1968 *Present :* **T. S. Fernando, J., and Weeramantry, J.**

S. PARARAJASEKERAM and 2 others, Appellants, *and*
C. VIJAYARATNAM, Respondent

S. C. 414/66 (F)—D. C. Jaffna, 2736/M

Lessor and lessee—Informal lease of land—Legal effect—Whether it can be treated as a tenancy from month to month—Prevention of Frauds Ordinance, s. 2—Unjust enrichment—Doctrine of promissory estoppel—Scope of its applicability.

Plaintiff-respondent claimed that from the year 1961 the defendants-appellants had orally leased a garden to him annually at a rental of Rs. 180. In January 1964 the defendants forcibly dispossessed the plaintiff who was on the land, removed certain water lifting machinery from the land, destroyed a water course and damaged the crop of onions and tomatoes raised by the plaintiff. The trial judge awarded the plaintiff damages assessed at Rs. 2,400.

It was contended for the defendants for the first time at the stage of appeal that no action for damages could lie on the basis of the pleadings for the reason that the lease relied on by the plaintiff lacked the formalities prescribed by section 2 of the Prevention of Frauds Ordinance.

Held, that an informal lease of a land is not one which may be treated as a tenancy from month to month. In view of section 2 of the Prevention of Frauds Ordinance such an agreement is null and void and of no force or avail in law. Accordingly, the dispossession of the plaintiff was not actionable either in contract or in delict. Nor was there here a sustainable claim based on unjust enrichment.

Per WEERAMANTRY, J.—The doctrine of promissory estoppel is not applicable in the present case for the following reasons :—(1) Estoppel of any variety may afford a defence against the enforcement of other enforceable rights but it cannot create a cause of action. In other words it may only be used as a shield and not as a sword. (2) The doctrine of estoppel cannot be invoked in the face of a statute, for against a statute no estoppel can prevail.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, Q.C., with *P. Sivaloganathan* and *Mrs. K. Thirunavakarasu*, for the defendants-appellants.

V. Arulambalam, for the plaintiff-respondent.

Cur. adv. vult.

March 30, 1968. T. S. FERNANDO, J.—

I agree with the order proposed by my brother that this appeal be allowed. He has set out very fully in his judgment his reasons why the plaintiff's action must fail. There was evidence at the trial that the agreement in breach of which the plaintiff alleged he had been dispossessed was only an oral lease and, therefore, in view of section 2

of the Prevention of Frauds Ordinance, was of no force or avail in law. The plaintiff, therefore, had no legal right to possession of the land in question and, for the same reason, the dispossession found by the trial judge was not tortious. Nor was there here a sustainable claim based on unjust enrichment.

I would accordingly allow the appeal and direct the dismissal of the plaintiff's action. In view of the facts found by the trial judge and of the circumstances that this appeal is being allowed on a ground not raised in the trial court or in the petition of appeal, I would exercise the discretion this Court has in the matter of costs and deprive the successful defendants of their costs both here and below.

WEERAMANTRY, J.—

The plaintiff-respondent claimed in this case that from the year 1961 the defendants-appellants had leased a garden to him annually at a rental of Rs. 180. The rent for each year of lease was payable according to the plaintiff in July of the year following that in which the lease commenced, and payments had been so made up to July 1963. When on 10th January 1964, the plaintiff was in possession in terms of the lease then current the first defendant, acting for himself and as agent for the second and third defendants, is alleged to have dispossessed the plaintiff, removed certain water lifting machinery from the land, destroyed a water course and damaged the crop of onions and tomatoes raised by the plaintiff. The plaintiff estimated the damage and prospective loss so caused to him at Rs. 3,500 and on this basis averred that a cause of action had accrued to him to sue the defendants jointly and severally for the recovery of this sum.

The defendants denied all the averments in the plaint save and except those specifically admitted in their pleadings. They further averred that no valid cause of action had accrued to the plaintiff to sue them and that the plaintiff did not and could not have suffered any damages whatsoever.

By way of further elucidation of their case the defendants further pleaded that the first defendant had allowed the plaintiff to cultivate the land for a period of one year only, on his paying to the first defendant in advance a sum of Rs. 180 as rent for the year beginning 1st October 1961. On the entreaties of the plaintiff the first defendant permitted him to cultivate the land for a further period of one year, a similar sum being payable by way of advance rent for the year beginning 1st October 1962. The plaintiff did not however pay this rent although he had agreed to pay it and, when pressed for the rent in January 1963, promised to pay the rent in or about July 1963 and to quit the land by the end of September 1963. He accordingly paid the rent in July 1963 and left the land in September 1963 in terms of his undertaking.

It was the defendants' position that after quitting the land the plaintiff attempted to re-enter the land and to plough it on or about 12th November 1963. The first defendant objected to these acts on the part of the plaintiff and made complaint accordingly to the Grama Sevaka but thereafter in January 1964 the plaintiff wrongfully and forcibly entered the said land. The first defendant protested against this illegal entry and made complaint to the appropriate authorities.

Arising from certain subsequent acts on the part of the plaintiff the first defendant claimed in reconvention a sum of Rs. 5,000 as damages and consequential damages.

The learned District Judges held against the defendants on the question whether the plaintiff had promised to quit the land at the end of September 1963 and had in fact done so. He further held that the plaintiff was corroborated both by oral and documentary evidence on his refusal to vacate the land and on the forcible attempt by the defendants to eject him therefrom. He consequently held that the first defendant acting for himself and on behalf of the second and third defendants had forcibly dispossessed the plaintiff in January 1964 from the land, prevented him from using the water lifting machinery and destroyed the water channel, thus causing damage to the crops of onions and tomatoes raised by the plaintiff. In this view of the facts the learned District Judge awarded the plaintiff damages which he has assessed at Rs. 2,400. The first defendant's claim in reconvention was dismissed with costs.

The learned Judge's findings on questions of fact are strong and stand unassailed. This judgment therefore proceeds on the basis of the facts as found by the learned District Judge.

It would perhaps not be inappropriate for us at this point to express our disapproval of the conduct of the defendants in forcibly dispossessing the plaintiff who was on the land on the basis of an informal lease, but unfortunately the compelling legal issue raised by learned Counsel for the defendants and referred to in the next succeeding paragraph, precludes us from giving relief to the plaintiff on this basis.

Learned Counsel for the defendants takes up the point in appeal that no action for damages as claimed will lie on the basis of the pleadings for the reason that the lease relied on by the plaintiff lacks the formalities prescribed by section 2 of the Prevention of Frauds Ordinance and is by the clear terms of that section rendered null and void. He therefore submits that despite the findings of fact against the defendants, the award of damages cannot stand, dependent as it is on a contract which has no validity in law.

The point raised does not appear to have been taken in the trial court nor do the respective parties appear to have given their minds specifically to this aspect of the case. This is perhaps attributable to the view

formerly taken that an informal lease could operate as a tenancy from month to month thereby removing it from the operation of section 2 of the Prevention of Frauds Ordinance. This view of the law has however been stated on more than one occasion by this Court to be erroneous, [1] a view of the law which now stands confirmed by a decision of a Divisional Bench.[2] We must proceed therefore on the basis that the informal lease in question is not one which may be treated as a tenancy from month to month and is therefore subject to the formalities prescribed by the Prevention of Frauds Ordinance.

Though, as already observed, the legal issue now relied on was not specifically taken, there was a general denial in the answer of the averments in the plaint and there was no admission by the defendants of notarial attestation. Furthermore the first issue raised at the trial was on the question whether the plaintiff was a tenant under the defendant in respect of the land described in the plaint for the period July 1963 to July 1964, and the burden this issue placed upon the plaintiff could not be discharged otherwise than by proof of notarial attestation. Proof of a mere informal agreement null and void in law could in no correct view of the matter lead to an answer to this issue in the plaintiff's favour.

Learned Counsel for the plaintiff submits to us that the defendants cannot be permitted to take this point of law here in appeal in view of their failure to canvass it before the learned trial Judge. He submits that prejudice is thereby caused to his clients as the trial proceeded on the assumption that there was a valid lease and he argues that his clients have not had an opportunity of placing before the Court such evidence as they might have placed had the validity of the lease been questioned before the learned Judge.

This argument is no doubt attractive, but a perusal of the evidence led at the trial places it beyond doubt that the lease relied on is an informal one. The evidence of the witness Subramaniam, a cultivator under the first defendant, was that the agreement in 1961 was not reduced to writing and the plaintiff himself has so stated in a rural court case the evidence in which was marked as a production both by plaintiff (P 1) and defendants (D 4). The first defendant has given similar evidence in the rural court. We are thus left in little doubt as to the true factual position.

Seeing then that no prejudice has resulted to the plaintiff from the failure of the defendants to take this point in the trial court, we hold that the appellant is entitled to take this point in appeal, and proceed now to an analysis of the plaint with a view to ascertaining the juristic basis of the cause or causes or action revealed therein. This examination is necessitated by the contention of learned counsel for the plaintiff that his claim against the defendants is one not necessarily sounding in contract. Apart from contract he suggests as possible alternative bases for his claim,

[1] *Hinniappuhamy v. Kumarasinghe (1957) 59 N. L. R. 566 ; Samarakoon v. Van Starrex (1965) 71 C. L. W. 25.*

[2] In *Perera v. Perera (1967) 70 N. L. R. 79 at 82.*

causes of action sounding in delict and in quasi-contract, and he suggests further that estoppel, or, to be more accurate, the doctrine of promissory estoppel, may also be called in aid as a ground for relief.

The contractual aspect of the claim need not detain us much longer. It is trite law that section 2 of our Statute of Frauds is more stringent in its provisions than its English counterpart and renders null and void those contracts which infringe its provisions. While the English Statute considers the question merely from the point of view of enforceability the Ceylon Statute concerns itself with essential validity and is hence " much more drastic ".[1]

If therefore the plaintiff's claim be one in contract it cannot succeed. The plaint avers dispossession from a land leased to the plaintiff and damages sustained in consequence. There seems little doubt that one of the bases if not the basis of the claim is the violation of contractual rights flowing from the lease. Apart from the lease referred to no other right is averred on the basis of which the plaintiff entered on or possessed the land.

A claim for damages on this basis, being built upon a contract which is null and void, is one which clearly cannot be sustained.

The first alternative basis on which learned Counsel for the plaintiff sought to rest his case was that of delictual liability. He argued that his right to be on the land had been violated by the defendants and that wrongful loss had been caused to him in consequence.

It is clear however that delictual liability in a claim of this nature must flow from the breach of a duty recognised by law. Of what particular duty lying upon them, the defendants are in breach, the plaint leaves us unaware, unless it be contended that it was a duty created by the informal contract. However, neither such a duty nor an associated right in the plaintiff can take its origin from a contract which statute expressly renders null and void. Moreover although infringement of contractual rights by a third person may constitute a delict, the breach of a contract by one of the parties to it cannot constitute a delict[2]. The attempt to rest the claim on a delictual footing must therefore fail.

Two further bases on which it is alleged that the claim can be sustained now call for examination and these are quasi-contract and promissory estoppel.

There would appear to be little doubt that a person who improves a land on the faith of a document from the owner, which document turns out to be void in law, is entitled to be compensated for his improvements and that the doctrine of unjust enrichment lies at the basis of this right.

[1] *Adaicappa Chetty v. Caruppan Chetty (1921) 22 N. L. R. 417 at 426 ; Arsecularatne v. Perera (1927) 29 N. L. R. 342, P. C.*

[2] *Wille, Principles of South African Law 5th ed. p. 501 ; Wessels, 2nd ed. s. 841.*

As Garvin J. observed in *Nugapitiya v. Joseph*[1] in relation to a person who had effected improvements on the strength of a lease void for informality, a claim made in such circumstances is one against the person with whose knowledge and consent these improvements were made and this gives the improver the rights of a *bona fide* possessor though in point of fact he has not the *possessio civilis*[2]. However the only items in the plaintiff's claim which arise out of improvements by him to the land would appear to be the crop of onions and tomatoes and the preparation of the land for these crops and the tobacco crop. The damages claimed for the destruction of the water course and removal of the water lifting machinery, for dispossession and for loss of prospective profits, do not fall within the scope of the principles of retention or compensation. In the result then it is only a small and indefinable portion of the defendant's claim that falls within the scope of these principles. Moreover it is not the plaintiff's position that the defendants have been enriched by their acts complained of, for the plaintiff's own allegation is that the crops have been damaged and the water course destroyed. These facts tend to negative rather than suggest unjust enrichment. It must also be observed that the state of mind of a *bona fide* possessor, to prove which such agreements are called in aid, was not the state of mind of the plaintiff, for the learned judge himself has found that the plaintiff had been refusing to vacate the land as is evidenced by documents D1, D3 and D4.

It has been suggested that it is open to us at this stage to raise an issue on the existence of a quasi-contractual obligation requiring the defendants to make good to the plaintiffs what they had received in consequence of their action, as was done by Tambiah J. in *Peiris v. Municipal Council, Galle*[3]. It is true that in that case an issue was formulated in appeal on unjust enrichment and the case remitted to the original court for trial upon this issue, but, as particularly observed by Tambiah J., all the averments necessary to raise the issue of unjust enrichment were contained in the pleadings already before court. That is not true of the present case. Nor is this a case of the type of *Jayawickrama v. Amarasuriya*[4] where again the circumstances of a deliberate promise were so clear as to enable Their Lordships of the Privy Council to raise an issue on the question whether there was a contract at the stage of the hearing before them.

I do not think it necessary for the purpose of the present appeal to go into the scope of those various judgments both of the Privy Council and of this court which take the view that it is within the competence of the court to frame issues even outside the scope of the pleadings. Although in an appropriate case the court may be prepared

[1] *(1926) 28 N. L. R. 140 at 142.*

[2] *see also William Silva v. Attadassi Thero (1962) 65 N. L. R. 181 ; Hassanally v. Cassim (1960) 61 N. L. R. 529.*

[3] *(1963) 65 N. L. R. 555.*

[4] *(1918) 20 N. L. R. 289 P. C.*

to go so far as to take the view that "an omission in the plaint or answer may be supplied by raising a relevant issue at the trial and indeed at any time before judgment "[1] and may even on terms allow issues which do not " square with the pleadings as they stand " [2] an examination of those cases would show that adequate and suitable grounds existed in each one of them for such an exercise of the court's undoubted power.

Even apart from considerations of the inadequacy, or rather the total lack, of pleading, the facts of the present case, as already observed, render quite inappropriate any interference by this court on the lines of *Peiris v. Municipal Council, Galle*, and we are not disposed to resort to this course to give effect to what is at best a rather nebulous claim.

Learned Counsel for the plaintiff respondent finally argued that whatever be the formalities requisite to give validity to the lease, the defendants were estopped from denying that the plaintiff had a right to possess and cultivate the land. He submitted that upon the basis of this estoppel he was entitled to claim damages from the defendants for their wrongful acts. The question of estoppel raised by learned counsel is in effect a plea based on the doctrine of promissory estoppel which in its recent development by the courts has travelled beyond the limits of the former common law estoppel [3]. His contention is in substance a plea that when the defendants by their conduct indicated to the plaintiff that they would permit him to remain on and cultivate the land they were making a representation in regard to the future which was of a promissory nature and operated by way of estoppel. The essence of the doctrine of promissory estoppel is the principle that when one party has by his words or conduct made to the other a promise or assurance which is intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but must accept their legal relation subject to the qualifications which he himself has so introduced [4]. Whereas common law estoppel was confined to representations of existing fact, promissory estoppel is not so circumscribed in its scope and may be founded upon a representation in regard to future conduct, [5] and the estoppel Mr. Arulambalam suggests is based upon the representation that the plaintiff would be permitted to occupy and improve the land for the period of the lease.

[1] *Niles v. Velappa (1921) 23 N.L.R. 241.*

[2] *Punchi Mahatmaya Menike v. Ratnayake (1940) 18 C.L.W. 18 ; See also Ratwatte v. Owen (1896) 2 N. L. R. 141 ; Bank of Ceylon, Jaffna v. Chelliah Pillai (1962) 64 N. L. R. 25 at 27 (P. C.)*

[3] *See in particular Lyle-Mellor v. Lewis & Co. (Westminster) 1956 All E. R. 247 per Lord Denning at page 250.*

[4] *Combe v. Combe 1951 All E. R. 767 at 770 per Denning L.J. ; Halsbury 3rd ed. vol. 15, p. 175.*

[5] *Halsbury 3rd ed. vol. 15 p. 175.*

There are however two principles which militate against our acceding to Mr. Arulambalam's contention. In the first place estoppel of any variety may afford a defence against the enforcement of otherwise enforceable rights but it cannot create a cause of action. In other words it may only be used as a shield and not as a sword [1]. The doctrine cannot therefore create any new cause of action where none existed before [2]. In the second place the doctrine of estoppel cannot be invoked in the face of a statute, for against a statute no estoppel can prevail [3]. With special reference to statutory invalidity Viscount Radcliffe has observed in a recent decision [4] that " there is in most cases no estoppel against a defendant who wishes to set up the statutory invalidity of some contract or transaction upon which he is sued, despite the fact that by conduct or other means he would otherwise be bound by estoppel." Where therefore the legislature has enacted that a particular transaction shall be invalid, estoppel cannot be called in aid to clothe it with a validity of which the statute denudes it [5]. Where the denial of legal validity proceeds, as in the case of the Prevention of Frauds Ordinance, from general social policy, it has been considered that it is not open to the Court " to give its sanction to departures from any law that reflects such policy, even though the party concerned has himself behaved in such a way as would otherwise tie his hands" [6]. The doctrine of estoppel affords no basis therefore on which the plaintiff respondent can build a legal claim.

Whether therefore one looks at this plaint in the light of the principles of contract or of delict, of quasi-contract or of promissory estoppel, it becomes clear that the plaintiff's claim cannot be sustained in law and that there is no legal basis on which he can be awarded damages.

As observed earlier we come to this conclusion with reluctance having regard to the conduct of the defendants as found by the learned Judge. In the result therefore we allow the appeal but award no costs to the appellant, either here or in the court below.

Appeal allowed.

[1] *see Combe v. Combe 1951 1 All E.R. 767 at 772 ; Spencer Bower : Estoppel by Representation 2nd ed. pp. 342-7*

[2] *Halsbury 3rd ed. vol. 15 p. 175.*

[3] *Phipson on Evidence 10th ed. s. 2032.*

[4] *Kok Hoong v. Leong Cheong Kweng Mines Ltd. (1963) 71 C.L.W. 41 at 47, P. C. See also In re a Bankruptcy Notice (1924) 2 Ch. 76 at 96 per Atkin ,L.J.*

[5] *see Halsbury 3rd ed. vol. 15, p. 176 ; Beesly v. Hallwood Estates Ltd. (1960) 2 All E.R. 314 at 324.*

[6] *per Viscount Radcliffe in Kok Hoong v. Leong Cheong Kweng Mines Ltd., supra at 48. See also in re Stapleford Colliery Co. (1880) 14 Ch. D. 432 at 441, per Bacon V-C.*