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

Selvamany Samy Letchumenan
No.243, Dimbulla Road, Hatton.
PLAINTIFF

C.A Case No.684 A-B/2000 (F)

-Vs-

D.C. Hatton Case No. DE/132

1. Kamatchi Dharmalingam
2. R. Dharmalingam

Both of 187/F, Dimbulla Road, Hatton.
DEFENDANTS

AND

1. Kamatchi Dharmalingam
2. R. Dharmalingam

Both of 187/F, Dimbulla Road, Hatton.
DEFENDANT-APPELLANTS

-Vs-

Selvamany Samy Letchumenan (Deceased)
No.243, Dimbulla Road, Hatton.
PLAINTIFF-RESPONDENT

a. Letchumenan Siva Nithyanandan
b. Letchumenan Siva Jothimala

c. Sivasundari Subramaniam

d. Letchumenan Siva Nandani

e. Letchumenan Sivaghanaguru

All of No. 243, Dimbulla Road, Hatton.

Substituted PLAINTIFF-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : S. Mandaleswaran with M.A.M. Haleera for the 1st Defendant-Appellant and Substituted 2nd Defendant-Appellant

L.M. Kumar Arulanandam, P.C with Devika Panagoda for the Substituted Plaintiff-Respondents

Decided on : 27.08.2018

A.H.M.D. Nawaz, J.

The Defendant-Appellants (hereinafter sometimes referred to as "the 1st Defendant" and "the 2nd Defendant") have preferred this appeal against the judgment of the learned District Judge of *Hatton* dated 31.08.2000.

The pith and substance of the action in the court *a quo*is that the cause of action was founded was founded on a partnership agreement between the Plaintiff and the 1st Defendant and the 2nd Defendant and the said agreement came to an end on 14.03.1994 and that the 1st Defendant had refused to hand over the partnership premises provided by the Plaintiff to the Defendants. Both the Defendants were a husband and wife.

The Plaintiff filed this action on 31.10.1994 and averred the following-*vide* page 36 of the brief.

i. the Plaintiff entered into a partnership agreement dated 10.09.1991;

ii. the said agreement was with the 1st Defendant;

iii. the Plaintiff provided the premises No.187, Dimbulla Road, Hatton for the partnership business to be carried on at the said premises and reckoned the same as cash value in a sum of for Rs.27,000/- and the Defendant contributed a capital of Rs.27,000/-;

iv. the partnership was for a period of 30 months commencing from 15.09.1991 and terminating on 14.03.1994;

v. the Defendant failed to hand over the premises No.187, Dimbulla Road, Hatton after 14.03.1994;

vi. the Defendant continued to be in illegal possession despite notice dated 09.05.1994;

vii. the plaint prayed for a decree of ejectment and damages.

The 1st Defendant and the 2nd Defendant in their answers (*vide* page 30 and 40) admitted the agreement dated 10.09.1991.

Both the 1st and 2nd Defendants in the answers filed denied partnership and took up the position that 2nd Defendant was the tenant of the premises No.187, Dimbulla Road, Hatton.

The plaintiff's issues were No.1 to 9, whilst Issues No.10 and 11 were those of the 1st Defendant and 12 and 13 of the 2nd Defendant. The issues of the 1st and 2nd Defendants were raised on 04.06.1998 (*vide* page 67 and 68). Admittedly the 1st and 2nd Defendants are husband and wife. If I may set out the issues, they went as follows:-

- **Issue No. 1** - whether the Plaintiff and the 1st Defendant entered into a Partnership Agreement on 10.09.1991-vide Deed No.223
- **Issue No. 2** - whether the duration of the said agreement was for the period of 30 months
- **Issue No. 3** - whether the Partnership Business stands dissolved as at 14.03.1994

- **Issue No. 4** - whether the Plaintiff was in possession of the Partnership Premises bearing No.187, Dimbulla Road, Hatton
- **Issue No. 5** - whether the 1st Defendant came into occupation of the premises No.187 F, Dimbulla Road, Hatton upon the execution of the Deed bearing No.223
- **Issue No. 6** - whether the 1st Plaintiff brought in the premises No.187 F, Dimbulla Road, Hatton as her share of the Partnership Business with the 1st Defendant
- **Issue No. 7** - whether the 1st Defendant is bound by the contract in terms of the Deed bearing No.223 with regard to the vacation of the Partnership Business premises.
- **Issue No. 8** - whether the 1st Defendant is the wife of the 2nd Defendant
- **Issue No. 9** - If the answers are "yes" to the Issues No.1 to 7 whether the Plaintiff is entitled to judgment against 1st to 2nd Defendants as prayed for in her Plaint.

(vide page 67 and 68)

- **Issue No. 10** - was Partnership Agreement filed of record as "X1" in this case executed in order to conceal or cover up tenancy?
- **Issue No. 11** - if this issue is answered in favour of the 1st Defendant can the Plaintiff have and maintain this action?
- **Issue No. 12** - is the 2nd Defendant a tenant of the premises which is subject-matter of this action?
- **Issue No. 13** - if this issue is answered in favour of the 2nd Defendant can the Plaintiff have and maintain this action?

Upon the aforesaid issues it is clear that the Defendants set up a case on the lines that the said Partnership Agreement dated 10.09.1991 was a sham or a simulated transaction and thus it was executed in order to camouflage a tenancy the Plaintiff had with the 2nd Defendant.

When the partnership agreement was marked, the Defendants at no stage objected to its admission and they admitted even the signature and execution of the said Partnership Agreement.

The Plaintiff gave evidence in court on 04.06.1998, 01.07.1998 and 19.11.1998. Her evidence, in brief, *inter alia*, was as follows:-

i. she entered into Partnership Agreement with the 1st Defendant on 10.09.1001 since 1st defendant was interested in doing business;

ii. she spent on the building and was in possession of premises No.187, Dimbulla Road, Hatton prior to the execution of the Partnership Agreement on 10.09.1991;

iii. the said Partnership Agreement was for 30 months;

iv. the period of partnership ended on 14.03.1994;

v. a quit notice was sent to the 1st Defendant on 09.05.1994;

vi. it was she who paid the rent and the 2nd Defendant was not a tenant of the business premises as claimed by him;

vii. the 1st Defendant came into the premises only after the execution of the Partnership Agreement;

viii. she denied any tenancy with the Defendants.

In order to establish the fact in issue raised in Issue No.12 namely the 2nd Defendant is a tenant of the business premises, questions were posed to the Plaintiff in cross-examination that the Plaintiff gave the premises to the defendant on rent (*vide* page 81 of the brief). This is inconsistency *per se* that shakes the creditworthiness of the Defendants. Having admitted the partnership agreement, the case of the Defendants would become inconsistently incongruent and intrinsically improbable if they put questions to the Plaintiff that the Plaintiff had a tenancy with the 2nd Defendant. One cannot approbate and reprobate-*see* ***Ceylon Plywood Corporation v. Samastha Lanka GNSM & RSS Sangamaya*** (1992) 1 Sri L.R 157 at 163:-

".....The doctrine of approbate and reprobate *(quod approbo non reprobo)* is based on the principle that no person can accept and reject the same instrument."

This equitable principle has been endorsed in the English case of ***Barclays Bank Trust Co Ltd. v. Bluff*** (1981) 3 AII ER 232. This doctrine will forbid the assertion of tenancy in the face of the admission that there was an agreement to carry on business with a view to make profit.

Only the 1st Defendant gave evidence on behalf of the Defendants (*vide* pages 87-92). She recalled that she entered into the premises in question from October 1991. She denied doing business at the premises. She *though* admitted entering into the agreement on 10.09.1991. Having admitted the signature to the partnership agreement, she denied the contents therein. Did she sign it without knowing the contents? This volte-face would render the story of tenancy inherently implausible. Section 91 of the Evidence Ordinance deals with matters, which the parties have put in writing by consent, or as required by law to be in writing. In such cases, except where secondary evidence may be given, the document is an exclusive record of that which it embodies. The parties are not at liberty to resort to other evidence.

Sections 91 enacts that: When the term of a contract, or of a grant, or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under provisions hereinbefore contained.

It is a cardinal rule of evidence, not one of technicality but of substance, which it is dangerous to depart from, that where written documents exist they shall be produced as being the best evidence of their own contents. The normal rule is that the contents of a document must be proved by primary evidence, which is the document itself and it is the

production of the document which renders the transaction admissible and an attempt to vary its terms is viewed with disfavour.

The partnership agreement looms large in the case and it estops the 1st and 2nd Defendants from resiling from their contents which do not speak to a tenancy.

The Defendants have referred to the Supreme Court judgment in the case ***Jayantha de Alwis and others v. D.M. Appuhamy and another*** (1997) Vol.VII Part I Bar Association Law Journal Reports 14.

In this precedent the Supreme Court confirmed the finding of the District Judge that the partnership agreement on which the tenant relied in order to deny sub-letting was a sham. That was a case where the plaintiff was the landlord and the 1st defendant therein was the tenant. The 1st defendant tenant had sublet the premises to the 2nd defendant against whom an *ex parte* trial had been ordered as he was absent. The Partnership agreement was a subterfuge adopted by the tenant to conceal subletting.

This case has no application at all to the case before me wherein the Defendants had admitted the partnership agreement. They were attempting to renege on the partnership agreement

The Defendant did not prove tenancy in this case by way of producing rentals or by calling any landlord to prove tenancy.

The learned District Judge delivered judgment on 31.08.2000. The learned District Judge has stated, *inter alia*, the following reasons for deciding the case in favour of the Plaintiff.

i. the execution of partnership agreement the document **P1** and the quit notice **P2** have been accepted by the Defendant;

ii. the Defendants have failed to reply to **P2**;

iii. the Defendants have not discharged evidentiary burden of proving tenancy;

iv. the judgment in the case ***Jayantha de Alwis and others v. D.M. Appuhamy and another*** *(supra)* is inapplicable in the context of the facts of this case;

v. the Defendants have not led evidence to show the applicability of the rent act to the premises in question;

vi. the 2nd Defendant has not given evidence in the instant case to prove tenancy;

vii. the partner cannot remain in the business premises after dissolution of partnership;

viii. the partner cannot remain in the business premises upon dissolution of the partnership in the light of the judgment in the case ***J. Quin v. M.M. Ibrahim*** 72 N.L.R 130;

ix. leasing of business does not attract tenancy of premises in the light of the judgment in the case of ***B. Predris Sighno v. D.J. Wijesinghe*** 70 N.L.R 185.

As correctly held by the learned District Judge, the Defendants bear the evidentiary burden to discharge on the question of tenancy and they cannot simply state that they did not understand the terms and conditions contained in the said Partnership Agreement. As regards signatures one has to bear in mind the case of ***L'Estrange v. Graucob*** (1934) 2 KB 394 KBD.

The Rule in L'Estrange

The rule in ***L'Estrange v. Graucob*** (1934) 2 KB 394 affirms that the clauses of a written contract are binding on signatories. Spencer writing an article entitled ***Signature, Consent, and the Rule in L'Estrange v. Graucob*** (1973) Cambridge Law Journal 104 submits that signature of a document indicates actual consent to its contents; a person who signs a document is thereby estopped from denying consent to the contents of the documents.

The case of ***Mercantile Credit Limited v. Tilekeratne*** (2002) 2 Sri L.R 206 is a precedent in point of fact.

> *The plaintiff-appellant filed action against the 1st (principal debtor), 2nd and 3rd defendant-respondents (guarantors) jointly and severally to recover a certain sum of money, and the return of the vehicle (on hire purchase) and damages. The 2nd defendant-respondent (guarantor) whilst*

admitting signing the Guarantee Bond stated that he was not aware of the conditions of the agreement, he had not renounced all the rights and privileges to which the sureties are entitled to by law and that the clause relating to the renunciation of the benefit were not explained to the guarantors. The District Court held with the defendant-respondent.

Held:

1. *The burden of proving that the clauses relating to the renouncing of all benefits and privileges to which sureties are entitled to by law were not understood by him is a special fact within the knowledge of the person alleging it and by virtue of section 101, the burden of proving that fact is with the person who asserts that fact.*

2. *as asserted to by the 2nd defendant-respondent that he was not aware of the conditions of the agreement at the time he signed it, it was open for him to have opted for his common law remedy of repudiating his suretyship when he came to know by receipt of certain letters. Furthermore, he states in evidence that he did not care to read it and that he signed because a friend told him to do so.*

3. *Negligence on the part of the 2nd defendant-respondent is not an excuse to deny liability.*

   "Where a person who is neither illiterate nor blind signs a deed without examining the contents he would not as a general rule be permitted under the Roman Dutch Law to set up the plea that the document is not his."

It has to be noted that the 2nd Defendant who averred that he had been the tenant of the premises has failed to give evidence and the failure to give evidence would amount to a culpable failure to explain away evidence placed by the Plaintiff. In his seminal work, viz. **"A Practical Approach to Evidence"** at page 444, Peter Murphy, Professor of Law South Texas College of Law having considered the effect of omission to cross-examine a witness on a material point states the same as above.

It is, therefore, not open to a party to impugn in a closing speech or otherwise, the unchallenged evidence of a witness called by his opponent or even to seek to explain to

the tribunal of fact the reason for the failure to cross-examine. In other words there had been an admission of the Plaintiff's case on the part of the 1st and 2nd Defendants.

Upon a consideration of the totality of evidence led in this case, I take the view that the Plaintiff's case has been established on a preponderance of evidence and I proceed to affirm the judgment of the learned District Judge of *Hatton* dated 31.08.2000 and dismiss the appeal.

JUDGE OF THE COURT OF APPEAL