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

G.L. Geethananda
31, Ramya Road,
Colombo 4.
**(Deceased)**

**PLAINTIFF**

C.A 871/1998 (F)
D.C. Balapitiya No. 2017/L

Vs.

Swarnalatha Hemamalee Geethananda
16/9, Nagahamulla Road,
Thalangama South,
Battaramulla.

**SUBSTITUTED PLAINTIFF**

(Appointed according to the Court of Appeal order on 13th October, 2011)

Vs.

W. G. S. Nanayakkara
13, Station Road,
Ambalangoda.

**DEFENDANT**

**BETWEEN**

G.L. GeethananDA
16/9, Nagahamulla Road,
Thalangama South,
Battaramulla.

**(Deceased)**

Swarnalatha Hemamalee Geethananda
16/9, Nagahamulla Road,
Thalangama South,
Battaramulla.

**SUBSTITUTED-PLAINTIFF-APPELLANT**

(Appointed according to the Court of Appeal order on 13th October, 2011)

Vs.

W. G. S. Nanayakkara
13, Station Road,
Ambalangoda.

**DEFENDANT-RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** Gamini Marapana P.C. with Keerthi Gunawardane and Navin Marapana for the Substituted-Plaintiff-Appellant

G.D. Kulatilleke for the Defendant-Respondent instructed by S. Jayaweera

**ARGUED ON:** 13.02.2012

**DECIDED ON:** 17.05.2012

**GOONERATNE J.**

This was a rei vindicatio action filed in the District Court of Balapitiya. Plaintiff-Appellant got only partial relief from the learned District Judge of Balapitiya i.e a declaration of title to the premises in dispute (prayer 'ඇ' to the plaint). Trial Judge had however not granted eviction and damages against the Defendant-Respondent as prayed for in prayer 'ඈ' & 'ඉ' of the plaint. I do not wish to discuss the affinity between an action rei-vindicatio and declaration of title in this judgment, but I observe that one should not loose sight of the fact that this is an action for a declaration of title, and need to consider the very basic principles applicable therein since the cause of action is more particularly based on eviction of the Defendant-Respondent. (paragraph 4 & 5 of plaint). The question of tenancy had been tested at the trial by way of evidence which led the Trial Court Judge to deny eviction and damages for the Plaintiff-Appellant. In all these

circumstances I believe that the main question that has to be decided would be the legality of tenancy and or the continued possession of the premises in dispute by the Defendant, was legal or not? If the continued possession of the premises in dispute by the Defendant-Respondent was illegal, then the Respondent would be a trespasser?

Parties proceeded to trial on 6 issues. Defendant-Respondent issue Nos. 3 – 5 suggest tenancy of Defendant under Plaintiff's father and the deposit of rents after the demise of Plaintiff's father in the Ambalangoda Local Authority (issue 4). As such Defendant seeks to establish continued tenancy (issue No5). It is very apparent that the media in which the Defendant-Respondent thought it fit to approach this case at the very outset was to deny title, but having realised the weakness of that position decided to accept title of Plaintiff, and to urge tenancy for Defendant's benefit (vide proceedings of 17.8.1995) objecting to issue No. 5 resulted in the case being taken to the Court of Appeal at a very initial stage as regards the burden of proof. The order of this court dated 24.11.1995 was very relevant and correct

The said order deals with the correct and undisputed legal position. Hence evidence was led and commenced on behalf of the Defendant at the trial which was more or less conceded by the Respondent

and order of the District Judge of 17.8.1995 was vacated directing the Defendant-Respondent to begin the trial.

I would initially refer to the position taken up by the learned Counsel for the Respondent as regards the question of attornment at the hearing before this court. It was his submission that such a position, re-attornment, cannot be considered by the Appellate Court since it was not raised as an issue in the Original Court, and that it is raised for the first time in appeal and as such invited this court to reject such a legal concept. It was also the position of the learned counsel for the Respondent that if the question of attornment was raised in the District Court Defendant-Respondent could have led more evidence and the learned District Judge could have given his mind to this aspect of the case. In view of this objection, it would be necessary at the outset to examine the evidence led at the trial and submissions both oral and written of the Plaintiff-appellant.

Appellant 's father had by deed of gift P2 gifted the premises in dispute to the Appellant on or about 1979. Father expired on 12.10.1980. (P3). Thereupon the Appellant by letter of 7.6.1981 (P4 Pg. 64 – proceedings of 31.3.1997) informed the Respondent about the appellant's father's death and requested the Respondent to attorne to him and accept

him as land lord as from 1980. On examining this letter I find that the contents of P4 refer to:

(a) Death of Appellant's father
(b) Property gifted to him by father and he is the owner.
(c) To accept Applicant as landlord as from November 1980.
(d) To pay rent to Appellant and obtain a receipt.
(e) Pay arrears of rent and if rent had been deposited since 1977 in the local authority to give the relevant period and to pay such arrears of rent.
(f) Copy of letter sent to private address of addressee.

There had been no objection to producing and marking letter P4. Registered postal article to prove dispatch of P4 had been produced P4a (not objected). Learned President's Counsel submitted to this court that letter P4 was not denied or objected and that there was no reply or response by the Respondent to P4. It was the position of the Appellant that since there was no reply or response to P4, Appellant sent another letter dated 01.10.1981 (P7) inviting the attention of the Respondent to P4 and reiterated his position and requested for arrears of rent. P7 also refer to mistakenly inserting as N.S.G (initials of Appellant) when it ought to be W.S.G. There had been no objection to P7 and Appellant also state that the relevant postal article was produced marked P7A. It is the position of the Appellant that the Respondent continued to occupy the premises in question without attorning to the Appellant and paying the arrears of rent. Appellant emphasis that the

Respondent willfully ignored and completely ignored the requests made in P4 & P7 and acted in breach of the contract of tenancy. If so, is the Defendant a trespasser?

**ATTORNMENT** – Stroud's Judicial Dictionary of Words and Phrases – Sixth Ed. Vol. 1 pg. 217... "'Attornment' signifies the tenant's acknowledgment of a new lord"(Cowel). "Attornment' is an agreement of the tenant to the grant of the seigniorie, or of a rent, or of the donee in tayle, or tenant for life or yeeres, to a grant of a reversion or remainder made to another" (Co. LITT. 309, A: TOUCH. 253; see hereon VOODFALL; Termes de la Ley).

At this stage I wish to mention and stress that tenancy is a contract. The question is whether the Respondent tenant has repudiated the fundamental obligation of tenancy. In these circumstances can court impose on parties a contractual relationship which the Tenant-Respondent reject or refuse to accept or attorn with the Appellant. If the tenant reject and refuse to accept the landlord (Appellant) then the Appellant could elect to treat the Defendant-Respondent as a trespasser.

On the other hand can the tenant merely ignore the rights of the new owner who got title on a deed of gift and continue to deposit rent in a local authority under the name of the former landlord? Tenancy need to be proved, and agreement to continue tenancy must also be proved. Parties need to be or were ad idem as to terms, unless there is waiver that could be inferred. Mere acceptance of rent cannot create a new tenancy or agreement.

At this point I would prefer to deal with the evidence led at the trial and consider the authorities cited by counsel to decide on it's applicability.

Witness Kamalasiri from the local authority (called by Defendant) in his evidence on 22.8.1996 state briefly as follows (The gist narrated as follows):

(a) owner G.L. Podisingho De Silva (Appellant's father) as in document V3.
(b) Payment made to above person named in the document V3 after 1978. If there was a change the ledger would indicate.
(c) V1 – claim form refer to Podisingho Silva. Rent paid to G.L. Podisingho. But the basis of payment cannot be ascertained from the documents.
(d) During 1978 to 1984 payments made by W.G.S.Nanayakkara (Defendant).
(e) Documents does not indicate in whose name money had been deposited.
(f) Ledger state the name of tenant but not landlord. It is a lapse on the part of the local authority.
(g) By V2 Plaintiff withdrew a sum of Rs. 1960/20 in August 1984 from the local authority.
(h) By V2 (එ) Plaintiff authorised G.L.P. De Silva to collect the cheque on his behalf from the local authority.
(i) V3 & V4 wich the Appellant remarks as fabricated documents. Not certified in terms of Section 76 of the Evidence Ordinance – V4 Defendant deposit rent in Plaintiff's favour.

V3 is a deposit in Plaintiff's father's favour.

When I look at the entire evidence of the witness called by the Defendant, a Clerk from the Local Authority, it is doubtful whether any

reliance could be placed on that evidence which at a certain point tend to favour the Defendant –Respondent. There seems to be no consistency in evidence of the witness. Even the trial Judge refer to the lapses of the local authority witness but prefer not to damage the case of Defendant-Appellant or hold against him for the lapses of the witness. In law should the court take this attitude? Other important question is as to why the Defendant-Respondent the so called tenant preferred not to give evidence? A court could if necessary draw inferences on Defendant-Tenants failure to give evidence? Is it deliberate avoidance?

The position of the Defendant-Respondent seems to be to blow hot and cold and adjust the case as and when the Defendant-Respondent chooses to do so. If one looks at the answer Defendant denied Plaintiff title. (By denying paragraphs 2/3 of plaint). If it is so the Defendant-Respondent is not a tenant but a trespasser. However parties proceeded to trial on issues and when issues are raised pleadings recede to the background. Then with the issues a gradual shift took place. Issue Nos. 4 & 5 suggest that with the death of Plaintiff's father rent deposited with the Local authority and the Defendant became the tenant of Plaintiff. The Court of Appeal order of 24.11.1995 is also relevant in the circumstances of the case. (need not be repeated). Only when a challenge to Defendant-Respondents denial to title

took place by Plaintiff-Appellant that adjustments were made to enable the party Defendant to continue with the case. defendant never directly admitted Plaintiff-Respondent title. Respondent indirectly or reluctantly accepted plaintiff as the landlord at a subsequent stage to meet the challenge and of the risk of rejection of her rights.

Defendant-Respondent always took cover under the local authority. (even if the law provides) and resorted to indirect methods to prove tenancy. Section 21(3) of the Rent Act contemplates the authorized person to give a written acknowledgement of every payment of rent and transmit the amount in such payment to the ladlord of the premises. However from November 1980 up to the time this case was filed or heard no payments were sent by the authority to the Plaintiff. Document P1 of 6.1.1992 confirm this position when this authority required the Plaintiff to prove title and obtain the rents deposited. Witness of the Defendant was unable to correctly explain as to why Plaintiff's name did not appear in the ledger maintained by the local authority. Nor could the witness explain as to why rents deposited could not be sent to Plaintiff. (in compliance with Section 21(3). There is no doubt that if Plaintiff was accepted as landlord by the Defendant the Plaintiff's name and address were disclosed to the authority, rents deposited could have been sent to Plaintiff. This clearly

indicates the reluctance of Defendant-Respondent to accept Plaintiff-Appellant as landlord, but merely tried to take advantage of the letters P4 & P7 (paragraphs 11 & 12 of the Written Submission of Respondent) and to demonstrate tenancy between parties. One has to really understand the meaning and purpose of dispatch of letters P4 & P7 and it's contents. It is nothing but a request to attorn and nothing else. P4 & P7 was never replied by Defendant. As such no contract of tenancy could be at least presumed, between parties.

It would not be possible to reject the concept of attornent in law having not objected to documents P4 & P7. The said documents are admissible and is evidence for all purposes of the case and law. (vide Jugolinija Vs. Boal East 1981 (1) SLR 18 at 24) Therefore this court will not be in a position to entertain the submissions of learned counsel for Respondent that Appellant cannot be permitted to take it up in appeal. This court is concerned more particularly to decide the question of legality of possession of Defendant-Respondent in the premises in dispute. Defendant-Respondent failure to attorn in the Plaintiff-Appellant amounts to illegal possession and as such the Respondent is a trespasser. Therefore I am unable to agree with the learned District Judge's reasoning and judgment. Nor can I accept the submission of learned Counsel for Respondent that the case of

Gunasekera Vs. Jinadasa 1996(2) SLR 116 has no relevance or differ from the case in hand. A request to obtain rents deposited in the local authority or to authorize persons to collect the rent deposit on behalf of Plaintiff does not create a new tenancy, Mere acceptance would not be advantages to the tenant. In a contract of tenancy the contract and tenancy must be properly and correctly proved. The deposit of rent does not discharge tenants obligation to landlord.

In Kurukulasuriya Vs. RanMenika 1990(1) SLR 331 .....

Her Ladyship Bandaranayake J. referring to the contract of tenancy said ...

"This being so the ratio decidendi in the case of Vincent Vs. Sumanasena (supra) would apply. The acceptance of rent in the present circumstances does not amount to a waiver of the notice. Once the contractual tenancy is ended by notice, the landlord loses no rights in accepting rent from the statutory tenant. The mere acceptance of rent is insufficient to create a new tenancy. The agreement to continue the tenancy must be proved. It must be shown that the parties were ad idem as to the terms. A waiver of a notice to quit cannot be presumed. Fernando vs. Samaraweera (8); Attorney General vs. Ediriwickremasuriya (9); Virasinghe vs. Peiris (10); Dias vs. Gomes (11); Perera vs. Magie (12). Acceptance of rent for a period subsequent to the notice revives the tenancy only if from the facts established an intention to waive can reasonably be inferred. Every such payment does not ipso facto amount to a revival. Eastern Hardware Stores vs. Fernando (5)"

In my concluding remarks I refer to the above mentioned case of Gunasekera Vs. Jinadasa which is relevant to the case in hand in every respect which has considered a variety of matters, all of which could be

connected to the case in hand. The purpose and meaning of P7 & P4 does establish tenancy or a contract between the parties unless attorn with the Plaintiff. Appellant; for which there was no response. Resulting position is to reject any further tenancy between parties and make Defendant-Respondents possession illegal.

In Gunasekera vs. Jinadasa....

> The premises were let in 1960 by the Plaintiff Respondent Appellants' father to the father of the Defendant Appellant Respondent. Later in 1970, the Plaintiff's father gifted the premises to him, but they neither informed the Defendant's father nor called him to attorn, the latter died in 1973, the Defendant then attorned to the Plaintiff's father, the Defendant continued to pay rent to the Plaintiff's father; when the Plaintiff's father refused to accept rent from 1980, the Defendant deposited the rent with the authorized person, to the credit of the Plaintiff's father. The father and son by their letter of 23.10.81, informed the Defendant of the Transfer and called upon him to pay rent to the Plaintiff with effect from 16.11.81. The Defendant did not reply but continued to occupy the premises, he deposited the rent in the father's name and continued to do so even after his answer was filed.
>
> The Plaintiff instituted vindicatory action, the Trial Judge held that both the Plaintiff and his father had called upon the Defendant to attorn, to the plaintiff and that the Defendant having failed to attorn to the Plaintiff was a trespasser, and gave judgment for the Plaintiff.
>
> On appeal the Court of Appeal reversed the judgment, holding that the Defendant had become aware of the Plaintiff's title in 1973, and that the father continued to collect rent as the Plaintiffs agent, and that the Defendant had not deliberately

refused to accept him as landlord and had not refused to pay him rent; and that therefore the Defendant had not been transformed from a tenant into a trespasser; on appeal.

Held:

Per Fernando J.

"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 the one had or Defendants or tenants on the other.

(j) While it is legitimate initially to infer attornment from continued occupation, thus establishing privity of contract between the parties, another principle of law of contract comes into play in 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.

Per Fernando J.

"The court must not apply the presumption of attornment as a trap for the transferee, allowing the occupier who fails to fulfil the obligation of a tenant, if used 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 an tenant and can only be sued in a tenancy action, since it is the occupiers conduct which gives rise to such

uncertainty, equitable considerations confirm the option which the law of contract gives to the transferee.

(ii) Payment to the authoirsed person in the name of the person who is not the landlord does not discharge the tenants obligation to the landlord.

In all the circumstances of this case and considering all the evidence placed at the trial in its entirety, this court is of the view that possession of the Defendant-Respondent has become illegal from the point of issuance of letters P4 & P7, for which tenant never replied or responded. In fact when the Defendant-Respondent was challenged of the failure to accept Plaintiff's title, and the attempt to raise tenancy as an issue resulted in a change of position and the stance of the Defendant-Respondent. Then the court is left with the position of Defendant paying rent to Plaintiff after 1981? A very vague and doubtful evidence were placed before court to arrive at a conclusion as regards payment of rents to Plaintiff. The Defendant's failure to give evidence and place direct evidence of the so called relationship of tenancy and thereby prove a contract of tenancy is a matter that cannot be ignored or taken lightly. This court is entitled to draw inferences on same, since Plaintiff request to attorn and pay rent directly to Plaintiff, are matters left in the dark and unexplained. The only available witness of Defendant has not performed well at all, to establish Defendants issues. No proper material had been placed by the local authority to establish

that rents deposited had been released to the Plaintiff. As observed above document P1 demonstrate the local authorities position in this regard. There is a breach of the law on the part of the local Authority to comply with Section 21 (3) of the Rent Act.

Section 21 (3) reads thus:

> Where the rent of any premises is paid to the authorized person, the authorized person shall issue to the tenant of the premises a receipt in acknowledgment of such payment, and shall transmit the amount of such payment to the landlord of the premises. It shall be the duty of such landlord to issue to the authorized person a receipt in acknowledgment of the amount so transmitted to him.

Even if the Plaintiff withdraw the deposits which are more or less deposits made during the life time of Plaintiff's father, it cannot be considered as rent paid to Plaintiff. On the death of a person, the deceased persons property both movable and immovable vest immediately on the heirs. Once vested it cannot be divested unless by well known modes recognized by law. i.e last will. 10 N.L.R at 98. Document P8 also does not favour the Defendant since licnece had not been issued after 1979. Therefore I am not inclined to accept the views of the learned District Judge. This court

set aside the judgment of the learned District Judge and enter judgment for Plaintiff-appellant as in sub paragraphs (i) & (ii) of the Petition of Appeal with costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL