

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

M. R. Malani Seneviratne  
Watapotha, Nivithigala.

**PLAINTIFF**

C.A 148/1999 (F)

Vs.

1. Arauwatte Jayasoma  
Nivithigala, Watapotha  
**(DECEASED)**
2. Ramasinghe Jayasoma  
Nivithigala, Watapotha

**And others**

**DEFENDANTS**

- 1A. Ramasinghe Jayasoma  
Nivithigala, Arauwatta, Watapotha

**1A DEFENDANT-PETITIONER**

**AND**

1. Thenuwara Acharige Karunathilaka
2. T.A Rathnasekera  
Nivithigala, Watapotha  
**(DECEASED)**

**RESPONDENTS**

Ramasinghe Jayasoma  
Nivithigala, Watapotha

**1A DEFENDANT-PETITIONER-  
APPELLANT**

Vs

T. A. Ratnasekera  
Nivithigala.

**2<sup>ND</sup> RESPONDENT-RESPONDENT**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** B. O. P. Jayawardena for the 1<sup>st</sup> Defendant-Petitioner-Appellant  
Chathura Galhena for the 2<sup>nd</sup> Respondent-Respondent

**ARGUED ON:** 06.09.2012

**DECIDED ON:** 05.02.2013

**GOONERATNE J.**

This appeal arises from the order of the learned District Judge dated 1.12.1998 pertaining to an order made under Section 52(2) of the Partition Law (delivery of possession of land). To state very briefly, 1A Defendant-Petitioner-Appellant was substituted in the room of the deceased

1<sup>st</sup> Defendant. By final partition decree the 1<sup>st</sup> Defendant was allotted lot 3 in plan No. 1409 of 21.10.1980. The 1<sup>st</sup> Defendant in terms of the above Section 52 of the Partition Law, applied to court to get delivery and possession of the said lot 3. According to journal entry 40 & 41 of the original record the fiscal who went to the particular lot found the building locked, and an application was made to break open and hand over possession (motion of 12.2.1990). On or about 25.7.1990 the 1<sup>st</sup> Respondent filed papers claiming tenancy to the building 'C' on lot 3 above. By journal entry 43 application for execution of writ was stayed. However with regard to application to deliver possession to 1<sup>st</sup> Defendant the journal entries 49, 50 & 53 indicate that court made order to deliver possession made subject to tenancy rights, but the 1<sup>st</sup> Defendant refused to take delivery of possession with the 2<sup>nd</sup> Defendant who claimed to be a tenant. The fiscal's report at pg. 226 of the original record and annexures 'A' & 'B' at pg. 228 are noted.

In the above circumstances the 1<sup>st</sup> Defendant made another application on or about 15.6.1994 praying for an order of eviction under Section 52 of the Partition Law. In that application 2<sup>nd</sup> Respondent Ratnasekera was made Respondent who contended that the 1<sup>st</sup> Respondent his father was the tenant. Objections were filed and thereafter several steps seems to have been taken to substitute proper parties as and when parties

died and the matter in the original court was fixed for inquiry. The inquiry proceeded in the District Court only on written submissions and no evidence was led. In the impugned order it is recorded as “වමසීම ලිඛිත දේශන මගින් අවසන් කර ගැනීමට එකඟ වූයෙන් ලිඛිත දේශන ගොනු කර ඇත”.

The learned District judge in his brief order has come to the conclusion that the Respondent had been a tenant prior to entering final decree within the said lot (garage) and that sufficient evidence had been placed to establish tenancy. As such trial judge hold that the handing over of possession to the Appellant would be subject to the tenant's rights and that the tenant cannot be evicted.

I would refer to the argument and contention of the Appellant party in the original court and in this court. I have noted the following in this regard.

(1) Respondent though claim to be a tenant never attempted to intervene in the partition suit, nor has tenancy being proved in the inquiry before the District Judge.

(2) Respondent was never a tenant of the Appellant but maintained that he had a garage within lot 3 of the above plan. Appellant contends that in the absence of obtaining permission from a owner of a co-owned property and any tenant cannot make other co-owner liable in a contract of tenancy.

(3) Section 14 of the Rent Act protects only residential premises. Section 14 reads thus:

14(1) Notwithstanding anything in any other law, the tenant of any residential premises which is purchased by any person under the Partition Law or which is

allocated to a co-owner under a decree for partition shall be deemed to be the tenant of such purchaser or of such co-owner, as the case may be, and the provisions of this Act shall apply accordingly, and where such tenant is deprived of any amenities as a result of such partition, the owner of the premises where such amenities are located shall permit such tenant to utilize such amenities without making any payment therefore until such amenities are provided by such purchaser or co-owner or by the tenant under subsection (3).

(2) The board may, on application made by the tenant of any premises referred to in subsection (1), or by the owner of the premises where such amenities are located, by order fix the period within which such purchaser or co-owner shall provide the amenities.

(3) The board shall in any order under subsection (2) authorize the tenant, in the event of the purchaser or co-owner failing to provide the amenities within the period fixed by the board, to provide the amenities and to incur for the purpose expenditure not exceeding such amount as may be specified in that behalf in the order; and where such amenities are provided by the tenant in pursuance of the authority so conferred, the tenant shall be entitled to set off against the rent payable in respect of the premises, the expenditure actually incurred by him for the purpose or the amount specified in that behalf in the order, whichever is less.

Therefore no benefit will accrue to the Respondent under Section 14 of the Rent Act as the alleged premises claimed to be is not a residential premises but a business premises and a garage (temporary structure).

Even Section 52(2) of the Partition Law refer to a tenancy of a residential premises. Section 52(2) (b) is designed to protect a tenant of a house who came into occupation prior to the final decree.

(4) Documents submitted by Respondent at the inquiry with the written submissions in the District Court does not establish a contract of tenancy.

The 2<sup>nd</sup> Respondent inter alia support the case of a tenant and take up the position that the trial judge's order is correct. The learned counsel for 2<sup>nd</sup> Respondent emphasize the provisions of Section 52(2)(a) and (b) of the Partition Law and demonstrate that his client is entitled to the protection of a tenant and submit possession could be taken by a party to a

partition action subject to the tenancy rights of a legal tenant, and learned counsel refer to the case of Virasinghe vs. Virasinghe 2002(1) SLR 204 where it was held that rights of a tenant has to be considered at the time of eviction and not at the main trial. (Execution under Section 52 of the law) There is also reference in the written submissions of the 2<sup>nd</sup> Respondent that the 3<sup>rd</sup> Defendant in the partition case had claimed the building which was claimed by the Respondent. It is also stated that the 3<sup>rd</sup> Defendant had given an affidavit to the effect of the Respondent's tenancy and that such affidavit is not available in the record.

The other matter urged by the 2<sup>nd</sup> Respondent is that no oral evidence being led at the inquiry and stress the fact that it is disadvantages to the parties, to the suit.

The decision as to the procedure to be adopted in the conduct of the inquiry need to be dealt in the trial court. If the party concerned needed to lead oral evidence the trial judge should have been notified. Both parties at the inquiry decided to proceed to inquiry on written submissions and as such the trial court merely gave effect to such views of both parties, and permitted them to proceed to inquiry on their application. The record does not indicate that one of the parties were averse to such an inquiry at that

point of time. I do not think that on that basis alone the case need to be sent back to the original court after a long lapse of time, for inquiry denova.

The scheme of the Rent Act is to afford certain amount of protection to a statutory tenant. It is the subsistence of a contract of tenancy that is protected in the partition suit. Once final decree is entered in the partition of the land in question, allottees under the partition decree or those who purchase rights from allottees under the partition decree would get a perfect title valid against the whole world. In this case the only question that need to be considered in this appeal is whether the learned District Judge has correctly applied the facts to the applicable law which need to protect a tenant as long as a valid tenancy is in operation as contemplated under Section 14 of the Rent Act.

The delivery of possession of the land partitioned is referred to in Section 52(1) and 52(2) of the Partition Law.

Section 52(1) and (2) reads thus:

Every party to a partition action who has been declared to be entitled to any land by any final decree entered under this Law and every person who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the court, shall be entered 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;

Provided that where such party is liable to pay any amount as owelty or as compensation for improvements, he shall not be entitled to obtain such order until that amount is paid

52(2)(a) 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.

(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 or certificate of sale, 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.

The above Sections of the Partition Law enables an allottee to obtain possession, if the relationship of land lord and tenant does not arise. However the relevant and applicable law that takes precedence in a case of this nature the Rent Act, namely Section 14 of the Rent Act.

Section 14(1) reads thus:

Notwithstanding anything in any other law, the tenant of any residential premises which is purchased by any person under the Partition Law or which is allocated to a co-owner under a decree for partition shall be deemed to be the tenant of such purchaser or of such co-owner, as the case may be, and the provisions of this Act shall apply accordingly, and where such tenant is deprived of any amenities as a result of such partition, the owner of the premises where such amenities are located shall permit such tenant to utilize such



amenities without making any payment therefore until such amenities are provided by such purchaser or co-owner or by the tenant under subsection (3).

It is very clear that under Section 14(1) a contract of tenancy in respect of residential premises will not be affected by a sale or a decree for partition under the Partition Act. It is further stated that the tenant shall be deemed to be the tenant of the purchaser or the co-owner to whom the residential premises have been allotted, as the case may be.

It is noted that Section 14(1) does not attract business premises, and business premises are not governed by Section 14(1) of the Rent Act.

This court also wish to observe that the tenant is protected only if all the co-owners or one of them lets the entirety of the premises with the consent and acquiescence of the other co-owners. There cannot be any doubt on this aspect. Per Sharvananda J. "The Rent Act does not give any protection to a tenant against a person who is not his landlord. Per Seneviratne J... protection is granted under the Rent Act is the contract of tenancy not the premises. Vide 1987(1) SLR 367.

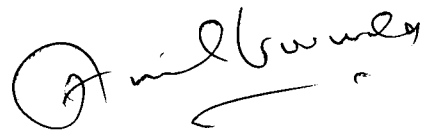
It is evident that the Respondent claim tenancy to a building marked 'C' in lot 3. It is described as a temporary structure housed as a garage to repair motor vehicles and the structure 'C' is built by 3<sup>rd</sup> Defendant (folio 101, 102, 105 & 107 of original record). On the

Respondent's own written submissions it was the 3<sup>rd</sup> Defendant who claimed lot 3 and a tenancy between Respondent and 3<sup>rd</sup> Defendant.

The impugned order of the trial Judge only state that the there is a tenancy. How the judge arrived at the conclusion is not borne out from the order. Even assuming there was a tenancy, then who is the landlord? Nor has the trial judge gone into the question whether the premises is a residential premises or not. What is the position of all the co-owners? Have they given their consent to such an arrangement? Record does not indicate so.

In all the above circumstances this court is not inclined to affirm the order of the trial judge. As such I set aside the order of the trial judge dated 11.12.1998, and allow this appeal without costs.

Appeal allowed.

A handwritten signature in black ink, appearing to read "A. M. G. M. S.", written over a horizontal line.

JUDGE OF THE COURT OF APPEAL