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MAJID ALI NABIJAN AND ANOTHER

v.

DALI CHAND

B

[SUPREME COURT, 1969 (Thompson Ag. P.J.), 3rd, 6th, 24th, October]

Appellate Jurisdiction

Estoppel—possession of land—Magistrate's Court—order for vacant possession in earlier proceedings on basis of trespass—subsequent action for arrears of rent—misapprehension by parties as to facts—whether plaintiffs estopped by record, election or representation—jurisdiction of Magistrate's Court in action for vacant possession of land—Crown Lands Ordinance (Cap. 138—1955) s.15(1).

C

Court—Magistrate's Court—jurisdiction—action for possession of land—trespass—estoppel.

In an action by the appellants against the respondent for possession of land and mesne profits the appellants alleged that the respondent was a trespasser; the respondent by his pleadings admitted that he was in illegal occupation of the land on the basis that it was held by the appellants under a protected Crown Lease, and that no consent had been given by the Director of Lands to his occupation of it. The magistrate made an order for the vacant possession of the land by consent of the parties and the action was later discontinued.

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Subsequently, it having been claimed that a consent by the Director of Lands to the occupation of the land by the respondent's predecessor in title had in fact been given, the appellants brought the present action against the respondent for (inter alia) arrears of rent and alternatively mesne profits and damages.

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On an application to strike out the claim, the magistrate ruled that as an order for vacant possession remained on the record, based on pleadings alleging a relationship of owner and trespasser *ab initio*, there was estoppel by record; he accordingly struck out that part of the claim based upon a relationship of landlord and tenant. On appeal to the Supreme Court from this order it was common ground that the original order for vacant possession was beyond the jurisdiction of the Magistrate's Court and was a nullity.

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Held: 1. There was no estoppel by record as the original order for vacant possession had been made without jurisdiction.

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2. There was no estoppel by election as the party electing must be shown to have had full knowledge of the rights among which he elects, whereas the appellants believed, on information supplied by the Lands Department, that no consent had been given by the Director.

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3. There was no estoppel by representation as the parties were dealing with each other at arms' length and the respondent could not say that he was induced to act to his detriment by a statement in the pleadings or that it was a representation intended to be acted upon by him.

Cases referred to: *Ram Narain v. Ram Kisun* (1968) 15 F.L.R.1: *Evans v. Bartlam* [1937] A.C.473; [1937] 2 All E.R. 646: *Clarke and Chapman v. Hart* (1858) H.L.C.633; 27 L.J.Ch.615: *Palmer v. Moore* [1900] A.C. 293; 82 L.T. 166.

Appeal and cross appeal from an order in the Magistrate's Court striking out (in part) a claim on the ground of estoppel by record.

S. M. Koya for the appellants.

C. Gordon for the respondent.

The history of the proceedings is fully set out in the judgment.

THOMPSON J.: [24th October 1969]—

These cross-appeals are brought against an order made in an action in the Magistrate's Court of the First Class at Lautoka. In that action the appellants in the original appeal were the plaintiffs. They claimed as landlords against the defendant as their former tenant for unpaid rent and, in the alternative, they claimed mesne profits. As there are cross-appeals I shall, in the course of this judgment, refer to the parties as the plaintiffs and the defendant.

There had been a previous action between the parties and, as the ruling now appealed against is that an order made in that action resulted in the plaintiffs being estopped from bringing the present action as landlords against the defendant as their tenant, it is necessary to recite the somewhat unusual course which they followed.

That action was also in Lautoka Magistrate's Court. The statement of claim was badly drawn; it did not clearly disclose the cause of action. In it the plaintiffs alleged that they were the registered proprietors of certain land, that the defendant had failed "to negotiate a lawful tenancy on terms to be agreed upon mutually" and that they had by notice determined any licence he might have had to occupy the land. No details were given of the period of alleged trespass. They sought an order for vacant possession, damages for trespass and an injunction to restrain the defendant from entering upon the premises.

By his Defence the defendant admitted that he was occupying the land but objected to the jurisdiction of the magistrate's court on the ground that "the annual rental value" exceeded £400, the plaintiffs having, by a letter to his father in 1967, increased the rent to £40 per month. He counterclaimed for the cost of improvements he had allegedly made.

The plaintiffs filed a reply stating that the lease by which they held the land was a "protected" lease affected by the provisions of section 15 (1) of the Crown Lands Ordinance (Cap. 138)." They said, in respect of the counterclaim, that the improvements had been carried out by "the defendant's predecessor lawfully in occupation" and the cost had been paid to him by deductions from rent payments.

On those thoroughly unsatisfactory pleadings the action came on for hearing in the magistrate's court. The defendant immediately objected to the court's jurisdiction to hear it. He did not challenge that the plaintiffs' lease was a "protected lease". The learned Senior Magistrate pointed out that, on the pleadings, as they stood, the action was between owner and alleged trespasser, and ruled that the annual rental value of the land was therefore irrelevant and that the court had jurisdiction to hear it.

The defendant appealed to this court against that ruling. In the course of the hearing of the appeal he submitted that a landlord and tenant relationship did exist between the parties. The court then, with the agreement of both parties, ordered that the parties be at liberty to amend their pleadings so as to pinpoint with particularity the allegation of illegal occupation and the defence to it and remitted the action to the magistrate's court with the observation that the Senior Magistrate was not precluded from ruling upon those pleadings, once he knew what they were, that his court had no jurisdiction to hear the action.

The plaintiffs then filed an amended statement of claim; they repeated the allegations made in their original statement of claim and added the additional ground that the Director of Lands had not given his consent to the occupation of the premises by the defendant and that, in consequence, as it was a protected lease, his occupation was illegal. The plaintiffs also gave details of the date on which they had demanded vacant possession. They claimed a declaration that the defendant was a trespasser and illegally in occupation of the premises, an order for vacant possession, damages for trespass and an injunction, as sought before.

The defendant in his amended defence repeated the contents of his original defence. He said that he was not aware that the consent of the Director of Lands to his occupation of the premises had not been given and did not admit it. He alleged that the plaintiffs had accepted rent after the date on which he had been required to quit the premises.

He then filed a further amended defence admitting that he was in illegal occupation because the Director of Lands had not given his consent to his occupation and consenting to give vacant possession. He denied, however, that the plaintiffs were entitled to damages for trespass.

The action then came on again for hearing before the learned Senior Magistrate and, on the parties consenting to his doing so, he forthwith made an order for vacant possession. He then adjourned the proceedings for 4 weeks with a view to the parties' settling the action out of court in respect of the remaining issues. As no settlement was reached, the action was subsequently set down for the remaining issues to be tried. On the date on which it was to be heard, counsel for the plaintiffs informed the court that a few days earlier, after search, a letter from the Director of Lands had been found in which the Director gave his consent to the plaintiffs to sublet the premises to the defendant's father, to whose interest he had apparently succeeded. As the whole foundation of the plaintiffs' case had changed, they sought leave to discontinue the action; leave was given. Nothing was done, however, to set aside the order for vacant possession and it appears that in the two months which had elapsed vacant possession had been given. No order was made for payment of costs to the defendant. The learned Senior Magistrate commented :

> " It is not challenged that the defendant has been in occupation of the premises to 30.4.68 and that from 1.6.67 the defendant has paid no rent, nor mesne profits.

A By discontinuing his action the plaintiff is not now claiming rent or mesne profits which is a matter the Court is entitled to take into consideration, inter alia, on the defendant's application for costs and, in all the circumstances, I consider it proper to make no order as to costs.

I might add that should the plaintiff bring a fresh action before the Court for mesne profits in respect of the period in question the B Court, in considering and assessing such a claim, would inevitably take into account any loss or expense to which the defendant had been put, including his costs incurred herein."

Eight days later the plaintiffs commenced a new action. They pleaded a relationship of landlord and tenant between themselves and the defendant and claimed for rent not paid and arrears of town rates for 1965, C 1966 and 1967. They also alleged the unlawful removal of a wood and iron shed and sought damages to the extent of its value. In addition, however, they included the following paragraph :

"9. In the alternative the Plaintiffs claim against the Defendant the sum of £275 mesne profits for the period 1/6/67 to 30/4/68 both inclusive at the monthly rate of £25 and the sum of £117-4-5 being Town Rates in respect of the premises paid by the Plaintiffs D upon default by the Defendant for the years 1965, 1966 and 1967."

The defendant pleaded a tenancy agreement to let the premises to his father for 10 years from 31st December, 1966, but denied that he was himself the tenant. He pleaded in the alternative that the plaintiffs were estopped from alleging that the defendant was their tenant because of their claim in the previous action and because "upon the said trial E the learned Magistrate ruled that no consent was obtained for the defendant to occupy the premises and it was a suit between lessee and trespasser and the said ruling still remains in force." He again counterclaimed the cost of improvements. The plaintiffs again denied any outstanding liability in respect of the improvements and, in the alternative sought to set off against this cost damage wilfully caused to the premises by the defendant.

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When the action came on for hearing the defendant sought to strike out the plaintiffs' claim on a number of grounds, including the alleged estoppel which he had pleaded. The learned Senior Magistrate refused to strike it out on any of the grounds other than estoppel and against his decision in respect of those grounds there has been no appeal by G either party.

He held, however, that, as an order for vacant possession remained on the record in the previous action and that order was based on pleadings alleging a relationship of owner and trespasser *ab initio*, the plaintiffs were estopped from denying such a relationship and seeking to set up a relationship of landlord and tenant. Accordingly, he struck out all H that part of the claim based on such an alleged relationship but refused to strike out the alternative claim for mesne profits. He based his ruling on estoppel by record but commented "I might add that had the plaintiffs not been estopped by record they would in any event appear to be estopped by election."

Against the learned Senior Magistrate's order both parties have appealed. Mr. Gordon, on behalf of the defendant, has conceded that, in view of the decision of the Fiji Court of Appeal in *Ram Narain v. Ram Kisun* (1968) 15 F.L.R.1, the magistrate's court had no jurisdiction to entertain the plaintiffs' claim in the first action and that the order for vacant possession, therefore, was a nullity. In fairness to the learned Senior Magistrate I should point out that the judgment of the Fiji Court of Appeal in that case had been given only a few days before he made his order, that a copy of it obviously had not reached him, that before that judgment the construction of section 16 of the Magistrates' Courts Ordinance (Cap. 10) was doubtful and that the judgment of the Court of Appeal was not unanimous.

Mr. Gordon has conceded that, since estoppel by record exists only where the court which made the previous order had jurisdiction to do so, there is no estoppel by record in this case. However, he sought leave, in view of the learned Senior Magistrate's comment to which I have referred, to argue the appeal on the basis of estoppel by election. It would have been unsatisfactory for this court simply to uphold the appeal on the ground that there was no estoppel by record, as immediately the case came on in the magistrate's court the defendant would have submitted that there was estoppel by election and a further appeal to this court against the ruling on that submission would have been likely; it was agreed, therefore, by the parties that it should be argued as part of these appeal proceedings.

When Mr. Gordon came to make his submissions, he did not seek to show that there was estoppel by election but rather that there was estoppel by representation; no objection to this was taken by Mr. Koya. I must, however, deal with the question of estoppel by election as it was raised. In order that there may be such estoppel, the party electing must be shown to have had full knowledge of the various rights among which he elects (*Evans v. Bartlam* [1937] A.C. 473 at 479). In this case the plaintiffs believed, from information given to their solicitors by an officer of the Lands Department, that there was no consent and therefore no tenancy. They were not aware that they had any right to bring the action on the basis of a landlord and tenant relationship. There was, therefore, no election.

In order to establish estoppel by representation the party seeking to raise it must show that the other party by his words or conduct made a representation of fact to him with the intention that it should be acted upon by him and that in consequence he altered his position to his detriment in reliance upon that representation. It has been held that in most cases the doctrine ought not to be applied unless the representation is such as to amount to the contract or licence of the party making it (*Clarke v. Hart* (1858) 6 H.L.C. 633 at 656; *Palmer v. Moore* [1900] A.C. 293 at 298).

In this case there was litigation between the parties. The defendant is not seeking to rely on anything done or said outside the proceedings in the earlier action. The fact that the proceedings were, in fact, *ultra vires* does not affect the position that the parties were dealing with each other at arm's length. In those circumstances the defendant, in my view, cannot say that he was induced by reliance on a statement in the

pleadings to act to his detriment or that the statement amounted to a representation by the plaintiffs intended to be acted on by him. Certainly the statement does not amount to the contract or licence of the person making it.

The plaintiffs' appeal must, therefore, succeed. The defendant's cross-appeal, to extend the learned Senior Magistrate's order so as to strike out the alternative claim, is based on estoppel and must accordingly fail. However, I consider it necessary for the guidance of the lower court to comment upon that alternative claim. The learned Senior Magistrate declined to strike it out because it is not necessarily based on the alleged relationship of landlord and tenant; it could be based on the relationship alleged in the first case, namely owner and trespasser. It must be pointed out, however, that nowhere in the present action is any such relationship pleaded. Indeed paragraph 9 of the Statement of Claim is yet another example of the bad draftsmanship which has bedevilled this action, and the previous action, throughout; it sets out an alternative claim without showing clearly what the cause of action is.

Mr. Gordon has sought in this appeal to have paragraph 9 struck out on the ground of estoppel. That ground alone has been argued. I do not intend, therefore, to make any order in respect of paragraph 9; probably it can be put right by amendment designed to show clearly what cause of action is alleged. I do, however, draw it to the attention of the lower court as it would be unsatisfactory for the action to proceed with the pleadings as they stand.

The plaintiffs' appeal is upheld. The learned Senior Magistrate's order striking out part of the plaintiffs' claim is set aside. The defendant's cross-appeal is dismissed. The defendant must pay the plaintiffs' costs of their appeal and of his cross-appeal. Costs to the taxed if not agreed.

Appeal allowed; cross appeal dismissed.