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

S.C. Appeal No. 48/2010

K.G. Somapala alias R.U. Somapala
Keselgollegoda
Ginihampitiya
Hemmathagama.

PLAINTIFF

Vs.

W. A. Sumanasiri
Udawatta,
Samapura,
Hemmathagma.

DEFENDANT

AND BETWEEN

W. A. Sumanasiri
Udawatta,
Samapura,
Hemmathagma.

DEFENDANT-APPELLANT

Vs.

K.G. Somapala alias R.U. Somapala
Keselgollegoda
Ginihampitiya
Hemmathagama.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

W. A. Sumanasiri
Udawatta,
Samapura,
Hemmathagma.

DEFENDANT-APPELLANT-PETITIONER

Vs.

K.G. Somapala alias R.U. Somapala
Keselgollegoda
Ginihampitiya
Hemmathagama.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: Priyasath Dep P.C., J.
Rohini Marasinghe J. &
Anil Gooneratne J.

COUNSEL: Manohara de Silva P.C. with Hirosha Munasinghe
For the Defendant-Appellant-Petitioner

Maura Gunawansa for the Plaintiff-Respondent-Respondent

ARGUED ON: 20.05.2015

DECIDED ON: 13.11.2015

GOONERATNE J.

This was an action filed in the District Court of Mawanella for a declaration that the Defendant to the original action has violated the conditions of the lease agreements bearing Nos. 2597/2705 and accordingly the agreements terminated. The prayer to the plaint inter alia seeks a declaration of title to ½ share of the property described in the schedule to the plaint and for eviction of Defendant and damages as prayed for in the said prayer to the plaint. To state very briefly, the position of each party revolves on the construction of shop premises in the land in dispute which is admittedly owned by the Plaintiff-Respondent-Respondent. In the area specified in the plan P1, the Plaintiff takes up the position that by lease P2 (2597) Defendant had to construct a shop which

constructions starts below the described road level and have a concrete slab built as the roof to enable the Plaintiff to sell betal on it. Lease P2 was operative during 01.04.1998 to 30.03.2014.

The 2nd lease (P3) as stated by the Plaintiff was to operate during the period 01.04.2014 to 30.09.2031, and another shop had to be constructed during the said period on the concrete slab. This would mean construction of two shop premises, on the land in dispute. This position was vehemently denied by Defendant-Appellant-Petitioner, who argued that construction was only for one (1) shop premises and maintained that the lease agreements were in respect of land and not shop premises. Further learned counsel for the Defendant-Petitioner-Appellant argued that subject matter of the two lease agreements are land, in extent of about 10 perches and entirety of land as per the two lease agreements would entitle him for continued possession during the duration of the lease bonds up to the year 2031. Defendant-Appellant-Petitioner also state that he has incurred certain expenses in the construction of the shop premises and plead the sums due by way of a claim in reconvention in para 12 to 15 of his answer.

Parties proceeded to trial in the original court on 27 issues, plaintiff having raised issue Nos. 1 – 17 and the Defendant-Appellant-Petitioner relied on issues 18 to 27. The learned trial Judge has answered Plaintiff's issues in the affirmative in favour of the Plaintiff, except issue No. 2 and had entered judgment in favour of Plaintiff-Respondent-Respondent. All Defendant's issues are answered in the negative as not proved except issue No. 24. The judgment of the learned District Judge was affirmed by the High Court by its judgment dated 09.11.2009. Learned District Judge in a very exhaustive judgment held in favour of the Plaintiff-Respondent-Respondent having considered very many factual positions, relevant to the case in hand.

On appeal the High Court affirmed the judgment of the learned District Judge. This court on 01.06.2010 granted Leave to Appeal on all questions of law set out in paras 11(a) – (i) in the petition dated 18.12.2009. The said questions reads thus:

(a) The said judgment is contrary to law and against the weight of evidence;

(b) The learned Judges of the High Court erred in holding that lease marked P3 was in respect of the construction of a separate boutique room;

(c) The learned Judges of the High Court erred in holding that the Defendant violated the terms of lease marked P2;

(d) The learned Judges of the High Court failed to consider that the leases marked P2 and P3 were in respect of the same land for two different periods of time;

(e) The learned Judges of the High Court failed to consider Clause 2 of leases marked P2 and P3 which specifies that the subject matter of the said leases is the land in extent of 10 perches described therein and not a shop premises.

(f) The learned Judges of the High Court failed to consider that by documents marked P2 and P3, the Plaintiff has leased the land in suit to the Defendant for a total period of 30 years and that in the circumstances, the Judgment of the District Judge preventing the Defendant from entering the second boutique room is wrongful.

(g) The learned Judges of the High Court failed to consider that the Plaintiff has acquiesced in the construction of the shop at the upper level of the main road;

(h) The learned Judges of the High Court erred in holding that the parties agreed to construct two boutique rooms;

(i) The learned Judges of the High Court failed to properly evaluate the evidence.

The judgment of the High Court focus on three main points i.e (a) whether parties agreed to construct (2) boutique rooms (b) whether the 2nd lease bond is a separate agreement to construct the 2nd boutique room and (c) whether the 2nd lease bond was signed to secure a further sum of Rs. 1,75,000/- to

construct the original building. Our attention has been drawn by both parties to certain items of evidence which they claim to support each other's case.

On a plain reading of lease bonds P2 & P3, (though not so legible and unclear copies are included in the brief) the P3 lease agreement does not in any way refer to P2 or does not in its simple terms give any indication that it is an extension or was entered as an ancillary agreement to P2 lease agreement. What is noteworthy of both contracts as highlighted by both original courts is that the two agreements refer to separate and distinct periods for due compliance of the agreements. P2 operates during 1st April 1998 to 30th March 2014. The second lease agreement (P3) was to operate during 01.04.2014 to 30.09.2031. Clause (5) of P2 specifically state a construction of a boutique room. In the lease bond P3 which is due to operate as from 01.04.2014 to 30.09.2031, it's clause (5) refer to a construction of a boutique room. Each lease agreement operates for over 15 years. If one were to bring both lease periods consecutively it's a long lease period of over 30 years, provided its terms and conditions are fulfilled. Within a period of 30 years it is hardly unimaginable to arrive at a conclusion that it was only to construct one boutique room, which was provided by the lease agreements. The evidence led at the trial and on such evidence what is suggested/analysed by both Judges of the District Court and the High Court as

regards the construction of two boutique rooms cannot in any way offend the rule contained in Section 92 of the Evidence Ordinance, but such evidence assist both courts to explain and demonstrate the necessity to have two boutique rooms within the available space, as contemplated by the lease agreements.

The law is very firmly built as in the Evidence Ordinance, and Section 91 of the Evidence Ordinance prohibits extrinsic evidence and makes it inadmissible to supersede the agreement in its documentary form. Usually oral evidence cannot be led as a substitute for the document (agreement). Mohamadu Bhai Vs. James (1919) 21 NLR 234; Pathbeniya Vs. Kachohamy 24 NLR 487; 22 NLR 343; 74 NLR 142; (1986) (1) SLR 390. The other cardinal rule in this regard is contained in Section 92 of the Evidence Ordinance but its provisos tends to relax the above position. Proviso (2) enables the existence of any separate oral agreement as to any matter on which the agreement is silent, and not inconsistent with its terms may be proved. Court can in such a situation have regard to the degree of formality of the document itself. 58 NLR 457 at 461; 18 NLR 264; 22 NLR 54. The oral evidence led in the case in hand would not offend basic rules as stated above. It is also relevant to bear in mind that parties generally express themselves in regard to the main outlines of their agreement and leave unexpressed terms upon which they have in fact agreed or deemed to

have agreed. Thus some terms which they had no intention to exclude had they given their mind to same. In these circumstance oral evidence could be led.

The position of a lessee does not differ from that of persons who are entitled to real rights. The title of a lessee is a defaceable one, and is dependent on the observance of the conditions an covenants incorporated in the lease agreement. Owner of a land naturally will impose certain duties on the lessee by the conditions and terms of the lease agreement. Failure to fulfill the terms and conditions of the lease agreement will result in a breach of agreement, the lessor would be entitled to determine and terminate the lease agreement. It is clear that clause 5 referred to above in P2 & P3 contemplates of two boutique rooms. Issue No. 6 specifically state and refer to the boutique rooms and its roof would be a concrete slabs. Appellant has <u>also admitted this fact</u> in evidence, as regards the concrete slab. I am not in a position to fault the views of the learned District Judge and the High Court Judge on an important item of evidence that transpired at the trial that the 2nd boutique room was to be built on the concrete slab. Trial Judge's explanation that it was the reason to have a flight of steps is plausible. Evidence led on this aspect is a question of fact and this court will not unnecessarily interfere on questions of fact. Further I find that issue No. 7 has

been answered by the learned District Judge in the affirmative in favour of Plaintiff-Respondent-Respondent. The said issue relates to construction of another boutique room on the concrete slab.

The Appellant in his evidence state that he had incurred a sum of Rs. 4,51,400/-. This amount exceed the stipulated amount in the lease agreement P2. If that be so, Clause 8 of P2 provides that in the event the stipulated amount exceeds the construction of the boutique room, lessors permission must be sought to utilize extra money for the construction. The evidence led at the trial clearly establish that no such permission was sought. As such the Appellant has breached Clause 8 of P2. Appellant's contention that parties agreed to enter into a further agreement (evidence at folio 106) and document V1 signed on 05.10.1998, enabled him recover amounts incurred as extra sum of money of Rs. 1,75,000/-. V1 no doubt was a disputed document, and not properly proved according to law. At the least, Notary should have been called to prove the document, as P2 & P3 were attested by the same Notary. On the other hand Plaintiff-Respondent-Respondent rejected V1 and went to the extent of alleging it to be a forged document and disputed his signature. In these circumstances will the named Notary (in P2 & P3) take it upon himself to give evidence and support the Defendant-Appellant-Petitioner's case as far as V1 is concerned in breach of

the Prevention of Frauds Ordinance, Stamp Duty Ordinance, and the Notaries Ordinance? Why did the Notary not refer to the contents of V1 when lease P3 was executed as V1 according to the Appellant was in existence when P3 was executed? In any event, V1 seems to contradict P3 with the insertion of words තට්ටු දෙකේ ගොඩනැගිල්ලක්.

There is nothing to justify the conclusion that there had been a fresh contract or an extensions to lease agreement P2. The nature of the contract is of such a nature that fulfillment of every term and condition of lease agreements P2 and P3 is essential for its due performance. It was within the contemplation of parties that if the specified sums of money exceed, further performance could be achieved only with approval of the lessor. One cannot rely on a doubtful unproved document as V1 to fulfill Clause 8 of P2.

I observe that title to the property in dispute is not contested by the Defendant-Appellant-Petitioner. Both parties do not deny lease agreements P2 and P3. As such the periods stated therein in each agreement would be an important aspect which was in contemplation of both parties whilst entering into P2 and P3, and if there was due compliance with both agreements by the Defendant-Appellant-Petitioner, he would be entitled to continue in possession till 30.09.2031 (as per P3). It is also clear that the expenses or cost to be incurred

as in P2 and P3 is a factor curtailed in the manner incorporated in Clause 8 of P2. Expenditure over and above the amounts specified in the two lease agreements would require the approval of the Plaintiff-Respondent-Respondent.

The Defendant-Appellant-Petitioner is not expected to act contrary to Clause 8 of P2 and the evidence transpired in the District Court no doubt suggest that the stipulated cost had exceeded, for which Plaintiff-Respondent-Respondent had not given his approval as required in the lease bond. There was an attempt to introduce document V1 by the Defendant-Appellant-Petitioner at the trial stage but court cannot recognize and accept the validity of document V1 as required by law. Therefore I find that the learned District Judge has correctly answered issue No. 16 i.e the 2nd agreement has been violated.

The subject matter of the agreements P2 and P3 is of a such a nature that time and period in both P2 and P3 and the cost of construction/construction of two boutique rooms are of a fundamental nature which goes to the root of the contract. The promises exchanged by the parties are interdependent and not independent. An effect of breach is in every case is to entitle the innocent party to damages – Cheshire & Fi Foot 6th Ed. P302. There may be cases that in some instances a breach may not entitle an innocent party to be discharged from further performance. That is different from the case in hand as the performance

of each party is interdependent, but has to be considered separately for each lease bond (P2 and P3). To explain further the terms in P2 are interdependent to each other and so are the terms in P3.

Evidence led and its terms referred to in each lease bond contemplate of two separate boutique rooms, the first being the room on the ground floor for which the roof has to be a concrete slab and the 2nd being for the room to be constructed on the said concrete slab. That is the reason for evidence to have transpired at the trial to have a betal shop on the concrete slab up to 2014 and on termination of the period in P2 for the lessor to shift to the ground floor and permit the Defendant-Appellant-Petitioner to construct the room on the concrete slab as per P3. As observed earlier in this judgment P3 is not an extension of P2.

The learned District Judge has carefully considered the evidence led at the trial and answered the issues and we see no basis to interfere with his Judgment. Issue Nos. 11 to 16 provides important answers by the learned District Judge. This explains the position of the case before the original court based on evidence. One cannot look at only issue No. 16 in isolation and attempt to demonstrate something different. Learned District Judge has considered very carefully the sequence of events and answered the issues, in the light of lease

agreements P2 & P3, and decided upon its legal consequences. Directions given by the learned District Judge in the last two pages of his Judgment (prior to answering issues) and entering of decree as per District Judge's Judgment remains unaltered.

The High Court affirmed the judgment of the learned District Judge and dismissed the appeal. I answer the nine questions of law contained in the petition of 01.06.2010 as follows, in favour of the Plaintiff-Respondent-Respondent.

(a) No

(b) No

(c) No – the learned High Court Judge has given reasons at pg 9 of his Judgment.

(d) High Court Judge cannot be unnecessarily faulted. Entirety of the judgment of the High Court Judge need to be considered and at pg. 8 of the judgment of the High Court refers to the periods in P2 and P3 and state it was written as separate lease bonds. P2 & P3 contemplate of two boutique rooms to be constructed on the same land.

(e) The property leased is in extent of 10 perches of land and shown by referring to extent and its situations as lot 'B', described in condition (2) of P2 & P3. There is no failure to consider this aspect by the High Court Judge.

(f) There is no failure of the learned District Judge and the High Court Judge in their reasoning in arriving at a decision as regards the lease periods in P2 & P3. If the Defendant-Petitioner-Appellant complied with terms and conditions as in P2 & P3 lease period in P3 would lapse by 30.09.2031.

(g) Based on evidence led at the trial learned District Judge and the High Court Judge has considered the position of construction of two boutique rooms, as per P2 & P3.

(h) No

(i) No

In all the above circumstances Judgment of the learned District Judge is affirmed. In fact the decision to enter Judgment as stated by the learned District Judge was not disturbed by the High Court. Accordingly we proceed to dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree

JUDGE OF THE SUPREME COURT

Rohini Marasinghe J.

I agree.

JUDGE OF THE SUPREME COURT