

SUMANASENA

V.

L. M. HERFT

SUPREME COURT.

FERNANDO, J., KULATUNGA, J. and DHEERARATNE, J.,

S. C. NO. 11/89.

C. A. NO. 473/81 (7).

D. C. COLOMBO 3380 RE.

OCTOBER 25, 1991.

Lease - Is it lease of business or of premises?

The Plaintiff instituted an action against the defendant for recovery of the business of a motor repair garage together with its machinery, equipment and material and for ejection from the place where the business was being carried on.

The plaintiff averred that by a written non-notarial agreement the said business was leased out to the defendant for a term of five years on a monthly rental. The defendant pleaded that the Agreement was executed with a view to circumventing the rent laws and that he, as the lawful tenant of the premises, was protected by the provisions of the Rent Act.

Held:

If the occupation of the premises is subordinate to the rights conveyed in respect of the business, then the occupier is a lessee or assignee of the business, and a licensee but not a tenant of the premises. The non-notarial agreement was a lease of the business not of the premises.

Cases referred to:

1. *Andiris Appuhamy v. Kuruppu* (1963) 65 NLR 21
2. *Abdul Latiff v. Seyed Mohammed* (1967) 72 NLR 20
3. *Nicholas Hamy v. Janes Appuhamy* (1950) 52 NLR 137
4. *Charles Appuhamy v. Abeysekera* (1954) 56 NLR 243
5. *Pieris v. Jafferjee* (1959) 57 CLW 30
6. *Pathirana v. De Silva* (1978) 79(2) NLR 265
7. *Jayasinghe v. Goolam Hussain* (1955) 56 NLR 243
8. *Devairakkan v. Samarasinghe* (1962) 65 NLR 18
9. *Sediris Singho v. Wijesinghe* (1965) 70 NLR 185
10. *Nizam v. Mustaffa* [1981] 1 Sri. L. R. 58
11. *Abeypala v. Abeyakirithi* [1981] 1 Sri. L. R. 87

12. *Gunaratne v. Gaffoor* [1982] 2 Sri. L. R. 719.
13. *Graham v. Local and Overseas Investments (Pvt.) Ltd.* 1942 A. D. 95 at 108

APPEAL from a judgment of the Court of Appeal.

H. L. de Silva, P.C. with *R. Mannikkavasagam* for Defendant – Appellant.

A. K. Premadasa, P.C. with *P. A. D. Samarasekera, P.C.* for substituted Plaintiff – Respondent.

Cur.adv.vult.

December 18, 1991.

DHEERARATNE, J.:

The plaintiff (respondent) as executor of the estate of one S. U. Herft, instituted this action against the defendant (appellant) for recovery of the business of a motor repair garage together with its machinery, equipment and material and for ejection of the defendant from premises No. 275, Nawala Road, Rajagiriya, being the place where the said business was being carried on. The plaintiff averred that by a written non-notarial agreement dated 15.01.1970, (produced at the trial marked P11) S. U. Herft leased out the said business to the defendant for a term of 5 years on a monthly rental; that S. U. Herft died in April 1974; and that the defendant was unlawfully over-holding the said lease after its expiry. The defendant pleaded that the agreement was executed with a view to avoid the provisions of the Rent Restriction Ordinance in force at that time and that he being the lawful tenant of the premises No. 275 was now duly protected by the provisions of the Rent Act, No. 7 of 1972. The trial judge as well as the Court of Appeal held with the plaintiff on the footing that what was let to the defendant was a business and as such the defendant's occupation of the premises was ancillary to the letting of the business thereby making him only a licensee and not a tenant of the premises.

Time and again courts have been called upon to decide on the true nature of transactions embodied in documents similar to P11 with a view to finding out whether the relationship of landlord and tenant was created thereby or not. It is right to say that on examination of the reported judgments the Appellate Courts have reached three broad conclusions having considered the relevant written agreements and the circumstances surrounding the transactions. They are:—

- (i) That the agreement was a sham or a blind to circumvent the rent laws and the effect of the agreement was the creation of a tenancy in respect of the premises. *Andiris Appuhamy v. Kuruppu* (1), (lease of a business) and *Abdul Latiff v. Seyed Mohammed* (2) (partnership agreement).
- (ii) That the effect of the agreement was the creation of a tenancy in respect of premises let along with equipment and was not the letting of a business as a going concern - *Nicholas Hamy v. James Appuhamy* (3).
- (iii) That the effect of the agreement was not the creation of a tenancy in respect of the premises, but, (a) an assignment of rights in a business - *Charles Appuhamy v. Abeysekera* (4), *Peiris v. Jafferjee* (5), and *Pathirana v. De Silva* (6) or (b) a lease of a business - *Jayasinghe v. Goolam Hussain* (7) *Devairakkan v. Samarasinghe* (8) *Sediris Singho v. Wijesinghe* (9) *Nizam v. Mustaffa* (10) *Abeypala v. Abeyakirithi* (11) and *Guneratne v. Gaffoor* (12).

In passing I may observe that in *Charles Appuhamy v. Abeysekera* (supra) Nagalingam S.P.J. was of the view that the transaction in that case, although so called, was not a lease in the true sense of the term, for, he said "a lease relates to the letting and hiring of immovable property". Perhaps in making that observation Nagalingam S.P.J. was influenced by the distinction drawn in the English Language between the words "lease" and "let" the former being used in relation to

immovable property only. (20th Century Chambers Dictionary). But according to the common law it would appear that the letting and hiring of things *Locatio Conductio Rerum* is called a lease (Wille Principles of South African Law, 5th edition, page 396). Voet Book xix; title 2; section 3; (Gane's Edition) says "all things can be let out which are the subject matter of commercial transactions whether Corporeal or Incorporeal". (See observations of Watermeyer J.A. in *Graham v. Local and Overseas Investments (Pvt.) Ltd.* (13). The long line of cases which followed *Charles Appuhamy v. Abeysekera* (supra) has proceeded on the basis that a business could lawfully form the subject matter of a lease.

Be that as it may, whether a transaction is a lease of a business or an assignment of rights in a business, the common principle which has emerged from the last category of cases appears to be that if the occupation of the premises is subordinate to the rights conveyed in respect of the business, then the occupier is a lessee or assignee of the business, and a licensee, but not a tenant of the premises. This principle was lucidly expressed by Nagalingam S.P.J. in *Charles Appuhamy v. Abeysekera* (supra) at page 246 as follows:—

"On a proper reading of the document P1 it is impossible to resist the conclusion that the transaction entered into between the parties was one not of letting any immovable property for the purpose of enabling one party to carry on a business, nor the letting of the building to that party with the option to him to carry on or not the business previously carried on there, but of placing the "lessee" in-charge of a business that had been carried on for the sole purpose of its being continued as a going concern and with a view to its being delivered back as such going concern together with the advantages gained or accrued thereto in the meantime, and as ancillary to the object which the parties had in contemplation it was that possession of the premises was delivered. The defendant's position was no more than that of a licensee and is far removed from that of a tenant"

It is seen that an essential feature of a lease of a business or an assignment of rights in a business is the existence of an on going business which is the subject matter of such lease or the assignment. Mr. H. L. de Silva P.C. for the appellant submits that neither the terms of the lease P11 nor the attendant circumstances to the transaction demonstrate the existence of an on going business at the commencement of the lease. It is pointed out that the absence of the word "business" in the agreement P11 is conspicuous, and suggests that the subject matter of letting is premises called a garage with equipment as in the case of *Nicholas Hamy v. James Appuhamy* (supra). But one cannot easily overlook the words "all that licensed motor garage now being run at premises No. 275, Nawala Road" in the agreement, although the word business is not used. It is also pointed out that unlike in the cases of *Jaya-singhe v. Goolam Hussain* (supra) and *Pathirana v. De Silva* (supra) that the agreement P11 does not inhibit the lessee from carrying out any other business in the premises. However, according to P11 on termination of the agreement the lessee had covenanted to handover in good condition the "said garage" together with machinery and equipment. According to the definitive clause in the recital of the agreement P11 it is seen that the reference to the 'said garage' means the licensed motor garage "now being run at premises 275" together with machinery and equipment. It is significant that the only description of the immovable property in the lease P11 is confined to its assessment number like in the case of *Charles Appuhamy v. Abeysekera* (supra) showing its relative insignificance in the transaction.

Documentary evidence produced in the case disclosed that S.U. Herft obtained a certificate of conformity from the local authority in 1967 to run a welding shop in the premises; he purchased a fair amount of machinery and equipment from several sources in 1967 which was reasonably required to run a well equipped workshop; for the years 1968, 1969 and 1970 he obtained licences from the local authority to run a motor vehi-

cle repair shop; and from 1967-1975 he had a running account with the Ceylon Oxygen Company on a deposit made for the purpose of obtaining oxygen which was undoubtedly necessary to run a workshop. Evidence also disclosed the fact that S.U. Herft fell ill and was paralysed somewhere in 1969 which in all probability impelled him to lease out the business. He leased the business initially to 2 persons jointly for a period of two years on a written agreement similar to P11 which was produced at the trial. That lease was prematurely terminated and on its termination S.U. Herft leased out the ongoing business activity of the garage on P11. The defendant carried on the garage for the year 1970 on the licence obtained by S.U. Herft from the local authority to run a motor repair garage and he made use of Herft's deposit with the Ceylon Oxygen Company for several years for his regular purchases of oxygen.

Much emphasis was placed on behalf of the appellant that almost immediately after the lease was executed, the defendant got the business registered with the Registrar of Business Names under the new title "new Piyasena Garage" and an opening ceremony was held for which printed cards were sent to the invitees. It was suggested that the commencement of a business under a new name was inconsistent with the existence of a lease of a business which had been carried on in the premises earlier. I am unable to agree with this suggestion. In *Pathirana v. De Silva* (supra) the fact that the terms of the agreement expressly prohibited the assignee from using the original name in which the business was carried on did not persuade Samarakoon C.J. to hold that there was no letting of an ongoing business. On the other hand in *Devairakkan v. Samaranayake* (supra) the fact that no alteration was sought to be made in the Business Names Register by the lessee weighed in the mind of Herath J. among other factors, as pointing to the existence of an ongoing business which was leased out. Reliance was also placed on behalf of the appellant on the receipts issued by S.U. Herft to the defendant in respect of the rent paid which read "house rent in respect of

premises No. 275, Nawala Road" as demonstrating that there was a tenancy in respect of the premises. It seems to me that whatever appeared in printed receipts they were referable to the covenant in P11 regarding the payment of rent in respect of the business. Further as the Court of Appeal rightly observed, using those printed receipts taken from a house rent receipt book was something particularly a sick man might well have done without much concern as to what the printed words would have signified.

A close consideration of the agreement P11 makes it clear that its object was the leasing out of the existing business of a garage; a consideration of the surrounding circumstances as revealed by evidence fails to convince me that an object different from that which was envisaged in the agreement was achieved. (vide *Pathirana v. De Silva (supra)*.)

For the above reasons the judgment of the Court of Appeal is affirmed and the appeal is dismissed with costs.

Fernando, J. — I agree.

Kulatunga, J. — I agree.

Appeal dismissed.