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

In the matter of an Application for Leave to Appeal.

Seetha Luxmie Arsakulasooriya
No. 41, Willium Gopallawa Road,
Kandy.

DEFENDANT-APPELLANT-APPELLANT

S. C. Appeal No. 54/2008
S. C. (H.C.) C.A. L. A. No. 34/2008
C.P./H.C.C.A. No. 303/00
D.C. Kandy Case No. 2592/RE

-Vs-

Avanthi Sudarshanee Tissera, nee Wadugodapitiya,
No. 24, Hathbodiya Road,
Kalubowila, Dehiwala.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE	:	Hon. R. A. N. G. Amaratunga, J., Hon. Saleem Marsoof, P.C., J., and Hon. P. A. Ratnayake, P.C., J.
COUNSEL	:	Mohan Peiris, P.C. with Harindra Rajapaksa for Appellant. S. Ratwatte for Respondent.
ARGUED ON	:	30-09-2008 and 11-11-2008
WRITTEN SUBMISSIONS	:	19-01-2009
DECIDED ON	:	09-09-2010

MARSOOF, J.

This is an appeal from the decision of the Civil Appellate High Court of the Central Province holden in Kandy dated 5th March 2005, which affirmed the judgement of the District Court of Kandy pronounced on 7th February 2003 in favour of the Plaintiff-Respondent-Respondent (hereinafter referred to as the "Respondent"), for the ejectment of the Defendant-Appellant-Appellant (hereinafter referred to as the "Appellant") from the premises in suit, namely premises No. 41, William Gopallawa Mawatha, Kandy, more fully described in the schedule to the plaint, and for damages.

The action has been instituted on 15th May 2000 on three causes of action of which only the first, which was for the recovery of possession of the premises on the basis of the alleged reasonable requirement of the Respondent, was pressed at the trial. In paragraph 3 of the plaint, the

Respondent had averred that the Appellant was the tenant of the said premises from about 1979 for which the standard rent was Rs. 95.30 per month. In paragraph 5 of the answer, the Appellant has specifically denied that the tenancy commenced in 1979, and has expressly stated that the tenancy commenced in the year 1969. The Appellant has also in paragraph 7 of the answer, denied the position taken up by the Respondent in paragraph 8 of the plaint that notice of the proposed action has been issued to the Commissioner for National Housing.

At the commencement of the trial in the District Court, two admissions were recorded to the effect that the Respondent is the owner of the premises and that it was subjected to a tenancy in which the Appellant was the tenant of the Respondent landlord. It appears from the proceedings in the District Court that the issues raised by the Respondent were not confined to the initial notice to quit issued by the Respondent to the Appellant on 27th November 1998, requiring her to vacate the premises by 1st December 1999, on the ground of the alleged reasonable requirement of the Respondent landlord, and in addition raised the question of the alleged repudiation of the tenancy and the challenge posed by the Appellant to the rights of the Respondent as landlord, by entering into a lease agreement with the Basnayaka Nilame of the Sri Naatha Devalaya, Kandy, with respect to the premises in suit, and by the institution of D. C. Kandy Case No. 20541/L against the Respondent seeking a declaration that the Appellant was entitled to possess the premises in suit by virtue of the said lease agreement. The issues raised on behalf of the Respondent were as follows:-

" **විසඳුම් ප්‍රශ්න : (පැමිණිල්ලෙන්) :-**

(1) පැමිණිලිකාරිය විසින් සිය නීතීඥ තැන විසින් එකී දේපලේ පැමිණිල්ලේ 6 වන ඡේදයේ දක්වා ඇති ආකාරයට හිස් හා නිරවුල් බුක්තිය ලබා දීමට විත්තිකරුට නොතීසියක් යවා ඇත්ද ?

(2) එකී නොතීසි කාලයෙන් පසුවද, විත්තිකරු එකී දේපලේ පදිංචිව සිටින්නේද ?

(3) පැමිණිලිකාරියට එසේ පදිංචිව සිටීමෙන් සිදු වන අලාභය කොපමණද ?

(4) කෙසේ වෙතත් මෙම නඩුවේ විත්තිකරු එල් 20541 දරණ මහ/දිසා අධිකරණයේ නඩුව පවරා පැමිණිලිකාරියගේ අයිතිවාසිකම් තර්ජනයට ලක්කර ඇත්ද ?

(5) විත්තිකරු 1999/8/27 දින අංක : 2961 දරණ බදු ඔප්පුව මගින් වෙනත් පාර්ශවයකින් ලබාගෙන තර්ක කර ඇත්ද ?

(6) ඉහත විසඳනාවන් වලට පැමිණිලිකාරියගේ වාසියට පිලිතුරු ලැබෙන්නේ නම් විත්තිකාරියට කුලී නිවැසි භාවය හිමි නොවිය යුතුද ?

(7) ඉහත විසඳුම් ප්‍රශ්න පැමිණිල්ලේ ආයාචනයේ ඉල්ලා ඇති සහන ලබාගත හැකිද ?"

It is noteworthy that only issues 1,2 and 3 strictly arose from the pleadings, and issues 4, 5 and 6 were raised on behalf of the Respondent without any objection from the Appellant, and adopted by court. The Respondent was the only witness to testify at the trial. In the course of her testimony, the Respondent produced in evidence the Deed of Gift bearing No. 1009 dated 13th March 1993 made in her favour by her sister Ruwani Dilhara Priyatilake *nee* Wadugodapitiya and attested by Visakha K. Girihagama, Attorney-at-Law and Notary Public, by which she derived title to the premises in suit. She explained in her testimony that by the Amended Final Decree dated 29th July 1997 entered in D.C. Kandy Case No. 7911/P, her sister and she were jointly allotted lot No. 4 of Plan No. 1552 dated 13th October 1995 prepared by Bernard P. Rupasinghe, Licensed Surveyor and Court Commissioner. She further testified that she had become the owner of the entirety of the said lot by virtue of the aforesaid Deed No. 1009 by which her sister had donated to her all rights, title and interest, divided or undivided, that may be allotted to her "in Partition Case No. P/7911 in the District Court of Kandy".

The Respondent testified that she did not own any other housing property, and that she required the premises in suit for occupation as a residence. She stated in evidence that she desired her daughter to be educated in Kandy in the same manner in which she herself had been educated, and that she was unable to have her daughter admitted to a reputed school in Kandy as she was compelled to reside in Dehiwala with her in-laws, as the premises in suit was unavailable for her

occupation by reason of the tenancy in favour of the Appellant. She testified that notice was issued on the Appellant by the letter dated 27th November 1998 requiring her to vacate the premises in suit on or before 1st December 1999, but the Appellant did not so vacate the premises. She made no mention in the course of her testimony of any notice being served on the Commissioner for National Housing as contemplated by Section 22(1A) of the Rent Act, which was in the submission of the President's Counsel for the Appellant, a "mandatory requirement" imposed by law for the ejectment of a tenant protected by the Rent Act, nor was she specifically asked in cross-examination as to whether she had taken this allegedly vital step prior to institution of action.

In the course of her testimony, the Respondent also adverted to the conduct of the Appellant, which from her perspective amounted to a repudiation of the admitted tenancy between the Appellant and the Respondent. In particular, she referred to the fact that the Appellant had prior to the institution of the action from which this appeal arises, entered into a Lease Agreement with the Basnayake Nilame of the Sri Naatha Devalaya, Kandy, bearing No. 2961 dated 27th August 1999 attested by O. C. Meegastenne, Attorney-at-Law and Notary Public, for a period of 20 years commencing on 8th March 1999 with respect to the premises in suit. She also referred to D. C. Kandy Case No. 2054/L instituted by the Appellant against her on or about 3rd September 2001, whereby the Appellant prayed for a declaration that she was the lawful tenant of the premises in suit under its alleged owner, the Sri Naatha Devalaya, Kandy.

Although the Appellant did not testify at the trial nor call any other witness to give evidence on her behalf, the position of the Respondent that the Appellant had repudiated her contract of tenancy with the Respondent is strengthened by the issues raised on behalf of the Appellant herself, which were as follows:-

"**විසඳුම් ප්‍රශ්න : (වත්තියෙන්) :-**

(8) වත්තිකාරිය මෙම දේපල 1999 මාර්තු මස 8 වෙනි දින නාථ දේවාලයේ බස්නායක නිලමේ තුමාගෙන් අංක : 2961 දරණ බදු ගිවිසුම යටතේ ලබා ගෙන තිබෙද ?

(මෙය වත්තියේ උත්තරයේ සඳහන් කර නැති නිසා එයට විරුද්ධ වන බව නීතීඥ සමන්ත රත්වත්තේ මහතා කියා සිටියි.)

(9) එම බදුකරය මඟින් වත්තිකාරිය කුලී නිවැසියෙක් ලෙස පදිංචිව සිටින්නේ නම්, පැමිණිල්ලට මෙම නඩුකරය පවත්වාගෙන යා හැකිද ?

(10) ඉහත ගිවිසුම අනුව වත්තිකාරිය අදාළ දේපොලේ නීත්‍යානුකූල බදු කාරියද ?

(11) ඉහත විසඳනාවන් එකකට හෝ සියල්ලටම 'ඔව්' යනුවෙන් පිළිතුරු ලාවෙන්නේ නම් පැමිණිල්ල නිශ්ප්‍රභා වේද ?"

In this factual setting, the thrust of the submissions of learned Counsel for the Respondent in the District Court was that in view of the repudiation of the tenancy by the Appellant, she is disentitled to the protection of the Rent Act, and that in view of the fact that the existence of the tenancy has been admitted by the Appellant in her pleadings as well as at the commencement of the trial, the Respondent was entitled to an order for ejectment as well as the other relief prayed for in the plaint. On the other hand, it was strenuously contended by learned Counsel for the Appellant that the failure on the part of the Respondent to prove that a notice as contemplated by Section 22(1A) of the Rent Act was served on the Commissioner for National Housing, was fatal to the maintainability of the action.

At the conclusion of the trial, the learned District Judge pronounced his judgement dated 7th February 2003 in favour of the Respondent, answering issues 1, 2, 4, 5, 6, 7, 8 and 9 in the affirmative and 10 and 11 in the negative, and granted the Respondent relief as prayed for in prayers අ and ආ of the plaint, that is to say, for the ejectment of the Appellant and her servants, agents, assigns and any other person claiming under her from the premises in question and the delivery of vacant and peaceful possession thereof to the Respondent and for damages in a sum of

Rs. 7,500/- per month with legal interest thereon payable by the Appellant from 1st December 1999 up to delivery of vacant and peaceful possession of the premises in suit to the Respondent. It is not clear on what basis the learned District Judge arrived at the aforesaid quantum of damages, as he has specifically answered issue 3 in favour of the Appellant and held that the Respondent has failed to adduce evidence to sustain the claim for damages, but this is not one of the questions for determination on this appeal.

The primary basis on which the District Court held in favour of the Respondent was that the Appellant, having admitted the Respondent as her landlord, has proceeded to repudiate the tenancy by her persistent conduct, and has thereby deprived herself of the protection afforded to tenants covered by the Rent Act. The learned District Judge relied on the decisions in *Mansoor v. Umma* [1984] 1 Sri LR 151 and *Dean v. Rauf* [2002] 2 Sri LR 6 and held that the Appellant has by reason of her conduct, forfeited the protection of the Rent Act. The Civil Appellate High Court for the Central Province holden in Kandy has, by its judgement dated 5th March 2005, affirmed the decision of the District Court on the same basis. Against this decision, this Court has on 9th June 2008 granted leave to appeal on the following substantial questions of law:-

(i) Did the Civil Appellate High Court misdirect itself by not considering the fact that the plaint did not contain an averment setting out the exact date on which it was let having regard to the fact that the exact date would decide the applicable law in terms of the Rent Act i.e. Section 22(1)(b) or 22(1)(bb)?

(ii) Did the Civil Appellate High Court misdirect itself by not considering the fact that the Respondent has failed to establish the fact that a notice was sent to the Commissioner of National Housing, which is a mandatory requirement in terms of Section 22(1A) of the Rent Act?

Before considering the above questions of Law on which leave to appeal has been granted by this Court, it is necessary to consider the relevancy of the date of commencement of tenancy for the purpose of determining this appeal.

Relevance of date of commencement of tenancy

It is to be noted that the Rent Act No. 7 of 1972 has been amended by Law No. 34 of 1976, Law No. 10 of 1977, Act No. 55 of 1980 and Act No. 26 of 2002. As expressly provided in Section 1(1) of the Rent Act, the provisions of the Act (other than the provisions of Sections 15, 16 and 17 thereof with respect to which Section 1(3) made specific provision regarding the date of commencement), came into operation on 1st March, 1972.

For the purpose of deciding this case, the date of commencement of the admitted tenancy between the Appellant and the Respondent was crucial in view of the provisions of Section 22 (1)(bb) and Section 22 (1A) of the Rent Act, which had been introduced by the amending Law No. 10 of 1977. Prior to the said amendment, action for the ejectment of a tenant from any premises the standard monthly rent of which did not exceed one hundred rupees, could have been lawfully instituted on the basis of the four grounds set out in Section 22(1) of the Rent Act. One such ground, set out in sub-paragraph (b) of that section, is that the premises, having been let on or *after* the date of commencement of the Rent Act, was reasonably required for the occupation as a residence for the landlord or any member of the landlord's family, or for purposes of the trade, business, profession, vocation or employment of the landlord. Although there was no provision in the Rent Act for the ejectment of a tenant on the ground of reasonable requirement of the landlord where the tenancy had commenced *prior* to the coming into operation of the Rent Act, by the amending Law introduced in 1977, provision was made for this eventuality by Section 22 (1)(bb) which applies to "premises which have been let to the tenant *prior* to the date of commencement of this Act" (Italics added).

It is of significance to note that a greater degree of protection was provided to the latter category of tenants (i.e. tenants of premises which have been let prior to the date of commencement of the Rent Act) by Section 22 (1A) of the Act, which provided as follows :-

> "Notwithstanding anything in subsection (1), the landlord of any premises referred to in paragraph (bb) of that subsection shall not be entitled to institute any action or proceedings for the ejectment of the tenant of such premises on the ground that such premises are required for occupation as a residence for himself or any member of his family, if such landlord is the owner of more than one residential premises and *unless such landlord has caused notice of such action or proceedings to be served on the Commissioner for National Housing*." (Italics added.)

Section 22 (1B) of the Act specially provides that any action filed in terms of Section 22 (1)(bb) should be given priority over all other business of court, and Section 22 (1C) of the Act provided that where a decree for the ejectment of the tenant of any premises referred to in Section 22 (1)(bb) is entered, "no writ in execution of such decree shall be issued by such court until after the Commissioner for National Housing has notified to such court that he is able to provide alternative accommodation for such tenant." By the Rent (Amendment) Act No. 26 of 2002, the provisions of Sections 22 (1)(bb), 22 (1A) and 22 (1C) have been repealed and replaced with provisions which make it much easier to have a tenant ejected from rented premises on the ground of reasonable requirement of the landlord by serving notice of proposed action on the Commissioner for National Housing and depositing with him prior to the institution of an action a sum equivalent to ten years' rent or Rs. 150,000/-, whichever is higher. As the date of institution of the action from which this appeal arises is 15th May 2000, it is only the provisions of the Rent Act No. 7 of 1972, as amended up to that date, which would have applied to the Appellant tenant. Therefore, the provisions of the amending Act No. 26 of 2002 will have no application with respect to the Appellant tenant.

Adequacy of pleadings

It is clear that, as the law stood at the time of the institution of the action from which this appeal arises, no landlord could sue for the ejectment of his tenant unless he has caused notice of action to be served on the Commissioner for National Housing, where the tenant in question had commenced *prior* to the date on which the Rent Act came into operation, which was 1st March, 1972. It is in this context, and having regard to the fact that the *exact date* on which the premises was let would decide whether Section 22(1)(b) or 22(1)(bb) of the Rent Act is applicable to the determination of this case, that this Court granted leave to appeal on the question whether the Civil Appellate High Court misdirected itself by not considering the fact that the plaint did not contain an averment setting out the *exact date* on which the premises was let. As already noted, the Respondent has averred in paragraph 3 of the plaint that the Appellant was the tenant of the premises in suit from about 1979 (1979 පමණ සිට), which position has been denied by the Appellant in paragraph 5 of the answer, where she has stated that the tenancy commenced in the year 1969. Neither party has specified the *exact* date on which the tenancy is alleged to have commenced, and have been content to disclose only the particular year in which they contend the tenancy commenced.

Sections 40, 75 and 79 of the Civil Procedure Code set out the essential requisites of the plant, the answer and further pleadings respectively, and Section 40(d) of the Code specifically provides that a plaint must contain a "plain and concise statement of the circumstances constituting each cause of action, and where and when it arose." It is not the contention of the Appellant that the plaint did not disclose a cause of action or the averments in the plaint fall short of setting out one or more cause of action. If that be the case, it is trite law that the correct procedure is for the defendant, before filing answer, to move court as contemplated by Section 46(2) of the Code to return the plaint to the plaintiff for amendment. *See, Mudali Appuhamy v. Tikarala* 2 Ceylon Law Recorder 35; *Actalina Fonseka v. Dharshani Fonseka* [1989] 2 Sri LR 95. As His Lordship K.M.M.B Kulatunga, J., observed in the course of his judgement in the latter case, at page 100-

> "The law does not require that the plaint should make out a prima facie case which is what the Defendants-Appellants appear to insist on, nor are the Plaintiffs required to state their evidence by which the claim would be proved. The plaint in the action discloses a cause of action and if as it appears to me, the real grievance is that it does not contain sufficient particulars, the defendants should, before pleading to the merits, move to have the plaint taken off the file for want of particulars…."

Adherence to this procedure is both sensible and pragmatic, as without sufficient particulars of the cause of action in the plaint, there will be nothing for the defendant to plead by way of defence.

Learned President's Counsel for the Appellant, however, submits with some force, that as the question whether it is Section 22(1)(b) or 22(1)(bb) of the Rent Act which is applicable to the tenancy in question, would depend on the *exact date* of the commencement of the tenancy, and as such, the failure to disclose such date is fatal to the maintainability of the action from which this appeal arises. I do not see any merit in this submission. In the first place, as was observed by His Lordship G.P.S de Silva CJ in *Hanaffi v. Nallamma* [1998] 1 Sri LR 73 at page 77, "since the case is not tried on the pleadings, once issues are raised and accepted by the court, the pleadings recede to the background." There was no admission in regard to the date of commencement of the tenancy, nor had either party put the matter in issue. Even the defendant, who was obliged by Section 75(d) of the Civil Procedure Code to plead all matters of fact and law on which she relies for her defence, has not averred in her answer the *exact date* on which she alleges that her tenancy commenced, except to say that it was in the year 1969. Secondly, it is plain that the only year in which the *exact date* of commencement of tenancy would have been material to the decision of a case of this nature was 1972, as it will be crucial to determine whether the tenancy commenced prior or subsequent to the date on which the Rent Act came into operation, which was, as already noted, the 1st day of March 1972. Since neither party in this case has alleged that the tenancy in question commenced in the year 1972, the *exact date* of commencement would not have been a material fact on which the right decision of this case would have depended, even assuming that at the commencement of the trial or at a later stage an issue had been formulated in regard to the requirement of the service of a notice on Commissioner for National Housing as contemplated by Section 22(1A) of the Rent Act.

Accordingly, I answer substantive question (i) on which leave had been granted in this case, in the negative, and hold that the Civil Appellate High Court had not misdirect itself by not considering the fact that the plaint did not contain an averment setting out the *exact date* on which the premises in suit was let out.

Failure to give notice of action to Commissioner for National Housing

The other substantive question on which leave to appeal has been granted is whether the Civil Appellate High Court misdirected itself by not considering the fact that the Respondent has failed to establish that "a notice was sent to the Commissioner of National Housing, which is a mandatory requirement in terms of Section 22(1A) of the Rent Act."

Learned President's Counsel for the Appellant has referred to two decisions of our courts for the proposition that causing a notice to be issued on the Commissioner for National Housing is a mandatory requirement in terms of Section 22(1A) of the Rent Act. The first of these is the decision of the Supreme Court in *Miriam Lawrence v. Arnolda* [1981] 1 Sri LR 232, and the other is the decision of the Court of Appeal in *Wiesinghe v. Nadarajah Eswaran* [1984] 1 Sri LR 33. In the course of his judgement in *Miriam Lawrence v. Arnolda,* His Lordship Ismail, J., observed at page 234 as follows:-

> "It will be noted that under sub-section (1A) there had to be two essential pre-requisites before institution of any action or proceedings for ejectment of a tenant. These are, firstly, that the said landlord will not be entitled to institute any action or proceedings for ejectment of a tenant if he is the owner of more that one residential premises and secondly, the said

landlord had caused notice of such action or proceedings to be served on the Commissioner of National Housing."

That case turned on the alleged failure on the part of the landlord in that case to plead in the plaint that he was not the owner of more than one residential premises, and in regard to that omission in the pleadings Ismail J observed at page 235 that "if this is clearly pleaded only, would the Court have jurisdiction to entertain and proceed with the case instituted under the provisions of this Law." This reasoning was followed by the Court of Appeal in *Wiesinghe v. Nadarajah Eswaran* in setting aside a settlement reached by the parties in a case which had been filed by a landlord against his tenant who had commenced his tenancy *prior* to the date the Rent Act came into operation, for the simple reason that the plaintiff had *failed to plead* in the plaint that notice in terms of Section 22 (1A) of the Act had been served on the Commissioner for National Housing. H.A.G de Silva J at page 41 of his judgement described this as "an essential requirement as by sub-section (1C) the Court is precluded from issuing a writ of execution until the Commissioner of Housing has notified the Court that he is able to provide alternate accommodation for such tenant." His Lordship noted that "in the absence of such an averment that such notice has been given to the Commissioner of National Housing the plaint is prima facie bad and could have been rejected by Court."

Learned Counsel for the Respondent, has in my opinion very rightly, refrained from making any serious attempt to controvert the correctness of the propositions of law laid down in the aforesaid decisions of our courts. Instead, he has strenuously contends that Section 22 (1A) of the Rent Act is irrelevant in the circumstances of this case insofar as the Appellant has, by her conduct, repudiated the tenancy, and thereby deprived herself of the protection of the Rent Act. He relies on two decisions of this Court for this proposition of law, namely, *Kanthasamy v. Gnanaekeram and Another,* [1983] 2 Sri LR 1 and *Ranasinghe v. Premadharma and Others,* [1985] 1 Sri LR 63. Before discussing these decisions, it is necessary to advert to a long line of decisions commencing with *Muthu Natchia v. Pathuma Natchia,* (1895) 1 NLR 21 that held that a tenant who disclaims to hold of his landlord and puts him at defiance was not entitled to have the action dismissed for want of a valid notice to quit. *See, Sundrammal v. Jusey Appu***,** (1934) 36 NLR 40; *Pedrick v. Mendis,* (1959) 62 NLR 47**;** *Hassun.* ***v.*** *Nagaria,* (1969) 75 NLR 335. In *Edirisinghe v. Patel and Two Others* **(**1973) 79(1) NLR 217, the Supreme Court refused to extended the principle enunciated in *Muthu Natchia v. Pathuma Natchia* to a case of a tenant who is entitled to the protection of the Rent Restriction Act No 29 of 1948, as subsequently amended. Pathirana, J., at page 220 of his judgement stated that-

> "Under the Rent Restriction Act the common law right of the landlord to institute an action for the ejectment of the tenant of any premises to which the Act applies is fettered. He cannot institute any action nor will such an action be entertained by a Court unless he obtains the written authorization of the Rent Control Board. The authorization of the Board is, however, not necessary on the grounds stated in section 13 (1)(a), (b) (c) and (d)……. The resulting position, therefore, is that when a landlord institutes an action against a tenant to have him ejected from the premises on any one or more of the grounds set out above, in my view, once the landlord comes to Court on the averment that the person in occupation of the premises is his tenant and establishes this fact, then such a person cannot be ejected from the premises unless the landlord satisfies the requirements of any one of the grounds set out in section 13 or on the ground of sub-letting under section 9 of the Act. A tenant may deny tenancy for a number of reasons. He may do so in order to avoid payment of rent. But once it is proved that he is tenant ***ipso*** *facto* he is entitled to the protection of the Rent Restriction Act as he is a protected tenant. A reading of section 13 of the Act makes it also clear that the denial or repudiation of a tenancy is not one of the grounds on which the landlord can institute an action in Court."

In *Kanthasamy v. Gnanaekeram and Another* [1983] 2 Sri LR 1, on which learned Counsel for the Respondent to this appeal has placed great reliance, the factual circumstances as well as the strategies adopted by Counsel were somewhat similar to the action from which this appeal has

arisen. The Plaintiffs-Respondents in that case, who were landlords of premises No. 115, Rosmead Place, Colombo 7, filed action to terminate the tenancy of the Defendant-Appellant on the ground of reasonable requirement as a residence as set out in Section 22(b) of the Rent Act. The Defendant-Appellant filed answer admitting his residence in part of the said premises but denying that he occupied the said portion as the tenant of the Plaintiff-Respondents stating that he had been paying rent as an agent of one Sittampalam and not as the tenant of the said Plaintiffs-Respondents. When issues were raised, the learned Queen's Counsel for the Plaintiff-Respondents abandoned the cause of action grounded on reasonable requirement and simply framed an issue as to whether the Plaintiff-Respondents were entitled to a writ of possession against the Defendant-Appellant by reason of his denial of the tenancy. Thereupon, learned Queen's Counsel for the Defendant-Appellant raised issues as to whether the premises in suit were reasonably required for the residence of the Plaintiff-Respondents, and if that issue is answered in the negative, whether Plaintiff-Respondents can have and maintain the action for ejectment. The Defendant-Appellant did not testify at the trial or call any witnesses, but throughout the course of the trial and particularly in the cross-examination of the witnesses of the Plaintiff-Respondents, consistently took up the position that he occupied part of the premises only as the licensee of Sittampalam. The learned District Judge held that the Defendant-Appellant was indeed the tenant of the Plaintiff-Respondents, but that he was liable to be ejected as he had in his answer and conduct repudiated the said tenancy. Despite the fact that the Plaintiff-Respondents had abandoned their cause of action based on reasonable requirement, he also answered the issue raised by Queen's Counsel for the Defendant-Appellant as to whether the premises were reasonably required for the residence of the Plaintiff-Respondents, in the affirmative.

On appeal, the Court of Appeal affirmed the decision of the District Court on the latter issue, and left open "the interesting but not altogether easy question whether a defendant who denied a tenancy in his answer is entitled to plead the benefits of the Rent Act."When the matter ultimately reached the Supreme Court on appeal, Victor Perera, J., (with whom Wimalaratne, J., and Colin Thome, J., concurred), held that the finding of the learned District Judge affirmed by the Court of Appeal in regard to reasonable requirement cannot be sustained on the evidence, and went on to consider the question whether a defendant who denied the tenancy in his answer was entitled to the protection of the Rent Act. In answering this question in the negative, His Lordship at pages 13 and 14 of his judgement, quoted with approval the following *dictum* of Sirmianne, J., in *Edirisinghe v. Patel and Two Others* (1973) 79 (1) NLR 217 at page 228 seeking to explain the reasoning behind the line of decisions commencing with *Muthu Natchia v. Pathuma Natchia* -

> "The reason why such notice is not necessary and why a defendant who denies a tenancy cannot take up such a plea is because by his denial he repudiates the contract of tenancy and *thus terminates* it. It is therefore not open to the defendant who has himself terminated the contract to say that the plaintiff has not terminated it by a valid notice. *A contract of tenancy can be terminated not only by a valid notice, but also by a repudiation of that contract*". (Italics added.)

Accordingly, His Lordship Victor Perera, J., concluded at page 15 of his judgement that -

> "If that was the correct legal position, the defendant in that case was not the tenant on his own plea and therefore could not invoke the protection of the Rent Restriction Ordinance then in force."

The conflict between the decisions of this Court in *Edirisinghe v. Patel and Two Others* (supra) and *Kanthasamy v. Gnanaekeram and Another* (supra) was finally resolved by a Bench of 5 Judges of the Supreme Court in *Ranasinghe v. Premadharma and Others,* [1985] 1 Sri LR 63. The facts of that case were not very complicated. The plaintiff instituted action against the defendants, claiming arrears of rent, damages and ejectment of the defendants, from the premises in suit, which were admittedly governed by the provisions of the Rent Act. The plaintiff had averred in her plaint that she had rented out the premises to the defendants at a monthly rental of Rs. 16 and that they had failed to

pay rent since August 1972 and that by notice dated 27th November 1976 she had requested them to quit and deliver possession of the premises on or before the end of February 1977. The defendants in their answer took up the position that they had constructed the house standing on the premises at a cost of Rs. 5,000 and that they were entitled to remain in occupation thereof free of rent until the said amounts are set off. The defendants thus based their right to occupation of the premises not on any tenancy under the plaintiff but on an independent title of their own - namely *jus retentionis*. By way of reconvention they claimed this amount for the improvements effected by them. They also denied both the receipt and the validity of the notice to quit pleaded by the plaintiff. By majority decision, the Supreme Court overruled the Court of Appeal and restored the decision of the District Court that the defendants were not entitled to the protection of the Rent Act in the circumstances of the case. Sharvananda, C.J., (with whom Wimalaratne, J., Colin-Thome, J., and Ranasinghe, J., concurred, Wanasundera, J., dissenting) observed at page 69 of his judgement that-

> "The court in *Edirisinghe v. Patel* had adopted a very literal interpretation of the language of section 9 and 13 of the Rent Restriction Act. In doing so it had not taken into consideration a very relevant principle of law "which has its basis in common sense and common justice, that a man should not be allowed to blow hot and cold, to affirm at one time and deny at another" as stated by Victor P.erera, J. in *Kandasamy v. Gnanasekeram* (supra). It does not appear to me to be sound law to permit a defendant to repudiate a contract and thereupon specifically to rely upon a statutory defence arising on the contract which he repudiates."

Further elaborating this line of reasoning, His Lordship clarified at page 71 of the judgement that -

> "Where the defendant by his conduct or pleading makes it manifest that he does not regard that there exists the relationship of landlord and tenant between the plaintiff and him, it will not be reasonable to include him in the concept of "tenant" envisaged by section 22 of the Rent Act although the court may determine, on the evidence before it, that he is in fact the tenant of the plaintiff. Since such a person had by his words or conduct disclaimed the tenancy which entitles him to the protection of the Rent Act, it will be anomalous to grant him the protection of a tenancy, which, according to him, does not exist. *Invito beneficium non datur* (Digest 50. 17. 69) said the Romans - the law confers upon a person no right or benefit which he does not desire. Whoever abandons or disclaims a right will lose it. The defendant has to blame himself for this consequence.
>
> The decision in *Edirisinghe v. Patel* (supra) has erred in overlooking the above principles and in holding the conduct of the defendant as irrelevant. Hence it was not correctly decided and should not be followed."

While the Rent Act as much as its predecessor, the Rent Restriction Act, has created what Wanasundera J in *Ranasinghe v. Premadharma and Others,* [1985] 1 Sri LR 63 at page 72 quite rightly described as "a statutory relationship between landlord and tenant ……designed to ensure a great measure of security and protection to the tenants", in my considered opinion, no tenant who has by his own conduct repudiated the contract of tenancy could seek shelter under the salutary provisions of the Rent Act which are only attracted by a contract of tenancy, whether express or implied. Conversely, as the Supreme Court decided in *Imbuldeniya v. D. de Silva* [1987] 1 Sri LR 367 the Rent Act does not give any protection to a tenant against a person who is not the landlord, even if it be shown that he is the true owner of the property which is subject to the tenancy.

Not only did the Appellant in the instant case very clearly repudiate the tenancy and thereby renounce the protection afforded by the Rent Act, she has also failed to prove the ingredients necessary to bring the protective provision of Section 22 (1A) of the Rent Act into play. The condition that a landlord seeking to have his ejected on the ground of reasonable requirement should cause notice of the proposed action or proceeding served on the Commissioner for National Housing, applies only to a landlord of any premises referred to in Section 22 (1)(bb) of the Rent Act, namely a "premises which have been let to the tenant *prior* to the date of commencement of this

Act". As already noted, the Respondent in this case has averred in his plaint that the Appellant was the tenant of the premises in suit from about 1979, whereas the Appellant stated in her answer that the tenancy commenced in the year 1969. Although at the commencement of the trial, the fact of the tenancy was admitted by the parties, the date of commencement of the tenancy was not so admitted, nor was any issue raised by either of the parties in regard to the date of commencement of the tenancy, to enable the District Court to make any determination in this regard. If the Appellant was relying on the salutary provision of Section 22 (1A) of the Rent Act, issues should have been raised on her behalf as to the date of the commencement of tenancy and as to whether the Respondent can have and maintain the action in the absence of evidence to show that she has caused the requisite notice to be served on the Commissioner for National Housing as averred in terms of such 22 (1A). As reflected in issue 8 raised at the trial, the defence of the Appellant in the District Court was based on her alleged right to occupy the premises in suit under the Lease Agreement bearing No. 2961 dated 27th August 1979 signed with the Basnayake Nilame of the Sri Naatha Devalaya, Kandy, which the Appellant sought to further fortify through three consequential issues to follow. These issues, along with the conduct of the Appellant in challenging the title of the Respondent through the institution of D.C Kandy case No. 2054/L, in my opinion clearly constituted a repudiation of the very tenancy agreement on which the Appellant was seeking to found her claim for protection under the Rent Act.

In this context, it may be of some importance to note that the learned District Judge has in his judgement proceeded to answer issue 8 raised by the learned Counsel for the Appellant, despite the objection taken on behalf of the Respondent to this issue on the basis that it has not been pleaded. The learned District Judge has noted in the course of his judgement, that although he had made order rejecting the said issue on the basis that it had not been pleaded in the answer, this order has not been duly recorded by the court stenographer. However, he has taken the said issue into consideration in his judgment and answered the same, in view of the fact that the court stenographer has recorded the said issue as having been admitted, which entry has not been corrected in the course of the trial. The learned District Judge has also noted that the learned Counsel for the Respondent had later withdrawn his objection to the said issue. This is well and good, as the duty imposed on the Court by Section 146(2) of the Civil Procedure Code in cases where learned Counsel are not agreed on the issues, is to ascertain upon what material propositions of fact or law the parties are at variance and record issues on which the right decision of the case appears to the Court to depend, "upon the allegations in the plaint, *or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party*, *and after such examination of the parties as may appear necessary*". There is no express reference to the answer in the above quoted provision, but it has been the inveterate practice of our courts to be guided by the averments of the plaint, answer and replication as well as the other pleadings for the purpose of formulating the issues. However, our courts are not restricted to such pleadings, and it is clear from the above provision of the Civil Procedure Code that there is an obligation cast on the court to look beyond the pleadings for ascertaining the issues, provided that the essential character of the action is not fundamentally changed in the process. It is abundantly clear from the documents produced at the trial, particularly the Lease Agreement bearing No. 2961 dated 27th August 1979 executed by the Basnayake Nilame of the Sri Naatha Devalaya, Kandy, in favour of the Appellant and the plaint in D.C. Kandy Case No. 2054/L, that issue 8 (and its consequential issues 9, 10 and 11) raised questions of vital importance, and to strike down the said issue would have been to render the Appellant issueless.

It is significant that the submission that the Respondent cannot have and maintain the action from which this appeal arises in view of non-compliance with the mandatory requirement of Section 22 (1A) of the Rent Act was put forward on behalf of the Appellant for the first time in the written submissions tendered to the District Court after the closing of all evidence. This stand was not only contradictory to the positions taken by the Appellant in her issues and throughout the conduct of the trial, but also the belatedness of the submission precluded the possibility of the Respondent leading evidence to show that Section 22 (1A) had no application because the tenancy in fact

commenced in 1979, or alternatively, that she had caused the service of notice on the Commissioner for National Housing as contemplated by that provision, if that be the case.

For all these reasons, I am of the opinion that substantive question (ii) on which leave to appeal had been granted by this Court should also be answered in the negative, and I hold that the Civil Appellate High Court did not misdirect itself by not considering the fact that the Respondent has failed to establish the fact that a notice was sent to the Commissioner for National Housing, as contemplated by Section 22 (1A) of the Rent Act.

Conclusions

Accordingly, I answer both substantive questions for determination on this appeal in the negative. The appeal is dismissed and the decisions of the lower courts are affirmed, with costs payable to the Plaintiff-Respondent-Respondent by the Defendant-Appellant-Appellant in a sum of Rs. 25,000/-.

JUDGE OF THE SUPREME COURT

HON. AMARATUNGA, J.
I agree.

JUDGE OF THE SUPREME COURT

HON. RATNAYAKE, J.
I agree.

JUDGE OF THE SUPREME COURT