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 නිල් 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 සින්නයියා වන මමද, මට පදිංචියට භාර දෙන ලද ඉහත කී ගෙය ආරක්ෂා කර ගෙන එහි පදිංචි සිටින බවටද, මා විසින් ගෙවිය යුතු ගෙවල් කුලිය වෙනුවට ඉහත කී ඉඩමේ පිහිටි පොල් ගස් 37 ත් 25 ක පලදාව ආරක්ෂා කර ඒවා කලට වේලාවට කඩා ඉහත කී කාසි ලෙබ්බේ මුහම්මදු රෂිඩ්ට භාර දෙන බවට ද විරිපනම් ඔස්තු 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.