IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA.

C.A. CA 125 / 99 F

D.C. Galle 419/RE

1. W G Upasena,
2. W G Jayasingha
544A, Matara Road,
Katugoda, Galle
Defendant-Appellants

Vs.

Mohamed Sali Siththy
Kadeeja,
Katugoda, Galle
Plaintiff-Respondent

BEFORE : A W A SALAM, J

COUNSEL : Manohari Hewawasam with Wijaya Gunaratna for the defendant-appellants and Sudharshani Cooray with Dr Sunil Cooray for the plaintiff-respondent.

Written Submissions filed on : 02.04.2012

ARGUED ON : 23.02.2012.

DECIDED ON : 26.07.2012.

A W Abdus Salăm, J

The plaintiff landlord, a teacher retired from Government Service, filed action with a view to regain possession of business premises bearing Assessment No 544A, Matara road, Katugoda, Galle rented out to the defendants, on the ground of reasonable requirement. The case of the plaintiff was that the premises in question were originally owned by her father-in-law which title passed hands and ultimately devolved on her.

The 1st defendant admitted his occupation of the premises but specifically stated that his occupation was without the approval or consent of the plaintiff whom he alleged had no title to the premises in suit. The 2nd defendant elected to abide by the pleadings of the 1st defendant for the purpose of his defence. The matter of the dispute proceeded to trial on 8 issues, of which 6 were suggested by the plaintiff and 2 by the 1st defendant. The plaintiff put in issue as to whether the business premises let to the defendants from the year 1982, are reasonably required, for her to run the business. The plaintiff alleged termination of the tenancy giving notice in writing (P1) to the defendants extending to 1 year.

At the trial the plaintiff gave evidence and led the evidence of P. K. L. Bandara, Attorney-at-law to prove P1 and closed her case reading in evidence P1 to P4. The 1st defendant gave evidence and closed his case without producing any documents. The 2nd defendant neither gave evidence nor did he call witnesses nor produce documents.

The trial judge by judgment dated 7.1.1991, held *inter-alia* that the defendants were tenants of the premises under the plaintiff. He further held that the plaintiff established her need to regain possession of the premises to engage in a business as an additional means of livelihood and directed the ejectment of the defendants.

This appeal has been preferred against the said judgment. The 1st defendant in his answer took up the position that he was never a tenant of the plaintiff nor paid rent to her. He maintained in the pleadings that he became the tenant of one Razik in the year 1982 and the plaintiff has purchased certain

portions of the premises from one of the co-owners. Quite unusually, the defence raised in the pleadings and the position taken up in evidence are diametrically opposed to each other. According to the testimony of the 1st defendant, he had caused a search to ascertain title at the land registry and having found out that there were several co-owners, entered the premises in question along with his brother. Another version of the 1st defendant, he had become the tenant of the premises under her in the year 1982. The position maintained by the defendants at the trial was rather contradictory to the pleadings. The 1st defendant stated that he came into the premises in the year 1981, along with his brother named Bandula and upon his death he continued to run a business in the premises. The 2nd defendant runs a separate business in the same premises. The 1st defendant had paid rent to one Musthaffa and later having examined the ownership at the Municipal Council, deposited rent in favour of the plaintiff.

On the question relating to the contract of tenancy alleged by the plaintiff, taking into consideration the manner in which rent was paid by the defendants, the learned district judge accepted the evidence of the plaintiff and rejected the evidence of the 1st defendant, for reasons well stated in the judgement. He has observed that the defendants on one occasion had denied the plaintiff's ownership of the premises and later admitted having paid rent to the Municipal Council in the name of the plaintiff. This clearly shows that the defendants are not entitled in law to deny the plaintiff's ownership of the tenanted premises.

The defendants have admittedly failed to reply the notice to quit P1. The notice to quit sent to the defendants contain serious allegations. If the plaintiff had no status to send the notice to quit, the defendants ought to have replied the same denying the plaintiff's assertion in P1 and setting out the nature of their possession. It is appropriate at this stage to refer to the judgement in Saravanamuththu Vs De Mel 49 NLR 529. The facts briefly in that case are that the election of the respondent to the Parliament was challenged *inter alia* on impersonation and Rosalin Nona, a supporter of De Mel was imprisoned on being

found guilty to a charge of impersonation. She wrote to R. A. De Mel, from the prison stating that she voted for him impersonating another and recalled having been detected at Kanatte polling booth and inquired as to whether he (De Mel) too had not seen her there. The respondent De Mel stated that he was not proficient in Sinhala language to read the letter and was pestered with such letters that compelled him to consign them to the waste paper basket unread. Taking into consideration that the respondent was a public man, the reasons given by the respondent against the failure to reply the letter was considered inconceivable.

Applying the principle so explicitly laid down in the case of Sarawanamuththu (supra), I cannot see any reason as to what made the defendants to take the risk of remaining silent after reading the notice P1, if the plaintiff who was not the landlord had nothing to do with the premises in question. Thus, I am compelled to assume that the imputations, assertions and observations made in the said notice to quit has been conceded by the defendants.

The learned district judge has considered this aspect of the matter before he came to the conclusion as to the credibility of the parties. Since the learned district judge has had the distinct advantage of hearing the evidence of both the plaintiff and the 1st defendant on this matter and observing their demeanour and deportment, I am not inclined to reverse his finding on the credibility, as no injustice appears to have occurred by reason of the finding on the question of credibility.

On a close scrutiny of the pleadings of the defendants and the testimony given in court, it appears that the defendants particularly the 1st defendant has made an unsuccessful attempt to approbate and reprobate in the course of presenting their case. Having denied tenancy at the beginning, the defendants in their desperation had raised the question of the validity of the notice to quit and the reasonableness of the plaintiff's claim on a balance of probability. I think the doctrine against "approbation and reprobation" or the rule against the permissibility to blow hot and cold stands in the way of the defendants to question the

plaintiff's reasonable requirement. In any event, assuming that the defendants have the right to challenge the reasonableness of the plaintiff's requirement, yet the learned district judge is right in his conclusion that the plaintiff has established the ingredients to regain possession of the tenanted premises.

In this respect it is useful to refer to the judgement in Muttu Natchia v. Patuma Natchia, (1895) 1 NLR 21. The plaint in that case averred that the defendant having entered the premises and holding as a tenant of the plaintiff, had disclaimed to hold of him and put the plaintiff at defiance. It was held by Browne, J. that it is unnecessary for the plaintiff, to have averred or sought to prove any notice to quit given by him to the defendant, and defendant was not entitled to have the action dismissed because no valid notice was given. This line of ruling has been followed in the case of *Sundra Ammal v. Jusey Appu* (1934) 36 NLR 400 and *Pedrick v. Mendis* (1959) 62 NLR 471.

Even then, as regards the question whether the premises in dispute are reasonably required by the plaintiff, the learned district judge has given cogent reasons for his decision. The plaintiff is the mother of five children and both the plaintiff and her husband have retired from government service. By a preponderance of evidence adduced at the trial the learned district judge was of the firm view that the necessity of the plaintiff to regain possession of the tenanted premises far outweigh the defendants need to continue in possession. In the circumstances, the impugned judgement does not appear to me as one that needs to be disapproved.

The judgement in the case of Arnolda Vs Lawrence 1982 2 SLR 768, has no relevance to the present case, since the judgement cited deals with the question relating to reasonable requirement of residential premises. Even otherwise, the questions raised by the learned counsel for the defendants in his argument as to whether the plaintiff was the owner of one residential premises has not been raised in the original court.

Hence, the appeal preferred by the defendants merits no favourable consideration and therefore should stand dismissed.

There shall be no costs.

Judge of the Court of Appeal

NR/-