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

C.A. Case No.1282/2000 (F)

D.C. Ratnapura Case No.10939/RE

M.Z.M. Ummu Ayesha
"Ayeshdale" Main Street,
Dharga Town.
PLAINTIFF

-Vs-

1. Kathaluwa Ananda Liyanage (Deceased)
   Hakamuwa, Marapana.
1A. Weerarathne Patabandige Sriya Liyanage
1B. Kathaluwa Pawithra Chandima Liyanage
1C. Kathaluwa Roshan Indika Liyanage
   All of No.16, Warakatota Road,
   Ratnapura.
2. M.I. Salman Faris (Deceased)
2A. Salman Faris Mohamed Sahan
   No.157, Main Street,
   Ratnapura.
   DEFENDANTS

AND

M.Z.M. Ummu Ayesha (Deceased)
"Ayeshdale" Main Street,
Dharga Town.

1A. **Ahamed Jeffrey Mohamed Akbar**
"Ayeshdale" Main Street,
Dharga Town.
Substituted PLAINTIFF-APPELLANT

-Vs-

1. **Kathaluwa Ananda Liyanage** (Deceased)
1A. **Weerarathne Patabandige Sriya Liyanage**
1B. **Kathaluwa Pawithra Chandima Liyanage**
1C. **Kathaluwa Roshan Indika Liyanage**
All of No.16, Warakatota Road,
Ratnapura.
2. **M.I. Salman Faris** (Deceased)
2A. **Salman Faris Mohamed Sahan**
No.157, Main Street,
Ratnapura.
DEFENDANT-RESPONDENTS

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

COUNSEL : Anuruddha Dharmaratne with Indunil Piyadasa for the Substituted-Plaintiff-Appellant

Lasitha Chaminda with Mihiri Abeyratne for the Defendant-Respondent

Decided on : 02.05.2019

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

The original Plaintiff instituted this action by a plaint dated 06.05.1992, seeking to eject the 1st and 2nd Defendants from premises bearing Assessment No. 34, Warakatota Road, Ratnapura (previous Assessment No.16). The Plaintiff instituted this action on two grounds, namely,

*a.* Arrears of rent; and

*b.* Sub-letting the said premises by the 1st Defendant to the 2nd Defendant.

The 1st Defendant filed his answer dated 08.06.1993 and denied the claims of the Plaintiff and prayed, *inter alia* for a dismissal of the Plaintiff's action. The 2A Defendant too filed an undated answer and prayed for a dismissal of the Plaintiff's action.

The matter was taken up for trial on 13.10.1997 where two admissions were recorded, whereby there were admissions to the effect that the Plaintiff had let the said premises to one K.W. Liyanage and upon his death the Defendant Ananda Liyanage became the tenant of the said premises under the Plaintiff and that the said premises was governed by the Rent Act, No.7 of 1972 (as amended).

As for issues the Plaintiff raised Issues Nos.1 to 5 among which Issue No.2 raised by the Plaintiff was whether the 1st Defendant without the written authority of the Plaintiff sub-let the said premises to the 2nd Defendant. The 1st Defendant raised Issues Nos.6 to 11 and the 2A Defendant raised Issues Nos.12 and 13.

On behalf of the Plaintiff, her son Ahamed Jiffrey Mohamed Akbar, Upali Hemachandra- a clerk from the Ratnapura Municipal Council and Gurubavila Lekamlage Don Karunadasa gave evidence and documents **"P1"** to **"P3"** and **"Y"** were marked in evidence.

During the pendency of the action, the 1st Defendant passed away and at the trial his widow the 1A Defendant gave evidence with the adduction of documentary evidence **V1** to **V53A**. The 2A Defendant did not call any witnesses to testify.

In a judgment dated 05.10.2000 the learned District Judge dismissed the Plaintiff's action.

It is against this judgment that the Plaintiff has preferred this appeal.

Upon a perusal of the judgment it is clear that the learned trial Judge has rejected the first cause of action relied upon by the Plaintiff, namely, arrears of rent on the basis of which the tenancy of the Defendant was terminated by letter marked **P1** dated 10.02.1986, but the action was filed five years later on 06.05.1992 and after the said letter **P1** rent had been deposited in the Municipal Council, and the Plaintiff had not sent a second letter of Demand terminating the tenancy prior to filing action.

The Plaintiff had admitted to the defect vin the first cause of action in her written submissions to the District Court.

Then the question remains whether the alleged sub-letting of the said premises by the 1st Defendant to the 2nd Defendant in the second cause of action has been established.

The Plaintiff took the stance that the 1st Defendant sub-let the said premises to several persons during various periods of time and from 1991 sub-let the said premises to the 2nd Defendant. The Plaintiff's position was that the 1st Defendant could not take advantage of the benefit of the Rent Act, and was therefore liable to be ejected in terms of Section 10(2) of the Rent Act.

The learned District Judge proceeded to reject the second cause of action mainly on the ground that no notice of termination of the tenancy had been given to the 1st Defendant as regards subletting. It is the decision of the District Court that a condition precedent to institution of action on the ground of sub-letting was a letter of demand and no cause of action lies without this condition being satisfied-*see* page 164 2nd paragraph, and 166 1st paragraph.

It has to be noted that nowhere in Section 10(2) of the Rent Actis found a specific reference to giving of a notice terminating the tenancy before filing action in relation to a cause of action based on sub-letting.

It was contended before this Court that if the 1st Defendant had sub-let the premises to the 2nd Defendant without the prior written approval of the Plaintiff, the 1st Defendant had infringed the provisions of Section 10(2) of the Rent Act. The cause of action arises from the mere fact of subletting andin such a situation it was contended that no notice of termination of a tenancy was necessary before an action for ejectment on the basis of sublettingwas instituted.

The learned Counsel for the Plaintiff-Appellant cited ***Wimalasooriya v. Ponniah*** 52 N.L.R 191 wherein it has been held, *inter alia*, that, "where a tenant sub-let the leased premises in contravention of section 9 of the Rent Restriction Act, No.29 of 1948, the landlord is entitled to institute proceedings in ejectment without terminating the tenancy by notice". Section 9 of the Rent Restriction Act, No.29 of 1948 is identical to Section 10 of the Rent Act.

I take the view that the learned District Judge was in error on this question of law namely termination of tenancy was mandatory before action was filed on the basis of sub-letting.

The question then arises whether sub-letting has been established within the four corners of Section 10(2) of the Rent Act. It is the decision of the learned District Judge that the Plaintiff has not established the conditions stipulated in Section 10(2) of the said Rent Act.

Turning to evidence one finds that the Plaintiff's son Mohamed Akbar testified that the 1st Defendant had sub-let the said premises to the 2nd Defendant to carry on a business of a jewelry workshop-*see* pages 76, 79 83 and 84 of the Appeal Brief.

This evidence was corroborated by the testimony of Gurubavila Lekamlage Don Karunadasa who stated that he had provided security services to the jewelry workshop and a document detailing the relevant Security Services Agreement was marked as **Y**-*see* pages 122 and 123 of the Appeal Brief, and document marked **"Y"** at page 297 of the Appeal Brief.

The learned trial Judge has rejected the said evidence on the basis that there had been litigation between the said witness and the 1st Defendant, and therefore the said witness was unworthy of credit.

Be that as it may, notwithstanding the fact that there was litigation between the witness and the 1st Defendant, the totality of evidence has to be evaluated to ascertain whether subletting has been proved.

The said witness Karunadasa explained that the litigation was in relation to non-payment of EPF. It was established that the 1st Defendant had worked as a security guard under the said witness Karunadasa.

Therefore the 1st Defendant could not have carried on the business of hiring loudspeakers at the said premises whilst at the same time working as a security guard under the said witness Karunadasa.

The learned District Judge has also not considered the cross-examination of the witness Karunadasa on behalf of the 2nd Defendant, which clearly establishes that the 2nd Defendant had carried on a business jewelry workshop at the said premises. (Vide pages 131 and 132 of the Appeal Brief).

In the circumstances the testimony of Karunadasa that he provided security services to the jewelry workshop situated in the said premises which jewelry workshop was owned by the 2nd Defendant had to be accepted. The fact that the 1st Defendant had worked as a security guard under Karunadasa is borne out by Karundasa's evidence and in my view the previous litigation between the 1st Defendant and Karunadasa does not cast a dent on the truthfulness of Karunadasa's evidence.

On the other hand the 1st Defendant admittedly at one time carried on a business of hiring loudspeakers. The 1st Defendant did not have a jewelry workshop as his own business. Therefore it is evident that the jewelry workshop carried on the said premises was someone else's business, which clearly proves that the 1st Defendant had sub-let the said premises without any authority from the Plaintiff.

It would appear that the learned District Judge has misdirected on these facts and such misdirection would amount to an error of law.

It is commonplace that sub-letting is done in secrecy and there is a string of authorities for the proposition that when a Plaintiff establishes a *prima facie* case of sub-letting the burden shifts to the Defendant to explain the nature of the occupation of the alleged sub-tenant.

***Sangadasa v. Hussain and Another*** (1999) 2 Sri L.R 395, at page 397 is a case in point of fact:-

> *"What is the nature of the burden cast on a Plaintiff Landlord who alleges sub-letting? It is too well known that the act of sub-letting (without the permission of the landlord) of rent controlled premises is done in stealth for obvious reasons. The Landlord may not be able to ascertain the true nature of the occupation of the sub-tenant with precision because that is usually a matter within the exclusive knowledge of tenant and sub-tenant only. In these circumstances, it is sufficient for the landlord to establish a prima facie case of sub-letting and the burden then shifts to the tenant to explain the nature of occupation of the alleged sub-tenant."*

The dicta of ***Thaha v. Sadeen*** 72 N.L.R 142, at page 144, is to the same effect:-

> *"Sub-letting, without consent, as can well be imagined, is unlike letting. It is done by the tenant in stealth for his profit. The landlord may in the generality of cases never know whether his premises were sub-let. Proof of sub-letting is in the circumstances, invariably difficult to obtain, and if in addition, it is required that the landlord should establish the date of sub-letting, it will be casting on the landlord a well nigh impossible burden. My interpretation of this section is that at whatever time it is discovered that the premises have been sub-let then on that discovery the cause of action arises."*

The learned trial Judge has not borne in mind the aforesaid principles and fell into an error by concluding that the Plaintiff had failed to prove the sub-letting.

The learned trial Judge has also not considered the fact that the 1st Defendant had passed away and only his widow gave evidence. Even though she merely denied sub letting, she has not explained how her husband ran a loud speaker hiring business, whilst working as a security guard.

The learned trial Judge has also stated that this action has been filed as an ejectment and damages action but it should have been filed a rent and ejectment action, and therefore the Plaintiff from the beginning has based his case on a wrong footing-*vide* page 166.

But upon a perusal of the plaint it is clear that the said premises is governed by the Rent Act and the 1st Defendant was the tenant of the Plaintiff, and it was established at the trail that the 1st Defendant had sub-let the said premises to the 2nd Defendant. In the circumstances one cannot proceed to dismiss the Plaintiff as defective merely because the caption of the plaint states ejectment and damages. It is the fact in issue and the evidence led thereon which brings out the scope and nature of the action.

After the plaint had been accepted and a trial had proceeded on the said plaint, one cannot now classify the plaint as defective.

A perusal of the admissions and issues clearly bring out the scope of the action-*see* page 66. Issue No.2 is in relation to sub-letting of the said premises to the 2nd Defendant. The trial had proceeded on the said issues and it is axiomatic that once the issues are raised pleadings recede to the background-*see* ***Dharmasiri v. Wickrematunga*** (2002) 2 Sri L.R 218 which reiterates the long established principle that 'once issues are framed and accepted, pleadings recede to the background'.

In the circumstances one cannot now look back at the caption and dismiss the action on the ground that the plaint is defective. No issue has been raised to the effect that the action cannot be maintained because the plaint is presented as an ejectment and damages action.

On a consideration of the totality of evidence I take the view that the learned District Judge erred in fact and law in dismissing the Plaintiff's action and as the Plaintiff has

established sub-letting, I would set aside the judgment of the learned trial Judge dated 05.10.2000 and allow this appeal holding that the judgment is entered in favour of the Plaintiff as prayed for in the plaint.

JUDGE OF THE COURT OF APPEAL