

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

In the matter of an application for Leave to appeal under Section
5C of the High Court of Provinces (Special Provisions) Act No.
54 of 2006

Bentota Multi Purpose Cooperative Society
Limited,
Bentota

**Defendant-Judgement Debtor-
Respondent-Appellant-Petitioner**

SC Appeal 13/2012
S.C.H.C.C.A.(LA)Application
No. 297/11
SP/HCCA/GA/21/2010
D.C. Balapitiya Case No. 3107/L

V.

Payagalage Girly Yvonne Karunaratne,
Angagoda,
Galle Road,
Bentota.

**Plaintiff-Judgement Creditor-
Petitioner-Respondent-Respondent**

Before : Tilakawardane, J
Marsoof, PC, J
Dep, PC, J

Counsel : Manohara de Silva PC with Pubudini
Wickramaratne for Defendant-Judgement Debtor-
Respondent-Appellant-Petitioner.

D.M.G. Dissanayake with Upali Lokumarakkala for
Plaintiff-Judgement Creditor-Petitioner-Respondent- Respondent

Argued on : 25.06.2012

Decided on : 20.03.2014

Priyasath Dep, P.C. .

The Plaintiff-Judgment Creditor-Petitioner-Respondent-Respondent (hereinafter referred to as the Plaintiff) instituted action in the District Court of Balapitiya bearing Case No 3107/L against the Defendant – Judgment Debtor- Respondent- Appellant- Petitioner-Appellant (hereinafter referred to as the Defendant) claiming the following reliefs:

- 1 A declaration to the effect that the Plaintiff is the owner of 1/64 shares of the land described in the schedule to the plaint;
- 2 To eject the Defendant and its servants and agents from the premises bearing assessment numbers 136/1, 136/2 and 136/3;
- 3 Damages in a sum of Rs 25,000/= per month from 01-09-2005 until vacant ,quiet and peaceful possession is handed over.

At the trial the Plaintiffs raised the following issues:

1. Did the Plaintiff grant leave and license to the Defendant to occupy the premises relevant to this case from 28.08.1985?
2. If it is so, did the Plaintiff by the letter dated 29.07.2005 sent through D.C. Balasuriya, attorney-at-law terminate the leave and license ?
3. If the above two issues are answered in the affirmative, is the Defendant unlawfully and unjustly in possession of the premises from 01.09.2005.
4. If one or more of the above issues are answered in the affirmative, is the Plaintiff entitled to the relief prayed for?

The Defendant raised issues numbered 5-12. Out of the issues raised by the Defendant ,the issues number 7 and 10 given below are the most important issues for the determination of the case.

Issue No. 7

Is the Defendant Society a tenant of the Plaintiff?

Issue No. 10

According to the Plaintiff the tenancy of the Defendant has not terminated ?

The Plaintiff in her evidence stated that she along with her husband A.K.Dharmasekera constructed three shops bearing assessment numbers 136/1, 136/2 and 136/3. These premises were let to the Defendant

by her husband. Her husband died on 28-08-1985 and after his death, she requested the Defendant to hand over the premises to her. The Defendant undertook to hand over the premises after the construction of a building . She alleged that the Defendant is in occupation of the premises with her leave and license.

She stated that she, through her Attorney D.C.Balasuriya sent a letter dated 24-7-2005 to the Defendant terminating the leave and license granted to the Defendant after one month's notice. She submits that the Defendant has been in unlawful occupation of the premises since 01-09-2005 causing damages of a sum of Rs. 25,000/= per month.

In cross-examination, she admitted that she entered into an agreement with the Defendant on 1-6-1974 and let three premises for a monthly rental of Rs 250/= for each of the premises.

The Defendant admitted that the Plaintiff is the owner of the premises in suit and the Defendant is the lawful tenant of the Plaintiff and that there is no termination of the tenancy. The Defendant refuted the claim of the Plaintiff that it occupied the premises with leave and license of the Plaintiff.

The learned District Judge accepted the evidence of the Plaintiff and answered the issues of the Plaintiff in the affirmative and gave judgment in favour of the Plaintiff. However the damages awarded to the Plaintiff was restricted to monthly rentals with interest. The learned District Judge answered issue no 7 and 10 raised by the Defendant in the affirmative.

Being aggrieved by the judgment of the District Judge, the Defendant appealed against the judgment to the High Court of the Southern Province exercising appellate jurisdiction in Case No. SP/HCA/115/2009(F). The Plaintiff as the Judgment -Creditor applied for a writ of execution pending the appeal. The Defendant –Judgment Debtor objected to the application. The District Judge rejected the objections of the Defendant- Judgment Debtor on the basis that the Defendant-Judgment Debtor failed to establish that there was a substantial question of law involved in the appeal and if the decree is executed it will suffer grave and irreparable loss.

The Defendant –Judgment- Debtor being aggrieved by the Order of the District Judge filed a Leave to Appeal Application in High Court of the Southern Province exercising civil appellate jurisdiction in SP/HCCA/GA/LA/21/2002. The Civil Appellate High Court dismissed the leave to Appeal application and in its Order held that:

“It appears that the Defendant-Petitioner has not stated in his petition that there is a substantial question of law to be considered in appeal and also it is observed by this Court that the Learned District Judge has not determined the fact that the premises are subject to the Rent Act and also it is apparent to this Court that the Learned District Judge has not determined that the Defendant-Petitioner is a tenant in terms of the provisions of the Rent Act. In the circumstances, we are of the opinion that there is no substantial question of law to be considered in appeal . The Defendant-Petitioner has failed to satisfy the Court that substantial loss may result unless execution is stayed.”

Being aggrieved by the order of the High Court of the Southern Province exercising Appellate jurisdiction, the Defendant filed a Leave to Appeal Application to this Court and obtained leave on the following questions of law.

1. Did the Learned Judges of the High Court err in holding that there is no substantial question of law to be considered in Appeal ?
2. Did the High Court err in dismissing the Defendant's application on the basis that the Defendant has not stated in his petition that there is a substantial question of law to be considered in Appeal?

The Learned President's Counsel for the Defendant-Appellant submitted that there is a substantial question of law to be decided as the District Judge has seriously erred in answering the issues raised by the parties. The learned District Judge answering the issues raised by the Plaintiff held that the Defendant was in occupation of the premises with leave and license of the Plaintiff and the Plaintiff by the letter dated 29-7-2005 sent by D.C. Balasuriya, Attorney-at-Law had terminated the leave and license granted to the Defendant.

On the contrary in answering two vital issues raised by the Defendant namely issue No. 7 and 10 the learned District Judge held that the Defendant is a tenant of the Plaintiff and the tenancy between the Plaintiff and the Defendant was not terminated.

The learned President's Counsel for the Defendant- Appellant submitted that this is a serious contradiction that will affect the validity of the judgment. The learned President's Counsel further submitted that this contradiction raises a substantial question of law and for that reason District judge should not have issued a writ pending appeal. In support of his argument he cited the judgment in *Collettes v. Bank of Ceylon (1982) 2SLR 14*. In that case the Supreme Court considered what constitutes a substantial question of law. Supreme Court drew a distinction between 'question of law' and a 'substantial question of law'. It adopted several tests to determine what constitutes a substantial question of law and among the numerous tests referred to in the judgment which are not exhaustive was the following criteria. 'Where there is no evidence to support the determination or where the evidence is inconsistent with or contradictory of the determination or where the true and only reasonable conclusion contradict the determination, a substantial question of law is involved'

On the other hand the learned Counsel for the Plaintiff submitted that there is no substantial question of law involved and according to the tenor of the judgment it appears that the Learned District Judge had made a mistake in answering issues No. 7 and 10 in favour of the Defendant. His contention is that the learned District Judge had answered all the issues raised by the Plaintiff in the affirmative and gave judgment in favor of the Plaintiff rejecting the position taken up by the Defendant that it is a tenant. Therefore in answering issue numbers 7 and 10 raised by the Defendant the learned District Judge had made a mistake.

The Plaintiff's position is that the Defendant failed to establish a substantial question of law involved in the Appeal and if the execution is not stayed grave and irreparable damage will be caused to the Defendant. Plaintiff further submitted that Plaintiff should not be deprived of the fruits of victory. The Counsel for the Plaintiff cited the cases of *Cooray v. Ilukkumbura* 1996 2SLR 263, *Chartolt Perera v. Thambaiyah* 1983 1SLR 352, *Mohamed v. Seneviratne* 1989 2SLR 389 in support of his argument.

The learned President's Counsel for the Defendant Appellant submits that there is a serious contradiction in the Judgment that could not be reconciled and it affects the validity of the judgment. There is merit in the submissions made by the Counsel for the Appellant. I am of the view that there is a substantial question of law involved in the Appeal. In these circumstances I am of the view that the learned District Judge should not have granted a writ of execution pending appeal.

For the reasons set out above, I set aside the order of the learned District Judge dated 30-08-2010 in D. C. Balapitiya Case No. 3107/L made under section 763 of the Civil Procedure Code allowing a writ of execution pending appeal and the Judgment dated 26-07-2011 of the High Court of Galle exercising appellate jurisdiction in Case No. SP/HCCA/GA/21/2010 affirming the judgment of the District Court.

Appeal allowed. No Costs.

Judge of the Supreme Court

Shiranee Tilakawardene, J.

I agree.

Judge of the Supreme Court

Saleem Marsoof, P.C. J.

I agree.

Judge of the Supreme Court