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

1. Bopage Martin
2. Indrani Bopage
   Both of Kadaveediya,
   Horawapathana
   Plaintiffs

SC APPEAL NO: SC/APPEAL/92/2014
SC/HCCA/LA NO: SC/HCCA/LA/457/2013
HC NO: NCP/HCCA/ARP/968/2012
DC ANURADHAPURA NO: 19194/RE

Vs.

Abdul Fareed Mohamed Malik
(Deceased)

1. Abdul Fareed Mohamed Malikge Nawaz
2. Abdul Fareed Mohamed Malikge Riyaz
3. Abdul Fareed Mohamed Malikge Farees
   All of New Lanka Stores,
   Trincomalee Road,
   Kadaveediya,
   Horawapathana
   Defendants

AND BETWEEN

Indrani Bopage,
Kadaveediya,
Horawapathana
Plaintiff-Appellant

Vs.

1. Abdul Fareed Mohamed Malikge Nawaz
2. Abdul Fareed Mohamed Malikge Riyaz
3. Abdul Fareed Mohamed Malikge Farees
   All of New Lanka Stores,
   Trincomalee Road, Kadaveediya,
   Horawapathana
   Defendant-Respondents

AND NOW (BY AND BETWEEN)

1. Abdul Fareed Mohamed Malikge Nawaz
2. Abdul Fareed Mohamed Malikge Riyaz
3. Abdul Fareed Mohamed Malikge Farees
   All of New Lanka Stores,
   Trincomalee Road, Kadavediya,
   Horawpathana
   Defendant-Respondent-Appellants

Vs.

Indrani Bopage,
Kadaveediya,
Horawpathana
Plaintiff-Appellant-Respondent

Before: Hon. E.A.G.R. Amarasekara, J.
Hon. Yasantha Kodagoda, P.C., J.
Hon. Mahinda Samayawardhena, J.

Counsel: Nuwan Bopage for the Defendant-Respondent-Appellants.
Hirosha Munasinghe for the Plaintiff-Appellant-Respondent.

Written Submissions:
By the Defendant-Respondent-Appellants on 14.08.2014
By the Plaintiff-Appellant-Respondent on 25.08.2016 and 20.12.2023

Argued on: 24.11.2023

Decided on: 12.02.2024

Samayawardhena, J.

The two plaintiffs, the father and the daughter respectively, filed this action more than 21 years ago by plaint dated 16.01.2003, seeking ejectment of the defendant from the premises known as "New Lanka Stores" described in the schedule to the plaint and damages on the basis that the defendant is the overholding tenant. The defendant filed answer seeking the dismissal of the plaintiffs' action and a declaration of title to the premises described in the schedule to the answer on "long possession". In other words, he was claiming title to the premises by prescription. However, he did not specify against whom he was seeking

prescriptive possession. He never denied in the answer that he is in possession of "New Lanka Stores". The plaintiffs filed a replication seeking the dismissal of the claim in reconvention. The plaintiffs also averred that the premises described in the answer is the same premises described in the schedule to the plaint. They further averred that after the institution of the action, the defendant removed the business name "New Lanka Stores" to another place in the Horawpathana town but continued to carry on a similar business in the premises in suit.

During the pendency of the case, the 1st plaintiff and the defendant died. The 1st plaintiff had transferred the premises to the 2nd plaintiff prior to the institution of the action by Deed marked P10. Hence the 2nd plaintiff (hereinafter "the plaintiff") proceeded with the case. The three children of the defendant (hereinafter "the defendant") were substituted in place of the deceased defendant.

The case for the plaintiff is that the plaintiff rented out the premises to the defendant on a monthly rent of Rs. 500. The defendant was informed by letter dated 11.08.2002 marked P1 that the rent would be increased to Rs. 6000 from 01.01.2003 and if he was unable to pay the said sum, the monthly tenancy would be terminated from that date. The defendant did not reply to this letter. He refused to pay even the old rent from September 2002. Thereafter, the plaintiff sent the letter dated 02.01.2003 marked P3 terminating the monthly tenancy and demanding the defendant to hand over the premises on 15.01.2003. The defendant neither replied to this letter nor handed over the premises. It is thereafter the action was filed in the District Court.

At the trial, on behalf of the plaintiff, nine witnesses (including the plaintiff) have given evidence and documents P1-P22 have been produced. The plaintiff's case had been formally closed on 21.02.2007. I must observe that most of those witnesses have been called as a matter

of course. Documents have been marked subject to proof for no reason. Witnesses have been called to prove documents which were not marked subject to proof.

On behalf of the defendant no witnesses have been called but two documents marked V1 and V2 have been produced. The defendant's case had been formally closed on 29.02.2012.

No evidence whatsoever had been led before the judge who pronounced the judgment. By judgment dated 10.08.2012 the plaintiff's case has been dismissed on the sole basis that the premises in suit has not been identified by the plaintiff. The defendant's cross-claim has also been dismissed on the basis that it has not been proved.

On appeal, the High Court of Civil Appeal set aside the judgment of the District Court and entered judgment for the plaintiff as prayed for in the plaint. This appeal by the defendant is against the judgment of the High Court.

This Court has granted leave to appeal mainly on two questions of law:

(a) Has the High Court of Civil Appeal failed to consider that the plaintiff has not identified the subject matter of the action?
(b) Has the High Court of Civil Appeal failed to consider that the plaintiff has not discharged the burden of proof in a civil action?

Let me now consider those two questions of law.

As the High Court has correctly pointed out, there was no reason for the District Judge to dismiss the plaintiff's action on the basis that the premises in suit has not been identified by the plaintiff when there was no such issue raised by the defendant at the trial. When the defendant described the premises in suit in his answer differently, the plaintiff in

the replication stated that it is the same premises. Thereafter, the defendant did not raise an issue on the identification of the premises.

I will reproduce below the English version of the defendant's issues and the answers given by the District Judge thereto to make this point clear:

> (10) Has the defendant been in possession of the premises described in the schedule to the answer for a long time?
> Not proved.
>
> (11) If the answer to that question is in the affirmative, is the defendant entitled to the relief as prayed for in paragraph (a) to the answer?
> In view of the above answer, does not arise.
>
> (12) Has a cause of action accrued to the plaintiff against the defendant?
> The cause of action against the defendant has not been proved.
>
> (13) Has the plaintiff filed this action maliciously?
> Not proved.
>
> (14) Has the case No. 19049/RE been filed by the plaintiff against the defendant in the same Court on the same cause of action?
> Not proved.
>
> (15) If so, can the plaintiff maintain this action?
> In view of the above answer, does not arise.
>
> (16) If one or several of the above issues are answered in favour of the defendant, is the defendant entitled to the reliefs prayed for in the prayer to the answer?
> The defendant is entitled to the relief for the dismissal of the plaintiff's action.

The District Judge did not answer the plaintiff's issues on the basis that the premises in suit have not been identified.

When the identification of the subject matter was not put in issue at the trial, the District Judge cannot find an easy way out to write the judgment stating that the subject matter has not been properly identified by way of an assessment number.

It is true that the plaintiff has not identified the premises in suit in the schedule to the plaint by an assessment number. But in almost all the correspondence, including the ones attached to the plaint, the premises have been identified as No. 45. This includes the letter of termination of tenancy. The plaintiff has marked several letters including P4, P5 and P6 sent by none other than the defendant's lawyer to the plaintiff with money orders as monthly rentals for premises No. 45.

P9 dated 14.02.1988 is a statement made by the defendant to the Horowpathana police station. This was not marked subject to proof although a police officer who typed it was called as a witness. Martin referred to therein is the plaintiff. It reads as follows:

> මම දැනට අවුරුදු 04 ක පමන සිට මෙම බෝපගේ මාටින් යන අයට අයිති හොරොව්පොතාන නගරයේ ඇති වරිපනම් අංක 45 දරණ කඩය කුලියට මසකට රු: 100/= ක් දෙන පොරොන්දුවට ගත්තා. නමුත් මෙම කඩය වෙනුවෙන් මීට වඩා වැඩි කුලී මුදලක් මට ගෙවීමට නොහැක. උසාවියේ නඩුවකින් පසුව අවශ්‍ය වේ නම් කුලිය වැඩි කරදීමට කැමතියි. මට කීමට ඇත්තේ මෙපමනයි.

This puts the matter beyond doubt that the defendant was the monthly tenant of the plaintiff at assessment No. 45 and there is no issue regarding the identification of the subject matter.

At the argument, learned counsel for the defendant drew the attention of the Court to the Fiscal's Report marked P17 to say that there is an issue

regarding identification of the premises. I cannot agree. This Fiscal's Report is in respect of another case No. 12581/L filed by the plaintiff against another person, namely Karunaratne. According to the Fiscal's Report, the possession of the entire land described in the schedule to the plaint in extent of 19.37 perches had been handed over to the plaintiff on 08.09.1999. Learned counsel for the defendant argues that, if the possession of the entire land was handed over to the plaintiff on 08.09.1999, the plaintiff's version that the defendant is in part of the land even now cannot be believed.

This matter has been explained by the plaintiff during the cross-examination and in answer to the Court's questioning. In answering the Court's questioning the plaintiff has stated that within 19.37 perches, there are five business premises in a row belonging to the plaintiff. Case No. 12581/L was in respect of No. 37. In the execution of the decree in case No. 12581/L, the defendant was not ejected from his premises (No. 45) because there was no issue with the defendant at that time – *vide* pages 14-16 of the District Court proceedings dated 09.11.2005.

I affirm the finding of the High Court of Civil Appeal that there was no issue in the District Court trial as to the identity of the subject matter.

Learned counsel for the defendant did not press the argument on the second question of law. The second question of law is on the burden of proof. The plaintiff did not file a *rei vindicatio* action. The plaintiff filed the action as the landlord against the defendant as the overholding monthly tenant. As I explained earlier, the monthly tenancy has unequivocally been admitted by the defendant. The termination of monthly tenancy was proved by P3 and P3(a). The plaintiff's action is based not on ownership but on the violation of the privity of contract. The plaintiff's main relief is the ejectment of the defendant, not the declaration of title to the premises. In cases of this nature, seeking a declaration of title is customary, yet it

is superfluous. Although the plaintiff produced the title deed, it was not necessary as the defendant tenant cannot question the plaintiff's ownership to the property by operation of the principle of estoppel embodied in section 116 of the Evidence Ordinance.

Section 116 of the Evidence Ordinance states:

> *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 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.*

In *Ruberu v. Wijesooriya* [1998] 1 Sri LR 58 at 60, Gunawardana J. held:

> *Whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (the defendant-respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of him, i.e. the plaintiff-appellant without whose permission, he (the defendant-respondent) would not have got it. The effect of the operation of section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must, first, quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-appellant is perforce an admission of the fact that the title resides in the plaintiff. No question of title can possibly arise on the pleadings in this case, because, as the defendant-respondent has stated in his answer that he is a lessee under the plaintiff-appellant, he is estopped from denying the title of the plaintiff-appellant. It is an inflexible rule of law that no lessee or licensee will ever be permitted*

either to question the title of the person who gave him the lease or the licence or the permission to occupy or possess the land or to set up want of title in that person, i.e. of the person who gave the licence or the lease. That being so, it is superfluous, in this action, framed as it is on the basis that the defendant-respondent is a licensee, to seek a declaration of title.

The difference between a *rei vindicatio* action based on ownership and an action for ejectment based on the breach of the contract was lucidly explained by Gratiaen J. in *Pathirana v. Jayasundara* (1955) 58 NLR 169 at 172-173:

*In a rei vindicatio action proper the owner of immovable property is entitled, **on proof of his title**, to a decree in his favour for the recovery of the property and for the ejectment of the person in wrongful occupation. "The plaintiff's ownership of the thing is of the very essence of the action". Maasdorp's Institutes (7th Ed.) Vol. 2, 96.*

*The scope of an action by a lessor against an overholding lessee for restoration and ejectment, however, is different. Privity of contract (whether it be by original agreement or by attornment) is the foundation of the right to relief and **issues as to title are irrelevant to the proceedings**. Indeed, a lessee who has entered into occupation is precluded from disputing his lessor's title until he has first restored the property in fulfilment of his contractual obligation. "The lessee (conductor) cannot plead the exceptio dominii, although he may be able easily to prove his own ownership, but he must by all means first surrender his possession and then litigate as to proprietorship…" Voet 19.2.32.*

Both these forms of action referred to are no doubt designed to secure the same primary relief, namely, the recovery of property. But

the cause of action in one case is the violation of the plaintiff's rights of ownership, in the other it is the breach of the lessee's contractual obligation.

A decree for a declaration of title may, of course, be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner.

The plaintiff proved his case as required by law. The defendant manifestly failed to prove his case or resist the plaintiff's claim successfully.

I answer the two questions of law on which leave to appeal was granted in the negative and affirm the judgment of the High Court of Civil Appeal. The appeal is accordingly dismissed.

The defendants are in unlawful possession since 15.01.2003. The premises in suit are business premises. In addition to the reliefs as prayed for in the prayer to the plaint, each substituted defendant shall pay Rs. 200,000 (Rs. 600,000 in total) as costs of this appeal to the plaintiff.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.
I agree.

Judge of the Supreme Court