Privy Council Appeal No. 8 of 1967

Meeruppe Sumanatissa Terunnanse – – – – *Appellant*

v.

Warakapitiye Pangnananda Terunnanse – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JANUARY 1968

Present at the Hearing:
VISCOUNT DILHORNE
LORD GUEST
LORD DEVLIN
LORD WILBERFORCE
LORD PEARSON
[*Delivered by* LORD DEVLIN]

The respondent, who was the defendant in the original proceedings in the District Court of Matara, is a bikku, that is, a monk or priest, belonging to a temple in Welihinda. In 1942 he was permitted by the appellant, who was or who claimed to be the Viharadhipathi, that is, the Chief Priest or Chief Incumbent of the Temple, to live on a piece of land of about 18 acres in extent situated at Warakapitiya, about a mile away from the Temple but part of its property. The land had previously been leased for cultivation. Shortly after 1942 the respondent built on this land an avasa or residence in which he lived with dayakas attached to him. It was the respondent's obligation to hand over to the Chief Incumbent the paraveni share, that is, the landowner's share of the produce of the land. This the respondent did until 1953. It is his refusal or failure to do so after that year that has led to the present dispute, the claim with which the Board is concerned being a claim by the appellant to eject the respondent from the land.

In the courts below the principal matter in issue was whether the appellant was the rightful Viharadhipathi of the Welihinda Temple. It is common ground that, if he was, he was entitled to possession of the land and to eject the respondent. Proceedings were begun on 20th September 1954, the appellant in his amended plaint asking for a declaration that he was entitled to the land and for an order of ejectment. The respondent in his amended answer denied that the appellant was the rightful Chief Incumbent and entitled to the land. The respondent claimed also that, if he was ejected, he ought to be compensated for the cost of the avasa and other improvements made to the land. He claimed further that in any event he was as a bikku entitled to reside in the Temple or on land belonging to it and to be maintained out of the revenues of the Temple. It is not disputed that this is his right as a bikku unless he has forfeited it by his contumacy.

The trial began in September 1957 and after a number of adjournments was concluded in December 1960. The District Judge by a judgment delivered on 21st December 1960 decided that the appellant was the lawful Viharadhipathi and so declared. The learned judge made an order for the ejectment of the respondent. He refused him any

compensation, finding that the buildings had been paid for out of the income from the land; and this claim for compensation has not been further pursued. The learned judge also held that the respondent had by his contumacy forfeited his right to residence. On 15th May 1963 the whole of this judgment was reversed in the Supreme Court which held that the appellant's action failed because he could not establish his title as Viharadhipathi.

The course which the argument has taken before the Board makes it unnecessary for their Lordships to do more than indicate the nature of the dispute as to title. It is agreed that in 1928 the Reverend Gunananda became the lawful Viharadhipathi of the Welihinda Temple and of three other temples as well. On 26th December 1930 Gunananda, who was residing in one of his other temples and found it difficult to manage the Welihinda Temple, executed an Adhikari Deed which conferred certain rights and duties on the appellant. In the opinion of the District Judge the Reverend Gunananda by this Deed renounced his rights as Viharadhipathi of the Welihinda Temple in favour of the appellant. The Supreme Court on the contrary held that the Deed was not a renunciation and that even if it were, the Reverend Gunananda could not lawfully appoint the appellant as his successor. The Court said that under the rule of sisyanu sisya paramparawa, which governed the succession, the Viharadhipathi must choose his successor from among his pupils. The appellant was not one of Gunananda's pupils; the two men were in fact co-pupils of the previous Chief Incumbent. The respondent is Gunananda's senior pupil. The Court held that the true effect of the Deed was to appoint the appellant to act for Gunananda as the *de facto* Viharadhipathi of the Welihinda Temple so that he could manage that Temple on Gunananda's behalf.

The Reverend Gunananda died in 1944 and therefore any authority to act merely as his deputy would have come to an end in that year. Indeed, the respondent contends that on Gunananda's death, he as the senior pupil and in default of any valid appointment succeeded him as Viharadhipathi; but he concedes that he is now barred under the Prescription Ordinance from asserting his claim.

In the argument before the Board Mr. Gratiaen for the appellant invited their Lordships to decide the appeal in his favour on the simple ground that, whether or not the appellant was the lawful Viharadhipathi, the respondent was estopped from challenging his title to possession of the land in dispute. This contention was not considered in either of the judgments in the courts below. The plea was introduced while the appellant was giving evidence. It was then accepted as an additional issue and the point was put in argument by the appellant's counsel but the District Judge did not decide it. There is no note of the argument before the Supreme Court but it has not been suggested that the point was there abandoned. It was clearly raised in the appellant's case in this appeal and has not been objected to before the Board. Their Lordships are obviously at a disadvantage in considering a point which was left undecided by the courts of Ceylon. The disadvantage is to some extent diminished by the fact that, as will appear, the point is governed by English law.

The appellant relies on s. 116 of the Evidence Ordinance which reads as follows:

> "No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and
>
> no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given."

The respondent concedes that he was a licensee of the land in dispute. His argument against the estoppel rests, as will appear, upon a narrow interpretation of the Ordinance. Section 116 is one of three sections that compose Chapter X of the Ordinance, which is headed Estoppel. This Chapter is a very condensed version of the English common law on estoppel *in pais*. Their Lordships consider that it must be interpreted, and if necessary expanded, in the light of the common law. The Ordinance is one of a number which follow the Indian Evidence Act 1872. This Act, as is well known, was drawn up by Sir James Stephen. In 1876 he reproduced it in substance for English lawyers in his Digest of the Law of Evidence. The object of the Digest was to supply a concise code and not an elaborate treatise and so principles are briefly stated; but in his introduction to the first edition Stephen said that it was "intended to represent the existing law exactly as it stands". Section 116 of the Ordinance corresponds with Article 112 of the Digest. It is therefore in their Lordships' opinion legitimate, when applying s. 116, to consult and give effect to the English cases, even if they appear to go further than the language of the section; and specific authority for so doing is given by s. 100 of the Ordinance which provides that whenever in a judicial proceeding a question of evidence arises not provided for by the Ordinance or by any other law in force in Ceylon, such question shall be determined in accordance with the English Law of Evidence for the time being.

The authorities which settle the English law are conveniently collected in Spencer Bower & Turner on "Estoppel by Representation", 2nd Edn. p. 170. This form of estoppel, although it has since the decision in *Doe v. Baytup* (1835) 3 Ad. and El. 188 been extended to licensor and licensee and other similar relationships, originated out of the relationship of landlord and tenant. The basis for it is the acknowledgment or recognition of the landlord's title. The acknowledgment may be formal as by the execution of a lease or of a deed of attornment; an attornment has been defined by Holroyd, J. in *Cornish v. Searell* (1828) 8 B. and C. 471 at 476 as "the act of the tenant's putting one person in the place of another as his landlord". Estoppel can also arise informally from any act of recognition, the most common being the payment of rent after entry or after attornment. But then it is always open to the tenant to explain that the act relied upon was not intended or understood as a recognition. In *Harvey v. Francis* (1837) 2 M. and Rob. 57 Patteson J. held "that where a tenancy was attempted to be established by mere evidence of payment of rent, without any proof of an actual demise, or of the tenants having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent, and to show on whose behalf such rent was received". See also *Jones v. Stone* [1894] A.C. 122.

It will be observed that s. 116 does not in terms embrace the situation in which there has been a change of landlords during the tenancy nor does it deal with the effect of payment of rent. It is on this sparseness of language that the respondent relies. He concedes, as their Lordships have said, that he is the licensee of the land in dispute; he admits also that he was let into possession of it by the appellant as licensor and it was found against him that until 1953 he paid his dues to the appellant in the form of crops or cash. But he points to the words in the second paragraph of s. 116 "at the time when such license was given", which correspond to the words "at the beginning of the tenancy" in the first paragraph. He says that he does not deny that the appellant had as *de facto* Viharadhipathi at the time when the license was given in 1942 the title to possession of the land. But, he says, the situation changed in 1944 when the death of the Reverend Gunananda deprived the appellant of his *de facto* title; and he contends that there is nothing in the Ordinance to prevent him from challenging the *de jure* title which after 1944 the appellant assumed.

For the purposes of the argument on estoppel it is unnecessary, and indeed irrelevant, to consider what the appellant's title truly was. The question is what was the title which the respondent was apparently

recognising, and this depends on the title which the appellant was apparently claiming. There is clear evidence to show that the appellant and the Reverend Gunananda both considered that the Deed of 26th December 1930 was effective to pass the full title of Viharadhipathi to the appellant and not merely the power of management. In 1933 the appellant's title was challenged by another bikku of the Welihinda Temple. On 16th July 1933 the appellant filed a plaint in the District Court of Matara seeking against this bikku a declaration that he, the appellant, was the Chief Incumbent of the Welihinda Temple. The issue was fought and went to the Supreme Court which on 7th June 1937 granted the appellant the declaration for which he asked. The meaning and effect of the Deed of 26th December 1930 was not directly in issue, since the defendant based his claim on a title which he sought to derive from an earlier Chief Incumbent. But the Reverend Gunananda gave evidence in support of the appellant's claim to be Viharadhipathi; and, referring to the Deed, said he gave it " not temporarily ".

If the appellant was to the knowledge of the respondent claiming his dues as Viharadhipathi *de jure* and they were paid to him as such, it would be no answer to an estoppel to say that he could have claimed them in some other capacity or as agent for the Reverend Gunananda, when undoubtedly they would have been payable. The question is whether acknowledgment or recognition of title is to be inferred from the transactions between the parties and the inference depends on what the nature of the transactions was and not what it might have been. In a case where the bare fact of payment is consistent with an inference either way, the transactions would have to be closely investigated before the correct inference could be drawn. The payments of the paraveni share made before the death of the Reverend Gunananda covered only a short period and occurred a long time before the trial took place. There is no satisfactory evidence of the terms on which they were demanded and made and, though there may be suspicion, there is no proof that the respondent then knew exactly what the plaintiff was claiming his position to be. Their Lordships will therefore assume in favour of the respondent that he intended to pay his dues to the appellant only as agent for the Reverend Gunananda and will treat the case as if it was not until after the Reverend Gunananda's death that the appellant claimed the dues in his own right.

After this there was no room for misunderstanding. The respondent knew himself to be the senior pupil of the Reverend Gunananda and knew therefore that, if the appointment of the appellant was invalid, it was he himself who was the lawful Viharadhipathi. Yet the payment of dues continued as before. From 1948 onwards there is documentary evidence of accounts rendered and payments made. In 1953 when payment was first withheld by the respondent, the appellant prosecuted him for criminal misappropriation and on the complaint form the appellant was styled as Viharadhipathi of the Welihinda Temple. The record shows that the value of the produce appropriated was thereafter paid to the complainant and the accused was discharged. Neither formally then nor later in a letter which he wrote to the appellant in September 1953 did the respondent challenge his title. The envelope in which this letter was sent was addressed to the appellant under his title of Viharadhipathi in the respondent's own handwriting and it expresses only distress at the bringing of criminal proceedings.

The construction which the respondent puts on s. 116 is that under it the estoppel operates only in favour of the first landlord of a tenancy or the original grantor of the license; and that it cannot operate in favour of their successors in title. This truncates the English doctrine. Until attornments were virtually abolished by the Law of Property Act 1925 s. 151, it was customary, if not necessary, when a reversion was assigned, for the tenant to attorn to the new assignee. Many of the cases of estoppel in the books relate to tenants who are prevented by their attornment from denying the title of the assignee. Their Lordships need not pause to consider whether the language of the first paragraph of s. 116 would, if

literally construed in its application to a term of years, ignore an attornment and confine the estoppel to the landlord in possession at the beginning of the tenancy. If it does, the scope of the paragraph must by virtue of s. 100 be expanded to give full effect to the English law of estoppel. The same considerations apply to the second paragraph which, since the present case is concerned with a license, is the one on which the appellant relies.

Their Lordships must however add that in their opinion not even the most limited construction of the second paragraph would on the facts of the present case avail the respondent. The license which was granted to him in 1942 was clearly a revocable one. A revocable license is automatically determined by the death of the licensor or by the assignment of the land over which the license is exercised. Thus if the license was not originally granted in 1942 by the appellant in his own right, after the death of the Reverend Gunananda the grant of a new license must be implied. The respondent argues nevertheless that he did not " come upon " the land by virtue of the new license but by virtue of that which had expired. In their Lordships' opinion the reference in the paragraph to the licensee coming upon the land does not mean only, or even primarily, a physical entry; it imports a taking of possession under the license. When a lease or license is renewed, there is no moment at which the tenant or licensee physically leaves the land and re-enters it. There is none the less a new taking of possession in law. In *Foster v. Robinson* [1950] 2 All.E.R. 342 Evershed M. R. said at p. 348: " The determination of the former tenancy was equivalent to delivery up of possession under that tenancy and then a resumption of possession under a new transaction immediately afterwards. I think, to use the language of Cockburn C. J. in *Oastler v. Henderson* [1877] 2 Q.B.D. 575 at 578, there was a virtual taking of possession." The principle was applied again by the Court of Appeal in *Collins v. Claughton* [1959] 1 All.E.R. 95 where Lord Evershed's dictum was cited at 98.

Their Lordships conclude that the plea of estoppel succeeds. It applies only to the respondent's interest as a licensee and does not affect his rights as a bikku. Mr. Gratiaen said that he would not contest these rights. Their Lordships will therefore humbly advise Her Majesty to allow the appeal and to restore the order and decree of ejectment made in the District Court, subject to the right of the respondent to continue to reside in the avasa on the land in suit and to be maintained out of the income of that land or of other temporalities belonging to the Welihinda Temple. The respondent must pay the costs of this appeal. As to the costs in the courts below their Lordships consider that a large part of them must have been incurred on the issue of title on which the respondent succeeded in the Supreme Court and which the appellant has not asked the Board to resolve. Moreover the final result of the proceedings is to restore to the respondent his rights of residence and maintenance of which he was deprived by the judgment of the District Court. Their Lordships consider that in these circumstances each party should pay its own costs of the proceedings in the courts below and they will humbly advise Her Majesty to vary accordingly the order of the Supreme Court.

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In the Privy Council

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v.

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DELIVERED BY
LORD DEVLIN

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