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

Nippon Hotel Company Ltd.,
No. 123, Kumaran Ratnam Road,
Colombo 2.

**PLAINTIFF**

C.A 733/1998 (F)
D.C Colombo 7829/RE

Vs.

1. Mahadeva Kurakkal
   No. 139, Kumaran Ratnam Road,
   Colombo 2.

2. Colombo Studio (Pvt.) Ltd.,
   No. 139, Kumaran Ratnam Road,
   Colombo 2.

**DEFENDANTS**

**And now between**

Nippon Hotel Company Ltd.,
No. 123, Kumaran Ratnam Road,
Colombo 2.

**PLAINTIFF-APPELLANT**

Vs.

3. Mahadeva Kurakkal
No. 139, Kumaran Ratnam Road,
Colombo 2.

4. Colombo Studio (Pvt.) Ltd.,
No. 139, Kumaran Ratnam Road,
Colombo 2.

**DEFENDANTS-RESPONDENTS**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** K. Aziz for the Plaintiff-Appellant

G. Gunawardane with K. Seneviratne
for the Defendants-Respondents

**ARGUED ON:** 21.11.2011

**DECIDED ON:** 18.01.2012

**GOONERATNE J.**

This was a rent and ejectment suit filed in the District Court of Colombo, by the Plaintiff-Appellant Hotel Nippon Limited against the 1st Defendant M. kurukkal and the 2nd Defendant Colombo Studios Limited. In

the Original Court Plaintiff sought to eject the Defendants on grounds of arrears of rent and subletting. (1st Defendant to 2nd Defendant). However in the appeal argued before me the Appellant only urged the ground of subletting, may be due to the reason that Plaintiff own witness admitted at the trial that rent had been paid and that there had been no arrears of rent (proceedings of 1.7.1997).

The Appellant's position in the Original Court as well as in the appeal had been that the 1st Defendant had unlawfully sublet the premises in question to the 2nd Defendant Company. Parties proceeded to trial on 9 issues. There is no dispute that Plaintiff let the premises in dispute to the 1st Defendant-Respondent on a rent of Rs. 738/13, and that the premises are governed by the Rent Act. On the evidence transpired in the District Court it is evident that from the beginning of tenancy a business, namely Colombo Studios had been carried on in the premises in dispute. On or about 6.2.1990 the above Colombo Studios were converted into a limited liability Company called Colombo Studios (Pvt.) Ltd., (2nd Defendant).

Appellant contends that the 2nd Defendant is a juristic person, who runs the business "Colombo Studios". As such 1st and 2nd Defendants

are two different persons. Therefore subletting is apparent. 2nd Defendant cannot run the business unless it has exclusive possession. The 1st Defendant failed to give evidence at the trial and has failed to give any explanation as to the presence of the 2nd Defendant. The Appellant in the written submissions and in the oral submissions before this court submitted that the learned District Judge has erred in his judgment and the Appellant state the following.

In the case of Seyad Mohamed Vs. Meerampillai 70 NLR 237....

It is the duty of the tenant to give a reasonable explanation as to why another person is in occupation of the premises.

The tenant must give the said explanation to the landlord, but if he cannot give the required explanation, the inference is that other person is a sub-tenant. However that may be, the learned Additional District Judge has misapplied the judgment in Perera Vs. Seneviratne 77 NLR 403. In Perera's case H.N.G Fernando C.J took the view that where ejectment is sought on the basis of sub-tenancy, the Plaintiff must not only prove exclusive occupation but also that rent was paid for such occupation. The learned Additional District Judge has clearly misdirected himself in holding that there is no proof that rent was paid by the 2nd defendant to the 1st defendant. The learned Additional District Judge in reaching this finding has overlooked that the proved payments made by the 2nd defendant are in fact and in law consideration by way of rent paid to the 1st defendant. Further, the learned Additional District Judge has patently misdirected himself in holding that the 1st and 2nd defendants are one and the same person. The leaned Additional District Judge has thus reached the perverse finding that the Appellant has failed to establish any of the pleaded causes of action.

The counsel on either side drew the attention of court to the following provisions of the Rent Act, which reads thus:

> Section 10(1) For the purposes of this Act, any part of any premises shall be deemed to have been let or sublet to any person, if, and only if, such person is in exclusive occupation, in consideration of the payment of rent, of such part, and such part is a defined and separate part over which the landlord or the tenant, as the case may be, has for the time being relinquished his right of control; and no person shall be deemed to be the tenant or the subtenant of any part of any premises by reason solely of the fact that he is permitted to use a room or rooms in such premises.
>
> Section 10(2)(a)
> 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
>
> Section 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.

The Appellant's position is that the requirement under Section 10(1) and Section 10(2)(a) have been established and as such Plaintiff-Appellant is entitled in law to eject the 1st Defendant Tenant and the 2nd

Defendant (sub tenant). It was also the learned Counsel's position that the Plaintiff in compliance with the above provisions only need to place prima facie evidence of subletting and an explanation would have to be forthcoming from the Defendant as the burden would shift to the Defendant regarding facts specially within the knowledge of the tenant.

The Respondent's counsel on the other hand argued that sub-tenancy itself is not an actionable wrong which gives rise to a cause of action under the Civil Procedure Code. What is actionable in sub-tenancy is that premises is let without prior consent of land lord. It was his position that there is no question of consent at all as the persons originally involved in the contract of tenancy continued to occupy and continue the same business even after incorporation of the 2nd Defendant Co. It was the 1st Defendant who continued to pay rent and continues the business, and as such there is no sub-tenancy and no consent is necessary in terms of the law. It is unthinkable and does not stand to reason that 2nd Defendant who is not a natural person paid rents to the 1st Defendant.

I have considered the judgment of the learned District Judge. Based on evidence the trial Judge arrives at a decision that from the commencement of the contract of tenancy a business called Colombo

Studios had been carried on in the premises in dispute. On 6.2.1990 'Colombo Studios' had been converted to a limited liability Co. (2nd Defendant). Judge also emphasis that the shareholders, and Directors of the 2nd Defendant Co. are the 1st Defendant his wife and daughter. 1st Defendant managed the business. In the judgment of the District Judge at folio 165 it is stated.

> In the instant case the Plaintiff has not proved that the 2nd Defendant paid any rent to the 1st Defendant. In any event the 2nd Defendant could not have paid any rent to the 1st Defendant inasmuch as the 2nd Defendant and the 1st Defendant are in fact one and the same person though the 2nd Defendant is a limited liability Company by name.

I am not convinced with the argument put forward by the learned counsel for Appellant. The trial Judge may have made a mistake with regard to burden of proof since payment of rent is not a matter that could be easily proved by Plaintiff since it is a matter within the knowledge of the Defendant-Respondent.

However that would not mean that the entire judgment could be faulted. The evidence suggest that it is the same persons who continued the business even after incorporation. No doubt a juristic person (2nd Defendant)

came into existence after incorporating, but no other natural person took over the business or ran the business and there is no other natural person's name had been suggested or led in evidence. Only shareholders and Directors of the 2nd Defendant are the 1st Defendant, his wife and daughter. Business changed it's name (vide v1 – v4) Even Plaintiff under went a change (Hotel Nippon v1, v2/v3). Merely because an incorporation of the business took place would not mean that a new natural person came into the picture or took over the business to enable court to draw an inference in the absence of evidence in that regard. I have considered the documents v6, v7, v8 & P10 etc.

The question of subletting of a premises in which a business is carried out would be a question of fact depending on the agreement, (if any) the evidence and the circumstances in each particular case. The case in hand does not in any event in law and fact suggest subletting. As such providing any explanation by the Defendant party is not necessary, in the circumstances of the case. The material placed before the original court is not sufficient to conclude question of subletting on the part of the 1st Defendant-Respondent who controlled and managed the business at all times relevant to the action. In the commercial world changes do take place in the

nature of business. In the case in hand such a change (incorporation of the 2nd Defendant-Respondent) has not introduced subletting in terms of the Rent Act.

In all the above circumstance I see no real basis to interfere with the judgment of the Original Court. The trial Judge has correctly dealt with all primary facts and the Appellate Court will not unnecessarily interfere with primary facts. 1993(1) SLR 119; 20 NLR 332; 20 NLR 282; 1955(1) All E.R 326. As such I affirm the judgment of the District Judge and dismiss this appeal without costs.

JUDGE OF THE COURT OF APPEAL