

AYUPALA
v
PUBLIC TRUSTEE OF SRI LANKA

COURT OF APPEAL
SOMAWANSA. J.
EKANAYAKE. J.
CA 429/96 (F).
JULY 29, 2004.
SEPTEMBER 15, 2004
OCTOBER 15, 2004

Land Development Ordinance – Permit holder – Right to bring a vindicatory action to eject trespasser – Permit holder dies – Is the land an asset in the Estate when the permit holder dies ? – Last will – Do the normal laws of succession apply ? – Is the lessee the owner during the period of the lease? – State Land Ordinance Section 2. – No distinction between short and long leases.

The plaintiff-respondent claiming that he is lessee of the State land sought to evict the 1st defendant-appellant and the 2nd defendant-respondent from the land in question on the basis they are trespassers, and sought a declaration of title to the land. The 1st and 2nd defendants took up the position that they were in possession of the premises with the leave and licence of one S from 1977 and paid all rates and taxes. The 3rd defendant-respondent intervened and claimed that he too was in possession from 1977 with the leave and licence of the plaintiff-respondent. The Public Trustee was substituted in the room of the deceased plaintiff-respondent as the Public Trustee has been granted limited probate in respect of the estate of the deceased plaintiff-respondent. The land and the building has been included in the last will of the lessee. The District Court held with the plaintiff.

Held:

- (1) Permit holders under the Land Development Ordinance has been conferred with a sufficient interest in the land to bring a vindicatory action to eject any third party who is a trespasser and to recover damage for wrongful occupation.
- (2) Land held on a permit under the Land Development Ordinance cannot be the asset in the estate when the permit holder dies. The land remains State land and on the death of the permit holder it devolves in the manner set out in the Ordinance and the permit holder is not free to dispose of it by last will and will not devolve according to the normal rules of succession.

- (3) A lessee under a valid lease from the owner is dominus or owner for the term of the lease. He is the owner during that time against all the world. The distinction between short and long leases is not recognised as part of the law of Sri Lanka.

AN APPEAL from the judgment of the District Court of Anuradhapura.

Cases referred to:

- (1) *C.A. No. 201/95 (Rev) D.C. Anuradhapura No. 846/T* (distinguished)
- (2) *Palisena v Perera* 56 NLR 407
- (3) *Hinni Appuhamy v Kumarasinghe et al* 59 NLR 566
- (4) *Bandara v Appuhamy* 25 NLR 171
- (5) *Ukkuwa v Fernando* 38 N 125
- (6) *Ukku Amma et al v Jema* 51 NLR 254
- (7) *Carron v Fernando et al* (1933) 35 NLR 352
- (8) *Abdul Azeez v Abdul Rahiman* 1909 1 Current Law Reports 271

Daya Guruge for the 1st defendant-appellant.

Sunil Cooray or the substituted-plaintiff-respondent.

Cur.adv.vult.

November 5, 2004

ANDREW SOMAWANSA, J.

The plaintiff-respondent instituted the instant action in the District Court of Anuradhapura seeking a declaration of title to the land and premises described in the schedule to the plaint, ejectment of the 1st defendant-appellant and 2nd defendant-respondent from the aforesaid property in suit and damages.

The pleaded case for the plaintiff-respondent was that he obtained a long term lease (99 years) of the aforesaid State land in terms of Section 2 of the State Land Ordinance for the purpose of constructing buildings. The said lease granted to the plaintiff-respondent by the President of Sri Lanka in terms of Section 2 of the State Land Ordinance dated 03.08.1989 is marked P1, that he constructed a house on the said land, that on or about July 1991 the 1st defendant-appellant and the 2nd defendant-respondent without any manner of right, title or interest to the land in suit forcibly came into occupation of the house constructed by the plaintiff-respondent on the said land and continued to be in occupation without the consent of the plaintiff-respondent thereby causing damages at the rate of Rs. 2000/- per month.

The 1st defendant-appellant and the 2nd defendant-respondent while denying the aforesaid averments took up the position that they were in possession of the premises in suit with the leave and licence of one K.T. Somaratne de Silva from year 1977, that having paid all assessment taxes and other payments they were in possession of the said building for over 12 years and that thereby they have acquired prescriptive rights to the said building. Further they averred that if the plaintiff-respondent had any cause of action, it was against the aforesaid K.T. Somaratne de Silva and not against them. In the premises, they prayed for a dismissal of action of the plaintiff-respondent and a declaration that they were entitled to the house and the land in suit.

The 3rd defendant-respondent intervened in this action and pleaded that he was in possession of the land and premises in suit as from March 1977 with leave and licence of the plaintiff-respondent, that the plaintiff-respondent and his sister Dayawathi Premaratne entered into an agreement with him to sell the aforesaid property to him for a sum of Rs.45,000/- and he took possession thereof and spent a sum of Rs.63,912 and 82 cents on improvements to the house and property and claimed the said sum as a claim in reconvention. Further that the plaintiff-respondent and the said Dayawathi Premaratne undertook to sign all documents transferring the property in suit to him on acceptance of a grant from the State and that he permitted the husband of the 1st defendant-appellant to occupy the premises and on his death the widow and the sons the 1st defendant-appellant and the 2nd defendant-respondent are in possession thereof. In the premises, he prayed for a dismissal of the plaintiff-respondent's action, a declaration that he is entitled to the premises in suit and in the alternative damages in a sum of Rs.500,000 and a sum of Rs.63,998/82 as compensation for improvements.

At the trial 21 issues were settled between the parties and at the conclusion of the trial, the learned District Judge by his judgment dated 13.03.96 held with the plaintiff-respondent. It is from the said judgment that the 1st defendant-appellant has lodged this appeal.

At the hearing of this appeal counsel for the 1st defendant-appellant contended that the plaintiff-respondent's action is misconceived in law and is not maintainable. He submitted that the

land in suit being State land continues to be State land and the lessee cannot obtain a declaration from Court that he is the legal title holder of the land for the lessee continues to be a lessee and has no title. For this proposition of law he has cited the decision of Ranarajah, J in *C.A. Application No. 201/95 (Revision)*⁽¹⁾. He further submits that in the instant case the Public Trustee intervened in the appeal on the basis that the land and the building is included in the Last Will of the lessee R.L. Chandrasekera.

It is to be noted that on an application made by the Public Trustee to be substituted in the room of the deceased plaintiff-respondent, for the reason that as per document marked P2 limited probate in respect of the estate of the deceased plaintiff-respondent has been issued to the Public Trustee.

As for the submission that the plaintiff-respondent's action is misconceived in law and not maintainable is without any merit. For it is well settled law and recognized by our Courts that a valid lease is a *pro tanto* alienation of the land leased and the lessee has a right to bring a vindicatory action to eject any trespasser and recover damages for wrongful occupation. it is to be noted that validity of grant marked P1 not being assailed there is no dispute that the plaintiff-respondent is the grantee under the said grant marked P1. At this point, it is pertinent to note that our Courts accepted the position that a lessee who had never had possession is entitled to sue even his lessor or any third party to have his rights as lessee declared and to have the lessor or such third party ejected from the leased property.

It is of interest to note that even permit holders under the Land Development Ordinance has been conferred with a sufficient interest in land to bring a vindicatory action to eject any third party who is a trespasser and to recover damages for wrongful occupation as was held in *Palisena v Perera*⁽²⁾. That being so a lessee who has greater rights conferred on him by the lease is certainly entitled to have his rights as a lessee declared and to have the defendant-appellant ejected. In the case of *Palisena v Perera (supra)* the facts were:

"On 24th January 1947 the Government Agent of Sabaragamuwa Province issued in favour of the plaintiff a

permit under the provisions of the Land Development Ordinance (Cap. 320), in respect of certain allotments of Crown land. The plaintiff has sued the defendant, whom he alleges to be a trespasser on the land, for ejectment and for consequential relief. The defendant raised a number of defences to this claim, including a plea that in any event a "permit holder" under the Ordinance was not entitled, as against a third party, to the relief of the kind asked for. The case went to trial on a number of issues, but after a considerable volume of evidence had been led, the learned District Judge decided the action against the plaintiff on the ground that the plaint did not, in his opinion, disclose a remedy against the defendant. The basis of the decision was that " a permit holder is only a licensee who is entitled to possess the land with the leave and licence of the Crown and at the will and pleasure of the Crown" and was therefore "not entitled to ask for a possessory decree or to ask that a (third party in possession) be ejected from the land".

Gratiaen J. held that,

"the Judge has misunderstood the scope of the remedy asked for by the plaintiff and failed to appreciate the nature of a permit holder's rights under the Land Development Ordinance. This was not a possessory action in which a person complaining of dispossession can in certain circumstances, without proof of his title; obtain a decree for the ejectment of a person who has dispossessed him otherwise than by due process of law. This is a vindicatory action in which a person claims to be entitled to exclusive enjoyment of the land in dispute, and asks that, on proof of that title, he be placed in possession against an alleged trespasser".

"It is very clear from the language of the Ordinance that of the particular permit P1 issued to the plaintiff that a permit holder who has complied with the conditions of his permit enjoys, during the period for which the permit is valid, a sufficient title which he can vindicate against a trespasser in civil proceedings. The fact that the alleged trespasser has prevented him from even entering upon the land does not afford a defence to the action; it serves only to increase the necessity for early judicial intervention"

Though the judgment of Dr. Ranarajah, J cited by the counsel for the 1st defendant-appellant is a judgment of a single Judge of this Court and is not binding on us, I have no reason to disagree with Dr. Ranarajah, J for what was decided in that case is that the land held on a permit under the Land Development Ordinance cannot be an asset in the estate when the permit holder dies. This is for the reason that the land remains the State land and on the death of the permit holder it devolves in the manner set out in the Land Development Ordinance and the permit holder is not free to dispose of it by Last Will and will not devolve according to the rules of intestate succession. In that case the learned district Judge had excluded the land given on the permit but held that the building should be included in the inventory. Dr. Ranarajah, J. held that:

"I am of the view that since the land granted on a permit continues to be Crown land, any buildings put up by the deceased on the land granted on the permit cannot be included in the inventory of the testamentary case. Accordingly, I set aside the order of the learned District Judge dated 22.09.95 in respect of the building and direct that the said building should be excluded from the inventory filed in the case"

It is to be seen that Dr. Ranarajah, J. has not held that the permit holder will not be entitled to bring a vindicatory action to eject any trespasser. In any event, Dr. Ranarajah, J's judgment has no application to the facts of the instant action.

In the case of *Hinniappuhamy v Kumarasinghe et al.*,⁽³⁾ the facts were:

"This was an action for ejectment and damages. The field in suit, in extent of 13 acres and 16 perches, belonged to N.S. Doole on whose death it devolved on her three children, viz., the added defendant, and N.B. and N.S. Thalip. The added defendant became the administrator of his mother's estate on 27th March 1952. Six days later, he gave to the defendant a non-notarial writing purporting to lease the field in suit for a period of four years upon the condition that the defendant should asweddumise the premise and give the added defendant one eighth share of the produce as rent. On 4th

May 1953, N.B. and N.S. Thalip gave a notarial lease of the field to the plaintiff for a period of six years commencing from 1st September 1953. He instituted this action for the ejectment of the defendant and damages, alleging that he had been placed in possession of the property and the defendant had ejected him. the defendant denied the right of the plaintiff to eject him or claim damages".

After trial the learned District Judge dismissed the plaintiff's action on the basis that the plaintiff had not obtained vacant possession from his lessors, that the defendant is not a trespasser but a monthly tenant and cannot be ousted by his own lessor without due notice to quit. it was held in that case:

"A person in possession of immovable property under a non-notarial "lease" may be sued in ejectment by a subsequent lessee of the property on a duly executed notarial lease. In such a case, the defendant is not entitled to claim that he is a monthly tenant of his lessor and that he must be given due notice to quit before action can be instituted against him".

L.W. de Silva, AJ who delivered the judgment in that case declined to follow the decisions in *Bandara v Appuhamy*⁽⁴⁾ and *Ukkuwa v Fernando*⁽⁵⁾ but opted to follow the decision *Ukku Amma et al v Jema et al*⁽⁶⁾ wherein the Court took the view that a person holding a notarial lease is entitled during his term to the legal remedies of an owner possessor. In that case the head note reads:

"A lessee under a notarial lease who has not been put in possession of the property leased can bring an action against third parties in possession of the property and compel them to surrender possession to him without making the lessors parties to the action. The distinction between short and long leases is not part of the law of Ceylon".

Per Wijewardena, CJ at 256:

"I see no reason for drawing a distinction in Ceylon between short leases and long leases spoken of by text book writers, when we are considering the question whether a lessee has rights against third parties. All that we have to consider is whether the lease is duly executed according to law. If a lease

for any period exceeding a month is notarially attested it should be regarded as giving "a species of ownership in land" (Lee: Introduction to Roman Dutch Law, fourth edition, page 161), and vesting in the lessee proprietary rights which could be enforced between third parties. If the lessee is duly registered, it is entitled to prevail even against those claiming title from the lessor under deeds executed prior to the lease but registered subsequently. Therefore, I would respectfully adopt the views expressed by the Judges in *Carron v Fernando et al*⁽⁷⁾. Though the applicant's counsel attempted to distinguish it on the ground that the lease considered in that case was for a period of over ten years, it is clear from the judgments that the distinction between short and long leases was not recognized as part of the law of Ceylon".

Pulle, J agreed with Wijewardena, CJ and both adopted the views expressed by Court in *Carron v Fernando (supra)* wherein it was decided that:

"A notarially executed lease of land creates a real right in the land and a duly registered mortgage of the leasehold interest is an effective and an affordable charge into whosoever's possession that interest may pass".

In that case Garvin, ACJ at 359 and Maartensz, AJ at 365 took the view that:

"A lessee under a valid lease from the owner is dominus or owner for the term of the lease. he is the owner for the term of the lease. He is the owner during that time against all the world".

In fact they followed the view taken by Hutchinson, CJ in *Abdul Azeez v Abdul Rahiman*⁽⁸⁾ wherein Hutchinson, CJ made the above observation.

In the instant action there is no dispute as to the lease granted to the plaintiff-respondent and no issues settled in this point. In fact the 1st defendant-appellant or the other defendants have not challenged the validity of this grant marked P1 made in favour of the plaintiff-respondent whereby the plaintiff-respondent is given 99 year lease. In the circumstances in view of the settled law on this

point as aforesaid the 1st defendant-appellant cannot succeed in this appeal.

For the foregoing reasons, I see no basis to interfere with the judgment of the learned District Judge. Accordingly the appeal stands dismissed with costs fixed at Rs. 5000/-.

EKANAYAKE, J. - I agree.

Appeal dismissed.