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

Perakum Dissanayakage Jayasuriya
No.147, Kurunegala Road
Rambukkana
1st Defendant-Respondent-Petitioner

S.C.Appeal No.07/2016
S.C/HCCA/ LA No.483/2014
SP/HCCA/KAG Appeal No.43/2013[F]
D.C.Kegalle Case No.72/RE

Vs.

K. M. Tharanganee Mallika Kumari
Kadawattiya, Walpola Watta,
Kotawella
Plaintiff-Appellant-Respondent

Dissanayake Mudiyanselage Gunathilaka
No.147, Kurunegala Road,
Rambukkana

Presently at "Tilaka Stores",
Wahawa Junction,
Rambukkana
2ndDefendant-Respondent-Respondent

BEFORE : **S.E.WANASUNDERA, PC, J.**
UPALY ABEYRATHNE, J.
K.T.CHITRASIRI, J.

COUNSEL : S.C.B.Walgampaya, P.C. with Upendra Walgampaya for the 1st Defendant-Respondent-Petitioner

D.Jayasinghe for the Plaintiff-Appellant-Respondent

ARGUED ON : 10.11.2016

WRITTEN SUBMISSIONS ON : 22.11.2012 by the Plaintiff-Appellant-Respondent
12.02.2016 by the 1st Defendant-Respondent-Petitioner

DECIDED ON : 16.12.2016

CHITRASIRI, J.

Plaintiff-appellant-respondent (hereinafter referred to as the plaintiff) filed this action seeking to eject the 1st defendant-respondent-petitioner (hereinafter referred to as the 1st defendant) and the 2nd defendant-respondent-respondent (hereinafter referred to as the 2nd defendant) from the premises, morefully described in the schedule to the plaint. It was filed on the basis that the premises put in suit had been sublet to the 2nd defendant by the 1st defendant. 1st defendant coming into occupation of the premises as a tenant under the father of the plaintiff, had not been disputed. In fact, he had paid rent to the father of the plaintiff until 28.02.1983. Plaintiff alleged that she did not receive rent since then from the 1st defendant.

2nd defendant in his evidence has stated that he came into occupation of the premises as a tenant in the year 1979 under the 1st defendant Jayasuriya. Document dated 27th August 1979 marked P6 too, shows that the 1st defendant had handed over part of the premises to the 2nd defendant Gunathilaka, having accepted Rs.1,200/= from him, as the rent due for the next two years. Therefore, it is clear that the 1st defendant having come into

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occupation of the premises in question, as the tenant of the plaintiff's father had sublet, a section of the premises to the 2nd defendant. These facts have not been disputed.

Under the Rent Act, such subletting, if it is without the prior written consent of the landlord, give rise to obtain a decree for ejectment of the tenant. It is in Section 10(2) of the Rent Act that this prohibition to sublet without the prior consent in writing of the landlord is stipulated. It reads thus:

> 10(2) Notwithstanding anything in any other law, the tenant of any Premises-
>
> a) Shall not, without the prior consent in writing of the landlord, sublet the premises to any other person; or
>
> b) Shall not sublet any part of the premises to any other person-
>
> i) Without the prior consent in writing of the landlord; and
>
> ii) Unless prior to so subletting, he had applied to the board to fix the proportionate rent of such part of the premises and had informed the board and the landlord the name of the person to whom he proposes to sublet such part.

Section 10 (5) of the Rent Act reads thus:

> 10(5) Where the tenant of any premises sublets such premises or any part thereof without the prior consent in writing of the landlord, the landlord of such premises shall, notwithstanding the provisions of section 22, be entitled in a Court of competent jurisdiction to a decree for the ejectment of such tenant from such premises, and also for the ejectment of the person or each of the persons to whom the premises or any part thereof had been sublet.

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In view of the above statutory provisions, landlord is empowered to obtain a decree for ejectment of his/her tenant provided no prior written consent of the landlord had been obtained to sublet the premises. Admittedly, the 1st defendant had not obtained prior written consent of the landlord to sublet the premises to the 2nd defendant.

However, the position of the 1st defendant was that the landlord namely, the plaintiff's father has waived his right, referred to in Section 10(5) of the Rent Act, to eject the tenant since the landlord (plaintiff's father) by his conduct has condoned the act of subletting the premises to the 2nd defendant. It is the matter that was in issue before the District Court as well as in the High Court. It is the same issue that was raised as the question of law in this appeal. The said question of law upon which the leave was granted reads as follows:

> *"When tenanted premises have been sublet without the written consent of the landlord but where there is clear evidence before Court, and a finding by the Trial Judge, that the landlord was fully aware that the tenanted premises had been sublet, and the landlord has continued to accept rent from the tenant for a considerably long period of time thereafter and has had dealings with the sub-tenant, has the landlord implicitly condoned the tenant's conduct of subletting and waived his right to eject the tenant under Section 10(1) of the Rent Act?"*

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Matters referred to in the aforesaid issue had been discussed in the cases of:

- **Abdul Cader vs. Menike [1983] BALR Vol. I, Part 1,page 38**
- **D.T.Robert vs. Mrs.P.Rashad [1954] 55 N.L.R page 517**
- **Chandrasena v. Alfred Silva [1997] 3 S.L.R. page 136**

Head note in the aforesaid reported case, **D.T.Robert vs. Mrs. P.Rashad** (supra) reads as follows:

> *"A tenant wrongfully sublet a portion of the premises without the landlord's prior written consent, but the landlord, although he was aware of that fact, made no protest of any kind and continue to demand, and to accept from the tenant, rent for each subsequent month.*
>
> *In an action brought subsequently by the landlord claiming cancellation of the tenancy on the ground that the tenant had sublet the premises in contravention of the provisions of Section 9 of the Rent Restriction Act-*
>
> *Held that the landlord's conduct after he became aware of the sub-tenancy disentitled him to have recourse to his statutory remedy under Section 9. When a landlord becomes aware of the contravention of Section 9, he must forthwith elect whether or not to treat the contract of tenancy as terminated; if he does not so elect, the contravention is condoned, and the contractual tenancy continues."*

In the case of Abdul Cader Vs. Menike (supra) Soza J held as follows:

> *"Waiver is the voluntary abandonment with full knowledge of the relevant facts, of a right or benefit. The waiver can be express or implied. The expression condonation is a variant of the term waiver.*

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It means complete forgiveness of a wrong of which all the material facts are known to the innocent party on condition that the wrong will not be continued. The wrong is remitted and the offender reinstated letting bygones be bygones. It is inappropriate to talk of condonation when the wrong is being continued though one can still talk of waiver. Condonation is not always the same as consent. To condone is to forgive a wrong and not to consent to it."

In the case of **Chandrasena vs. Alfred Silva**, (supra) it was held that:

(1) A breach by the tenant of the prohibitions against sub-letting could be waived by the landlord expressly or impliedly. Waiver and Condonation are not always the same as consent.

(2) When the tenant has sublet without the landlord's written consent, the landlord must elect whether or not to treat the contract as terminated. He must make his election forthwith and not so long afterwards as to suggest condonation or waiver.

(3) There is sufficient evidence to show that the previous landlord had not objected to sub-letting and therefore implicitly condoned the 1st defendant's conduct and waived his right to eject him by filing action forthwith.

As Soza J held in Abdul Cader vs. Menike, (supra) condoning subletting can be determined, basically upon considering the facts and circumstances of each case. Then only the issue as to the implied consent by the landlord for subletting can be decided. Hence, it is necessary to look at the evidence

adduced in this case to ascertain whether or not the plaintiff or her father had condoned subletting of the premises by the 1st defendant to the 2nd defendant. Admittedly, 1st defendant became the tenant of the plaintiff's father, long before he sublet it to the 2nd defendant in the year 1979. Even thereafter, 1st defendant was occupying part of the premises while the 2nd defendant was occupying the remaining section of the premises. Thus, he becomes the best person to explain the manner in which the landlord acted in order to establish implied consent of the landlord for subletting the premises to the 2nd defendant. Despite having such a privilege to speak as to the circumstances, the 1st defendant had opted not to give evidence.

He ought to have even known the fact that subletting will adversely affect him. Under those circumstances, I do not see any reason why the 1st defendant did not give evidence to establish condonation on the part of the landlord. Such a failure would stand against the 1st defendant proving condonation of the landlord of subletting. 1st defendant is the person who had taken up the defence of condonation of the landlord. Then it is his burden to establish condonation by the landlord.

Furthermore, only witness who gave evidence to establish implied consent of the landlord for subletting is one Nandasiri. He, in his evidence, has stated that he knew the plaintiff's father as well as the plaintiff. He has stated that he knew plaintiff's father coming to this premises to buy

provisions. That is the only evidence available to establish that the plaintiff and her father were condoning the act of subletting.

Learned Counsel for the plaintiff submitted that the plaintiff's father when he visited the premises may have thought that the 2nd defendant was acting as an agent of the 1st defendant and not as a tenant under the 1st defendant. Such a contention also cannot be totally disregarded when there is no other evidence is forthcoming to establish implied consent of the landlord.

Significantly, the **2nd defendant** who came into occupation under the 1st defendant **has given evidence on behalf of the plaintiff**. He was called as a witness by the plaintiff. His evidence does not suggest that the plaintiff's father consented for him to occupy the premises as a tenant of the 1st defendant.

Furthermore, clear evidence is found to show that the plaintiff and/or her father had not accepted the rent from the 1st defendant from the time the father became aware of subletting of the premises to the 2nd defendant. Even though the rent had been deposited in the Local Authority, the plaintiff has not taken that rent deposited in the Local Authority. Such a conduct shows that the plaintiff or her father had not consented for subletting.

Having considered the aforesaid facts and circumstances, I am of the opinion that the 1st defendant has failed to establish that the plaintiff or her

father has given consent even impliedly, for the 1st defendant to sublet the premises to the 2nd defendant. Accordingly, the first defendant has failed to establish that the plaintiff or her father has condoned subletting the premises to the 2nd defendant. Hence, it is clear that the 1st defendant has not been successful in having the cover of the authorities referred to hereinbefore.

For the aforesaid reasons, the plaintiff is entitled to obtain reliefs as prayed for in her plaint in accordance with the law referred to in Section 10(5) of the Rent Act. Accordingly, the decision of the learned Judges of Civil Appellate High Court is affirmed. This appeal is dismissed. Having considered the circumstances, I do not wish to make any order as to the costs of this appeal.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

WANASUNDERA, P.C, J .

I agree

JUDGE OF THE SUPREME COURT

UPALY ABEYRATHNE, J.

I agree

JUDGE OF THE SUPREME COURT