VANNAKAR AND 6 OTHERS
V.
URHUMALEBBE.

COURT OF APPEAL
F.N.D. JAYASURIYA, J.
C.A. 503/87
D.C.KALMUNAI 19/Misc.
MARCH 27,1996.

Agrarian Services Act No. 58 of 1979 S.5 (6) - Inquiry - Absent - No steps taken to purge default - Can a party contradict the record by filing fresh affidavits in the Court of Appeal - Question of Law - Estoppel by Record.

The Respondent-Appellant who once appeared before the Asst. Commissioner had failed to appear on the second occasion on 24.2.87. The letter sent by the Counsel for the Respondent-Appellants was rejected with valid cause; and after inquiry order was pronounced in terms of S.5(6) on 23.3.87.

The Appellants seek to Revise this order.

Held:

(1) During the period commencing from 24.2.87 and ending on 23.3.87 and even thereafter, the Appellants had failed to file petitions and affidavits to purge their default on 24.2.87.

'No party ought to be permitted to file a belated self serving and convenient affidavit to contradict the Record, to vary the record or to purge a default where they have not taken proper steps to file such affidavits before the Judge/Tribunal.'

'If a party had taken such steps, then an inquiry would be held by the Tribunal and the self-serving statements and averments could be evaluated after cross-examination of the affirmant when he gives evidence at the Inquiry'.

'When such procedure is not adopted, Court of Appeal could not take into consideration self-serving and convenient averments in the affidavits to contradict and vary the Record or to purge a default committed, before the Court of first instance'.

(2) The order of the Asst. Commissioner had been filed of Record in D.C. Kalmunai-19/Misc. and an appeal filed from the order of the District Judge has already been decided in S.C. 677/73 (F) DC Kalmunai- 19/Misc. This judgment of the Supreme Court operates as Estoppel by Record against the Petitioner in respect of the revision application No. 503/87-DC Kalmunai 19/Misc.

APPLICATION in Revision from the order of the District Court of Kalmunai.

Cases referred to:

1. *K. v. Jayawardane* 48 NLR 489 at 503.
2. *Gunawardane v. Kelaart* 48 NLR 522.

Nizam Kariapper with *Wasantha Wanigasekare* and *A.M. Ramzeen* for Appellant
M. Kanagasunderam P.C. with *Janaka de Silva* for Respondent.

Cur.adv. vult.

March 27, 1996.
JAYASURIYA, J.

Learned Counsel for the Appellant relied on one solitary ground to impugn the order of the Assistant Commissioner of Agrarian Services

(Inquiries) pronounced on 23.3.87 which appears at page 139 of the record. He contended that the Appellant who had once appeared before the Assistant Commissioner (Inquiries) had failed to appear at the inquiry office on the second occasion on 24.2.87. It is orally alleged that the Appellants were precluded from travelling from their place of residence to the town where the inquiry was being held due to blast of bombs. It is alleged that counsel appearing for the Respondent-Appellant at the inquiry had sent a letter to the Inquiring Officer which had been rejected with valid cause at the commencement of the proceedings of the inquiry. After inquiry the Assistant Commissioner's order was pronounced in terms of section 5 (6) of the Agrarian Services Act and read only on 23.3.87. During the period commencing from 24.2.87 and even ending on 23.3.87, and even thereafter the Respondents to this application, who are the present Appellants, had failed to file affidavits and petitions to purge their aforesaid defaults on 24.2.87 and to take steps for an inquiry to be held in the Agricultural Tribunal with a view to purge their default. Justice Dias in *King v Jayawardena*[1] has considered the earlier line of decisions laying down the cursus curiae with regard to the legality of filing convenient and self-serving affidavits in appeal to vary and contradict the record or with a view to purge a default which had taken place before the Court of first instance. After a review of these decisions he held that no party ought to be permitted to file a belated self-serving and convenient affidavit to contradict the record, to vary the record or to purge a default where they have not taken proper steps to file such affidavits before the Judge or President of the Court of first instance or tribunal respectively. Vide also the judgment of Justice Canekeratne in *Gunewardena v Kelaart.* [2] If a party had taken such steps to file papers before the presiding officer of Court of first instance, then an inquiry would be held by him and the self-serving statements and averments could be evaluated after cross-examination of the affirmant when he gives evidence at the inquiry. If such a procedure was adopted the Court of Appeal would have the benefit of the recorded evidence which has been subjected to cross examination and the benefit of the findings of the judge of the Court of first instance. When such procedure is not adopted, Justice Dias ruled that the Court of Appeal could not take into consideration self-serving and convenient averments in the affidavits to contradict and vary the record or to purge a default committed before the Court of first instance. In the courts of

first instance I have respectfully followed such prudent observations made by judges with considerable experience in the actual working of the Magistrate and of the District Courts. In the circumstances this Court refuses to take into consideration the self-serving and convenient oral assertions on the facts made by the learned counsel for the Appellant for the first time at the hearing of this appeal. These matters ought to have been placed before the inquiring Officer to enable him to conduct a proper investigation or inquiry into the matters which are now sought to be adduced for the first time in appeal.

Learned Counsel for the Appellant was unable to impugn the correctness of the order of the Commissioner of Agrarian Services dated 22.3.83 or to point to any error of law in that order. An appeal lies only on a question of law from an order made by the Assistant Commissioner under the provisions of section 5 (6) of the Agrarian Services Act. There is no misdirection in point of fact or on a point of law, no improper evaluation of evidence nor any defect of procedure on a consideration of the totality of the evidence and order pronounced by the Assistant Commissioner. I hold that there is no error of law which arises upon this appeal and therefore this Court is obliged to dismiss this appeal with costs.

This order of the Assistant Commissioner of Agrarian Services has been filed of record in the District Court of Kalmunai Case Number 19 Miscellaneous and an appeal filed from the order of the District Judge has already been decided in Supreme Court Appeal No. 677/73 (F) D.C. Kalmunai 19 Miscellaneous - vide Supreme Court Minutes dated 08.6.1978. Vide judgment pronounced by Justice George T. Samarawickrema and Justices, V. Thamotheram and J.G.T. Weeraratne. This judgment of the Supreme Court operates as estoppel by record against the Petitioner in respect of the revision application No. 503/87 D.C. Kalmunai 19/Misc. In the result I proceed to dismiss the appeal of the Appellants and the revision application filed by the Appellant-Petitioners with costs in a sum of Rs. 2100/- payable by the appellant-Petitioners to the respondent. The aforesaid revision application is also *dismissed with costs.*

Application dismissed.