

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

CA 913/99(F)

D.C. Colombo -16388/L

W.G.N.S. Ranaweera, No: 12, Sukastan
Gardens,
Word Place,
Colombo 07.

Plaintiff

Vs.

S.K. Karunaratne, No: 43/5,
Ananda Rajakaruna Mawatha,
Colombo 10.

Defendant

And Now Between

W.G.N.S. Ranaweera,
No: 12, Sukastan Gardens,
Word Place, Colombo 07.

Plaintiff-Appellant

Vs.

S.K. Karunaratne, No: 43/5,
Ananda Rajakaruna Mawatha,
Colombo 10.

Defendant-Respondent

Before : A.W.A. Salam, J. &

Sunil Rajapakshe, J.

Counsel : Ikram Mohamed PC with Shyama Fernando for the Plaintiff-Appellant and C.E. de Silva for the Defendant-Respondent.

Argued on : 13.03.2013

Written Submissions tendered on: 03.04.2013

Decided on : 10.09.2013

A.W.A. Salam, J.

This appeal relates to a judgment pronounced in an action where the plaintiff sought a declaration of title to the subject matter of the action and ejectment of the defendant who claimed to be a tenant under the predecessor in title of the plaintiff. The basis on which the plaintiff sought the ejectment of the defendant is that the premises which is purported to be under a contract of tenancy, is an unauthorized construction. The learned district judge dismissed the plaintiff's action on the basis that the allegation of the premises in question being unauthorized had not been established. The present appeal has been preferred by the plaintiff.

The learned President's counsel has submitted that the dismissal of the action of the plaintiff is wrong as the plaintiff has proved the assertions embodied in issues 1 and 2. Issue No 1 is whether the plaintiff the owner of the subject matter of the action by reason of the purchase made by him on deed No

9536 dated 6 June 1990. As the defendant has admitted the ownership of the plaintiff by pleading the benefit of a contract of tenancy the learned district judge should have treated that there is an admission of ownership as between the parties and declared the plaintiff's the owner of the subject matter of the action.

The next question that arises for consideration is whether the defendant is entitled to plead the benefit of a contract of tenancy inasmuch as the subject matter of the tenancy is said to be an unauthorized construction. In the case of *Malwattage Vs Dharmawardena* 1991 2 SLR 141, it was held by the Supreme Court that where a building is unauthorized, it is incapable of being let and the contract of letting is illegal and such an illegality cannot give rise to any tenancy rights nor can the Rent Act be used to cover up and rectify any illegality under the Housing and Town Improvement Ordinance. The Supreme Court in that case held that the illegal tenant is liable to be ejected on account of the tenanted premises being unauthorized.

Section 3 of the housing and town improvement Ordinance No 19 of 1915 reads as follows :-

3. This ordinance shall apply:-

(a) within the administrative limits of any Municipal Council, Urban Council or Town Council

(b) within any other limits in which it shall be declared to be in

force by resolution of the Senate and the House of Representatives.

It is also relevant at this stage to reproduce Sections 5, and 15 (1) of the Housing and Town Improvement Ordinance. Section 5 of the said Ordinance reads as follows...

No person shall erect or re-erect any building within the limits administered by a local authority, except in accordance with plans, drawings and specifications approved in writing by the Chairman.

Section 15 (1) of the Housing and Town Improvement Ordinance enacts as follows..

No building constructed after the commencement of this Ordinance shall be occupied, except by a caretaker, until the Chairman has given a certificate that such building, as regards construction, drainage and in all other respects in accordance with law. The certificate issued under Section 15 (1) of the said Ordinance is generally referred to as the "certificate of conformity".

The main question that arises for determination in this appeal is on whom the burden of proof lies when an allegation relating to the occupation of an unauthorized building by a person claiming to be a tenant is made. Section 101 of the Evidence Ordinance enacts that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those

facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Remarkably, there is no admission in this case that the building in question is unauthorized. Issue No 3 has been recorded at the instance of the plaintiff and it reads as follows ...

3. Is the building bearing assessment No 43/5 an unauthorized construction?

The above issue raised at the instance of the plaintiff clearly shows that the plaintiff has taken upon the burden of establishing the unauthorized nature of the building which the defendant claims to occupy as a tenant. I am in total agreement with the learned counsel for the defendant-respondent that to succeed in an action of the present nature the plaintiff must establish that the building of the premises in suit had been constructed after the coming into operation of the Housing and Town Improvement Ordinance No 19 of 1915. The very reason that the said Ordinance had come into operation on 1 - 2 - 1915 renders any building constructed before that date without a plan, drawing and specification approved in writing by the Chairman of the local authority as being an authorized construction. Hence, the plaintiff has to establish that the premises in question has been constructed contrary to Section 15 of the Housing and Town Improvement

Ordinance after 1 - 2 - 1915. the plaintiff has failed to establish this aspect of the matter and therefore in my opinion, the finding of the learned district judge as to the failure of the plaintiff to establish the main ingredient that constitutes the cause of action is faultless and calls for no intervention of this court by way of exercising the appellate jurisdiction.

The learned Presidents's counsel has submitted that the judgment of the learned district judge is bad in law for non-compliance of the requirements contemplated under Section 187 of the Civil Procedure Code. Both the Supreme Court and the Court of Appeal have time and again re-echoed the necessity of complying with Section 187. Bare answers to issues without reasons are not in compliance with the requirements of Section 187 of the Civil Procedure Code. The evidence relevant to each issue must be reviewed or examined. No doubt, the established law is that the judge must evaluate and consider the totality of the evidence and the mere narration of the summary of the evidence adduced at the trial expressing the election to accept the version of a particular party is no compliance of the requirements under Section 187 of the CPC.

On a perusal of the judgment delivered by the learned district judge, it is quite apparent that she has addressed her mind to every issue raised at the trial and given cogent reasons for her conclusion. Even though she has not reproduced the issues, as

it is normally done in the preparation of judgments by original court judges, the learned district judge has answered each and every issue in her judgment. In the circumstances, it is not possible to attribute to the learned district judge non-compliance of Section 187 of the Civil Procedure Code.

The finding of the learned district judge on the main issue namely as to the building in question being unauthorized construction or not, is quite consistent with the evidence led at the trial. As such, I am not inclined to disturb the finding of the learned district judge except to direct him that the plaintiff be declared the owner of the subject matter of the action. Consequently, this appeal should fail resulting in the impugned judgment being affirmed subject to the plaintiff being declared the owner of the subject matter as aforesaid.

Accordingly, the appeal is dismissed without costs.

Judge of the Court of Appeal

Sunil Rajapaksha, J.

I agree.

Judge of the Court of Appeal

NR/-