

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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 158/2014

SC/ HC/CALA/ 235/2012

UP/HC (Civil) 04/2001(F)

DC Badulla No. L/645/96

1. Navaratnarasa Jayalingam,
2. Navaratnarasa Jeevalingam,
3. Navaratnarasa Jothilingam,

All of No.16 1/17, Mudalige Mawatha
Presently of No. 415/2A, Galle Road,
Mt. Lavinia.

Plaintiffs

Vs.

Kuda Bandara Wettewa,
No. 18/1, Eladaluwa Road,
Badulla.

Defendant

AND BETWEEN

1. Navaratnarasa Jayalingam,
2. Navaratnarasa Jeevalingam,

3. Navaratnarasa Jothilingam,
All of No.16 1/17, Mudalige Mawatha
Presently of No. 415/2A, Galle Road,
Mt. Lavinia.

Plaintiff Appellants

Vs.

Kuda Bandara Wettewa,
No. 18/1, Eladaluwa Road,
Badulla.

Defendant Respondnt

AND NOW BETWEEN

1. Navaratnarasa Jayalingam,
2. Navaratnarasa Jeevalingam,
3. Navaratnarasa Jothilingam,
All of No.16 1/17, Mudalige Mawatha
Presently of No. 415/2A, Galle Road,
Mt. Lavinia.

Plaintiff Appellant-Appellants

Vs.

Kuda Bandara Wettewa,
No. 18/1, Eladaluwa Road,
Badulla.

Defendant Respondent-Respondent

BEFORE : SISIRA J. DE ABREW, J.
 UPALY ABEYRATHNE, J.
 K. T. CHITRASIRI, J.

COUNSEL : Faiz Musthapha PC with Ms. T. Machado
 for the Plaintiff Appellant-Appellants
 Harsha Soza PC with Upendra Walgampaya
 for the Defendant Respondent Respondents

WRITTEN SUBMISSION ON: 27.01.2016 (Plaintiff Appellant Appellants)
 05.12.2014 (Defendant Respondent Respondents)

ARGUED ON : 08.02.2016

DECIDED ON : 04.08.2017

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of the Uva Province holden at Badulla dated 18.05.2012. By the said judgment, the Civil Appellate High Court has dismissed the appeal of the Plaintiff Appellant-Appellant (hereinafter referred to as the Appellant) and allowed the appeal of the Defendant Respondent-Respondent (hereinafter referred to as the Respondent).

However, the bench comprised of two High Court Judges have held two different views as regard the judgment of the learned District Judge dated 12.03.2001. Whilst one of the learned High Court Judges has set aside the said judgment of the learned District Judge, the other Judge has upheld the said judgment of the learned District Judge subject to certain corrections and modifications.

This court granted leave on the following question of law;

“Did the learned Judges of the Civil Appellate High Court and the learned District Judge err by failing to take in to account the attendant circumstances which established possession on the part of the Defendant?”

According to the Appellant, the predecessors in title of the land in suit Annamalai Navaratnarasa and his wife Leelawathie, by an informal agreement, had agreed to sell the land in suit to the Respondent and the Respondent has agreed to purchase the same for a sum of Rs 45,500/-. Accordingly, the Respondent had paid a sum of Rs. 42,587.49 to said Annamalai Navaratnarasa and Leelawathie, and the Respondent had been placed in possession of the said land. Since, the said informal Agreement had been breached, the Respondent had instituted a case bearing No. 10415 against said Annamalai Navaratnarasa in the District Court of Badulla seeking specific performance of the said informal agreement or in the alternative to recover a sum of Rs. 42, 587.49 with the interest accrued thereon. Said Annamalai Navaratnerasa had died during the pendency of the action. The Appellants had been substituted in the room of said Navaratnarasa. Upon hearing the evidence of said case No 10415, a decree had been entered in favour of the Respondent (the plaintiff in said case No 10415) to recover the said sum of Rs. 42,587.49. Furthermore, the learned District Judge, answering to the issue No 18 in the said case No. 10415 had concluded that a separate action has to be instituted against the Respondent to recover the vacant possession of the land in suit.

Accordingly, the Appellants have instituted the present action bearing No. L. 645/96 against the Respondent in the District Court of Badulla seeking to recover possession of the said land in suit. The Appellants have averred that the Respondent was placed in possession of the land in suit in terms of said informal agreement with leave and license of said Navaratnarasa. By letter dated 18th

October 1995, they have terminated the said leave and license given to the Respondent.

At the trial, the Respondent has raised issues No 08 to 14. Said issues have been raised on the basis that at any time, said Navaratnarasa and Leelawathie did not place the Respondent in possession of the land in suit in terms of the said informal agreement. It is also pertinent to note that at the trial, the Respondent has not claimed title to the said land in dispute. The issues raised by the Respondent clearly demonstrate that the Respondent had no claim against the Appellants or he had no other right over the land in dispute. Also, the Respondent has not challenged the title of the Appellants.

Accordingly, in terms of the said informal agreement whether the Respondent has been placed in possession of the land in dispute is the sole question to be dealt with by this court. It has transpired from the evidence of the case that the Respondent and his wife, Mrs. Mallika Wettewa had executed a lease agreement bearing No 32377, dated 1st June 1979 (P 2) in favour of the Respondent's brother in law, A. M. Jayawardena in respect of the said land in dispute. It has transpired from the evidence that the said lease agreement has been executed by the Respondent in his capacity as the owner of the said land. In the said lease agreement, the Respondent and his wife Mallika Wettewa has declared that “ ... And which said premises have been purchased by us, the said lessors, from Annamalai Navaratnarasa and Leelawathie having paid the full purchase price to them”.

The Respondent in his evidence has testified that he was not placed in the possession of the said property in dispute by Nawaratnarasa. He is in occupation of premises bearing No 18/1, Eladaluwa Road, as tenant under one Mrs. Padmanathan Sivanathan. Since said Jayawardena was in possession of the

property in dispute Appellants' parents could not sell the said property. For the said reason, the Respondent came forward to buy the said premises in question.

I am not inclined to accept the said evidence of the Respondent. The Respondents' standing as regards the land in suit is clear from the said lease agreement bearing No 32377. Having entered into the said lease agreement as the owner of the land in suit, he now cannot deviate from the capacity he demonstrated at the time of executing the lease agreement. The Respondent, as the owner, has entered in to the said lease agreement with his brother in law, said Jayawardena. Hence the nexus between the Respondent and said Jayawardena, as regards the land in dispute is concerned, Lessor and lessee.

Furthermore, it is clear from the said informal agreement dated 17.01.1976 that the Respondent had agreed to purchase the land in suit from said Navaratnarasa on payment of a sum of Rs 45,500/-. In the said informal agreement, said Navaratnarasa had agreed to hand over the vacant possession to the Respondent from the 1st of April 1976. The parties had further agreed, in event the arrangements could not be made to finalise the deal, to refund the deposit and to hand over the vacant possession back to said Navaratnarasa. Thereafter, on 1st June, 1979, the Respondent, acting as the owner of the said land, had leased out the said property to his brother in law Jayawardena. Just five months after the said lease agreement, the Respondent, by a plaint dated 30.10.1979, had instituted the action bearing No M/10415 against said Navaratnarasa in the District Court of Badulla seeking an order to execute a deed in favour of the Respondent as agreed in the said informal agreement or in the alternative to recover a sum of Rs. 42,587.49 which had been paid to said Navaratnarasa.

Although the said informal agreement is inactive as regards the immovable property is concerned, it has an evidential value in deciding the money

transaction and also can be used as corroborative evidence in deciding whether the possession of the land in suit had been changed or not. It is important to note that the Respondent, as the plaintiff of the said case No M/10415, has sought an order only to execute a deed according to the said informal agreement. But he had not sought an order, directing said Navaratnarasa, to hand over the vacant possession of the said land to him.

Also, it is important to note that the Appellant has sent the letter dated 18th October, 1995 to the Respondent terminating the leave and license given to him and requesting him to vacate the said premises in suit and to hand over vacant possession thereof to the Appellants on or before 30th November, 1995. But the Respondent has failed to reply to the said letter sent by the Appellants. Since the said letter had indicated contrary position to his claim, if the Respondent was not in possession of the said land in suit, a burden would cast on him to reply the said letter denying the averments contained therein. But he has failed to do so. It is well settled law that in business transactions failing to reply a letter would amount to an admission of the contents contained therein.

Said conduct of the Respondent has crystallised the fact that the Respondent was in possession of the said land in dispute at the time of executing the said lease agreement in favour of his brother in law, said Jayawardena. Hence the Respondent cannot now plead that said Jayawardena is in possession of the said land in suit and the Respondent is residing elsewhere.

In the case of Jayasundera Vs. Dantanarayana and Another [1981] 1 Sri L.R 1 it was held that “A landlord and tenant may both be considered to be in possession of the leased property and, subject to the tenancy, the landlord has the full and complete right to possession. If the tenancy is terminated by surrender of

possession by the tenant and acceptance thereof by the landlord, then the landlord's possession is enlarged to full and complete possession.”

In *Harrison Vs. Wells*, 1966 (3) All ER 524 at 530, Salmon LJ, in the Court of Appeal, observed that the rule of estoppel was founded on the well-known principle that one cannot approbate and reprobate. The doctrine was further explained by Lord Justice Salmon by holding "it is founded also on this consideration, that it would be unjust to allow the man who has taken full advantage of a lease to come forward and seek to evade his obligations under the lease by denying that the purported landlord was the landlord".

In *Kok Hoong Vs. Leong Cheong Kweng Mines Ltd.*, (1964 Appeal Cases 993 at 1018), the Privy Council held that "a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned."

Justice Ashutosh Mookerjee in *Dwijendra Narain Roy Vs. Joges Chandra De*, 39 CLJ 40 at 52 (AIR 1924 Cal 600), held that it is an elementary rule that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. This wholesome doctrine applies not only to successive stages of the same suit, but also to another suit than the one in which the position was taken up, provided the second suit grows out of the judgment in the first.

In view of the said circumstances, I am of the view that both the learned District Judge and the learned High Court Judges have erroneously come to their respective conclusion that said Jayawardena was a tenant under the

Appellants. Lease Agreement P 2 was ample evidence to conclude that having entered in to the possession of the said property under the aforesaid informal agreement he had with said Navaratnarasa, the Respondent, as the owner of the said property in suit, has leased out the same to his brother in law said Jayawardena. Hence the Respondent, who had entered in to the land under the said informal agreement with leave and license of said Navaratnarasa, is now estopped denying his possession of the land in suit.

For the forgoing reasons, I set aside the judgment of the learned District Judge Dated 12.03.2001 and the judgment of the learned High Court Judges dated 18.05.2012. I make order to enter a decree in favour of the Appellants as prayed for in prayer 'a', 'b' and 'd, of the plaint. The Appellants are entitled to execute a writ against the Respondent, his servants and agents only upon the payment of the decreed amount in the said case bearing No M/10415. I allow the appeal of the Appellants without costs.

Appeal allowed.

Judge of the Supreme Court.

SISIRA J. DE ABREW, J.

I agree.

Judge of the Supreme Court

K. T. CHITRASIRI, J.

I agree.

Judge of the Supreme Court.