

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

C.A. Case No. 959/1997 (F)

D.C. Galle Case No. 12191/L

Udugama Gamage John
of Gamagoda, Udugama

PLAINTIFF

-Vs-

Kokmaduwa Mudalige Karunadasa
of Gamagoda, Udugama

DEFENDANT

AND NOW BETWEEN

Kokmaduwa Mudalige Karunadasa
of Gamagoda, Udugama

DEFENDANT-APPELLANT

-Vs-

Udugama Gamage John
of Gamagoda, Udugama

PLAINTIFF-RESPONDENT

BEFORE

:

A.H.M.D. Nawaz, J.

COUNSEL

:

Mahinda Nanayakkara for Defendant Appellant
Athula Perera with Chaturani de Silva for
Plaintiff-Respondent

Decided on : 10.08.2018

A.H.M.D. Nawaz, J.

The Plaintiff Respondent (hereinafter sometimes referred to as the Plaintiff) instituted this action seeking a declaration of title described as Lot 4 of *Klukondewatta alias Kaluikandewatta* and the boutique room standing thereon more fully described in paragraph 2 of the plaint. The Plaintiff averred that he was the owner of a half share of the corpus and the other half share had belonged to his brother Udugama Gamage Sagaris who later transferred his rights in the half share to the plaintiff by a deed bearing No 45108 of 11th July 1985 and thus he became the owner of the entirety of the corpus.

The Plaintiff-Respondent further stated in his plaint that in 1983, he permitted the Defendant Appellant (hereinafter sometimes referred to as the Defendant) to construct a boutique room on the said land and thereafter be terminated the leave and licence. Notwithstanding the said termination of the leave and licence, the Defendant stayed put on the land and thus was in wrongful and unlawful occupation of the corpus.

The Defendant Appellant filing answer admitted that Udugama Gamage Sagaris was the owner of a half share of the corpus, who had also promised to transfer his share to him. The Defendant for the stated in his answer that he had paid the said Sagaris a sum of Rs 8,000 and it was upon the promise of Sagaris to transfer the property, he constructed a boutique room thereon at a cost of Rs 29,000 and thereafter spend a further sum of Rs 11,000 to obtain electricity, and as such he claimed Rs 40,000 as compensation on the basis that he was a bona fide improver. There were two admissions that were recorded at the trial namely the corpus and the fact that Sagaris had transferred his share to John-the Plaintiff Respondent.

At the trial, only the Plaintiff Respondent as well as the Defendant Appellant gave evidence for their respective cases. By a judgement dated 6th November 1996, the learned Additional District Judge of Galle delivered his judgement in favour of the Plaintiff Respondent, whilst ordering a sum of Rs 10,000 to be paid to the Defendant Appellant for the improvement that he had made on the land. The learned Additional District Judge *though* subjected this sum of Rs 10,000 to be deducted for the damages that that the Plaintiff had sought.

Aggrieved by this judgment, the Defendant has preferred this appeal. The argument before this Court of the respective Counsel for the parties principally focused on the question as to who had given leave and licence to the defendant to construct a boutique room in one corner of the land as it was described. The variance between the parties as to the author of the leave and licence emerged in the pleadings themselves. Whilst the Plaintiff averred that it was him who had given the leave and licence to the Defendant, the Defendant pleaded in his answer dated 26th February 1993 that it was Sagaris (the brother of the Plaintiff) who had given the leave and licence.

In paragraph 6 (a) of the answer, the Defendant referred to the leave and licence and stated that he had given Sagaris Rs 8, 000 for that purpose. In fact paragraph 6 of the answer spoke of an oral agreement between Sagaris and the Defendant wherein apart from the above leave and licence, the verbal agreement, according to the Defendant, included a covenant to the effect that Sagaris had agreed to transfer his half share to the Defendant in the future provided the Defendant paid some more consideration. This paragraph crystallized into Issue No 13 which the learned Additional District Judge answered in the negative. In other words as to the issue whether there was an oral agreement between Sagaris and the Defendant embodying the above covenants, the answer of the learned Additional District Judge was that there was no such oral agreement. To put it in another way, the learned Additional District Judge disbelieved the Defendant on his

assertion that it was Sagaris who had given the leave and licence. According to the learned Additional District Judge, it was the Plaintiff who had given the leave and licence. Is this finding right?

The evidence discloses the two conflicting versions of the leave and licence. The Plaintiff said that the leave and licence was his, but the Defendant attributed it to Sagaris. There is evidence on the record that Sagaris passed away in 1994. The defendant's list of witnesses was filed in 1993. One finds Sagaris absent from this list of witnesses. If the Defendant was intending to prove that Sagaris was his licensor, Sagaris did not find himself in the list of witnesses filed by the defendant. This shows that the Defendant was not even intending to establish the identity of his licensor. On the contrary, when the Plaintiff asserted in his evidence that he was the licensor Of the Defendant, this evidence was not challenged at all. One is reminded of the perennial dictum of H.N.G. Fernando C.J. in *Edrick de Silva vs. Chandradasa de Silva*. (1967) 70 N.L.R. 169 at 174.

"Where a plaintiff has, in a civil case, led evidence sufficient in law to prove a factum probandum, the failure of the defendant to adduce evidence which contradicts it adds a new factor in favour of the Plaintiff. There is then an additional 'matter before the court', which the definition in section 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the plaintiff is uncontradicted"

In fact when the Plaintiff declared in his evidence that it was him who gave the leave and licence, there was no serious challenge posed to this evidence, just like his title was admitted as a formal admission at the beginning of the trial. In fact in cross-examination the Plaintiff asserted that Sagaris objected to any leave and licence being given to the Defendant. Sagaris had berated him for letting the Defendant onto the land. This evidence remained unchallenged.

In the teeth of this evidence, the Defendant should have led rebutting evidence of the stances taken up by the Plaintiff. By the time Karunadasa (the Defendant) took the witness stand in 1996, the so called licensor Sagaris had already crossed the great divide and except the mere *ipse dixit* of the Defendant, there was no evidence available to corroborate him that it was Sagaris who had given leave and licence. It was in this backdrop that the learned Additional District Judge concluded that it was John Appu (the Plaintiff) who had given leave and licence. I find no reason to disturb this finding.

There is also evidence of termination of the said leave and licence spoken to by the Plaintiff. At page 48 of the Appeal Brief there is sufficient evidence to establish that the Plaintiff terminated the leave and licence and requested the Defendant to quit the land. Subsequent police complaints in respect of the refusal of the Defendant to quit the land have also been marked in evidence. There is thus evidence of a cause of action that had accrued to the Plaintiff to sue the Defendant in ejectment.

Once a Plaintiff establishes himself as the licensor of the Defendant, a declaration of title action ensues to sue the licensee in ejectment-see *Pathirana v. Jayasundera* 58 NLR 169 (H.N.G. Fernando J and Gratiaen J) and *Jamaldeen Abdul Latheef and Another v. Abdul Majeed Mohamed Mansoor and Another* (2010) 2 Sri.LR 333 (Marsoof.J). Title is irrelevant in these actions-see *Ruberu and Another v. Wijesooriya* [1998] 2 SRI L.R at p 58 (U. De Z. Gunawardana.J).

The Defendant began to refer to the leave and licence allegedly granted by Sagaris. By the time the Defendant took the witness stand to testify for himself, Sagaris had passed away and there was nothing to corroborate the Defendant.

On appeal, the whole case including the facts is within the jurisdiction of the appellate court. But, generally speaking, it is undesirable to interfere with the

findings of the fact of the trial judge who saw and heard the witness and had an opportunity of noting their demeanor, especially in cases where the issue is simple and depends on the credibility which attaches to one or the other of conflicting witnesses. The appellate court ordinarily cannot change the evidence recorded in the trial court in civil cases. The burden of showing that the judgment appealed from is wrong, lies upon the appellant. If all that he can show is nicely balanced calculations, which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded. But in the case before me the probability of the leave and licence being given by the Plaintiff is greater having regard to the evidence so I affirm the finding that the Plaintiff was the licensor of the Defendant and there was proof of termination of this license.

Leave and licence-Should it be notarially executed?

In the course of the argument, Mr. Mahinda Nanayakkara for the Defendant-Appellant brought forth a novel argument namely there must be proof that leave and licence must be in accordance with Section 2 of the Prevention of Fraud Ordinance. Mr, Athula Perera opposed this argument strenuously and contended that this is a mixed question of fact and law and therefore this cannot be raised for the first time in appeal. But Mr. Mahinda Nanayakkara argued that he was raising this in appeal as it was a pure question of law. His argument was that in the event of this Court holding that the Plaintiff gave leave and licence, that leave and licence is null and void because it has not been notrally attested.

In my view the answer to this question lies in Section 2 of the Prevention of Fraud Ordinance itself.

Section 2 of the Prevention of Frauds Ordinance which may be called the palladium of our conveyancing law lays down the general rule as to the formalities required for the transfer of Immovable Property.

Section 2 of the Prevention of Frauds Ordinance, states the following:

“No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract or agreement for effecting any such object or for establishing any security, interest, or encumbrance affecting land or other immovable property.....shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses”.

If I may dissect the section and set them down conveniently it will look thus:

- a. Purchase and sale of immovable property.
- b. Transfer thereof.
- c. Assignment of such property.
- d. Mortgage thereof.
- e. Promise, bargain, contract or agreement for effecting any of the above objects.
- f. Promise, bargain, contract or agreement for establishing any security, interest or encumbrance affecting immovable property.
- g. Contract or agreement for the future sale or purchase of immovable property.

None of the above transactions will be of *force or avail* in law unless the following requirements are satisfied:-

- a. The instrument must be in writing,
- b. It must be signed either by: 1. the party making the same or
2. some person lawfully authorized by such party.

- c. It must be signed in the presence of a licensed Notary Public and two or more witnesses.
- d. Such Notary Public and witnesses must be present at the same time.
- e. The execution of the instrument must be duly attested by the notary and witnesses- *Emalia Fernando v. Caroline Fernando* 59 N.L.R. 341.

As the above provision quite clearly shows, no formalities are required to establish a bare or contractual licence. The formality rules contained in Section 2 focus solely on the conferral of a right in rem in the land, or a contract or agreement to confer such a right. Licenses are not rights in rem at all. Licenses comprise those consensual rights in personam-see dicta to this effect in *Pathirana v. Jayasundera* 58 NLR 169 (H.N.G. Fernando J and Gratiaen J) and *Jamaldeen Abdul Latheef and Another v. Abdul Majeed Mohamed Mansoor and Another* (2010) 2 Sri LR 333 (Marsoof.J).

In *King v David Allen and Sons Billposting Ltd* (1916) 2 AC 54 and *Clore v Theatrical Properties Ltd* (1936) 3 All ER 483, the House of Lords and Court of Appeal respectively treated contractual licenses as rights in personam. They just give the right to be on someone's land and certainly they cannot be equated as an interest in the land. In the circumstances I hold that leave and licence need not be notarially attested and so I would affirm the judgement of the learned Additional District Judge of Galle and allow the reliefs sought by the Plaintiff-Respondent. The order of compensation made by Court for improvements in favor of the Defendant is affirmed.

So I would dismiss the appeal of the Defendant-Appellant .

JUDGE OF THE COURT OF APPEAL