842/99(F)

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

T.Piyasena,

Wagolla Watte, Koorempola,

Rambukkana.

Defendant-Appellant

C.A.Case No:-842/99(F)

D.C.Kegalle case no:-3847/L

Vs

1. Dolage Ralage Dingiri Mahattaya
2. Ratnayake Mudiyanselage Podimenike both of Koorempola, Rabukkana.

Plaintiff-Respondents

Before:- H.N.J.Perera, J.

Counsel:-Dr.Sunil Cooray with Sudharshini Cooray for the Defendant-Appellant

D.M.G.Dissanayaka with B.C.Balasuriya for the Plaintiff-Respondents

Argued On:- 06.08.2013

Written Submissions:- 09.09.2013/10.09.2013

Decided On:-06.05.2014

H.N.J.Perera, J.

The Plaintiff-Respondents filed this action for a declaration of title to the land described in 1st schedule to the plaint, and for the ejectment of the Defendant-Appellant and possession of the said land described in the 2nd schedule to the plaint and for damages.

According to Plaintiffs they have purchased ¼ of the land in question from one Daniel Ranasinghe Appuhamy by deed No 1430 dated 13.02.1976 marked P1 and the balance ¾ of the land was acquired by them by prescriptive title.

The Plaintiff-Respondents instituted action on the basis that, the Defendant-Appellant was granted a leave and license to reside in the house situated on the subject matter as the Defendant-Appellant was employed as a tractor driver under one Tillekeratne who was the son of the 1st Plaintiff-Respondent and the brother of the 2nd Plaintiff-Respondent.

According to the plaintiffs at the end of the year 1984, Tillekeratne sold his tractor and the Defendant-Appellant's service under him ended but however, he refused to leave the premises and hand over vacant possession thereof to the Plaintiff-Respondents although several requests were made thereto. Thereafter the Plaintiff-Respondents have caused to serve the quit notice on 30.12.1986 thereby terminating the license granted to him, which was never replied.

The Defendant-Appellant filed answer and prayed that, he be declared lawful owner of lot 1 of plan No 752A on prescriptive rights of the Defendant and also prayed that the Plaintiff's action be dismissed.

The Defendant-Appellant's position was that, he commenced the possession of the subject matter in the year 1972 under one Siriwardena Peiris who held title thereto. Thereupon after the demise of the said Siriwardena in 1974, he continued to posses the land he claimed and has acquired title thereto.

After trial the learned District Judge delivered judgment dated in favour of the Plaintiff-Respondents. Aggrieved by the said judgment of the learned District Judge of Kegalle the Defendant-Appellant had preferred this appeal to this Court.

The Plaintiff-Respondents instituted this action to eject the Defendant-Appellant from the premises in question. It was the contention of the Counsel for the Defendant-Appellant that this is an action for rei vindication and the pleadings in the plaint does not amount this action to be construed as a leave and license action.

It was the position of the Plaintiff-Respondents that the Defendant-Appellant has come to occupy the said premises with their permission. It is to be observed that in paragraphs one to six in the plaint the Plaintiff's had very clearly stated so. Therefore it is very clear that the Plaintiff's have filed this action not on the basis that they are the owners of this land. The Plaintiff's too have sought a declaration that they be declared owners of the land described in the schedule to the plaint.The learned District Judge in this case has come to a clear conclusion based on evidence that the defendant-Appellant was residing in lot 1 of the plan marked X as a licensee of the Plaintiffs in this case.

In Ruberu and Another Vs Wijessooriya (1998) 1 Sri L.R 58 it was held that:-

"Whether it is a licensee or lessee, the question of title is foreign to a suit in ejetment against either. The licensee obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of the Plaintiff without whose permission he would not have got it. The effect of Section 116 Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must first quit the land. The fact that the licensee obtained possession from the plaintiff is perforce an admission of the fact that the title resides in the plaintiff."

Further it was held that:-

"It is an inflexible rule of law that no lessee or licensee will never be permitted either to question the title of the person who gave him the lease or the license or the permission to occupy or possess the land or set up want of title in that person."

In Pathirana Vs Jayasundera 58 N.JL.R 169, the Supreme Court held that the lessee who has entered into occupation must first restore the property to his landlord in fulfilment of his contractual obligation which the Defendant in this case has failed to fulfil.

In the same case Gratien, 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 ejectment of the personin wrongful occupation. "The Plaintiffs 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 exception dominie, 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 Plaintiffs 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 re vindication 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."

Analysed in the light of these simple rules, the Plaintiff's in their plaint have asked for relief against the Defendant on the ground of an alleged contractual relationship. It is therefore quite apparent that the action as constituted is not a rei vindication action proper in which any issue as to rights of ownership could properly arise for adjudication.

In Majubudeen and others Vs Simon Perera [2003] 2 Sri L.R 341 it was held that:-

"Privity of contract is the foundation of the right to relief in an action by a lessor against an overholding lessee for restoration and ejectment and issues as to title are irrelevant. 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 obligations."

In the case of Alvar Pillar Vs Karuppan 4 N.L.R 321, it was held that:-

"I am of the view that the defendant is not entitled to dispute the title of the plaintiff. In this case the defendant was permitted to occupy the premises with the permission of the plaintiff. In my opinion the defendant has no defense to this action. He must give up possession to the plaintiff."

In Visvalingham Vs Gajaweera 56 N.L.R 111 it was held that:-

"Even assuming that the defendant had become owner of the entire premises, it was not open to him to refuse to surrender possession to his landlord. He must first give up possession and then it would be open to him to litigate about the ownership."

The learned District Judge has arrived at certain factual matters or has decided on primary facts i.e defendant entered the land in question as a licensee, and that at that point of time the Plaintiff was the owner. As such the plaintiff's title cannot be disputed by the defendant. At the trial the 2nd Plaintiff produced P1 to P5, to which no objection was taken at the close of the Plaintiffs 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.

P2 is the quit notice sent by the plaintiff's to the defendant and P3 has been marked and produced to prove that the said letter has been delivered to the defendant by registered post. The defendant has failed to send a reply to the said letter marked P2. The silence of the defendant amounts to an admission of the truth of the allegations contained in the quit notice.

In Saravanamuttu Vs De Mel, 49 N.L.R 529, Dias, J held that in business matters, if a person states in a letter to another that a certain state of facts exits, the person to whom the letter is written must reply if he does not agree with or means to dispute assertions. Otherwise, the silence of the latter amounts to an admission of the truth of the allegation contained in that letter.

I have considered the entire judgment, and see no reason to interfere and the trial Judge has given cogent reasons. I do not wish to interfere with the primary facts of this case. Trial Judge has arrived at a correct conclusion. Appellate Court should not without cogent reasons interfere with primary facts.1993 (1) S.L.R 332 & 282.

For the above reasons I see no reason to disturb the judgment of the learned District Judge. Accordingly the appeal of the Defendant-Appellant is dismissed with costs.

Appeal dismissed

JUDGE OF THE COURT OF APPEAL