IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

CA 438 /1999 F
DC Colombo 17310/L

SHAHUL HAMEED JAUFER,
No 180/131, GRANDPASS ROAD,
COLOMBO 14
PLAINTIFF-APPELLANT (DECEASED)

MOHAMED JAUFER NEWMATH UMMA
MOHAMED JAUFER KAMARUDEEN
MOHAMED JAUFER FATHIMA NAZLY
MOHAMED JAUFER IZZATHUL RAHUMA
MOHAMED JAUFER NOORUL HAQ
MOHAMED JAUFER RIHULJENNA
MOHAMED JAUFER SAMSUL SURAFA
MOHAMED JAUFER ISHAMDEEN
No 180/151, GRANDPASS ROAD, COLMBO 14
SUBSTITUTE-PLAINTIFF-APPELLANTS

V s

GERTY KELLER
No 359/16, MALAIGAWATTA JUMMA MASJID ROAD, MARADANA, COLOMBO
DEFENDANT-RESPONDENT-(DECEASED)
WELENDA HETTIGE MAGILIN PERERA,
359/16, MALAIGAWATTA JUMMA MASJID ROAD, MARADANA, COLOMBO 10
SUBSTITUTED-DEFENDANT-RESPONDENT

Before: Abdus Salâm,J.
Counsel : C E De Silva for the Substituted-plaintiff-appellants and Sisira Kumara Siriwardena for the substituted-defendant-respondent.
Written Submissions tendered on : 08.02.2011
Argued on : 08.02.2012
Decided on : 30.04.2012

A W Abdus Salam, J

The plaintiff (Landlord) sued the defendant (Tenant) for a declaration of title and ejectment, to enable him to regain peaceful possession of the tenanted premises, on the footing that the tenant had turned out to be a trespasser. The defendant resisted the action on the premise that he had acquired a prescriptive title. In the schedules to the plaint and the answer, the premises in dispute were fully set out and as a matter of fact, both parties made rival claims for declaration of title to the tenanted premises. Hence, the subject matter referred to in the plaint and also in the answer was identical and one and the same carrying the identical premises assessment number and the same metes and bounds.

The plaintiff claimed ownership to the premises in suit by right of inheritance and prescriptive possession. Undisputedly, the defendant had entered the premises, as a tenant, in the year 1946 and paid rent to the plaintiff until 1988, at the rate of Rs 23/- per mensum. The plaintiff averred that the defendant neglected the payment of rent from February 1988, expecting to purchase the property from him. The defendant too accepted the position that he delebrately refrained from paying the rent to the plaintiff.

The defendant admittedly bequeathed the property by a Last Will attested before a notary, basing his title to adverse, independent and prescriptive possession. The plaintiff became aware of the execution of the Last Will, in the month of October 1988. The plaintiff maintained that by executing the said Last Will the defendant disputed his title to the subject matter and thus turned out to be a rank trespasser of the tenanted premises. Undoubtedly, as it transpired from the answer the conduct of the defendant was a blatant defiance of the basic doctrine of estoppel applicable to a tenant and led to needless hostility and contumacious behaviour towards the landlord.

At the trial, the plaintiff gave evidence and upon the closure of his case, read 23 documents (P1 to P 23) in evidence without any objection. The failure of the defendant to give evidence, call witnesses and produce documents featured as significant occurrences at the trial, despite the learned district judge not realizing their importance in assessing the balace of probabities. At the conclusion of the trial, the action was dismissed, for the alleged failure of the plaintiff to establish his title. The basis of this decision is that the Last Will of Kaana Mohamed (P1), Order nisi (P2), inventory (P22) and the petition and affidavit (P23) filed in the testamentary case do not establish the existence of a building by the No 359/16. According to the learned district judge, the premises No 43 referred to in P1,P2,P22 and P23, has no connection whatsoever to the premises in suit. Hence, the trial judge concluded that the premises bearing No 43, Maligawatta is not possible to be identified as being connected with building bearing No 359/16.

In a declaration of title or rei vindicatio action, if the subject matter is admitted no further proof of the identity of the corpus is required, for no party is burdened with adducing further proof of an admitted fact. The hearing of an action commences, with the parties stating the question of fact or law to be decided between them in the form of issues, if they are so agreed. However, under section 146(2), if no consensus is reached on that matter, the court records the issues on which the right decision of the case appears to depend.

Quite strikingly, the CPC is silent as to whether admissions arising from the pleadings should be recorded as in the case of issues. Although the court is under no obligation, the inveterate practice is to record the admissions at the beginning of the trial or at any time before judgment, as and when the admissions are made. Such admissions recorded in a methodical and consistent style would be useful to the trial judge to ascertain the facts

admitted in the pleadings to pronounce his judgment, in the strict compliance of the requirements embodied in Section 184 (1) of the Civil Procedure Code. Undobtedltly, it may also facilitate the avoidance of repetitiousness.

The Civil Procedure Code emphasizes the need to establish (to highlight them for the sake of clarity) only so much of the substantial part of the case of a party, **which is not admitted in his opponent's pleadings**. Explanation 2 to Section 150 of the CPC is worded as follows...

> "The case enunciated must reasonably accord with the party's pleadings, i.e., plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. And the facts to be established must in the whole amount to, so much of the material part of his case as is not admitted in his opponent's pleadings".

Section 184 of the CPC dealing with the material on which the judgment has to be pronounced states that admissions made in the pleadings or otherwise should also be taken into consideration amongst other matters. From the above it is very clear that the admissions made in the pleadings are important and useful in the preparation of the judgment to be pronounced whether admissions are formally recorded or otherwise. Quite significantly, in this case admission No 3, is a clear acknowledgment of the plaintiff's status in relation to the corpus. As such the doctrine of estoppel and Section 150 are two firm absolute bars which stood in the way of the defendant to challenge the plaintiff's authority over the corpus.

Thus it is a fact that the agreement between the parties constitutes a tenancy that gives rise to an estoppel. It therefore seems to me that the question of tenancy by estoppel arise/ in this case and the issue is simply whether the agreement is a tenancy.

The importance of the admissions made in the pleadings was the subject of emphasis in the case of A V Arnolis Vs Mrs Miriam Lawrence CA (SC) application No 45/80 in which the plaintiff sued the defendant for ejectment based on a contract of tenancy. Dealing with the admissions made by the plaintiff and its impact on the judgment His Lordship Soza, J stated as follows...

> Quote
> "Section 184 of the Civil Procedure Code requires the court to act on the admissions in the pleadings and on the evidence led before it. It must be borne in mind that the issues are framed on the responsibility of the court only on material questions that are in controversy and regarding which evidence to be led. **Matters that are admitted in the pleadings will not be raised in the issues and no evidence need be led on them**. What a party must seek to establish by evidence is so much of the material part of his case that is not admitted in his opponents pleadings" – Unquote (Emphasis is not that of Soza J)

The subject matter of the action both in reference to the assessment number and its metes and bounds, is unambiguously set out in the plaint. The defendant in his answer chose to reiterate the same assessment number with almost the same metes and bounds. Further, the defendant sought a declaration of title in his favour for the same premises from which the plaintiff wanted him ejected. The main prayer to the answer is that the defendant be declared entitled to the subject matter of the action No 359/16, Maligawatta Jumma Masjid Road, Maradana, Colombo 10 by right of prescriptive possession. (Emphasis added)

In paragraph 1 of the plaint, the plaintiff identifies the corpus in reference to the land described in the schedule to the plaint. The defendant having denied the accrual of the cause of action did not admit nor did he choose to deny the rest of the paragraph. This in substance would mean that he has admitted the premises described in the schedule to the plaint. For purpose of

convenience the averments contained in paragraph 1 of the plaint and 2 of the answer are reproduced below in its original form.

පහත උපලේඛණයේ විස්තර කර ඇති දේපල පිහිටා ඇත්තේද ඉහත නම් සඳහන් විත්තිකාරිය පදිංචිව සිටින්නේද, මින්මතු විස්තර කරනු ලබන නඩු නිමිත්ත හටගන්නා ලද්දේද මෙම අධිකරණයේ බල සීමාව තුලදීය.

Paragraph 2 of the answer

පැමිණිල්ලේ 1 වන ඡේදයට පිළිතුරු දෙන විත්තිකාරිය එහි අඩංගු කරුණු වලින් නඩු නිමිත්තක් පැමිණිලිකරුට උපවය වී ඇති බව තරයේ ප්‍රතික්ෂේප කරනු ලැබේ.

Emerging from the above, the learned district judge could have without any difficulty arrived at the conclusion that defendant has unequivocally admitted the subject matter of the action as being exactly what has been averred in the plaint.

At the trial the plaintiff produced P4 to P19 to which no objection was taken at the close of the plaintiff's case. The *cursus curiae* of the Original Civil Court followed for more than three decades in this country is that the failure to object to documents, when read at the closure of the case of a particular party would render them as evidence for all purposes of the law. In the light of the above *cursus curiae*, when documents P 4 to P 19 are examined, it is not at all possible to conclude that the defendant was not the tenant of the plaintiff. The documents tendered by the plaintiff in evidence, ought to have been considered by the trial judge as evidence establishing the truth of the allegation made against the defendant with regard to the commencement, continuation and the extinction of tenancy of the defendant in respect of the premises in question under the plaintiff.

Giving the marking as P3, the plaintiff produced the declaration made by him with a copy to the defendant, in terms of section 37 of the Rent Act, No 7 of 1972, describing the defendant as the tenant of the premises, the tenanted premises as 369/16, Jumma Masjid Road, Maligawatta and identifying him as the landlord. The counterfoils of rent receipts totaling up to 49 in number were produced by the plaintiff to prove the tenancy, despite the fact that the tenancy was admitted at the trial. Quite surprisingly, the defendant neither gave evidence nor did he challenge the veracity of the said documents.

It is useful to address ourselves to the question as to whether the plaintiff in this case is entitled to judgment, assuming that he is not the true owner of the property. The law is settled, on this matter that a person who is not the owner of property may let it and such letting would be a valid one- Voet 1[19.2.3.]

If a person without having any property rights rents out an immovable property, such a tenancy agreement it is binding as between the parties to the agreement and they become subject to the obligations of a landlord and a tenant. This principle underlying the Roman, Roman Dutch and English Law is said to reflect truly in section 116 of the Evidence Ordinance. It is trite law that a person who had been let into possession as a tenant is estopped from denying his landlord's title without first surrendering the possession.

As the plaintiff has established the contract of tenancy with the defendant and by virtue of that contract he placed him in possession of the premises, the defendant cannot be permitted to deny now that the plaintiff had a sufficient title to let the premises to him or even raise the question of what that title was, for such a question, is unknown and alien to the law relating to letting and hiring.

It is useful to refer to the finding of the learned district judge relating to the status of the defendant when he entered the premises in question. The finding is to the effect that the defendant had entered the premises as a tenant and defaulted in paying the rent. The said finding is at page 100 and 101 of the brief and reproduced below...

> විත්තිකාරිය 1976 වර්ෂය තෙක් එම ස්ථානයේ කුලී නිවැසියෙකු වශයෙන් සිටි බව පිලිගෙන ඇත. ඒ සමගම 1988 ජුනි 21 වන දින මෙම ස්ථානය, මෙම විත්තිකාරිය විසින් අන්තිම කැමති පත්‍රයකින් අයිතිය ප්‍රකාශ කරවාගෙන ඇති බව ද පැහැදිලිව තහවුරු වේ. එම ප්‍රකාශණ ඔප්පුව පැ.21 වශයෙන් ලකුණු කර ඉදිරිපත් කර ඇත. එදින දක්වා එනම් 1988.06.21 වන දිනය දක්වා විත්තිකාරිය විසින් පැමිණිලිකරුට කුලී ගෙවිව බව ඔප්පු කිරීමටද ලේඛණ ඉදිරිපත් කර ඇත. ඒ අනුව විත්තිකාරිය මෙම ස්ථානයේ කුලී නිවැසියෙකුව සිටිමින් පසුව අන්තිම කැමති පත්‍රයක් මගින් අයිතිය ප්‍රකාශ කරවා ගෙන ඇති නිසා ඇයගෙන් කුලී නිවැසි භාවය ඉවත් වී ඇති බව පැහැදිලිය.
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> කෙසේ වෙතත් මෙම කරුණ මෙහිදී සලකා බැලීමට නම් පැමිණිලිකරු විසින් ප්‍රථමයෙන්, මෙම ස්ථානයට අයිතිය, ඔහු වෙත තිබෙන බව පැහැදිලිව ඔප්පු කර තිබිය යුතුය. කලින් සඳහන් කල පරිදි, පැමිණිලිකරු මෙම ස්ථානයට ඇති තම අයිතිවාසිකම් පැහැදිලිව ඔප්පුකර නැති නිසා එම කරුණු එතරම් දීර්ඝ වශයෙන් සලකා බැලීමක් නොකරමි.

The learned counsel of the appellant has cited the judgments in K Hassan Vs A O Nagria 75 NLR 335, Mansoor Vs Umma 1984 (1) SLR 151 and Ranasingha Vs Premadharma and others 1985 (1) SLR 63 to buttress his argument that when a tenant denies tenancy by his own act he repudiates the contract of tenancy. Applying the evidence led in this case, I am totally in agreement with the counsel that the defendant in this case has clearly lost his right of tenancy and become a trespasser.

It is quite appropriate at this stage to refer to the judgment in the case of Reginal Fernando Vs Pabilinahamy and another 2005 SLR 1 38 in which the Supreme Court held inter alia that upon the plaintiff (licensor) establishing that the defendant is a licensee, the former is entitled to take steps for ejectment of the latter even in the absence of proof as to the ownership of the land.

In the case of R W Pathirana Vs R E De S Jayasundera 58 NLR 169 the Supreme Court held that the lessee who has entered into occupation must first restore the property to his landlord in fulfillment of his contractual obligation which the defendant in the instant case has miserably failed to fulfill. In the same case Gratiean, J stated the law as follows...

> "In a *rei vindicatio* action proper, the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. "The plaintiff's ownership of the thing is very essence of the action ". Maasdorp's Institutes (7th Ed.) Vol. 2, 96.
>
> 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 fulfilment of his contractual obligation**. "The lessee (conductor) cannot plead the exceptio dominii, 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.
> Voet 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 lessee's contractual obligation.
>
> A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei

vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership **in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true' owner**". (Emphases are mine)

Having thus stated the law as regards the two types of action, namely rei vindicatio proper and an action for restoration of possession and ejectment against an overholding lessee, I am of the view that the action filed by the plaintiff in this case falls within the latter type of action, in which issues as to title is irrelevant.

In the instant matter, not only the plaintiff has established his title but he is also deemed to have had title by reason of the unconditional admission No 3. In terms of section 58 of the Evidence Ordinance no fact need be proved in any proceedings which the parties thereto or their agents agree to admit at the hearing, or before the hearing, they agree to admit by any writing under their hands, or which by a rule of pleadings in force at the time they are deemed to have admitted by their pleadings. This section conveys the principle that what is admitted need not be proved. The court has to try the questions on which the parties are at issue, not those on which they have agreed. Similarly, although the pleadings recede to the background once issues are framed; as far as the admissions are concerned the pleadings are kept alive and moved forward by reason of section 184 of the Civil Procedure Code. Section 184 of the Civil Procedure Code, without the words inapplicable, reads that "the court, upon the evidence which has been duly taken or **UPON THE FACTS ADMITTED IN THE PLEADINGS OR OTHERWISE, SHALL** pronounce judgment in open court". (Capitalization is mine)

By way of useful observation, let me add a few comments. The law of adverse possession possibly can strip an owner of all his characteristics of ownership to an immovable property based on inaction. This may appear unreasonable, irrational and illogical and even sound extremely severe from the standpoint of the true owner. On the contrary, it might well be a windfall for a dishonest person who illegally takes possession of an immovable property. Nevertheless, a tenant having entered the property, later acts in derogation of his landlord's ownership of the tenanted premises, loses the right remain in possession as a tenant.

Had the learned district judge addressed his mind to the *carsus curiae* referred to above, the doctrine of estoppel which operates against a tenant, the duty of court to take cognizance of the admissions stemming from the pleadings under section 184 of the CPC, the failure of the defendant to adduce evidence coupled with the infirmities in the defence case and the unsuccessful attempt to circumvent the law by the defendant, he would never have arrived at the findings he did arrive in this case.

In order to render the impugned judgment consistent with the principles of law enunciated hereinbefore, I am compelled to conclude that the learned district judge completely misdirected himself as to the onus of proof and generally of the law applicable to an action filed by a landlord against an overholding tenant. His evaluation of the evidence adduced at the inquiry is totally unsatisfactory. The decision of the learned district Judge therefore is tainted with multitudes of illegalities, resulting in a travesty of justice.

Hence, I feel obliged, in the exercise of the appellate jurisdiction, to set aside the judgment, findings and decree, entered in this case. Undoubtedly, such a power has to be exercised in an extreme case of necessity to avoid a miscarriage of justice. As regards the grounds urged by the appellant in the instant appeal,

it is my view that this is a fit case where such a course should take precedence over the defendant's baseless assertion.

Consequently, I set-aside the findings, judgment and decree of the learned district Judge and answer the issues in the following manner.

1. Yes, the plaintiff is the owner.
2. Yes, the defendant was a tenant.
3. Yes, the defendant has disputed and denied the title of the plaintiff.
4. The defendant's occupation is unlawful.
5. Plaintiff is entitled to judgment as prayed for in the plaint.
6. No.
7. No.
8. No.
9. Yes. The defendant is stopped from setting up a prescriptive title.

The district judge is directed to re-enter decree accordingly.

The plaintiff is entitled to the costs of this appeal.

Judge of the Court of appeal

Kwk/-