

FERNANDO

v.

SARATH

SUPREME COURT

SAMARAKOON, C.J., WANASUNDERA, J. AND ABDUL CADER, J.

S.C. No. 8/83 – C.A. No. 321/77(F) – D.C. COLOMBO No. 1691/RE

FEBRUARY 6, 1984.

Nature of rights of tenant of premises after entry of decree in ejectment subject to conditions against him – Partnership agreement by tenant with partner to run business using a portion of the tenanted premises and tenant's building and tools and equipment – Right of action of tenant against purchaser from vendee of partner.

The appellant, the tenant of certain premises was sued by his landlady for rent and ejectment. At the trial a settlement was entered into on 11.6.1974 whereby the appellant agreed to pay the arrears of rent in monthly instalments along with current monthly damages. If these payments were made without three defaults writs were not to issue till 31.5.80 and satisfaction of decree was to be entered with the right to the appellant to continue the tenancy on a fresh contract from 1.6.1980 by paying the authorised rent in accordance with the order made by the Rent Board in August 1972 or any other lawful order.

In August 1972 while the suit against the appellant was still pending he entered into a partnership agreement with one M. J. de S. to run a motor repair business under the name of "Auto Care" in a portion of the tenanted premises. By this agreement the appellant was to have title to the buildings of the business and the tools and equipment. M. J. de S. undertook not to allow any person other than the employees to occupy the building and premises set apart for the business. Contrary to the agreement M. J. de S. by a deed of 30.5.1975 sold the portion of the premises where the motor repair business was run along with the buildings and tools and equipment to one R.R. Of the business itself he gave a usufructuary mortgage to R.R. Thereafter R.R. on two deeds of 10.11.1975 conveyed the right, title and interest he had purchased from M. J. de S. to the respondent.

The appellant then sued the respondent alleging that the respondent was in unlawful occupation of the premises and conducting the business as a trespasser. The respondent claimed that M. J. de S. was the sole proprietor and owner of "Auto Care" and these rights had devolved on him. No plea that the appellant's partnership agreement with M. J. de S. was a cover for what was in reality a subletting was pleaded or raised in issue at the trial.

The District Judge held with the appellant and gave judgment for him but this judgment was set aside by the Court of Appeal and the appellant's action was dismissed. The Court of Appeal granted leave to appeal to the Supreme Court on two points :

- (1) Whether the right to occupy the premises granted to the appellant by the decree in the ejectment case enabled him to maintain the present action.
- (2) Whether the respondent can enter the premises by virtue of the right he claims on the purchase from R.R. and whether he can be said to be in unlawful occupation of them and a trespasser.

Held—

- (1) The appellant was in lawful possession of the premises in terms of the decree of the District Court. The Decree vests a sufficient legal interest in the appellant enabling him to occupy the premises. The law will protect this interest. Incidentally considering the fact that the appellant was a partner and the nature of his rights to the property on the basis of his agreement, he must be treated as having a sufficient occupancy of the premises so as to maintain the action.
- (2) On the terms of the partnership agreement M. J. de S. would have had to hand over possession of the portion of the premises where the motor repair business was run to the appellant in the event of the partnership coming to an end — so also the tools and equipment. The position of the respondent cannot be better.
- (3) No contention that the partnership agreement of the appellant with M. J. de S. was a deception to cover what was in fact a subletting was pleaded or raised at the trial and therefore cannot be raised for the first time in appeal.
- (4) The right the respondent has in respect of the partnership properties arises only after a dissolution of the partnership and upon conversion of the partnership assets into money. He has therefore no present right to occupy the premises or to the use of the equipment and tools. There is no valid legal basis for him to remain in occupation or to use the tools and equipment.

Cases referred to

- (1) *Pocock v. Carter*, (1912) 1 Ch. 665.
- (2) *Benham v. Gray*, (1847) 5 C.B. 138 ; 136 E.R. 827

APPEAL from a judgment of the Court of Appeal.

H. L. de Silva, S. A., with *Neville Jacolyn Seneviratne* for plaintiff-appellant.
A. C. Gooneratne, Q.C.; with *R. Manickavasagar* for defendant-respondent

Cur. adv. vult.

February 23, 1984

WANASUNDERA, J.

This appeal is in respect of an action instituted by the plaintiff-appellant (hereinafter referred to as the appellant) against the defendant-respondent (hereinafter referred to as the respondent) for ejection from a portion of premises No. 816/5, Maradana Road, Colombo, for damages in a sum of Rs. 200 per mensum and for the delivery of some equipment and tools on the ground that the respondent was in occupation of the said portion of the premises as a trespasser and was making use of the equipment and tools in the premises.

Premises No. 816/5, Maradana Road, is owned by Mrs. Angela Madappuli. The appellant was her tenant. In action D.C. Colombo No. 1734/RE, Mrs. Madappuli sued the appellant for ejection. This action was settled by the parties on the 11th June, 1974, judgment being entered for Mrs. Madappuli in a sum of Rs. 25,470 as damages and further damages at the rate of Rs. 522/80 per mensum.

The Decree provided that—

“if the defendant pays the current month’s damages of Rs. 522/80 together with a sum of Rs. 500 in liquidation of the aforesaid sum of Rs. 25,470 totalling to a sum of Rs. 1,024/50 on or before the end of each and every month commencing from 30.6.75 without making any three defaults, writs not to issue till 31.5.80. In default of any three payments both writs to issue without notice. If writs issued after 1 year, writs to issue without notice. If there is an increase in the rates, the defendant agrees to pay the amounts that will become payable as a result of an increase in rates in accordance with the determination made by the Rent Board, after a month’s notice being given to the defendant by the plaintiff.”

" If the defendant makes the above payments without making any three defaults, satisfaction of Decree to be entered and the defendant to continue occupation of the said premises on a fresh contract of tenancy as from 1.6.80, by paying the authorised rental in accordance with the terms of the order made by the Rent Board in August 1972 or any other lawful order."

The appellant however pending this action entered into an agreement P4 in August 1972 with M. J. de Silva for running a business in partnership with him in a portion of these premises under the name and style of " Auto Care " for the repair of motor vehicles. By this agreement the appellant undertook to make available to M. J. de Silva, the portion coloured pink depicted in sketch P1 of the premises No. 816/5, Maradana Road. He also agreed to supply bath and toilet facilities in consideration of which M. J. de Silva was to pay him a fee of Rs. 200 per mensem. The business was to be run and managed by M. J. de Silva and it was agreed that the appellant would be exonerated from all liabilities. The appellant handed over to M. J. de Silva tools and equipment belonging to him valued at Rs. 4,100 as his share of the capital. Accounting was to take place every 3 years and the appellant was entitled to 1/5 share, while M. J. de Silva would get the balance 4/5 share both amounts to be free of income tax. It was also agreed that no change in the partnership was to be effected without the written consent of both parties and if consent is refused the partnership was to be wound up.

Contrary to the terms of this agreement, M. J. de Silva, purporting to be the owner and proprietor of the business, by Deed D1 of 30th May, 1975, sold to Rienzie Rodrigo for a sum of Rs. 7,900 the premises where the business of " Auto Care " was conducted together with the tools and equipment mentioned earlier. On the same date by mortgage bond D2, M. J. de Silva mortgaged the business of " Auto Care " to Rienzie Rodrigo and handed over the management of the business to him. The business however was carried on till 9th November, 1975, by Sydney Claude Perera, a cousin of Rienzie Rodrigo on behalf of Rienzie Rodrigo. This Sydney Claude Perera happened also to be a nephew of the appellant. Thereafter Rienzie Rodrigo by Deed D4 dated 10.11.1975 sold the building and structures on premises No. 816/5, to the respondent and on the same date on D5 sold the

business and goodwill also of "Auto Care" to the respondent. Again on the same day, the Attorney of M. J. de Silva, had sent to the Registrar of Business Names, the form relating to notice of change of partners stating that M. J. de Silva has ceased to be a partner and that his right, title and interest in the business had devolved on the respondent.

When the appellant found that the premises were in the unlawful occupation of the respondent and discovered on further probing the dealings with this property by M. J. de Silva and Rienzie Rodrigo, he filed this action. He came to court on the basis that he continues to be a tenant of the premises by virtue of the Decree in the District Court, Colombo, Case No. 1,734 and that from 31.8.1972, he had used a portion of the premises for running the business "Auto Care", in partnership with M. J. de Silva. He averred that the building and structure, tools and equipment belong to the appellant and that the respondent was in unlawful occupation of the premises and conducting the business as a trespasser.

In his answer the respondent stated that M. J. de Silva was the sole proprietor and owner of the business of "Auto Care". That in terms of the devolution of title referred to earlier the respondent had succeeded to M. J. de Silva's rights. He claimed that he was therefore in lawful occupation of the premises and has a right to carry on the business as in succession to M. J. de Silva.

After trial the learned District Judge gave judgment for the appellant.

The respondent appealed to the Court of Appeal and the Court of Appeal reversed the judgment of the learned District Judge and dismissed the plaintiff's action with costs.

The Court of Appeal while agreeing with the appellant that Deeds D1, D2, D4, and D5 relied on by the respondent "were insufficient to compel the respondent to accept the appellant as a partner or to confer upon him a right to interfere with the business" nevertheless held that the sales were "operative to convey such right, title and interest as M. J. de Silva had in the concern. The nature of the interest is M. J. de Silva's proportion of partnership assets after they have been all realised and converted into money, after all the partnership debts and liabilities had been paid and discharged."

The Court of Appeal also held that it was not disposed to grant the appellant relief for an additional reason. The Court of Appeal held that the tenancy claimed by the appellant could not be regarded as lawful possession for the appellant was really in the position of a trespasser, because he was paying damages under a Decree of Court although the appellant had the prospect of converting the occupancy into that of a tenancy upon fulfilling the conditions stipulated in the Decree. Further the partnership business installed in the premises by the appellant was in effect a subletting of the premises, and hence the appellant could not be said to be in actual occupation of the said portion of the premises to enable him to institute and maintain this action.

In regard to the ground of subletting it may be mentioned that the genuineness of the transaction set out in P4, namely, whether this was a partnership or a deception to cover a subletting does not appear to have been put in issue by the respondent in the proceedings in the lower court. Such a defence is also not put forward in his pleadings. We cannot also agree with Mr. Gooneratne that issues 4 and 9 pointed out by him in this connection could be stretched to cover this situation. These issues have not been understood in that way either by the learned District Judge or by the parties. In the result we are of the view that this finding is unwarranted and has not been the subject of contention between the parties in the lower court.

The Court of Appeal has granted Leave to Appeal only on the following grounds :

- (1) whether the right to occupy the premises in question granted to the plaintiff-petitioner by virtue of the Decree in D.C. Colombo 1734/RE enables him to maintain the present action, and
- (2) whether the defendant-respondent can enter the premises by virtue of the right which he claims on D5 and can be said to be in unlawful occupation thereof and therefore a trespasser.

Mr. Gooneratne's main submission was that since the partnership had not been dissolved, the matters in issue in this case, namely the right to occupy the portion of the premises No. 816/5, and the right to the use of the equipment and tools continue

to belong to the partnership and any right the appellant has must be subordinate to the rights of the partnership. If so, Mr. Gooneratne submits the appellant has no right or title to maintain this action except in his capacity as a partner. Further he adds that the appellant's rights or interests under the Decree do not amount to possession ut dominus.

I am of the view that the appellant was in lawful possession of the premises in terms of the Decree of the District Court. The Decree vests a sufficient legal interest in the appellant enabling him to occupy the premises. This is undoubtedly an interest which the law will protect. Incidentally since the appellant was a partner and having regard to the nature of his rights to the property in terms of the partnership agreement it cannot be said that the appellant did not have a sufficient occupancy of the premises so as to maintain this action.

Further the submission of Mr. Gooneratne on the second ground on which the Court of Appeal declined to grant relief, does not appear to be referable to a matter that has been specifically put in issue between the parties in the trial court. It is true that the Court of Appeal said "The present action is constituted on the footing that the defendant appellant is a person without any right whatsoever. The suit should have been oriented in the partnership and as it is not it is misconceived."

I do not understand this statement as showing that the ground contended for by Mr. Gooneratne was in issue between the parties. It would appear that the Court of Appeal made this statement in the context of the respondent's rights and not in regard to the position of the appellant with which Mr. Gooneratne is now concerned. In the result this ground too which was not specifically put in issue cannot be entertained at this stage.

Mr. Gooneratne's second submission which is based on the finding of the Court of Appeal is that the respondent has succeeded to certain rights and interests of the partner M. J. de Silva sufficient to give him a proprietary interest. Mr. H. L. de Silva, however submitted that having regard to the terms of the partnership agreement relating to the disposition of partnership property

neither the right to occupy the portion of the premises nor the right to the use of the tools and equipment can constitute assets of the partnership, so as to vest such a right or interest in the respondent.

The following citation from *Lindley on Partnership* and the two authorities cited below throw some light on the legal position in situations such as the present.

Lindley 12th Ed.(page 663)–

“Again it by no means follows that property used by all the partners for partnership purposes is partnership property, for example the house and land in and upon which the partnership business is carried on, often belong to one of the partners only, either subject to a lease to the firm or without any lease at all. So, it sometimes happens, though less frequently, that office furniture and even utensils in trade are the separate property of one of the partners subject to the right of the other to use them as long as the partnership continues”

In *Pocock v. Carter* (1), it was held that where the premises upon which a partnership business is carried on are and are declared by the partnership deed to be the property of one partner and the partnership deed contains no provisions as to the tenancy of the partnership but only a general direction that all rents are to be paid out of profits, the court will infer that the partnership was intended to hold the premises on tenancy only during the continuance of the partnership and not on a tenancy from year to year or at will.

In *Benham v. Gray*, (2) the plaintiff and defendant entered into a partnership, the terms of which were not definitely arranged. Business was carried on in their names in a shop and counting-house, which formed a part of a house of which the plaintiff was a lessee. Due to disputes the plaintiff caused the defendant to be served with a notice of dissolution of partnership. A few days later the defendant broke into and entered the shop and counting house. The court held that the defendant was liable in trespass, his right to occupation of the premises having ceased with the determination of the partnership.

In the present case there is however no need to resort to general principles since the matter is governed by the express provisions of the partnership agreement P4. They are the following :

Clause 1—"The party of the first part (the appellant) agrees and undertakes to make available to the said business a portion out of the building and premises bearing assessment No. 816/5

Clause 3—"The party of the second part (M. J. de Silva) shall be entitled to spend in the first instance a sum of Rupees Five Thousand (Rs. 5,000), repairing certain parts of the roof and supports of that portion of the building, including the wiring for electricity and other incidental expenses, so that the said business could be run efficiently. The said sum so expended shall be recovered by the party of the second part from the party of the first part in monthly instalments of Rupees One hundred and forty (Rs. 140) per month.

Clause 15 - " The party of the second part agrees and undertakes not to allow any person other than the employees of the said business to occupy any section of that portion of the building and premises set apart specifically for that purpose.

Clause 16—"The party of the second part agrees and undertakes to hand over peaceful and vacant possession of that portion of the building and premises described in Para 1 hereof, if and when the business is wound up or on any cessation of the partnership and if at any time the dissolution or cessation of business takes place before the aforementioned sum of Rupees Five Thousand (Rs. 5,000) is fully recovered, an account of any sum due to the party of the second part shall be taken and the party of the first part shall pay the same forthwith, making any adjustments if any, for the tools and equipment not returned or value paid as provided in paragraph 14 hereof."

It is clear from these provisions that M. J. de Silva himself would have been obliged to hand over possession of the portion of the premises in the event of the partnership coming to an end. The respondent is in no better position and can claim no greater rights than M. J. de Silva.

The position seems to be no different in the case of the tools and equipment claimed by the appellant. Even if the appellant had handed over those items to M. J. de Silva, as his share of the capital, clauses 14 and 16 contain express provision regarding their disposal upon a cessation of the partnership.

Clause 14 is worded as follows :

"The party of the second part accepts the said valuation of Rupees Four Thousand One Hundred (Rs. 4,100) for the said equipment and tools as capital from the party of the first part for the said business, and upon the dissolution of the said business or any change of the partnership duly effected as above, the party of the second part undertakes to return the said tools and equipment in good condition or their full value thereof."

It is not a matter of surprise to find M. J. de Silva had agreed to those terms since the rights to those properties had been with the appellant from the inception and it was he who made them available to the partnership for the purpose of its business.

Even if we were to go by the finding of the Court of Appeal that the Deeds D1, D2, D3, D4 and D5 were adequate to convey the right or interest which the law recognises as being vested in a partner upon a dissolution of partnership namely the right to a proportion of partnership assets after they have been all realised and converted into money and all the partnership debts and liabilities have been paid and discharged, this would not help the respondent. This statement of the law makes it abundantly clear that the right the respondent has in respect of the properties referred to could arise only after a dissolution of the partnership and upon the conversion of the partnership assets into money. How then can the respondent claim a present right to occupy these premises or a present right to use those equipment and tools? Those rights are necessarily restricted to the partners and only in respect of an existing partnership. Both these requirements are absent in this case. Accordingly the respondent cannot show a valid legal basis to remain in occupation of the premises or for the use of the tools and equipment.

For these reasons I would set aside the judgment of the Court of Appeal and restore the judgment of the District Court. The respondent will pay to the appellant the costs of appeal both here and in the Court of Appeal.

SAMARAKOON, C.J.—I agree.

ABDUL CADER, J.—I agree.

Appeal allowed.
