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

In the matter of an application for Revision in terms Article 138(1) and 145 of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.A.C.M. Mansoor,
139, Totawatta, Panadura.

Plaintiff

C.A.(Revision) Application No: 903/2002
D.C.Panadura Case No.167/RE

Vs

S.M.A.Abdul Variz
No.64/7 Madari, Ibrahim Road,
Totawatta, Panadura.

Defendant

And Between

S.A.C.M. Mansoor,
139, Totawatta, Panadura.

Plaintiff- Petitioner

Vs

S.M.A.Abdul Variz
No.64/7 Madari, Ibrahim Road,
Totawatta, Panadura.

Defendant- Respondent

Mohamed Saheed Hadjiar Mohamed Ameer.
No, 50 Galle Road, Moratuwa.

Intervenient-Respondent

Now Between

Mohamed Saheed Hadjiar Mohamed Ameer.

No, 50 Galle Road, Moratuwa.

Intervenient-Respondent - Petitioner

Vs

S.A.C.M. Mansoor,

139, Totawatta, Panadura.

Plaintiff- Petitioner-Respondent

S.M.A.Abdul Variz

No.64/7 Madari, Ibrahim Road,

Totawatta, Panadura.

Defendants- Respondent – Respondent

BEFORE : **S. SRISKANDARAJAH, J.**

COUNSEL : Gamini Marapana PC with Navin Marapana,
for the Petitioner
Faiz Musthapa PC with Faizar Maricar and Mrs Machado
for the Respondents.

Argued on : 10.01.2011

Decided on : 21.03.2011

S.Sriskandarajah.J

The Plaintiff-Petitioner -Respondent (herein after referred to as Plaintiff) filed an action in the District Court of Panandura to evict the Defendant -Respondent -Respondent (here in after referred to as the Defendant) from the premises in suit for non-payment of rent and subletting the premises without the permission of the land lord the Plaintiff. The case was settled between the Plaintiff and the Defendant and by this settlement the Defendant could occupy the said premises till 31.12.1990 without the payment of any

cost or damages. The Intervenient-Respondent-Petitioner (hereinafter referred to as Petitioner) who claimed to be the tenant of the premises in suit filed papers to intervene in the said action but the said intervention was not permitted by court.

The writ of possession could not be executed as it was resisted by the Petitioner. The Plaintiff complained to the court by a petition under Section 325 of the Civil Procedure Code, the learned District Judge after an inquiry delivered his order on 07.05.2002. By which order the learned District Judge rejected the claim of the Petitioner and ordered the issue of Writ.

The Petitioner filed this application to revise the said order made by the learned District Judge on 07.05.2002. The position of the Petitioner is that the Defendant was the tenant of the premises in suit from 1975 to 1977 and that by 1978 the Defendant had left the premises and he became the tenant. The Petitioner heavily relied on a document marked as 2V2 a receipt the purported to have been issued by the Plaintiff to the Petitioner to prove his claim of tenancy. The Petitioner alleges that the document 2V2 was signed and issued by the Plaintiff after accepting a sum of Rs 43,200/= being the rent for the said premises for 12 years. The Plaintiff denied the said transaction and denied that the signature appearing in 2V2 is his signature. This document was sent to the Examination of Question Documents (EQD) and he filed a report in court while giving evidence in the said inquiry.

The Petitioner challenged the order of the learned Distinct Judge on the basis that he had without good reasons rejected the report and evidence of the EQD. The Petitioner claimed that rent receipt taken together with all other documentary and oral evidence show that the Petitioner is the tenant from 1978 and as such he has discharged the burden placed upon him and shown that he had a valid bona fide claim to occupy the premises and that he is not claiming under the judgement debtor.

The duty of the court in considering a petition under Section 325 was considered in *Vasalatchi and others v R.R.Chettiar and others 69 N.L.R 473* where the court held: Section 325 only provides for a petition informing the court of the resistance. When the matter is inquired into the court must make one of the orders set out in Section 326, 327 or 327A and the court has therefore a duty to determine whether or not the person offering the resistance comes within the description in Section 327 or 327A.

Section 327 provides:

327. Where the resistance , obstruction , hindrance or ouster is found by court to have been occasioned by any person other than the judgment-debtor, claiming in good faith to be in possession of the whole of such property on his own account or on account of some person other than the judgment-debtor by virtue of any right or interest, or where the claim notified is found by the court to have been made by a person claiming to be in possession of the whole of such property on his own account or on account of some person other than the judgment-debtor, by virtue of any right or interest, the court shall making order dismissing the petition, if it finds that such right or interest has been established.

The Plaintiff's case for eviction is on two grounds one of the grounds is that the Defendant had sub let the premises without his consent. The Plaintiff's position is that the Petitioner is in possession of the said property as a tenant of the Defendant and the Plaintiff produced a document at the inquiry to prove that there is an agreement between the Defendant and the Petitioner to this effect. It is settle law that the Plaintiff in a case of eviction need not make a subtenant a party to the action. *In Kudoos Bhai v Visvalingam 50 NLR 59 Nagalinjam J* held:

> A landlord cannot seek to enforce his right of recovery of possession of the property let "against the entire world ", but only against his tenant. Hence no person other than the tenant can properly be sued by a landlord for ejectment. There is the high authority of *Voet* for this proposition who lays down, 19-2-21, " *non tarmen locatori primo contra secundum conductorem ull ex locato actio est, cum nihil inter eos conveniri sit,* " that is to say in the words of Nathan in his Common Law of South Africa, Vol. 2, Edt. 1904, p. 807, " a lessor will not have an action on

the lease against a sub-lessee since there is no contract between the parties and a person cannot sue or proceed upon the contract of a third party. "

The Petitioner's claim is that he is in possession of the said property as a tenant of the Plaintiff in other ward he is in possession of the said property on his own account by virtue of a right as a tenant. The burden is on the Petitioner to establish this right. It was held in *Chinnathamby v Somasundera Aiyer 48 NLR 515:* Section 327 merely says that the claim shall be investigated as if it were an action by the decree-holder against the claimant. But it is the claim (i.e., the case of the person offering resistance to the decree) which is required to be investigated, and not the decree-holder's own right for he holds the decree, and the onus is on the claimant to support his claim as against that decree.

The Petitioner gave evidence and said that he had paid a sum of Rs.43,200.00 being the rent for a period of 12 years from April 1978 to March 1990 and has obtained a receipt dated 25.03.1978 signed by the Plaintiff which is marked as 2V2. The signature on this document has been denied by the Plaintiff and he alleged forgery.

The EQD gave evidence on his report and stated that in his opinion the signature on "2V2" has been placed by the same person who has placed the signature on the documents forwarded to him signed by the Plaintiff.

The Court when considering the claim of the Petitioner that he is the tenant of the Plaintiff considered the genuineness of this document marked 2R2 vis-à-vis the other evidence and circumstances that was produced in the inquiry. The learned District Judge considered the fact that the Petitioner when making the application to this court to intervene in the case between the Plaintiff and the Defendant has neither submitted the said document marked 2V2 nor stated in his petition that he has paid a sum of Rs.43,200.00 being the rent for a period of 12 years from April 1978 to March 1990. The learned judge observed that a person claming to be a tenant on his one right would have submitted such evidence to prove that he had paid rent to the Plaintiff but he has

not only failed to annex this document but also failed to mention about this transaction in the application for intervention. The Petitioner has also failed to explain about the payment of rent after March 1990. He has sent the rent to the Plaintiff by post only on 12.09.1990 just before he made the application on 18.09.1990 to intervene in the said District Court eviction action. The fact that the Petitioner paid rent to the Plaintiff a sum of Rs.43,200.00 being the rent for a period of 12 years from April 1978 to March 1990 and that he has a document to prove this fact or the fact that he made attempts to pay rent to the Petitioner from March 1990 to September 1990 was not mentioned in his application made to court on 18.09.1990 to intervene in the said action or in the subsequent action filed by him in the District Court Case No 2520/SPL The learned trial judge has considered these facts and the evidence of the Plaintiff that the tenancy agreement is between him and the Defendant. To support this position it was revealed in evidence that the Petitioner had entered into a lease agreement with the Defendant in relation to the said property. In this background the learned District Judge in evaluating evidence has not given weight to the evidence submitted to court by the document marked 2V2. The learned Distinct judge is not bound to accept the evidence produced by document marked 2V2 without analysing it merely because the EQD in his evidence has stated that the signature appears in the said document tallies with the signature of the Plaintiff.

H. A. Charles Perera and Another v M. L. Motha and Another 65 N.L.R 294 The court held:

"The expert opinion is only a relevant fact to be taken into account in forming the opinion of the Court. Cases which have come up before us in appeal indicate a tendency on the part of Judges to regard the opinion of persons who describe themselves as handwriting experts as conclusive on the question of identity or genuineness of handwriting and not merely as a relevant fact, like any other such fact, to be taken into account in arriving at the Court's opinion as to the identity or genuineness of the handwriting in question. A Court should guard against that tendency. The duty of forming the opinion as to the identity or genuineness of the handwriting is on the Court

and the Court alone. The expert's opinion on the points of identity or genuineness of the writing is a relevant fact in forming its opinion. The weight to be attached to such a fact would depend on the circumstances of each case. "

In *Lily Perera v Chandani Perera And Others [1990] 1 Sri L R 246 at 253* the court cited with approval a passage from "The Law of Evidence " by E. R. S. R. Coomaraswamy 2nd Edition (1989) Volume I at page 627:

"The correct position as to the value of the evidence of the handwriting expert seems to be that his evidence must be treated as a relevant fact and not as conclusive of the fact of genuineness or otherwise of the handwriting: His opinion is relevant but only in order to enable the Judge himself to form his opinion (Charles Perera v. Motha) (1961) 65 N.L.R. 294 at 296 (8) State of Gujarat v. Vinaya Lal Pathi A.L.R. (1967) S.C. 778; (1967) Crim L.J. 668 (9). It is not in the class of the opinion of the finger print expert (Bhagwan v. Maharaj A.I.R. (1973) S.C. 246) (10)".

And held:

"The District Judge upon a review of the evidence of Mr. Samaranayake has concluded that this was not a case where an expert could have expressed a definite opinion and has advised himself not to accept that evidence. Indeed he has preferred to accept the other evidence suggesting that P1 contained the signature of the deceased as he was well entitled to do."

The court further held:

"Whether or not the evidence satisfies the conscience of the Court is always a question of fact. The Appellate Court will not interfere with such findings unless the plainest considerations justify such interference."

The learned District Judge rejected the evidence of the handwriting expert when considering all the evidence placed before him and held that the claimant has not established his claim. This is a question of fact and the Petitioner cannot challenge this in a judicial review proceedings. There is no illegality in the learned District Judge's order allowing the petition of the plaintiff filed under section 325 of the CPC. Therefore I dismiss this application without costs.

Judge of the Court of Appeal