

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

In the matter of an  
application for restitutio et  
integrum

Court of Appeal No: CA 282/2007 (Rev)

District Court of Kalutara No: 6279/P

Nahalle Indrasiri Thero

Substituted-Plaintiff-  
Respondent-Petitioner

Vs.

K. Kumarasiri

Petitioner-Respondent

Before: **Eric Basnayake J**  
**K.T. Chitrasiri J**

Counsel: Rohan Sahabandu for the Substituted-Plaintiff-Respondent-Petitioner

Petitioner-Respondent is absent and unrepresented

Argued On: 4.5.2009

Written Submissions Tendered On: 30.7.2009

Decided On: 6.7.2011

Eric Basnayake J

The substituted plaintiff respondent petitioner (substituted plaintiff) filed this application inter alia to have the order dated 26.1.2007 of the learned District Judge of Kalutara set aside. By this order the learned Judge had confirmed the restoration of possession of the petitioner respondent (petitioner).

On 15.9.1993 the original plaintiff instituted partition action No. 6279/P in the District Court of Kalutara to partition the land called Sittawatte alias Maittawatte in extent 3 roods and 2 perches. The judgment was entered on 17.6.1996 to partition the land. The final plan No. 8632 dated 12.5.1997 prepared by W. Seneviratne, Licensed Surveyor and Court Commissioner, was confirmed and the final decree was entered accordingly.

Prior to the filing of the partition action the original plaintiff had leased to the petitioner by deed No. 488 of 14.12.1989 the northern half share of this land with an extent of 1 rood and 20 perches, for a period of two years. By this agreement the petitioner had the right to erect structures of semi permanent nature and to have electricity and water. At the termination of the lease the petitioner had the right to remove all the structures but was not entitled to any compensation. The petitioner states that he erected a structure and obtained electricity and water and started a motor repair business. This business was registered under the Business Names Statute No. 4 of 1990. The petitioner stated that he had been paying license fees to the Beruwela Pradeshiya Sabhawa.

After the expiry of the lease he continued to remain in the premises paying lease fees to the original plaintiff. The petitioner states that with the final decree the original plaintiff was allotted lots 1 & 2 of plan No. 8632 with 1 rood and 18.25 perches. The petitioner occupied lot 1. Lot 2 contained an extent of 2 perches. The petitioner states that the original plaintiff died on 1.12.2004. Thereafter on 26.12.2004 the garage got destroyed by the tsunami. The petitioner states that the premises were repaired after paying a sum of Rs.36000 to the successor of the original plaintiff. This payment was in lieu of the monthly lease up to 31.7.2008. The petitioner claimed that he had obtained a loan of Rs.2,500,000 from the Bank of Ceylon to repair the damage caused by the tsunami.

On 5.5.2006 the petitioner filed a petition and an affidavit together with several documents claiming that he was evicted on 24.4.2006 by the Fiscal and possession was handed over to the substituted plaintiff. The petitioner complained that the substituted plaintiff had obtained a writ under section 52 (1) of the Partition Law, without making the petitioner a party as required by section 52 (2) (A). Thus the petitioner moved that he be

restored into possession. The District Judge on the same day made order to restore the petitioner into possession and on 11.5.2006 the petitioner was restored into possession of lot 1.

On 21.6.2006 the substituted plaintiff filed objections. The substituted plaintiff claimed that the petitioner is not entitled to notice under section 52 (2) (a) of the Partition Law. The substituted plaintiff moved that he be restored back into possession. The substituted plaintiff claimed inter alia that the property in question is “sangika property” and the lease the petitioner had entered in to is void. The learned District Judge after an inquiry made his order on 26.1.2006 rejecting the objections and holding that the petitioner is a lessee and is entitled to notice under section 52 (2) of the Partition Law. The learned Judge had confirmed the restoration of possession of the petitioner. It is this order the substituted plaintiff is seeking to set aside.

In terms of section 52 (1) of the Partition Act a party declared entitled to any land by a final decree is entitled to obtain an order for delivery of possession. Section 52 (1) is as follows:-

Every party to a partition action who has been declared entitled to any land by any final decree entered under this Law.....shall be entitled to obtain from the court in the same action, on application made by motion in that behalf, an order for the delivery to him of possession of the land:

In terms of section 52 (2) (a) if he seeks to evict any person in occupation of a land or a house standing on the land as tenant for a period not exceeding one month such person shall be made a respondent. The applicant should also set out the material facts entitling him to such order.

Section 52 (2) (a) is as follows:-

Where the applicant for delivery of possession seeks to evict any person in occupation of a land or a house standing on the land as tenant for a period not exceeding one month who is liable to be evicted by the applicant, such

application shall be made by petition to which such person in occupation shall be made respondent, setting out the material facts entitling the applicant to such order.

In this case admittedly the petitioner was in occupation of the land claiming tenancy rights. The substituted plaintiff, without disclosing that the petitioner was in occupation of this land, had obtained a writ and got the petitioner evicted. The petitioner after having made an application to court was placed back in possession. Thereafter the court inquired in to the petitioner's right to remain in possession. For this purpose the substituted plaintiff filed objections. It is only after this inquiry that the learned Judge made order on 26.1.2006. This order appears to have been made under section 52 (2) (b).

At this inquiry what the court had to determine was whether the petitioner had entered in to occupation prior to the date of the final decree and to determine whether the petitioner is entitled to continue in occupation. Under this section one is entitled to continue in occupation in the event such person is a tenant for a period not exceeding one month and the lease is in respect of a house. The sub section is as follows:-

52 (2) (b): After hearing the respondent, if the court shall determine that the respondent having entered into occupation prior to the date of such final decree.....**is entitled to continue in occupation of the said house as tenant under the applicant as landlord**, the court shall dismiss the application; otherwise it shall grant the application and direct that an order for delivery of possession of the said **house and land** to the applicant do issue (emphasis added).

Under this sub section there is no reference to a land separate from the house. From the material placed before court there is no evidence of occupation of a house. The Rent Act refers to "premises". Section 2 (4) of the Rent Act states thus "...the provisions of this Act shall apply to all premises other than....". Section 48 interprets "premises" to mean any building or part of a building together with the land appertaining thereto; The Rent Act does not apply to leases in respect of bare land (Jayasiriwardena vs. Piyaratne (2004) 1 Sri L.R. 37, Madanayake vs. Senaratne 75 N.L.R. 349).

The learned counsel for the substituted plaintiff submitted that what was let was a bare land and the lessee had put up a structure only of a semi permanent nature and had to remove the structures so erected at the expiry of the period. The learned counsel submitted that the premises is not a house.

In *Jayawardene vs. Bandaranayake* (1998) 3 Sri L.R. 72 Ranaraja J held that a lease is formed by consent or agreement of the parties on three essential points, namely:-

1. Object of the contract to let and hire
2. Ascertain property
3. Fixed rent.

Dr. Ranaraja J held that just because there are buildings on a land, if the aforesaid three ingredients are not satisfied there cannot be a contract of tenancy for a building, when originally the contract was for the letting of a bare land. Dissanayake J in *Jayasiriwardene vs. Piyaratne* (supra) held (pg 45) if the building belonged to the tenant it would not be possible to enforce certain rights and duties under the Rent Act and will result in the following consequences:-

1. Under section 22 a landlord would not be able to seek to retake possession of a building that was constructed by the tenant on reasonable requirement.
2. A landlord will not be able to effect repairs to the building as it does not belong to him.
3. If the tenant damages the building the landlord cannot complain as the tenant is the owner of the building.
4. The landlord cannot be made liable for withholding amenities as the building belongs to the tenant.
5. The landlord cannot be made liable if the building collapses due to faulty construction.
6. If on the landlord obtaining a decree on reasonable requirement if the tenant demolishes the house and takes away the material, the landlord will be without a remedy.
7. It would not be possible for anyone to take on rent one's own house and make the owner of the land liable because one cannot lease to himself his own building.
8. If the building was constructed by the tenant and if he causes damage or deterioration to the property, the tenant cannot be evicted by the landlord for

- causing damage or deterioration to the property as he is not the owner of the building.
9. If the building that was constructed by the tenant is sublet the landlord cannot evict him as the landlord has no control over the building.
  10. If the building was constructed by the tenant, the landlord cannot ask for vacant possession as the tenant is entitled to remove the structure.

Considering the above legal position the petitioner does not fall within the category of a tenant as the property leased was only a bare land. Therefore I am of the view that the learned Judge had erred in law by declaring the petitioner entitled to notice by his order dated 26.1.2007 and the same is set aside and I direct the learned District Judge to make an order for the delivery of possession of the land to the substituted plaintiff. The plaintiff's application is allowed with costs.

Judge of the Court of Appeal

K.T. Chitrasiri J

I agree

Judge of the Court of Appeal