THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 1 SRI L.R. - PART 7**

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views by interview panels would encourage parents of

prospective students to government schools to obtain

title deeds by any method and would undermine the whole

purpose of the enforcement of the present circular.

On a consideration of the above matters, I am of the

opinion that the Petitioners are entitled to 35 marks for

the electoral register extracts. 6 marks for the residence

documents P17, 4 marks for the category of documents which

confrm residence and 20 marks in relation to other schools,

making up a total of 65 marks which is above the cut off

mark for this school. This would entitle the 3rd Petitioner to

obtain admission to the School.

The interview panel has failed to evaluate the documents

that were submitted by the petitioners in support of their

application to admit the child to the School and appear to

have acted arbitrarily. The Panel appears to have considered

the concept of residence in a very abstract manner

and has failed to consider the totality of the documents

that were submitted which clearly establish the residence

of the Petitioners. The Panel seems to have acted under

a fxed notion of considering residence only if the stereotyped

documents relating to title, such as transfers, gifts, leases etc

are produced without considering the cumulative effect of the

totality of the documents submitted. Although such panels

do have to interview large numbers, they have to be mindful

of the fact that it is the ambition of every parent to admit their

child to a school of their choice when a child has reached the

school going age and that they should consider such applica-

tions in a reasonable manner specially when such applicants

have satisfed the basis criteria regarding residence.

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In the above circumstances I hold that the Petitioners

have established the fact of violation of their fundamen-

tal rights in terms of Article 12(1) of the Constitution. The

decision of the Respondents that the 3rd Petitioner is not

entitled to be admitted to D. S. Senanayake College is set aside.

The Respondents are directed to take steps to admit the 3rd

Petitioner to Grade I of D. S. Senanayake College forthwith.

**Saleem marSoof J.** - agree.

**Chandra ekanayake J.** – I agree.

*Relief granted.*

*Karunawathie V. Piyasena & Others*

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**KARUNAWATHIE v. PIYASENA & OTHERS**

SUPREME COURT

DR. SHIRANI A. BANDARANAYAKE, C.J.,

SRIPAVAN, J. AND

IMAM, J.

S.C. APPEAL NO. 09 A/ 2010

S.C. (HC) CA LA NO. 309/2009

SP/HCCA/KAG/283/2007 (F)

D.C. KEGALLE NO. 24119/P

JULY 7TH, 2011

***Civil Procedure Code – Section 760 A – Death or change of status of***

***party to appeal – Supreme Court Rules, 1990 – Rule 38 – Records***

***which have become defective by reason of the death or change of***

***status of a party to the proceedings in an application before the***

***Supreme Court or Court of Appeal.***

The Appellant had made an application under Section 48(4) A (V) of the

Partition Law which was taken up for inquiry on 23.07.2000 and the

Final Order had been made on 20.05.2005. The 15th Respondent, who

was also the 16A Respondent for the deceased 16th Respondent, had

died on 30.05.2004 whilst the case was pending before the District

Court and the necessary steps for substitution were not taken at the

time. Against the said Final Order an appeal had been fled in the High

Court and whilst the case was pending before Court, the 2nd Respondent

had died on 06.09.2007. Admittedly no steps had been taken to substi-

tute in place of the deceased 2nd Respondent before the High Court. The

judgment of the High Court had been delivered on 13.10.2009.

Since leave to appeal had been granted by the Supreme Court and the

appeal had been fxed for argument, the question that arose was wheth-

er substitution in place of the deceased Respondents could be effected

before the Supreme Court.

**held:**

(1) The record of the present appeal had become defective before the

Final Order of the District Court was given and thereafter prior

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to the delivery of the judgment of the High Court. Accordingly,

at the time the leave to appeal application was fled before the

Supreme Court the record in question had become defective. In such

circumstances, the provisions in Section 760 A of the Civil

Procedure Code (as amended) read with Rule 38 of the Supreme

Court Rules, 1990, cannot be applicable to the present appeal.

(2) When a party to a case had died during the pendency of that case,

it would not be possible for the Court to proceed with that matter

without appointing a legal representative of the deceased in his

place. No sooner a death occurs of a party before Court, his coun-

sel loses his position in assisting Court, as along with the said

death and without any substitution he has no way of obtaining

instructions.

(3) Since the 15th Respondent, who was also the 16A Respondent,

died on 30.05.2004 and as no steps were taken for substitution of

parties prior to the judgment of the District Judge, the judgment of

the District Court is a nullity. Thereafter the 2nd Respondent died

prior to the delivery of the judgment of the High Court. Accordingly

both judgments are ineffective and therefore the judgment of the

High Court dated 13.10.2009 and the judgment of the District

Court dated 20.05.2005 are set aside.

**Cases referred to:**

*(1) State of Punjab V. Nathu Ram* AIR (1962) SC 89

*(2) Swaran Singh Puran Singh and another V. Ramditta Badhwa (dead)*

*and Others* AIR 1969 Punjab & Haryana 216

*(3) Kanailal Manna and Others V. Bhabataran Santra and Others* AIR

1970 Calcutta 99

*(4) Achhar Singh and Others V. Smt. Ananti* AIR 1971 Punjab &

Haryana 477

**appliCation** against the Judgment of the High Court of the

Sabaragamuwa Province.

*Buddhika Gamage* for Appellant.

*D. Jayasinghe* for Substituted Plaintiff – Respondent.

*Karunawathie V. Piyasena & Others*

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*Srinath Perera* for 1A, 17th and 18th Respondents

*Rohan Sahabandu* for 6th Respondent

*Cur.adv.vult*

December 05th 2011

**dr. Shirani a. Bandaranayake, CJ**

This is an application fled by the 20th defendant-

appellant-petitioner-appellant (hereinafter referred to as the

appellant) against the Judgment of the High Court of the

Sabaragamuwa Province holden at Kegalle (hereinafter

referred to as the High Court) dated 13.10.2009.

By that judgment the High Court had rejected the appeal

of the appellant. The appellant came before this Court seek-

ing leave to appeal against the said judgment, for which this

Court had granted leave to appeal on 05.02.2010.

The parties thereafter had moved for time to consider a

settlement; this appeal was not fxed for hearing, but was

mentioned on two (02) occasions. On 09.06.2010 when this

matter was considered in open Court, the 6th defendant-

respondent-respondent- respondent (hereinafter referred to

as the 6th respondent) had informed Court that 16a defen-

dant- respondent is deceased and therefore the appellant had

moved for time to take steps for substitution. At the same

time this court had noted that the 2nd defendant-respon-

dent- respondent- respondent (hereinafter referred to as the

2nd respondent) and the 15th defendant-respondent- respon-

dent- respondent (hereinafter referred to as the 15th respon-

dent) are dead and there had been no substitution in their

place.

When this matter came up on 07.07.2011, all learned

Counsel agreed that, in the frst instance it would be

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necessary to consider substitution as the 15th respondent had

died on 30.05.2004 and necessary steps were not taken in the

District Court and the 2nd respondent had died on 06.09.2007

and no steps were taken in the High Court.

All learned Counsel agreed that the said 15th respondent,

namely, Narangode Lakamalage Kiri Mudiyanse had died on

30.05.2004, whilst the case was pending before the District

Court and that necessary steps for substitution were not

taken at that time. It was also submitted that the appellant

had made an application under Section 48(4) A (v) of the

Partition Law, which was taken for inquiry on 23.07.2000

and the Final Order had been made on 20.05.2005(A).

When the case was pending before the High Court

of Sabaragamuwa Province, the 2nd respondent, namely,

Manchanayaka Arachchige Jinaratna Banda had died on

06.09.2007. It was submitted that no steps were taken

to substitute in place of the said deceased 2nd respondent

before the High Court of the Sabaragamuwa Province. The

Judgment of the High Court had been delivered on 13.10.2009

(D). It is to be noted that the 15th respondent, who had died

on 30.05.2004, whilst this matter was pending before the

District Court was the 16A respondent as well. Learned

Counsel for the appellant submitted that in order to dispose

of this appeal, it has become necessary to effect substitution

in the room of the deceased 2nd and 15th respondents.

After hearing all learned Counsel on the limited question

as to how the substitution could be effected, the order on the

said limited issue, was reserved.

It is not disputed that the 15th respondent, namely,

Narangode Lakamalage Kiri Mudiyanse, who was the

substituted 16A respondent for the deceased 16th respon-

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dent in the District Court had died on 30.05.2004. It is

also not disputed that the Final Order of the District Court

was delivered only on 20.05.2005. It therefore cannot be

disputed that at the time the Final Order was delivered in the

District Court, the 15th respondent who was appearing not

only for himself, but also for the deceased 16th respondent as

the 16a respondent had been dead. As stated earlier, the 2nd

respondent, namely, Manchanayaka Arachchige Jinaratna

Banda, had died on 06.09.2007, prior to the delivery of the

Judgment of the High Court on 13.10.2009.

In such circumstances, since leave to appeal had been

granted by this court and the appeal has been fxed for argu-

ment, the question arises as to whether substitution in the

room of the deceased respondents could take place before the

Supreme Court.

In deciding this question, our attention was drawn to

Section 760 A of the Civil Procedure Code (as amended), in

support of the fact that the substitution in the room of the

deceased respondent could be made in the Supreme Court.

The said Section 760A of the Civil Procedure Code (as

amended) is contained in Chapter LVIII, which deals with

Appeals and Revisions and the said section refers to death or

change of status of party to appeal and is as follows:

 *“Where at any time after the lodging of an appeal in any*

*civil action, proceeding or matter, the record becomes*

*defective by reason of the death or change of status of*

*a party to the appeal, the Supreme Court under Article*

*136 of the Constitution, determine who, in the opinion*

*of the Court is the proper person to be substituted or*

*entered on the record in place of or in addition to, the*

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*party who had died or undergone a change of status, and*

*the name of such person shall thereupon be deemed to be*

*substituted or entered on record as aforesaid.”*

The said Section 760A of the Civil Procedure Code

(as amended), clearly shows that the applicability of the said

section is for matters where the record has become defective

by reason of the death or change of status of a party to the

appeal after the lodging of an appeal. Moreover Article 136

of the Constitution had clearly referred to the Rules of the

Supreme Court stating that such Rules would give guidance

to the manner in which the said application for substitution

should be made. Rule 38 of the Supreme Court Rules, 1990

accordingly, deals with applications when the Record had

become defective by reason of the death or change of status

of a party to the proceedings.

When Section 760 A of the Civil Procedure Code (as

amended) is read with Rule 38 of the Supreme Court Rules,

1990 it is abundantly clear that the applications made under

the said provisions are in matters which are either before the

Supreme Court for special leave to appeal, or an application

under Article 126, or a notice of appeal, or the grant of special

leave to appeal or the grant of leave to appeal by the Court of

Appeal.

It is therefore apparent that, Section 760 A of the Civil

Procedure Code (as amended) read with Rule 38 of the

Supreme Court Rules, 1990 deal with Records which

have become defective by reason of the death or change of

status of a party to the proceedings in an application before the

Supreme Court or Court of Appeal. According to the said

provisions, the Record would have become defective at a time

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when the applications had been fled on appeal before the

Supreme Court or the Court of Appeal.

The present application before this Court, however is

different. As has been stated earlier, the record in the

present appeal had frst become defective before the Final

Order of the District Court was given and thereafter prior to

the Judgment of the High Court was delivered. Accordingly it

is evident that at the time leave to appeal application was fled

before this Court, the Record in question had become defective.

In such circumstances, it is quite clear that the provisions in

Section 760 A of the Civil Procedure Code (as amended) read

with Rule 38 of the Supreme Court Rules, 1990 cannot be

applicable to this appeal and it would be necessary to

consider as to the validity of the Final Order and the

Judgment given by the District Court and the High Court,

respectively.

When a party to a case had died during the pendency of

that case, it would not be possible for the court to proceed

with that matter without bringing in the legal representatives

of the deceased in his place. No sooner a death occurs of a

party before Court, his counsel loses his position in assisting

court, as along with the said death and without any substitu-

tion he has no way in obtaining instructions. At that stage,

the question arises, as to how and what are the steps that

has to be taken in order to cure the defect.

This question had been considered by several decisions

in India.

In *State of Punjab v Nathu Ram*(1), land belonging to two

brothers L and N jointly was acquired for military purposes.

The two brothers had refused to accept the compensation

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offered to them and the State Government had referred the

matter for inquiry to an arbitrator. The arbitrator had passed

a joint Award granting a higher compensation. The State

Government had appealed against the said Award to the High

Court. During the pendency of that appeal L died and his

legal representatives were not substituted.

It was decided that since the legal representatives were

not brought on record after the death of L, the appeal abated

against him. The question that had arisen at that time was

whether the appeal also abated against N.

The Supreme Court of India had decided that the subject

matter for which the compensation had been awarded was

one and the same land and the assessment of compensation

as L was concerned having become fnal, there could not

be different assessments for compensation for the same

block of land and therefore the appeal against N also cannot

proceed.

It is however to be noted that in *Nathu Ram’s case*

*(Supra)*, the question that had to be decided by the Supreme

Court was as to whether the appeal had abated against N as

well.

Reference was made to the decision in *State of Punjab*

*v Nathu Ram (Supra)* in *Swaran Singh Puran Singh and*

*another v Ramditta Badwa* (dead) *and others*(2). In *Swaran*

*Singh (Supra)*, the decision in *Nathu Ram (Supra)* was clearly

analyzed and the Court had laid down the following proposi-

tion on the basis of the decision given in Nathu Ram (Su-

pra):

 “1. On the death of a respondent, an appeal abates

only against the deceased, but not against the other

surviving respondents;

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 2. in certain circumstances an appeal on its abatement

against the deceased respondent cannot proceed

even against the surviving respondents and in those

cases the Appellate Court is bound to refuse to proceed

further with the appeal and must, therefore dismiss

it;

 3. the question whether a Court can deal with such

matters or not will depend on the facts and circum-

stances of each case and no exhaustive statement

can be made about those circumstances;

 4. the abatement of an appeal means not only that

the decree between the appellant and the deceased

respondent has become fnal, but also as a necessary

corollary that the Appellate Court cannot in any way

modify that decree directly or indirectly.”

A similar view was taken once again in *Kanailal Manna*

*and Others v Bhabataran Santra and Others*(3) where one of

the plaintiffs had died before the appeal was fled against a

joint decree passed in their favour was heard by the lower

Appellate Court. The court without the knowledge of the

death had dismissed the appeal and had passed the decree.

It was held that the decree abates and cannot be considered

in law to be effective in any way and the proper procedure to

be followed by the High Court is to set aside the ineffective

decree and remand the case to the Court where abatement

has taken effect, keeping it open to the parties to move that

court for an opportunity to have the abatement set aside if

the parties could satisfy that they are so entitled in law.

The same issue was again considered in *Achhar*

*Singh and Others v Smt. Ananti*(4). While considering the

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appeal, reference had been made to the decision in *State of*

*Punjab v Nathu Ram (Supra)* and *Swaran Singh Puran Singh v*

*Ramditta Badhwa (Supra)*. Referring to the above, Tewatia, J

had held that, in an appeal fled against an Appellate

decree, which was a nullity in that it was passed in

ignorance of the death of one of the defendants during the

pendency of that appeal and when that appeal had abated

totally, the proper course for the second Appellate Court is

to set aside the decree and to remand the case to the lower

Appellate Court. If there is an entitlement, it could be kept

open for the parties concerned to take steps to get the abate-

ment set aside. Expressing his view, Tewatia, J said that.

 “In our opinion, the uniform procedure followed by the

other High Courts as referred to hereinbefore should be

accepted, namely, that the ineffective decree passed by

the Court of Appeal below should be set aside and the

appeal should be remanded to the said Court keeping

it open to the appellants to move the said Court for an

opportunity to have the abatement set aside if the

appellants could satisfy the said Court that they are so

entitled in law.”

In the present appeal, as clearly stated earlier, prior to

the judgment of the District Court dated 20.05.2005, the 15th

respondent who was the 16A respondent as well had died on

30.05.2004. No steps were taken for substitution of parties.

Thereafter, an appeal was taken before the High Court

and its Judgment was delivered on 13.10.2009. However the

2nd respondent had died prior to that on 06.09.2007.

Accordingly it is evident that both those judgments are

ineffective and therefore each judgment would be rejected as

a nullity. For the said reason the judgment of the High Court

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dated 13.10.2009 and the judgment of the District Court of

Kegalle dated 20.05.2005 are both set aside.

This case is sent back to the District Court of Kegalle

for the appellant to take steps according to law, for

substitution. The District Court is directed to hear the matter

expeditiously. Subject to the above, the appeal is dismissed.

I make no order as to costs.

**Sripavan, J.** - I agree.

**imam, J.** - I agree.

*The judgment of the High Court and the judgment of the*

*District Court set aside. Case sent back to the District Court for*

*the Appellant to take steps according to law, for substitution*

*and the District Court is directed to hear the matter expedi-*

*tiously subject to the above directions.*

*Appeal dismissed.*

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**WIMALA PERERA v. KALYANI SRIYALATHA**

SUPREME COURT

SHIRANEE TILAKAWARDANE, J.,

SRIPAVAN, J. AND

IMAM, J.

S.C. APPEAL NO. 51/2010

S.C.H.C.C.A.L.A. NO. 45/2010

WP/HCCA/COL/76/2002 (F)

D.C. COLOMBO NO. 8884/RE

MARCH 4TH, 2011

***Landlord and Tenant – Tenant disputes landlord’s title – Refusal***

***to give up possession of the property at the termination of the***

***lease on the ground that the tenant acquired certain rights to the***

***property.***

On or about 1st September 1996, the Plaintiff Appellant had purportedly

granted the Respondent leave and license to occupy the premises in

suit. By letter dated 30th September 1997 the said leave and license

was terminated and the Respondent was directed to hand over vacant

possession of the said premises. The Appellant claimed that the

Respondent failed to hand over the premises on the due date and has

remained in wrongful occupation, causing damages.

The Plaintiff Appellant instituted action in the District Court and after

hearing the parties the learned District Judge dismissed Appellant’s

action with costs. The Appellant appealed against the judgment of the

District Court to the High Court. The High Court by its judgment dated

12.01.2010 dismissed the appeal of the Appellant, and thereafter leave

to appeal was granted by the Supreme Court against the dismissal of

the appeal.

**held:**

(1) A lessee is not entitled to dispute his landlord’s title by refusing

to give up possession of the property at the termination of his

lease on the ground that he acquired certain rights to the property

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subsequent to him becoming the lessee and during the period of

tenancy.

Per Shiranee Tilakawardane, J. –

 “He must frst give up possession and then litigate about the

ownership he alleges.”

**Cases referred to:**

(1) *R. W. Pathirana v. R. E. de S. Jayasundera* 58 NLR 169

(2) *Alvar Pillai v. Karuppan* – 4 NLR 321

(3) *Visvalingam v. D. De S. Gajaweera* – 56 NLR 11

(4) *W. M. J. Bandara v. J. Piyasena* – 77 NLR 102

(5) *Muthukuda v. Sumanawathie* – 4 NLR 321

(6) *Noorbhai v. Karuppan Chetty* – (1925) 27 NLR 325

**appeal** from the Judgment of the Civil Appellate High Court of the

Western Province, Colombo.

*Edward Ahangama* for the substituted Plaintiff – Appellant – Petitioners

*Ravindra Anawarathna* with *D. L. W. Somadasa* for the Defendant –

Respondent – Respondent.

*Cur.adv.vult.*

July 18th 2011

**tilakawardane, J.**

Special Leave to Appeal was granted to the Substituted

Plaintiff – Appellant – Petitioner (hereinafter referred to as the

Appellant) on 15th October 2010 on the following question of

law:

1. Did the High Court err in law by entirely failing to

consider the vital admissions made by the Defendant –

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Respondent – Respondent (hereinafter referred to as the

Respondent) in her statement to the Grandpass Police

(marked as P3 and annexed to the annexed Record)?

2. Did the High Court err in law by determining that the

Respondent had proved on a balance of the probabilities

that she was a tenant of Matilda Gomez to the premises

bearing Assessment No: 147, Devos Lane, Grandpass

Road Colombo 14, from May 1995 and that such premises

had been transferred to her by the said Matilda Gomes in

1998 by the deed marked VI?

3. Has the High Court erred by deciding on the title to

the premises in suit in light of the fact that this is an

action for ejectment of an over-holding licensee, where the

title of the Appellant to the premises in suit is irrelevant

and the title to the respondent to the premises is not a

defence to the action.

4. Has the High Court erred in law by holding that Section

116 of the Evidence Ordinance does not apply to this case

merely because the Respondent has completely denied

being a licensee of the Appellant and further denied that

the Appellant has Prescriptive Title to the premises in

suit?

5. Is the judgment of the High Court not fairly based on the

totality of the evidence led in this action, particularly the

documents P1 and P3?

6. Is the judgment of the High Court not reasonably

supportable on the evidence led in this action?

The facts of the case in brief reveal that on or about

1st September 1996 the Appellant had purportedly granted

the Respondent leave and license to occupy the abovemen-

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tioned premises in suit. By letter dated 30th September 1997

(marked as), the said leave and license was terminated and

the Respondent was required to hand over vacant posses-

sion of the said premises on the 30th November 1997. The

Appellant claimed that the Respondent failed to tender the

premises on the aforementioned date and has remained in

wrongful occupation thereafter, causing damages in the sum

of Rs. 30,000/- and continuing to cause damages at the rate

of Rs. 5,000/- per month.

The appellant instituted action by Plaint dated 16th

February 1998 in the District Court of Colombo, and after

hearing both parties the Learned District Court Judge

dismissed the Appellant’s action with costs. Being aggrieved

by the said judgment, the Appellant appealed there from

to the High Court of the Western Province exercising Civil

Appellate jurisdiction of Colombo. The said High Court of the

Western Province by its judgment dated 12th January 2010

dismissed the appeal of the Appellant. Leave to appeal was

granted by this court on the questions of law set out above.

The Appellant claimed that the High Court has erred in

law by deciding on the title to the premises in suit, referring to

multiple decisions which support a fnding that hold-over by

the Respondent tenant is against the law. In *R. W. Pathirana*

*vs. R. E. De S. Jayasundara* (1), Gratiaen, J. stated that

 *. . .In a rei vindicatio action proper the owner of*

*immovable property is entitled, on proof of his title, to a*

*decree in his favour for the recovery of the property and for*

*the ejectment of the person in wrongful occupation. “The*

*Plaintiffs ownership of the thing is of the very essence of*

*the action”* (Maasdorp’s Institutes (7th Edition) Vol. 2, 96.)

It is, indeed, settled law in Sri Lanka that a lessee is not

entitled to dispute his landlord’s title by refusing to give up

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possession of the property at the termination of his lease on

the ground that he acquired certain rights to the property

subsequent to him becoming the lessee and during the

period of tenancy. In the case of *Alvar Pallai vs. Karuppan*(2),

it was noted that “K having been let into possession of the

whole of a certain land by A, it would seem that, by the

law of Ceylon, it is not open to K, even though he were

the owner of a moiety of it, to refuse to give up possession

of the whole to A, on the expiry of his lease. This and other

decisions as the decisions of *V. Visvalingam vs. D. De S.*

*Gajaweera*(3) and *W. M. J. Bandara vs. J. Piyasena*(4),

state that the correct protocol is to “give up possession

and then litigate about the ownership of his alleged half.”

(Vide *Alvar (supra*)).

However, a principal fact underlying all of the above-

mentioned cases cited by the Appellant to establish his point

is that, in each instance, there existed a clear, unequivocal

agreement, recognisable as valid under law between the

landlord and the tenant or licensee. This Court does not fnd

the relationship between the Appellant and Respondent in

the instant case to be either unequivocal or so clear.

The Appellant avers that it was on the basis of an agree-

ment marked as P1 (hereinafter referred to as Document

P1) that leave and license was granted to the Respondent

to possess the premises as a licensee of the Appellant. At

the time the initial plaint dated 16.02.1998 was fled in the

District Court, the Appellant came to court seeking posses-

sion of the Premises, purportedly as the clear owner and title

holder of these premises. However, in the replication fled on

24.09.1998, she changed her position claiming instead that

she was merely entitled to claim prescriptive rights to the

said premises. This is in direct contradiction to the position

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taken by her in her initial Plaint in which she represented

that she was the owner of the premises.

It is signifcant that it was at about this time that she

claims to have entered into the purported agreement P1 dated

01.09.1996, claiming her rights as the owner of the said

premises, though it is clear from the replication that she

was indeed not the title holder of the premises. Given the

inconsistency regarding Appellant’s capacity during the

execution of Document P1, it is incumbent upon this

Court to determine whether Document P1 can, in fact, be

considered to have created a valid and binding agreement

under the law and made it possible for the Appellant to avail

his rights as a *bona fde* landlord. It is interesting to note that

the Appellant did not testify to court, despite the fact that

doing so could have provided the best evidence for determin-

ing the validity of Document P1.

According to Sri Lankan law several elements must be

satisfed to create a valid agreement between two or more

parties. The prerequisite of a contract, as enumerated by

C. G. Weeramanthy in *The Law of Contracts,* Volume I

(at page 84) are:

(a) An agreement between the parties;

(b) Actual or presumed intention of the parties to create a

legal obligation;

(c) due observance of prescribed forms or modes of

agreement;

(d) legality and possibility of the object of the agreement;

and

(e) capacity of the parties to contract.

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It is an elementary rule that every contract requires an

offer and acceptance. Therefore an offer or promise which is

not accepted, is not actionable [vide Justice Weerasooriya

in *Muthukuda v. Sumanawathie,*(5) at, 208, 209]. It has

been stated that it is an elementary proposition of law

that a contract is concluded when in the mind of each

contracting party there is a *consensus ad idem, Noorbhai*

*v. Karuppan Chetty*(6) (per Lord Wrenbury). Cumulatively

therefore an intention to create a legal relationship and

a *consensus ad idem* or meeting of the minds needs to

be in existence in order to establish a contract between the

parties.

The Respondent denies that she entered into Document

P1 or for that matter, any other agreement of leave and

license in regard to the premises in dispute, stating that

the son of Appellant had taken her signature on a blank

paper and then later falsely flled up its content. She further

alleges that she was deceived into signing the paper by the

son of the Appellant, Mr. Premadasa Perera, being told that one

Matilda Gomez had been arrested and that the Respondent’s

signature was needed for the purpose of releasing Matilda

Gomez on bail. The Respondent further testifed that she

had done this at the time Matilda Gomez was in fact, the

owner of the premises and she had given the Respondent

leave and licence to occupy the premises initially and had

subsequently sold the said premises to the Respondent

in terms of a Deed of Transfer numbered 40, dated 1st May

1998 Attested by Mr. Dhananjaya Tilakaratne Notary Public

and marked as V1 (hereinafter referred to as the “Deed of

Transfer”).

It is undisputed that Document P1 was in fact, drafted

by Mr. Perera, the son of the Plaintiff, as he corroborated

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as much in his Testimony (*see* page 71 of the record). How-

ever, in his testimony Mr. Perera made out that Document

P1 was drafted pursuant to information given by the Respon-

dent, a fact she denies (see page 09 of the Record), and as

mentioned above, alleges that the Appellant took her

signature on a blank paper. This Court fnds this assertion

by Mr. Perera to be inconsistent with the substance of Docu-

ment P1. Mr. Perera claims that he wrote the letter according

to the instructions of the Respondent. He gave the reason that

he did so as the Respondent could not read or write – a fact

completely denied by her, Indeed the testimony and allegation

by Mr. Perera that the Respondent was illiterate was under-

mined by his own assertion that she had placed her signature

and address on Document P1 and this assailed the credibility

of Mr. Perera’s evidence.

Even if one was for a moment to consider that she was

illiterate, as Mr. Perera does not disclose in any part of

his oral evidence that he had ever read and explained the

contents of such letter to the Respondent the evidence

discloses clearly that he in any event never communicated its

contents to her.

Apart from the above inconsistencies in Mr. Perera’s

submissions, his testimony lacks a general creditworthiness

when considering the implausibility of his assertions even

with respect to circumstances peripheral to the main issue.

One can only wonder why Mr. Perera and his mother would,

when leaving occupation of the premises in suit leave behind

a Gas cooker, a gas cylinder, chairs and several other items

which, even if not taken alone, would in the aggregate be

considered of signifcant value. Mr. Perera’s submission of

this (*see* Page 60 of the Brief) is put simply, improbable.

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The Appellant alleged that the aforementioned Matilda

Gomez, the true titleholder to the property, was not in a proper

state of mind at the time that she entered into the Deed of

Transfer (VI). However, once Matilda Gomez was sworn in

and gave evidence in court, the Appellant did not pursue the

matter any further and abandoned claims of ownership. In

fact, it is to be noted at this juncture that the Appellant did

not even testify in this case at all. No valid reason was given

as to why she did not testify in Court, a surprising action

considering the obvious burden upon her to establish the

facts necessary for her position to prevail as well as the fact

that she is in the position to best provide such evidence.

The credibility of evidence given in respect of the

Appellant in relation to Document P1 is further assailed by

Ms. Gomez, who has proved by a deed of gift numbered 7132,

dated 26th July 1964 Attested by Mr. Alexander Seneviratne

Notary Public and marked as V2 (hereinafter referred to as

the “Deed of Gift”) as well as the subsequent Deed of Transfer,

that she had rights over the premises in suit as its owner

in 1995 when she leased it to the Respondents mother. The

Deed of Gift gives details of the premises being gifted to

Matilda Gomez by her parents, Hettiaratchige Milfred Perera

and Pattiyage Joseph Gomez.

Ms Gomez gave evidence to the District Court asserting

that she gave the premises in suit on lease to the Respon-

dent’s mother for a monthly sum of Rs. 75/- (Vide page 116

of the Record). She also stated that she had thereafter sold

the premises to the Respondent for a sum of Rs. 100,000/-

which was paid in installments. This evidence corroborates

the testimony of the Respondent that she entered into a lease

agreement with Ms. Gomez on the said premises in suit in

1995 (Vide page 86 of the Record) and had subsequently

purchased the same and assails the evidence of Mr. Perera.

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When the totality of the evidence is considered, this

Court necessarily concludes that the evidence given by

the Appellant is inconsistent and lacking in credibility. In

light of this conclusion, this Court fnds that Document P1

cannot be considered to have created a legally valid leave

and license agreement in law between the Appellant and the

Respondent.

This Court therefore holds that there was no error in the

Judgment of the Civil Appellate High Court of the Western

Province Holden in Colombo dated 12th January 2010 and

answers all the questions of law set out above in favour of the

Respondent.

In these circumstances this Court dismisses this Appeal

with a sum of Rs. 5000/- as costs to be paid by the Appellant

to the Respondent.

**Sripavan, J.** – I agree.

**imam, J.** – I agree.

*Appeal dismissed.*

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**UDAGAMA AND 2 OTHERS v. CHANDRA FERANANDO,**

**INSPECTOR GENERAL OF POLICE AND 5 OTHERS**

SUPREME COURT

TILAKAWARDENA, J.,

AMARATUNGA, J. AND

MARSOOF, J.

S.C. APPLICATION NO. FR 455/2005

JULY 21ST, 2011

***Constitution – Article 12(1) – Right to equality – Articles 13(1) and***

***13(2) – Freedom from arbitrary arrest, detention and punishment –***

***Article 14(g) – Freedom of speech, assembly, association, occupation,***

***movement – Article 126 – Fundamental rights jurisdiction – Excise***

***Ordinance – Section 33, 35, 37, 46g, 47, 48(a), 48 (c), 52(1) a***

The 1st and 2nd Petitioners were the partners of Don Patrick Wine Shop

situated in Pussellawa, that had a license issued under the Excise

Ordinance to sell foreign liquor and locally made malt liquor, but not to

be consumed on the premises.

On 10.10.2005 the 3rd Petitioner was a salesman of the Wine Shop. The

3rd and 4th Respondents were the Police Offcers who arrested the 3rd

Petitioner for allegedly selling arrack to a customer to be consumed in

the premises. The 3rd Petitioner was taken to the Police Station where

he was kept in Police custody for several hours before being released

on Police bail. The 3rd Petitioner’s position is that in any event, the sale

of liquor for consumption in the premises is not an offence under the

Excise Ordinance.

The Petitioners have contended that by the raid and the arrest of the 3rd

Petitioner, the Respondent Police offcers have violated the fundamental

rights guaranteed to the 1st and 2nd Petitioners by Articles 12(1)

and 14(g) of the Constitution and the 3rd Respondent’s fundamental

rights guaranteed by Articles 12(1), 13(1), 13(2) and 14(1) g of the Con-

stitution.

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In terms of the Excise Notifcation No. 509, all Police offcers have lawful

power to perform the acts and duties set out in Sections 33, 35, 37 and

48 (a) of the Excise Ordinance.

**held:**

(1) As a result of the combined effect of clause 1(11) of the Excise

Notifcation 509 read with Sections 35 and 46 (g) of the Excise

Ordinance, Police Offcers have the power to detect the offence

of selling an excisable article in contravention of the conditions

of a license issued under the Excise Ordinance and to arrest the

offender without a warrant.

(2) Although the Police have the power to detect and apprehend a

person who had committed an offence under Section 46(g), in view

of the provisions of Section 52(1) (a) of the Excise Ordinance, the

Police have no authority to initiate proceedings before a Magistrate

against an offender. Such offences, commonly called technical

offences, have to be referred to an excise offcer.

(3) When the Minister, by clause 1(11) of the Excise Notifcation,

has appointed all offcers of the Police Force to perform acts and

duties mentioned in Section 35 of the Excise Ordinance, offcers

of all ranks of the Police force have the power to arrest without

a warrant any person found committing an offence, in any place

other than a dwelling house, punishable under Section 46 or 47 of

the Excise Ordinance.

**appliCation** under Article 126 of the Constitution

*Ronald Perera* with *D. Johnthasan* for Petitioners

*Harshika de Silva,* State Counsel for the Respondents

*Cur.adv.vult*

July 21th 2011

**Gamini amaratunGa J.**

The 1st and 2nd petitioners are partners of Don Patrick

Wine Shop situated in Pussellawa. The 3rd petitioner is one

of their salesmen. The said wine stores has a licence issued

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under the Excise Ordinance for the sale of foreign liquor

including locally made malt liquor not to be consumed on the

premises.

According to their petition, on 10.10.2005 the 3rd and 4th

respondents who were at that time police offcers attached to

the Pussellawa Police station arrested the 3rd petitioner for

allegedly selling arrack to a customer (a decoy said to have

been sent by the 3rd and 4th respondents) to be consumed on

the premises. The 3rd petitioner was taken under arrest to the

police station where he was detained for several hours before

releasing him on police bail.

The 3rd petitioner’s position is that there was no such sale

as alleged by the police. The petitioners’ position is that in

any event, the sale of liquor for consumption in the premises

is not an offence for which the police offcers are empowered

by law to arrest any offender or to take any action under the

Excise Ordinance. The petitioners have therefore contended

that by the said raid and the arrest of the 3rd petitioner the

respondent police offcers have violated the fundamental

rights guaranteed to the 1st and 2nd petitioners by Article

12(1) and 14(g) of the Constitution and the 3rd petitioner’s

fundamental rights guaranteed by Articles 12(1), 13(1), 13(2)

and 14(1) (g) of the Constitution.

This Court has granted leave to proceed for the alleged

violation of the petitioners fundamental rights guaranteed by

Articles 12(1), 13(1), 13(2) and 14(1) (g) of the Constitution. In

this application the task of this Court is not to decide whether

the detection of the alleged offence was a result of a genuine

raid or whether it is a fabrication of the police. The question

to be decided by this Court is whether the police offcers

have lawful power or authority under the provisions of the

Excise Ordinance to detect and arrest a person for the alleged

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violation of a condition of the license by selling liquor to be

consumed in the premises. In order to decide this question

it is necessary to examine the provisions of the Excise

Ordinance and Excise Notifcations issued thereunder.

The position of the petitioners is that police offcers

do not have power or authority to detect violations of the

conditions of the licence issued under the Excise Ordinance.

In view of the position taken by the petitioner, what this Court

has to decide is whether police offcers have powers to de-

tect violations of the conditions of a licence issued under the

Excise Ordinance.

Section 8(b) of the Excise Ordinance (Cap 52 C. L.E.

1956 Revision) provides that the Minister may by Notifcation

“appoint offcers or persons to perform the acts and duties

mentioned in sections 33, 35 and 48(a).”

In pursuance of the power vested in the Minister by

the aforesaid section 8(b), Excise Notifcation No. 509 dated

9.2.1963 had been issued by the Minister and published in

the Government Gazette of 22.02.1963. By clause 1(ii) of the

said Notifcation, the Minister had appointed “all offcers of

the Police Force to perform the acts and duties mentioned in

sections 33, 35 and 48(a) of the Excise Ordinance through-

out the Island.” By clause 8(i) of the same Notifcation, the

Minister had ordered that the powers and duties of an

Inspector of the Excise Department under section 37 of the

Excise Ordinance shall be exercised by “all offcers of the

Police Force throughout the Island.”

Thus the aforementioned Excise Notifcation No. 509

appoints all offcers of the Police Force to perform all acts and

duties mentioned in sections 33, 35 and 48(a) of the Excise

Ordinance throughout the Island and orders that the powers

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and duties of an Inspector of the Excise Department under

section 37 of the Excise Ordinance shall be exercised by all

offcers of the Police Force throughout the Island.

In terms of the Excise Notifcation No. 509 referred to

above all police offcers have lawful power to perform the

acts and duties mentioned in sections 33, 35, 37 and 48(a)

of the Excise Ordinance. In order to decide the question to be

decided in this application, it is necessary to examine the

legal position arising from the operation of the aforesaid

provisions of the Excise Ordinance in combination.

Section 48(a) of the Excise Ordinance deals with the

offence of the failure of the licence holder or any person

acting on his behalf to produce the licence when a demand

for its production has been made by a person who is duly

empowered to make such demand. In this case there is no

allegation that the salesman present at the time of the raid

failed to produce the licence on demand made by the police.

Accordingly section 48(1) has no relevance to this applica-

tion.

Section 33 of the Excise Ordinance empowers the Excise

Commissioner or a Government Agent or any excise offcer

not below such rank as the Minister may prescribe, or any

police offcer duly empowered in that behalf to enter and

inspect places of manufacture, bottling and sale of any

excisable article. In view of the Excise Notifcation No. 509

the police offcers are entitled to inspect a place where an

excisable article is sold. This is a general power of inspection.

In the present case according to the respondent, their raid

had been carried out not as general inspection but for the

specifc purpose of detecting a violation of a condition of the

licence. Accordingly section 33 is not relevant to the present

application.