor even a certified copy of it and the Trial Judge held in favour of the plaintiff. At the hearing in appeal it was argued that the substituted 1st defendant cannot be ejected because there was evidence that he was the tenant cultivator.

Held-

(1) That the evidence called on behalf of the plaintiff was "more reliable" than the evidence called on behalf of the defendants since the plaintiff was able to produce the original deed on which he claimed the lands in question and also one of the attesting witnesses to prove the due execution of the deed whereas the defendants were unable to produce the original or a certified copy of their deed.

(2) Although the 1st defendant claimed to be a "tenant cultivator" of the fields and protection from eviction the question of his being a tenant cultivator is a mixed question of fact and law. It was neither pleaded nor raised in issue at the trial. Hence it cannot be raised for the first time in appeal.

Cases referred to

(1) *Setha v. Weerakoon* (1948) 49 N.L.R. 225.

APPEAL from Magistrate's Court, Teldeniya.

N.R.M. Daluwatta with *Mrs. A. Hegoda* for defendants-appellants.

No appearance for the plaintiff-respondent.

Cur. adv. vult.

January 31, 1984.

G. P. S. DE SILVA, J.

The plaintiff instituted this action against the 1st and 2nd defendants for a declaration of title in respect of the lands described in schedules 'A', 'B' and 'C' to the plaint, for ejectment and damages. The 1st and 2nd defendants are the brother and sister respectively of the plaintiff. The 1st defendant died while the action was pending and his son was substituted in the room of the deceased-defendant.

At the trial, it was admitted that the original owner of the lands in suit, was K. M. Appuhamy who on deed No. 3418, dated 12/7/20, conveyed the same to R. M. W. Dingirila who died leaving as his sole heir, his son R. M. W. Appuhamy. The principal issue upon which the case proceeded to trial was whether the said R. M. W. Appuhamy conveyed these lands on deed No. 11070, dated 18/7/65 (P 1), to the plaintiff or whether the said Appuhamy conveyed these lands to the 1st defendant on deed No. 25726, dated 24/7/65 (D 3). The Trial Judge answered this issue in favour of the plaintiff and the defendants have now appealed.

The plaintiff produced the original of the deed P 1 and called one of the attesting witnesses, named A. M. Aththanayake, to prove the due execution of the deed. On the other hand, the defendants were unable to produce the original of the deed D 3 but merely called the Additional Registrar of Lands who stated in evidence, that he is "producing" a certified copy of the deed. Although the certified copy was marked as D 3 in the course of the evidence, this document was never tendered to Court. The Trial Judge specifically refers to the fact that the defendants failed to tender D 3 to Court. In these circumstances, I am of the view that the finding of the Trial Judge, that the evidence called on behalf of the plaintiff was "more reliable" than that of the defendants is entirely justified.

Mr. Daluwatte, Counsel for the defendants-appellants, submitted that it was not open to the Court to order the ejection of the substituted 1st defendant as there was evidence that the 1st defendant was the tenant-cultivator of the fields described in schedules 'A' and 'B' to the plaint. It seems to me that this submission is not well-founded for the reason that it was not pleaded in the answer, nor was it put in issue at the trial. The question whether a party was a tenant-cultivator of a paddy field is a mixed question of fact and law which cannot be raised for the first time in appeal – Vide *Setha v. Weerakoon* (1). Moreover, the evidence on record is far from satisfactory. The best evidence of whether the 1st defendant was a tenant-cultivator is an "extract" from the "paddy lands register". No such document was produced nor was an independent witness called to speak to that fact.

Mr. Daluwatte, finally, submitted that there was no evidence to support the following statement made by the Trial Judge in the course of his judgment :-

"It has become clear that the field described in Schedule 'A' to the plaint is the land which is claimed by the 2nd defendant."

I have perused the evidence of the 2nd defendant and I find that under cross-examination, she has specifically stated that the field described in schedule 'A' to the plaint, is owned by her and is possessed by her and that the plaintiff is disputing her title.

For these reasons, the appeal fails, and is dismissed without costs.

SENEVIRATNE, J. – I agree.
Appeal dismissed.