

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

In the matter of an appeal to the Supreme
Court of the Democratic Socialist Republic
of Sri Lanka.

SC. Appeal 165/2010

SC/HCCA/LA 23/2010
CP/HCCA/Kandy/315/2003
DC. Kandy Case No. 2448/RE

1. Seyed Shahabdeen Najimuddin
of No. 357, Peradeniya Road,
Kandy.
2. Pichchei Hadjar Shahabdeen
of No. 357, Peradeniya Road,
Kandy.

Plaintiffs

Vs.

1. Thureiratnam Nageshwari nee
Sunderalingam
of No. 307, Peradeniya Road,
Kandy.
2. K.W.G. Chandrani Mangalika
of No. 8/A, , Peradeniya Road,
Kandy.
3. Anthony Sandanam
of No. 8/A, Peradeniya Road,
Kandy.
4. W.M.W.B. Weerabahu
of No. 307, Peradeniya Road,
Kandy.

Defendants

And Between

4. W.M.W.B. Weerabahu
of No. 307, Peradeniya Road,
Kandy.

4th Defendant- Appellant

Vs.

1. Seyed Shahabdeen Najimuddin
of No. 357, Peradeniya Road,
Kandy.
2. Pichchei Hadjar Shahabdeen
of No. 357, Peradeniya Road,
Kandy.

Deceased-Plaintiff-Respondents

- 1a. S.N. Fathima Rushana
- 1b. S.N. Mohamed Zawahir
- 1c. S.N. Fathima Rizmiya
- 1d. S.N. Fathima Shihara
- 1e. S.N. Mohamed Zahir
- 1f. S.N. Fathima Saffna
all of No. 12/5, Riverdale Road,
Anniwatte, Kandy.

Substituted-Plaintiff-Respondents

1. Thureiratnam Nageshwari nee
Sunderalingam
of No. 307, Peradeniya Road,
Kandy.
2. K.W.G. Chandrani Mangalika
of No. 8/A, , Peradeniya Road,
Kandy.
3. Anthony Sandanam
of No. 8/A, Peradeniya Road,
Kandy.

Defendant-Respondents

And Now Between

- 1a. S.N. Fathima Rushana
 - 1b. S.N. Mohamed Zawahir
 - 1c. S.N. Fathima Rizmiya
 - 1d. S.N. Fathima Shihara
 - 1e. S.N. Mohamed Zahir
 - 1f. S.N. Fathima Saffna
- all of No. 12/5, Riverdale Road,
Anniwatte, Kandy.

**Substituted-Plaintiff-Respondents
Petitioners**

4. W.M.W.B. Weerabahu
of No. 307, Peradeniya Road,
Kandy.

4th Defendant- Appellant-Respondent

1. Thurairatnam Nageshwary nee
Sunderalingam
of No. 307, Peradeniya Road,
Kandy.
2. K.W.G. Chandrani Mangalika
of No. 8/A, , Peradeniya Road,
Kandy.
3. Anthony Sandanam
of No. 8/A, Peradeniya Road,
Kandy.

Defendant-Respondent-Respondents

* * * * *

SC. Appeal 165/2010

Before : **Marsoof, PC.J.**
Dep, PC. J. &
Wanasundera, PC,J.

Counsel : Ikram Mohamed PC. with M.S.A. Wadood , Nadeeka Galhena and Milhan Mohamed for Substituted- Plaintiff- Respondent-Appellants.

Lakshman Perera, PC. with Nadeeka Sudasinghe for 4th Defendant-Appellant-Respondent.

Argued On : **21.03.2013**

Decided On : **17 .07.2013**

* * * *

Wanasundera, PC.J.

This appeal was made by the substituted Plaintiff-Respondent-Appellants (hereinafter referred to as Appellants) from a judgment of the Civil Appellate High Court of the Central Province holden in Kandy dated 18.12.2009. Leave was granted by this Court on 19.11.2010. The matter to be considered is whether the High Court has erred in setting aside the judgment of the District Court dated 05.3.2003 which was in favour of the Plaintiffs granting relief to eject the Defendants from the valuable business premises on the ground of subletting without the prior written consent of the landlord.

The questions of law to be looked into are whether the High Court acted in excess of jurisdiction when it set aside the ex-parte judgment against the 1st, 2nd and 3rd Defendants in the District Court; whether the High Court erred in holding that the affidavit given by the 4th Defendant could not be used in evidence as it constituted hearsay evidence and whether the High Court erred in disregarding the evidence placed by the Plaintiffs without any objection thereto taken by any other party at the trial.

In the District Court the Plaintiffs filed action on a contract of tenancy between the Plaintiffs and the 1st Defendant to eject him and the 2nd, 3rd and 4th Defendants, the position being that the 1st Defendant had sub-let to the 2nd Defendant and that the 3rd Defendant who is the husband of the 2nd Defendant, in turn, had sub-let it to the 4th Defendant.

At the trial the 2nd and 3rd Defendants filed answer admitting that they sub-let the premises to the 4th Defendant. The 1st Defendant also filed answer stating that she was the tenant of the Plaintiffs. Even though they filed answer at the trial, none of them appeared at the trial and an ex-parte judgment was entered against the 1st, 2nd and 3rd Defendants. The 4th Defendant also admitted in the answer that the 3rd Defendant sub-let the premises to him. The 4th Defendant's position was that later on he found out that the owner of the premises was the Natha Devale (the Kovil) and thereafter he paid rent to Natha Devale. The 4th Defendant requested the District Court to add Natha Devale as a Defendant and it was done by the District Court. The Plaintiffs came before the Court of Appeal making an application to revise that order dated 04.05.1998 and the Court of Appeal revised that order on 30.09.1999 directing the District Court to vacate the order of addition of Natha Devale as a party. The case proceeded to trial ex-parte against the 1st, 2nd and 3rd Defendants and inter partes against the 4th Defendant.

On behalf of the Plaintiffs, the 2nd Plaintiff gave evidence, he being the father of the 1st Plaintiff, the owner of the premises. The father acted at all times as the landlord on the authority given by the son. One more witness gave evidence on behalf of the Plaintiffs, ie. the record keeper of the primary Court of Kandy who produced the information in Primary Court case No. 52410/93. This Primary Court case was filed by the Kandy Police under Section 66(1) of Primary Court Act No. 44 of 1979 and the parties to that action were the 2nd, 3rd and 4th Defendants in the District Court case No.2448/RE. The information produced before the District Court by the Primary Court record keeper giving evidence, were affidavits and counter affidavits filed by the parties and the order

by the learned Primary Court Judge dated 23.2.1994. At the District Court trial the 4th Defendant did not give evidence or adduce any evidence at all for the defence.

The Learned District Court Judge delivered judgment on 05.03.2003 in favour of the Plaintiffs as prayed for in the plaint, ex-parte against the 1st, 2nd and 3rd Defendants and inter-partes against the 4th Defendant holding that the 1st Defendant has wrongfully sub-let the premises to the 2nd Defendant as per the affidavits of the 4th Defendant which were tendered in the Primary Court case No. 52410/93. The 4th Defendant had admitted that he had come into occupation of the premises on payment of rent to the 2nd and 3rd Defendants. The documents marked P1 to P13 have not been challenged by the 4th Defendant.

The 4th Defendant appealed against the judgment against him to the High Court of the Central Province and the High Court by its judgment dated 18.12.2009, not only set aside the judgment entered against the 4th Defendant but also set aside the ex-parte judgment against the 1st, 2nd and 3rd Defendants. The High Court giving reasons for the said judgment, held that the Plaintiffs have failed to prove the sub-letting through the evidence adduced on behalf of the Plaintiffs, and that the affidavits tendered by the 4th Defendant in the Primary Court action could not have been relied on, in law by the District Judge under Section 33 of the Evidence Ordinance. The High Court stressed quite wrongfully on two decisions of the Supreme Court, namely, *Perera Vs. Seneviratne (1991), 77 NLR 403* and *Ratnaweera Vs. Nandawathie Fernando (1998) 2 SLR 299*. Both these cases explain what should be proved by the landlord to eject a tenant from the particular premises under Section 10 of the Rent Act if the cause pleaded for ejectment is sub-letting. In the instant case, sub-letting has been admitted.

I have considered the pleadings in the District Court case No. 2448/RE by all the parties. The Plaint was answered by all the four Defendants filing three separate answers. The 1st Defendant in her answer admitted that she was the tenant of the Plaintiffs. The 2nd and 3rd Defendants being husband and wife filed one answer and admitted that the 1st Defendant sub-let the premises to them and also that they sub-let the same premises to the 4th Defendant. The 4th Defendant in his answer states that the

3rd Defendant posed as the owner of the premises and gave possession of the place after taking money from the 4th Defendant and later on, as he came to know that the 3rd Defendant is not the owner and that it is the property of the Natha Devale and he is paying rent to Natha Devale. Yet, I note that this 4th Defendant never gave evidence to prove the matters pleaded in his answer. I further observe that at the commencement of the trial the admission by the 4th Defendant was recorded to the effect that the 4th Defendant entered the premises as a tenant under the 3rd Defendant. It is clear that the 1st, 2nd and 3rd defendants have categorically stated that the 1st Defendant was the tenant of the Plaintiff. The 2nd and 3rd Defendants got the place as sub-tenants and they in turn sub-let it to the 4th Defendant. I fail to see how the Learned High Court Judges in the Civil Appellate High Court could ever demand proof of what has been admitted by the parties. The 4th Defendant admits that he was placed there, for money given to the 3rd Defendant which means that he is a sub-lessee or a sub-tenant. The Plaintiff in any civil case does not need to prove what is admitted. Therefore I am of the view that the case law cited by the Learned High Court Judges do not apply to the instant case.

The Learned High Court Judges have set aside the ex-parte judgment given by the District Judge against the 1st, 2nd and 3rd Defendants. These three Defendants have not come forward to contest the sub-letting even after having filed answers because they cannot face a trial after admitting the sub-letting of the premises as it would be futile to do so. They accept the judgment against them and they never appealed. I hold that the Learned High Court Judges have very much erred when they set aside the ex-parte judgments. The evidence led at the trial does not have to be considered to see whether the premises was sub-let or not, when that fact is admitted by the 2nd and 3rd Defendants. In fact, it is the answer filed by the 2nd and 3rd Defendants which admits the sub-letting which was done by the 1st Defendant as well as further sub-letting which was done by the 2nd and 3rd Defendants to the 4th Defendant.

I am of the view that the evidence given by way of an affidavit or otherwise in any judicial proceeding is relevant as proof of the standing taken by any person if in the second case he tries to contradict the position that he took up in the first case. The

Learned High Court Judges have erred in rejecting the said affidavits and concluding that sub-letting was not proved.

I observe that the failure on the part of the 4th Defendant to adduce or give evidence for the defence is vital to his case. In *Edrick de Silva Vs, Chandradasa de Silva 70 NLR 169*, the failure of the Defendant to adduce evidence to contradict the evidence against him, adds a new factor in favour of the Plaintiff by way of an additional matter before the Court which the Court should take into account, namely that the evidence led by the Plaintiff is uncontradicted.

The Learned District Judge has analysed the evidence before Court and adjudged that the Plaintiffs have proven the case and given judgment accordingly in favour of the Plaintiffs. All the documents had been marked at the trial and read in evidence at the conclusion of the Plaintiff's case without the defence taking any objection thereto and as such, those documents constitute lawful evidence in the case. Documents P1 to P13 were read in evidence at the closing of the case before the District Court on 22.01.2002 and no objection was taken at that time to any document by the 4th Defendant. Thus the contents of the documents became evidence in the case. (as per judgments in *Sri Lanka Ports Authority and another VS. Jugolinja- Boal East (1981) 1 SLR 18* and *Balapitiya Gunananda Thero Vs. Talalle Methananda Thero (1997) 2 SLR 101*).

In the circumstances I hold that the Learned High Court Judges have erred in setting aside the judgment of the District Court against the 1st, 2nd, 3rd and 4th Defendants. I set aside the judgment of the High Court dated 18.12.2009 and affirm the judgment of the Learned District Judge dated 05.03.2003 and grant the reliefs as prayed for by the Plaintiffs in their plaint with costs. I hold further that the Appellant is entitled to costs incurred in the Civil Appellate High Court as well as in the Supreme Court. I direct the Registrar of the Supreme Court to send the original brief to the District Judge of Kandy forthwith for the Appellants to get what is due to them in law which is long delayed.

Judge of the Supreme Court

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Marsoof, PC.J.

I agree.

Judge of the Supreme Court

Dep, PC. J.

I agree

Judge of the Supreme Court