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

In the matter of an application under and in terms of Section 754(1) of the civil Procedure Code

C. A No. 1006/94 (F)

D. C. Horana Case No. 4049/L

R. A. Sumana Nandasiri Ranasinghe
Ibulpe,
Horana

Defendant-Appellant

Vs.

P. R. De Silva
No. 18, Higalduwa Road,
Ambalangoda

Plaintiff-Respondent

BEFORE : **M. M. A. GAFFOOR, J.**

COUNSEL : Faiz Musthafa P. C. with Keerthi Tillekaratne for the Defendant-Appellant
Plaintiff-Respondent - absent and unrepresented

WRITTEN SUBMISSIONS TENDERED ON : 25.06.2018 (by the Defendant-Appellant)

DECIDED ON : **21.09.2018**

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M. M. A. GAFFOOR, J.

The Plaintiff-Respondent (hereinafter referred to as the 'Respondent') instituted this action for ejectment of the Defendant-Appellant (hereinafter referred to as the 'Appellant') from lot 4, 13 and 32 of Mukalana Estate on 09th November 1989 in the District Court of Horana bearing Case No. 4049/L. The District Court action was filed on the basis that the Lease Agreement bearing No. 1236 (marked as P6) which was signed on 11th January 1982 expired on 10th January 1987 and that the Appellant continued to enjoy the property unlawfully from 11th January 1987 (Para 3 of the Plaint). The Respondent stated that he had sent several letters (marked as P7) to the Appellant requesting her to hand over the vacant possession but the Appellant failed to do so.

The Appellant filed her answer and only admitted that she is living at the property and claimed that Lease Agreement 1236 is an illegal one and the Appellant had never sign that lease agreement in front of W. L. Silva, who was the Notary. The Appellant further stated that she only knew about it once she was served with summons and during that time from 1982 to 1987 there were no correspondents between the Respondent and Appellant.

In the District Court, the Respondent's position was that earlier the Respondent had transferred the property by the way of Deed of transfer No. 1235 dated 11th January 1982; and on the same day the Respondent leased the property to the Appellant.

In contrast, the Appellant made a claim in reconvention and claimed that Appellant's husband Don Francis Amarasinghe used to work at the G. P. Silva Company which is owned by the original Respondent and the owner threatened her after keeping her husband in captive and demanded that Rs. 15,000/- was missing and that they will take legal action unless she paid the money forthwith; therefore the Appellant stated that, she compelled to sign on four blank papers looks like deed papers as a pre-condition to release her husband. The Appellant further stated that she only found out that there is a deed of sale bearing No. 1235 after she checked at the Land Registry once she received notice.

Therefore, in the District Court, the Appellant prayed that Deed No. 1235 is a fraudulent one and to null and void the same, and dismiss the Plaint which was regarding the Lease Agreement No. 1236. *(Vide page 36 of the brief).*

At the end of the trial the learned District Judge pronounced his judgment dated 26.01.1994 in favour of the Respondent.

Being aggrieved by the said judgment this appeal was filed by the Appellant praying to set aside the said judgment of the learned District Judge dated 26.01.1994.

In this appeal, the Appellant's main averment was that the deeds Nos. 1235 and 1236 are fraudulently executed.

I would like to evaluate the allegations of the Appellant in respect of the deeds. She stated that the Notary was not there when her signature was placed on the deeds; she further stated that her signature was taken forcibly in G. P. de Silva's house while her husband Francis Amarasinghe

was forcibly detained in the house. She also stated that she did not know that they were deeds; even she signed some blank sheets. Now, there is a specific question arise in my mind that, if these allegations are true, or have enough basis of truth, what are the steps that taken by the Appellant. She stated that she and her husband had made two Police complaints regarding the alleged incident on the same day but unfortunately she could not produce those due to non-availability of those as it was made seven years ago *(vide 198 of the brief)*.

I am of the view that, the above averment of the Appellant is root for her case. Therefore, she has to prove the alleged incident with satisfactory evidence; even she had failed to do so. Section 101 of the Evidence Ordinance says that:

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existences 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."***

In the District court the Respondent also had raised *a question*, even though, the said Francis Amerasinghe the husband of the Appellant is the central figure in this case and he is the man who was said to have been subjected to wrongful confinement at G. P. de Silva's home, why he was not called to testify as a witness? The Respondent further stated that the said Francis Amarasinghe would have been the best witness to explain the rigours of wrongful confinement and threats against him which impelled him and his wife (the Appellant) to sign those blank papers. Therefore the Respondent took up a position that the alleged incident is fabricated.

In contrast, the Respondent had given evidence on the execution of deeds 1235 and 1236, P5 and P6 respectively. He had also called the Notary W. C. L. de Silva, as a witness regarding the execution of these deeds; then the evidence of a witness to the two deeds namely Gnanadasa has also been led in evidence. The Respondent stated that the Notary in the attestation of P5 the Deed of Transfer has referred to the cheque for Rs. 90,000/- handed over to the Appellant. The Respondent further stated in the District Court that Lal Silva (son of G. P. de Silva), the Appellant and her husband Francis Amarasinghe came later to his house and requested that she be given cash. The Respondent found the money for her and handed over a sum of Rs, 90,000/- to her. He further stated that the Appellant signed on the back of the cheque and returned the cheque (marked as P3) to him. Therefore the Respondent took up a position that her signature on the reverse of the cheque establishes that she received cash and therefore she returned the cheque after placing her signature on the reverse side of it. For establishing this transaction Respondent stated that according to P11 (a receipt) the Respondent had given the money to Appellant; the Respondent stated that he was kept the original receipt and handed over the duplicate to the Appellant. But the Appellant denied even giving of the duplicate. Therefore the Appellant submitted that if the receipt was given, then the original should have been given to her and not a copy and that shows this transaction never took place and the receipt was made subsequent to the events described by the Appellant to show it was in fact true. But the respondent simply took up an argument that, if these documents were false, then Francis Amerasinghe could have testified to these matters; instead of that he hides himself from case.

Furthermore, regarding the Rs.90, 000/- cheuqe payment the Appellant stated (*para 15 of the written submission dated 25.06.2108*) that there was no cheque number mentioned in the Deed of Transfer No. 1235, but when I peruse that deed (P5) there are some indication regarding the cheque. *(at page 312 of the brief).*

In the District Court, the Respondent had stated that after he had instituted the present action, the Appellant's husband paid Rs. 10,000/- and stated that they will leave the premises but he had failed to substantiate his statement with evidence as he was unable to produce the receipt given by him. Therefore in this appeal the Appellant submitted that the learned District Judge had failed analyze the evidence of the Respondent as he had stated that he has given two receipts to the Appellant, first is regarding the Rs. 90,000/- and second is regarding Rs. 10,000/-. But in both occasions he had failed to substitute his statements with proper proof.

However, in this case, it is important to note that the respondent had led some documentary and oral evidence to establish the validity of the deed and money transaction; the learned District Judge also satisfied on those evidences.

It is clear accustomed legal rule that in a civil action the standard of proof is balance of probability. Fernando J in ***Golagoda vs. Mohideen*** (1937) 40 N.L.R 92 held that a in a civil case, plaintiff needs to establish his case and perfectly satisfy the trail judge. In ***Wijeyaratne and Another vs. Somawathie*** (2002) 1 S.L.R. 93 it was held that ***proof of due execution would be on a balance of probability.***

Same rules followed in ***Sangadasa vs, Hussain and Another*** (1999) 2 S.L.R 395 and ***Ower Silva vs. Ranisaram*** (2003) 3 S.L.R. 223.

If I measure the totality of the evidence from the both party, I am of the view that the Appellant did not give evidence to contradict the position taken up by the Respondent at the trial especially regarding the two deeds.

In the case of ***Edrick de Silva Vs Chandradasa de Silva*** (1967) 70 N.L.R. 169, it was held that:

> *"Where the Petitioner has led evidence sufficient in law to prove his status, i. e. a factum probandum, the failure of the Respondent to adduce evidence which contradicts it adds a new factor in favour of the Petitioner. There is then an additional 'matter before court', which the definition in Sec. 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the Petitioner is uncontradicted. The failure to take account of this circumstance is a non-direction amounting to misdirection in law."*

Then again, in the case of ***Cinemas Ltd. vs. Sounderarajan*** (1998), 2 S.L.R. 16, it was held that:

> *"Where one party to a litigation leads prima facie evidence and the adversary fails to lead contradicting evidence by cross examination and also fails to lead evidence in rebuttal, it is a 'matter' falling within the definition of the word 'proof' in the Evidence Ordinance and failure to take cognizance of this feature and matter is a non-direction amounting to a misdirection." I find that the High Court has analyzed the evidence taking into account the fact that the Defendant had failed to give evidence or even*

failed to contradict the evidence on record by cross examination and thus, has correctly answered the issues in accordance with the evidence.

I find that the District Court has analyzed the evidence taking into account the fact that the Appellant had failed to give evidence or even failed to contradict the evidence on record by cross examination and thus, the learned Judge has correctly answered the issues regarding the validity of the deeds in accordance with the evidence.

I am of the opinion that in the case in hand, the learned District Judge has analyzed the oral and documentary evidence proper perspective on a balance of probability and answered the issues correctly.

It is important to note that this Court not interfere the factual issues; that duty cast on the primary courts; As held in ***Alwis vs. Piyasena Fernando*** (1993) 1 S.L.R .119, generally an Appellate Court would not interfere with primary facts unless such findings are highly unacceptable or without proper reasons. Further, I respectfully recall a relevant finding of Eva Wanasundera, P.C. J., in the case of ***G. W. Rathnayake vs. Don Andrayas Rajapaksa*** (SC Appeal No. 120/09 decided on 01.08.2017); Her Ladyship quoted the decision of ***Watt or Thomas vs. Thomas*** (1947) A.C. 484 at pp 485-6

"If there is no evidence to support a particular conclusion (and this is really a question of law) the Appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the Appellate Court will bear in mind that it has not enjoyed this

opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of the first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

In these circumstances, I hold that the learned District Judge correctly evaluated the entire evidence which were recorded from both parties; the two deeds P5 and P6 proved by the Respondent. Therefore, the District Judge held correctly that the Respondent in the capacity of Lessor issued a quit notice to Appellant after expiration of lease period; thereby the cause of action was ejectment of an over holding lessee. These matters already held in favour of the Respondent. I have not seen any miscarriage on the findings of the learned District Judge; he was relay on balance of probability and concluded that the Respondent had proven his case to get the reliefs prayed for the in the Plaint.

For these forgoing reasons, I affirm the judgment of the District Judge dated 26.01.1994; and dismissed the appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL