PUNCHI BANDA
v.
SIRIWARDENA & OTHERS

COURT OF APPEAL
UDALAGAMA, J. AND
NANAYAKKARA, J.
CA NO. 1103/99
DC MAHO NO. 1009/L
JULY 12, 2001

Civil Procedure Code s. 217 (g), 323, 325 – Resistance to execution of Writ – Agrarian Services Act, No. 56 of 1979 – Tenant cultivator – Constructive possession – Possession subject to tenancy rights of cultivator – Declaration of a right or status.

The plaintiff sought to be declared as the tenant cultivator and further sought interim relief to restrict the defendant from entering the field. The defendant-respondent prayed for the dismissal of the action and an order declaring the defendant to be the tenant cultivator. The District Court declared the defendant as the tenant cultivator and restricted the plaintiff from entering the field. In appeal the Court of Appeal approved part of the judgment and varied same by deleting the words "the plaintiff . . . be evicted from the field".

On an application for writ made by the defendant-respondent the plaintiff-petitioner was dispossessed and the defendant placed in possession. On a complaint lodged by the plaintiff-petitioner court ordered the restoration of the plaintiff-petitioner back into possession.

The Fiscal was met with resistance by the defendant.

The plaintiff-petitioner thereafter complained to court.

On a preliminary objection taken, the application was dismissed, the District Court holding that what has been declared is a status or right only.

Held:

(1) The order of the Court of Appeal is in line with the meaning given to the words "Constructive Possession". The possession granted to the plaintiff-petitioner was the claim the latter holds by virtue of some title without having actual occupancy.

(2) The order of the Court of Appeal declared the right of the tenant cultivator to cultivate the field in the capacity of a tenant cultivator.

(3) The Court of Appeal did not declare that the tenant cultivator be ejected and the plaintiff-petitioner be placed in possession as the tenant cultivator. Nor had the tenant cultivator ceded his rights under the provisions of the Agrarian Services Act to enable the plaintiff-petitioner to be tenant cultivator or for that matter the owner cultivator.

(4) The right of possession that the plaintiff-petitioner was entitled to was subject to tenancy. The possession was subject the rights of the defendant-respondent to the tenancy which would necessarily include occupancy.

(5) The right the plaintiff-petitioner was declared entitled to by the Court of Appeal was in fact constructive possession subject to the tenancy rights of the defendant-respondent.

APPLICATION for leave to appeal.

Wijedasa Rajapaksha, PC with *Kapila Liyanagamage* for plaintiff-petitioner.

W. Dayaratne for defendant-respondents.

Cur. adv. vult.

August 22, 2001

UDALAGAMA, J.

The plaintiff in DC Maho case No. 1009/L filed plaint on 20. 10. 78 claiming, *inter alia,* that the plaintiff be declared the tenant cultivator of the field described in the schedule thereto, and also moved for an interim injunction to restrain the defendants or their servants from entering the said field. The defendants on 19. 10. 81 while praying that the plaintiff's action be dismissed also sought an order declaring the defendants to be the tenant cultivators of the field described in the schedule to the plaint aforesaid. The case went to trial on eleven issues and on 18. 10. 82 the learned District Judge dismissed the plaintiff's action with costs and further declared the 1st defendant to be the tenant cultivator and restrained "the plaintiff and his agents and servants from entering the field aforesaid".

In appeal, the Court of Appeal on 06. 02. 91 affirmed part of the above judgment of the learned District Judge dated 18. 10. 82 and varied same by deleting the following words: "the plaintiff and his agents and servants be ejected from the field".

Later an application for writ by the respondent appears to have been filed, and allowed on 20. 11. 95. Subsequently, submissions were made by the plaintiffs-petitioners that the said order dated 20. 11. 95 was made on false representations but counter claimed by the respondents to have been made inadvertently and that in any event writ issued had also been in error.

However, on a perusal of the proceedings, I find the order that had emanated from the Court of Appeal was in fact to vary the judgment of the learned District Judge dated 18. 10. 82 and to precisely delete the part directing the ejectment of the plaintiff-petitioner. Nevertheless, this had been corrected subsequently, *vide* order of the learned District Judge dated 14. 07. 97, by which order the latter whilst declaring the 1st defendant to be the tenant cultivator restored the plaintiff-petitioner to possession.

On the 2nd respondent and his wife dispossessing the plaintiff-petitioner on a subsequent occasion which incident was inquired into by the learned District Judge, on 25. 05. 98, pursuant to that inquiry directed the fiscal to restore the plaintiff-petitioner back into possession. However, the fiscal who went to execute that order met with resistance once again, and *vide* his report marked 20/98, (P10) reported the incident of resistance to Court. The plaintiff-petitioner by P11 dated 12. 08. 98 complained to court of the second instance of resistance to the writ and moved for relief, which application was objected to by the defendants-respondents.

The learned District Judge by his order dated 10. 05. 99, however, accepted the preliminary objections of the defendants-respondents and refused relief.

The plaintiff-petitioner by this application seeks to canvass that order.

The learned District Judge in the course of the impugned order stated that although the plaintiff-petitioner had not submitted the basis of his application dated 12. 08. 98 as referred to above, in that, the provision under which the plaintiff-petitioner claimed relief had not been specified, the learned District Judge, however, went onto observe that by the tenor of the claim, the latter understood the application to be made under the provisions of section 325 of the Civil Procedure Code.

Section 325 aforesaid provides for the procedure in the event of resistance to the execution of a writ.

The finding of the learned District Judge pertaining to the variation of the judgment of the learned District Judge dated 18. 10. 82 appears to be that the Court of Appeal on 06. 02. 91 while affirming the judgment of the District Court had additionally deleted part of that judgment, and the resulting position, as stated by the learned District Judge, was a decree under the provisions of section 217 (G) of the Civil Procedure Code. It was also the finding of the learned District Judge that the end result of the Court of Appeal direction was a declaration of a right or status. The learned District Judge further points out that as the order of the Court of Appeal is a declaration of a right or status, that section 217 (*c*) of the Civil Procedure Code could not apply and consequently the learned District Judge proceeded to hold that section 323 of the Civil Procedure Code would also not apply.

Section 323 aforesaid refers to the mode of application for the execution of a decree for the recovery of property. The learned District Judge accordingly held that section 323 has no application as the final order to be executed is only a declaration of a right or status and that even section 325 which flows from section 323 would not apply.

The definite finding of the learned District Judge therefore appears to be that the plaintiff-petitioners in any event had no right to seek relief under section 325 aforesaid as he is not a judgment-creditor.

It is the submission of the learned President's Counsel for the plaintiff-petitioner that the District Judge has no jurisdiction to question the decree of the Court of Appeal. It is also his position that the petitioner was restored to possession on 12. 09. 97.

"Possession" according to Black's *Law Dictionary,* 4th edn, is "the detention and control or the manual or ideal custody of anything which may be the subject of property for one's use and enjoyment either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. The same Dictionary describes "constructive" possession to be "possession not actual but assumed to exist where one claims to hold by virtue of some title without having the actual occupancy".

It is my considered view that the order of the Court of Appeal is in line with the meaning given to the word constructive possession. As stated in the order of the Court of Appeal referred to above, the possession granted to the petitioner was the claim the latter holds by virtue of some title without having actual occupancy. The order of the Court of Appeal in no uncertain terms declared the right of the tenant cultivator to cultivate the field in the capacity of a tenant cultivator. The Court of Appeal did not declare or order that the tenant cultivator be ejected and the plaintiff-petitioner placed in possession as the tenant cultivator of the field, nor had the tenant cultivator ceded his rights under the provisions of the Agrarian Services Act to enable the plaintiff-petitioner to be a tenant cultivator or for that matter the owner cultivator.

I am not inclined to the view as submitted by the learned President's Counsel for the plaintiff-petitioner that the learned District Judge exercised an extraordinary revisionary jurisdiction that he was not

entitled to. I would hold that the learned District Judge in fact correctly determined and interpreted the order of the Court of Appeal dated 06. 02. 91.

The confusion, if there was one, obviously occurred due to the fact that a tenant cultivator is entitled to occupy and cultivate the field which act necessarily need to have ingredients of possession attached to it. The right of possession that the plaintiff-petitioner was entitled to was subject to tenancy. In terms of the provisions of the Agrarian Services Act, No. 58 of 1979 the plaintiff-petitioner while he is entitled to receive rent, acts of ploughing, reaping and harvesting were exclusively a tenant's right and by no stretch of imagination could the plaintiff-petitioner, on the pretext of the Court of Appeal order granting him possession oust the tenant cultivator. The possession was subject to the rights of the defendants-respondents to the tenancy which would necessarily include occupancy. In the circumstances, I would hold that the right which the plaintiff-petitioner was declared entitled to by the order of the Court of Appeal was in fact constructive possession subject to the tenancy rights of the defendants-respondents.

For the above reasons I find no reason to vary or set aside the order of the learned District Judge dated 10. 05. 99. The plaintiff-petitioner's application is dismissed with costs fixed at Rs. 7,350.

NANAYAKKARA, J. – I agree.

Application dismissed.