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

J. B. Dissanayake,
No. 44 / 13, Dodandeniya,
Matale.

Plaintiff

Vs.

Seemasahitha Keels Tours (Pudgalika)
Samagama,
No. 429, Ferguson Road,
Colombo 15.

Defendant

C.A. No. 904 / 2000 F

D.C. Colombo No. 18292 / MR

And Now Between

Seemasahitha Keels Tours (Pudgalika)
Samagama,
No. 429, Ferguson Road,
Colombo 15.

Defendant-Appellant

Vs

J. B. Dissanayake,
No. 44 / 13, Dodandeniya,
Matale.

Plaintiff **-Respondent**

BEFORE : UPALY ABEYRATHNE J.

COUNSEL : Harsha Soza PC with Ranjith Perera and Sivakantharajah for the Defendant Appellant
Murshid Maharoof for the Plaintiff Respondent

WRITTEN SUBMISSIONS : 02.02.2012 and 20.03.2012
ARGUED ON : 18.01.2013
DECIDED ON : 07.05.2013

UPALY ABEYRATHNE, J.

The Plaintiff Respondent (hereinafter referred to as the Respondent) has instituted an action against the Defendant Appellant (hereinafter referred to as the Appellant) in the District Court of Colombo seeking a judgment to recover a sum of Rs. 250,000/= as damages. The Respondent has prayed for a dismissal of the Appellant's action. The case proceeded to trial on 06 issues. After trial the learned Additional District Judge has delivered judgment in favour of the Respondent. Being aggrieved by the said judgment dated 13.11.2000 the Appellant has preferred the instant appeal to this court.

According to the facts of the case the Respondent had entered in to an agreement with the Appellant to lease the Respondent's Mitsubishi Pajero vehicle bearing No 32-6273 to the Appellant for a period of two years commencing from 6th of July 1995 for a monthly rental of Rs. 30,000/-. At the trial the said agreement has been produced marked P 1. The Respondent's position was that on or about

06th of October 1995 during a visit to the Appellant's Company, in breach of the terms of the said agreement, he was asked by the Appellant to take his vehicle back. The Respondent further submitted that he was not given a written notice under clause 10 of the agreement to take back the vehicle.

It was common ground that the Appellant has not given a written notice to the Respondent as stipulated in clause 10 of the Agreement. Clause 10 of the said Agreement P 1 read thus:

> "One calendar months notice will be given to either party for handing back or withdrawal of the vehicle"

It appears from the said clause of the agreement that in case of handing back or withdrawal of the said vehicle one calendar months notice should be given to either party. If there is no such notice given by the party who wishes of handing back or withdrawal of the vehicle it will amount to a breach of the said term of the contract between the parties.

No doubt that in terms of the said Agreement P 1 either party could terminate the said Agreement prematurely with one calendar months notice to the other party and in such event the party terminating the said Agreement is not required by the said Agreement to pay other party any damages whatsoever. But if there is no such notice given to the other party in order to terminate the Agreement within the operative period of the agreement then such termination would be a breach of the Agreement which give rise to a cause of action for damages.

The Appellant contended that even if one calendar months notice has not been given, the defaulting party in terms of the said Agreement would not be

liable to pay the other party anything more than a sum of Rs. 30,000/- which is in terms of the said Agreement the sum of money equivalent to a calendar months notice.

But unfortunately there have been no such terms or conditions laid down in the contract for payment of any penalty or liquidated damages in case of breach of the contract. Hence where two parties have made a contract which one of them has broken, the damages which other ought to receive, in respect of such breach of contract, should be such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of contract. In the present case the parties have not agreed upon to pay a sum of money equivalent to one month's rent in case of handing back or withdrawal of the vehicle in question without giving one calendar months notice to the other party. If they have intended to so do such terms or conditions would have been included in the contract. Therefore it appears on the face of the agreement between the Appellant and the Respondent that they did not wish to compensate the innocent party by paying one month's rent in case of handing back or withdrawal of the vehicle without giving one calendar months notice to the other party.

In the said circumstances I am of the view that the Appellant has failed to prove his case on a balance of probability. Hence I see no reason to interfere with the judgement of the learned Additional District Judge dated 13.11.2000. Therefore I dismiss the appeal of the Appellant with costs.

Appeal dismissed.

Judge of the Court of Appeal