

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

Weerasinghe Hettige Stela,
No.7,
Thalagollagoda Janapadaya,
Polgolla.
Defendant-Appellant

CASE NO: CA/204/2000/F

DC KANDY CASE NO: 15645/L

Vs.

H.M. Bala Manike (Deceased),
No. 13,
Thalagollagoda Janapadaya,
Polgolla.

Planintiff-Respondent

Walgamage Don Chandrapala,
No. 13,
Thalagollagoda Janapadaya,
Polgolla.

Substituted Plaintiff-Respondent

Before: Mahinda Samayawardhena, J.

Counsel: Kuvera De Zoysa, P.C., with Piume
Kulathilake for the Defendant-Appellant.

Sandamal Rajapaksha for the Substituted
Plaintiff-Respondent.

Decided on: 02.09.2019

Mahinda Samayawardhena, J.

The Plaintiff instituted this action against the Defendant in the District Court of Kandy seeking a declaration that she is the lawful Permit holder issued under the Land Development Ordinance and in terms of the said Permit she is lawfully entitled to possess the land described in the said Permit. In that premise, she also sought to eject the Defendant who was in possession of the land and recover damages from the Defendant until restoration of possession. The Plaintiff produced a copy of the said Permit marked P1 with the plaint.

The Defendant filed the amended answer seeking to dismiss the Plaintiff's action and also sought a declaration that she (the Defendant) is the lawful Permit holder of the land. The original of this Permit was marked at the trial D5.¹

The Plaintiff filed the replication stating that the Permit issued by the Government Agent in the name of the Defendant whilst the case was pending is invalid.

There is no dispute that it was the Defendant who was in possession of the land at the time of the institution of the action. It was the evidence of the Plaintiff that in the year 1974 she handed over the possession of the land to one Mallika Herath by

¹ Page 109 of the Brief.

accepting some money, and when she came after 8 years, she found that the Defendant was in possession.²

In evidence, the Plaintiff admitted that, it is by document marked D6(a) the possession was handed over to Mallika Herath.³ According to D6(a), the possession has been handed over to Mallika Herath upon receipt of a sum of Rs. 2500/= from Mallika Herath.

The position of the Defendant is that Mallika Herath in turn handed over the possession of the land to her (the Defendant) upon receipt of a sum of Rs. 6500/= from her. This document was marked as D7.⁴

The crucial question to be decided by the District Court was whether the second Permit issued in favour of the Defendant marked D5 was invalid and therefore the first Permit issued in favour of the Plaintiff marked P1 was still valid.⁵ After trial, the learned District Judge held with the Plaintiff on those issues and entered judgment for the Plaintiff as prayed for in the prayer to the plaint.

It is against this Judgment of the District Court dated 24.03.2000, this appeal has been filed by the Defendant-Appellant.

At first glance, it is my considered view that, without making the Divisional Secretary who issued Permit marked D5 a party to the case, the District Judge could not have decided that the second Permit marked D5 is invalid. That is a blatant violation of the

² Page 69 of the Brief.

³ Pages 71 and 111 of the Brief.

⁴ Page 112 of the Brief.

⁵ Vide issue Nos. 12 and 13 at page 56 of the Brief.

fundamental rule of natural justice-*audi alteram partem*. No Court has the right to decide against a person who is not a party to the case and who has not been given a hearing.

The position taken up by the Plaintiff before the District Court that the Defendant's Permit was issued pending the action is also, for the same reason, untenable.

This is admittedly a State Land, and therefore the State, which is not a party to the action, is not bound by the Judgment.

Another significant matter which seems to have escaped the attention of the learned District Judge is that the copy of the Permit tendered by the Plaintiff with the plaint is *ex facie* cancelled on 27.10.1989 by making an endorsement to that effect by the Divisional Secretary. That means, the Plaintiff knew before filing the case that the Permit P1 which she relied on to file this case is a cancelled Permit although she claimed a declaration from Court that she is the lawful Permit holder of the land. Then it is abundantly clear that the Plaintiff essentially sought the main relief against the Divisional Secretary although the Divisional Secretary was not made a party.

However, at the trial, the Plaintiff has called a representative of the Divisional Secretary as a witness. That witness had brought the relevant file to Court and affirmatively stated in evidence that after cancelling the Permit P1 issued to the Plaintiff, new Permit D5 was issued to the Defendant.

The learned District Judge has relied on *Seenithamby v. Ahamadulebbe*⁶ to say that the cancellation of the Plaintiff's Permit shall be clearly proved to defeat the claim of the Plaintiff. Unlike in that case, this has been proved in the instant case by evidence to the satisfaction of the Court.

That decision of the Divisional Secretary in my view is correct as the Plaintiff had virtually sold the land to a third party in 1974 and quit possession of the land thereafter voluntarily. It is a blatant violation of one of the many conditions of the Permit, which enables the State to cancel the Permit after an inquiry.

This decision has been taken by the Divisional Secretary, according to the evidence of the Plaintiff herself, after an inquiry.⁷ This has been reiterated by the Defendant in her evidence as well.⁸

The learned District Judge has placed great reliance on the Receipt marked P3 to say that the fine imposed on the Plaintiff for violation of a condition of the Permit, namely, failure to occupy and possess the land, has been paid.

On the one hand, there is no evidence that this Receipt was produced by the Plaintiff at the inquiry. On the other hand, payment of the fine does not give authority to the Plaintiff to continue to violate the conditions of the Permit. It is stated so in P2 letter itself.⁹ Admittedly, the Plaintiff has never gone into possession of the land after 1974.

⁶ (1971) 74 NLR 222

⁷ Page 71 of the Brief.

⁸ Page 81 of the Brief.

⁹ Page 102 of the Brief.

For the aforesaid reasons, I set aside the Judgment of the District Court and allow the appeal of the Defendant. The Plaintiff's action shall stand dismissed. The Defendant's cross claim made in the amended answer that the Defendant is the lawful Permit holder by the Permit marked D5 dated 18.12.1990 is allowed.

The Defendant is entitled to costs both in this Court and the Court below.

Judge of the Court of Appeal