

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

V. Tharumalingam
106, Mayfield Lane, Kotahena,
Colombo 13.
Presently of,
103, Rochman Blvd
Scarborough, Ontario M1H 1S1,
Canada.

PLAINTIFF

C.A.Appeal No. 591/97 (F)

D.C. Colombo Case No. 16032/L

Vs

1. S.Arulanandam and wife
 2. Ulgawathy Arulanandam
- Both of 106, Mayfield Lane
Kotahena, Colombo 13.

DEFENDANTS

BETWEEN

S.Arulanandam
of 106, Mayfield Lane, Kotahena
Colombo 13.

1st DEFENDANT-APPELLANT

Vs

V.Tharumalingam
106, Mayfield Lane, Kotahena
Colombo 13.
Presently of
103, Rochman Blvd, Scarborough
M1H 1S1, Canada.

PLAINTIFF-RESPONDENT

(now deceased)

1. Mrs. Elizabeth Nesamma
Tharumalingam
103, Rochman Blvd, Scarborough
M1H 1S1, Canada.
2. Mrs. Cecilia Puvaneswary
Nesakumar Collins
8, Olympic Drive, Whakatane, BOP,
New Zealand.
3. Mrs. Angela Rajeswari Selvakumari
Kulanthaivelu
3, Meadow Garth, Outwood,
Wakefield, WF1 3TE, UK.
4. Gerard Jeyakumaran
Tharumalingam
62, Bimbok Road, Scarborough
Ontario M1K 4T9, Canada.
5. Mrs. Ursula Savithri Vasanthakumari
Dunston
103, Rochman Blvd, Scarborough,
Ontario M1H 1S1, Canada.
6. Mrs. Francis Shirani Kumari
Theophilus
1, Alesia Close, 110-112,
Nightingale Road, London N22 4NH
England.
7. Anton Jeyarajan Tharumalingam
84, Rochman Blvd, Scarborough
Ontario, M1H 1S2, Canada.
8. Mrs. Marina Dharshini Shantakumari
Justin
39, Brentwood Drive, Scarborough
Ontario, M1H 2G5

**SUBSTITUTED-PLAINTIFFS-
RESPONDENTS**

BEFORE

: Deepali Wijesundera J.

: M.M.A. Gaffoor J.

COUNSEL

: Nizam Kariapper with

M.I.M. Iynullah, M.C.M. Nawaz and

M.S.S. Sanfara for the Appellant

Mano Dewanayagam with

Wilson Fernando for the

Plaintiff - Respondent.

ARGUED ON

: 23rd November, 2015

DECIDED ON

: 10th June, 2016

Deepali Wijesundera J.

The respondent (plaintiff in the District Court) instituted action against the appellant (defendant in the District Court) to enforce specific performance of the agreement marked **P2** with the plaintiff and also to eject the respondent from the premises in suit. The appellant had filed answer the second defendant has not filed answer and the case had proceeded to trial on the issues framed. At the trial only the respondent has given evidence for the plaintiff and the first defendant has given evidence for the appellant. At the trial the respondent has admitted the said agreement and the terms contained in it and also admitted his failure to pay the balance purchase price of Rs. 300,000/=. The learned District Judge has delivered his judgment in favour of the plaintiff respondent. Being aggrieved by the said judgment the appellant has filed this appeal.

The learned counsel for the appellant submitted that there isn't a single clause in the said agreement which gives right to the respondent to sue the appellant for ejection, if it is so by implication and not by expressly. The appellant stated that if one is to come to court to enforce specific performance of an agreement and if the court is to grant such specific performance then the terms and conditions of the agreement must be certain in its terms.

The appellant submitted that the learned District Judge did not answer any of the issues raised at the trial and that the District Judge is under legal duty to answer the issues based on his findings in his judgment.

The appellant also stated that the concept of leave and licence can not be applied in respect of an occupier of immovable property who is occupying the same based on an agreement to buy the property within a stipulated period of time.

The appellants further submitted that *Sec. 146 of the Civil Procedure Code* specifically sets out the duty of the court to determine the issues and that it is settled law that the judge must answer every issue framed in the case. He further stated that *Sec. 187 of the Civil Procedure Code* states that a decision has to be given on the points for determination and that court has to answer the issues and give reasons for coming to that answer. The appellant cited the judgment in **Sobanahamy vs Somadasa 2005 vol III page 201** and said failure to answer the issues is considered a fatal error.

The learned counsel for the respondents argued that under clause 4, 6 and 7 of the agreement marked **P2** no specific provision is needed for filing action for ejectment and that on the termination of the agreement and withdrawal of the leave and licence the defendant appellant is in the position of a trespasser and an action has to be filed for ejectment.

Citing the judgment in **Perera vs Lewis Abeysekera 58 NLR 506** the respondent stated that where under a non-notarial agreement to sell immovable property an advance is paid but the sale fails the agreement regarding the money paid in advance is severable from the agreement for sale, the plaintiff respondent has the right to demand that the defendant appellant should vacate the premises in exchange for the return of the advance.

The respondents submitted that although all the issues were not answered by the District Judge by way of findings from the evidence given the matters in issue have been referred to. The respondents stated that regarding issue no. 1 the defendant had admitted his failure to pay the balance sum, issues no. 2 refers to plaintiff respondent's evidence which the District Judge has accepted. Issue 3, 4, and 5 of the respondents all have been answered while making his findings. Referring to the defendant appellant's issue the respondents submitted the first had been answered as a preliminary issue in the affirmative, the other two issues the court has referred to in the findings. The respondents further submitted that the action in the District Court was filed over 23 years ago in 1992 and judgment was delivered on 22/05/1997 and the

plaintiff had died on 20/12/2005 and his heirs have been substituted as respondents and cited the judgment in **Jayasena vs Dayasena (2002) 3 SLR 261** where it was held that to remit the case back to the District Court after nearly 15 years to answer the issue will be a unfruitful exercise when the defendant appellant can not succeed in the original court.

The learned District Judge in his judgment delivered on 22/08/1997 has not specifically answered the issues one by one in the order they were raised but has referred to all the matters raised as issues in his judgment.

Section 147 of the Civil Procedure Code refers to framing of issues and states that issues on law may be taken up first and disposed of in the instant case the issue on law had been taken up first and proceeded to trial on the rest of the issues.

Sec. 187 of the Civil Procedure Code states the requisites of a judgment.

“The Judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively”.

No where does it say that the issues have to be answered by saying "yes" or "no" or in the numbered form they have been framed.

In Warnakula vs Ramani Jayawardena 1990 (1) SLR 206 it was held.

"Bare answers to issues without reasons are not in compliance with the requirements of section 187 of the Civil Procedure Code. The evidence germane to each issue must be reviewed or examined. The judge must evaluate and consider the totality of the evidence".

Therefore failure to answer the issues in the numbered order does not make it an error on the part of the District Judge.

The learned District Judge has analysed the evidence given before him by the plaintiff and the defendant and come to his findings on the issues framed before him. He has analysed the agreement entered into by the parties. The defendant has admitted the agreement in evidence and also the terms contained in it but he had failed to prove in the District Court that he paid any money other than the initial payment to the plaintiff. The learned District Judge has carefully analysed all these facts and evidence placed before him.

The instant case had been filed 24 years ago and as stated in **Jayasena vs Dayasena 2002 3 SLR 261** to remit this case to the District Court after 24 years to answer the issues will be an unfruitful exercise when the appellants can not succeed in the original court. The plaintiff in the District Court who had given evidence is no more in the living.

For the afore stated reasons I dismiss the appeal with costs fixed at Rs. 25,000/=

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor J.

I agree

JUDGE OF THE COURT OF APPEAL