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

S.C (Appeal) No. 112/2011
S.C (HC) C.A.L.A. 13/2011
WP/HCCA/MT/28/04(F)
D.C. Mt. Lavinia Case No. 618/00/RE

In the matter of an application for Leave to Appeal in terms of Section 5(c) (1) of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006

Maddumage Chandralatha Perera
No. 714/4, Medawala Road,
Erawwala, Pannipitiya.

PLAINTIFF

Vs.

Ratmalana Pedige Margaret Fernando
No. 168, (Assessment No. 312)
Dehiwala Road, Bellanwila,
Boralesgamuwa.

DEFENDANT

AND BETWEEN

Maddumage Chandralatha Perera
No. 714/4, Medawala Road,
Erawwala, Pannipitiya.

PLAINTIFF-APPELLANT

Vs.

Ratmalana Pedige Margaret Fernando
No. 168, (Assessment No. 312)
Dehiwala Road, Bellanwila,
Boralesgamuwa.

DEFENDANT-RESPONDENT

AND

Maddumage Chandralatha Perera
No. 714/4, Medawala Road,
Erawwala, Pannipitiya.

PLAINTIFF-APPELLANT-PETITIONER

Vs.

Ratmalana Pedige Margaret Fernando
No. 168, (Assessment No. 312)
Dehiwala Road, Bellanwila,
Boralesgamuwa.

DEFENDANT-RESPONDNET-RESPONDENT

BEFORE: Sisira J. De. Abrew J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Ranjan Suwandaratne for the Plaintiff-Appellant-Petitioner

Rohana Jayawardena for the Defendant-Respondent-Respondent

ARGUED ON: 29.04.2016

DECIDED ON: 03.11.2016

GOONERATNE J.

Plaintiff-Appellant (hereinafter referred to as the Plaintiff) instituted action in the District Court of Mt. Lavinia against the Defendant-Respondent (hereinafter referred to as the Defendant) seeking a declaration of title to the property described in the schedule to the plaint and eviction of the Defendant from the said property inclusive of a prayer for damages. However the District Court, Mt. Lavinia case bears the No. 618/00 RE. The Defendant who claims to be the tenant of the property was a successful litigant both in the District Court and in the Civil Appellate High Court of Mt. Lavinia. On 22.08.2011 the Supreme Court granted Leave to Appeal on the following questions of law set out in paragraph 36(a), (b) & (c) of the petition dated 11.01.2011. The said questions reads thus:

(a) Have the Hon. High Court Judge of the Civil High Court erred in law by not taking into consideration of the fact that the Respondent who is claiming tenancy of the premises in suit had done unlawful constructions without obtaining permission written or otherwise from the Petitioner who is the landlord in arriving at their final conclusion?

(b) Have the Hon. High Court Judges misdirected themselves and/or erred in law by not considering the several acts of repudiation of tenancy by the Respondent tenant throughout the District Court action in arriving at their final conclusion?

(c) Have the Hon. High Court Judges erred in law by failure to evaluate the evidence led at the trial on balance of probabilities?

The case of the Plaintiff to state briefly is that the property in dispute is in extent of about 15 perches and as pleaded in the plaint, the Plaintiff has clear title to the said property and also relies upon a final decree in District Court, Colombo Case 8797 Partition. Plaintiff gets title by a deed of gift 5093 (P1) by her father N. Aron Perera the original owner of the property which deed was executed on 12th January 1974. The said property is described as lot (5) in Plan (P2). It is also stated by the Plaintiff that the Defendant is in unauthorised and illegal occupation of premises in dispute which bears the No. 168 (Assessment No. 312) Dehiwala Road, Bellanwila. Premises is situated within the territorial jurisdiction of the Kesbewa Pradeshiya Sabah. It is pleaded that the house in question has been constructed without the approval of the said Pradeshiya Sabah and no certificate of conformity had been issued. Further in terms of the Provisions contained in the Housing and Town Improvement Ordinance the premises/structure is an unauthorised structure and the Defendant thereby has no right to claim the protection of the Rent Act in relation to the said premises.

In the plaint it is pleaded that the Defendant had on or about 15.11.2000 who is an unauthorised occupant without obtaining prior permission of the Plaintiff illegally commenced a construction which caused the Plaintiff an

irreparable loss. As pleaded, the Plaintiff had complained to the said Pradeshiya Sabah and the Kohuwela Police (paragraph 10 of plaint).

The position of the Defendant was that she is a protected tenant as per the Rent Laws of Sri Lanka. Further the Defendant is not a tenant of the Plaintiff. Defendant pleads that she is the tenant of Plaintiff's mother Nancy Balachandran and was also a tenant of her husband Aron Perera. The mother of the Plaintiff namely 'Nancy' had never intimated to the Defendant that rents should be paid to the Plaintiff. Defendant's father was the tenant of Plaintiff's father Aron Perera in 1968 on a rental of Rs. 25/-. Defendant 's father died on or about 1974. On the demise of Defendant's father Defendant succeeded to the tenancy and paid rent to Nancy Balachandran (Plaintiff's mother). Rent at Rs. 35/-. The said Nancy accepted rents but subsequently had refused to accept rent. As such Defendant deposited rent as from 1987 April at the Boralesgamuwa Pradeshiya Sabah which is a sub-office of the Piliyandala Pradeshiya Sabah. (Rent deposited in favour of 'Nancy').

It is also pleaded that the Defendant requested 'Nancy' to effect repairs to the premises in dispute and she refused to do so. Premises consist of zink roof and due to heavy rains sheets had been blown off due to the wind. Therefore Defendant spent about Rs, 75,000/- and put a roof with Asbestos

sheets erecting columns round the house for better protection and to strength the structure. Defendant vehemently denies it is an unauthorised structure.

Parties proceeded to trial on three (3) admissions and 14 issues. It was admitted that the original owner was Aron Perera (Plaintiff's father) who obtained good title on Partition Decree 8797/P and that the premises in dispute is situated within the territorial jurisdiction of the Kesbewa Pradeshiya Sabha. The learned trial Judge however has answered issue No. (1) regarding title to the premises in dispute as 'yes' in favour of the Plaintiff, but all other issues answered against the Plaintiff.

It is important to ascertain the position on which leave was granted by this court and it is equally important to consider the basis and nature of the action filed in the Original Court. Although the case number in the District Court bears 618/00 RE, action instituted in the District Court is an action for a declaration of title. The whole basis of an action of this nature and perhaps described as an action rei vindicatio with a thin area of difference, is the title or rather the superior title of Plaintiff and a denial of that title or an interference with Plaintiff's right under it by the Defendant. Burden of proof vests in the Plaintiff. If the Plaintiff is successful as required as above the burden will shift to the Defendant to prove his or her legal right to occupy or possess the property in dispute.

The main argument advanced on behalf of the Plaintiff by his learned counsel was on the footing (oral/written submissions) of repudiation of tenancy and unlawful construction, and he submitted to court that ownership of land lord or land lady to the premises in dispute is being challenged by the Defendant. Further the learned counsel for Plaintiff submitted to court that Respondent insisted the Petitioner to prove title to the old Deed No. 5093 at the trial. Defendant was not prepared to accept the title of the Plaintiff to the premises despite submitting title deeds. Therefore the contention of Plaintiff was that there is no basis at all for Defendant to claim tenancy in relation to the premises owned by the Plaintiff, and conduct of Defendant amounts to repudiation of tenancy. To explain above, learned counsel for Plaintiff inter alia submitted.

(a) In the District Court Defendant filed a statement of objections supported by an affidavit (to contest application for injunctive relief) challenging the title deed of petitioner referred to in the plaint and deed being executed in 1974, and demanded to prove ownership.

(b) Defendant claims tenancy from the time of Plaintiff's father and Defendant's father. Aron Perera who was Plaintiff's father and Defendant's father Simon Fernando was his tenant. Therefore on demise of Plaintiff's father, Plaintiff's mother Nancy succeeded as land lady and Defendant paid rents to her and on

her refusal to accept rent deposited rent in the local authority under her name or in her favour. Plaintiff argues in view of above Defendant was well aware of Plaintiff's relationship to above persons who were land lords, and that Plaintiff became owner.

Attention of court was drawn to Section 116 of the Evidence Ordinance and to the following authorities. Section 116 reads thus:

> No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property and – of licensee of person in possession – no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

The Acts of Repudiation of Tenancy was considered in the following decided cases. I note the following:

1. *Ranasinghe vs. Premadharma and Others 1985(1) SLR 63 & at 70*

In a suit for rent and ejectment the tenant claimed he had constructed the premises and was entitled to occupy them free of rent until the cost was set off. In effect he claimed a jus retentionis and denied tenancy.

Held – (Wanasundera, J. dissenting) –

The tenant is not entitled to notice because he had repudiated his tenancy. In such a case the land lord need not establish any one or more of the grounds of ejectment stipulated in section 22 of the Rent Act No. 7 of 1972 for success in his suit for ejectment.

In the case of Doe v. Frowd (9) Best, C.J., ruled that –

> "a notice to quit is only requisite where tenancy is admitted on both sides and if defendant denies the tenancy there can be no necessity for a notice to end that which he says has no existence."

When the defendant disclaims the tenancy pleaded by the plaintiff he states definitely and unequivocally that there is no relationship of landlord and tenant between the plaintiff and him to be protected by the Rent Act.

The rationale of the above principle appears to be that a defendant cannot approbate and reprobate. In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one he cannot afterwards assert the other; he cannot affirm and disaffirm. Hence a defendant who denies tenancy cannot consistently claim the benefit of the tenancy which the Rent Act provides. For the protection of the Rent Act to be invoked the relationship of landlord and tenant, between the plaintiff and him which is governed by the Rent Act should not be disputed by the defendant.

2. Subramaniam Vs. Pathmanathan 1984(1) SLR at 252& 253

The appellant was the tenant of certain premises under one R. who was the owner. R. by deed No. 17 of 1.4.1971 transferred the premises to his wife the respondent who called upon the appellant to attorn to her form 1.1.1972. After some earlier correspondence, the appellant on 13.3.1974 wrote P5 to the respondent's attorney-at-law requesting confirmation of R's signature on a letter calling upon him (the appellant) to attorn to the respondent and of the fact that the premises had not vested in the Commissioner of National Housing. By his letter (P6) of 17.9.1974 the respondent's attorney-at-law gave the required confirmation. The appellant however did not pay any rents to the respondent. On 20.12.74 the respondent filed action in the District Court of Colombo seeking the ejectment of the appellant and damages. The respondent filed answer bringing in to the credit of the case the rent from 1.1.1972 to 31.10.1975. Though the

pleadings in the case lacked clarity the Court of Appeal held this was a tenancy action. Title had been pleaded to show that the respondent was the new owner and repudiation of the contract of tenancy had been pleaded to show that such a tenant is not entitled to notice to quit nor to claim any rights to a tenancy.

Held –

(1) The appellant's failure to pay the rents even after he received confirmation by P6 that it was R who had signed the letter requesting attornment to the respondent and that the premises had not vested in the Commissioner of National Housing, was a repudiation of his tenancy and such a person is not entitled to notice. Pleading a termination in the plaint therefore did not arise.

3. *Thamodarampillai Meigananasunderam and Thamayanthi V. Suppiah Selvadurai 1986 The Colombo Appellate Law Report Vol. 1 Part 1 pg. 311*

In an action for ejectment and damages the District Judges held on evidence that the Defendants had neither attorned to the Plaintiff nor paid rent and therefore, there being no contract of landlord and tenant between the parties the Defendants could not maintain that the Plaintiff should give the Defendants notice to quit. The District Judge therefore held that, being in illegal occupation, the Defendants were liable to pay damages and be ejected. The Defendants appealed against this order

Held-

The Judgment of the District Judge on the basis of the reasons given is valid and should therefore be upheld.

I find two main conditions attached to Section 116 of the Evidence Ordinance. It could be classified as

(a) <u>Subsisting of tenancy</u> at all relevant times of the action

(b) Landlord or landlady as the case may be, should be <u>the owner</u> of the property in dispute.

Both conditions in (a) & (b) above need to be satisfied to get the benefit of the above section. If (a) & (b) could be proved estopel will operate which is to the Plaintiff's advantage if proved.

In the case in hand there cannot be any difficulty where title to the property in dispute is concerned. Even the learned District Judge takes the view that the Plaintiff has title to the property and Plaintiff became owner of the property in dispute by a deed of gift (P1) on or about 1974. What need to be focused is whether there was a valid tenancy subsisting, at all relevant times between the Plaintiff and the Defendant and or the illegal constructions done by the Defendant-Respondent amounts to repudiation of the tenancy and sue Defendant-Respondent as a trespasser.

There is nothing to prevent an owner not being the landlord of a property in dispute, and vice versa. However the landlord's ownership cannot be denied in law by the tenant as long as a valid tenancy, subsists. Problems arise where ownership of premises is acquired by a subsequent transferee from the original owner-landlord. In these situation, the question of "attornment" by the tenant to the new owner-landlord of the premises in question may become relevant. Classic examples are found in the above decided cases, in which a Defendant tenant has no right to argue that notice to quit was not sent as he

has repudiated tenancy. As such tenant need to be evicted and also cannot claim the protection given to a tenant under the Rent Laws of Sri Lanka.

The option to file a tenancy action or a vindicating action is a matter for the title holder of the land in dispute. Before I proceed any further the following dicta in *Gunasekera Vs. Jinadasa 1996 (2) SLR 115* need to be considered in its entirety to appreciate the facts of the case in hand, which is somewhat similar to the present case.

Pgs. 115 &116

The premises were let in 1960 by the Plaintiff Respondent Appellants' father to the father of the Defendant Appellant Respondent. Later in 1970, the Plaintiff's father gifted the premises to him, but they neither informed the Defendant's father nor called him to attorn, the latter died in 1973, the Defendant then attorned to the Plaintiff's father, the Defendant continued to pay rent to the Plaintiff's father, when the Plaintiff's father refused to accept rent from 1980, the Defendant deposited the rent with the authorised person, to the credit of the Plaintiff's father. The father and son by their letter of 23.10.81, informed the Defendant of the Transfer and called upon him to pay rent to the Plaintiff with effect from 16.11.81. The Defendant did not reply but continued to occupy the premises, he deposited the rent in the father's name and continued to do so even after his answer was filed.
The Plaintiff instituted vindicatory action, the Trial Judge held that both the Plaintiff and his father had called upon the Defendant to attorn, to the Plaintiff and that the Defendant having failed to attorn to the Plaintiff was a trespasser, and gave judgment for the Plaintiff.

On appeal the Court of Appeal reversed the judgment, holding that the Defendant had become aware of the Plaintiff's title in 1973, and that the father continued to collect rent as the Plaintiffs agent, and that the Defendant had not deliberately refused to accept him as landlord

and had not refused to pay him rent; and that therefore the Defendant had not been transformed from a tenant into a trespasser; on Appeal.

Held:

Per Fernando, J.

"I do not agree that simply because the Rent Act now gives tenants more extensive privileges, the common law should now be interpreted differently, either to assist the transferee or the occupier, the question before us must be approached without any predisposition towards an interpretation which would favour either Plaintiffs or owners, on the one hand or Defendants or tenants on the other.

(i) While it is legitimate initially to infer attornment from continued occupation, thus establishing privity of contract between the parties, another principle of law of contract comes into play in such circumstances to which the presumption of attornment must sometimes yield. When the occupier persists in conduct which is fundamentally inconsistent with a contract of tenancy, and amounts to a repudiation of that presumed contract the transferee has the option either to treat the tenancy as subsisting and to sue for arears of rent and ejectment or to accept the occupiers repudiation of the tenancy and to proceed against him as a trespasser.

Per Fernando, J.

"The court must not apply the presumption of attornment as a trap for the transferee, allowing the occupier who fails to fulfil the obligation of a tenant, if used on the tenancy, to disclaim tenancy and assert that he can only be sued for ejectment and damages in a vindicatory action, but if faced with an action based on title to claim that notwithstanding his conduct he is a tenant and can only be sued in a tenancy action, since it is the occupiers conduct which gives rise to such uncertainty, equitable considerations confirm the option which the law of contract gives to the transferee.

In the case in hand it is important to examine the evidence of the Plaintiff to decide on repudiation of tenancy by the Defendant. The following to

be noted. The Plaintiff testified about the deed of gift in her favour from her father (P1) in the year 1974. Land is situated within the Kesbewa Pradeshiya Sabha. Having given a description of the land and that construction done on or about November 2000, Plaintiff testified that there was no approved Survey plan or a certificate of confirmation (86/87). It is in evidence that Plaintiff received a letter from the Chairman Kesbewa Pradeshiya Sabha (P3) regarding unauthorised construction (P3). However as the Defendant objected to P3 the trial Judge disallowed (as not listed) the letter P3 to be admitted as evidence (89). About the unlawful construction the Plaintiff states, without demolishing the old structure a new structure was erected right round the old house. Defendant never obtained Plaintiff's permission to effect construction of building as stated above (90). Plaintiff states the roof was replaced by asbestos sheets. Earlier it was a cadjan hut, with zink sheets for the roof. The new construction was four times bigger than the old hut. As such Plaintiff informed the authorities concerned about the unlawful construction (92/93).

It is stated by the Plaintiff in her evidence that Defendant and her husband came to see her at her residence at No. 714/4, Pannipitya and informed Plaintiff that it is necessary to construct the house (94). Defendant came to see Plaintiff only once (95) and informed Defendant orally that rent should be paid to Plaintiff (95) Request to effect construction was refused and rejected by

Plaintiff as rent was not paid (95) photographs of new construction was taken and produced in court as P6 to P10 (96/97) without any objection.

The following matters, surfaced in cross examination of Plaintiff. In order to have more clarity on the issue I would itemize such evidence, in cross-examination, of Plaintiff as follows:

(a) Defendant's father was a tenant in 1968 under Plaintiff's father Aron Perera (P8)
(b) Plaintiff's father died in May 1975
(c) After father's demise Nancy Balachandra (Plaintiff's mother) played the role of landlord (P9).
(d) On Plaintiff becoming owner in 1974 rent collected by mother (99) (ඔව් මව කුලී ගත්තා (99) collected by mother.
(e) Plaintiff mentions that Defendant visited her at her house (100)
(f) Mother informed Defendant <u>verbally</u> to pay rents to Plaintiff (100) වාචිකව දැන්වීම් කලා.
(g) Mother informed me that Defendant did not pay her the rent (101)
(h) Mother spoke with tenant. Plaintiff was near her mother මම ඒ ළඟම සිටියා (101)
(i) To a question posed to Plaintiff whether a letter was written by a lawyer on her behalf as regards payments of rent, the answer was it was done verbally. Plaintiff has no letter to produce in this regard 102/103.
(j) Plaint is silent as to whether Defendant tenant was informed of new owner or payment of rent to Plaintiff. The answer of Plaintiff was she has no knowledge of it (103) ඒ ගැන මට අවබෝධයක් නැහැ.
(k) Plaintiff was never paid rent (104)

(l) Another question whether Defendant deposited rent with Boralesgamuwa Rent Board. Plaintiff's answer was 'yes' and deposited in the name of mother (104)

I note the following questions for which there was no answer by Plaintiff (104)

(m) ප්‍ර : විත්තිකාරිය අද වෙනකල් කුලි තැන්පත් කරලා තිබෙනවා

උ : උත්තරයක් නැහැ

ප්‍ර : කිසිම හිගයක් නැහැ

උ : උත්තරයක් නැහැ

(n) Letters V8 and V9 produced through Plaintiff (114/115). V8 dated 26.7.1997 and V9 dated 6.8.1999. These are letters written by Plaintiff's mother and a reply to same by Defendant.

These letters indicate the continuous tenancy between Defendant and Plaintiff's mother. No reference in either letter to Plaintiff's position although Plaintiff had title. The said letters were dispatched over 20 years after Plaintiff obtained title to the land in dispute (letters exchanged between Plaintiff's mother and Defendant). Mother was not called as a witness, irrespective of her age.

The action filed by the Plaintiff was for a declaration of title and eviction of the Defendant Respondent. The dicta in Gunasekera Vs. Jinadasa 1996(2) SLR 116 recognises in law and fact that Defendant-Respondent who is the occupier fails to fulfil the obligation of a tenancy, and with such conduct of the Defendant-Respondent it would amount to repudiation of the contract of tenancy, the transferee (Plaintiff-Appellant) has the option to sue by a tenancy

action or proceed against the Defendant-Respondent as a trespasser as in a vindicatory suit. There is no doubt that title to the property was vested with the Plaintiff-Appellant. There are important questions of law, on which the Supreme Court granted leave. These question go to the root of the case in hand. There is evidence of construction on the property in dispute. Such a construction cannot be done without the consent/permission of the owner of the property. This is the position of the Plaintiff-Appellant. The Defendant-Respondent attempts to demonstrate that there is no requirement to get approval from the relevant local authority, prior to construction, since the relevant gazette pertaining to the local authority was not produced and there is no requirement under the prevalent law to obtain permission from the local authority of the area in question. This is not a rent and ejectment action, but an action for a declaration of title and eviction. An independent witness from the Kesbewa Pradeshiya Sabha M. Somalatha gave evidence at the trial.

The evidence of Somalatha Peiris reveal that a complaint by Plaintiff was made by letter P3 of unauthorised construction by the Defendant-Respondent. The local authority warned Defendant based on P3 to remove illegal construction by P5, and the local authority conducted two inquiries. The first was based on the report P9 where the field officer of the Pradeshiya Sabha had reported of an unauthorised construction. The Second inquiry the witness

herself, Chairman of the Pradeshiya Sabha and another official had visited the scene or the premises in dispute. These items of evidence reveal a complete change to the premises and a change of character of the premises in dispute, as observed by the witness. The relevant evidence reproduced as follows in the verbertim.

ප්‍ර: ප්‍රථම පරීක්ෂණයෙන් කුමක්ද කලේ ?

උ: අදාල ස්ථානය පරීක්ෂා කලා. දැනට පවතින කුඩා ගෙය වට කර මැදිකර ගඩොලින් ගොඩනැගිල්ල ගොඩ නගා පැවතියා වහල ඉහළට. නව වහළ සීට් දැමීමට තිබුනා. එම ඉදි කිරීම සම්බන්ධයෙන් පුර්ව අනුමැතියක් ලබා නොගෙන කටයුතු කර තිබුන නිසා ඉදි කිරීම් වහාම නතර කර ඒ සදහා අනුමැතිය ගන්නා ලෙස වාචිකව දැනුම් දුන් අතර ලිඛිතව දැනුම් දෙන්න සූදානම් වුනා.

ප්‍ර . තමන් කිව්වා දෙවනි වතාවටත් ගිය බව පරීක්ෂණය කරන්න?

උ: දෙවැනි වතාවටත් ගියා

ප්‍ර: දෙවැනි වතාවටත් ගියේ කවුද?

උ: සභාපති, මා, කාර්යාලයේ නිලධාරියෙක්

ප්‍ර: ඒ ගිය අවස්ථාවේදි තමන් නිරීක්ෂණය කලේ මොන වගේ කාරණයක්ද ?

උ: ඔව් නිරීක්ෂණය කලා

ප්‍ර: කුමක්ද නිරීක්ෂණය කලේ

උ: ඇත්ත වශයෙන්ම කුඩා ගෙය ඉවත් කර වෙනත් නිවසක් ඉදි කර ගෙන යනවා

ප්‍ර: තමන් ගිය අවස්ථාවේදී වෙනත් නිවසක් ඉදි කර ගෙන ගියා

උ: අපි යන අවස්ථාවේදි ඉදි කරගෙන ගියා

ප්‍ර: ඉදි කලේ අත්තිවාරම් බිත්ති මත?

උ: ඔව්

ප්‍ර: තමන් යන අවස්ථාවේදී ඒතැන එහෙම තිබුනා. කලින් අවස්ථාවේදී තිබුනේ වෙනත් නිවසක්?

උ: ඔව්

I have considered the cross-examination of the witness. The line of cross-examination had been not to deny any construction as aforesaid but to project that no authority was required to be obtained and not bound to grant permission as the prevalent law does not apply to the Kesbewa Pradeshiya Sabha. Even if one accept the above position, the question of construction and changing the original character of the premises cannot be disputed based on evidence. This is a highly unsatisfactory and unacceptable state of affairs. On the other hand it is too high handed on the part of the tenant Defendant-Respondent to affect a complete structural alterations.

By the Rent (Amendment) Act No. 26 of 2002, structural alteration without prior permission by the tenant would be a ground to evict a tenant (Section 22(2) (e)). The case in hand consists of uncontradicted evidence of structural alterations which according to evidence the above witness, altogether a new house had been constructed. This court is more than convinced of such evidence led from an independent witness.

The acts of the Tenant-Defendant-Respondent amounts to wilful or reckless or deliberate acts which amount to illegality, not available to a protected tenant, and which operates in detriment to his position. Law cannot tolerate and entertain such high handed acts of the so called protected tenant. Therefore continued possession of the property in dispute by the Defendant-

Respondent is illegal. There is no evidence placed before the District Court that the Defendant-Respondent sought permission from the land lady prior to effecting any construction at the relevant time (November 2000) on the land in dispute. Nor is there any evidence that suggests permission was sought from the Plaintiff-appellant though attempts were made to deny title of Plaintiff-Appellants. In these circumstances Defendant-Respondent cannot refuse to surrender possession. This being an action for declaration of title and eviction of the Defendant-Respondent, irrespective of any authority or consent from a local authority to build or construct on land, the required consent and authority should initially flow and be made available only by the owner of the property in dispute or land lord as the case may be prior to any authorisation given by the local authority. Any tenant or occupier who acts contrary to above has to suffer the legal consequences.

The learned District Judge as well as the High Court Bench has failed to appreciate and consider the items of evidence led from the independent witness who was called to give evidence from the Kesbewa Pradeshiya Sabhahawa as discussed above. In a case of this nature the question of attornment may be useful from the tenant's point of view, but in the absence of proper authorisation to build by the land lord would also be a breach of conditions laid down by the Rent Act- vide Section 22 (2)(e) of the Rent Act

evidence led does not even indicate that the tenant sought permission from the land lady (Nancy) in the year November 2000 to effect construction. In these circumstances the title holder the Plaintiff-Appellant would have a right to evict the Defendant-Respondent and consider and treat the Defendant-Respondent as an unauthorised occupier. I also note that though a gazette was not produced to prove the applicability of the Town and Improvements Ordinance to the premises in dispute and the Defendant-Respondent's position was that no requirement to submit a plan for approval since the Kesbewa Pradeshiya Saba area is not covered by the relevant statute, witness from the Pradesiya Sabha mentained in evidence that approval of the local authority was essential for any structural alterations, and it was not obtained by the Defendant-Respondent.

In all the above circumstances and having considered all the evidence placed before the District court and the positions placed before the High Court by either side, the questions of law are considered as follows:

(a) Evidence placed before the trial court does not suggest in any way that Defendant-Respondent sought permission from the Plaintiff-Respondent for the construction. Nor was permission sought from Plaintiff-Respondent's mother to whom rent was paid by Defendant-Respondent until rent was deposited with the local authority. As such I hold that the construction on the premises in dispute is unlawful and unauthorised, irrespective of any authority from the local authority. Therefore the High Court has erred both in fact and in law.

(b) In view of the answer to (a) above it does not arise. This is an action for a declaration of title and eviction. Title to the disputed property is proved and established in favour of the Plaintiff-Appellant. As discussed in this judgment refusal to surrender possession by the Defendant-Respondent is illegal and the Defendant-Respondent by such unauthorised construction cannot be considered in law as a protected tenant.

(c) Yes

The judgment of the District Court and the High Court are set aside. This appeal is allowed with costs and relief granted as per sub-paras 'b', 'c' & 'd' of the prayer to the petition.

Appeal allowed with costs.

JUDGE OF THE SUPREME COURT

Sisira J. De Abrew J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT