IN THE COURT OF APPEAL OF THE DEMOCRAIC SOCIALIST REPUBLIC OF SRI LANKA.

Chandrs Gunasekara,
No.D 7, Aruppala Flats, Kandy.

Defendant Appellant

Vs.

C.A. Application No. 1136/98(F)

D.C. Kandy Case No. 17852/L

Madduma Bandara Dodanwela,
No. 252, Sir Kuda Rathwatta Mawatha,
Dodanwela, Kandy.

Plaintiff Respondent.

Sujeewa Dodanwela,
No.248, Sir Kuda Rathwatta Mawatha,
Dodanwela, Kandy

Substituted Plaintiff Respondent

Before : P.R.Walgama J.
: L.T.B. Dehideniya J.

Counsel : A.A. de Silva PC with Ajith Zoysa for the Defendant Appellant.
: Ikram Mohamad PC with N.Udalagama instructed by Buddhika Jayaweera for the Plaintiff Respondent.

Argued on : 29.02.2016

Decided on : 22.11.2016

L.T.B. Dehideniya J.

This is an appeal from the District Court of Kandy.

The Plaintiff Respondent (the Respondent) instituted action in the District Court of Kandy alleging that he is the lessee of the Milk Booth under the Government Agent. His contention is that he constructed the said Milk Booth with the permission of the G.A. and after obtaining the necessary permit from the Municipal Council Kandy. After some time he handed over the Milk Booth to one Rubasinghe as his licensee to run the business. After the death of Rubasinghe the Defendant Appellant (the Appellant) is occupying the Milk Booth without his permission. After issuing a quit notice, this action was instituted to declare his right to posses as a lessee and to eject the Appellant. The Appellant filed answer and claimed that she is in possession of the Milk Booth on the strength of an order made by the Magistrate Court under section 66 of the Primary Court Procedure Act. After trial, the learned District Judge decided the case in the Respondent's favour. Being aggrieved by the said decision, the Appellant presented this appeal.

At the argument, the learned Counsel for the Appellant submitted that this is a possessory action because the Respondent is claiming possession under a lease. I do not agree with this argument. The claim of the Respondent is that he is the lessee of the premises. He is claiming his right to possess under the lease. It is an admitted fact that the land where the Milk Booth is constructed is a state land. But the building was constructed by the Respondent. A witness from the Kandy Municipal Council gave evidence and produced the approved plan where the Respondent was permitted to construct the building. Rubasinghe (the Appellant was the mistress of Rubasinghe) has admitted in the Primary Court (Magistrate Court) that the Respondent is the owner of the Milk

Booth. He has given an affidavit in a 66 application filed in the Kandy Magistrate Court. The Appellant is claiming through Rubasinghe. Therefore it established that the Milk Booth is owned by the Respondent.

In an early case Goonewardana V. Rajapakse et al. 1 NLR 217 Bonser, C. J. considering a notarialy executed lease held that;

> *In my opinion we ought to regard a notarial lease as a pro tanto alienation, and we ought to give the lessee, under such a lease, during his term, the legal remedies of an owner and possessor (see D. C, Colombo, 55,552, Vanderstraaten, p, 283; and Perera v. Sobana, 6, S. C. C. 61, where the distinction between a modern lease and a Roman colonus or inquilinus is recognized).*

In the case of Luwis Singho And Others V. Ponnamperuma [1996] 2 Sri L R 320 the law was further developed by Wigneswaran J. after considering several authorities and held at page 325 that;

> *But in an action for declaration of title and ejectment the proof that a Plaintiff had enjoyed an earlier peaceful possession of the land and that subsequently he was ousted by the Defendant would give rise to a rebuttable presumption of title in favour of the Plaintiff and thus could be classified as an action where dominium need not be proved strictly. It would appear therefore that law permits a person who has possessed peacefully but cannot establish clear title or ownership to be restored to possession and be quieted in possession. This development of the law appears to have arisen due to the need to protect de facto possession. It is different from the right of an owner recovering his possession through a vindicatory action. Our courts have always emphasized that the plaintiff who institutes a vindicatory action must prove title. (Vide Wanigaratne v. Juwanis Appuhamy.(7))*

U. De Z. Gunawardana, J. held in the case of Ruberu and another V. Wijesooriya [1998] 1 Sri L R 58 at page 60 that;

> *But whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (the defendant-respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of him, i.e. the plaintiff-appellant without whose permission, he (the defendant-respondent) would not have got it. The effect of the operation of section 116 of the 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 or the lessee obtained possession from the plaintiff-appellant is perforce an admission of the fact that the title resides in the plaintiff. No question of title can possibly arise on the pleadings in this case, because, as the defendant-respondent has stated in his answer that he is a lessee under the plaintiff-appellant, he is estopped from denying the title of the plaintiff-appellant. It is an inflexible rule of law that no lessee or licensee will ever be permitted either to question the title of the person who gave him the lease or the licence or the permission to occupy or possess the land or to set up want of title in that person, i.e. of the person who gave the licence or the lease. That being so, it is superfluous, in this action, framed as it is on the basis that the defendant-respondent is a licensee, to seek a declaration of title.*

In the present case Rubasinghe under whom the Appellant is claiming has admitted the Respondent's title and therefore she is estoped from denying the title of the Respondent.

At the argument the Counsel for the Appellant claimed tenancy. His contention was that Rubasinghe was a tenant under the Respondent. While denying the title of the Respondent, she cannot claim tenancy under the Respondent. On the other hand the Appellant cannot succeed to tenancy because she is not the wife of Rubasinghe. The learned District Judge clearly analyzed that no right will flow to the Appellant by living in adultery with Rubasinghe. The learned Counsel argues that she was a business partner, but there is no evidence to that effect. The evidence is that she was living in adultery with Rubasinghe and on that relationship she is coming to the Milk Booth.

The Appellant in her answer has not claimed any tenancy. Her claim is based on the order of the Primary Court Judge (the Magistrate) in the 66 application. Under the explanation 2 of section 150 of the Civil Procedure Code, a party cannot present a case substantially deferent from the pleading. The section reads;

> *The party having the right to begin shall state his case, giving the substance of the facts which he proposes to establish by his evidence.*
>
> *Explanation 1 .....*
>
> *Explanation 2*
>
> *The case enunciated must reasonably accord with the party's pleading, 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 proposed 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.*

In the present case there was no claim of tenancy in the answer. Therefore, the Appellant is precluded from bring in a totally new claim in the appeal.

Candappa Nee Bastian V. Ponnambalampillai [1993] 1 Sri L R 184

Thus it is seen that the position taken up in appeal for the first time was not in accord with the case as presented by the defendant in the District Court. It is well to bear in mind the provisions of explanation 2 to section 150 of the Civil Procedure Code. It reads thus:

"The case enunciated must reasonably accord with the party's pleading, 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 ....". A fortiori, a party cannot be permitted to present in appeal a case different from the case presented before the trial Court except in accordance with the principles laid down by the House of Lords in The Tasmania (4) and followed by Dias, J. in Setha v. Weerakoon (5). The question of licence or sub tenancy involved matters of fact which were not put in issue at the trial. This was certainly not a pure question of law which could have been raised for the first time in appeal. I find myself unable to agree with Mr. Samarasekera that these were matters which fell within the issue raised on behalf of the plaintiff relating to the unlawful occupation of the premises.

The Appellant's claim in the answer is that she was given possession by an order of the Primary Court (Magistrate Court) in an application filed under section 66 of the Primary Court Procedure Act.

The order of the Primary Court under this section is a temporary order which has its validity only till a judgment of a competent court is pronounced. The section 74 of the Primary Court Procedure Act provides that the order of a Primary Court is no bar for a civil action. The section reads;

> *74. (1) An order under this Part shall not affect or prejudice any right or interest in any land or part of a land which any person may be able to establish in a civil suit; and it shall be the duty of a Judge of a Primary Court who commences to hold an inquiry under this Part to explain the effect of these sections to the persons concerned in the dispute.*

The Appellant cannot rest her claim of right to possess on an order of a Primary Court pronounced under part VII of the Primary Court Procedure Act.

Under these circumstances I do not see any reason to interfere with the judgment of the learned District Judge.

The appeal dismissed with costs fixed at Rs. 10,000.00

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the Court of Appeal