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

CA/998/96 (F)

DC/Colombo/16909/L

Melani Dilkushi Silva nee Gomes
129, Church Road,
Mattakkuliya, Colombo 15
Plaintiff-Appellant

Vs.

Mareena Wyman,
79, St; Maries Road, Mattakkuliya,
Colombo 15
Defendant-Respondent

Before
A.W.A. Salam,J.

Counsel
Athula Perera for plaintiff- appellants and S N Trimanna with Sulari Gamage for the defendant-respondent.
Written Submissions Filed on: 08.11.2010
Decided on : 27.04.2011

The plaintiff filed action against the defendant and averred interalia that by virtue of Deed of Gift 329 dated 21.8.1991, she became the owner of the premises in dispute and that the defendant without acknowledging her ownership is in unlawful possession. The plaintiff prayed for a declaration of title to the premises and ejectment of the defendant. By way of incidental

relief she prayed 4500/- a month by way of damages until she is placed in possession.

The defendant maintained that no cause of action had accrued to the plaintiff to sue her as she had never disputed the rights of the plaintiff. The factual background of the case as transpired in the answer is that the mother of the plaintiff Soma Serasingha Gomez as the landlady of the premises had let the same to the defendant since December 1977. The defendant further stated in her answer that the mother of the plaintiff and the plaintiff's attorney at law by two separate letters dated 30.11.1993 requested her to pay rent to the plaintiff with effect from 1.12.1993 and that she received both letters on 7.12.1993. However, prior to the receipt of the above letters, the defendant on 7.12.1993 had obtained a money order for Rs. 150/- and upon the defendant informing the plaintiff of the same, plaintiff requested the defendant to ignore the letters dated 30.11.1993 and specifically instructed her to continue with the same mode of payment of monthly rental to her mother. The defendant therefore had continued to send money orders to the plaintiff's mother and remarkably none of them had been ever returned undelivered and the plaintiff's mother had in fact encashed some of them.

However she states that to her utter disappointment on 28.01.1996, she received summons in the case and thereafter received 8 money orders drawn in favour of the mother of the plaintiff. It is her position that some of the money orders after the receipt of the letters dated 30.11. 1993 had been encashed with the knowledge of the plaintiff. In the circumstances, the defendant sought the dismissal of the plaint.

On 23rd February 1996, when the matter came up for trial two admissions were recorded. By these admissions the parties admitted the jurisdiction of court and the ownership of the plaintiff to premises in suit. Thereafter, 18 issues were recorded of which the first four were suggested by the plaintiff and the rest by the defendant. Subsequently, the matter was re-fixed for further trial. When it came up for further trial the defendant moved that issues 5 to 12 be tried as preliminary questions of law and it was acceded to by court of consent of parties subject to the rights reserved in them to tender written submissions. As regards the preliminary questions of law raised by the defendant, the plaintiff tendered written submissions inviting the court to hold on issues 5 to 12 in favour of her while the defendant invited court to dismiss the plaintiff's action. The

learned District Judge thereafter delivered her order upholding the preliminary objections and dismissed the plaintiff's action subject to costs. The present appeal has been preferred against the said order of the learned district judge in dismissing the plaintiff's action on the aforesaid preliminary issues.

On a perusal of the issues numbered as 5 to 12, it is quite apparent that the answers to them depends both on questions of fact and law. As far as the cause of action pleaded in the plaint is concerned, it is quite clear that in paragraph 4 of the plaint, she has clearly stated that the defendant is in unlawful possession of the premises, disputing the title of the plaintiff. In other words the plaintiff has sought to prove unlawful possession of the subject matter by the defendant by reason of non- attornment.

As regards the invitation for attornment, parties were obviously at variance since the defendant maintained that she never disputed the rights of the plaintiff while the plaintiff maintained a contrary position. In elaborating the factual position, the defendant had clearly set out the circumstances under which she became a tenant of the mother of the plaintiff and further adduced reasons to justify the monthly payments of rental to

the mother of the plaintiff, despite the letters dated 30.11.1993 requesting the defendant to pay rents to the plaintiff direct.

As far as the plaintiff is concerned the alleged payments made by the defendant to the mother of the plaintiff despite the request for attornment is a refusal on the part of the defendant to accept the plaintiff as the owner of the tenanted premises and failure on her part to attorn to the plaintiff. If the version of the defendant is believed then the acquiesce of the plaintiff with arrangement made by the defendant to pay the rents to the mother of the plaintiff would amount to condoning or approving the said arrangement. As has been submitted by the learned counsel for the appellant, if the defendant had refused and/or failed to attorn to the plaintiff there could not be contract of tenancy between the parties and the provisions of the Rent Act would not be then applicable. In any event, whether the defendant had disputed the rights of the plaintiff or not it is a pure question of fact and therefore needs to be resolved only after both parties are afforded the opportunity of adducing evidence.

In Muthukrishna vs Gomes 1994 (3) SLR 01, the plaintiff filed action against her tenant who died pending the determination

of it and her heirs were substituted. The defendant filed answer claiming that her husband who was the tenant had died leaving a Last Will devising the premises in suit to his widow (defendant), three children and a brother. It was contended in that case that an application should have been made by the landlady for an order under section 36(3) of the Rent Act as to who should be treated as the tenant. The substituted plaintiffs denied that the defendant was the widow. The issue as to whether the defendant was a widow was tried as a preliminary issue. It was held that under section 147 of the Civil Procedure Code for a case to be disposed of on a preliminary issue, it should be a pure question of law which goes to the root of the case. As the plaintiff alleged that the defendant had no rights and was in the position of a trespasser, it was open to her to file action without making an application to the Rent Board under section 36(3). According to the plaintiff, the defendant did not come within the class of persons enumerated in section 36(2) (c) (i) of the Rent Act. If the defendant adduced proof that she is the lawful wife of the deceased tenant plaintiff's action would have to be dismissed. In that case Wijeyaratna J observed as follows...

> "Judges of original courts should, as far as practicable, go through the entire trial and answer all the issues unless they are certain that a pure question of law without the leading

of evidence (apart from formal evidence) can dispose of the case".

As far as the facts in this case are concerned there is no difficulty in holding that issues 5, 6, 7 and 8 are based on questions of facts and therefore cannot be answered without evidence.

Issue 9 relates to the alleged legal defect of the plaint. The defendant has failed to adduce any reason as to why she maintained that the plaint is inconsistent with the law. This issue appears to be vague and needs to be reframed. One of the defects as referred to by the defendant is that in the plaint, no specific date has been mentioned as to when the defendant started disputing the rights of the plaintiff. The learned counsel for the appellant has submitted that if the position of the defendant was that if she relied on prescriptive rights to the subject matter much importance would attach to the date on which the defendant disputed the rights of the plaintiff and as the defence is that she is the tenant of the premises in dispute the so called defect pointed out by the defendant cannot be considered as a defect that goes to the root of the case. I am in total agreement with the learned counsel on this matter and the

learned district judge should not have dismissed the plaint on such an unimportant technical ground.

The plaintiff's action is for a declaration of title alleging that the defendant was disputing her rights as the owner. In such a case when the title is admitted the burden is on the defendant to establish the legality of her possession. However the defendant in this case has taken up the position that she received notice both from the plaintiff's mother and also the plaintiff to pay the rents to the plaintiff but yet she continued to pay rents to the plaintiff's mother for reasons stated by her in the answer. This being a pure question of mixed fact and law the learned district judge in any event should not have dismissed the plaintiff's action at the initial stage of the trial.

As regards issues 11 and 12, it is to be observed that the plaintiff in her plaint has clearly indicated that the defendant is in wrongful possession of the property of which the plaintiff claimed that she is the owner and that she was seeking a declaration of title to the said property due to the refusal of the defendant to accept the plaintiff as the owner. In the circumstances, in order to ascertain as to whether a valid cause of action has been pleaded in the plaint one has to read the

plaint in its entirety. When the plaint is so read, I do not think that anyone would conclude that the plaint is devoid of a cause of action.

For reasons stated above, it is my considered view that the impugned order of the learned district judge dated 5.12.1996 should be set aside and the case must be reheard. In the circumstances, I allow the appeal and send the case back for retrial. There shall be no costs.

Judge of the Court of Appeal

Kwk/-