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

In the matter of an application for Leave to Appeal under and in terms of Article 128 of the Constitution.

SC Appeal No. 196/2015

Case No.SC/HCCA/LA:03/2015

Civil Appeal Case No:-

CP/HCCA/KANDY/97/2011(FA)

DC Kandy Case No:-L/21801/05

Suppaiah Wijeratnam

No.47**,** Kandy Road**,** Kengalle

Plaintiff

V.

Sarath Perera,

No.90, Kandy Road, Kengalle.

Defendant

THEN BETWEEN

Sarath Perera,

No.90, Kandy Road, Kengalle.

Defendant-Appellant

V.

Suppaiah Wijeratnam,

No.47, Kandy Road, Kengalle.

Plaintiff-Respondent

NOW BETWEEN

Suppaiah Wijeratnam,

No. 90, Kandy Road, Kengalle.

Plaintiff-Respondent-Petitioner

V.

Sarath Perera,

No.90, Kandy Road, Kengalle.

Defendant-Appellant-Respondent

BEFORE:- S.E. WANASUNDERA, PCJ.

ANIL GOONERATNE, J.

H.N.J. PERERA, J.

COUNSEl:- Saman Galappaththi for the Plaintiff-Respondent-Petitioner.

Esara Wellala for the Defendant-Appellant-Respondent

ARGUED:-20.07.2016

DECIDED ON:-19.09.2016

H.N.J.PERERA, J.

The plaintiff-Respondent-Petitioner (hereinafter referred to as the Petitioner) instituted a rei-vindicatio action on 10th November, 2005 against the Defendant-Appellant-Respondent (hereinafter referred to as the Respondent) seeking inter-alia;

(a)A declaration that the plaintiff is the owner of the land more fully

described in the schedule to the plaint,

(b)An order for ejectment of the defendant and his agents and servants From the subject matter,

(c)Damages in a sum of Rs.4000/- per month until the possession is Handed over to the plaintiff.

The respondent filed his answer on 11.07.2008 and prayed inter-alia:-

(a)Dismiss the plaint,

(b)Judgment deciding that this matter cannot be proceeded under Section 35(1) of the Civil Procedure Code,

(c)An order stating that the respondent has the prescriptive title over the property against all the rights of the plaintiff and others

The respondent contended that he is in possession of a larger land including the land described in the schedule to the plaint since 22.12.1978 and thereby acquired prescriptive title to the land. It was also contended that the respondent filed an application in the Rent Board under the case No. f.l=u/ ukq / 831/2004 as the plaintiff continuously harassed him stating that the plaintiff is the owner.

The parties admitted the jurisdiction and the fact that an application was filed in the Rent Board under case No. f.l=u / ukq /831/2004 against the petitioner and that the said application had been dismissed.

It was the position of the petitioner that he has become the owner of the land described in the schedule to the plaint by virtue of deed No.68 marked P1 at the trial. His predecessors in title had become entitled to the land by virtue of deed No.1188 dated 02.07.2003 and deed N0. 4317 dated 10.01.1960 respectively marked as P3 and P4. After he purchased

the said land he has sent notice to the respondent informing him that he has purchased the said land and that he is the owner of the said land and has requested the respondent to accept him as the owner of the said land and to pay him the rent accordingly. The said letter sent by the petitioner to the respondent has been marked as P 6. It was the position of the petitioner that the respondent has refused to accept the petitioner as the new owner. The respondent has clearly admitted the fact that after he received the said notice marked P6 from the petitioner he filed an application before the Rent Board to ascertain as to who the real owner was. The respondent in his evidence had also very clearly admitted that he refused to accept the petitioner as the new owner. It is also an admitted fact that the said application filed by the respondent before the Rent Board was dismissed.

The petitioner himself and an officer from Rent Board gave evidence on behalf of the petitioner and closed his case marking P1 to P23 in evidence. It is also to be noted that although the Counsel for the respondent has objected to some documents at the time they were marked and tendered to court at the trial but has not objected to them when the plaintiff's Counsel closed the case for the petitioner marking in evidence documents P1 to P23 at the end of the petitioner's case. The *cursus curiae* of the original Civil Court followed for more than three decades in this country is that the failure to object to documents, when read at the closure of the case of a particular party would render them as evidence for all purposes of the law. The respondent too gave evidence and closed his case marking in evidence documents V1 to V 10.

The Learned District Judge after trial by his judgment dated 11.03.2011 held in favour of the petitioner and the cross claim of the respondent based on prescription was dismissed. Being aggrieved with the said judgment the respondent preferred an appeal to the Civil Appellate High Court of the Central Province Holden in Kandy. The Learned High Court

Judges of the Civil Appellate High Court of Kandy by their judgment dated 2.11.2014 set aside the judgment of the Learned District Judge and allowed the petition of appeal of the respondent.

Being aggrieved by the said judgment dated 25.11.2014 of the Civil Appellate High Court of Kandy the petitioner filed the application for leave to appeal and this court granted the said application of the petitioner on the following questions of law;

(a)Have the Learned High Court Judges erred in law when they came to a conclusion that the respondent has become a tenant of the petitioner by operation of law on the receipt of Notice of attornment despite the refusal to accept the petitioner as the Landlord?

(b)Have the Learned High Court Judges failed to give an appropriate consideration to the basic principle that a tenant who refuses to attorn the new owner as his landlord looses the protection under the Rent Act and thereby becomes a trespasser in the premises?

(c)Have the Learned High Court Judges erred in law when they held that the petitioner's action of rei-vindicatio is misconceived in law and that the petitioner would have filed an action under the Rent Act against a person who has repudiated the contract of Tenancy?

(d)Have the Learned High Court Judges failed to give an appropriate consideration to the fact that the respondent has taken up the position that he has prescribed to the subject matter which per se establishes that the respondent is possessing the land against the will of the petitioner and that no contract of tenancy subsists in such a situation?

It is to be noted that the Learned Judges of the Civil Appellate High Court interfered with the judgment of the District Judge on the basis that upon the receipt of the letter of attornment the respondent becomes the tenant of the petitioner and gets the protection of the Rent Act, by

operation of law and therefore the tenant can be ejected for breach of the tenancy contract and the proper action would have been to seek remedy under the Rent Act and not the type of action filed by the petitioner.

The substance of the aforesaid findings of the Learned High Court Judges is that irrespective of the fact that the tenant has repudiated the contract of tenancy by refusing to accept the new owner (petitioner) as the landlord yet the petitioner is bound to file action under the Rent Act but not an action of rei vindicatio on the basis of repudiation of tenancy under him.

It was contended on behalf of the Petitioner that in the present case the Defendant-Respondent has refused to accept the Plaintiff-Petitioner as the Landlord thereby has repudiated the contract of tenancy. In such event the Defendant-Respondent is not entitled to seek refuge under the provisions of the Rent Act.

The High Court Judges of the Civil Appellate Court has set aside the judgment of the Learned District Judge and allowed the Petition of Appeal of the Defendant-Respondent on the grounds that the Plaintiff-Petitioner's action is misconceived in law because the proper action for the Plaintiff-Petitioner would have been to seek remedy under the Rent Act.

In Zakariya V. Benedict 53 N.L.R 311 Swan J observed that Ordinarily a purchaser of property "steps into the shoes of the landlord and receives all his rights and become subject to all his obligations , so that he is bound to the tenant and the tenant is bound to him in the relation of landlord and tenant" Wille on Landlord and Tenant , 1910 Ediion, p.221.In Wijesinghe V.Charles (1915) 18 N.L.R 168, de Sampayo J. accepted the right of the tenant to exercise the option:–whether he was bound to remain as the tenant of the new landlord or exercise the option of

claiming a cancellation of the lease. In Zakeriya V. Benedict (supra) Swan J also stated as that it is also conceivable that the plaintiffs might bring an action for the recovery of possession on the strength of their title.

In Gunasekera V. Jinadasa [1996] 2 Sri.L.R. 115 Fernando, J held that:-

"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 one hand or Defendants or tenants on the other.

While it is initially legitimate to infer attornment from continued occupation, thus establishing privity between the parties, another principle of law of contract comes in to play is 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 arrears of rent and ejectment or to accept the occupiers repudiation of the tenancy and to proceed against him as a trespasser."

And in the instant case as the defendant-Respondent persisted in repudiating the contract of tenancy and also challenged the title of the Plaintiff-Petitioner and claimed prescriptive title to the said property, the Plaintiff-Petitioner has opted to exercise his right as the owner and to file a case of rei vindication against the Defendant-Respondent.

The trial Judge has held that the Plaintiff-Petitioner has called upon the Defendant-Respondent to attorn to the Plaintiff-Petitioner and that the Defendant-Respondent having failed to attorn to the plaintiff-Petitioner,

was a trespasser. The Learned trial Judge has held with the Plaintiff-Petitioner. The Learned Judges of the Civil Appellate High Court has clearly erred when they came to a conclusion that the Defendant-Respondent has become a tenant of the Plaintiff-Petitioner by operation of law on the receipt of Notice of attornment despite the refusal to accept the Plaintiff-Petitioner as the landlord.

In this case there is evidence to show that the Defendant-Respondent not only refused to accept the Petitioner as his new landlord, he also made an application to the Rent Board to find out whether in fact the Plaintiff-Petitioner was his landlord. The said application has been dismissed by the Rent Board. Furthermore, he claimed prescriptive title to the land in dispute.

When the defendant-Respondent, having failed expressly to accept the Plaintiff-Petitioner as landlord, he repudiated the fundamental obligation of a tenancy- he denied the Plaintiff-Petitioner's status as landlord. And further when he claimed prescriptive tile to the land in question he has clearly disputed the title of the Plaintiff-Petitioner.

In Gunasekera V Jinadasa (supra) it was further held that the court must not apply the presumption of attornment as a trap for the transferee: allowing the occupier who fails to fulfil the obligations of a tenant, if sued 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 tenant and can only be sued in a tenancy action. Since it is the occupier's conduct which gives rise to such uncertainty, equitable considerations confirm the option which the law of contract gives the transferee.

The evidence led in this case clearly disclose that the Defendant refused to accept the Plaintiff-Petitioner as his new landlord and failed to continue to pay rent as a tenant of the Plaintiff-Petitioner. It is an

admitted fact that the Plaintiff-Petitioner did inform the Defendant-Respondent in writing that he has become the new owner of the said premises and has requested the Defendant-Respondent to treat him as his new landlord and pay him rent accordingly.

But the Defendant in the instant case has very clearly refused to accept the Plaintiff-Petitioner as his new Landlord. He has challenged the title of the Plaintiff-Petitioner and also claimed prescriptive title to the land.

The Civil Appellate Court has held that since there has been a tenancy between the former owner and the Defendant-Respondent, the action against the Defendant-Respondent should have been constituted as one against an over-holding lessee. It has been held that the action instead, taking the form rei vindcatio and being therefore misconceived, the Defendant-Respondent is not liable to be ejected. Learned Counsel for the Plaintiff-Petitioner on the other hand contended that the acts complained of against the Defendant-respondent which the evidence had clearly established, were in derogation of the Plaintiff-Petitioner's rights as owner of the land. He contended that it was competent for the Plaintiff-Petitioner in the circumstances of this case, to maintain the action in this form and to get the relief he asked for.

The principle issue at the trial was whether the Defendant-Respondent was in unlawful possession of the premises by reason of his refusal to accept the plaintiff's title.

In the instant case the trial Judge held that the Plaintiff-Petitioner has called upon the Defendant-Respondent to attorn to the Plaintiff-Petitioner and that the Defendant-Respondent having failed to attorn to the Plaintiff-Petitioner was a trespasser, and gave judgment for the plaintiff.

In Thamayanthi V. Selvadorai 1986 (1) C.A.L.R.311 the Plaintiff filed action for ejectment and damages. The District Judge 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. In appeal Seneviratne, J , held that the judgment of the District Judge on the basis of the reasons given is valid and should therefore be upheld.

The facts in this case clearly indicate and establishes that the defendant-Respondent did not merely continue to possess the said property after receiving the notice of the fact that the Plaintiff-Petitioner is the new owner of the said premises, he refused to accept the Plaintiff-Petitioner as his new landlord and also proceeded to file an application in the Rent Board . He also disputed the title of the plaintiff-Petitioner and claimed prescriptive title to the land in dispute.

The plaintiff-Petitioner's title having been proved, the burden clearly is on the Defendant-respondent to show by what right he continued to occupy the premises. The Defendant-respondent has taken up the position that he has acquired prescriptive title to the land in question.

This principle was referred to by Sharvananda, C.J. in Theivandran V. Ramanathan Chettiar [1986] 2 Sri.L.R.219,222,

"An owner of a land has the right to possession of it and hence is entitled to sue for the ejectment of a trespasser…….Basing his claim on his ownership, which entitles to possession, he may sue for ejectment of any person in possession of it without his consent. Hence when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession."

Maarsdorf (volume 2,p 27) sys that the rights of an owner are comprised under three heads:-

(a)the right of possession and the right to recover possession

(b)the right to use and enjoyment; and

(c)the right of disposition.

And he goes on to say that these three factors are all essential to the idea of ownership.

The jus vindicandi or the right to recover possession is thus considered an important attribute of ownership in the Roman Dutch Law.

Wille in his book "Principles of South African Law" (3rd edition) at page 190 discussing the right to possession, states:-

"The absolute owner of a thing is entitled to claim the possession of it; or, if he has the possession he may retain it. If he is illegally deprived of his possession, he may by means of vindication or reclaim recover the possession from any person in whose possession the thing is found. In a vindicatory action the claimant need merely prove two facts, namely, that he is the owner of the thing and that the thing is in the possession of the defendant."

The Learned Judges of the Civil Appellate High Court have failed to give an appropriate consideration to the fact that the Respondent has taken up the position that he has prescribed to the subject matter which per se establishes that the Defendant-Respondent is possessing the land against the will of the Plaintiff-Petitioner and that no contract of tenancy subsists in such a situation. The moment title to the corpus in dispute is proved, like in this case, the right to possess is presumed. The burden is thus cast on the respondent to prove that by virtue of an adverse

possession he had obtained a title adverse to and independent of the paper title of the plaintiff.

The burden was cast on the defendant-respondent to prove that by virtue of an adverse possession he had obtained title adverse to and independent of the paper title of the plaintiff. According to section 3 of the Prescription Ordinance such a possession must be undisturbed, uninterrupted, adverse to or independent of that of the former possessor and should have lasted for at least ten years before he could transform such possession into prescriptive title. There must be proof that the defendant-respondent's occupation of the premises was such character as is incompatible with the title of the plaintiff.

The Learned trial Judge after considering the evidence placed by both parties has held that the Defendant-respondent has failed to prove prescriptive title to the said land. In my view in the present case there is significant absence of clear and specific evidence on such acts of possession as would entitle the Defendant-Respondent to a decree in favour in terms of Section 3 of the Prescription Ordinance.

The Defendant–Respondent has in this instant very clearly established by his conduct that he did not wish to be a tenant of the Plaintiff-Petitioner. In this case the conduct of the Defendant-Respondent has been fundamentally inconsistent with a contract of tenancy, and amounts to a repudiation of that presumed contract, therefore the Plaintiff-Petitioner has the right to accept the Defendant's repudiation of the tenancy and to proceed against him as a trespasser. The Learned Judges of the Civil Appellate Court has erred in law when they held that the Plaintiff-Petitioner's action of rei vindication is misconceived in law and that the Plaintiff-Petitioner would have filed an action under the rent Act against the Defendant-respondent who has repudiated the contract of tenancy.

Therefore I answer all the questions of law raised in this case in favour of the Plaintiff-Petitioner. I allow the appeal, set aside the judgment of the Civil Appellate High Court dated 25.11.2014, and affirm the decree of the District Court for the reasons set out. The Plaintiff-Petitioner will be entitled to costs in this court and in the Civil Appellate High Court.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PCJ.

I agree.

JUDGE OF THE SUPREME COURT

ANIL GOONERATNE, J.

I agree.

JUDGE OF THE SUPREME COURT