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

1. R. Jinadasa
2. D.M.Karunawathie
   Both are at 4th Mile Post,
   Gurutalawa.

Defendant -Appellants

Vs.

1. A.M.Samarasiri Kulasekera
2. A.M.Sisil Chandrasiri Kulsekera
   Both are at No.12/2, Polduwa Road,
   Battaramulla.

Substituted-Plaintiff-Respondents

C.A. NO.687/98(F)

D.C.BANDARAWELA
CASE NO.426/L

BEFORE : **K.T.CHITRASIRI, J**

COUNSEL : S.A.Kulasooriya with Charith Galhena for the Defendant-Appellants

H.Vithanachchi for the Substituted-Plaintiff-Respondents

ARGUED ON : **28.05.2013**

WRITTEN SUBMISSIONS FILED ON : 21.06. 2013 by the Defendant-Appellants
19.06.2013 by the Substituted-Plaintiff-Respondents

DECIDED ON : **03. 09.2013**

CHITRASIRI, J.

At the outset, I will briefly refer to the facts of this case. The original plaintiff (hereinafter referred to as the plaintiff) namely, A.M.Alexander Kulasekera filed this action by his plaint dated 25.10.1982 seeking *inter alia* to have a declaration, declaring that he is the legitimate holder of the permit marked P1 by which, permission had been granted for him to possess the land referred to in the 1st schedule to the plaint. In that plaint, it is stated that the plaintiff obtained the aforesaid permit dated 2.10.1952 under the reference No.17/70, enabling him to possess the land referred to in the first schedule to the plaint. It had been issued by the State in terms of the provisions contained in the Land Development Ordinance. Further it is stated that possession of a particular portion of the said land referred to in the first schedule to the plaint was forcibly taken over by the defendant-appellants (hereinafter referred to as the defendants) and the said portion of the land is described in the second schedule to the plaint. Accordingly, the plaintiff sought to have the defendants evicted from the land referred to in the second schedule to the plaint on the strength of the permit marked P1 issued in the name of the plaintiff. The defendants in their answer whilst praying for a dismissal of the action have stated that they were in possession of the land referred to in the 2nd schedule to the plaint for about 28 years.

Learned District Judge having accepted the rights of the plaintiff referred to in the permit marked P1, granted the reliefs to the plaintiff as prayed for in the prayer to the plaint. Being aggrieved by the said decision, the

defendants have appealed. When the appeal was taken up for hearing in this Court, learned Counsel for the defendant-appellants restricted his argument limiting it to the two issues mentioned herein below. Therefore, this appeal could be decided in favour of the defendant-appellants, only if either of those two issues is decided against the substituted-plaintiff-respondents. Learned Counsel for the respondents did not object to have the appeal concluded in that manner. The two issues raised by the learned Counsel for the appellants are as follows:

(1) Whether the permit marked P1 is valid in law when there is no evidence to establish that the original plaintiff had paid the annual fees payable to the Government in respect of the said permit upon which the claim of the plaintiff had been made.

(2) Whether the substitution, effected on 20.07.1998 substituting the two substituted-plaintiff-respondents in the room of the deceased-plaintiff, is valid in law.

I will first advert to the 1st issue referred to above. Admittedly, the plaintiff has failed to pay the annual fees for a considerable period of time before filing this action. It is evident by the following evidence of the plaintiff.

".....එයට ඉල්ලුම්කරන අවස්ථාවේදී බදු ගෙවුවා. මුලින් අවුරුද්දක බදු එකට ගත්තා. රු.25/- මුලින් ගෙවුවා. අවුරුදු පතා ගෙවුවා. බලපත්‍රයනි අවුරුද්දක ගණන දැන් නැත. රජයෙන් නැවත්වුවා. ඉඩමට බදු අයකර ගැනීම එපා කීවා.

ඒත් මම ගෙවුවා. නියමිත බදු ගෙව්වා. මාසික බද්ද රු.21/- ගෙව්වා. මේ බද්ද නැවැත්වුයේ ස්වර්ණභූමි ඔප්පු දෙන්න වෙන්න පුළුවන්."

Relying upon the aforesaid evidence of the plaintiff who admitted that he failed to pay the annual fees due to the State, learned Counsel for the appellant has argued that the learned District Judge should not have acted upon the permit in the absence of such evidence as to the payment of annual sum payable to the State. He also has referred to the condition (v) found in the permit marked P1 in support of his contention. Condition (v) referred to in the permit reads thus:

"(v) The annual sum payable to the crown by the permit holder shall be Twenty one Rupees and .....Cents (Rs.21/-Cents...) and it shall be paid on the First day of March each year."

In the circumstances, it is necessary to ascertain whether the failure to pay the annual fees would invalidate the permit marked P1, particularly in view of the aforesaid clause (v) contained in the said permit. The evidence of the plaintiff referred to above indicates the reasons as to why the plaintiff did not pay the annual sum due to the State. He has stated that he paid Rs.25/- annually at the beginning. He has then stated that the Government did not accept the dues despite his attempts to pay those dues thereafter. Also, he has said that the Government informed him not to pay the annual fees and to his

understanding it was probably due to a decision of the Government to issue "Grants" to such lands under the "SWARNABOOMI PROGRAMME".

In the circumstances, it is seen that the plaintiff had no intention of evading the payment of annual sum due to the State. The plaintiff in this instance cannot be penalized for the conduct of the others, particularly when those others who prevented the plaintiff making the dues, are the persons who are authorized to accept the annual fees. Hence, it is seen that the reasons for the failure to make the payment had been beyond the plaintiff's control.

Such circumstances should necessarily be considered in favour of the permit holder when making a decision to have a permit cancelled even if there is a condition in a permit issued by the Government to annul the same for non-payment of fees. Therefore, it is my view that the circumstances of each case should independently be considered before coming to a conclusion to make a permit invalid on the ground of non-payment of annual fees. Hence, it is incorrect to make the permit marked P1 invalid for non-payment of fees payable to the State since the permit holder had been prevented from making such fees for the reasons beyond his control.

Moreover, I wish to state that no provision is found in the Land Development Ordinance making such a permit invalid for failure to pay the annual fees even if such a failure has purposely been done. In this regard I refer to Section 19(2) of the Land Development Ordinance where the Legislature has

stipulated the manner in which the arrears of fees are to be recovered. It stipulates thus:-

> "(1) .....
>
> *(2) Every such person shall in the first instance receive a permit authorizing him to occupy the land.*
>
> *A permit-holder shall pay the purchase amount as determined by the Land Commissioner in full in final installments within a period of ten years, together with the interest falling due there on calculated at a rate not exceeding four per centum of the balance of the purchase amount outstanding each year after payment of the annual installment due for that year*
>
> ***Provided, however, that where the permit holder fails to make such full payment within the specified period, the Government Agent may extend such period for a further period of two years if the permit-holder satisfies the Government Agent that such failure was due to sickness, crop failure or other unavoidable cause".***
>
> (emphasis added)

This provision in law stipulates a particular process in recovering the annual fees due on the permits issued under the Land Development Ordinance. Indeed, it provides to extent the validity of the permit when there is evidence to show circumstances, similar to the matters referred to in this instance. In that Section nothing is mentioned as to invalidating a permit automatically, for non-payment of annual sum payable to the State. Under those circumstances, it is correct to decide that the permit marked P1 would not make it invalid for non-payment of annual fees due to the Government.

Moreover, non-payment of fees, it being a question of fact should have been raised at the trial held in the Court below. Merely, because questions were

asked by the plaintiff on the payment of annual fees, learned trial Judge could not have considered such a question without a clear issue being framed. Also, such a question of fact cannot be looked at this appeal stage. This criterion has been recognized in the case of **Thalwatte vs. Somasunderam. [1997 (2) S.L.R.at pg. 109]** In that decision **G.P.S,De Silva C.J.** held thus:

> *"Neither the pleadings nor the issues nor even the written submissions reflect the question of appropriation of payments. A new contention of this kind cannot be raised for the first time in appeal since it involves questions of mixed fact and law – vide the judgment of Dias J in Setha V Weerakoon. [49 NLR 225,228,229]"*

For the aforesaid reasons, I decide that the 1st issue namely, invalidating the permit issued in the name of the plaintiff for non-payment of annual fees, raised at the commencement of the argument does not favour the defendant-appellants.

Next issue is in relation to the substitution effected on 20.07.1998. Coincidently, the judgment in this case also has been delivered on this date. The journal entry made on that date reads thus:

" **98.07.20**

නී. මුණසිංහ මයා පැ/ට

නී. හේම අමරකෝන් මයා වි/ට

පැමි.

A.M. ඇලෙක්සැන්ඩර් කුලසේකර (මියගොස්)

විත්.

(1) K. පීනදාස

(2) කරුණාවතී

තීන්දුව

පැමිණිලිකරු වෙනුවෙන් පියවර.

මියගිය පැමිණිලිකරු වෙනුවෙන් ඔහුගේ උරුමකරුවන් දෙදෙනා විසින් ගතයුතු පියවර ගොනුකරයි. ඔවුන්ගේ පෙරකලාසියද ගොනු කරයි. නීතීඥ හේම අමරකෝන් මහතා ගෙන් විමසන ලදුව ඒ ගැන එම අය ආදේශ කිරීමට විරුද්ධ වන්නේද යන්න, ඔහු පවසන්නේ ඒ ගැන විරුද්ධ නොවන බවයි. ඔවුන් දෙදෙනා ආදේශිත පැමිණිලිකරුවන් බවට පත්කරමි.

නඩු තීන්දුව විවෘත අධිකරණයේ කියවනු ලැබේ.

නීතීඥ හේම අමරකෝන් මහතා විත්තිකරුවන් වෙනුවෙන් පෙනී සිටී.

1 වැනි විත්තිකරු උසාවියේ සිටී.

තීන්දු ප්‍රකාශය ඇතුලත් කරන්න.

.....

දි.වි"

The aforesaid journal entry shows that the learned District Judge has made order to substitute the two substituted plaintiff-appellants in the room of the deceased-plaintiff, on an application made by the Counsel appeared on behalf of the substituted plaintiff-respondents. A petition and an affidavit dated 18.07.1998 had been filed seeking to effect the said substitution. The petition and the affidavit so filed are found at pages 78 to 81 in the appeal brief.

More importantly, there was no objection what so ever had been raised on behalf of the two defendants to the said application for substitution. Indeed, the Counsel who appeared on their behalf, when the application was made, had informed Court that he had no objection for the substitution of the two respondents in the room of the deceased-plaintiff. Therefore, I do not see any error on the part of the learned District Judge when he made order to substitute the two substituted-plaintiff-respondents in place of the deceased plaintiff. In fact, the substitution effected in this instance had been an advantage to the defendants. If no substitution was effected substituting the heirs of the deceased plaintiff, it may have caused difficulties for the defendants to file this appeal since the party against whom the appeal was to prefer is dead by then.

Under those circumstances, I do not see any error in having the said substitution effected on 27.10.1998 substituting the substituted-plaintiff-respondents in the room of the deceased plaintiff. Accordingly, I am unable to hold with the defendant-appellants even with regard to the issue bearing No.2 raised at the beginning of the hearing.

For the aforesaid reasons, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL