[IN THE PRIVY COUNCIL]

1950 *Present :* **Lord Simonds, Lord MacDermott, Lord Reid and Sir John Beaumont**

H. E. WIJESURIYA, Appellant, *and* ATTORNEY-GENERAL, Respondent

Privy Council Appeal No. 75 of 1947

S. C. 205—D. C. Colombo, 15,380

Principal and agent—Agent acting in excess of authority—Plea of ostensible authority—Clear proof necessary—Oral agreement with Crown regarding permit to tap and take produce of rubber trees on Crown land—Is it in respect of a "lease" or a "licence"?—Applicability of regulation 2 of Land Sales Regulations to such agreement—Is such agreement valid though oral?—Prevention of Frauds Ordinance, sections 2 and 17.

The Land Commissioner wrote a letter to the Government Agent, Uva, giving him authority to issue a permit to the plaintiff to take the produce of the rubber trees on certain Crown land. The letter authorized the permit to be issued only after the Crown took possession of the land from one S. It was alleged by the plaintiff that on the 4th March, 1943, an oral agreement was entered into between the Assistant Government Agent and the plaintiff whereby it was agreed that the plaintiff should have the right to tap and take the produce of the rubber trees on the Crown land for a period of four years and two and a half months from the 15th March, 1943. The alleged agreement contravened the instructions of the Land Commissioner to take possession of the land on behalf of the Crown and *thereafter* issue a permit to the plaintiff.

In an action brought to recover damages from the Crown for failure to fulfil the alleged agreement—

Held, (i) that, assuming the agreement to have been made as alleged, it was unauthorized by the Crown and that on this ground alone the action must fail. The instructions given by the Land Commissioner in his letter were clear and were inconsistent with either a permit being issued before the Crown resumed possession of the land or an unconditional agreement being made to grant a permit before that event. The Assistant Government Agent therefore acted in excess of (if not in defiance of) the instructions he had received.

(ii) that if the plaintiff wrongly assumed that the instructions given by the Land Commissioner to his subordinates went further than they did, he acted at his peril.

(iii) that if the plaintiff relied on ostensible authority, evidence of it should have been presented with the particularity which such a plea, always a difficult one to establish, required.

(iv) that the alleged agreement was in respect of a permit which was not a lease but a licence and was therefore not governed by regulation 2 of the Land Sales Regulations.

(v) that the alleged agreement, being oral and not in writing notarially attested, was not "of force or avail in law" by virtue of section 2 of the Prevention of Frauds Ordinance. Nor was it saved by section 17 of the Prevention of Frauds Ordinance. Section 17 deals with instruments, i.e., with transactions which have already been reduced to writing, and exempts certain classes of instruments from the necessity of notarial attestation. There is

1——J. N. A 97629-1,042 (5/50)

nothing therefore in section 17 which saves oral agreements for the sale of immovable property by Government from the necessity of being reduced to writing.

Obiter : The omission of a trial Judge to measure expressly the reliability of the plaintiff's and defendant's witnesses is not *per se* a ground entitling the Appellate Court to reverse the judgment of the trial Judge on a question of fact.

APPEAL from a decree of the Supreme Court. The judgment of the Supreme Court is reported in (*1946*) *47 N. L. R. 385.*

Gerald Upjohn, K.C., with *A. A. Mocatta*, for plaintiff appellant.

Sir David Maxwell Fyfe, K.C., with *Frank Gahan*, for defendant respondent.

Cur. adv. vult.

April 26, 1950. [*Delivered by* LORD SIMONDS]—

This appeal, which is brought from a decree of the Supreme Court of Ceylon allowing the appeal of the Attorney-General of Ceylon from a decree of the District Judge of Colombo, raises difficult questions of fact and of law.

The primary question of fact is whether the appellant, a landed proprietor in Ceylon, on the 4th March, 1943, made an oral agreement with the Assistant Government Aggent, Uva Province, one N. Chandrasoma, on behalf of the Crown, whereby it was agreed that in consideration of payments to the Crown at the rate of Rs. 6,000 per annum the appellant should have the right to tap and take the produce of the rubber trees on certain defined Crown lands in the Badulla District of Uva Province for a period of four years and two and a half months from the 15th March, 1943. The learned District Judge found as a fact that such an agreement was made, but in the Supreme Court a different view was taken, that Court holding that, since the learned Judge had not based his finding on the demeanour or reliability of the witnesses, it could properly come to a different conclusion upon a consideration of the oral evidence and the relevant documents.

In this conflict of opinion upon the facts their Lordships have given anxious consideration to all the circumstances of the case and have come to the conclusion that the Supreme Court was not justified in reversing the judgment of the learned Judge, who had in their view ample material for forming the opinion to which he came and, though he did not expressly measure the reliability of the appellant's and respondent's witnesses, cannot fail to have been influenced in his decision by the view that he took of them. Moreover, as their Lordships think, the relevant documents are on the whole more consistent with the appellant's story than with that of the respondent.

Before referring to the events of the 4th March, 1943, it is necessary to say something of the surrounding circumstances.

On the 23rd January, 1942, the Land Commissioner had caused to be published in the *Government Gazette* a notification that the Government Agent of the Province of Uva would on the 7th March, 1942, put up to auction " the lease of the right to tap and take the produce of the rubber trees " on certain Crown lands of an area of about 278 acres, of which some 170 acres were in rubber, for a period of five years. The conditions of the auction provided (*inter alia*) that the purchaser should pay one-fifth of the rent immediately after the sale and the balance in four equal instalments. The appellant, who was a rubber planter of experience and the holder of leases of various other Crown lands, was the second highest bidder at the auction, the highest bidder being one Sabapathipillai with a bid of Rs. 44,000, who accordingly became the purchaser. He, however, for some time made default in the proper payments and it was not until the 10th August, 1942, that a permit was issued to him in terms which by reason of their importance upon another issue it is convenient here to set out in full. In the meantime negotiations had been entered into with the appellant and it appears that the Assistant Government Agent, Chandrasoma, had recommended to the Land Commissioner that the appellant should be offered the rights purchased by Sabapathipillai for Rs. 30,000 in the event of the latter's default, the large reduction in purchase price being no doubt due to the fact that on the 5th April, 1942, the first Japanese air raid on Ceylon had taken place.

The permit was, however, eventually issued to Sabapathipillai and was as follows :—

" Karuppannenpillai Sabapathipillai of Lemastota Estate, Koslanda (hereinafter referred to as 'the permit-holder') is hereby permitted to take the produce of the plantations on the parcel of Crown land called 'Atmagahinna *alias* Madugahainna, Wewelketiyahena, Keenaketiya Estate and Atmagahinna, Madugahahinna, Wewelketiyahena ' (hereinafter referred to as ' the land ') situated in the villages of Kiriwanaga and Tittawelgolla in the Chief Headman's Division of Wellawaya of the Badulla District depicted as lots Nos. 127 and 136 in Final Village Plan No. 318 Tittawelgolla, prepared by the Surveyor-General and kept in his charge, and computed to contain in extent two hundred and seventy-eight acres, two roods and eleven perches, subject to the following conditions :—

1. This permit shall expire on the 31st day of May, 1947.

2. The annual rental shall be eight thousand eight hundred rupees. The permit-holder shall pay the annual rental on the 1st day of June, in every year to the Government Agent of the Uva Province (hereinafter called ' the Government Agent ') at the Badulla Kachcheri.

3. This permit is personal to the permit-holder. The permit-holder shall not in any manner whatsoever deal with or otherwise dispose of his interest and rights under this permit.

4. The permit-holder shall not erect any permanent buildings or make any plantation on the land.

5. The permit-holder shall not fell or in any way damage or allow to be felled or in any way damage any rubber trees or any other valuable timber trees growing on the land except with the permission of the Government Agent previously obtained in writing.

6. The permit-holder shall not dig or in any other way whatsoever disturb the soil of the land, nor shall he clean weed the land.

7. Any breach of any of the conditions contained in this permit shall render the permit liable to immediate cancellation without compensation, on the orders of the Government Agent.

8. On the expiry or cancellation of the permit the permit-holder shall deliver quiet possession of the land to any person acting under the orders of the Government Agent, and such person may on such expiry or cancellation, enter upon the land and take possession thereof on behalf of the Government Agent.

9. The permit-holder shall not have or make any claim for compensation for improvements effected or expenses incurred, or for damages, or for any other cause or reason whatsoever.

10. The permit-holder shall not have any claim to preferential sale or lease of the land by reason of his having been granted this permit.

Issued on the 10th day of August, 1942:

(Sgd.) M. CHANDRASOMA,
Assistant Government Agent.

Accepted on the above conditions by the above mentioned permit-holder.

(Sgd.) K. SABAPATHIPILLAI."

It appears that Sabapathipillai continued to meet with difficulties in working his permit. On the 7th January, 1943, he requested the Land Commissioner for sanction to transfer it to another, and the appellant, seeing in this the opportunity to secure the permit for himself, asked Mr. Wijeratne, his advocate in Colombo, to interview the Land Commissioner on his behalf. This he did and the result of it was that in the words of Mr. Wijeratne the Land Commissioner ordered that the appellant should be granted the lease of the rights in question on the basis of Rs. 30,000 for five years. What in fact the Land Commissioner did—and it is a matter of vital importance in the case—was to write a letter of the 28th January, 1943, to the Government Agent, Uva, whose name was Coomaraswamy, in the following terms:—

"The conditions of the permit dated 10.8.42 [i.e., to Sabapathipillai] have been flagrantly violated. You should cancel the permit herewith and take possession of the land on behalf of the Crown. You may thereafter issue a permit to Mr. H. E. Wijesuriya to take the produce of the plantations on the land for the balance period of 5 years at the rental approved by my letter No. A/4161 of 25.4.42."

The approved rental referred to the basis of Rs. 30,000 for five years.

Their Lordships observe upon this letter that its terms are unambiguous and that it contains no authority to issue a permit before taking possession of the land on behalf of the Crown.

It was thought desirable in view of the fact that Sabapathipillai had entered into some private agreement with one Karunatileke, and the latter had entered on the land in question, to take the advice of the Attorney-General before proceeding further. Upon receipt of his advice that the permit could be cancelled, on the 2nd March, 1943, Chandrasoma, the Assistant Government Agent, wrote to Sabapathipillai informing him that in terms of clause 7 of the permit the lease granted to him was cancelled for breach of conditions 3 and 5 and that he was required to deliver peaceful possession of the land to the Divisional Revenue Officer, Wellawaya, on the 15th March, 1943, at 9.30 a.m., and vacate the land immediately thereafter. It is common ground between the parties that it was not expected that either Sabapathipillai or Karunatileke would make any trouble about complying with this notice, nor is it in dispute that it was contemplated that a permit should at some time be issued to the appellant. The question in dispute is whether on the 4th March, 1943, an agreement was made between the appellant and Chandrasoma in the terms alleged by the former. Upon this point the divergence of evidence is remarkable.

The appellant's evidence was to the effect that on that day he first went and saw the chief land clerk, whose name was Attanayaka, at the Government Office at Badulla, that the latter said that he had been asked by Chandrasoma to ascertain whether the appellant was willing to deposit Rs. 6,000, being the annual rent, in order that he might be given the lease, that the appellant then went into the office of Chandrasoma, who confirmed what Attanayaka had said, and the appellant then agreed the terms; that Chandrasoma then said that the appellant would be given the lease and would be put into possession on the 15th March, that the appellant then returned to the Land Department and drew a cheque for Rs. 6,000, for which on the following day he received a receipt dated the 5th March, 1943, in these terms: "Received from Mr. E. Wijesuriya the sum of Rupees six thousand only and cents—being rent on Kemapitiya Rubber Estate pending issue of lease". The next that the appellant heard about the matter was the receipt by him of a letter dated the 6th March, 1943, from the Chena Surveyor stating that he had been instructed by the Government Agent, Uva, to put him in possession of the lands in question as soon as the present lessee vacated it on the 15th March. The Chena Surveyor had in fact been so instructed in a letter of the 4th March upon the terms of which the appellant relied.

A very different account of the events of the 4th March was given by Chandrasoma and Attanayaka. The former denied that he had had any interview with the appellant on that day; the latter agreed that he had had an interview but differed from the appellant in asserting that he told him that he would be put in possession of the land in the event of Sabapathipillai vacating it and that the Rs. 6,000 would be placed on deposit and would be refunded to him if he was not put in possession of the land.

It appears to their Lordships that upon this evidence supplemented not only by the letter to the Chena Surveyor already mentioned but also by a contemporary minute clearly made before the interview between Attanayaka and the appellant (not, as the Supreme Court appears to have thought, after that interview) the learned District Judge could properly come to the conclusion of fact which was the basis of his decision and that the Supreme Court had no adequate ground for setting it aside.

But, while their Lordships are so far in favour of the appellant, there are other considerations which are fatal to his appeal.

The respondent in his answer to the plaint which alleged the agreement already stated denied that agreement and raised certain other defences but did not specifically plead that, if the agreement was in fact made by the Assistant Government Agent, it was made without authority. When, however, the issues came to be settled, the 7th issue was framed as follows: "If the (Assistant) Government Agent entered into the agreement pleaded in paragraph 3 of the plaint, was he acting without authority?" It would have been open to the appellant to demand that upon this issue he should be at liberty to plead that there was ostensible, if not actual, authority to enter into the agreement, and it would then have been for him to prove the facts upon which he relied as a holding out of authority. This course was not taken with the result that this part of the case was not presented with the particularity which such a plea, always a difficult one to establish, requires. Upon the available material their Lordships have come to these conclusions. First, they are of opinion that the Assistant Government Agent had in fact no authority to make the alleged agreement. The instructions given by the Land Commissioner in his letter of the 28th January, 1943, were clear and were inconsistent with either a permit being issued before the Crown resumed possession of the land or an unconditional agreement being made to grant a permit before that event. The Assistant Government Agent therefore acted in excess of (if not in defiance of) the instructions he had received. Secondly, their Lordships see no sufficient evidence of ostensible authority. On the contrary it became clear from numerous passages in the evidence, and particularly from the steps initially taken by the appellant in January, 1943, that he looked to the Land Commissioner himself for an order that, when Sabapathipillai vacated the land, he should enter in his place. He may have assumed that the instructions given by the Land Commissioner to his subordinates went further than they did, but, if his assumption was a wrong one, he acted at his peril: see *Russo-Chinese Bank v. Li Yan Sam* [1910] A. C. 174 at 184. Nor, apart from the incidents of this particular transaction, was there any sufficient evidence of a general holding out of the Assistant Government Agent as a person with authority to enter into an oral agreement to grant a lease of, or a permit to take the produce of, Crown rubber lands at a future date. Learned counsel for the appellant relied on the provisions of the Land Development Ordinance of Ceylon and referred to the Ceylon Government Manual of Procedure, but neither in these nor in any course of conduct of the Assistant Government Agent here concerned or of any other Assistant Government Agent could he find a clear assertion that to that officer had been delegated the duty

of making such an agreement. Their Lordships are therefore of opinion that, assuming the agreement to have been made as alleged, it was unauthorized by the Crown and that on this ground the action and appeal must fail.

Two other defences were raised in the action which must be mentioned. First, it was contended that the alleged agreement was contrary to the Land Sales Regulations and was void, and, secondly, that it was unenforceable in that it did not comply with the terms of the Prevention of Frauds Ordinance. It was common ground between the parties that the first point turned solely on the question whether the permit given to Sabapathipillai, which was the model of that agreed to be given to the appellant, was a "lease" or a "licence". If it was a lease, then it was of no effect, since Regulation 2 of the Land Sales Regulations of 1926 provided that every grant and every lease of land should (with certain immaterial exceptions) be under the signature of the Governor and the Public Seal of the Colony. Upon this question the learned District Judge and the Supreme Court have come to different conclusions, the former holding the instrument to be a licence, the latter a lease. Both courts have based their conclusion upon a consideration of the whole terms of the document. It appears to their Lordships that, while there are particular provisions which point in either direction, the decisive test is whether upon its true construction the effect of the document is to give exclusive possession to the holder of the so-called permit, and, adopting this test, they are of opinion that all that is granted by the document is the right to tap and take the produce of the rubber trees within a defined area together with such rights of occupation or possession and other ancillary rights as are necessary to make the primary right effective. They find nothing in the document which would exclude the Crown or its officers from entering upon, and making such use of, the land as might be thought fit, subject only to the limitation that in doing so they must not derogate from the rights granted to the grantee. In their Lordships' opinion, therefore, the so-called permit was not a lease but a licence. In expressing this opinion, they must observe that neither in the judgments under review nor in the arguments presented to the Board has it been suggested that the law of Ceylon upon the question whether an instrument is a "lease" within the meaning of the Land Sales Regulations differs from the English law which would be applicable upon a similar question.

The final question arose under the Prevention of Frauds Ordinance. It is convenient to set out sections 2 and 17 of that Ordinance. They are as follows:—

"Section 2. No sale, purchase, transfer, assignment or mortgage of land or other immovable property, and no promise, bargain, contract or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month) nor any contract or agreement for the future sale or purchase of any land or other immovable property shall be of force or avail in law unless the same shall be in writing and signed by the party

making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses.

"Section 17. None of the foregoing provisions in this Ordinance shall be taken as applying to any grants, sales or other conveyances of land or other immovable property from or to Government, or to any mortgage of land or other immovable property made to Government or to any deed or instrument touching land or other immovable property to which Government shall be a party, or to any certificates of sales granted by fiscals of land or other immovable property sold under writs of execution."

It is plain that the alleged oral agreement falls within section 2, whether as an agreement for effecting the sale of immovable property or as an agreement for establishing an interest affecting land or other immovable property. If so it would not be "of force or avail in law" unless it was saved by section 17; for it was not in writing as prescribed by section 2 and, necessarily, its execution was not notarially attested. Was it then saved by section 17? In their Lordships' opinion it was not. It appears to them that, while section 2 deals with transactions and enacts that they must be reduced to writing as therein prescribed, section 17 deals with instruments, i.e., with transactions which have already been reduced to writing, and exempts certain classes of instruments from the necessity of notarial attestation. The language of the section "grants, sales, or other conveyances" and "any deed or instrument touching land, etc.," points irresistibly to this conclusion. There is nothing therefore in the section which saves oral agreements for the sale of immovable property by Government from the necessity of being reduced to writing. Nor is there any reason to suppose that this is a *casus omissus*. The present case is sufficient to show how desirable it is that an agreement for the sale of immovable property should be in writing, even if one of the parties to the agreement is the Crown through one of its servants. On this ground also, therefore, the appeal must fail.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

Appeal dismissed.

1950 *Present* : **Dias S.P.J. and Pulle J.**

JAN SINGHO, Petitioner, *and* ABEYWARDENE *et al.*, Respondents

S. C. 613—Application for revision in D. C. Negombo, 15,116

Civil Appellate Rules, 1938—Meaning of "Final Appeal" and "Interlocutory Appeal".

H instituted proceedings for divorce against his wife W who, while denying the charges, counter-claimed for a judicial separation. W also obtained before