IN THE SUPEME COURT OF

THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Nihal Ranjith Weerawarna
No.91,
Wijaya Road,
Madaketiya,
Tangalla
Defendant-Appellant-Appellant

S.C.Appeal No.94/2013
C.A. No.263/97(F)
D.C. Tangalla Case No. 2468/L

Vs.

Herbert Walter Techope
No.91,
Wijaya Road,
Madaketiya,
Tangalla

Plaintiff-Respondent-Respondent

BEFORE : **S. E. WANASUNDERA, PC J.**
K.T.CHITRASIRI, J.
PRASANNA S. JAYAWARDENA, PC J.

COUNSEL : J.P.Gamage for the Appellant-Appellant-Appellant
Razik Zarook PC with Rohana Deshapriya for the Respondent-Respondent-Respondent

ARGUED ON : 30.11.2016

WRITTEN SUBMISSIONS ON : 14.12.2016 by the Appellant-Appellant-Appellant
28.01.2014 by the Respondent-Respondent-Respondent

DECIDEDON : 05.04.2017

CHITRASIRI, J.

Plaintiff-respondent-respondent (hereinafter referred to as the respondent) filed this action relying upon the lease agreement bearing No.386 attested by Siri A. Andrahannadi, Notary Public. Parties to the said lease agreement were the respondent and the defendant-appellant-appellant (hereinafter referred to as the appellant). Upon a perusal of the averments and the manner in which those averments are pleaded in the plaint, show that the respondent, he being a foreign national had been keen to have a house in Sri Lanka for him to live whenever he comes to this country. The way in which moneys were spent by the respondent for this purpose also is explained in detail in the plaint. Those matters are found not only in the averments in the plaint but in the evidence as well. The evidence also shows the manner in which the respondent came into occupation of the premises having spent a substantial amount of money.

The appellant in his answer has stated that he had no intention to have the said premises leased out to the respondent. He also has stated that the respondent did not pay him the full consideration referred to in the lease agreement marked P1. In the answer, the appellant has also pleaded that the aforesaid lease agreement P1 has no validity before the law. He has also taken up the position that the cause of action pleaded by the respondent has prescribed.

Relying upon the pleadings referred to above the parties framed their issues before the learned District Judge. Thereafter, the case proceeded to trial and the learned District Judge decided the case in favour of the respondent. Being aggrieved by the aforesaid findings of the learned District Judge, appellant filed an appeal in the Court of Appeal. Court of Appeal dismissed the appeal of the appellant. Thereafter, the appellant came to this Court seeking to have both the judgments of the District Court as well as the Court of Appeal set aside.

When this matter came up before this Court on the 15th July 2013, it granted leave, on the question of law set out in paragraph 9(b) of the petition of appeal. The said question of law reads as follows:-

"*Did the Court of Appeal err in law in deciding that the cause of action had not been prescribed?"*

Therefore, the only issue that is to be determined in this appeal is to ascertain whether or not the cause of action of the respondent is prescribed. According to the learned Counsel for the appellant, the aforesaid question of law is based on Section (4) of the Prescription Ordinance. It reads as follows:-

"It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of Law, to institute proceeding against the person dispossessing him at any time within one year of such dispossession. And on proof of such dispossession within one year before action brought, the Respondent in such action shall be entitled to a decree against the appellant for the restoration of such possession without proof of title."

The aforesaid provision of the law applies when a person is dispossessed from any immovable property. Next question then to be answered is whether that person who was dispossessed, came to court for relief within one year from the date of dispossession. Contention of the appellant is that the respondent has failed to file action within a period of one year from the date that he was dispossessed as required by Section 4 of the Prescription Ordinance.

In support of that, the appellant has relied on paragraph (16) of the plaint in which the respondent has averred that the appellant did not allow him to enter the premises on 19th January 1992. The appellant has also stated that the evidence of the respondent was that he was prevented entering the premises in dispute when he returned from Nurwara Eliya on the 19th January 1992. (vide at page 116 in the brief) Accordingly, the appellant has argued that the respondent when seeking relief under Section 4 of the Prescription

Ordinance, he should have filed the action on or before the 19th January 1993. Admittedly, the date of filing of this action is 28.06.1993. Hence, on the face of it, it is clear that the date of filing the plaint in this case is beyond the period of one year when counted from the date of dispossession namely 19.01.1992.

However, it is important to note that the appellant has failed to refer to the aforesaid Section 4 of the Prescription Ordinance upon which the argument was advanced in this Court, when his Counsel made submissions at the conclusion of the trial in the District Court. His submission to the learned trial Judge was on the basis of Section 6 of the said Ordinance and not on Section 4 therein. It was the position taken up by the appellant, right throughout the trial. The law referred to in Section 4 of the Prescription Ordinance was never brought to the notice of the trial judge. Indeed, the appellant's reliance on Section 6 of the Prescription Ordinance had been based on the lease agreement put in suit by the respondent. Accordingly, the appellant himself has taken up the position that it is the date of execution of the lease agreement that should be taken into consideration when determining the issue of prescription. [vide at page 273 in the appeal brief] Therefore, it is clear that the position taken up by the appellant as to the applicability of Section (4) of the Prescription Ordinance has never been an issue in the trial Court. In the circumstances, this Court cannot find fault with the decision of the learned District Judge on the question of prescription.

Be that as it may, I shall now consider whether the appellant has established whether the issue before this Court falls within the ambit of Section (4) of the Prescription Ordinance. As mentioned hereinbefore, the plaint of the respondent is basically on the strength of the lease agreement marked P1. In fact, it is the position taken up by the appellant too in the trial court. Such a position is evident by looking at all the issues framed by the appellant. Accordingly, it is seen that the respondent has presented his case to meet such a defence and not on the basis of Section 4 of the Prescription Ordinance. Therefore, merely because the reliefs sought in the plaint are to restore him in possession, it cannot change the character and the scope of the plaint particularly when arguing an appeal.

In this instance, it is also necessary to look at the background that prevailed when executing the lease agreement between the respondent and the appellant. Respondent being a foreign national has spent a huge sum of money to have his home in Sri Lanka. In order to achieve his desire, he has sought the help of the appellant. It may be due to the impediments in the law that was prevalent in Sri Lanka at the time the lease agreement P1 was executed, as far as the foreign nationals are concerned. Learned District Judge having considered the evidence carefully has held that the respondent is entitled to regain possession of the premises in dispute having interpreted the terms and conditions of the lease agreement marked P1.

In this connection, I would like to quote one passage from the judgment of the learned Judge in the Court of Appeal to see how he has looked at the issue. In that judgment, Anil Gooneratne J. has stated thus:

> *"if one considers document P-1 and the evidence suggested by Appellant-Appellant to invalidate the lease document, I find that the Appellant had not been able to substantiate any of those matters. P-1 and its conditions in no way prejudice or result in a failure of justice to either party. If at all the wrongdoer is the Appellant who prevented access to the Respondent Respondent, to the premises in question."*

Learned Counsel for the appellant has referred to two cases namely, **Fernando vs. Fernando 13 NLR 164** and **Silva vs. Appuhamy 15 NLR 297** in support of his contention. In the case of Fernando vs. Fernando the lease agreement relied upon by the plaintiff were defective and also contained infirmities. That was the reason assigned by Court when disregarding the lease agreement. However, the court in that case found that there were material to consider it as a possessory action in order to grant relief to the person who was dispossessed. In the case of Silva vs. Appuhamy (Supra) the lessee has subsequently become a co-owner having purchased part of the land in dispute in that case. Therefore, the two decisions relied upon by the learned Counsel for the appellant cannot be applied to this case since the facts involved in those cases are different to the facts in the case in hand.

As I have mentioned earlier, the manner in which the averments in the plaint been set out show that the respondent is basically relying upon the terms and conditions of the lease agreement marked P1. Therefore, I am unable to agree with the contention of the learned Counsel for the appellant that the plaint of the respondent should be considered as a possessory action that comes under Section 4 of the Prescription Ordinance.

In these circumstances, it is clear that the facts and circumstances of this case and the manner in which the case was conducted and proceeded in the trial court do not fall within the ambit of Section (4) of the Prescription Ordinance. Accordingly, it is my opinion that the law referred to in that Section 4 shall not apply to the case in hand. Therefore, the question of law raised in this appeal is decided in favour of the plaintiff-respondent-respondent. For the reasons set out above, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

I agree

S. EVA WANASUNDERA, PC J.

I agree

PRASANNA S. JAYAWARDENA, PC J.