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

PAGES 169 - 196

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Co. Printers (Private) Ltd.

Price: Rs. 25.00

DIGEST

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 confirm 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 fixed 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 applications in a reasonable manner specially when such applicants have satisfied the basis criteria regarding residence.

In the above circumstances I hold that the Petitioners have established the fact of violation of their fundamental 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

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 filed 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 substitute 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 fixed for argument, the question that arose was whether 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

to the delivery of the judgment of the High Court. Accordingly, at the time the leave to appeal application was filed 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 counsel 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.

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 filed 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 seeking 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 fixed 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 defendant- 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-respondent- respondent- respondent (hereinafter referred to as the 2nd respondent) and the 15th defendant-respondent- respondent- respondent (hereinafter referred to as the 15th respondent) 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 first instance it would be

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-

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 fixed for argument, 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*

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

when the applications had been filed 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 first 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 filed 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 substitution 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

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 final, 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 proposition on the basis of the decision given in Nathu Ram (Supra):

"1. On the death of a respondent, an appeal abates only against the deceased, but not against the other surviving respondents;

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 circumstances 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 final, 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 filed 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

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 filed 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 abatement 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

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 expeditiously subject to the above directions.

Appeal dismissed.

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

subsequent to him becoming the lessee and during the period of tenancy.

Per Shiranee Tilakawardane, J. –

"He must first 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 –

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-

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 possession 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 finding 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

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 find 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 agreement 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 filed in the District Court, the Appellant came to court seeking possession of the Premises, purportedly as the clear owner and title holder of these premises. However, in the replication filed 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

taken by her in her initial Plaint in which she represented that she was the owner of the premises.

It is significant 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 fide* 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 determining the validity of Document P1.

According to Sri Lankan law several elements must be satisfied 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.

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 filled 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 testified 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

as much in his Testimony (*see* page 71 of the record). However, in his testimony Mr. Perera made out that Document P1 was drafted pursuant to information given by the Respondent, 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 finds this assertion by Mr. Perera to be inconsistent with the substance of Document 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 undermined 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 significant value. Mr. Perera's submission of this (*see* Page 60 of the Brief) is put simply, improbable.

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 Respondent'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.

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 finds 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.

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 Officers 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 officers 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 Constitution.

In terms of the Excise Notification No. 509, all Police officers 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 Notification 509 read with Sections 35 and 46 (g) of the Excise Ordinance, Police Officers 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 officer.

(3) When the Minister, by clause 1(11) of the Excise Notification, has appointed all officers of the Police Force to perform acts and duties mentioned in Section 35 of the Excise Ordinance, officers 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

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 officers 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 officers 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 officers 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 officers have lawful power or authority under the provisions of the Excise Ordinance to detect and arrest a person for the alleged

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 Notifications issued thereunder.

The position of the petitioners is that police officers 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 officers have powers to detect 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 Notification "appoint officers 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 Notification 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 Notification, the Minister had appointed "all officers of the Police Force to perform the acts and duties mentioned in sections 33, 35 and 48(a) of the Excise Ordinance throughout the Island." By clause 8(i) of the same Notification, 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 officers of the Police Force throughout the Island."

Thus the aforementioned Excise Notification No. 509 appoints all officers 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

and duties of an Inspector of the Excise Department under section 37 of the Excise Ordinance shall be exercised by all officers of the Police Force throughout the Island.

In terms of the Excise Notification No. 509 referred to above all police officers 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 application.

Section 33 of the Excise Ordinance empowers the Excise Commissioner or a Government Agent or any excise officer not below such rank as the Minister may prescribe, or any police officer duly empowered in that behalf to enter and inspect places of manufacture, bottling and sale of any excisable article. In view of the Excise Notification No. 509 the police officers 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 specific purpose of detecting a violation of a condition of the licence. Accordingly section 33 is not relevant to the present application.