GUNARATNE
v.
GAFFOOR

SUPREME COURT
WEERARATNE, J., SHARVANANDA, J., WANASUNDERA, J.,
RATWATTE J., AND SOZA, J.
S.C. APPEAL NO. 47/81 – S.C. SPL. L/A NO. 33/81, C.A. NO.763/75 (F),
D.C. AVISSAWELLA 13736,
SEPTEMBER 23 AND OCTOBER 13, 1982.

Lease of business – Jurisdiction of Court of Appeal under 1978 Constitution to set aside judgment of Supreme Court under the Administration of Justice Law, No. 44 of 1973. – Civil Procedure Code, section 769 (2)

One Siyadoris Appuhamy was the tenant of No. 18, Yatiyantota Road, Avissawella where he commenced a Hotel business in 1966. After running it for three or four months he leased the business to one Rauff by Agreement dated 28.8.66.
15–2 The lease was to end on 17.10.71. The monthly payment to Siyadoris was

Rs. 77/40. In 1968 Siyadoris became an employee of Rauff and remained so till Rauff gave up the business in 1971. After Rauff handed over the business, Siyadoris entered into another lease with the defendant for one year from 7.1.72. On the expiration of one year the defendant refused to hand over possession.

Siyadoris instituted action and the District Judge held in his favour on the ground that what was leased was the business and not the premises.

The defendant gave notice of appeal under Section 318 of the Administration of Justice Law (AJL). When the appeal came up for hearing on 26.7.78 the appellant was absent and unrepresented. The Supreme Court established under the AJL dismissed the appeal acting under Section 769 (2) of the Civil Procedure Code.

On 12.7.79 defendant filed a motion for relisting, unsuccessfully. Another motion was filed on 24.8.79 and the Court of Appeal in the absence of objection listed the appeal. The Court of Appeal set aside the judgment of the District Judge.

An application for special leave was made. One of the grounds was that the Court of Appeal under the 1978 Constitution had no jurisdiction to set aside a judgment of the Supreme Court established under the AJL.

Held –

1. The Court of Appeal had jurisdiction to set aside the judgment of the Supreme Court and order relisting.
2. What was leased to the defendant respondent was the business and not the premises.

Cases referred to:

(1) *Walker Sons and Co. (U.K.) Ltd. v. W.P. Gunatillake and others S.C. Ref. 1/1979; C.A. Application 365/76; S.C. Minutes of 28.11.1979*

(2) *M.Z. Salith v. Asgar Kadibhoy S.C. Appeal 34/80; S.C. Miunutes of 30.10.1980*

(3) *Pathirana v. de Silva (1978) 79 N.L.R. II 265*

(4) *Nisam v. Mustaffa (1981) 1 S.L.R. (S.C) 59*

(5) *Abeypala v. Abeykirthi (1981) 1 S.L.R. (S.C) 87*

APPEAL from judgment of the Court of Appeal.

J.W. Subasinghe, S.A. with *W.P. Gunatilake* and *D.J.C. Nilanduwa* for substituted plaintiff-appellant.

H.L. de Silva, S.A. with *Miss P. Seneviratne* and *Nirmal Fernando* for respondent.

Cur.adv.vult.

November 4, 1982.

RATWATTE, J.

The original plaintiff Siyadoris Appuhamy (referred to hereinafter as Siyadoris Appuhamy) instituted this action on 31.08.1973 for the ejectment of the defendant-respondent (referred to hereinafter as the defendant) from the business and business premises No. 18, Yatiyantota Road, Avissawella and for the recovery of arrears of monthly payments as per the Lease Agreement referred to in the Plaint till 7.1.1973 amounting to Rs.970/- and for damages. Siyadoris Appuhamy averred that: *(a)* He was the owner of the Hotel business, its name, goodwill and the fittings therein, carried on under trade licences issued by the Urban Council of Avissawella at premises No. 18, Yatiyantota Road, Avissawella. *(b)* He had by Lease Agreement No. 11399 dated 7.1.1972 attested by D. Ranawaka, Notary Public, produced marked P14, leased the said business, its name, goodwill and the fittings and other articles referred to in the schedule to P14, to the defendant for a period of one year commencing from 7.1.1972 subject to the terms and conditions laid down in P14. *(c)* Although the lease period specified in P14 expired on 7.1.1973 the defendant in spite of Siyadoris Appuhamy's objections and in violation of the conditions of P14 continued to carry on the said business. *(d)* The defendant had not paid the monthly payments in respect of the business according to P14 as from April 1972.

Siyadoris further pleaded that he had on several occasions requested the defendant to hand over the business to him but the defendant refused to do so. Siyadoris Appuhamy accordingly averred that a cause of action had accrued to him to sue the defendant for the reliefs claimed in paragraph 7 of the plaint.

The defendant in his answer denied that Siyadoris Appuhamy was the owner of the hotel business and the articles therein referred to in the plaint. He admitted the bare execution of the Lease Agreement P14, but pleaded that the Agreement is void and of no avail in law as it was executed to circumvent the Rent Acts. The defendant further pleaded that on an application made by him to the Rent Board of Avissawella the Board issued a Certificate of Tenancy and determined the authorised rent at Rs. 8/96 per month. The defendant claimed to be the owner of the hotel business carried on in the premises under the name of Muslim Hotel. He also pleaded that he was a tenant of Siyadoris Appuhamy and was entitled to the

protection of the Rent Act No. 7 of 1972. The defendant made a claim in reconvention for the sum of Rs.6,500/- which he stated was excess rents paid to Siyadoris Appuhamy.

After trial, the learned District Judge entered judgment in favour of Siyadoris Appuhamy as follows: For the ejectment of the defendant, for the sum of Rs. 970/- as arrears of lease money till 7.1.1973 and for damages at Rs. 100/- per month from 7.1.1973 till the business is restored to Siyadoris Appuhamy. Siyadoris Appuhamy was also awarded the costs of the action.

The defendant by notice dated 8.12.1975 gave notice of appeal against the judgment in terms of Section 318 of the Administration of Justice Law No. 44 of 1973 (referred to hereinafter as the A.J.L.). The defendant did not lodge written submissions as he was required to do under the provisions of Section 330 (1) of the A.J.L. In terms of Section 330 (3) if an appellant fails without reasonable cause to lodge his written submissions within the prescribed period "the appeal shall be deemed to have abated." But the Civil Courts Procedure (Special Provisions) Law No. 19 of 1977 came into operation on 15.12.1977. In terms of Section 3 of that Law, Chapter IV of the A.J.L. which dealt with Appeals Procedure, was repealed, and in terms of Section 4 the Civil Procedure Code was deemed to have been in operation as if the same had not been repealed and the said Code was to continue to be the law governing procedure and practice in all Civil Courts. The defendant's appeal came up for hearing on 26.07.1978 before a Bench of three Judges of the Supreme Court established under the A.J.L. On that date the defendant was absent and unrepresented. The Court acting under Section 769 (2) of the Civil Procedure Code, considered the appeal and made order dismissing the appeal with costs. Thereafter the decree was entered and sealed and the record was returned to the District Court. On 21.12.1978 Siyadoris Appuhamy died leaving a Last Will appointing Jayasiri Gunaratne the present substituted plaintiff as the sole heir and executor. On 12.07.1979 the Attorney-at-Law for the defendant had filed a motion moving that the appeal be relisted. This motion had been put up for an order to the President of the Court of Appeal who was also the Judge who presided when the appeal was disposed of on 26.07.1978. He made order refusing the application to relist the appeal. This order was signed only by the President of the Court of Appeal as the other two judges who heard the appeal, were no longer in office. Thereafter on 24.08.1979 another motion

by Counsel for the defendant Mr. H.W. Jayewardene, Q.C., moving that the Appeal be re-listed for the reasons stated in the motion. On this motion, order had been made by the Court of Appeal to call for the record from the District Court. On that date the Court made Order substituting Jayasiri Gunaratne in the room of the deceased plaintiff, Siyadoris Appuhamy. As regards the motion filed by Mr. Jayewardene, Q.C., as the Counsel for the substituted plaintiff objected to the re-listing of the appeal. Order was made to list the matter for argument in due course. On 10.10.1980 the matter was taken up and Counsel for both the appellant and the respondent were present. The Court made the following Order:

> "As there is no objection to the re-listing of this appeal, Court makes Order allowing the application to re-list. Let this appeal be listed for argument on 7.11.1980 which is a date convenient to both Counsel before any Bench."

The appeal ultimately was taken up for hearing on 2.3.1981. After hearing arguments the Court of Appeal delivered its judgment on 30.3.1981 setting aside the judgment of the learned District Judge and dismissing the plaintiff's action with costs. The claim in reconvention of the defendant was also dismissed. The substituted plaintiff's application for Leave to Appeal to the Supreme Court was refused by the Court of Appeal. An application to this Court for Special Leave to appeal was allowed.

One of the grounds of appeal urged by the substituted plaintiff is that the judgment of the Court of Appeal is not a valid judgment as the Court of Appeal constituted under the 1978 Constitution had no jurisdiction to set aside a judgment of the Supreme Court established by the A.J.L.(Vide paragraphs 19 *(f)* and *(g)* of the Application for Special Leave to Appeal). When this appeal was taken up for hearing on 23.09.1982 by this Court we heard both Counsel for the substituted plaintiff and the defendant on the ground referred to above. At the close of their arguments on that question we rejected the said ground of appeal and informed Counsel for the substituted plaintiff that we would hear arguments on the merits of the appeal. We also informed Counsel that we would be giving our reasons for rejecting the said ground of appeal in our final judgment.

I shall now give our reasons.

Learned Counsel for the substituted plaintiff, Mr. Subasinghe based his argument chiefly on the provisions of Article 169 (5) of the 1978

Constitution which reads as follows:

> "No appeal shall lie from any judgment, order or decree of the Supreme Court established under the Administration of Justice Law No. 44 of 1973, to the Supreme Court created and established under the Constitution but such judgment, order or decree, as the case may be, shall be final as between the parties to the action, application or other proceeding in which such judgment, order or decree was made:

The proviso to paragraph (5) has no relevance to the question in issue. Mr. Subasinghe submitted that in view of the imperative Constitutional provisions of Article 169 (5) a judgment of the old Supreme Court is not amenable to any further judicial proceedings and cannot therefore be set aside. He argued that the Supreme Court established under the A.J.L. was at the apex of the judicial structure at that time and that its judgments are binding on the Court of Appeal established by the 1978 Constitution. He cited in support of his arguments the case of *Walker Sons and Co. (U.K.) Ltd. vs. W.P. Gunatilleke and others* (1). That too was a reference made to the Supreme Court by the Court of Appeal in terms of Article 125 (1) of the Constitution. The matter was heard by a Divisional Bench of five Judges. The matter arose in this way: There were two similar decisions of the Supreme Court constituted under the A.J.L. dealing with the question at issue before the Court of Appeal in that Application No. 365/76. The question arose whether the Court of Appeal was bound by the two decisions of the old Supreme Court. The Court of Appeal referred the question to the Supreme Court. The majority of the Court (four Judges) decided that the ratio decidendi of the two cases decided by the old Supreme Court is binding on the Court of Appeal. Mr. Subasinghe's contention therefore was that the Court of Appeal had no jurisdiction to set aside the judgment of the old Supreme Court dated 26.06.1978 and to order a relisting of the Appeal. Accordingly he contended that the judgment of the Court of Appeal dated 30.03.1981 is a nullity. I am of the view that the judgment in *Walker's* case (referred to above) has no application to the question at issue before us in the instant case.

The application to re-list the appeal was made on 24.08.1979. That application was supported and allowed on 10.10.1980 and the provision of law under which that was done is the proviso to Section 769 (2) of the Civil Procedure Code. The 1978 Constitution came into operation on 07.09.1978. The question that arises is when an application is made to the Court of Appeal subsequent to 07.09.1978 regarding

a judgment delivered by the old Supreme Court, is the Court of Appeal competent to deal with it? Learned Counsel for the defendant, H.L. de Silva contended that the answer is in the affirmative. He submitted that the Court of Appeal derives its jurisdiction by reason of the second limb of article 169 (2) of the Constitution, which states that: "Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal." In view of this provision therefore the reference to 'the Supreme Court' in the proviso to Section 769 (2) of the Civil Procedure Code is deemed to be a reference to the Court of Appeal. Then there are the provisions of paragraph 3 of Article 169, which states that all appellate proceedings etc. pending in the Supreme Court established under the A.J.L. on the day preceding the commencement of the Constitution shall stand removed to the Court of Appeal and the Court of Appeal shall have jurisdiction to take cognizance of and to hear and determine the same. An appellate proceeding would ordinarily include a re-listing application. I am of the view that on a reading of paragraphs (2) and (3) of Article 169 of the Constitution it is clear that the Court of Appeal had the jurisdiction to vacate the judgment of the old Supreme Court dated 26.07.1978 and to order the re-listing of the Appeal. This question arose earlier before this Court in the case of *M.Z. Salith vs. Asgar Kadibhoy* (2). In that case judgment had been entered against the defendant by the District Court. The defendant gave notice of appeal in terms of the provisions of the A.J.L. That appeal came up for hearing before the then Supreme Court on 30.06.1978. The defendant-appellant was absent and unrepresented at the hearing and the appeal was dismissed with costs. The decree had been entered and sealed and the record sent back to the lower court, which issued writ of possession and writ of execution. The writ was partly executed. Thereafter the defendant on 06.09.1978 filed an application under Section 769 (2) of the Civil Procedure Code to have the appeal re-instated. That application came up for hearing on 28.02.1979 after the promulgation of the 1978 Constitution. The Court of Appeal by its Order of 15.03.1979 vacated the Order of the Supreme Court and re-instated the appeal. The appeal was subsequently taken up for hearing and the Court of Appeal by its judgment dated 13.03.1980 allowed the defendant's appeal and dismissed the plaintiff's action. The plaintiff appealed to the Supreme Court. Wanasundera, J., in the course of his judgment with the other two

judges agreeing stated as follows:

> "At the hearing of the appeal before us, Counsel for the plaintiff-appellant submitted that the Court of Appeal had no jurisdiction in law to set aside the judgment dated 30.06.1978 after decree was entered and sealed. In my view this contention is not tenable. I agree with the judgment of the Court of Appeal dated 15th March 1979 holding that the entering of a decree and sealing thereof does not per se debar the Court from acting under section 769 (2) of the Civil Procedure Code, and further that the provisions of Article 169 (5) of the Constitution of the Democratic Socialist Republic of Sri Lanka do not shut out the application. I hold that in the circumstances the Court of Appeal was competent to entertain the application and was justified in vacating the exparte judgment and decree dated 30th June 1978 and directing the re-instatement of the appeal."

We are in agreement with the judgment of Wanasundera, J. For these reasons we reject the argument that the Court of Appeal had no jurisdiction to set aside the judgment of the old Supreme Court and to order a re-listing of the appeal.

I shall now proceed to consider the appeal on its merits. The question that arose for determination in this case was whether the Lease Agreement P14 was a lease of a business or whether it was only a blind to cover the letting of the premises. Siyadoris Appuhamy's case was as follows: He had been the tenant of premises No. 18, Yatiyantota Road, Avissawella from the year 1940 under the owner Pedoris Appuhamy. He was running a boutique in the premises. In the years 1961 and 1962 he renovated the premises and added a room to provide additional space for his boutique. For this purpose he employed a mason called Juwa who gave evidence in this case for the plaintiff. In 1966 he commenced a hotel business in the premises and ran it for about 3 or 4 months and thereafter he handed over the business to Mohamed Ismail Rauf. On 28.08.1966 he obtained from the Urban Council, Licence No. 5/66 which has been produced marked P3 to run the hotel business. On the same day on the Informal Agreement P4, he handed over the business to Mohamed Ismail Rauf who was to run the business for one year. Rauf was to pay Siyadoris Appuhamy a sum of Rs. 77/50 per month from the profits of the Hotel. According to P4, Siyadoris Appuhamy also gave over to Rauf the furniture and fittings of the Hotel, which are set out in the Agreement. Thereafter Siyadoris Appuhamy obtained in

his name Hotel Licenses P6, P8, P12 and P13 for the years 1967, 1968, 1969, 1970, and 1971 respectively and in respect of those five years he entered into the Lease Agreements P5, P7, P9 and P11. These Agreements were each for a period of 1 year and were similar to the first Agreement P4. The last Agreement P11 was to end on 17.10.1971. The defendant became an employee in the hotel business under Rauf in February 1968 and continued as an employee under Rauf till about the middle of 1971 when Rauf expressed a desire to give up running the hotel business. Siyadoris Appuhamy then entered into the Lease Agreement P14 with the defendant on 07.01.1972 and handed over the business to the defendant along with the furniture and fittings which are set out in the Schedule to P14. The Hotel Licence P15 dated 05.05.1972 was obtained by Siyadoris Appuhamy in his name. P14 was for a period of one year from 07.01.1982. On the expiry of that period of one year the defendant refused to hand over the hotel business and premises to Siyadoris and continued to run the hotel himself. The plaintiff therefore instituted this action on 31.08.1973.

In support of his case Siyadoris Appuhamy called as his witness Juwa the mason and Rauf. He also called a Revenue Inspector from the Urban Council to produce the Hotel Licenses referred to above.

The defendant did not give evidence in this case. He only called one witness, an employee of his in the hotel business named Caliph. Caliph produced certain documents. In April 1972 the defendant made the Application D2 to the Rent Board, Avissawella in Proceedings No. 35/72 claiming that he was a sub-tenant of Siyadoris Appuhamy. He prayed for a Certificate of Tenancy and for a determination of the authorized rent of the premises. The respondents to this Application were the owner of the premises D.S.D.Wijesinghe and Siyadoris Appuhamy. After inquiry the Rent Board made its Order on 25.05.1972. By its order the Rent Board decided to issue a Certificate of Tenancy and determined the authorized rent at Rs. 8/94 per month. Siyadoris Appuhamy appealed against this Order to the Rent Board of Review, which by its Order dated 10.09.1974, D4, dismissed Siydoris Appuhamy's appeal subject to the variation that the determination of the Rent Board regarding the authorized rent was set aside and the Board was directed to hear evidence on that point and thereafter give the basis on which the authorized rent was computed. The defendant took up the position at the trial that the Order of the Rent Board of Review was final and conclusive by virtue of Section 40 (11) of the Rent Act No. 7 of 1972.

I think it is opportune at this stage to mention that both the District Court and the Court of Appeal have considered this case on the basis that a Certificate of Tenancy had been issued to the defendant. It transpired in the course of the arguments before us that no such Certificate had been produced in this case. The entirety of the proceedings before the Rent Board and the Board of Review were produced at the trial. There is nothing in these proceedings to indicate that a Certificate of Tenancy had in fact been issued. According to the Order of the Rent Board, D6, only a decision had been made to issue a Certificate.

The learned District Judge after considering the oral and documentary evidence in this case and the judgments in two reported cases referred to in his judgment, came to the conclusion that what was leased to the defendant was the business of the Hotel only and not the premises. He also rejected the contention of the defendant regarding the effect of the Order of the Rent Board of Review.

As I have stated earlier the main question that arises for determination in this case is whether the document P14 was a lease of a business or the letting of a premises. There are several decided cases in our Law Reports regarding this question. I need refer only to the three most recent cases on this subject. They are *Pathirana v. de Silva* (3), *Nisam vs. Mustaffa* (4) and *Abeypala v. Abeyakirthi* (5). In all these three cases the facts were similar to the facts of the instant case. Previous decisions of the Supreme Court were considered in these three judgments. The ratio decidendi that emerges from a consideration of these cases is that in order to determine this question one has, as stated by Ismail, J. in *Abeypala vs. Abeyakirthi* (5) at page 89:

> "to examine the documents by which possession has been handed over in order to determine whether there has been a letting or sub-letting of premises or whether the lessee was merely permitted to occupy the premises as a licencee for the sole purpose of carrying on the business until the business was handed back to the lessor."

With these principles in view I shall now examine the document P14. The document is in Sinhala. It bears the heading "Lease of Movable Property – Rs. 1,100/-". The operative part of it states that the hotel business carried on under Licence No.52/71 (i.e.P13) belonging to Siyadoris Appuhamy at the premises in question and its name, firm and goodwill and the movable effects used for the conduct of the business as described in the schedule, are leased as from

for a lease rent of Rs. 1,100/- for one year, subject to the terms and conditions set out. There are 9 conditions. They are briefly as follows: the lessee at his own expense had to repair the building in which the business was being carried on during the first six months; the lessee had to pay Rs. 35/- per month as lease money during the first six months; during the latter six months he had to pay Rs. 150/- per month; the lessee had to pay the electricity bills and hand over the receipts to the lessor; the lessor was not to be held responsible for any debts incurred in the conduct of the business; the movable properties and effects described in the schedule had to be carefully used by the lessee during the lease and handed over to the lessor at the expiry of the lease term: the lessee had to re-imburse the lessor for any damages caused to such movable property; the lessee had to pay the fees in respect of the Licence to the Urban Council and finally on the expiration of the lease period the lessee had to hand over the business and the movable effects to the lessor and vacate therefrom. There is no reference at all in P14 to any letting or sub-letting of premises. In my view this document contains all the elements necessary for a lease of a hotel business. And for the sole purpose of running the business Siyadoris Appuhamy had to give possession of the premises to the defendant. The possession of the premises was merely ancillary to the running of the business.

The oral and documentary evidence in this case is in my view almost one way. There is the uncontradicted evidence of Siyadoris Appuhamy that he commenced the hotel business in 1966, ran it for 3 or 4 months and gave it over to Rauf in August 1966 on the Agreement P4 and that thereafter Rauf ran the business up to about the middle of 1971 on annual agreements. Rauf has corroborated Siyadoris Appuhamy on all these matters. All the hotel licences during this period was obtained by Siyadoris Appuhamy in his name. Siyadoris Appuhamy's evidence that the defendant was employed under Rauf from 1968 was also supported by Rauf. The witness Juwa also supported Siyadoris Appuhamy. He stated that the defendant was the tea maker in the Hotel under Rauf. The defendant did not give evidence in the case and deny any of these matters. He only called as a witness Caliph, an employee of his. Even he admitted that Rauf at one time ran a business in these premises. Caliph in his evidence stated that it was he who introduced the defendant to Siyadoris Appuhamy in 1967 and obtained the lease of the business for the defendant. This was not put to Siyadoris Appuhamy when he was cross-examined. It was suggested by the defence to Siyadoris

Appuhamy and Rauf that the five informal lease agreements in Rauf's name were drawn up and signed on one day for the purpose of this case. This was denied by both Siyadoris Appuhamy and Rauf. The learned District Judge has carefully examined the relevant documents and rejected the allegation and he has given convincing reasons for doing so.

The trial judge has closely considered Caliph's evidence and the documents produced by him. He has come to the conclusion that Caliph's evidence does not help the defendant. As regards the documents the learned Judge has held that none of them support the defendant's case that he ran the hotel business prior to 1972 and or that he was really a sub-tenant of the premises under Siyadoris Appuhamy. So the position is that there is not a single document to support the defendant's case.

The Court of Appeal in its Judgment had not given any reasons for setting aside the findings of facts of the learned trial Judge. The Court of Appeal has further misdirected itself on a number of points. It is stated in the judgment that Siyadoris Appuhamy admitted that the defendant was carrying on the business with Rauf and that in 1972 he gave the lease to the defendant. There was no such admission by Siyadoris Appuhamy. The uncontradicted evidence of Siyadoris Appuhamy which was supported by both Juwa and Rauf, was that the defendant was employed in the Hotel under Rauf. The Court of Appeal further states that it is clear from the evidence of Siyadoris Appuhamy that he did not run this business though he stated that he had done so for about 3 or 4 months. This finding is in the teeth of Siyadoris Appuhamy's uncontradicted evidence. No reasons have been given for rejecting that evidence. Again it is stated that according to Siyadoris Appuhamy's evidence the defendant had been in occupation of the premises from the beginning of 1968. What Siyadoris Appuhamy stated was that the defendant was employed by Rauf in the Hotel from 1968. The Court of Appeal has placed much importance in coming to this finding on a statement made by Siyadoris Appuhamy in the affidavit D1 filed by him in the proceedings before the Rent Board. In paragraph 4 of the affidavit Siyadoris Appuhamy has stated that prior to the execution of P14 he had let the business of the tea kiosk to the defendant and that he has attached marked R10 the Agreement dated 01.11.1969 by which he let the business to the defendant. The so called Agreement R10 does not form part of the proceedings of the Rent Board, which has been produced in this

case, nor has it been produced in the instant case. Subsequently when Siyadoris Appuhamy gave evidence before the Rent Board he stated that in 1966 he gave the business to Rauf and that after Rauf gave up the business in 1972 he gave the business to defendant and further that prior to that the defendant was an employee of the Hotel. That evidence is consistent with the evidence he gave at the trial in this case. The Court of Appeal states that the so called document R10 referred to in the affidavit D1 shows that P9, the Agreement with Rauf dated 05.10.1969 and the Hotel Licence P10 dated 17.10.1970 were sham documents, as the defendant had been in occupation from 1968. But this is not so. The evidence which has been accepted by the learned Trial Judge is that the defendant was an employee in the Hotel since 1968. The Court of Appeal has finally come to the conclusion that "on an examination of the terms and conditions in all these management agreements and the lease, they appear to be documents to cover up an actual sub-letting of the premises." There is no evidence to support this finding. As I stated earlier the defendant did not give evidence. The Court of Appeal has not even referred to the fact that the defendant did not give evidence and subject himself to cross-examination. As regards the Rent Board proceedings and the order of the Board of Review the Court of Appeal went on the footing that a Certificate of Tenancy had been issued. The judgment states that in terms of Section 35 of the Rent Act, the Certificate is prima facie evidence of the facts stated therein. As I have stated earlier no Certificate of Tenancy has been produced nor is there anything to show that it had been issued. The Court of Appeal further goes on to state that as Siyadoris Appuhamy took up before the Rent Board the identical position that he had taken up in this case, i.e. that he let the business and not the premises, the finding of the Board of Review D4 is final and conclusive in regard to the matters in dispute. As there is no Certificate of Tenancy I do not think that the order D4 can have that effect. Mr. H.L. de Silva for the defendant conceded that in the absence of a Certificate of Tenancy he is unable to claim for the defendant the benefit of section 35 of the Rent Act.

For these reasons I set aside the Judgment of the Court of Appeal and restore the Judgment of the learned District Judge. The appeal is accordingly allowed with costs. The substituted plaintiff is also entitled to his costs in the Court of Appeal.

WEERARATNE, J. – I agree.

SHARVANANDA, J. – I agree.

WANASUNDERA, J. – I agree.

SOZA, J. – I agree.

Appeal allowed.