

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

S.C. Appeal No. 51/2010
S.C. H.C.C.A.L.A. No. 45/2010
WP/HCCA/Col/76/2002 (F)
D.C.Colombo No. 8884/RE

In the matter of an Application for
Leave to Appeal from Judgment dated
12.01.2010 delivered by the High Court
of the Western Province in
WP/HCCA/Col/76/2002 (F)- D.C.
Colombo Case No. 8884/RE.

M. Wimala Perera
M. Premadasa Perera,
Both of No. 139,
De Waas Lane, Grandpass Road,
Colombo 14

Substituted Plaintiff-Appellant-Petitioners

vs.

R.A. Kalyani Sriyalatha,
No. 47, De Waas Lane, Grandpass Road,
Colombo 14.

Defendant-Respondent-Respondent

BEFORE : **TILAKAWARDANE.J**
SRIPAVAN.J &
IMAM.J

COUNSEL : Edward Ahangama for the Substituted Plaintiff-Appellant-
Petitioners.
Ravindra Anavarathna with D.L.W. Somadasa for the
Defendant-Respondent-Respondent.

ARGUED ON : 04.03.2011.

DECIDED ON : 18.07.2011

TILAKAWARDANE.J

Special Leave to Appeal was granted to the Substituted Plaintiff – Appellant – Petitioner (hereinafter referred to as the Appellant) on 15th October 2010 on the following questions of law:

1. Did the High Court err in law by entirely failing to consider the vital admissions made by the Defendant – Respondent – Respondent (hereinafter referred to as the Respondent) in her statement to the Grandpass Police (marked as P3 and annexed to the annexed Record)?
2. Did the High Court err in law by determining that the Respondent had proved on a balance of the probabilities that she was a tenant of Matilda Gomez to the premises bearing Assessment No: 147, Devos Lane, Grandpass Road Colombo 14, from May 1995 and that such premises had been transferred to her by the said Matilda Gomez in 1998 by the deed marked V1?
3. Has the High Court erred by deciding on the title to the premises in suit in light of the fact that this is an action for ejectment of an over-holding licensee, where the title of the Appellant to the premises in suit is irrelevant and the title to the Respondent to the premises is not a defence to the action
4. Has the High Court erred in law by holding that Section 116 of the Evidence Ordinance does not apply to this case merely because the Respondent has completely denied being a licensee of the Appellant and further denied that the Appellant has Prescriptive Title to the premises in suit?
5. Is the judgment of the High Court not fairly based on the totality of the evidence led in this action, particularly the documents P1 and P3?
6. Is the judgment of the High Court not reasonably supportable on the evidence led in this action?

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The facts of the case in brief reveal that on or about 1st September 1996 the Appellant had purportedly granted the Respondent leave and license to occupy the abovementioned premises in suit. By letter dated 30th September 1997 (marked as P2), the said leave and license was terminated and the Respondent was required to hand over vacant possession of the said premises on the 30th November 1997. The Appellant claimed that the Respondent failed to tender the premises on the aforementioned date and has remained in wrongful occupation thereafter, causing damages in the sum of Rs. 30,000/- and continuing to cause damages at the rate of Rs. 5,000/- per month.

The Appellant instituted action by Plaint dated 16th February 1998 in the District Court of Colombo, and after hearing both parties the Learned District Court Judge dismissed the Appellant's action with costs. Being aggrieved by the said judgement, the Appellant appealed there from to the High Court of the Western Province exercising Civil Appellate jurisdiction of Colombo. The said High Court of the Western Province by its judgment dated 12th January 2010 dismissed the appeal of the Appellant. Leave to appeal was granted by this court on the questions of law set out above.

The Appellant claimed that the High Court has erred in law by deciding on the title to the premises in suit, referring to multiple decisions which support a finding that hold-over by the Respondent tenant is against the law. In *R. W. Pathirana vs. R. E. De. S. Jayasundara* 58 NLR 169, Gratiaen, J. stated that

... In a rei vindication action proper the owner of immovable property is entitled, on proof of his title, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. "The Plaintiffs ownership of the thing is of the very essence of the action" (Maasdorp's Institutes (7th Edition) Vol.2, 96.)

It is, indeed, settled law in Sri Lanka that a lessee is not entitled to dispute his landlord's title by refusing to give up possession of the property at the termination of his lease on the ground that he acquired certain rights to the property subsequent to him becoming the lessee and during the period of tenancy. In the case of *Alvar Pillai vs. Karuppan* 4 NLR 321, it was noted that "K having been let into possession of the whole of a certain land by A, it would seem that, by the law of Ceylon, it is not open to K, even though he were the owner of a moiety of it, to refuse to give up possession of the whole to A, on the expiry of his lease." This and other decisions as

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the decisions of V. Visvalingam vs. D. De S. Gajaweera 56 NLR 111 and W. M. J. Bandara Vs. J. Piyasena 77 NLR 102, state that the correct protocol is to "give up possession and then litigate about the ownership of his alleged half." (Vide *Alvar*)

However, a principal fact underlying all of the above-mentioned cases cited by the Appellant to establish his point is that, in each instance, there existed a clear, unequivocal agreement, recognisable as valid under law between the landlord and the tenant or licensee. This Court does not find the relationship between the Appellant and Respondent in the instant case to be either unequivocal or so clear.

The Appellant avers that it was on the basis of an agreement marked as P1 (hereinafter referred to as Document P1) that leave and license was granted to the Respondent to possess the premises as a licensee of the Appellant. At the time the initial plaint dated 16.02.1998 was filed in the District Court, the Appellant came to court seeking possession of the Premises, purportedly as the clear owner and title holder of these premises. However, in the replication filed on 24.09.1998, she changed her position claiming instead that she was merely entitled to claim prescriptive rights to the said premises. This is in direct contradiction to the position taken by her in her initial Plaint in which she represents that she was the owner of the premises.

It is significant that it was at or about this time that she claims to have entered into the purported agreement P1 dated 01.09.1996, claiming her rights as the owner of the said premises, though it is clear from the replication that she was indeed not the title holder of the premises. Given the inconsistency regarding Appellant's capacity during the execution of Document P1, it is incumbent upon this Court to determine whether Document P1 can, in fact, be considered to have created a valid and binding agreement under the law and made it possible for the Appellant to avail his rights as a *bona fide* landlord. It is interesting to note that the Appellant did not testify to court, despite the fact that doing so could have provided the best evidence for determining the validity of Document P1.

According to Sri Lankan law several elements must be satisfied to create a valid agreement between two or more parties. The prerequisites of a contract, as enumerated by C.G. Weeramanthy in *The Law of Contracts*, Volume I (at page 84) are:

- a) an agreement between the parties;

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- b) actual or presumed intention of the parties to create a legal obligation;
- c) due observance of prescribed forms or modes of agreement;
- d) legality and possibility of the object of the agreement; and
- e) capacity of the parties to contract.

It is an elementary rule that every contract requires an offer and acceptance. Therefore an offer or promise which is not accepted, is not actionable [vide Justice Weerasooriya in *Muthukuda v. Sumanatwathie*, (1962) 65 NLR 205, 208, 209]. It has been stated that it is an elementary proposition of law that a contract is concluded when in the mind of each contracting party there is a *consensus ad idem*. *Noorbhai v. Karuppan Chetty* (1925) 27 NLR 325 (P.C.) (per Lord Wrenbury). Cumulatively therefore an intention to create a legal relationship and a *consensus ad idem* or meeting of the minds needs to be in existence in order to establish a contract between the parties.

The Respondent denies that she entered into Document P1 or for that matter, any other agreement of leave and license in regard to the premises in dispute, stating that the son of Appellant had taken her signature on a blank paper and then later falsely filled up its content. She further alleges that she was deceived into signing the paper by the son of the Appellant, Mr. Premadasa Perera, being told that one Matilda Gomez had been arrested and that the Respondent's signature was needed for the purpose of releasing Matilda Gomez on bail. The Respondent further testified that she had done this at the time Matilda Gomez was in fact, the owner of the premises and she had given the Respondent leave and licence to occupy the premises initially and had subsequently sold the said premises to the Respondent in terms of a Deed of Transfer numbered 40, dated 1st May 1998 Attested by Mr. Dhananjaya Tilakaratne Notary Public and marked as V1 (hereinafter referred to as the "Deed of Transfer").

It is undisputed that Document P1 was in fact, drafted by Mr. Perera, the son of the Plaintiff, as he corroborated as much in his Testimony (see page 71 of the record). However, in his testimony Mr. Perera made out that Document P1 was drafted pursuant to information given by the Respondent, a fact she denies (see page 91 of the Record), and as mentioned above, alleges that the Appellant took her signature on a blank paper. This court finds this assertion by Mr. Perera to be inconsistent with the substance of Document P1. Mr. Perera claims that he wrote the letter according to the instructions of the Respondent. He gave the reason that

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he did so as the Respondent could not read or write- a fact completely denied by her. Indeed the testimony and allegation by Mr Perera that the Respondent was illiterate was undermined by his own assertion that she had placed her signature and address on Document P1 and this assailed the credibility of Mr. Perera's evidence.

Even if one was for a moment to consider that she was illiterate, as Mr Perera's does not disclose in any part of his oral evidence that he had ever read and explained the contents of such letter to the Respondent the evidence discloses clearly that he in any event never communicated its contents to her.

Apart from the above inconsistencies in Mr. Perera's submissions, his testimony lacks a general creditworthiness when considering the implausibility of his assertions even with respect to circumstances peripheral to the main issue. One can only wonder why Mr. Perera and his mother would, when leaving occupation of the premises in suit leave behind a Gas cooker, a gas cylinder, chairs and several other items which, even if not taken alone, would in the aggregate be considered of significant value. Mr. Perera's submission of this (see Page 60 of the Brief) is put simply, improbable.

The Appellant alleged that the aforementioned Matilda Gomez, the true titleholder to the property, was not in a proper state of mind at the time that she entered into the Deed of Transfer (V1). However, once Matilda Gomez was sworn in and gave evidence in court, the Appellant did not pursue the matter any further and abandoned claims of ownership. In fact, it is to be noted at this juncture that the Appellant did not even testify in this case at all. No valid reason was given as to why she did not testify in Court, a surprising action considering the obvious burden upon her to establish the facts necessary for her position to prevail as well as the fact that she is in the position to best provide such evidence.

The credibility of evidence given in respect of the Appellant in relation to Document P1 is further assailed by Ms. Gomez, who has proved by a deed of gift numbered 7132, dated 26th July 1964 Attested by Mr. Alexander Seneviratne Notary Public and marked as V2 (hereinafter referred to as the "Deed of Gift") as well as the subsequent Deed of Transfer, that she had rights over the premises in suit as its owner in 1995 when she leased it to the Respondents mother. The Deed of Gift gives details of the premises being gifted to Matilda Gomez by her parents, Hettiaratchige Milfred Perera and Pattiyage Joseph Gomez.

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Ms Gomez gave evidence to the District Court asserting that she gave the premises in suit on lease to the Respondent's mother for a monthly sum of Rs.75/- (Vide page 116 of the Record). She also stated that she had thereafter sold the premises to the Respondent for a sum of Rs.100,000/- which was paid in installments. This evidence corroborates the testimony of the Respondent that she entered into a lease agreement with Ms. Gomez on the said premises in suit in 1995 (Vide page 86 of the Record) and had subsequently purchased the same and assails the evidence of Mr. Perera.

When the totality of the evidence is considered, this Court necessarily concludes that the evidence given by the Appellants is inconsistent and lacking in credibility. In light of this conclusion, this Court finds that Document P1 cannot be considered to have created a legally valid leave and license agreement in law between the Appellant and the Respondent.

This Court therefore holds that there was no error in the Judgement of the Civil Appellate High Court of the Western Province Holden in Colombo dated 12th January 2010 and answers all the questions of law set out above in favour of the Respondent.

In these circumstances this Court dismisses this Appeal with a sum of Rs. 5000/- as costs to be paid by the Appellant to the Respondent.

JUDGE OF THE SUPREME COURT

SRIPAVAN.J

I agree.

JUDGE OF THE SUPREME COURT

IMAM.J

I agree.

JUDGE OF THE SUPREME COURT

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