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

Nihal Ranjith Weerawarna of
No. 91, Wijeya Road,
Madakatiya, Tangalle.

DEFENDANT-APPELLANT

C.A No. 263/1997 (F)
D.C. Tangalle L/2468

Vs.

Hubert Walter Tschope of
No. 91, Wijeya Road,
Medaketiya, Tangalle.

PLAINTIFF-RESPONDENT

BEFORE: Anil Gooneratne J.

COUNSEL: J. P. Gamage with Suminda Perera
for the Defendant-Appellant
Nimal Muthukumarana for the Plaintiff-Respondent

ARGUED ON: 15.07.2011

DECIDED ON: 25.10.211

GOONERATNE J.

The prayer to the plaint filed in this action seek the following relief.

(a) declaration that Plaintiff is entitled to possess the land and building described in the schedule to the plaint until 24.12.2080

(b) eviction of Defendant and those holding under him and to hand over possession of same.

(c) Damages at the rate of Rs. 500/- per day from date of plaint.

Action is more or less based on a 99 year old lease document marked P1. Parties proceeded to trial on 30 issues. The learned District Judge entered judgment in favour of the Plaintiff. At the hearing before this court learned counsel for Appellant based his argument only on three matters, i.e:

(a) Prescription. It was his contention that this is a possessory action which should be filed within 1 year and 1 day. Relies on Section 4 of the Prescription Ordinance. Action filed, according to the learned counsel after 2 years.

(b) Plaintiff has violated the terms and conditions of the lease document marked P1. The balance sum due on lease document P1 not paid by Plaintiff. Referred to Pg. 135 of the brief (on plaintiff's own evidence).

(c) The subject matter of the lease (P1) is not properly described – schedule to the plaint is a misdescription relies in the case of Sameen vs. Ceylon Hotels Ltd. 1989 (1) SLR 81.

The learned counsel for Plaintiff-Respondent inter alia supported the judgment of the District Judge and emphasized the fact that his client has paid various sums of moneys to the Defendant at various times and it is a large sum of money paid to him which in fact is more than the sum specified in the lease document and submitted to court that Plaintiff-Respondent is legally entitled to possess the land in dispute based on lease document P1. Though in the Original Court Defendant challenged the lease document to be invalid, in the appeal learned counsel did not wish to pursue such position. On a balance of probability learned District Judge has preferred to accept the version and evidence of Plaintiff, to be more probable.

At this point of this judgment I would endeavour to consider the issue of prescription which had been answered in the negative by the learned District Judge, though his judgment has not given details of reasoning, on the plea of prescription, the issue had been answered. The entire case is based on a lease document (P1) and in fact the lease period is 99 years. Relief sought is a declaration that Plaintiff is entitled to possess until 24.12.2080. In breach of a condition in the lease document will amount to a continuing breach on one hand and on the other continuing breach of a duty in view of the long period of the lease. Even if the end result is to deny a person of possession, when the agreement to possess is embodied in an

agreement like the lease agreement P1, action is more or less based on breach of agreement. As such I cannot give a narrow interpretation to bring the case within Section 4 of the Prescription Ordinance.

When I read issue Nos 1 – 3 and 5 & 6 as well as paragraphs 2, 3, 4, 12 & 15 of plaint and paragraphs 3 & 17 of answers it is clear that the nature of the suit is dependant on the lease agreement (P1) and as such document in it's entirety should not be isolated merely on dispossession. One has to read the entirety of pleadings and the issues raised in the case to conclude that Section 4 of the Prescription Ordinance does not apply. As such, as observed above, when terms and conditions of an agreement are embodied in a document as P1 action has to be based on an agreement. Section 6 of the Prescription Ordinance should prevail over Section 4 which is the general section.

I also fortify my views on this aspect with the case reported in 79 NLR Part II pg. 5 Ceylon Insurance Co. vs. Diesel Motor Engineers Co. Ltd. In that case:

The plaintiff-respondent firm sued the defendant, in insurance company, in respect of repairs carried out by it at the request of the defendant to three motor vehicles. The plea of prescription was taken and the sole issue for determination was whether the claims of the plaintiff on these three causes of action were prescribed. The relevant sections of the Prescription Ordinance were section 6 (claims on a written contract or promise), section 7 (claims on an unwritten contract or promise) and section 8 (claims for work and labour

and for goods sold and delivered), The trial judge held with the plaintiff and entered judgment against the defendant. Although in the present case the claim was one undoubtedly for work and labour done as well as materials supplied, such work could be done and materials supplied in terms of a contract written or unwritten between the parties, and the question arose as to what particular section of the Prescription Ordinance would apply, and in the case of each section the period of prescription was different. It was found by the trial judge that the debts on all three causes of action arose more than one year prior to the date on which action was instituted, so that if section 8 of the Prescription Ordinance were to apply, in terms of that section, all three causes of action would be prescribed.

In regard to the first two causes of action, the plaintiff produced documents P1 and P4 being an estimate of the repairs and the acceptance of the defendant by letters P2 and P5. There was also oral evidence that on the receipt of letters P2 and P5 the plaintiff carried out the repairs and informed the defendant whose representative inspected the vehicles and approved the job done. The final bills P3 and P6 were also sent to the defendant thereafter. In respect of the third vehicle no estimate or acceptance thereof was produced by the plaintiff but a supplementary estimate marked P7 and a letter from the defendant marked P8 were produced. In P8 the defendant company stated with reference to document P7that the sum of Rs.1,545 would be paid by them.

It was argued on behalf of the defendant appellant that event if there was a written or unwritten contract, nevertheless, section 8 of the Prescription Ordinance must prevail and apply to the facts of this case as it provided for the prescriptive period applicable in respect of this particular class of contract. It was submitted, therefore, that in the case of any conflict Section 8 must prevail over both section 6 and 7.

Held:

(1) That the plaintiff's first two causes of action were on the evidence based on written contracts and the third cause of action on a written promise to pay and therefore came within section 6.

(2) That in the case of written promises or contracts section 6 being the particular enactment must in keeping with the rules of interpretation prevail over section 8 of the Prescription Ordinance which is the general section. In the present case,

therefore, the plaintiff's three causes of action fell within the prescriptive period of six years applicable and were not prescribed.

Held further: that, however, in the case of unwritten contracts. Section 8 of the Prescription Ordinance would be the particular enactment to which the general section 7 must give way.

In Campbell & Co. Vs. Wijesekere 21 N.L.R 431 at pg. 435.... It would seem, them, that a contract for goods sold and delivered applies rather to an unwritten contract, which can be enforced by an action owing to the goods having been delivered, rather than to the contract made in writing and signed by the parties. In the circumstances I would hold that this is not a case of goods sold for which an action lies owing to the fact of delivery, but rather a case where the action is brought on the written contract.

In Dawbarn Vs. Ryall 17 N.L.R 372 at pg. 374/375... In Horsfall Vs. Martin the question was whether money due for goods sold and delivered on an unwritten agreement was governed by section 8 or by section 9 of the Ordinance. It was held that section 9 was applicable, so that the action should have been brought within one year. But the reasoning of this decision is not easily reconciled with the decision of the Full Court in Kalahe Parene Vitanage Louise de Silva v. Akmimene Pallia Gurugey Don Louis.

For the reasons above stated I am of opinion that the present claim is founded upon a written contract of sale, and that it is not prescribed.

The other point raised by the learned counsel for the Appellant relates to violation of the terms and conditions of the lease document P1. He emphasize the fact that the balance sum due on P1 was not paid and drew the attention of this court to pg. 135 of the brief on Plaintiff's evidence. On a perusal of that part of the evidence Plaintiff states that by January 1982 he

had not paid the full amount of the balance sum due. I do not think that one could reach conclusions by merely reading the above pg. 135 in isolation of the other evidence of Plaintiff contained in several pages of the brief. However before I go any further there is uncontradicted evidence on that days proceeding itself to prove that Plaintiff had from time to time paid the Defendant a large sum of money and by January 1982 a sum of Rs. 50,000/- was paid (P15). The evidence of Plaintiff commenced on 14.9.1994 from folios 99 of the brief onwards. Perusal of same I find full details of the transaction and payments made. How he entered into the transaction and the association of Defendant are well explained. Further the large amount of money paid to the defendant is in evidence which are not contradicted. Details of payment are shown in document P3. Amounts paid are supported by documents P4, P5, P6 & P7, P11, P12, P14, P15, P16, P17 & P18 etc. Such large amounts of money paid by Plaintiff cannot be ignored merely on one aspect of a question posed at pg. 135 of the brief.

The learned District Judge having considered the aspect of payment has in his judgment (folio 282) stated that by deed P1 it is stated that a sum of Rs. 2,52000/- was paid and the balance of Rs. 2,68000/- to be paid by January 1982. Trial Judge is satisfied that part of the balance sum due was

paid in full. The learned District Judge concludes that all sums paid are based on evidence led at the trial.

In view of the above which supports Plaintiff's case on payments due on P1, I see no legal basis to invalidate lease document P1.

I am unable to consider learned counsel's submission on the balance sum due, and as such the submission is rejected. Even the witness from the Bank had testified to several remittances. If one considers document P1 and the evidence suggested by Defendant-Appellant to invalidate the lease document, I find that the Appellant had not been able to substantiate any of those matters. P1 and it's conditions in no way prejudice or result in a failure of justice to either party. If at all the wrongdoer is the Appellate who prevented access to Plaintiff-Respondent, to the premises in question.

The third and the last point urged by the learned counsel for the Defendant-appellant is on the identity of the property and that the schedule to the plaint is a misdescription. The lease document P1 and the plaint and their schedules gives details of the property. There is no specific issue raised on this point at the trial but issue 13 merely state that the plaint has not been prepared in compliance with chapter VII of the Civil Procedure Code. Section 41 of the Civil Procedure Code states that the land sued for to be described by metes and bounds or sketch plan. When I look at the

schedules in the plaint and the lease document I am unable to conclude that there is a misdescription as far as Section 41 of the Code. No doubt there is an obligation to describe the boundaries or extent of land. There is sufficient compliance in this regard by Plaintiff in it's plaint and lease document. Both parties have on the other hand entered into a lease agreement and one cannot approbate and reprobate the same transaction. 20 N. L.R 124

The evidence that transpired in the Original Court no doubt indicate a long association between the parties, which developed into monetary transactions and entering into a long lease are not matters that could be denied. The Defendant-Appellant seems to have had the privilege of entering into financial transaction for his benefit. As from 19.1.1992 Plaintiff-Respondent had been denied access to the premises in dispute, as a result of forceful or illegal occupation of Defendant-Appellant. The learned District Judge has considered all relevant and primary facts and entered judgment in favour of the Plaintiff-Respondent. This court is not inclined to interfere with the findings of the learned District Judge. Judgment of the District Court is affirmed. Appeal dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL