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

In the matter of an Application for Leave to Appeal in terms of Section 5(C) (1) 0f the High Court of the Provinces (Special Provisions)(Amended) Act No. 54 of 2006 read together with Article 127 of the Constitution.

Annamalai Muthuappan Chettiar
No.111, Sea Street, Colombo 11.

Defendant-Appellant-Petitioner

Case No:-SC 147/2011

SC HC (CA LA) No.166/2010

WP HC CA/COL/358/2002 (F)

DC Colombo Case No.17598/L

V.

Subramaniam Sankaran
No.109, Sea Street, Colombo 11.

Plaintiff-Respondent-Respondent

BEFORE:-B.P.ALUWIHARE, PC, J.

ANIL GOONERATNE J. &

H.N.J.PERERA, J.

COUNSEL:- Nihal Jayamanna PC with C.V.Vivekanandan Uditha Collure

Instructed by Pancy N.Joseph for the Defendant-Appellant Petitioner

Hiran de Alwis with Asitha Ranasinghe for the Plaintiff-Respondent-Respondent

Argued On:-31.08.2016

DECIDED ON:-15.12.2016

H.N.J.PERERA, J.

The Plaintiff-Respondent (hereinafter referred to as the Plaintiff) Respondent instituted action against the Defendant-Appellant (hereinafter referred to as the Defendant) praying inter alia for a declaration of title to the upper floor of premises No. 109, Sea street, Colombo 11, more fully described in the 2nd schedule to the plaint, for ejectment of the Defendant therefrom and for recovery of damages. The Defendant by his amended answer prayed for a dismissal of the plaintiff's action.

It was the Plaintiff's position that by virtue of Final decree in the Partition Case No. 14414/P in the District Court of Colombo the Plaintiff was entitled to the premises bearing Assessment No.109, Sea Street,

Colombo more-fully described in the 1st schedule thereto. The said premises consisted of a ground floor and an upper floor. The upper floor is more fully described in the 2nd schedule to the plaint. The plaintiff alleged that the Defendant who is a trespasser is in wrongful and/ or unlawful occupation of the premises described in the 2nd schedule to the plaint. By Notice dated 3rd June 1996 the Plaintiff gave the Defendant Notice to quit and to deliver peaceful and vacant possession of the said premises to the Plaintiff at the expiry of 31st July 1996.The plaintiff's position was that the Defendant continued to be in unlawful possession from 1st August 1996.

The Defendant's position was that he has been in possession of the said portion of the upper floor of No. 109, Sea Street as a Tenant and sought dismissal of the Plaintiff's action.

After trial, the learned Additional District Judge of Colombo delivered his judgment on 30th April 2002 in favour of the Plaintiff. Being aggrieved by the said judgment of the learned trial Judge, the Defendant preferred an Appeal to the Civil Appellate High Court Colombo which too upheld the said judgment of the learned District judge in favour of the Plaintiff.

Being aggrieved by the said judgment dated 30.04.2010 of the Civil Appellate High Court Colombo, the Defendant filed an application for Leave to Appeal to the Supreme Court, and the Court granted leave on the following questions of Law raised by the Counsel appearing for the Defendant.

(1) In view of the proceedings and Final decree and the terms of settlement effected in the District Court of Colombo Case No.14414/P dated 29.07.1992 was the Defendant-Appellant declared a Tenant of the Plaintiff-Respondent of the premises in suit?

(2) Did the Learned High Court Judge err in holding that the Defendant-Appellant was not a Tenant of the Plaintiff-Respondent?

(3) Could the Plaintiff-Respondent file a case for declaration of title and ejectment to eject the Defendant-Appellant on the basis that he was in unlawful possession, in terms of the facts in this case?

And on the following question of Law raised by the Counsel for the Plaintiff-Respondent.

(4) Did the Defendant discharge his burden of establishing that he was a tenant of the said Plaintiff-Respondent of the premises in suit?

There is no dispute between the parties that the Plaintiff in this case was the Plaintiff in the said Partition case No.1444/P and the Defendant in this case was the 3rd defendant in the Partition case. The Plaintiff in this case claims title to the corpus described in the second schedule under and by virtue of the Final decree in the said Partition Action. The title of the Plaintiff is not in dispute. It is also not in dispute that the Defendant is in occupation of these premises. The Defendant's contention is that he is the tenant of the premises in suit. According to the pedigree the Plaintiff is entitle to 2/3rd of the property and the 1st Defendant to 1/3 of the property plus 2 Perches.

It is an admitted fact that "Letchchumy Jewellers" is a business carried on by the Defendant and that he was carrying on the said business even when the Partition Action was pending. It is also accepted that "Letchchumy Jewellers" was also carried on in the premises by the Defendant that was allotted to the Plaintiff in the Final Partition Decree and that it was decided that the Defendant will have full tenancy right in respect of the lot allotted to the Plaintiff by the Partition Decree. It was the contention of the learned President's Counsel for the Defendant that

if the Defendant was in unlawful possession of the divided portion allotted to the Plaintiff in the Partition decree there is specific remedy available to the Plaintiff under the Partition Act itself to obtain possession. It was further contended that Section 52 of the Partition Law No.2 of 1977as amended provides specific remedy of obtaining delivery of possession. The Plaintiff should have made an application for possession in terms of Section 52 of the Partition Law as held in Munidasa & Others Vs. Nandasena reported in (2001) 2 Sri.L.R.224. It was the learned Counsel's position that in view of this judgment, the present case cannot be had and maintained by the Plaintiff.

In Munidasa & Others Vs Nandasena the question arose as to whether a party to a Partition Action who was allotted a lot could proceed under Section 325 of the Civil Procedure Code without resorting to the specific provisions under Section 52(1) and Section 53(1) of the Partition Act. In that case it was held that the Partition Law provides a specific remedy, the Plaintiff-Respondent is not entitled to resort to provisions of the Civil Procedure Code. It was further held that the provisions of the Partition Act are mandatory provisions and provides a simple and easy remedy of obtaining delivery of possession.

In the instant case the Plaintiff has not made an application under Section 52 of the Partition Act to obtain possession of the said premises which is allocated to him by the Final decree of the said Partition Action. But after about four years from the date of the final decree he has filed the present action to eject the defendant from the said premises and to obtain possession of the same on the basis that he is the owner of the said premises and that the Defendant is in unlawful possession of the same.

There is no doubt that in the said Partition Action the Defendant has been allowed to continue in possession of the said premises allocated to

the Plaintiff by the said Final Decree on the basis that he is a Tenant. The Plaintiff has filed the present Action against the Defendant after about 4 years of the entering of the Final decree in the said Partition Action on the basis that the Defendant is no longer in lawful possession of the same and that as the owner of the said premises the Plaintiff is entitled to get possession of the same.

In Martin Sinngho and Two Others V, Nanda Peiris and Two Others [1995] 2 Sri.L.R 221, it was held that Section 52 read with Section 48(1) of the Partition Law and Section 14 (1) of the Rent Act required Court to determine :-

(1)Whether the petitioners had entered into occupation of the premises as Tenants prior to the date of the Final Decree.

(2)Whether they were entitled to continue in occupation of the premises as Tenants under the original Respondent (i.e Plaintiff)

Section 52 (2) read with section 48(1) of the Partition Law and section 14 (1) of the Rent Act, required court to determine –

(1)Whether the Defendant had entered into occupation of the premises as tenants prior to the date of the final decree and

(2)Whether the Defendant was entitled to continue in occupation of the premises as a tenant under Plaintiff who was allotted the lot in which the relevant house stood.

If the Defendant succeeds in satisfying court of the two matters aforesaid, the application of the Plaintiff has to be dismissed, as section 14(1) of the Rent Act makes provision for the tenants of residential premises to continue as such, under any co-owner who has been allotted the relevant premises in the final decree.

In the instant case there in no such application under Section 52 of the Partition Law been made by the Plaintiff to obtain possession of the said

premises. Instead the plaintiff has filed the instant Action against the Defendant to eject the Defendant from the said premises on the basis that the Defendant is in unlawful possession of the said premises and that the Plaintiff is the lawful owner of the said premises.

The Plaintiff has filed a Rei Vindicatio Action against the Defendant to eject him from the said premises on the basis that he is the owner of the said premises described in the 2nd schedule to the plaint and that the Defendant is in unlawful possession of the said premises. Therefore it is very clear that the Plaintiff has instituted this action on the basis of his title to the said premises.

It is not disputed that the Plaintiff is the owner of the said premises. He has become the owner of the said premises by virtue of the Final Decree entered in the Partition case No. 14414/p in the District Court of Colombo. It is also not in dispute that the Defendant is in occupation of the said premises.

In Luwis Singho and Others V. Ponnamperuma [1996] 2 Sri.L.R 320 it was held that:-

(1) Actions for declaration of title and ejectment and vindicatory actions are brought for the same purpose of recovery of property. In Rei vindication action the cause of action is based on the sole ground of the right of ownership, in such an action proof is required that:-

(a)The Plaintiff is the owner of the land in question. i.e he has the dominium.

(b)That the land is in the possession of the Defendant.

The moment the title of the Plaintiff is admitted or proved the right to possess it, is presumed.

Willie in his book “Principles of South African Law” (3rd edition) at page 190 discussing the right to possession, states:-

“The absolute owner of a thing is entitled to claim the possession of it; or, if he has the possession he may retain it. If he is illegally deprived of his possession, he may by means of vindication or reclaim recover possession from any person in whose the thing is found. In a vindicatory action the claimant need merely prove two facts, namely, that he is the owner of the thing and that the thing is in the possession of the Defendant”.

In Siyaneris V. Jayasinghe Udenis de Silva 52 N.L.R 289, it was held that in an action for declaration of tile to property, where the legal title is in the Plaintiff but the property is in the possession of the Defendant , the burden of proof is on the Defendant.

It was contended on behalf of the Plaintiff that the Defendant has failed to prove that he is in lawful possession of the said premises in dispute.

The said Final Decree in the Partition Action has been entered in 1992. The present action has being filed against the Defendant in 1996.The Defendant has failed to submit any document to substantiate the position that he was a tenant of the Plaintiff in 1996.

The Defendant has clearly admitted that he received the Quit Notice marked P4 sent by the Plaintiff in this case. (Vide page 2 of the proceedings of 15.06.1999 and page 8 of the proceedings of 23.05.2001). In the circumstances it is clear that the Notice to Quit P4 dated 03.06.1996 has been received by the Defendant. The Defendant also admits that he did not sent a reply to the said Quit Notice marked P4.

It is trite Law that what is admitted need not be proved. In Mariammal V. Pethrupillai 21 N.L.R 200 it was held that:-

“If a party in a case makes an admission for whatever reason, he must stand by it; It is impossible for him to argue a point on appeal which he formally gave up in the court below”.

It is sometimes permissible to withdraw admissions on questions of law but admissions on questions of fact cannot be withdrawn. See Uvais V. Punyawathie [1993] 2 Sri.L.R 46.

The Notice marked P4 had been dispatched requiring the Defendant to vacate the said premises. The Defendant whilst giving evidence had admitted that he received the said Notice and that he did not respond to it.

The Defendant had admitted having received the Notice to Quit but failed to reply to the said Notice. In all circumstances, I feel that this is a case which a reply to P4 is expected. The defendant could have informed the Plaintiff that he is the Tenant of the said premises and that he continues to occupy the said premises on that basis and that he is in lawful possession of the said premises as the tenant.

In Jayawardenea V.Wanigasekera and Others [1985] 1 Sri.L.R 125 it was held that the best test for establishing tenancy is proof of the payment of rent. The best evidence of the payment of rent is the rent receipts. Also see Martin Singho and Two Others V. Nanda Peiris and Two Others [1995] 2 Sri.L.R 221

In the present action no rent receipts were produced by the Defendant at the trial. Although in his answer he has stated that h continued to be the tenant of the upstairs of the premises No.109 and because the plaintiff refused to accept the rent from him he had paid the same to the Municipality Colombo, the Defendant did not state so in his evidence and also failed to mark and produce a single receipt issued by the Colombo municipal Council to substantiate the same. The Defendant has very

clearly failed to lead evidence and prove that he was a tenant of the said premises described in the 2nd schedule to the plaint.

The main contention of the learned Counsel for the Defendant was that the Plaintiff cannot deny and is in fact bound by the decree to the portion that the defendant is the lawful tenant of the premises in which "Letchchumy jewellers' is carried on by the defendant which falls within the portion allotted to the Plaintiff. Therefore the Plaintiff should have made the application for possession under and in terms of section 52 of the Partition law.

In Virasinghe V.Virasinghe and Others [2002] 1 Sri.L.R 264 where the issues as to tenancy have been answered in favour of the Defendant and it was held that the Rent Act applies in respect of premises and that he is the tenant of the co-owners in the District Court, the Plaintiff appealed from the said findings to the Court of Appeal and the appeal was dismissed by the Court of Appeal , the Supreme Court granted leave to appeal on questions raised in the Petition of Appeal as to the findings on tenancy; alternatively on the question whether the matter of a monthly tenancy can come within the scope of a trial in a partition action and whether such question should be considered , if at all, at the stage of execution in terms of section 52 of the Partition Law.

The Supreme Court held that in view of the provisions of Section 5(a) read with section 48(1), the claim of a monthly tenant is not within the scope of a partition action. It is not permissible to enter a finding, in a judgment, interlocutory decree, or final decree in a partition action with regard to any claim of a monthly tenant in respect of the land sought to be partitioned. Sarath N Silva C.J observed that:-

"Thus, it is seen that the Partition Law makes the same distinction as section 2 of the Prevention of Frauds Ordinance of 1840 as amended, in respect of the type of lease that would not be considered as an

encumbrance affecting land. In both laws, whilst a lease for a specified period exceeding one month is considered an encumbrance affecting land and should be notarially executed, a lease at will or for a period not exceeding one month (same language used in both laws) is not considered an encumbrance affecting land.

Therefore, it is not permissible to enter a finding, in a judgment, interlocutory decree or final decree, in a partition action with regard to any claim of a monthly tenant in respect of the land that is sought to be partitioned."

It was further held in the said case that it would be inconsistent with the scheme of the Partition Act and the provisions of the Rent Act to bring the claim of a monthly tenant within the scope of trial in a partition action.

It was further held that a person having a claim in respect of a lease at will or for a period not exceeding one month, is not a necessary party to a Partition action.

Therefore it cannot be said that the Plaintiff is bound by the decree to the portion that the Defendant is the lawful tenant of the premises in which "Lethchumy Jewellers" is carried on by the Defendant which falls within the portion allotted to the Plaintiff. Therefore the Defendant cannot claim tenancy under the said Final decree entered In case No.14414/P in Colombo.

In the instant action the Plaintiff has clearly exercised his right as the owner of the said premises to vindicate his title and to eject the Defendant from the said premises. Being the absolute owner of the said premises the Plaintiff is entitled to claim the possession of it from the Defendant. The Plaintiff has denied the fact that there was a tenancy agreement between the two parties in 1996.The mere fact that the

Plaintiff did not make an application under section 52 of the Partition law in Case No 14414/P is not a bar to institute an action to vindicate his title against the Defendant since this present action will have the effect of deciding finally whether in fact the Defendant is a tenant of the said premises or not.

In Virasinghe V. Virasinghe (supra) it was further held that Section 52 (2) (a) appears to contemplate a situation where the applicant for an order for delivery of possession recognizes the person in occupation as a tenant but moves for eviction on the basis that he is not entitled to continue in occupation of the house as a tenant under the applicant as landlord. If, however, the applicant, on the premise that he does not recognize the person in occupation as a tenant, moves for an order for the delivery of possession who claims to be a tenant entitled to continue such occupation of the house as tenant under the applicant as landlord, could resist the Fiscal and seek hearing from court to establish his right in terms of section 52 (2) (b). In the present action the Plaintiff does not recognize the defendant as a tenant. Therefore even if the Plaintiff makes an application under section 52 the Partition law the burden would be on the Defendant to establish his right in terms of section 52 (2) (b).

In this case as observed by the learned District Judge and the learned Judges of the Civil Appellate High Court, the Plaintiff has proved that he is the owner of the said premises and the Defendant has failed to produce documentary evidence in proof of his tenancy. The best test of establishing tenancy is proof of payment of rent, and the best evidence of payment of rent is rent receipts. (See Jayawardena V. Wanigasekera) I see no reason to interfere with the order of the Civil Appellate High Court.

Accordingly I answer the questions of law raised in this case in favour of the plaintiff-Respondent in the following manner.

Question No.1-----No.

Question No.2------No.

Question No.3------Yes.

Question No.4------No.

I affirm the judgment of the Civil Appellate High Court Colombo dated 30.04.2010 and dismiss the Defendant's appeal with cost.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PCJ.

I agree

JUDGE OF THE SUPREME COURT

ANIL GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT