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

C.A. Case No.572/1999 (F)

D.C. Avissawella Case No.19406/L

A.C.M. Mukthar,
'Ruwanwella Dispensary',
No. 119, Main Street,
Ruwanwella.
DEFENDANT-APPELLANT

1. G.S.F.Mukthar,

2. M.M.M.Safran
Substituted DEFENDANT-APPELLANTS

-Vs-

A.R. Haniffa
No.06/236, Bandaranaika Mawatha,
Thihariya,
Kalagedihena.
PLAINTIFF-RESPONDENT

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

COUNSEL : Jacob Joseph with Sandamali Madurawala for the Defendant-Appellants

Vidura Gunaratne with R.J. Upali De Almeida for the Plaintiff-Respondent

Decided on : 25.07.2018

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

By a plaint dated 07.11.1994, the Plaintiff-Respondent (hereinafter sometimes referred to as the Plaintiff) instituted this action against his maternal uncle-the original Defendant-Appellant (hereinafter sometimes referred to as the Defendant) seeking *inter alia* to have him ejected from the premises depicted in the 1st schedule to the plaint and to secure vacant possession, whilst he claimed the goods described in the 2nd schedule or alternatively their value in a sum of Rs.41,500/-. The premises were described as No.119, Main Street, Ruwanwella in the District of *Kegalle*. The plaintiff A.R. Haniffa alleged that it was his father-Dr. A.C.M. Haniffa who was a tenant of the premises and after his demise on 17.01.1986, he became the tenant of the premises and thereafter he gave his uncle-Dr. A.C.M. Mukthar (the Defendant) leave and licence to occupy the premises and operate his medical centre. The Plaintiff also alleged that the owner of the premises was one Siriwardene who accepted the rent that had been deposited at the Ruwanwella Pradeshiya Sabha.

The cause of action raised against the Defendant was that though the leave and licence were terminated on 30.06.1994, he repudiated the existence of such a leave and licence and in violation of the licence, he continued to be in occupation of No.119, Main Street, Ruwanwella and failed to hand over possession and therefore he should be ejected and ordered to pay damages from 01.07.1994-the day after the leave and licence had allegedly been terminated. In fact the Defendant traversed in his answer *inter alia* that he had purchased the property from the original owner Siriwardene on 23rd July 1993 and become the absolute owner of the property.

So the pith and substance of the case of the Plaintiff that was alleged against the Defendant was that the Defendant and all those holding under him should hand over possession of No.119, Main Street, Ruwanwella since the leave and licence had been terminated.

Defendant's Position

As I said above, the Defendant repudiated any suggestion of leave and licence made by the Plaintiff. The Defendant further traversed that the Plaintiff's father-Dr. A.C.M. Haniffa and he had been carrying on their medical practice in partnership since 1984 and after the death of Dr. Haniffa on 17.01. 1986, he became the tenant of the premises and had been carrying on his medical practice and at no stage did the Plaintiff (son of Dr. Haniffa and his nephew) give him any leave and licence.

The Defendant-Dr. Mukthar further averred that long before the Plaintiff instituted this action 07.11.1994, Siriwardene (the owner of the premises) had sold the premises to him on 23.07.1993 and he was the current owner of the premises, No.119, Main Street, Ruwanwella. Thus the Defendant countered the claim of the Plaintiff with his version of his title that had accrued to him almost 10 months before the institution of the action. By virtue of this title the Defendant sought a dismissal of the action.

Much argument before this Court was focused on the question of who became the tenant of these premises just after the death of Dr.A.C.M.Haniffa on 17.01.1986. The Plaintiff-the son of Dr. A.C.M.Haniffa claimed that it was him who became the tenant whereas the maternal uncle-the Defendant asserted that he succeeded to the tenancy.

For purposes of convenience I would bifurcate the period of time between 17.01.1986- the date of the demise of the original tenant Dr. A.C.M.Haniffa and the institution of the case on 07.11.1994. The first period is between 17.01.1986 and November 1990, while the 2nd period would be between December 1990 and 07.11.1994. The Defendant bought the premises on 23.07.1993, which would fall within the 2nd period. In other words one and year and four months prior to the institution of the case, the Defendant became the owner of the property in question.

As it would be apparent in the course of this judgment, the Defendant did become the tenant of the premises and continued in that capacity in the 2nd period namely sometime between December 1990 and 27.07.1993. Whilst in the capacity of a tenant under Siriwardene, there is evidence that on 27. 07.1993 the Defendant changed his status by

becoming the absolute owner of the property as Siriwardene-the owner of the property conveyed it to the Defendant. These are material facts in the case. Instead it appears to me that the parties concentrated more on the question of who became the tenant immediately after the demise of the original tenant-Dr. A.C.M.Haniffa. In other words the question that figured prominently at the trial was-who became the tenant after the demise of A.C.M.Haniffa in the 1st period I have mentioned above. It would appear that the trial judge too concentrated on this question and so did the counsel who argued the case before this Court. Once the tenant after the death of A.C.M.Haniffa was identified, the contention before this Court was that the status of tenant, whether it belonged to the Plaintiff or Defendant, it continued till 27.07.1993 -the date on which Siriwardene sold the premises the Defendant.

The Plaintiff's counsel argued before me that since it was the Plaintiff who was the tenant after his father's death, the status continued despite the fact that the title of the premises devolved on the Defendant on 23.07.1993. Mr Vidura Guneratne for the Plaintiff argued that the despite the sale of the property to the Defendant, the Defendant remained a licensee of the Plaintiff and he must surrender possession of the premises to the Plaintiff and then litigate his title. The learned Additional District Judge of *Avissawella* was also guided by this principle and it was in those circumstances that he allowed the ejectment of the Defendant by his judgment dated 26.04.1994.

In fact this principle is an application of the rule founded on estoppel as exemplified by Section 116 of the Evidence Ordinance. Bonser C.J. and Withers J. propounded this principle deriving from estoppel in ***Alvar Pillai v Karuppen*** (1899) 4 N.L.R 321. In that case the defendant was let into possession of the whole land in dispute by the plaintiff on a non-notarial document. When the terms of the letting expired, the defendant refused to give up possession on the ground that he had acquired title to half the land from a third party. Bonser C.J. said at p 322: "Even though the ownership of one half of this land were in the defendant in himself, it would seem that by our law, having been let into possession of the whole by the plaintiff, it is not open to him to refuse to give up possession, and then it will be open to him to litigate about the ownership." In similar vein, Withers J said:

"Taking as proved-and I think it is proved-that the defendant took possession of the whole of the property in question from the plaintiff, it was his manifest duty under our law to restore it to the plaintiff as soon as his term of tenancy had expired."

This rule based on Voet 19.2.32 is set out by Masssdorp as follows:

> *"A lessee is not entitled to dispute his landlord's title, and consequently, he cannot refuse to give up possession of the property to the termination of his lease on the ground that he is himself the rightful owner of the same. His duty in such a case is first to restore the property to the lessor and then to litigate with him as to the ownership."- Institutes of Cape Law (4th Edition)* Volume 3, at p 348.

In ***Ruberu*** v ***and Another v. Wijesooriya*** **[1998] 2 SRI L.R 58** UdeZ Gunawardana J in striking down the order of a District Judge to amend the plaint in the case to include a prayer for a declaration of title quite perspicaciously alluded to the aforesaid rule in section 116 of the Evidence Ordinance which is analogous to the doctrine of the Roman-Dutch common law.

> *Whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (defendant-respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of the plaintiff-appellant without whose permission he would not have got it. The effect of S. 116 Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must first quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-respondent is perforce an admission of the fact that the title resides in the plaintiff.*

I hasten to point out that there are circumstances in which no estoppel based on section 116 arises and as I will show presently, this case throws up a category of a distinct situation in which the rule embodied in section 116 of the Evidence Ordinance has no application and the learned Additional District Judge had not borne in mind the departures from the rule on section 116 of the Evidence Ordinance.

After giving my anxious consideration to the evidence led in the case, I come to a firm conclusion that it does not matter who became the tenant in the first period. Rival arguments have indeed been made on both sides to show that one or the other became the tenant in the 1st period namely after the original tenant A.C.M.Haniffa (the father of the Plaintiff) had passed away on 17.01.1986 and in my view in order to resolve the issues in the case, it becomes necessary to ascertain who was the tenant between December 1990 and 23.07.1993. This is the period ending on 23.07.1993 when the Defendant bought the property from the title holder Siriwardene. I take the first terminal as December 1990 because it is from this month, according to Siriwardene, that the Defendant began to pay rent at the rate of Rs 30 until he bought the property from Siriwardene on 23.07. 1993.

The passage of title from Siriwardene to the Defendant on 23.07. 1993 is quite material enough to dispose of this case because this peculiar situation throws up an instance of a departure from Section 116 of the Evidence Ordinance. Before the title passed to the Defendant on 23. 07. 1993 by a deed bearing No 4877 (**V2**), there is evidence in the case that the Defendant had become the tenant of Siriwardene-the original owner of No 119, Main Street, Ruwanwella. The tenancy of the Defendant under Siriwardene somewhere between December 1990 and 23rd July 1993, coupled with the fact that the title passed to the Defendant on 23rd July 1993, are material facts that afford a departure from the rule of estoppel embodied in section 116 of the Evidence Ordinance. The learned Additional District Judge had not been cognizant of this distinct exception and the fact that the Defendant became a tenant of Siriwardene sometime after December 1990 shows that the Plaintiff had lost his tenancy somewhere after December 1990 assuming that he had tenancy before December 1990.

So December 1990 marks a watershed in the facts of the case and it is for this reason I hold the firm view that it is inconsequential to indulge in an analysis of who became the tenant on 17.01.1986-the day the father of the Plaintiff A.C.M. Haniffa passed away. Was it the Plaintiff (the nephew) or the Defendant (the maternal uncle) who became the tenant at the beginning? That was the pivotal question at the trial. The learned Additional District Judge held that it was the Plaintiff (the nephew) who was the tenant under Siriwardene.

Therefore the licencee (the Defendant uncle) must surrender possession and litigate to establish his title even though title devolved on him in July 1993. In May 1994 the Plaintiff terminated what he called *his agency* he had given to the uncle occupy the premises and directed him to quit by June 1994 (P10). The Defendant uncle responded that he had paid rent for the premises not only from January 1986 but also up to 23rd July 1993. This seems to be the import of the letter that the Defendant wrote to the Plaintiff in response to the quit notice-see the response marked as P11. Whilst the Plaintiff has argued that he became the tenant from January 1986 and he continued to be so even during the 2nd period, the Defendant has contended that right throughout till 23.07.1993 when he bought the premises, he remained the tenant of the premises. No doubt it is the argument of the Plaintiff that won the day in the District Court but there is a salient feature of the Plaintiff's case that has not been considered by the learned Additional District Judge of *Avissawella*.

There are undoubtedly arguments that this Court heard on who succeeded to the tenancy after the death of the original tenant A.C.M.Haniffa on 17th January 1986. The Plaintiff led the evidence of the owner of the premises Siriwardene to establish that Siriwardene recognized him as the tenant. The Plaintiff also produced in Court a joint affidavit of the Defendant and Plaintiff's mother marked **P14** wherein the Defendant had affirmed that the Plaintiff had succeeded to his father. An argument was advanced by the counsel for the Defendant that though the Defendant had recognized in his joint affidavit the Plaintiff as having succeeded to the tenancy, it was erroneous in law because a son could not succeed to the father in respect of business premises if the son had not been in the same business as the father-see section 36 (2) (c) of the Rent Act No 7 of 1972. The Additional District Judge accepts this legal position but goes on to hold that the Plaintiff became the tenant because the owner Siriwardene had testified that the Plaintiff was indeed his tenant. This assertion of tenancy was strenuously resisted by the Defendant who categorically stated that it was his money that the Plaintiff paid to the Pradeshiya Sabha as rent but in the Plaintiff's name. There was some force in the testimony of the Defendant that his money was paid as rent albeit in the Plaintiff's name and thus there were two rival versions at the trial but the learned Additional District Judge preferred to accept the version of the

Plaintiff and held that the Plaintiff became the tenant immediately after the demise of his father A.C.M. Haniffa on 17th January 1986. The learned Additional District Judge has also gone on the assumption, as misconceived as it is, that this tenancy had continued uninterrupted but the evidence seems to be to the contrary. I now turn to that evidence which strikes at that assumption. This was an item of evidence that the learned Additional District Judge of *Avissawella* failed to consider.

Stoppage of payment of rent by the Plaintiff

Whilst giving evidence for the Plaintiff, Siriwardene-the owner of the premises came out with an important item of evidence. He testified that sometime after another premises No 121, Main Street, Ruwanwella was sold by him to the Plaintiff's family, the Plaintiff simply stopped paying rentals in respect of No 119, Main Street-the subject matter of the case. The witness asserted that after the Plaintiff stopped paying the rentals, it was the Defendant who paid the rent continuously. As a result he in the end executed a transfer of the premises to the Defendant- see page 5 of the proceedings dated 23.09.1997. This evidence given by a witness summoned by the Plaintiff remains uncontradicted. I must state that Siriwardene described the commencing terminal of the Defendant's payment of rent as December 1990 in a document marked as **V1** but he did admit at the trial on 23.09.1999 that **V1** was inaccurate. Even the Defendant disputed the commencing terminal of December 1990 was wrong but he was emphatic that he had been paying the rent since one and a half years prior to the institution of the case-see page 8 of the proceedings dated 26.01.1999. In other words he had been paying rent to Siriwardene for nearly 18 months and this led to Siriwardene executing a deed of transfer in favour of the Defendant on 23rd July 1993. This evidence remains unchallenged.

Thus the is evidence of Siriwardene (the Plaintiff's witness) and the Defendant at the trial to the effect that the Plaintiff had refrained from paying rent for nearly 18 months and it was the Defendant who paid the rent. This was uncontradicted and unassailed evidence that does not inure to the benefit of the Plaintiff.

Abandonment of tenancy by the Plaintiff

The omission of the Plaintiff to pay rent in respect of premises No 119 for nearly 18 months raises the question of abandonment of tenancy on the part of the Plaintiff. In order that there might be abandonment not only should the tenant leave the premises but his intention to abandon should also be clear. A person cannot abandon a right without intending to do so-vide ***Mouson v Boehm*** (1884) 26 Ch.D 398: ***Nagamani v Vinayagamoorthy*** (1923) 24 N. L. R. 438. A temporary departure with the intention of returning to the premises does not constitute abandonment-vide Tambiah J in ***Premaratne v Suppiah*** 64 N.L.R 276. In ***Edirisinghe v Charlis Singho*** (2000) 3 Sri.LR 380, UdeZ Gunawardana J explained the distinction between surrender and abandonment. Surrender differs from abandonment. Abandonment of rights is simply an act on the part of a lessee/tenant. Surrender is a contractual act and occurs by mutual act.

It simply means that abandonment of one's right is a unilateral act that has to be inferred from conduct or evidence. In the unabridged edition of the Random House Dictionary, the word 'abandon' has been explained as meaning 'to leave completely and finally; forsake utterly; to relinquish, renounce; to give up all concern in something'. According to the Dictionary of English law by Earl Jowitt (1959 edition) 'abandonment' means 'relinquishment of an interest or claim'. According to Black's Law Dictionary (Tenth Edition), 'abandonment' means relinquishing or giving up with the intention of never again reclaiming one's rights or interest.

Therefore , the intention to abandon may be inferred from the acts and conduct of the party, and is a question of fact. One cannot get away from the evidence led by the plaintiff himself. His only witness Siriwardene testified that for 18 long months, the Plaintiff refrained from paying the rentals but the Defendant handed over the rentals. It is therefore irrational and preposterous to argue that the Plaintiff continued to remain a tenant of Siriwardene. The tenancy between Siriwardene and the Plaintiff had lapsed or suffered extinction through abandonment. Instead a new tenancy was created between Siriwardene and the Defendant. If I may put it in another way, the nephew (the Plaintiff) had acquiesced in the payment of rent by the uncle (the Defendant) directly to Siriwardene

(the owner of the premises). I would further conclude that by acquiescing in the payment of rent by the Defendant, the Plaintiff must be taken to have acknowledged the Defendant as the tenant.

What stronger evidence of abandonment does one need rather than the acquiescence on the part of the Plaintiff in the payment of rent by the Defendant for 18 months? Assuming that the Plaintiff had tenancy under Siriwardene, it was superseded when the Defendant started paying rentals directly to Siriwardne. It is irrational to think that the Plaintiff was not aware of the payment of rentals by the Defendant. The defendant was practising medicine at the premises and it was as plain as a pikestaff that Siriwardene would never allow somebody to occupy the premises for free. The Defendant brought the fact of his payment rent to the notice of the Plaintiff by P11 and he testified to this effect at the trial. The corroborative evidence came from Siriwardene who was summoned by the Plaintiff. This evidence of non-payment of rent and consequent forfeiture of tenancy by abandonment remains unchallenged. *So I would make bold to observe that it was the case of the Plaintiff that the Defendant was the tenant of Siriwardene.* It was the case of the Plaintiff because abandonment of tenancy arose in the course of the trial on the evidence adduced by him. In the circumstances it was incumbent on the part of the Additional District Judge of *Avissawella* to have raised an issue on abandonment and resolved the issues inherent in the case by indulging in an analysis of the evidence, but the judgement suffers from a paucity of that analysis.

So I conclude that the Plaintiff had forfeited his tenancy by July 1993 and on 23rd July 1993 the defendant became the absolute owner of the property. The so called leave and licence that the Plaintiff spoke of had become extinguished once the abandonment of tenancy took place. The Plaintiff has no right to give a licence in respect of property which has abandoned. Undoubtedly one does not have to be an owner of a property to grant a licence. In the circumstances of this case the licensor has to be the owner or a tenant. If the Plaintiff ceases to be a tenant, he forfeits the right to grant a licence or even maintain that his so called licence persists. Once the new contract of tenancy was created between Siriwardene and the Defendant, the Defendant became a tenant on Siriwardene's land and

it is preposterous for the Plaintiff to speak of a licence which had got extinguished. The Defendant cannot be a tenant of an owner whilst at the same time having another character of a licensee of someone who no longer has an interest in the land. So no question of licence arose in the case, come July 1993.

It is for this reason that I commented at an anterior stage of this judgement that estoppel of tenancy encapsulated in Section 116 of the Evidence Ordinance would not operate against the Defendant. When the so called licensor (the Plaintiff) has lost his tenancy, how can he use section 116 of the Evidence Ordinance aagainst the Defendant? This is one exceptional situation where the rule embodied in section 116 of the Evidence Ordinance has no application. Nagalingam J put it in a nutshell in ***Cader v Nicholas Appuhamy*** (1948) 50 N.L.R 93.

> *It is sufficient to say that the estoppel of a tenant, as enunciated in section 116 of the Evidence Ordinance only bars the tenant from denying that the landlord had at the beginning of the tenancy, a title to the property. It does not, however, prevent the tenant from showing that the landlord has lost title since."*

If the Plaintiff had the right to possession as a tenant under Siriwardene and given a licence to the Defendant, indisputably it is not open to the Defendant to deny that the Plaintiff had a title to possession at the time when the licence was given. This is the rule of estoppel in section 116. But it has no application when the licensor has lost his title to possession. The licensee can show the forfeiture of the title to possession on the part of the licensor. The licensee can show that the licensor has lost his title since. This evidence of forfeiture emerged in the course of the Plaintiff's case itself but the learned Additional District Judge misdirected himself when he erroneously held that the Defendant must restore possession to a person who had already lost the title to possession. He overlooked abandonment of tenancy and erroneously applied section 116 of the Evidence Ordinance, whereas he should have departed from its application.

Thus the Plaintiff had no right to demand the ejectment of the Defendant who became the owner of the property after having become the tenant of Siriwardene in the first instance.

There was indeed no cause of action that had accrued to the Plaintiff to seek the eviction of the Defendant and he could not have terminated a non-existent licence.

In the circumstance the judgment of the District Court of Avissawella dated 24.06.1999 is set aside and I proceed to allow the appeal of the Defendant-Appellant. The Plaintiff's case is thus dismissed.

JUDGE OF THE COURT OF APPEAL