THE
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DIGEST

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PARTITION ACT, NO. 21 OF 1977 – Partition Act, section 23(1) - *Lis pendens* registered in respect of a larger land?–Corpus not properly identified - Should the judgment be allowed to stand?

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DIAS

VS

YASATILAKA AND OTHERS

COURT OF APPEAL.

SOMAWANSA, J. (P/CA).

EKANAYAKE, J.

CA 897/92 (F).

DC GALLE 9396/P.

MARCH 4, 2005.

Partition Law, No. 21 of 1977 - Partition Act, section 23(1) - Lis pendens *registered in respect of a larger land?–Corpus not properly identified - Should the judgment be allowed to stand?*

The *lis pendens* has been registered in respect of a larger land which is inclusive of an extent acquired by the State. The Court allowed the partitioning of the larger land.

HELD:

1. The *lis pendens* has been registered in respect of a larger land and not in respect of the *corpus.* The trial judge has not properly identified the *corpus.*

2. The impugned judgment cannot be allowed to stand - the plaintiff's action has to be dismissed.

APPEAL from the judgment of the District Court of Galle.

Cases referred to :

Grampy Appuhamy vs. Monis Appuhamy 60 NLR 337.

Dr. Jayantha Almeida Gunaratne, PC for 3rd defendant-appellant.

Manohara R. de Silva for plaintiff-respondent.

Athula Perera for 1st defendant-respondent..

Cur. adv. vult.

March 04, 2005.

CHANDRA EKANAYAKE, J.

This is an appeal preferred by the 3rd Defendant–Appellant (hereinafter sometimes referred to as the 3rd Defendant), to set aside the judgment of the learned Additional District Judge of Galle dated 5.11.1992 and the interlocutory decree entered in the case, to declare that the 3rd Defendant is entitled to the *corpus* and to have the action of the Plaintiff dismissed.

The Plaintiff - Respondent (hereinafter sometimes referred to as the Plaintiff) instituted this action in the District Court of Galle to partition the land called Pambaketiye godawatte *alias* contiguous lots 3, 4, 5 (after a re-survey of contiguous lots 3 and 4) of Pambaketiyegodawatte which is morefully described in paragraph 2 of the plaint dated 03.01.1995 in extent 4 Acres 3 roods 12.5 Perches (4A., 3R., 12.5P) which being the extent after excluding an extent of 5 Acres 4.9 Perches (5A., 0R., 4.9P) which

was said to have been acquired by the State from the larger land of 9 Acres 3 Roods 17 Perches (9A., 3R., 17P). According to the pedigree pleaded in paragraphs 3 to 9 and on acquistion of prescriptive rights as averred in paragraph 10 of the plaint, the Plaintiff had prayed for an order to partition the above mentioned *corpus.* It has to be observed that by paragraph 9 of the plaint, Plaintiff has claimed that he and the 1st Defendant were entitled to an undivided 1/2 share each from the *corpus.*

The 3rd Defendant and the 2nd Defendant being father and son having claimed rights before the Court Commissioner, Sisira Amendra (L. S.) when carrying out the preliminary survey, were made 3rd and 2nd Defendants in the case subsequently. The 1st Defendant by his statement of claim dated 21.05.1987 whilst admitting the pedigree and the share shown to him in the Plaint prayed for an order making him entitled to the aforesaid share from the corpus together with what was claimed by him at the preliminary survey.

The 2nd and 3rd Defendants by their joint statement of claim dated 11.09.1997 whilst denying the averments in the plaint and the statements of claim of the other Defendants which are inconsistent with the averments in their statement and the contents of the preliminary plan bearing No. 62 and the report annexed had prayed for a dismissal of the Plaintiff's action and for a declaration that the 3rd Defendant is entitled to the land proposed to be partitioned. It was further contended by the 2nd and 3rd Defendants *inter -alia* that, neither the Plaintiff nor the 1st Defendant has possessed the land proposed to be partitioned and that the 3rd Defendant had acquired

prescriptive title having independent and uninterrupted possession against the Plaintiff and the 1st Defendant for well over 18 years.

Case had proceeded to trial on points of contest 1 and 2 raised on behalf of the Plaintiff; and 3 and 4 raised on behalf of the 2nd and 3rd Defendants. An admission had been recorded at the commencement of the trial to the effect that the corpus was the land depicted in plan No. 62 of S. Amendra (L. S.) However the 2nd and 3rd Defendants at the conclusion of the examination-in-chief of the Plaintiff had resiled from the said agreement (at page 150 of the brief). It has to be observed that no point of contest had been raised with regard to what the corpus was. However the learned Judge in his judgment has arrived at the finding that the *corpus* is the land depicted as lot 1 in the preliminary plan No. 62 (X).

Plaintiff's case had been concluded with the evidence of the Plaintiff, one Malini Sirimathie (an officer from the Land Acquisition Department of the Galle Kachcheri), one M de Silva (an Officer of the National Housing Department), one Marthenis De Silva and Sisira Amendra (Court Commissioner). On behalf of the 2nd and 3rd Defendants, Samarapala Simon, Nandasiri, Diyonis and one Somadasa had testified. After filing of written submissions by the parties who contested the case the learned Judge had pronounced the impugned judgment and ordered to partition the land according to the shares given therein *viz* - undivided 1/2 share each to the Plaintiff and the 1st Defendant and the improvements and plantation also to go according to the judgment. This is the judgment now appealed against.

At the hearing of this appeal all the parties had agreed to resolve the same by way of written submissions and same have been tendered by the Plaintiff - Respondent and 1st Defendant - Respondent. The 3rd Defendant - Appellant had agreed to abide by the written submissions initially filed in the case.

What needs consideration first is whether a *lis pendens* was correctly registered in respect of the land depicted in the preliminary plan. According to the judgment the learned Judge had concluded that the corpus to be partitioned was the land depicted as lot 1 in the preliminary plan X. But it has to be observed that the *lis pendens* in this case has been registered in respect of a larger land in extent 9A., 3R., 7 P which is inclusive of the extent of 5A., 0R., 4.9P which was the portion said to have been acquired by the State as seen by document marked P 11. Furthermore the plaint did not contain a schedule but the land sought to be partitioned was described in paragraph 2 of the plaint. That description was one giving the boundaries in respect of the said larger land, neither the boundaries of the portion which has to be partitioned nor the portion of the land said to have been acquired by the State was specified. When the learned Judge allowed the partitioning of the land depicted as lot 1 in plan X it was inclusive of the portion which was acquired by the State. This definitely is another aspect of the matter which needs consideration. In the light of the above it has become crystal clear that the *lis pendens* which was registered in the case was in respect of a larger land but not in respect of the correctly identified *corpus.*

It has to be observed that the learned Judge in his judgment has arrived upon the finding (at page 311) that the *corpus* is the land depicted as lot No. 1 in preliminary plan X. The Learned Judge has stated to the following effect at pages 310 and 311 of the brief :

..... නමුත්, පැමිණිල්ලෙන් කැඳවන ලද බලය ලත් මිනින්දෝරු සිසිර අමේන්ද්‍ර මහතාගේ සාක්ෂිය සලකා බලන විටද, එම සාක්ෂිකරුගෙන් විත්තිය වෙනුවෙන් හරස් ප්‍රශ්න අසා නොමැති කරුණ සලකා බලන විට ද, එම සාක්ෂිකරුගේ සාක්ෂිය අනුවම පිඹුර සකස් කරන අවස්ථාවේදී මායිම් සම්බන්ධව කිසිම විරද්ධත්වයක් කවුරුන් විසින් හෝ ඉදිරිපත් නොකල බව, අනාවරණය වන කරුණ සලකා බලන විට ද, මෙම නඩුවට අදාල විෂය වස්තුව "X"දරන පිඹුරෙහි කැබලි අංක 1 වශයෙන් නිරූපනය කර ඇති බව මම තීරණය කරමි.

Just because *Mr. Amendra* (L. S) was not cross examined by the defence and that there had been no objection by anybody when carrying out the survey the learned Judge cannot conclude that the *corpus* was lot No. 1 in Plan X. In my view it is an erroneous conclusion. According to the plan marked X and report marked X1 both had been prepared without any reference being made to a survey plan and/or to the portion acquired by State. Therefore it is clear that there had been no material before the learned Judge to arrive at the finding as to what the *corpus* was. Accordingly in those circumstances I conclude that the learned Judge had erred when he decided that the *corpus* was the land depicted as lot 1 in plan X. In this context I have considered the principle of law offered in the case of *Brampy Appuhamy vs Monis Appuhamy*[1] In the above mentioned case the *corpus* sought to be partitioned was described in the plaint as a land about 6 acres in extent, and a commission was issued to a surveyor to survey a

land of that extent. The surveyor, however, surveyed a land of only 2 Acres and 3 Roods. Interlocutory decree was also entered in respect of a land 2 Acres and 3 Roods in extent without any question being raised by any of the parties as to the wide discrepancy between the extent given in the plaint and that shown in the plan made by the surveyor. None of the defendants had averred under section 23(1) of the Partition Act that only a portion of the land described in the plaint should be made the subject matter of the action. It was held *inter - alia* that the Court acted wrongly in proceeding to trial in respect of what appeared to be a portion only of the land described in the plaint". In the instant case too the learned Judge has proceeded to trial having determined the *corpus* as lot 1 in preliminary plan x which being a land less in extent to what was described as the land proposed to be partitioned in paragraph 2 of the plaint. This also becomes a cardinal error committed by the learned Judge in ordering a partition in respect of the land depicted in plan x.

For the above reasons my considered view is that the impugned judgment cannot be allowed to stand, and the same has to be set aside. Further I conclude that the above grounds are sufficient to dismiss Plaintiff's action. The need does not arise to consider the merits of the 3rd Defendant's prescriptive claim.

Accordingly, the appeal is allowed with costs fixed at Rs.10,000. The judgment of the learned Judge dated 05.11.1992 is hereby set aside and the Plaintiff's action is dismissed with costs. The Learned Additional District Judge is directed to enter decree accordingly.

The Registrar of this Court is directed to forward the record in Case No. 9396/P to the respective District Court forthwith.

ANDREW SOMAWANSA, J(P/CA) – *I agree.*

Appeal Allowed.

Plaintiffs action dismissed.

CAROLINE NONA AND OTHERS

VS

PEDRICK SINGHO AND OTHERS

COURT OF APPEAL.

SOMAWANSA, J, (P/CA) AND

WIMALACHANDRA, J.

CA 603/2004.

DC HORANA 1799/P.

MARCH 21, 24, 2005.

Partition Law, No. 21 of 1977 - Final decree entered - Revisionary powers invoked - Miscarriage of Justice - Judgment palpably wrong?– Is intervention by way of revision permitted?–Laches - Can delay be excused if judgment is manifestly erroneous? - Court of Appeal (Appellate Procedure) Rules 1990- Non compliance - Is it fatal ?

The 1st defendant – petitioner sought to set aside that part of the interlocutory order granting the house and the toilet to the 2nd defendant and the order

made in the final decree that Rs.178,000 shall be paid as compensation by the 1st defendant to the 2nd defendant as the said house and toilet had been included in the lot allotted to the 1st defendant. The application made to the original Court was dismissed on the ground that it was a belated application.

The defendant – respondents contended that revision does not lie as there are no exceptional circumstances urged and there is delay and violation of the Court of Appeal (Appellate Procedure) Rules.

HELD:

(1) Without an iota of evidence that the house and toilet belong to the 2nd defendant, the District Judge had granted the house and toilet to the 2nd defendant despite the fact that the plaintiff, the only person who gave evidence without any ambiguity had said that the 2nd defendant's house was no longer in existence and the 1st defendant has constructed a house.

(2) The decision of the District Judge amounts to a miscarriage of justice. Granting the house/toilet to the 2nd defendant is wrong ex-facie. Those are exceptional circumstances, for the court to exercise revisionary jurisdiction having regard to the facts and circumstances of the case.

(3) If the impugned order or part of the judgment is manifestly erroneous and is likely to cause grave injustice, the court should not reject the application on the ground of delay alone.

Per Wimalachandra, J.

"In my view if this court is unable to understand the order sought to be revised in the absence of the relevant documents, it is only then the failure to observe the Rules and the failure to file the relevant documents will amount to a fatal irregularity which would result in the dismissal of petition."

APPLICATION in revision from an order of the District Court of Horana.

Cases referred to :

1. *Rustom vs. Hapangama and Co.* 1978-79 Sri LR 225
2. *Soysa vs. Silva 2000* 2 Sri LR 235
3. *Biso Menike vs. Cyril de Alwis* 1982 1 Sri LR 368
4. *Kiriwanthe vs. Navaratne* 1990 2 Sri LR 393

Champaka Ladduwahetty for 1st defendant - petitioner,

Ifthikar Hushain for 2nd defendant–respondent.

Cur. adv. vult.

October 28, 2005.

WIMALACHANDRA, J.

This is an application in revision filed by the 1st defendant–petitioner (1st defendant) from the judgment and the interlocutory decree of the learned

District Judge of Horana entered on 01.06.2001 in the partition action bearing No. 1799/P.

By this application the 1st defendant seeks to set side that part of the interlocutory order entered in the partition action granting the house and the toilet to the 2nd defendant and the order made in the final decree that Rs.178,000 shall be paid as compensation by the 1st defendant to the 2nd defendant as the said house and toilet had been included in the lot allotted to the 1st defendant. The Learned District Judge refused to grant the relief prayed for by the 1st defendant. The Learned Judge in his order observed that the 1st defendant had made a belated application to amend the judgment and the interlocutory decree nearly one year after the interlocutory decree had been entered. The reason given by the 1st defendant for the delay was that she had been ill. However the 1st defendant had failed to produce a medical certificate to establish that she had been ill and had been unable to give the necessary instructions to her lawyer.

When the partition action had come up for trial on 28.05.2001 only the plaintiff and the 2nd defendant had been present in Court and they had been represented by counsel. Apparently, as there was no dispute as to the *corpus*, the pedigree and the improvements, only the plaintiff had given evidence. As regards the improvements apart from the plantation the plaintiff had stated that the 2nd defendant was in possession of a house and toilet and that the said house was no longer in existence in the land to be partitioned.

The plaintiff said : (at page 5 of proceedings dated 28.05.2001)

"ගෙයක් සහ වැසිකිලියක් දෙවන විත්තිකරු බුක්ති විඳිනවා කියා තිබෙනවා. ඒ ගේ දැන් පොළොවේ නැහැ."

The District Judge in his judgment had granted the house and toilet to the 2nd defendant despite the fact that the plaintiff, the only person who gave evidence at the trial without any ambiguity, had said that the 2nd defendant's house was no longer in existence. Besides, the 2nd defendant's counsel on 18.06.1999 had submitted to Court that the 1st defendant had demolished the house in question and thereafter commenced constructing a house towards the end of the land.

Moreover, the learned counsel for the 1st defendant had drawn attention to the preliminary survey report marked 'P3 (a).' It is to be observed that the only house and the toilet on the land to be partitioned had been claimed by the 1st defendant before the surveyor and no one else. Even at the trial the 2nd defendant had not made a claim to the aforesaid house and toilet despite the 2nd defendant's presence at the trial and also represented by a lawyer.

In the circumstances, it seems to me that the District Judge, without any evidence and acting arbitrally, had granted the house and toilet to the 2nd defendant. After the final partition the said house and toilet had been

included in the lot allotted to the 1st defendant and the 1st defendant had been called upon to pay a sum of Rs. 193,583 to the 2nd defendant, which included the value of the house amounting to Rs.178,000. The 1st defendant invokes the revisionary jurisdiction of this Court to remedy this situation.

In these circumstances, without an iota of evidence that the said house and toilet belongs to the 2nd defendant, the learned Judge had granted the said house and toilet to the 2nd defendant. In the circumstances, in my view the decision of the District Judge amounts to a miscarriage of justice and that part of the judgment granting the house and toilet to the 2nd defendant is wrong *ex--facie*. This Court possesses the power to set aside in revision an erroneous decision of the District Court which amounts to a miscarriage of justice in an appropriate case even though an appeal against such decision has been available to the petitioner and he has not resorted to that remedy. It was held in the case of *Rustom vs. Hapangama and Co.*[1] that "the powers by way of revision conferred on the Appellate Court are very wide and can be exercised whether an appeal has been taken against an order of the original Court or not. However, such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptional circumstances are is dependant on the facts of each case."

In this situation, exceptional circumstances do exist for this Court to exercise its revisionary jurisdiction having regard to the facts and circumstances of this case. It is my view that non - interference by this

Court will cause a denial of justice and irremediable harm to the 1st defendant.

It was held in the case of *Soysa vs. Silva*[2] that the power given to a superior Court by way of revision is wide enough to give it the right to revise any order made by an original Court. Its object is the due administration of justice and correction of errors sometimes committed by the Court itself, in order to avoid miscarriage of justice.

The next question to be decided is whether the 1st defendant is guilty of laches. The judgment and the interlocutory decree of the aforesaid partition action had been entered on 01.06.2002. The 1st defendant had made the application to the District Court to amend the judgment and the interlocutory decree on 17.07.2003 when the final plan No.1401 marked 'P6' had come up for consideration on 28.01.2004 with regard to the scheme of partition proposed by the surveyor. The 1st defendant made an application to the Court to amend the interlocutory decree and the judgment and sought that the portion of the interlocutory decree entered in this case granting the house to the 2nd defendant be set aside. The learned counsel for the 1st defendant submitted that this appllication in revision was filed on 04.03.2004. and the 1st defendant had sought to amend the interlocutory decree dated 01.06.2001 after a lapse of two years and ten months.

The question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. If the impugned order or that

part of the judgment is manifestly erroneous and is likely to cause grave injustice, the Court should not reject the application on the ground of delay alone.

In the case of *Biso Menike Vs. Cyril de Alwis*[3] *Sharvananda*, J. (as then he was) at 379 observed :

> "When the Court has examined the record and is satisfied the order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically."

In the instant case the learned Judge has completely disregarded the evidence adduced at the trial with regard to the ownership of the said house and toilet and held that the house should belong to the 2nd defendant. This finding of the District judge is manifestly erroneous and has deprived the 1st defendant or his right to the said house. in the circumstances it appears that the 1st defendant has made out a strong case amounting to a positive miscarriage of justice. In this situation, in my view, despite the

fact that there is a delay on the part of the 1st defendant in making this application , as the order challenged discloses a miscarriage of justice which shocks the conscience of Court since it had deprived the 1st defendant of some right, justice of the case requires the use of the discretion of this Court to excuse her delay in coming to court.

It now remains to consider the preliminary objection raised by the learned counsel for the 2nd defendant with regard to the non compliance with Rule 3 (1) of the Court of Appeal Rules. The learned counsel submitted that the 1st defendant had failed to comply with Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules 1990 in failing to annex certified copies of the application made to the District Court seeking to amend the interlocutory decree entered in this action. The aforesaid Rule 3(1) is similar to Rule 46 of the Supreme Court Rules.

The rules of procedure have been devised with the sole object of eliminating delay and facilitating due administration of justice. On an examination of the decisions made by the Appellate Courts, it appears that the Superior Courts have time and again emphasized the mandatory nature of the observance of the Appellate Court Rules. it seems to me that the observance of the Rules is necessary to understand the order sought to be revised and to place it in its proper context. In my view, if this Court is unable to understand the order sought to be revised in the absence of the relevant documents, it is only then the failure to observe the Rules and the failure to file the relevant documents will amount to a fatal irregularity which would result in the dismissal of the petition.

In the case of *Kiriwanthe vs. Navaratne*[4] Mark Fernando, J. held that the weight of authority thus favours the view that while these rules (Appeal Procedure Rules) must be complied with, the law does not require automatic dismissal of the application or appeal of the party in default. The consequence of non - compliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation, therefore, in the context of the object of the particular rule.

At the trial the parties have settled their disputes and had led the evidence of the plaintiff who was the only witness who gave evidence. The plaintiff in giving evidence had said that the house that was in the possession of the 2nd defendant is no longer on the ground. At page 5 of the proceedings dated 28.05.2001 the plaintiff who is the father of the 2nd defendant had said ;

"ගෙයක් සහ වැසිකිලියක් 2 වන විත්තිකරු භුක්ති විඳිනවා කියා තිබෙනවා. ඒ ගේ දැන් පොළවේ නැත"

The preliminary plan and the report of the surveyor were marked P2 and P2(a) respectively. It is to be seen that the only house on the land was claimed by the 1st defendant - petitioner and no one else. However, notwithstanding the evidence given at the trial the only house on the land was given to the 2nd defendant. The learned Judge has failed to consider the evidence given by the only witness, the plaintiff who said that the 2nd

defendant's house is no longer in existence. In the circumstances, I am of the view that the granting of the house to the 2nd defendant is an error on the face of the record which amounts to a miscarriage of justice which is an exceptional circumstance which warrants the exercise of the revisionary powers of this Court. In this application in revision, though the petitioner has not made available to Court a copy of the application made to the District Court by which she sought the amendment of the interlocutory decree, the copies of all the relevant documents are before this Court to understand the impugned order. The proceedings of the trial was produced marked "P4". The copies of the final partition plan and the judgment were produced marked P5, P6, and P6A respectively. The submissions made by the counsel at the inquiry were filed marked "P7". In my view these documents are sufficient to understand the order sought to be revised.

The preliminary objection raised by the respondent is overruled and acting in revision we set aside that part of the interlocutory decree entered in this case allotting the said house and the toilet to the 2nd defendant and we also set aside that part of the final decree granting compensation of Rs.178,000 being the value of the said house, to the 2nd defendant - respondent.

We make no order as to the costs of this inquiry.

ANDREW SOMAWANSA, J. (P/CA) – *I agree.*

Application allowed.

NELUM

VS

KADIJA UMMA

COURT OF APPEAL.

SOMAWANSA, J. (P/CA).

EKANAYAKE, J.

CA 100/95 (F).

DC KURUNEGALA 2936/L.

AUGUST 26, 2004.

NOVEMBER 16, 2004.

Leave and licence - Permission to occupy house - Contract of tenancy alleged - Importance of rent to be specified in document - True nature of the transaction– Intention? – Findings of primary facts - Not likely to be disturbed.

The plaintiff – respondent - Administrator of the estate of one R sought the ejectment of the defendants on the basis that the said R had permitted the 1st defendant - appellant by document P5 to occupy the house without any payment of rent but on the undertaking that vacant possession would be handed over when requested by R or his heirs. The defendant had refused to vacate the premises. The defendant – appellant contended that he is a tenant and that certain priviledges were extended in lieu of the rent payable by P 5. The trial court held with the plaintiff respondent.

On appeal –

HELD:

1. To constitute a contract of tenancy, quantum of rent is an essential requirement. P5 does not fix a quantum, therefore no contract of tenancy has been created by P5.

2. Mere permissive occupation by a person of property of another, even if some payment of money for the personal privilege extended is made, is not a letting of premises creating a tenancy.

3. Although there is some reference to 'in lieu of rent' in P5 the use of words such as rent, tenancy, rent in advance, is not conclusive proof of a contract of tenancy.

4. The true nature of the transaction is to be ascertained by a consideration of all the relevant facts. The Court must find out what the parties intended to create.

Per Chandra Ekanayake, J.

"The trial judge who was in an advantageous position of listening to the witnesses has proceeded to rely upon the testimony of the plaintiff. It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal."

APPEAL from the judgment of the District Court of Kurunegala.

Cases referred to *:*

1. *Theevandram vs. Ramanathan Chettiar 1986 2 Sri LR - 219 (SC)]*
2. *Hameed vs. Weerasinghe and Others 1989 1Sri LR - 217 (SC)*

3. *Alwis vs. Piyasena Fernando 1993 1 Sri LR 119 (SC)*

4. *Eileen Peiris vs. Marjorie Patternott Sc 61/93 Spl LA 91/93 CA 374/96*

S. C. B. Walgampaya, PC for 1A/2A substituted defendant – appellant.

Hemasiri Withanachchi with Hussain Ahamed for plaintiff – respondent.

Cur. adv. vult.

June 17, 2005.

CHANDRA EKANAYAKE, J.

This is an appeal preferred by the Defendant - Appellant (hereinafter sometimes referred to as "the Defendant") against the judgment of the learned Additional District Judge of Kurunegala dated 22.02.1995 moving to set aside the same and for a dismissal of the Plaintiff's action.

The Plaintiff - Respondent (hereinafter sometimes referred to as "the Plaintiff") has filed this action in the capacity of Administratrix of the estate of late C. Mohamed Rasheed who was said to be the lawful owner of the land and premises morefully described in the schedule to the plaint depicted as Lot 1 in Plan No. 3016 of S. G. Gunasekara (Licensed Surveyor) in extent of 1 Rood and 8 2/3 Perches seeking *inter -alia*, for ejectment of the defendants and restoration of possession thereof and damages prayed in sub paragraph (2) of the prayer to the plaint. It was contended by the plaintiff (vide Paragraph 4 of the Plaint) that said Rusheed the late husband of the plaintiff, by writing entered into on 13.11.1963 with the 1st defendant, permitted the 1st defendant to occupy the house standing thereon

without any payment of rent but on the undertaking that the vacant possession would be handed over when requested by the said Rusheed and his heirs. Despite the requests made by the plaintiff the defendants continued to be in unlawful possession of the same disputing plaintiff's rights and causing damage as averred in the plaint.

The original 1st and 2nd defendants by their joint amended answer dated 18.10.1989 whilst denying the accrual of the cause of action and entering into the aforesaid writing, averred that they were in occupation of the premises as tenants of late Rasheed. In the aforementioned premises they had moved for a dismissal of the plaintiff's action and for a declaration that they are the tenants of the house in the subject matter.

Having admitted plaintiff's title to the subject matter, case had proceeded to trial on issues 1 to 4 and 5 to 10 raised on behalf of the plaintiff and the defendants respectively.

It was common ground that the original 1st and 2nd defendants were husband and wife and during the pendancy of the action 1A/2A defendant - appellant (hereinafter referred to as the appellant) who was their daughter was substituted in the room of the original 1st and 2nd defendants after their death.

The plaintiff while testifying having produced the letters of Administration granted to her in Case No. 6701/T by which the estate of her late husband was administered stated that she is the widow of said Rasheed and administratrix of his estate, and the subject matter in this case was included in the inventory (P2) tendered in the said testamentary case. She has futher testified to the fact that Rasheed became entitled to the

subject matter by virtue of the final decree in D. C. Kurunegala Case No. 2664/P marked P3 and Sinniah the original 1st Defendant came into occupation of the house therein on a writing marked P5 given by her late husband. It is seen from the proceedings of 7.5.91 though this was objected to by the defence the Court had allowed it to be marked having overruled the objection. Further the uncontradicted position taken by this witness was her late husband had put the original 1st defendant Sinniah in possession under the terms and conditions set-out in the said writing marked P5 whereby said Sinnah had agreed to go into occupation of the said house and look after the same and in lieu of the rent payable by him to look after the 37 coconut trees in the land and to handover the crop of 25 trees to the said Rasheed, to pay the rates and taxes and to handover vacant possession of the same within 10 days of the notice to quit when given. After the death of her husband on 11.12.1983 the original 1st defendant prevented the plaintiff from collecting the coconuts as agreed upon disputing her rights.

Further it has to be observed that P7 is only an application made by the original 2nd defendant to the Rent Board of Kurunegala to remove an over hanging dangerous coconut tree and P9 being the order of the Board with regard to the same. But the application made for determination of rent (V12) had been subsequently dismissed as evidenced by VII due to the death of the original owner Rasheed during the pendency of the application.

The pivotal question to be decided in this case is whether the original 1st defendant and the 2nd defendant were the licensees or whether they were the tenants of the premises from the year 1961. Since title of the plaintiff was admitted by the defendant the burden shifts to the defendants to establish under what right they were in occupation of the premises.This well established principle was followed in several cases including

Theevandran vs. Ramanathan Chettiar [1] and *Hameed* vs. *Weerasinghe* and Others[2].

On behalf of the defence the substituted 1A/2A defendant gave evidence, although the original 2nd defendant was living at that time. On a consideration of the evidence of 1A/2A substituted defendant it is revealed that an attempt has been made to establish that the rates and taxes were paid by them and upto the time of Rasheed's death rent was paid to him at the rate of Rs.25 per month. Thereafter it was sent by money order. However, it is admitted in her evidence that over a period of 16 years Rasheed had never issued receipts for the same and when the plaintiff refused to accept rent, thereafter only the deceased 2nd defendant (mother) started depositing at the Rent Board. On a perusal of the evidence it has to be observed that although she has alleged that the appellant paid rent to Rasheed no receipts or any other document was produced in this respect. According to her own evidence when she was testifying in 1964 her age was 37 years and that she was born on 28.09.1957. If so in 1961 her age would have been around 4 years. At the time of giving evidence although the original 2nd defendant (mother) was living she has failed to give evidence in this regard despite the fact of her being the person who could be assumed to have a better knowledge of what took place in 1961. It has to be noted from the judgment the learned Judge has even considered the fact that the above witness was unable to say anything about the document P5 when she was questioned on the same. The Learned Judge who was in an advantageous position of listening to the witnesses has proceeded to rely upon the testimony of the plaintiff. In this regard it would[3] be pertinent to consider the case of *Alwis* vs. *Piyasena Fernando per* G. P. S. De Silva, C. J.–

"It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal."

Having considered the evidence I am of the view that the learned Judge has been correct in arriving at the finding that the original defendants were in occupation of the said house with the leave and license of late Rasheed.

The other position taken up by the appellant in this appeal is that certain services were rendered 'in lieu of rent' which gave rise to a tenancy. P5 clearly states that '.....' allowed to occupy the house free of rent". On behalf of the appellants it has been contended that P5 contains the words "in lieu of the rent payable by me : ..... " Contents of P5 are to the following effect.....

ක්‍රිස්තු වර්ෂ එක්දහස් නවසිය හැටතුනක් වූ නොවැම්බර් මස 13 වෙනි දින මල්ලවපිටියේදීය.

මෙහි පහත අත්සන් කරන මල්ලවපිටියේ පදිංචි කාෂිලෙබ්බේ මුහම්මදු රෂීඩ් වන මම මෙයින් ප්‍රකාශ කර සිටින්නේ :

කුරුණෑගල තෙලියගොන්නේ පිහිටි තෙලියගොන්න පටු මාවතේ අංක 9 දරන, අංක 924 දරන ප්ලැනේ සඳහන් අංක 6 සහ 7 ද වන කොටස් දෙකෙන් නොබෙදූ තුනෙන් දෙපංගුවක්, මාගේ පියා වන පකීර් පුල්ලෙලාගේ ලෙබ්බේ කන්ඩු ආරච්චිගේ කාසිලෙබ්බේ (ආරච්චි) විසින් මට දෙන ලදුව මා විසින් භුක්ති විඳිනු ලැබේ.

ඉහත කී කාසිලෙබ්බේ මුහම්මදු රෂීඩ් වන මෙහි පහත සඳහන් කරන පරිදි, එකී තෙලියගොන්නේ පදිංචි නීල් පෙරුමාල් සින්නයියා විසින් ඉටු කරන්නට බැඳෙන පොරොන්දු නිසා ඉහත කී ඉඩමේ පිහිටි මට අයිති ගෙට කුලිය නොගෙවා පදිංචිව සිටීමට ඉහත කී සින්නයියාට මෙයින් බලය දුනිමි.

ඉහත කී සිත්නයියා වන මමද, මට පදිංචියට හාර දෙන ලද ඉහත කී ගෙය ආරක්ෂා කර ගෙන එහි පදිංචිව සිටින බවටද, මා විසින් ගෙවිය යුතු ගෙවල් කුලිය වෙනුවට ඉහත කී ඉඩමේ පිහිටි පොල් ගස් 37 න් 25 ක පලදාව ආරක්ෂා කර ඒවා කලට වේලාවට කඩා ඉහත කී කාසි ලෙබ්බේ මුහම්මදු රෂීඩ්ට හාර දෙන බවට ද වරිපනම් ගාස්තු මා විසින් ගෙවන බවට ද, එකී ඉඩමෙන් මට අස්වෙන්නට දැන්වූ විට එසේ දැන්වූ දින දහයක් තුළදී අස්වෙන බවට ද මෙයින් පොරොන්දු වීමි.

But document P5 is amply clear with regard to the fact that 'no quantum of rent has been specified'. To constitute a contract of tenancy quantum of rent is an essential requirement. By P5 when no such quantum has been fixed obviously no contract of tenancy has been created by P5. Wille on Landlord and tenant at page 8 states as follows :-

> **"*Rent* - A definite agreement as to the amount of rent payable is an essential element of every contract of lease : so much so, that until the rent has been fixed, the contract is not considered to be complete."**

Therefore I conclude that as no quantum of rent has been specified or it is silent about even subsequent determination of rent P 5 does not create a contract of tenancy. Therefore the authorities cited by the Appellant have no application since those have been instances where services were quantified in money. No evidence was placed by the defendants to establish determination of any rent. Even the application made (VII) for determination of rent had been dismissed. Therefore I conclude that the contention of the 1A/2A appellant's counsel, that the deceased 1st defendant did pay a rent by rendering services, cannot succeed.

In my view necessity has also arisen to consider the decision in *Eileen Prins V. Marjorie Patternott*[4] wherein it was held to the following effect by G. *R. T. Dias Bandaranayake, J. (S. B. Gunawardena, J,* and *P. R. P. Perera, J.* agreeing) that :

(a) Section 10 (1) of the Rent Act, No. 07 of 1972 sets out what constitutes the letting of a part of premises. In such a tenancy,

(i) the object should be to let and hire;

(ii) the portion of the premises must be properly defined for exclusive occupation by the tenant;

(iii) the landlord should relinquish his right of control over such part of the premises; *and*

(iv) there must be payment of a fixed rent which is ascertainable at any time by a definite method.

(b) Mere permissive occupation by a person, of property of another, even if some payment of money for the personal privilege extended is made, is not a letting of premises creating a tenancy.

(c) the true nature of the transaction is to be ascertained by a consideration of all the relevant facts. The Court must find out what the parties intended to create.

(d) The use of words such as rent, tenancy, rent in advance *etc.* is not conclusive proof of a contract of tenancy. These are words which laymen are apt to use for any payment in respect of accommodation.

According to the above decision mere permissive occupation by a person, of property of another, even if some payment of money for the personal privilege extended is made, is not a letting of premises creating a tenancy. In the instant case there is nothing to infer that any payment of money has been made. Further it has to be observed although there is some reference to '*in lieu of rent*' in P5, according to the above decision use of words such as rent, tenancy, rent in advance *etc.* is not conclusive proof of a contract of tenancy.

For the foregoing reasons I see no reason to interfere with the findings of the learned Judge and the appeal will stand dismissed with costs fixed at Rs.5000 payable by the Appellant to the Plaintiff - Respondent.

The Registrar of this Court is directed to forward the record in case No. 2936/L to the respective District Court forthwith.

ANDREW SOMAWANSA , J (P/CA) – *I agree.*

Appeal dismissed.