1977 *Present :* **Samarakoon, C.J., Samerawickrame, J. and Vythialingam, J.**

T. W. A. PEIRIS, Appellant

and

T. S. PEIRIS, Respondent

S.C. 67/71 (F)—D.C. Panadura, 11809

Lease—Action for cancellation on the ground of abuse of property—Proof of grave damage necessary.

Plaintiff sued the defendant for the cancellation of a lease of a 'tiled house and garden'

There was evidence that the defendant had caused damage to two trees, but there was no evidence or finding as to the value of such damage. There was also evidence that the kitchen of the house had been damaged by falling coconuts and branches.

It is a question to be left to the discretion of a prudent and cautious Judge whether the abuse of the leased property ought to be punished by ejectment or by an adverse judgement for damages only, or should even be overlooked and allowed to pass on account of its triviality.

Held : That the damage here was not of the grave kind that would justify the cancellation of the lease.

Cases referred to :

Perera v. Peiris, 15 N.L.R. 313
Silva v. Obeysekera, 24 N.L.R. 118
Perera v. Thaliff, 8 N.L.R. 118

APPEAL from a Judgment of the District Court of Panadura.

C. Ranganathan, Q.C., with *C. R. D. Fernando* and *L. Hassim* for the defendant-appellant.

A. C. Goonaratne, Q.C., with *R. C. Goonaratne* for the plaintiff-respondent.

October 21, 1977. SAMARAKOON, C.J.

This is an appeal against the judgement of the District Court of Panadura ordering the cancellation of the lease effected by Bond No. 5941 dated the 6th of July, 1965, attested by C. C. Stembo, Notary Public. This Bond deals with two allotments of land. Subsequently it was rectified by Bond No. 6632 on 6th December, 1966, which is produced marked P2. The lease applies to a land which is described in D3 as a " tiled house and garden ". The lease was for a period of 5 years commencing 6th July, 1965. Clause 8 of the lease stated that : " At the termination of this lease, the lessor will execute another lease for a further period of 5 years ". The lease was primarily for the purpose of enabling the defendant-appellant to construct a building at his own expense in the land to install machinery for the purpose of manufacturing tea chests. The appellant further undertook *inter alia* to protect the trees and plantations from thieves. Prior to the execution of this lease the appellant paid the plaintiff-respondent a sum of Rs. 65 being the value of 5 coconut trees standing on the land which had to be cut down and removed to enable the appellant to construct the stores. The document D2 shows, that on the 6th of December, 1966, the appellant was entrusted with 2 mango trees standing on the said land. The plaintiff-respondent instituted this action on the 13th of November, 1969, claiming the cancellation of the deed of lease alleging various acts of commission and omission on the part of the defendant-appellant. After trial the learned trial Judge found as a fact that the defendant has caused damage to a mango tree and a coconut tree on the land, that the kitchen of the house had been damaged, and that

the appellant had built 3 sheds on the land when the lease permitted him to build only one. For these reasons the learned Judge ordered a cancellation of the lease. The question now arises whether the damage found by the Judge was of such kind as to justify the cancellation of the lease. Our law recognises such a right of cancellation of leases whether they be rural or urban tenaments. Vide the cases of *Perera vs. Peiris,* 15 N.L.R. 313 and *Silva vs. Obeysekera,* 24 N.L.R. 97. There must however be proof that the damage complained of is of a grave kind. Voet, Book XIX, Title 2, Section 18 states : 'that it must be only of a misuse that is markedly serious and ruinous'. Middleton, J. in the case of *Perera vs. Thaliff,* 8 N.L.R. 118 stated : 'that the abuse must be of notably grave and damnifying misuse'. The ways of misuse are many and as Voet himself points out, the whole matter ought to be left to the discretion of a prudent and cautious Judge ; for him to say whether the misuse ought to be punished by ejectment or by an adverse judgment for damages only, or should even be overlooked and allowed to pass on account of its triviality. See also the case of *Perera vs. Thaliff supra*). Does then the damage found by the Judge in his order justify an order of cancellation ? The respondent himself stated that there were 70 coconut trees, 2 mango trees and one jak tree on this land. The evidence shows that damage to the kitchen was caused by falling coconuts and coconut branches. The respondent valued the damage at Rs. 2,000 but the Judge was not prepared to accept that assessment from the respondent. In the result there is no finding of the value of the damage. There is no-evidence as to the value of the damage to the 2 trees. However, judging from the evidence in the case, the damage referred to by the Judge in his order is not of a grave kind that would justify the cancellation of the lease. It is a significant fact that this action was instituted six months prior to the effluxion of the 1st period of five years.

I am, therefore, of opinion that the order of cancellation of the lease P1 was wrong, and issue 2 should have been answered in the negative.

In view of this finding it is not necessary to consider issues 3 to 7 raised at the trial, and those are therefore left open, should the parties desire to agitate them in some other proceedings.

I, therefore, allow the appeal and I direct order be entered dismissing the plaintiff's action with costs.

The defendant-appellant will also be entitled to costs of appeal.

SAMERAWICKRAME, J.—I agree.

VYTHIALINGAM, J.—I agree.

Appeal allowed.