BABY NONA
VS
SAMON

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
C. A. NO. 997/98(F)
D. C. HAMBANTOTA 1273/L
DECEMBER 12, 2003.

Leasehold rights — Heir succeeding to the leasehold rights of deceased - Evidence Ordinance Section 3 — Failure of defendant to adduce evidence to contradict - New factor — Duty of a party to give evidence - Can the Lessee - dispute Lessors rights ? - Is there a duty to restore property to Lessor first and then to litigate ? - Licensee - Trespasser - Termination of Leave and License ? Can a cause of action be based by a Lessor or Licensor against an over holding lessee or licensee- Privities of contract - Rule of Estoppel.

The plaintiff appellant sought a declaration that there exists a contract of tenancy between her and the UDA in respect of certain premises and that the sub tenancy claimed by the defendant is at an end.

The defendant denied the averments in the plaint. It was the position of the plaintiff that the plaintiff being the mother of one "N" to whom the UDA had leased out the boutique, became entitled to the leasehold rights of "N", after his death, and that the defendant who had been and employee of "N" had refused to vacate the premises first claiming a sub tenancy from "N" and subsequently stating that the premises have been sold to him by R, the trial court dismissed the action.

HELD

(i) The defendant respondent did neither give evidence nor call witnesses on his behalf.

It is the bounden duty of a party who personally knows the whole of the circumstances to go into the witness box to dispel the suspicions attaching to case, failure would be the strongest possible circumstances going to discredit the truth of his case.

(ii) Under the rule of estoppel a cause of action can be based by a lessor or licensor against an over holding tenant.

(iii) Lessee cannot dispute lessors title. He ought to give back the possession first and then litigate about the proprietorship.

(iv) By his conduct in refusing to accept the rights of the lessor and handover possession to the plaintiff appellant he had repudiated the license — No necessity to give notice of termination of license.

Per Dissanayake, J.

"the defendant respondent who was a licensee of "N" had become the licensee of the plaintiff by operation of law — there is a privity of contract between the plaintiff and the defendant."

APPEAL from the judgment of the District Court of Hambantota.

Cases referred to :

(1) *Edrick Silva vs. Chandradasa Silva 70 NLR 169*
(2) *Pathirana vs. Jayasundera 58 NLR 169*
(3) *Alvar Pillai vs. Karuppan 4 NLR 324*
(4) *Mary Beatrice and Others vs. Seneviratne 1997 1 Sri LR 197*
(5) *Ruberu and another vs. Wijesuriya 1998 1 Sri LR 58*
(6) *Gunasekera vs. Jinadasa 1996 2 Sri LR 115 S. C. (DB)*

Rohan Sahabandu with *Athula Perera* for the 1st plaintiff appellant
Wijedasa Rajapakse, P. C. with *R. Dissanayake* for defendant respondent.

Cur. adv.vult.

December 12, 2003
DISSANAYAKE, J.

The plaintiff-appellant instituted this action, seeking a declaration

(i) that there exists a contract of tenancy between the plaintiff-appellant and U. D. A., in respect of premises No. 91 morefully described in schedule to the plaint.

(ii) that the sub-tenancy claimed by the defendant-respondent is at an end and further seeking.

(iii) the eviction of the defendant-respondent and damages.

The defendant-respondent by his answer whist denying the averments in the plaint prayed for dismissal of the action.

The case proceeded to trial on 12 issues and at the conclusion of the trial, the learned District Judge by his judgement dismissed the plaintiff - appellant's action.

It is from the aforesaid judgment that this appeal is preferred.

Learned counsel who appeared for the plaintiff-appellant contended that the learned District Judge had erred in dismissing the action, on the ground that the learned District Judge had failed to embark on a proper evaluation and an analysis of the evidence.

The claim of the plaintiff-appellant was based as mother and heir of W. A. Nandasena to whom the Urban Development Authority had leased out boutique bearing No. 91 at Sella Kataragama in 1981. She claimed that on the death of Nandasena she had become entitled to the leasehold rights of the premises in suit.

It was her position that the defendant-respondent who had been an employee of her late son Nandasena had refused to vacate the premises in suit, at first claiming a sub tenancy from Nandasena. Subsequently the defendant-respondent had changed his stance and had claimed that the premises in suit has been sold to him by Nandasena and had offered Rs. 5,000 to the plaintiff-appellant stating that it was the balance purchase price.

This claim of the defendant-respondent was rejected by the plaintiff-appellant. The plaintiff-appellant sought the assistance of the local police and had made a complaint dated 03.12.1991(P7) to gain possession of the premises in suit.

In the course of the investigations conducted by the police, the defendant-respondent had made a statement to the police which too is dated 03.12.1991 (P8), wherein he had stated that he had first obtained a lease of the premises from Nandasena on payment Rs. 1,000 per month as rental.

He had further stated in his statement to the police that subsequent to the death of Nandasena he had purchased the premises in suit from his father for a sum of Rs. 50,000 out of which there was a balance sum of Rs. 5,000 to be settled. The defendant-respondent had claimed that he was in possession of necessary documents to prove his claim.

The defendant-respondent's answer filed in this case was devoid of any of the aforesaid facts. He merely had stated that he was in possession of the premises in suit and that the plaintiff-appellant had no right to institute the present action. The defendant-respondent did neither give evidence in court nor call witnesses on his behalf, to at least explain the basis on which he happened to be in possession of the premises in suit. The defendant-respondent had not refuted the matters stated by the plaintiff-appellant in her police statement (P7). His answer did not contain any of the matters that were in his statement to the police (P8).

It is pertinent to refer to the observations of H. N. G. Fernando, J (as His Lordship then was) at 174 of the case of *Edrick Silva Vs Chandradasa Silva*[1] He observed :

> "But where the plaintiff has in a civil case led evidence sufficient in law to prove a factum probandum, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the plaintiff. There is then an additional 'matter before the court.", which the definition in Section 3 of the Evidence Ordinance requires the court to take into account, namely, that the evidence; led by the plaintiff is uncontradicted".

It is also relevant to refer to the commentary made by Professor Monir in his book 'Principles and Digest of the Law of Evidence.' 4th edition at page 692 under the heading "Presumption where a party does not go into the witness box." He states; " A party runs a great risk if he does not enter into the witness box and himself give evidence in his case upon facts which are directly in his knowledge and which relate to the matters in controversy. It is the bounden duty of a party who personally knows the whole of the circumstances of the case to go into the witness box, to dispel the suspicions attaching to his case, and if he, being present in court, fails to do so, his non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case, where a party whose evidence is material does not go into the witness box and give evidence, the presumption is that he has abstained from giving evidence by reason of the fact that truth is on the opposite side and the court is entitled to infer everything against him."

Although it is seen that the aforesaid observations of Professor Monir have been made with regard to presumptions that arise in a criminal action. However in my view the same principles are valid in respect of evidence in a civil action too where the standard of proof is less stringent as they are decided on balance of probabilities and not beyond reasonable doubt like in a criminal action.

It is to be observed that the evidence of the plaintiff-appellant to the effect that the defendant-appellant entered into possession of the premises in suit, at the beginning as an employee of her late son Nandasena is uncontroverted by the defendant-respondent.

It is interesting to note that the defendant-respondent after having entered into the premises in suit as a licensee of Nandasena is now seeking to challenge the right of Nandasena's mother to claim the boutique in dispute, claiming that he had purchased same from Nandasena's father after Nandasena's death. These matters were revealed in his statement to the Kataragama police made by him on 03.12.1991 (P8).

It transpired in the evidence that Nandasena had died unmarried and issueless and three of his brothers too had died. The plaintiff-appellant who is his mother is undoubtedly an heir of Nandasena on whom the

majority of shares would devolve. And as such heir she is entitled to all leasehold rights of Nandasena, in respect of the property in suit. Being an heir of Nandasena she contended that she steps into the shoes of Nandasena.

It is of significance to observe that the defendant-respondent who was the licensee of Nandasena had become the licencee of the plaintiff-appellant by operation of law. Therefore it appears that there is privity of contract between the plaintiff-appellant and the defendant-respondent.

Under the rule of estoppel recognized by our common law, a cause of action can be based by a lessor or licensor against an overholding lessee or licensee.

It is relevant to refer to the observations of Gratien J at 173, in the case of *Pathirana* vs *Jayasundara*[2] in this regard. At 173 Gratien J observed :-

> "The scope of an action by a lessor against an overholding lessee for restoration and ejectment however is different. Privity of Contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and issues as to title are irrelevant to the proceedings. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title, until he has first restored the property in fulfillment of his contractual; obligation. The lessee (conductor) cannot plead the *exceptio domini*; although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship. . . . ." Vote 19.2.32.

Both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessees contractual obligation.

The legal position as stated vide, Voet, Commentary on the Pandects translated by Percival Gane, Volume 3 Book 19.2.32, "Lessee cannot dispute lessors title though a third party can-Nor can the setting up of an exception of ownership by the lessee stay the restoration of the property leased even though perhaps the proof of ownership would be the case for

the lessee. He ought in every event give back the possession first and then litigate about the proprietorship."

In the case of *Alvar Pillai* Vs *Karuppan*[3] where, the defendant was given a land on a non-notarially attested document Bonser C. J., observed at 322,

"It is not necessary for the purpose of this case, to state the devolution of the title, for even though the ownership of one half of this land were in the defendant, himself, it would seem that by our law having been let into possession of the whole by the plaintiff. It is not open to him to refuse to give up possession and then it will be open to him to litigate about the ownership."

In the case of *Mary Beatrice and others Vs Seneviratne*[4], at 202, *Senanayake*, J has observed.

"It is opportune of this moment to quote Maasdorp, Institutes of Cape, Law, 4th Edition Volume 3, page 248, "A lessee as already stated is not entitled to dispute his landlord's title and consequently he cannot refuse to give up possession of the property at the termination of his lease on the ground that he is himself rightful owner of the same. His duty in such a case is first to restore the property to the lessor and then to litigate with him as to the ownership." *Also Vide Ruberu and another Vs Wijesuriya.*[5]

The action of the plaintiff-appellant is not one based on declaration of title. It is based on the contract of leave and license.

Witness Piyadasa, another son of the plaintiff-appellant asserted to the fact of sending a letter through an Attorney-at-Law by the plaintiff-appellant giving notice of termination of the license to the defendant-respondent.

The defendant-respondent had failed to contravert the matters that transpired in the evidence of the plaintiff-appellant and her witnesses since he had neither given evidence nor adduced evidence on his behalf. Therefore

it is to be observed that on a balance of probabilities those matters have been established by the plaintiff-appellant.

Then, there arises the question whether the plaintiff-appellant had lawfully terminated the leave and license given to the defendant-respondent.

It is of significance to observe that in any event by his conduct in refusing to accept the rights of the licensor and hand over possession to the plaintiff-appellant he had repudiated the license. It appears that by such conduct he had ceased to be a licensee and had become a trespasser. Thus there is no necessity in law to give notice termination of such license. *Gunasekara Vs Jinadasa* (6).

The defendant-respondent is estopped from denying the rights of the plaintiff-appellant. He must first quit the premises in suit and thereafter litigate to establish his rights by way of another action.

It is to be observed that the learned District Judge had failed to embark on a proper analysis and evaluation of evidence. Further it is to be observed that the learned District Judge has erred in concluding that no rights devolved on the plaintiff-appellant on the death of Nandasena.

I set aside the judgment of the learned District Judge and direct him to enter judgment in favour of the plaintiff-appellant as prayed for in the plaint.

The appeal of the plaintiff-appellant is allowed with costs fixed at Rs. 5,000.

SOMAWANSA, J.—I agree.

appeal Allowed.