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

S.C. Appeal 33/2005
S.C. Spl. LA. No. 03/2005
CA No. 597/2002
DC Mt. Lavinia No.1518/P

In the matter of an application for Substitution under Section 398(1) (a) of the Civil Procedure Code

Gilbert Samaraweera

PLAINTIFF (Deceased)

Weerasooriya Arachchige Agnes
No. 273/A, North Mulleriyawa,
Angoda.

SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANT-PETITIONER

Vs.

Mahadurage Hemapala
No. 170, Galle Road,
Dehiwela.

RESPONDENT-APPELLANT-RESPONDENT (Deceased)

AND NOW BETWEEN

Weerasooriya Arachchige Agnes
No. 273/A, North Mulleriyawa,
Angoda.

SUBSTITUTED PLAINTIFF-RESPONDENT-APPELLANT-PETITIONER

Vs.

Mahadurage Hemapala
No. 170, Galle Road,
Dehiwela.

RESPONDENT-APPELLANT-RESPONDENT (Deceased)

Mahadurage Asantha Senarathna
No. 170, Galle Road,
Dehiwela.

RESPONDENT SOUGHT TO BE SUBSTITUTED

1. Mahadurage Palani Senarathna
   No. 255/5B/1, Saman Mawatha,
   Nadimala, Dehiwala

2. Mahadurage Manoja Senarathna
   No. 237/110, Mahagedara Watta,
   Arukgoda Road, Alubomulla.

3. Mahadurage Samantha Senarathna
   No. 437/1/B, Sama Pedesa,
   Hokandara North, Hokandara

4. Mahadurage Mahinda Senarathna
   No. 255/5B/1, Saman Mawatha,
   Nadimala, Dehiwala.

5. Mahadurage Helaruwan Senarathna
   No. 277/11A, Quarry Road,
   Nadimala, Dehiwala.

RESPONDENTS-RESPONDENTS

BEFORE: B. P. Aluwihare P.C., J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: D.P. Mendis P.C. with J.G. Sarathkumara for
Plaintiff-Petitioner-Respondent-Petitioner

Ms. C. Weerakoon Unamboowa with
Ms. Lumbini Kohilawatta for Substituted-Respondent-
Appellant-Respondent

ARGUED ON: 11.05.2016 &13.06.2016

DECIDED ON: 18.07.2016

GOONERATNE J.

The Plaintiff-Petitioner-Respondent-Petitioner (hereinafter referred to as Plaintiff-Petitioner) having purchased undivided shares of the land in dispute (more fully described in the schedule to the plaint in partition case 1518/P) on or about 1981, filed a partition suit in the District Court of Mt. Lavinia in Case No. 1518/P, on or about 1985. Final decree (P3) was entered in the partition case on or about August 1998. Plaintiff-Petitioner was allotted lot No. 3759 in the partition plan in extent of 3.410 perches which includes the building/premises bearing Assessment No.170. Subsequent to the final partition decree, Plaintiff-Petitioner moved the District Court in terms of Section 52(2) of the Partition Law for a Writ of Possession to evict the occupants in lot No. 3759,

assessment No. 170. The Respondent-Petitioner-Respondent (hereinafter called the Respondent) who claimed tenancy of the above described premises (Assessment No. 170) filed objection and a protracted inquiry commenced in the District Court of Mt. Lavinia. At the conclusion of the inquiry the learned District Judge made order dated 14.03.2002 issuing a Writ of Possession against the Respondent who claimed tenancy rights.

The Respondent tenant being aggrieved of the order of the learned District Judge, filed a revision application in the Court of Appeal. The Court of Appeal, however acting in revision set aside and quashed the order dated 14.03.2002 and dismissed the application of the Plaintiff-Petitioner under Section 52 of the Partition Law. This court, had on or about 25.04.2005 granted leave to appeal for the substantial question of law specified in paragraph 18(a) & (b) of the petition dated 07.01.2005. The said questions reads thus:

(a) The said judgment is against the law in that the Respondent-Petitioner-Respondent has been held to be a deemed tenant which the facts and law that surfaced at the inquiry in the District is contrary to any claim of tenancy.

(b) The receipt of a deemed Tenancy is applicable only in the circumstances emerged in terms of Section 36 of the Rent Act No. 7 of 1972 cannot in law be applied to the circumstances of this case.

It is essential to consider in a way the history of the land in dispute since on one hand the Plaintiff-Petitioner was a purchaser of certain shares in the property in question, and purchased in 1981. Plaintiff-Petitioner no doubt initiated a partition action in 1985, since the property itself was undivided and co-owned by others. On the other hand the question of tenancy arose in the Original Court and it has to be decided according to law and the protection afforded to a tenant in the circumstances need to be considered where the property in dispute is co-owned property. The original owner gifted or sold certain shares to some of his family members and those family members who acquired property rights sold certain shares in the property in dispute to Plaintiff-Petitioner. As such establishing tenancy alone in a co-owned property may not suffice?

The material placed before this court indicates that the original owner was one Lakshapathi Vidanalage Alexander Leopold de Mel, who had five children, namely Artilio, Daisy Agnes, Aloysius, Irene and Albert. The original owner gifted undivided 1/5th share of the property to his son Artilio and sold undivided 1/5th share to Sylvester Perera (son-in-law) who was married to Daisy Agnes. The above original owner Alexander Leopold died intestate and the balance 3/5th undivided share devolved on his children. The son Artilio and daughter Daisy Agnes gave up their shares to the other three children, viz.

Aloysius, Irene and Albert. Thus the three of them became entitled to 1/5th share each. Plaintiff Petitioner purchased undivided shares form Artilio (1/5th share) and original owner's son-in-law who died intestate and his wife Daisy the daughter of original owner inherited undivided share and she sold her share to Plaintiff-Petitioner.

In the petition dated 07.01.2005 filed in the Supreme Court it is pleaded that Plaintiff-Petitioner was declared entitled to 12/40th undivided share and interlocutory decree entered accordingly. Thereafter by the final partition plan No. 3066, Plaintiff-Petitioner was allotted lot 3759 consisting of 03.410 perches (P2). In the said lot allotted to Plaintiff-Petitioner premises No. 170, 170 A (part) and 168 (part) of Galle Road, Dehiwala was included. The Respondent abovenamed claim tenancy of the building bearing No. 170 (part of land allotted to Plaintiff) beginning from the time of the original owner L.V. Alexander Leopold de Mel. To prove tenancy Respondent marked and produced rent receipts, subject to proof.

Notwithstanding the protection given to a tenant under the Rent Laws of our country and particularly provision contained in Section 14(1) of the Rent Act, the position must be seriously considered as to whether the Respondent who claim to be a tenant under one co-owner is in law entitled to continue his tenancy after the purchase of the property in dispute on the basis

that the other co-owners had given their consent for the Respondent to continue his tenancy? In the absence of genuine consent by all the co-owners to permit tenancy, what would be the position in law of the tenant? Or whether the Respondent was a tenant of the premises in dispute for over 30 years, would suffice in all the facts and circumstances of this case?

On a perusal of the evidence as projected by the Respondent, I note that the Plaintiff-Petitioner had accepted the position that the Respondent (Somapala) was the tenant of the original vendor of the land in dispute. Rent was paid to Aloysius the 5th Defendant and when the partition action was filed rent was paid to Aloysius. Somapala entered the land during the period of the original owner and some rent receipts also had been issued by the original owner (X1 – X7). It is in evidence that the Plaintiff-Petitioner having purchased the land in dispute was never paid any rent.

In cross-examination of Plaintiff-Petitioner the following evidence had been elicited. I note proceedings dated 29.06.2000 pg.5 (A9) the following:

අධිකරණයෙන්

ප්‍ර : "තමන් මෙම ඉඩම මිලට ගන්නකොට කුලි කාරයෙක් හිටිය. එහෙත් තමන් ඒ ගැන හිතන්නේ නැතිවද මිලදී ගත්තේ?
උ : "ඔව් මට ඔවුන්ගෙන් සත පහක්වත් ලැබුනේ නැ"

c. In the proceedings (A9) dated 29.06.2000 Pg. 06 it is stated as

උ : මෙම තීන්දුව දුන්නාට පසුව මෙම සෝමපාල යන අය බලහත්කාරයෙන් මෙම ස්ථානයේ ඉන්නේ මට කුලිය වශයෙන් කිසිවක් දුන්නේ නෑ. මෙම තීන්දු ප්‍රකාශය දෙන්න පෙර සෝමපාල මගේ ගෙදරට ඇවිල්ලා කිව්වා තීන්දුව දුන්නාට පසුව ඔහුට එය කුලියට දෙන්න කියලා. මම කිව්වා අවසාන තීන්දුවෙන් පසුව තමයි මොකක් හරි කරන්න ඔනේ කියලා නඩු තීන්දුව දෙන්න කලින් කාට කොටස් යයිද කියලා මට කියන්න බැහැ කිව්වා".

ප්‍ර : එසේ කථා කරනකොට තමන් දැනගෙන හිටියේ නැහැ මෙම සෝමපාල පදිංචි කොටස තමන්ට අයිති වෙන බව?

උ : මම දැනගෙන හිටියේ නැහැ

<u>d. In the proceedings (A9) dated 29.06.2000 Pg. 07 it is stated as.</u>

ප්‍ර : ඔහු කුලි ගෙව්වේ ඇලෝසියස් යන අයට. තමන්ගේ නඩුවේ 5 වන විත්තිකරු තමයි ඔහු? ඇලෝසියස්ට මෙම නඩුවේ වෙනත් කොටසක් දුන්නා?

උ : ඔව්

ප්‍ර : සෝමපාල මෙම නඩුව දමනකොට කාටද කුලි ගෙවමින් සිටියේ ?

උ : ඇලෝසියස් ද මෙල් යන අයට

ප්‍ර : නඩු පවරන අතරතුර සෝමපාය කුලී ගෙව්වේ මෙහි 5 වෙනි විත්තිකරු

උ : ඔව්

<u>e In the proceedings (A9) dated 29.06.2000 Pg. 08 it is states as</u>

ප්‍ර : සෝමපාලගේ ඉල්ලීම තමන් අධ්‍යයනය කර බැලුවාද?

ඒ ඉල්ලීමේ දෙවන ඡේදයේ සෝමපාල කියා තිබෙනවා 170 දරන පරිශ්‍රයේ අවුරුදු 30 කට අධික කාලයක් අඛණ්ඩව නිත්‍යානුකූල කුලී නිවැසියාව සිටි බව ඒ අනුව ඔබ දැනගත්තා සෝමපාල අවුරුදු 30 ක කාලයක් පදිංචිව සිටින බව ?

උ : ඔව්

ප්‍ර : එකී සෝමපාල සඳහන් කර තිබෙනවා ඔහු මෙම ස්ථානයට ආවේ ඇලෝසියස් ලියෝ පෝල් ද මෙල් යටතේ පැමිණි බව?

උ : ඔව්

ප්‍ර : ඒ අනුව තමන් දන්නවා 170 දරණ පරිශ්‍රයේ කුලී නිවැසියා ලෙස අවුරුදු 30 ට අධික කාලයක් පදිංචිව සිටි බව ?

උ : ඔව්

ප්‍ර : සෝමපාල යන අය මුලින්ම ඇලෝසියස් ලියෝ පෝල් ද මෙල් නිකුත් කල කුලී රිසිට් ඉදිරිපත් කලා ?

උ : ඔව්

The position of the Plaintiff-Petitioner was that all the documents that were produced were marked subject to proof and the documents were never proved by the Respondent party. Further it was stressed on behalf of the Plaintiff-Petitioner that document V27 produced on behalf of the Respondent was not proved by Respondent nor could the Respondent explain it and Respondent even denied V27 in the cross-examination of Respondent. Document V27 was an attempt by the Respondent to show that all the co-owners in 1978 accepted the tenancy of Respondent Somapala. This court observes that if V27 was proved, Respondent no doubt would be entitled in law to the protection afforded to a tenant under the Rent laws of our country. This position need to be examined seriously. The Court of Appeal acting in revision may have thought it fit not to examine the evidence on this aspect. However this court need to examine in this appeal the evidence relevant to above to arrive at a conclusion of consent of all co-owners at the relevant time. This aspect is so germane to the central issue before us. Let us examine whether V27 is a legally acceptable document?

The tenant Respondent Somapala in his evidence in chief state, he came into occupation in 1959, but he has no documentary proof to establish that fact. It was under the original owner he occupied the premises in question but the original owner never issued receipts for some time. The first rent receipt according to the proceedings was marked V7. (December 1974) issued by the original owner and singed in his presence. This document was marked subject to proof. Thereafter V8 – V20 were produced and marked (rent receipt) without any objection. Proceedings reveal that V21 was marked subject to proof. It is a letter issued one week before the death of the original owner, wherein the original owner states to pay the rent to one of his sons Artie de Mel. Thereafter the receipts V22 to V26 were marked subject to proof. The important document V27 was also marked subject to proof.

It is important to note the evidence on V27 as it is alleged that all co-owners consented to permitted Aloysius De Mel to collect the rent and signed V27.

Tenant Somapala states all five children of deceased original owner signed letter V27 and thereafter he paid rent to Aloysius De Mel. All other receipts up to V55 were produced subject to proof. Witness also state that he was not aware of the partition case. In cross-examination the witness was questioned on V7 – V20 and the opposing counsel suggested that these

documents were spurious documents but witness Somapala never replied that question. V22 – V26 was shown to witness and was asked as to who signed same on the stamp. Witness states he cannot state who signed these receipts. කියන්න බැහැ කවුද අත්සන් කලේ කියා.

The letter in question (V27) was shown and cross-examined by counsel. Specific question was asked from tenant Respondent (the witness) as to who signed on the stamp on V27. He replied and stated he cannot identify same 'ඒක මට පේන්නේ නැහැ'. Witness was asked who wrote the letter and reply was that this is not the letter මේක නොවේ කොලේ. It is relevant and important to note the evidence on this point in verbatim.

ප්‍ර : කවුද අත්සන් කලේ ව 27?

උ : (සාක්සිකරු බලයි)

ප්‍ර : මුද්දරය උඩ අත්සන් කලේ කවුද?

උ : ඒක මට පේන්නේ නැහැ

ප්‍ර : මේ ලිපිය ලිව්වේ කවුද?

උ : සාක්ෂිකරු බලයි මේක නොවේ කොලේ

ප්‍ර : මේක නොවේ කොලේ කියන්නේ එහෙනම් මොකක්ද?

උ : ඒකේ නම් ලයිස්තුව දිගට තිබුනා

ප්‍ර : මේක ඒක නොවේ තමාගේ නීතිඥ මහතා ඉදිරිපත් කල ලේඛණයක් මේක?

උ : (සාක්ෂිකරු බලයි)

ප්‍ර : තමා කියන්නේ මේක නොවේ ද කොලේ ?

උ : මේක නොවේ නම් 5ක් තිබුනා මෙහි තියෙන්නේ නම් 4ක්

ප්‍ර : මේක මුද්දරයක් උඩ කවුද අත්සන් කලේ? කවුද අත්සන් කලේ කියා දන්නවාද ව 27

උ : හරියට දන්නේ නැහැ

ප්‍ර : කවුද අත්සන් කලේ කියා කියන්න බැරිද?

උ : හරියට පේන්නේ නැහැ

Perusal of the Proceedings I find that there was no re-examination on behalf of Respondent on the above matters especially on V27. The above matters and answers should have been clarified in re-examination. As such court has to conclude that in view of the vague answers given by Respondent on V27 it's contents are not proved and remains a questionable document. If the witness doubt V27, all that should have been explained in re-examination. What remains on V27 is a vague doubtful items of evidence, not proved to the satisfaction of a court of law. Further to prove V27 the 5th, 6th, & 7th Defendants should have been called as witnesses to identify signature and its contents along with all who had undivided shares, to prove V27.

I will also examine the evidence of the other witness called on behalf of the Respondent. The Respondent's son testified. Respondent's son admits that his father Somapala was questioned on documents. This witness was questioned on the genuineness of V27. It was his reply that he is not keen to reply that question. He only wish to state his father was a tenant. The witness' position on the documents proved at the trial are as follows:

ප්‍ර : ව 27 හි අත්සන් ගැනැ සමහර ලියමන් ගැන බොරු කියල මම හරස් ප්‍රශ්ණ අහපු බව දන්නවානේ?

උ : ඔව්

ප්‍ර : තමා ඒවා අද ව 27 ලියවිල්ල සත්‍ය ලියවිල්ලක් බව කියනවාද?

උ : මේක ගැන කියන්න මට වුවමනාවක් නැහැ. තාත්තා කුලී නිවැසිය කියලා කියන්න මම ආවේ

ප්‍ර : මෙම කුවිතාන්සිය තමා හදුනා ගත්ත ව 1 සිට ව 39 දක්වාත් ව 41 සට ව 46 දක්වාත් එහෙම නේ?

උ : ඔව්

The above evidence relate to V27 also, witness states he is unable to state or identify the signature in the documents, including of V27. Evidence of this witness is not supportive of V27 at all. As such there is no corroboration of tenants (Respondent) version.

I observe that the document relied upon by the Respondent tenant (V27) was produced and marked at the trial subject to proof. When the opposing party had the opportunity the witness had been cross-examined on document V27. The material surfaced indicate that reliance cannot be placed on the contents of document V27 and not proved. Respondent at a certain point rejects V27. Nor did the party concerned call, those persons whose names appear in some form in V27 as witnesses to prove its signature and contents. However at the closure of the defence case when the marked documents were read in evidence, the Plaintiff party did not object to the documents produced on behalf of the Respondent. As such the Respondent party rely in the case of Sri Lanka ports Authority Vs. Jugolinija-Boal East 1981(1) SLR 18.

The dicta in the above case refers to the fact that if no objection is taken, when at the close of the case documents are read in evidence, they are evidence for all purposes of the law. This is no doubt the 'cursus curiae' of the Original Court. However the above dicta would not be offended as regards the case in hand is concerned, for the following reason.

The learned counsel for the Plaintiff-Petitioner at the trial took up the objection as and when the document was marked in evidence and court allowed the document to be produced subject to proof. Learned counsel for the Plaintiff-Petitioner cross-examined the witness on document V27 and other documents and went to the extent to establish in court that no reliance could be placed on V27. It was not a mere mechanical objection to the document concerned, but a challenge to the document itself and its contents and proof, under cross-examination. At the end of it even the Respondent on his own rejects V27. Document concerned was subject to scrutinising in open court, and disproved. None of this happened in the case of 'Sri Lanka Ports Authority and another Vs. Jugolinija'. In the said decided case a document was objected to by the opposing party and was only a mere objection without an scrutiny/examination of the document to disprove same. The relevant portion of that judgment reads as follows:

> At the Preliminary hearing Counsel appearing for the appellants stated that he was admitting all documents listed by the respondent except documents listed in item 7 in column II. P1 was one of item 7. When P1 was marked during the trial objection was taken 'as the author of P1 has not been called". I take it, what was meant was, that P1 be rejected unless the author was called to prove the document. Counsel for the respondent closed his case leading in evidence P1 and P2. There was no objection to this by counsel for the appellants who then proceeded to lead his evidence. If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the *cursus curiae* of the original Civil Courts. The contents of P1 were therefore in evidence as to facts therein (vide section 457 Administration of Justice Law, No. 25 of 1975) and it is too late now in appeal to object to its contents being accepted as evidence of facts. Furthermore the trial Judge has, in the course of his order, accepted the document in evidence in terms of the provisions of section 32(2) of the Evidence Ordinance. I cannot therefore agree with the contention that the order of the trial Judge on this point is wrong.

In the above decided case the document which was objected was not challenged and scrutinised in cross-examination like the case in hand. As such the dicta in the above decided case cannot be extended to the case in hand.

In all above circumstances I hold that the protection afforded under the Rent Act does not extend to the tenant Respondent. In the case in hand there is no acceptable/admissible evidence to establish that all other co-owners consented and acquiesced to the tenancy claimed by the Respondent. As such the protection under the Rent Act is not available to the Respondent as against the purchaser i.e Plaintiff-Petitioner. There are some decisions by the Supreme Court and the Appellate Court on this aspect.

The case in point is *Ranasinghe and another Vs. C.A.C. Marikar 73 NLR 361 and at 371*

When there is a valid letting of the entirety of premises to which the Rent Restriction Act applies, a sale of the premises under the Partition Act does not extinguish the rights of the tenant as against the purchaser, even if the tenant's interest is not expressly specified in the interlocutory decree entered in the partition action. Section 13 of the Rent Restriction Act protects any tenant of rent-controlled premises "notwithstanding anything in any other law", except upon grounds permitted by the Section.

Britto v. Heenatigala (57 N.L.R 327) approved
Heenatigala v. Bird (55 N.L.R 277) overrueld.

But if rent-controlled premises are owned by co-owners and one of them lets the entirety of the premises without the consent or acquiescence of the other co-owners, the protection of the Rent Restriction Act is not available to the tenant as against a purchaser who buys the premises subsequently in terms of an interlocutory decree for sale entered under the Partition Act. In such a case, the tenant cannot resist an application by the purchaser to be placed in possession of the premises.

Per Sirimane J.

A person who takes on rent a house which is co-owned, from one co-owner only does so at his peril. If there are circumstances which show that the lessor had a mandate express or implied, from the other co-owners to deal with the entirety of the co-owned property, then the tenant's occupation is secure. If not, it may still be argued on his behalf that because a co-owner cannot be ejected from the corpus in which he has undivided rights, so too, a tenant who claims under him. But, the decree for a partition or sale under the Act puts an end to co-ownership, and the tenant is now a lessee of interests which have no physical existence as "premises" within the meaning of the Rent Restriction Act (as amended by section 11 of Act 10 of 1961) and

> that Act can therefore give him no protection when a purchaser seeks to eject him. His position, in my view, is at best the same as that of a lessee of an undivided share for a period over one month, whose rights have been specified in the decree, and by an analogy, he may claim these interest – perhaps the equivalent of a month's rent – out of the share of the proceeds of sale allotted to his lessor, under Section 50(2) of the Partition Act. But he cannot, in my view, resist an application by a purchaser to be placed in possession.

Ramasinghe Vs. P.D. Hettihewa and others B.A Law Journal Reports 1998 Vol. VII Part II 34 held that:

> A tenant of a co-owner in respect of a house can be ejected on the basis that the tenant was not the tenant of all the co-owners if the house is allotted to another co-owner in terms of a partition decree

66 N.L.R. 302..

> Where there are a number of co-owners in respect of rent-controlled premises, a lease of the entire premises executed by one of them does not bar the other co-owner, in the absence of an issue on acquiescence, from having the tenant ejected as a trespasser.

I also wish to comment on the Judgment of the Court of Appeal wherein it was held that the Respondent to be a "deemed tenant". This is a misdirection of the law by the Court of Appeal as the concept of 'deemed tenancy arises in situations where continuance of the contract of tenancy on death of a tenant. Section 36 of the Rent Act deals with continuance of tenancy

upon death of tenant. Under that Section land-lord has no choice and he is bound to accept persons specified in the section. It has no application to Section 52(2) of the Partition Law merely because the phrase 'deemed to be a tenant is included in Section 14(1) of the Rent Act. No extended meaning to 'deemed tenancy' could be made as regards the Partition Law. The phrase used by the learned District Judge සන්තකයේ තබා ගැනීම උදෙසා කුලී නිවැසියන් වශයෙන් නාම මාත්‍රිකාව හිමිකම් පානු ලබන්නේ ද යන්න". That phrase cannot be interpreted to be "deemed tenancy" as stated by the Court of Appeal but should be understood in the context of the case in hand. Court of Appeal was completely mislead, to give such an extended meaning. There is no comparison or relevance to Section 52(2) of the Partition Law with Section 36(2) of the Rent Act under Section 36, land-lord has no choice, and Section 14(1) requires proof of ownership and consent of all.

In Mrs. D. Karunaratne Vs. Mrs. N.S. Fernando 73 NLR 458 deals with a case where the widower and children could continue tenancy.

It is possible to argue that a tenant is protected in both sections of the Rent Act (Section 14(1) & (36) but reasons contemplated under each section is different and should be understood in the context of a case.

In all the above circumstances I set aside the Judgment of the Court of Appeal, and affirm the learned District Judge's order directing the issuance of a Writ of Possession as per the relevant statutory provisions of the Partition Law. In the context of the case in hand the protection under the Rent Act is not available to the tenant Respondent as against a purchaser who buys an undivided share in a property co-owned and by a partition suit interlocutory decree and final decree is entered for the reasons enumerated in this Judgment.

I observe that proof of tenancy alone would not be a ground to reject an application under Section 52(1) & (2) of the Partition Act in a case where the property in dispute is co-owned. The absence of items of evidence to prove consent and permission of all co-owners to tenancy will terminate tenancy of a co-owned property. As stated above V27 has no evidentiary value. In these circumstances a purchaser of an undivided share in a co-owned property should not be deprived of his genuine property rights. I answer the question of law as follows:

(a) Yes

(b) Yes. Section 36 of the Rent Act deals with continuance of a tenancy upon the death of a tenant. This section enables the survivors of a deceased tenant to continue in occupation. Thus it is a statutory protection afforded to a tenant. It is alien to Section 52(1) & (2) of the Partition Law which

should be understood in the circumstances and context of the case in hand. One co-owner cannot encumber the property as against all other co-owners, unless others have consented.

Judgment of the Court of Appeal dated December 2004 is set aside

Appeal allowed without costs.

JUDGE OF THE SUPREME COURT

B.P. Aluwihare P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT