SENANAYAKE

v.

PETER DE SILVA

COURT OF APPEAL.
G. P. S. DE SILVA, J. (PRESIDENT, C/A) AND GOONEWARDENA, J.
C.A. No. 925/75 (F) (S.C.).
D.C. GALLE No. 7442/L.
AUGUST 29, 1986.

Landlord and tenant – Lease of bare land – Termination of lease – Can vindicatory suit be maintained?

Where the tie of landlord and tenant has been severed and the lessee has lost his right of occupation and there is no legal basis justifying the tenant's continued occupation, a suit in vindicatory form to recover possession on the basis of title would lie. The owner is not confined to his remedy in contract and not bound to proceed as if against an overholding lessee.

Cases referred to:

(1) *Attorney-General v. Herath – (1960) 62 N.L.R. 145.*

(2) *Graham v. Ridley – S.A.L.R. 1931 T.D.P. 476.*

(3) *Leesh v. Crowther – S.A.L.R. 1947 (2) 956.*

(4) *Beshop v. Union Government – S.A.L.R. 1932 T.D.P. 345.*

(5) *Myaka v. Havemann and Another – S.A.L.R. 1948 (3) 457.*

(6) *Winter v. South African Railways and Harbour – 1929 AD 100.*

(7) *Karim v. Baccus – 1946 N.P.D. 721, 726.*

(8) *Thomas v. Guirguis – S.A.L.R. 1953 (2) 36.*

(9) *Mensina v. Joslin – 1 Sriskantha's Law Reports 76.*

(10) *Fernandes v. Perera – (1974) 77 N.L.R. 220.*

(11) *Subramanian v. Pathmanathan – (1984) 1 SLR 252.*

(12) *Pathirana v. Jayasundera – (1955) 58 N.L.R. 169.*

APPEAL from Judgment of the District Court of Galle.

N. R. M. Daluwatte, P.C. with *Miss K. Gabadage* for substituted defendant-appellant.

M. S. A. Hassan with *Miss S. Jayatilleke* and *I. Waffa* for plaintiff-respondent.

Cur. adv. vult.

October 16, 1986.

GOONEWARDENA, J.

The plaintiff-respondent brought this action against the deceased defendant in the District Court on the following basis. Under a final decree for partition entered in D.C. Galle case No. 26122 (P1A) Lot B of the defined portion of Kekiribokkewatta depicted on plan 2425A (P2) was allotted to one Y. B. Arlis de Silva his father who upon P1 of 1956 gifted the property to him. Prior to his death in 1963, Arlis de Silva upon an informal writing dated 12th June 1951 (P19) permitted the defendant to erect temporary buildings on a portion of this land in extent about a quarter of an acre (now bearing separate assessment No. 121A) adjoining Galle-Wakwella Road on payment monthly of a ground rent, in pursuance of which the defendant constructed a temporary wooden building wherein he carried on the business of running a timber depot. The defendant paid the ground rent to Arlis de Silva during his life time and after his death to the plaintiff. On or about 31st May 1966 the plaintiff revoked the permission granted to the defendant and noticed him to quit this portion of land on or before 31st August 1966 and remove the temporary buildings erected by him. Notwithstanding this, the defendant in violation of the plaintiff's rights of ownership, in the exercise of a purported right, unlawfully put up new buildings and in the exercise of a pretended right of retention continued in occupation of the land. In consequence, as relief the plaintiff asked that he as owner be declared entitled to the full rights of dominion over this area of land, that the defendant be ordered to remove the buildings, that the defendant be ejected and he be restored to possession and awarded damages.

The defendant in his amended answer (and answer) did not admit that the plaintiff had title to the area in question and called upon him to prove the same, although subsequently at the trial he admitted such title. He also claimed that on the right granted to him by Arlis de Silva he filled up with earth at his expense this extent of land and put up three sheds and that he paid a monthly rental to Arlis de Silva and after him to the plaintiff. The defendant also denied that there was a revocation of the permission granted and the right of the plaintiff to effect the same and that he at any time acted in violation of the plaintiff's rights. His principal defence however was that he was entitled to the protection of the Rent Restriction Act and not liable to be ejected. While asking for a dismissal of the plaintiff's action, he made a claim for compensation for improvements.

At the conclusion of the trial the learned District Judge held with the plaintiff but ordered the payment by him of Rs. 1,000 as compensation on account of the filling up operation. It is against this judgment that this appeal was taken by the defendant.

At the hearing before us learned President's Counsel appearing for the substituted defendant appellant (who figures in this appeal in room of the defendant now deceased) did not seek to canvass the District Judge's finding that the Rent Restriction Act did not apply to these premises but contended that as the evidence and the judge's finding clearly indicated that there was a contract of tenancy in respect of the premises, the notice to quit was bad in law. According to the plaint the period of the notice spanned three months and this appears to be supported by the original of the notice which was produced according to the proceedings from the custody of the defendant and marked at the trial by his counsel as D3. Be that as it may, whether it is permissible at this stage in appeal to canvass the adequacy of the notice to sever the contractual relationship of landlord and tenant is another matter. Counsel contended that since the defendant had put in issue at the trial the question whether the plaintiff had terminated the tenancy, upon the material in the record this Court could come to the finding that the notice was bad in law. In my view it would be wrong to go into this question for the first time now. If the defendant intended to challenge the effectiveness of the notice that should have, and having regard to the averments in the plaint, could have been done in a clear and precise manner upon a specific issue framed for that purpose, so that the attention of the District Judge could have been focussed upon this question, where we would then have had the benefit of his finding. Not having done so at the trial I am of the view that this cannot be gone into now. Questions of fact are involved here, inter alia, that one of the original contracting parties (the father of the plaintiff) went out of the picture and the plaintiff took his place and also that the gift to the plaintiff of these premises by his father upon P1 was prior to his death. As such, without there being a finding on this question by the District Judge I am not disposed to consider this submission and refrain from doing so.

The principal argument of counsel for the substituted defendant however lay elsewhere. Stated briefly, he contended that since there had been a tenancy between the parties (at the very least in respect of the bare land) the action against the defendant should have been

constituted as one against an over-holding lessee. He argued that the action instead, taking the form rei vindicatio and being therefore misconceived, the defendant is not liable to be ejected. Learned counsel for the plaintiff-respondent on the other hand argued that the acts complained of against the defendant which the evidence had clearly established, were in derogation of the plaintiff's rights as owner of the land and resulted in a diminution of such rights and consequently the relief asked for was a declaration that the plaintiff as owner had full rights of dominium. He contended that it was competent for the plaintiff in the circumstance of this case, to maintain the action in this form and to get the relief he asked for including a restoration to possession.

I understood the argument of learned President's Counsel for the appellant to be to the effect that a overholding tenant whose contract of tenancy has been terminated by a valid notice to quit, can be ejected only in an action brought on the basis of the terminated contract of tenancy and that such over-holding tenant is not liable to be ejected in an action rei vindicatio.

I think it would simplify matters to express my view at the outset itself, that in circumstances such as those present here, where the tenancy stands terminated and the tie of landlord and tenant is severed and there is no legal basis justifying the tenant's continued occupation, there can be no objection to a landlord, on the basis of his title successfully recovering possession of the property leased.

Maarsdorf (Volume 2, p. 27) says that the rights of an owner are comprised under three heads namely:

(1) the right of possession and the right to recover possession;

(2) the right of use and enjoyment; and

(3) the right of disposition,

and he goes on to say that these three factors are all essential to the idea of ownership. That this statement is applicable to this country was recognised by the Privy Council in the case of *Attorney General v. Herath* (1).

The jus vindicandi or the right to recover possession of one's property is thus considered an important attribute of ownership in the Roman-Dutch Law. Voet (6.1.2) states that from the right of dominium or ownership strictly so called arises the action called rei

vindicatio, the action in rem by which we sue for the recovery of a thing that is ours which is in the possession of another. The question then is whether a jus vindicandi is enforceable in an action rei vindicatio against an over-holding tenant.

In the case of *Graham v. Ridley* (2) Greenberg, J. (at p. 479) stated with respect to the unreported case of *Gordon v. Kamaludeen* decided by the Transvaal Provincial Division on 15.9.27 as follows:

"The pleadings and the facts showed that the plaintiff was the owner of the premises, and the Court held that even though he had invoked this lease in his pleadings as the ground for ejectment he had a prima facie right to succeed because of his ownership".

Referring further to that judgment, Greenberg, J. stated with approval thus:

"An extract from the judgment reads:

'One of the rights arising out of ownership is the right of possession; Indeed Grotious (Introd. 2, 3, 4) says that ownership consists in the right to recover lost possession. Prima facie, therefore, proof that the appellant is the owner and that respondent is in possession entitles the appellant to an order giving him possession, i.e. to an order for ejectment. When an owner sues in ejectment an allegation in his declaration that he has granted the defendant a lease which is terminated is an unnecessary allegation and is merely a convenient way of anticipating the defendant's plea that the latter is in possession by virtue of a lease, which plea would call for a replication that the lease is terminated'".

With respect to the case before him Greenberg, J. (at p. 479) stated thus:

".....but the cause of action arises out of the fact that she is the owner and is therefore entitled to possession, and whether a monthly lease is alleged, which has been lawfully terminated or whether it is alleged that there is a long lease which has been lawfully terminated, it does not affect her real ground of the right of possession".

In the case of *Leesh v. Crowther* (3) Fisher, J.P. (at p. 961) expressing his agreement therewith, cited this passage as reflecting the true position.

In *Boshoff v. Union Government* (4) Greenberg, J. once again stated (at p. 351) thus:

"I do not think that any court would be entitled to decree an order for ejectment, when a plaintiff comes to court and says:

'I am the owner of ground; I let that ground to the defendant on a lease which covers the present period, without some allegation that the lease is no longer in force or no longer gives the defendant the right of occupation. It may be that the cause of action in such a case, is the ownership of the ground, but where the plaintiff's own allegations in his declaration or what is equivalent to his declaration, show that he is not entitled to ejectment, it does not appear to me that any court would be entitled to decree ejectment in his favour. The court would require something to show that notwithstanding the right that he has given to the defendant, the defendant no longer has a right to remain in possession'".

The case of *Myaka v. Havemann and Another* (5) was one where in a claim for ejectment and damages the plaintiffs who sued as cessionaries of the right of action of the owners of a farm, after alleging their right as cessionaries from the owners, set out an agreement with the defendant, under which he was lawfully in occupation, and its termination by due notice. Davies, A.J.A. (at p. 465) stated thus:

"The plaintiffs were the cessionaries from the owners. They could consequently have relied solely on that fact, and, after stating that the defendant was in wrongful occupation, have claimed ejectment, as was done in the case of *Winter v. South African Railways and Harbours* (6)..... But in *Karim v. Baccus* (7) Hathorn, J.P. while recognising that this preposition is sound, said:

'when a plaintiff is the owner of land and he seeks to recover possession he is free to choose his cause of action and when, having made his choice, he pleads that he is the owner, that he let the land and the lease is at an end, he has placed on record that he parted with his right of possession and, for the purposes of the case, he is bound by that statement. It is clear, in my opinion, that having made his bed he must lie upon it. He, of his own free will, has placed upon himself by his own act the onus of proving that the right of possession, with which by his own admission he has parted, is once more his'".

This view was echoed in *Thomas v. Guirguis* (8) where Clayden, J. (at p. 37) stated thus:

> "The applicant's claim to relief is founded on *Graham v. Ridley – 1931 T.P.D.* which lays down that an owner, seeking ejectment, can base his claim on his ownership. It would then be for the occupier to set up, and prove, a right of occupation against the owner. If the owner so sets out his cause of action as to travel beyond the allegation of ownership and to allege that he has parted with possession but cancelled that right to possession then he may take upon himself the onus of proving that the right to possession which he gave is at an end".

These authorities, it will be seen, go so far as to hold that it is sufficient for an owner in these circumstances to make an assertion of ownership to the property, without further statement that the defendant's right of occupation is at an end (if that be the case) and upon the proof of such title to obtain recovery of possession. Indeed, they then demonstrate beyond any manner of doubt, that it is competent for an owner who has leased his land, upon showing that the lessee has lost the right of occupation, to eject him on the strength of his title and that an action so framed is not misconceived nor that the action should be constituted as one against an overholding lessee based upon the lawful termination of the contract of lease, before possession can be recovered.

Learned counsel for the appellant relied upon certain authorities as supporting his preposition, which I will make reference to now.

The case of *Mensina v. Joslin* (9) was one where the premises occupied by the defendant as tenant was sold by the landlord to the plaintiff who brought an action rei vindicatio in respect of the premises on the basis that the defendant failed to attorn to her though called upon. Rodrigo, J. was there strongly influenced by the decision in *Fernandes v. Perera* (10) which was a case where the Rent Restriction Act applied and it was held that upon a change of ownership of the premises, the tenant by operation of law became a tenant of the new owner and entitled to the protection of the Act and could be ejected from the premises, not in an action rei vindicatio, but only in a properly constituted tenancy action if there was a breach of any of the conditions laid down in that Act. Rodrigo, J. stating that the case before him was on all fours with the case of *Fernandes v. Perera*

(supra) went on to hold that as the plaintiff there had not brought the action on the contract of tenancy that had arisen in favour of the defendant by operation of law, he could not in an action for declaration of title seek the ejectment of the defendant as a trespasser. It is to be observed that in both these cases the tenant was shown to have a right to remain in occupation and as such they have no application to the question before us.

The case of *Subramaniam v. Pathmanathan* (11) was also relied on by counsel for the appellant. In this case there was no relief by way of a declaration of title to the premises sought, as Samarakoon, C.J. observes in the course of his judgment. I am of the view therefore that this too has no application to the question before us and the following statement of Samarakoon, C.J. (at p. 256) shows why "The Court of Appeal has held that this was an action of a tenancy and I am of the opinion that it was correct in so holding."

Of more relevance to the question is the case of *Pathirana v. Jayasundera* (12). It was held there that a lessor of property who institutes action on the basis of a cause of action arising from a breach by the defendant of his contractual obligations as lessee is not entitled to amend his plaint subsequently so as to alter the nature of the proceeding to an action rei vindicatio if such a course would prevent or prejudice the setting up by the defendant of a plea of prescriptive title. The decision here, it is to be noted, touched the question whether the proposed amendment would be prejudicial to a possible plea of prescription available to the defendant. Fernando, J. there however said (at p. 171):

> "I have no doubt that it is opened to a lessor in an action for ejectment to ask for a declaration of title, but the question of difficulty which arises is whether the action thereby becomes a rei vidicatio for which strict proof of the plaintiff's title would be required, or else is merely one for a declaration (without strict proof) of a title which the tenant is by law precluded from denying. If the essential element of a rei vindicatio is that the right of ownership must be strictly proved, it is difficult to accept the proposition that an action in which the plaintiff can automatically obtain a declaration of title, through the operation of a rule of estoppel should be regarded as a vindicatory action. The fact that the person in possession of property originally held as lessee, would not preclude the lessor-owner from choosing to proceed against him by a rei vindicatio."

Gratiaen, J. in the same case (at p. 173) stated:

"A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner."

Learned President's Counsel for the appellant in my opinion has failed to hold up his contention upon any authoritative basis, while the South African cases which I referred to earlier uniformly support the contrary view. The effect of these authorities which I have referred to show that a plaintiff on the strength of his title can seek to eject a defendant who though at one time his tenant has had such tenancy terminated and cannot show any right to justify his continued occupation of the leased premises.

In the view I take that it was competent for the plaintiff to seek the relief of recovery of possession in an action rei vindicatio, it is all too clear that he is entitled to the relief he asks of a declaration of full rights of dominium and restoration of possession based upon a claim that he is the owner (without seeking a full declaration to that effect). Indeed the argument of learned counsel for the appellant was that the entire structure of the plaintiff's case suggested an action rei vindicatio.

I am of the view that the learned District Judge addressed his mind properly to the questions before him and came to a correct conclusion. His judgment and decree are affirmed and the appeal is dismissed with costs.

G. P. S. DE SILVA, J. – I agree.

Appeal dismissed.