

9, 1950

30987

In the Privy Council.

No. 75 of 1947.

ON APPEAL FROM THE SUPREME
COURT OF CEYLON

14 JUL 1953

ADVANCED
STAGES

BETWEEN

H. E. WIJESURIYA (Plaintiff) APPELLANT

AND

THE ATTORNEY-GENERAL OF CEYLON (Defendant) RESPONDENT

CASE FOR THE RESPONDENT

RECORD

1.—This is an appeal from a Decree, dated the 22nd August, 1946, of the Supreme Court of Ceylon (Soertsz and Cannon, JJ.), which sets aside the Decree, dated the 3rd November, 1944, of the District Court of Colombo, and dismissed the Appellant's action against the Respondent for damages for an alleged breach of contract, and also a cross-appeal by the Appellant complaining that the District Court had awarded as damages too small a sum.

p. 128

p. 115

2.—The Appellant's plaint alleged that on or about the 5th March, 1943, the Government Agent on behalf of the Crown agreed to lease to the Appellant the right to tap and take the produce of the rubber trees on specified Crown lands for four years and two and a half months, at a yearly rental of Rs. 6,000, possession of the land to be given to the Appellant on the 15th March, 1943. The plaint then alleged that the Appellant had on the 5th March, 1943, deposited with the Government Agent Rs. 6,000 being the rent for the first year, but that the Government Agent had broken the agreement by not granting a lease or giving possession to the Appellant. The Appellant claimed from the Respondent as representing the Crown Rs. 75,000 as damages and the return of Rs. 6,000 with interest at 9 per cent. per annum from the 15th March, 1943, until Judgment.

p. 7, ll. 10-31

20 Judgment.

p. 8, l. 19 to
p. 9, l. 12

3.—The Respondent's answer denied any agreement, and pleaded that the agreement alleged was invalid and unenforceable under the Prevention of Frauds Ordinance and the Land Sale Regulations. The answer further pleaded that the Appellant had deposited Rs. 6,000 in anticipation of his obtaining a lease if and when the lands were vacated by one Sabapathipillai, then under a notice to quit which was cancelled on the 11th March, 1943, whereupon an order was made for the return to the Appellant of the deposited Rs. 6,000, which could have been withdrawn at any time thereafter, and for which on the 14th December, 1943, a requisition was sent to the Appellant, enabling him to obtain 10 payment. Rs. 6,000 was brought into Court.

4.—On these pleadings eight issues were framed as follows :

p. 11, l. 10

(1) Did the Government Agent, Uva, on or about the 5th March, 1943, acting for and on behalf of the Crown enter into the agreement pleaded in paragraph 3 of the plaint ?

p. 11, l. 1

(2) Did the Government Agent, Uva, commit a breach of the said agreement ?

p. 11, l. 3

(3) If so, (A) is the Plaintiff entitled to a return of the sum of Rs. 6,000 deposited by him on the 5th March, 1943, with legal interest thereon from the 15th March, 1943 ; (B) is Plaintiff entitled to recover damages for breach of the said agreement ; and (C) if so, in what sum ? 20

p. 11, l. 16

(4) Can the Plaintiff enforce the agreement pleaded in paragraph 3 of the plaint in view of the fact that it was not notarially attested ?

p. 11, l. 18

(5) Was the agreement pleaded in paragraph 3 of the plaint contrary to the Land Sale Regulations of Government ?

p. 11, l. 20

(6) If issue 5 is answered in the affirmative, is the said agreement invalid and unenforceable at law ?

p. 11, l. 40

(7) If the Government Agent entered into the agreement pleaded in paragraph 3 of the plaint, was he acting without authority ? 30

p. 12, l. 1

(8) Is the Crown entitled to rely on an alleged breach of Land Sale Regulations by the Government Agent ?

p. 98, l. 18

By reason of a divergence between the pleadings and the Appellant's evidence, the learned District Judge in giving Judgment amended the first issue by substituting therefor : " Did the Assistant Government Agent, Uva Province, on or about 4th March, 1943, acting for and on behalf of the Crown enter into the agreement pleaded in paragraph 3 of the plaint ? "

5.—Section 2 of the Frauds and Perjuries Ordinance makes an agreement in respect of land or other immoveable property of no force or avail unless it is notarially executed. Section 17 of the Ordinance

provides that none of the foregoing provisions shall be taken as applying to grants, sales or other conveyances of land or other immoveable property from or to the Government. The regulations relating to Sales and Leases of Crown Lands provide by regulation 2 that every grant and every lease of land shall (with two immaterial exceptions) be under the signature of the Governor and the Public Seal of the Colony ; by regulation 24 that sales of land and of leases of land must be advertised at least six weeks before sale or three months if the land is over 250 acres ; by regulation 26 that at the advertised time the articles and conditions of sale should be read, and that no land shall be put up on any condition other than those advertised ; by regulations 27 and 28 that the auction shall be conducted in a prescribed manner ; and by regulation 29 that 10 per cent. of the lease premium shall be paid on the day of sale and the balance of the purchase money within one month, and that if the balance is not so paid the sale shall be considered void and the Government shall be at liberty to re-sell the lease in the same manner as in the original instance, save that no bid shall be accepted from the defaulter. By Article VI of the Letters Patent constituting the office of Governor and Commander-in-Chief of the Island of Ceylon, dated the 22nd April, 1931, His Majesty has provided that : “ The Governor in Our name or on Our behalf may make and execute, “ under the public seal of the Island grants and dispositions of any lands, “ which may lawfully be granted or disposed of within the Island.”

RECORD

p. 134, l. 20

p. 138, l. 29

p. 139, l. 1

p. 139, l. 19

p. 139, l. 33

6.—On the 23rd January, 1942, the Land Commissioner advertised the auction of the lease of the right to tap and take the produce of the rubber trees on the Crown lands in question in this case for five years from the purchaser being put into occupation of the lands, the purchaser to pay immediately after the sale one-fifth of the rent, and the balance by four equal instalments on each anniversary of the commencement of the lease.

7.—At the auction Sabapathipillai who bid Rs. 44,000 was the highest bidder and the Appellant, who bid Rs. 43,950 was the next highest bidder. On the day of sale Sabapathipillai paid only Rs. 880 and asked for indulgence. The balance of the first year's rent was paid on the 9th June, 1942, and a permit to take the produce until the 31st May, 1947, was issued to Sabapathipillai on the 10th August, 1942, but by letter dated the 2nd March, 1943, the Government Agent informed Sabapathipillai that the lease granted to him was cancelled for breach of conditions. He was required to deliver possession and to vacate the land on the 15th March, 1943. On the 10th March, 1943, the Land Commissioner instructed the Government Agent to defer action. Pursuant to further instructions from the Land Commissioner dated the 21st June, 1943, the Government Agent took steps which resulted in Sabapathillai remaining in possession of the land.

p. 12, ll. 30-33

p. 165, ll. 28-30

p. 171

p. 176, l. 14

p. 179, l. 28

p. 188

p. 189, l. 17

8.—When the Land Commissioner learned from a letter from the Assistant Government Agent, dated the 2nd April, 1942, that Sabapathipillai

p. 165, l. 18

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- p. 166, l. 9 had defaulted, he asked for a report on the amount of the second highest bid and whether the bidder was prepared to comply with all the conditions in the sale notice. The reply was that the Appellant was the second highest bidder, but was not prepared to pay the amount he bid. He would, however, pay Rs. 30,000, the bid where the third highest bidder dropped out, and would comply with the conditions. The Assistant Government Agent suggested that the lease should be given to the Appellant for Rs. 30,000 and on the 25th April, 1942, the Land Commissioner approved this suggestion. As a result of a further instruction on the 27th April, 1942, the suggestion, however, was not carried out. 10
- p. 167, ll. 1-8
- p. 167, ll. 9-13
- p. 167, ll. 16-23
- p. 173, ll. 38-41
- p. 173, ll. 38-44
- p. 174, ll. 10-21
- p. 14, ll. 3-21
- p. 15, l. 36
- 9.—On the 21st January, 1943, the Government Agent raised questions of breaches by Sabapathipillai and recommended to the Land Commissioner that the earlier suggestion that the lease be given to the Appellant should be carried out. In reply the Land Commissioner authorised the Government Agent to cancel Sabapathipillai's permit, to take possession of the land on behalf of the Crown, and thereafter to issue a permit to the Appellant for the balance of the five years at the rent of Rs. 30,000. On the 27th January, 1943, an agent of the Appellant saw the Land Commissioner who told him that he had made an order that the Appellant should be given the lease. The Appellant was then waiting to carry out the directions 20 of the Land Commissioner.
- p. 15, l. 37 to
- p. 16, l. 1
- p. 16, ll. 1-7
- p. 16, l. 7
- p. 16, l. 10
- p. 16, l. 12
- p. 19, l. 26 ; p. 178
- l. 1
- p. 16, l. 15
- p. 16, ll. 23-25
- p. 30, l. 10
- 10.—On the 4th March, 1943, events occurred about which there is a direct conflict of evidence. The Appellant's account was as follows :— he saw the Land Clerk who said they had instructions to give the Appellant the lease and who asked the Appellant if he was willing to deposit Rs. 6,000 ; the Appellant then went to the office of the Assistant Government Agent who said if the Appellant deposited the money the Appellant would be given the lease for five years, the other terms being the same ; the Appellant agreed to take the lease on those terms ; neither party confirmed this conversation in writing ; the Appellant then went to the Land Department 30 and paid to the Land Department by cheque Rs. 6,000 for which he was on a later day given a receipt, the amount being described as " rent " on the land " pending issue of lease " ; he was promised possession on the 15th March, 1943. The Appellant denied that the lease was to be given to him if and when the land was vacated, or that the Land Clerk had told him that if he could not get possession on the 15th March he could have his money back.
- p. 61, ll. 1-22
- p. 61 ll. 23-42
- 11.—The Land Clerk said in evidence that on the 4th March, 1943, he informed the Appellant that the Land Commissioner had given instructions to give Sabapathipillai notice of cancellation and to offer the 40 lease to the Appellant ; that the cancellation notice had been issued, and that if the Appellant would agree to deposit the first year's payment he could be put in possession in the event of Sabapathipillai vacating the land. To this the Appellant agreed. The Land Clerk also said that he told the Appellant that the deposit would be refunded if he were not put in possession

of the land, and that the period would be the balance of five years ; that the Appellant agreed to deposit Rs. 6,000 and then and there gave the Land Clerk a cheque for that amount ; and that the Appellant did not go to see the Assistant Government Agent. The Assistant Government Agent (who was a close friend of the Appellant and with whom the Appellant stayed) in his evidence stated that on the 4th March, 1943, the Land Clerk submitted to him a minute suggesting the acceptance of a year's rent, on deposit until the Appellant was put in possession, and then to be credited to revenue ; that the Assistant Government Agent had indorsed on the

10 minute that he agreed and directed that the Appellant be asked to let him know if he agreed ; that the Land Clerk had noted on the minute that the Appellant agreed ; that the Land Commissioner received this note on the 5th March ; that the Land Clerk had not seen him in the interval ; that the Appellant did not come into his room on the 4th March ; and that he had had no discussion about the lease with the Appellant since April, 1942. In cross-examination he explained that his letter dated the 4th March telling the surveyor that the lease had been given to the Appellant, and that the surveyor should put him in possession was written on the assumption that Sabapathipillai would give possession, and that the

20 Appellant would take the lease.

12.—The learned District Judge in his Judgment referred to the claim and defence thereto and then dealt with the question of fact. There was a divergence between the Appellant's pleading and his evidence, which affected the first issue but the District Judge was prepared to amend the first issue. On the making of the agreement alleged there was a direct conflict of evidence between the Appellant and the Assistant Government Agent both of whom were " on the same plane of credibility," and therefore the District Judge thought the matter was to be decided in the light of the circumstances, general probabilities, corroboration, and the consistency of

30 conduct. Having applied these principles, he felt forced to accept the Appellant's evidence.

13.—The lease of the right to tap and take the produce of the rubber trees was, in the opinion of the District Judge, only a licence. The District Judge then held that the suggestion that if Sabapathipillai were to default the Appellant might take the lease, first came from the Land Commissioner when a Japanese air raid made it problematical whether on a resale anything like Rs. 44,000 would be realised ; that the Land Commissioner gave the Government Agent authority to approach the Appellant ; that the Government Agent approached the Appellant and then recommended

40 to the Land Commissioner that if Sabapathipillai defaulted the lease should be given to the Appellant for Rs. 30,000 ; and that about the 17th April, 1942, the Appellant had offered to take the lease on those terms.

14.—The learned District Judge then considered the Appellant's evidence that on the 4th March, 1943, there was an unqualified acceptance

p. 77, l. 30 to
p. 78, l. 16
p. 177, l. 9

p. 85, ll. 20-44
p. 177, l. 30

pp. 97-115

p. 97, l. 39 to
p. 98, l. 21

p. 98, l. 22 to
p. 99, l. 30

p. 99, l. 32 to
p. 100, l. 3
p. 100, ll. 4-44

p. 100, ll. 44-48

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- p. 101, l. 1 to
p. 103, l. 20
- p. 102, l. 43 to
p. 103, l. 20
- p. 103, l. 21 to
p. 109, l. 35
- p. 109, l. 35 to
p. 112, l. 7
- p. 112, l. 8 to
p. 113, l. 5
p. 113, ll. 6-46
- p. 114, ll. 1-29
- Mr. Vangeyzel's
affidavit
- pp. 120- 28
- of his offer entitling him on depositing Rs. 6,000 to have the lease on the 15th March, 1943, and the Appellant's denial that he could have the lease "if and when" Sabapathipillai vacated the land. The District Judge then dealt with what passed between officials and between officials and Sabapathipillai, of which in the District Judge's opinion the Appellant had no knowledge. The District Judge held that on the 4th March, 1943, the position was that the Land Commissioner had informed the Appellant that the permit to Sabapathipillai would be terminated and the lease given to the Appellant; that Sabapathipillai had been asked to deliver peaceful possession of the land to an official on the 15th March, 1943, and to vacate the land immediately thereafter, and that the Acting Government Agent and the Chief Clerk had no doubt the land would be vacated on the 15th March, 1943, and there was no legal or practical impediment in the way of giving the lease to the Appellant. The learned District Judge then set out in detail why on the evidence and an examination of the documents he came to the conclusion that on the 4th March, 1943, the Chief Clerk told the Appellant that the lease was to be given to him from the 15th March; that the Assistant Government Agent confirmed that statement; that the Appellant then gave a cheque for Rs. 6,000 as advance rent for the lease; that steps were taken to give vacant possession to the Appellant; that something caused the Land Commissioner to send a telegram cancelling the arrangements; and that the Chief Clerk and the Assistant Government Agent therefore found that they could not carry out their promise to the Appellant. 10
- 15.—The learned District Judge then considered whether the Crown was bound and summarised the arguments of Counsel. He accepted the argument that under the Land Development Ordinance the Land Commissioner had power to give directions to the Government Agent in regard to the granting of a licence to tap rubber trees, and held that the servants of the Crown were not acting *ultra vires*. Further, he held that the Crown could not rely on Section 2 of the Frauds and Perjuries Ordinance. He also held that the Rs. 6,000 had to be returned with interest at the legal rate of 5 per cent. from the 15th March, 1943, until the date of action, and thereafter at the same rate. The damages for breach were assessed at Rs. 49,800. 30
- 16.—The Respondent appealed to the Supreme Court. On the hearing of the appeal the Court asked the Respondent's Counsel (the Acting Attorney-General) whether the canvassing of the findings of fact would be of any use and whether it would not be better for him to confine his argument to the legal issue. Counsel, in answer, made it clear that he did not accept the findings of fact. 40
- 17.—The Supreme Court by their Judgment dated the 28th August, 1946, held that the Appellant's action for breach of contract failed both on the facts and on the law.

18.—The Judgment of the Supreme Court was delivered by Soertsz, J., who, after summarising the pleadings, dealt with the question whether in fact there was such an agreement as the Appellant pleaded. After referring to the conflict of evidence and the fact that the District Judge had not based his finding on the demeanour or the reliability of the witnesses, Soertsz, J. found that the documents bore out the evidence of the Respondent's witnesses, and that their evidence gave the more probable version of the facts. Soertsz, J. accordingly held that the Appellant's action failed because there was no contract between the Appellant and the Government Agent.

pp. 120-128
p. 123, l. 1, to
p. 124, l. 31

p. 124, ll. 31-33

19.—Soertsz, J., however, proceeded to consider the case as it stands on the finding that there was such a contract. The first question was whether the Assistant Government Agent was competent to bind the Land Commissioner and through him the Crown. Assuming that it was competent for the Land Commissioner to constitute the Government Agent and the Assistant Government Agent his agents to make the contract on which the Appellant relied, the authority conferred by his letter showed that the resumption of possession of the land was a condition precedent to the issue of a permit to the Appellant. Soertsz, J. had no doubt that the Appellant knew of the limitation of authority, but even if he did not know and the Land Commissioner was bound by and had broken a contract with the Appellant, the question arose whether the Land Commissioner could involve the Crown in liability by making a contract. The alleged contract was in reality a lease of land for four years and two and a half months, and it was a play upon words to describe it as a permit, licence, or lease of a right to take produce. The notice of auction and the "permit" read together disclose only a lease of land. The rights and restrictions are appropriate to a lease. Soertsz, J. therefore held that the transaction contemplated by the alleged contract was a lease of land. Such a lease or a grant or disposition of land, if not within exceptions irrelevant to this case, must be under the signature of the Governor and the public seal of the Colony, although the Executive Committee may grant licences for produce. Soertsz, J. was therefore of opinion that neither a lease nor any lesser interest in land could be granted by the Land Commissioner. He held that the Land Development Ordinance had no application. Moreover, regulation 29 required the Land Commissioner to offer the right for sale again in open competition. The result was that whether the right was a lease or something less, the Land Commissioner had no power to render the Crown liable, and so could not delegate such power. Nor was any excess of authority ratified by the Crown. Accordingly the Crown was not liable and the Appellant's action failed.

p. 124, l. 33

p. 125, l. 9

p. 125, ll. 18-30

p. 174, l. 10

p. 125, ll. 30-45

p. 125, l. 45 to
p. 126, l. 19

pp. 164, 171

p. 126, ll. 19-42

p. 126, l. 42 to
p. 127, l. 12

p. 127, l. 12

p. 139, l. 33

p. 127, ll. 13-30

p. 127, ll. 31-38
p. 127, l. 39

20.—As regards the claim for Rs. 6,000 with interest, Soertsz, J. thought that technicalities should be disregarded and that the Appellant should have Judgment for that sum with legal interest from the 10th March, 1943, when the notice to Sabapathipillai was cancelled till the 15th December 1943, when the Appellant could have withdrawn the sum.

p. 127, l. 41 to
p. 128, l. 6

RECORD
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21.—The Respondent submits that the decree of the Supreme Court of Ceylon dated the 22nd August, 1946, was right, and should be affirmed for the following amongst other

REASONS.

1. BECAUSE the oral and documentary evidence shows that the contract alleged by the Appellant was not in fact made.
2. BECAUSE neither the Land Commissioner, the Government Agent, nor the Assistant Government Agent had any power to make or to authorise the making of the contract alleged by the Appellant. 10
3. BECAUSE if any official purported to make the contract alleged, his act was without authority from and was not ratified by the Crown.
4. BECAUSE the District Judge was wrong in holding that the contract alleged was not for a lease of land.
5. BECAUSE of the other reasons given by Mr. Justice Soertsz.

FRANK GAHAN.

In the Privy Council.

No. 75 of 1947.

ON APPEAL FROM THE SUPREME COURT OF
CEYLON.

BETWEEN

H. E. WIJESURIYA (*Plaintiff*) APPELLANT

AND

THE ATTORNEY-GENERAL
OF CEYLON (*Defendant*) RESPONDENT.

CASE FOR THE RESPONDENT

BURCHELLS,

9 Bishopsgate, E.C.2,;

Solicitors for the Respondent.