

**Hodoul v Kannu's Shopping Centre
(2007) SLR 52**

Somasundaram RAJASUNDARAM for the applicant
Basil HOAREAU for the respondent

Ruling delivered on 23 February 2007 by:

GASWAGA J: In this application for a writ of habere facias possessionem, the respondent is the lessee of a commercial building known as Bel Etang standing on Parcel V7069 situated at Mont Fleuri, Mahe and owned by the applicant, lessor. The uncontested facts leading to this application and Civil Suits no 301 of 2006 filed in this Court by the present applicant against the respondent and no 293 of 2006 where the respondent herein is the plaintiff and the applicant is the Defendant are as follows:

Pursuant to a lease deed dated 1/7/2004 the respondent took possession of the said premises and at the expiry of one year. By way of endorsement, that lease was extended for a further period of one year until 31/7/2006. In a letter dated 30/3/2006 the applicant terminated the lease. This led to a series of letters being exchanged.

The applicant on 8/8/2006 lodged the present application after the plaint and injunction application dated 3/8/2006 had been filed and served on her by the respondent herein.

The respondent maintained that they were not only in possession of the premises but also paying rent promptly and will continue occupation thereof since the applicant had orally allowed another extension of the lease till July 2007.

Hence, the respondents contend that they are statutory tenants and are covered by section 12 of the Control of Rent and Tenancy Agreement Act. Mr. Hoareau for the Applicant submitted that section 12 stands repealed (impliedly) while the lease herein was not tacitly renewed but terminated. Alternatively, he argues that the purported lease was not registered as required by the Land Registration Act and as such it is not a valid lease. Therefore, this leaves the respondent, who is considered to have no serious or valid defence, as a trespasser who should be ordered to quit and vacate the premises. In *Barbe v Ernesta* (1986) SLR 69 it was held that a formal lease or agreement was not a prerequisite to establish a lessor and lessee relationship under the Control of Rent and Tenancy Agreement Act otherwise the Act would have been so drafted and, further, that when the lease or agreement for a lease concerns a dwelling-house or business premises no ejectment may be resorted to unless an application is first made to the Rent Board and an ejectment order obtained.

A wealth of authorities in this jurisdiction has settled the law, procedure and circumstances under which this writ can be granted. The Supreme Court of Seychelles derives its powers to determine, in a summary manner, applications for a writ habere facias possessionem, under articles 806-811 of the French Code of Civil Procedure.

The practice of the Court generally is to determine application for such writ on affidavit of the petitioner and the respondent's affidavit in reply.

The Court may proceed on the basis of affidavits only and issue or refuse to issue the writ. Issue of a writ of habere facias possessionem (that you be caused to have possession) is a special remedy available to anyone who is dispossessed otherwise than by a process of law and it is available to a party whose need is of an urgent nature and who has no other equivalent legal remedy at his disposal. The Court may issue such writ, upon an application by the owner or the lessor of property. If the Court is satisfied that the respondent has raised substantial grounds indicating that he or she has a bona fide, genuine, serious and valid defence, the application shall be refused and the petitioner may pursue a regular action to obtain an alternative remedy. See *Delphinus Tristica Maritime SA v Villebrod* (1978) SLR 28 at 121; *Dhanjee v Habib Bank* (1989) SLR 169; *Ah-Tou Vs Dang Kow* (1987) SLR 117.

The case of *Ragoonaden v Rampergass* 1956 MR 110 elucidates the position in Mauritius in the following terms:

The writ habere facias possessionem is, I apprehend, the old name for the writ of possession referred to in order 17 of the English Rules of the Supreme Court. I cannot find a reference to the writ in the body of our Rules of 1903, but in Schedule A there are three forms for it; 79, 86 and 87. Form 79 is for the enforcement of a judgment by default. Form 86 for the enforcement of a judgment of the Supreme Court, and form 87 for the enforcement of an award by the Master at a sale by licitation, the last being headed "(On judge's order)". The common factor in the concept of the writ as contemplated by the English Rules and our own is that it is a means of enforcing a judgment or order for possession, but it seems that this Court puts the remedy to a different and more extensive use.

Citing the above authority, Perera, J found the position in Seychelles to be similar to that of Mauritius. This was in the case of *Cedric Petit v Christa Margitta Bonte* (unreported) CS 194/1998. The learned Judge then went on to explain that although there is no statutory provision for an application for a writ habere facias possessionem, the framers of the Seychelles Code of Civil Procedure had thought it fit to prescribe a form to be used in executing the writ as form number 26 under Schedule C of that Code. This form which appears in the 1952, 1971 and 1991 Revised Editions of the Laws of Seychelles is the same as form 87 of the Rules of the Supreme Court of Mauritius. Though headed "writ habere facias possessionem" the form is worded in a manner to evict a person who prevents a purchaser of land at a sale by licitation from obtaining possession. But the Courts have further extended this writ to order persons who have no manner of right or title like trespassers or squatters to "quit, leave and vacate" immovable property.

The parties have opted to file affidavits and also make submissions. It emerged clearly from the record that the applicant has good title to the premises but did not however demonstrate before the Court that her need for these commercial premises was of an urgent nature. Her intention to use the unit occupied by the respondents for personal business was first made mention of only in the applicant's affidavit of 8/8/2006. All earlier communication, including the termination letter did not bring this to light. In these circumstances I cannot but say that the applicant has other equivalent legal remedies available at her disposal. She could pursue an order before the Rent Board or prosecute the civil suit already filed before the Supreme Court. The writ should, however, not be used as an instrument to evade the necessity of pursuing a regular action: see *Pike v Vardin* (The Seychelles Digest 1979-1996) 136.

At the centre of this application however lies the crucial question of section 12 of the Control of Rent and Tenancy Agreement Act (Act) being impliedly repealed by the Civil Code of Seychelles (Code), as asserted by Mr Hoareau, which I feel should be given special attention since it strikes directly at the root of the respondent's defence. The Code came into force on 1/1/1976 much later after the Control of Rent and Tenancy Agreement Ordinance that was enacted in 1952 to, among other things, deal specifically with the relationship between lessor and lessee in respect of control of rent and tenancy agreements. The Seychelles Independence Order (no 894/1976) that came into operation on 29/6/1976 upheld the existing laws to continue in force and thereafter the word 'Ordinance', wherever it appeared, was substituted with the word 'Act'. Section 4 (1) and (6) thereof provide thus -

- (1) Subject to the provisions of this section, the existing laws shall, notwithstanding the revocation of the existing Orders or the establishment of a Republic in Seychelles, continue in force after the commencement of this Order as if they had been made in pursuance of this Order.
- (2) ...
- (3) ...
- (4) ...
- (5) ...
- (6) For the purposes of this section, the expression "the existing laws" means all Ordinances, laws, or statutory instruments having effect as part of the law of Seychelles or any part thereof immediately before the commencement of this Order (including any Ordinance, law or statutory instrument made before the commencement of this Order and coming into operation on or after the commencement of the Order) which were made or had effect as if they were made in pursuance of the existing Orders.

It is, then, an elementary rule that an earlier Act must give way to a later, if the two cannot be reconciled - *lex posterior derogat priori* - and one Act may repeal another by express words or by implication; for it is enough if there be words which by necessary implication repeal it. But a repeal by implication is never to be favoured, and must not

be imputed to the legislature without necessity (*Dobbs v Grand Junction Waterworks Co* (1883) 9 App Cas 49), or strong reason (per Lord Bramwell in *Great Western Railway Co v Swindon and Cheltenham Express Railway Co* (1884) 9 App Cas 787 at 809) to be shown by the party imputing it. It is only effected where the provisions of the later enactment are so inconsistent with, or repugnant to, those of the earlier that the two cannot stand together; unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal cannot be implied; and special Acts are not repealed by general Acts unless there be some express reference to the previous legislation, or a necessary inconsistency in the two Acts standing together (per AL Smith J in *Kutner v Phillips* [1891] 2 QB 267 at 272), which prevents the maxim *generalalia specialibus non derogant* from being applied (per Willes J. in *Daw v Metropolitan Board of Works* (1862) 12 CBNS 161 at 178). For where there are general words in a later Act capable of reasonable application without being extended to subjects specially dealt with by earlier legislation, then, in the absence of an indication of a particular intention to that effect, the presumption is that the general words were not intended to repeal the earlier and special legislation (per Lord Selborne in *Seward v Vera Cruz* (1884) 10 App Cas 59 at 68), or to take away a particular privilege of a particular class of persons. (See *Brooms Legal Maxims*, 10th Edition, By R. H. Kersley p. 347 to 350)

It was held in *Lyn v Wyn* (1665) O Bridg 122 at 127 that "the law will not allow the exposition to revoke or alter by construction of general words any particular statute, where the words may have their proper operation without it". Lord Chancellor Westbury's holding in *Ex Parte St Sepulchre* (1873) LR 8 CP 185 at 189 too is instructive.

The Court said "if the particular Act gives itself the *complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject matter of the rule out of the general Act*" (emphasis added). *Generalalia specialibus non derogant* is one of the leading and guiding maxims applied to legislative texts, which embody canons of construction applicable to any type of prose, and are mainly based on logic. This maxim, meaning 'general provisions do not derogate from particular ones' may save the particular or specific Acts in similar or related situations such as the one faced by this Court now. The rule can also apply to conflicting provisions in general Acts: see *Francis Bennion on Statute Law* 84. From the above discourse it cannot be said that the framers of the Code particularly intended to repeal section 12 of the Act otherwise the Code would have made specific reference to the Act by expressly stating so.

I think the intention of the proceedings for the writ of *habere facias possessionem* and the relevant law was to provide an owner who has been dispossessed unlawfully with a quick executory measure or remedy against intruders with no colour of right whatsoever. At the same time Courts have extended the writ to protect the rights of tenants (lessees) especially against getting ejected from the landlord's property unfairly. The lengthy submissions of both counsel addressing several pertinent aspects is a clear testimony to the fact that there are a number of triable issues between the parties that would need more careful and detailed analysis than being entertained and

determined in a summary manner. The respondent, who continues to enjoy possession, occupation and the use of the premises, contends that there is in place a subsisting lease that was verbally extended by the lessor but the applicant submits otherwise. An inquiry into the validity of the lease would be handled well in a trial proper. Moreover, the duty of the Court at this point is to look at the evidence before it and satisfy itself whether the respondent has a bona fide defence.

Even if one was to say that the lease in question was invalid and therefore never existed, the relationship between the parties, especially how the respondent came to take possession of the premises, cannot just be swept under the carpet and the respondent suddenly declared a trespasser or squatter. It should be recalled and, for that matter, stressed that payment of rent was not in issue at all as the applicant continued to receive the rent. Further, the *Barbe* case (supra) emphasised "[e]njoyment of the use and occupation i.e. there must be invitation or acceptance."

For these reasons, and after diligently considering the authorities cited by both counsel, I find myself unable to agree with the applicant that the respondent has no genuine or serious or bona fide defence. The application is accordingly refused.

Record: Civil Side No 293 of 2006