

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

In the matter of an application for
Leave to Appeal under Section 5C
Of the High Court of the Provinces
(Special Provisions) Amended by Act
N0.54 of 2006.

SC APPEAL No:-56/2015

SC (HC) CALA No:- 326/2012

WP/HCCA/MT 103/2008(F)

D.C.Mt.Lavinia 2068//05/L

BEFORE:- PRIYASATH DEP,PC,CJ.

SISIRA J. DE ABREW, J.

H.N.J.PERERA, J.

COUNSEL:- Manohara de Silva, PC with Boopathy Kahathuduwa

For the Plaintiff-Appellant-Appellants

M.R.M.Fazeem instructed by K.Farook for the Defendant-

Respondent-Respondent

ARGUED ON:- 15.01.2018

DECIDED ON:- 22.03.2018

H.N.J.PERERA, J.

The Plaintiff-Appellant-Appellants (here-in-after referred to as Plaintiffs) instituted this action against the Defendant-Respondent-Respondent (here-in-after referred to as Defendant) in the District Court of Mt.Lavinia seeking inter alia for a declaration that the Plaintiffs are the lawful owners of the property described in the 2nd schedule to the plaint, to eject the Defendant and all those persons holding under her from the said premises and also to recover damages.

It was the position of the Plaintiffs that the said premises in suit was originally rented out by one S.M.Sisilin Gunawardene in 1978 to A.C.M.Hussain, who lived with his family including the Defendant. Further the Plaintiffs claim that the said Hussain defaulted the payment of monthly rent to Sisilin Gunawardene and the said Sisilin Gunawardene consequently by quit Notice dated 25.07.2003 terminated the said tenancy but the said Hussain continued to be in occupation and thereafter the Plaintiffs on 21.02.2005 sent another Quit Notice and demanded the said Hussain to vacate the said premises in question on or before 31st May 2005 and to hand over vacant possession of the same to the Plaintiffs. It was the position of the Plaintiffs that this was not a tenancy action at all, but a rei vindication action based on the ground that the Defendant was a trespasser for the reason that there was no tenancy agreement with the Defendant at all.

The Defendant's position was that the original tenant Hussain who was her father died on 07.03.2005 and on the death of her father she became the statutory tenant of the premises thereafter. It was the position of the Defendant that on her father's death as the lawful heir of her father she requested the 1st Plaintiff to accept her as their tenant and sent a money order for Rs 200/- being the rent for the month of April 2005. The Defendant further claimed that the Plaintiffs in response to the said

request failed to attorn the Defendant as their tenant and even denied the fact that the Hussain (original tenant) was their tenant by letter dated 16.05.2005. After trial the learned trial Judge delivered his judgment on 29.08.2008 dismissing the plaintiffs' action with cost and held that the Defendant has succeeded as statutory tenant in relation to the premises in question. The finding of the trial Judge was that the above action cannot be for a Declaration of title as the original defendant (Hussain) had come to the premises as a tenant and after the death of the original tenant the Defendant became the statutory tenant of the Plaintiffs.

Being aggrieved by the said judgment of the learned trial Judge the Plaintiffs appealed to the Civil Appellate High Court of Mt.Lavinia and the said Court too dismissed the appeal of the Plaintiffs holding that the Learned trial Judge has arrived at a correct conclusion that the proper cause of action for the plaintiffs would have been an action in terms of the Rent Act. Being aggrieved by the said judgment of the Civil Appellate High Court of Mt.Lavinia the Plaintiffs has sought Leave to Appeal from the said judgment and this Court granted leave to appeal on the questions of law set out in paragraph 12 (b), (c), (d), (e), (f),(g), (h), (i), and (j) of the Petition dated 09.08.2012.

12(b) the learned judges of the High Court erred in holding that the Plaintiff cannot maintain this action for a declaration of title and that the action should have been filed under the Rent Act.

12(c) the learned judges of the High Court and the District Court erred by holding that the Defendant has succeeded to the tenancy of A.C.M.Hussain in terms of the provision of Section 36 (2) of the Rent Act as amended and in the circumstances the Plaintiffs ought to have taken steps under the Rent Act to eject the Defendant.

12(d) the learned judges of the High Court failed to appreciate and/or consider the fact that the deceased A.C.M.Hussain and/or all those claiming under him including the Defendant had completely acted contrary to and/or in violation of the contract of tenancy by failing and/or neglecting to pay monthly rent from on or about January 2000 and by denying the Plaintiffs title.

12(e) the learned judges of the High Court failed to appreciate and/or consider the fact that the contract of tenancy between Sisilin Gunawardene and A.C.M.Hussain had terminated by A.C.M.Hussain's conduct upon failing and/or neglecting to pay monthly rent and thereby fulfil his obligations as tenant,

12(f) the learned judges of the High Court failed to appreciate and/or consider the fact that the deceased A.C.M.Hussain and/or all those claiming under him including the Defendant are estopped from claiming tenancy when they disputed and/or denied the title of the Plaintiffs,

12(g) the learned judges of the High Court erred by mistakenly holding that the A.C.M.Hussain was the original Defendant and the present Defendant is the substituted Defendant. No action was filed against A.C.M.Hussain. Action was filed only against A.C.M.Hussain's daughter who was in unlawful occupation of the premises in suit.

12(h) the learned judges of the High Court erred in law and in fact by holding that the Defendant is a lawful tenant of the premises in suit,

12(i) the learned judges of the High Court erred in law and in fact by holding that the Defendant is a lawful tenant of the premises in suit when (a) the Defendant's father failed and/or neglected to pay monthly rent and breached and/or terminated the contract of tenancy and (b) the Defendant denies the title of the Plaintiffs,

12(j) the learned judges of the High Court erred in failing to consider that the answer to issue No.28 was wrong in as much as the Defendant denied the Plaintiffs title in paragraph 04 of the answer and thereby failed to appreciate that the Plaintiffs were entitled to judgment in their favour.

Although the general rule is that a contract cannot bind a person who is not a party to it, a person may by contract not only bind himself but may bind his heirs, executors and administrators. (Kuruneru V.Alim Hadjar 61 N.L.R 277.)

Basnayake, C.J. in Abdul Hafeel V.Muttu Bathool (1957(58 N.L.R. 409 set out the principle in the words of Van Leeuwen:-

(Van Leeuwen in Censura forensic, Pt.1BK.IV ch.111s.3-Barber's translation, P 12)

"We covenant for ourselves and for our heirs; not for others, unless either it is to the interest of the covenantor; or it is a contract with regard to restoring to a third party his rightful property, or with regard to giving up his own property to another; or unless the covenantor in under the *patria potestas* of the man for whom he covenants."

Even where there is no express stipulation in a contract of letting and hiring-

" At the death of either of the parties the contract of letting or hiring is not terminated, but passes to the heirs both of the lessor and the lessee until the time fixed arrives and this is so everywhere."

Thus it is very clear that **generally the death** of the **landlord** or the **tenant** does not terminate a contract of monthly tenancy.

It is common ground that the occupation of the premises in suit in this case commenced and continued as a monthly tenancy. It is not disputed

that the Defendant's father Hussain was the original tenant of one Sicilin Gunawardena. The said Hussain died on 2005. It is the position of the Defendant that her father continued to be the tenant of the said Sisilin Gunawardene until the time of his death. The plaintiffs had taken up the position that although the said Hussain was sicilin Gunawardena's tenant, he failed to pay rent and Sisilin Gunawardene thereafter terminated the said lease prior to the death of Hussain in the year 2003. The Defendant denies the fact that her father failed to pay the rent to Sisilin Gunawardena or that the said agreement was terminated before her father's (Hussain's) death.

In this case the original tenant Hussain died on 07.03.2005. The plaintiffs in their plaint took up the position that at the time of the death of the said Hussain he was not in occupation of the said premises in suit as a lawful tenant of Sisilin Gunawardene and therefore contended that the Defendant has no legal basis to be in occupation of the premises in suit.

It is not in dispute that Sisilin Gunawardene was the original landlord of the said premises in suit. It is the plaintiffs position that thereafter heirs of Violet Perera Chandrasiri Thero, K.Sunil Perera and K. Anura perera became the owners of the said premises and from them by deed of Gift bearing No 98 dated 10.05.2003 the Plaintiffs became the owners of the said premises. The plaintiffs admit the fact that said Hussain came to occupy the said premises in the suit as a tenant of Sisilin Gunawardene. Therefore it is manifestly clear that the Plaintiffs as new owners of the said premises had issued a Quit Notice on 21.02.2005 before the death of Hussain in March 2005. By the said quit notice the plaintiffs given time till the 31.05.2005 for Hussain to vacate and handover the vacant possession to the plaintiffs. Before the expiry of the said period of time Hussain had died. The present Defendant the daughter of Hussain had thereafter requested the Plaintiffs to accept her as their new tenant.

It is quite clear the plaintiffs had refused to accept the Defendant as their tenant. The plaintiffs had very clearly by the letter dated 16.05.2005 through their lawyer informed the Defendant that they do not accept the Defendant as their tenant and had returned the said money orders sent by the defendant to them, back to the defendant by registered post.

It is common ground that the occupation of the premises in suit in this case commenced and continued by the original tenant Hussain, as a monthly tenant. Therefore under the Roman Dutch law the general rule was that death of either party does not automatically terminate the lease.

But in *Sellamuttu V. Medonza* 1986 C.A.L.R.318 it was held that:-

“Where a tenancy is created by a person who has a **limited right or interest less than ownership** in the property, it will be effective for the period of his own contract but not beyond it.

Where a tenancy is created by a person who had **absolute title** to the property subsequent successors in title are bound by the tenancy.”

“The absolute owner of property has obviously sufficient title to grant a lease of such property for any period.A person who has a real right in property less than ownership, that is, a *jus in re aliena*, but which comprises the use and occupation of the property, has, as a rule, sufficient title to grant a lease of the property which will be effective for the period of his own right but not beyond it. (George Wille, *Landlord and Tenant*, 4th ed. Pages.15, 17,18)

In *Somaskandan Shivaraman Sellamuttu and another V. Titus Medonza* C.A.L.R. , G.P.S.De Silva, J. re-affirmed this position by stating:-

“Where a tenancy is created by a person who has a **limited right or interest less than ownership**, in the property, it will be effective for the period of his own right but not beyond it.

Where a tenancy is created by a person who had absolute title to the property subsequent successors in title are bound by the tenancy.”

Further in *Imbuldeniya V. D. De Silva* [1987] 1 Sri.L.R. 367, it was held that:-

“A contract of letting is a contract whereby one party agrees to give another the use of a thing and the other party agrees to pay him a price (rent) in return. In order to grant a valid and effective tenancy a landlord must have sufficient legal title in the property to give to the tenant the right agreed upon. A person without any title to a particular piece of property may grant a tenancy thereof to another person. Such a tenancy is valid between the landlord and tenant but is not binding on the true owner.

Where the father of the plaintiff let out the premises to the defendant for his own benefit at a time when the plaintiff was not aware she was the owner and without her authority and not as her agent and the plaintiff neither acquiesced in nor adopted the letting, the defendant cannot claim the protection of S.22 (2) of the rent Act against the plaintiff.

It would be quite wrong to include within the definition of “landlord” any person **other than original lessor or someone who derives the title from the original lessor**. The term “landlord” is defined as the person for the time being entitled to receive the rent under the contract of tenancy. (Section 48 of the Rent Act) Such person need not necessarily be the true owner.”

In *Mohamed V. Public Trustee* (1978-79) 1 Sri.L.R.at pg 4- Samarakoon, C.J., expounded the principle thus:-

“Under the Roman Dutch Law the general rule was that death of either party does not automatically terminate the lease. If the tenant or lessor

dies during the continuance of the lease, his heirs must carry out the contract. Except in the case of encumbered or other property, which the lessor does not possess in full ownership in which event the lease expires with the death of the lessor for when the right of the lessor comes to an end, the right of the lessee is also terminated since no one can transfer a greater right to another than he himself possess.”

From the averments in the plaint it is clear that the said **Sisilin Gunawardene** who was the landlord of Hussain was **not the owner** of the said premises in suit. She has been the wife of one of the co-owners of this premises one Edmond Perera and had looked after the children of deceased Violet Perera and had merely looked after children and managed the affairs of the family. Therefore Sisilin Gunawardene who managed the affairs of the said children of deceased Violet Perera had rented out the said premises to Hussain the father of the Defendant who continued to occupy the said premises until his death. Before the death of the said Hussain, Sisilin Gunawardene in the year 2003 **terminated** the said contract by the Quit Notice dated 25.07.1003. It is the position of the Plaintiffs that the said Hussain failed to pay the rent from the year 2000 and the said letter was sent in 2003 by Sisilin Gunawardene terminating the said contract of tenancy.

The plaintiffs’ position is that the said Sisilin Gunawardene has terminated the said contract of tenancy on 25.07.2003 and Hussain remained in occupation of the said premises as a **trespasser**. In the said Quit Notice marked P9 it is clearly stated that Hussain has failed to pay the rent for a number of years and that therefore he has no right to stay in the said premises and therefore to hand over the said premises to the new owners of the said premises, the Plaintiffs in this case. Although the Defendant has stated that her father paid rent regularly to Sisilin Gunawardene, no receipts were marked and tendered or any other document produced by the Defendant to show that her father had in fact

made any payments as rent to the Landlord Sisilin Gunawardene. In *Jayawardena V. Wanigasekera and others* [1985] 1 Sri.L.R 125 it was held that the best test for establishing a tenancy is proof of the payment of rent. The best evidence of the payment of rent is the rent receipts.

At the time of the death of Hussain the Plaintiffs were the owners of the said premises and they have by the Quit Notice marked P 10 on 21.02.2005 given notice to Hussain to vacate the said premises before 31st May 2005. The tenant Hussain has died on 21.05.1005 few days prior to 31.05.2005.

Sisilin Gunawarene the landlord was not the owner of the said premises at the time she leased out the said premises to Hussain. Therefore it is very clear that the new owners, the **plaintiffs** were **not her heirs** who derive title to the said premises. Hussain had continued to occupy the said premises even after Sisilin Gunawardene had terminated the contract by the Quit Notice marked P9. There is nothing to show that Hussain had at any stage prior to his death has **requested the Plaintiffs to treat him** as their **tenant**. In the said Quit Notice marked P9 Hussain was not requested to pay the rent to the new owners but to quit the premises and hand over the said premises to the new owners. Hussain had merely continued to occupy the said premises until his death **without paying rent** to anyone.

According to Pothier's Treatise on the Contract of Letting and Hiring:-

"A lease is not dissolved by the death of one of the parties: but, in accordance with a rule common to all contracts, the rights and obligations arising from the lease pass to the person of his heirs, or to that of his Vacua Successio."

He gives two exceptions to this general rule, which is accepted by the writers on Roman Dutch Law, that:-

(1)Where the lessor's title was one for his life only, such as fiduciary interest or life interest , the death of lessor terminates the lease, and

(2)Where the lease is at the will of the lessor, or lessee, death of the lessor or lessee, as the case may be, terminates the lease. See Fernando V. De Silva (1966) 69 N.L.R 164-at pg 165)

The rule is subjected to the second exception, namely, in cases where the lease has not been made for a definite period, but for as long as the lessor may please. Such a lease is terminated by the lessor's death: For the same reason, where the lease was for as long as the lessee pleased, it ought to be said that it would be terminated by the death of the lessee.

In this case the said lease had been made for an indefinite period and the said lease was terminated by the original landlord Sisilin Gunawardene in the year 2003. By the said Quit Notice marked P9 Hussain was asked to hand over the premises to the new owners, the Plaintiffs. There is no evidence to show that Hussain had ever requested the Plaintiffs to accept him as their tenant. The evidence led in this case clearly establish that Hussain had simply continued to occupy the said premises without paying rent to anyone. He has died after receiving the Quit Notice marked P10 sent by the Plaintiffs in the year 2005. The contract between the landlord Sisilin Gunawardene and Hussain had come to an end after P9 in the year 2003. **Even if** one holds that the said lease agreement has not come to an end after the Quit Notice marked P9, as this is a contract between the Landlord Sisilin Gunawardene and the tenant Hussain for an indefinite period, the said lease will automatically expire after the death of Hussain in the year 2005. In the instant case there was no rights or obligations arising from the lease to pass to the heirs of Hussain (tenant).

In Imbuldeniya V. De Silva [1987] 1 Sri.L.R. 367, it was held that it is well settled law that a person may let to another, property without having

any right or title in it, and without any authority from the true owner. Such a letting is valid as between the landlord and the tenant. However the owner of the property is not bound by the letting of such property which is made without his authority or consent or subsequent ratification.

Wessels , J ., in Glatthaar V Hussan (1912 T.P.D.127) said-

“It is true that I may lease to you another’s land and if I do so you cannot question my title nor can I deny to you the right to holding the land against me., but this in no way prejudices the right of the true owner.”

The true owner is entitled to have the letting declared null and void and to an order evicting the person in occupation who claims to be the tenant. But, between the parties to the letting, the lease is binding, and they acquire the rights and become subject to obligations of landlord and tenant respectively.

According to common law as enunciated above, the tenancy which Sisilin Gunawardene granted to the defendant’s father Hussain will not bind the plaintiffs the true owners of the premises; the plaintiffs would be entitled to an order evicting the defendant who is a trespasser as against them.

One cannot say that there was privity of contract between Hussain and the Plaintiffs in this case. There is nothing to indicate that the Plaintiffs had ever indicated their willingness to elect Hussain as their tenant. In these circumstances, no question arose: the tenant’ occupation of the premises, after Quit Notice P9, was not as tenant under the new owners (Plaintiffs) but as a trespasser. No rent has been accepted by the Plaintiffs from Hussain at any time and they have all along refused to recognize Hussain as their tenant. The Defendant in her answer denying the title of the Plaintiffs stated that A.C.M.Hussain is her father and he

was in occupation of premises in suit bearing No.5 and he died on 7th March, 2005 and claimed succession to the tenancy under the provisions of Rent Act No.7 of 1972.

“There is no indication in the Rent Act that the legislature intended to overthrow fundamental principles of the common law.”

“In my opinion the provisions of the Rent Act apply only to those who are parties to the contract of tenancy and to those who derive title from them respectively” Sharvananda, C.J. –Imbuldeniya V. De Silva-[1987] 1 Sri.L.R 367 at page 373.

In Abdul Hafeel V. Muttu Bathool (1957) 58 N.L.R 409 Basnayake C.J. held that, on the death of a monthly tenant, the contract of tenancy terminates at the end of the month in which the tenant dies, and that the heirs or executors of the deceased tenant are not entitled to occupy the premises thereafter except on a fresh contract with the landlord or unless they can avail themselves of the provisions contained, respectively, in section 18 of the Rent Act and section 36 of the Rent Act.

In the present case there was no admission recorded by parties at the commencement of the case that the said premises is governed by the provisions of the Rent Act of 1972. The Defendant in paragraph 5 of her answer has taken up the position that the provisions of the Rent Act applies for the said premises and accordingly had raised an issue No.16 regarding the same at the trial.

The Defendant in this case seeks the protection of the Rent Act and if a person seeks the protection of the Rent Act, the burden is on that party to prove the necessary ingredients as prescribed by the said Act. When there is no admission by the parties to the case that the provisions of the Rent Act applies to the said premises, it is incumbent on the Defendant to lead evidence and prove that the said premises is situated in an area

where the provisions of the Rent Act applies. The Defendant has not even stated in evidence that he was a tenant protected under the Rent Act. The Plaintiff has not instituted the action on the basis that the Rent Act applies to the said premises. The plaintiffs have filed action on the basis that they are the owners of the said premises and that the Defendant is in unlawful occupation of the same as a trespasser.

On perusal of the evidence that had been led in this case it is seen that no questions has been put to the Plaintiffs by the Defendant's Counsel on that basis. The Defendant has in her evidence stated that she continued to reside at the said premises after her father's death and that the said premises are situated in Mt.Lavinia. The judgment dated 2008.08.29, when perused clearly shows that the learned District Judge has failed to analyze and consider the oral and documentary evidence in the correct perspective before he dismissed the plaintiff's case. The learned District Judge was in grave error in coming to a finding that the Defendant comes within the definition of a statutory tenant under the Rent Act and therefore the plaintiffs had no right as owners to institute the present action on the basis that they are the owners and for the eviction of the Defendant who is a trespasser from the said premises. I am in entire agreement with the submissions of Learned Presidents Counsel for the Plaintiff-Appellants. I am of the opinion, in the circumstances, the Defendant's claim to protection under the Rent Act has no merit and must fail.

In my view the learned Judges of the Civil Appellate High Court had misdirected themselves in holding that the parties are governed by the provisions of the Rent Act. The inferences drawn by the Civil Appellate High Court are not supported by evidence.

Therefore I answer all the questions of law raised in this case in the affirmative in favour of the Plaintiffs-Appellants. Accordingly I set aside

the judgment of the Civil Appellate High Court dated 28.06.2012, and the judgment of the District Court of Mt.Lavinia dated 29.08.2008 in this case. Judgment is entered in favour of the Plaintiff-Appellants for the ejectment of the Defendant-Respondent from the premises, and for the recovery of damages as prayed for in the plaint. I allow the appeal of the Plaintiff-Appellants. The Plaintiff-Appellants will be entitled to costs in this Court and in the Civil Appellate High Court and the District Court.

JUDGE OF THE SUPREME COURT

PRIYASATH DEP, PC CJ.

I agree.

CHIEF JUSTICE

SISIRA DE ABREW, J.

I agree.

JUDGE OF THE SUPREME COURT