CIVIL PROCEDURE CODE

Ref.01/03/2002

Petiton of Appeal – Signed by the instructing Attorney.

Jayantha Hettiarachchi v.
Rev.Wanduramba Uparatne

C.A.No.640.89(F), D.C.Galle No.T/9501

Decided by N.E.Dissanayake, J. and A.M.Somawansa, J on 22.03.2002.

Registred attorney's failure to sign the petition of appeal goes to the validity of the petition of appeal and as such it is not curable under Section 759(2) of the Civil Procedure Code.

Dissanayake, J. Held:

Admittedly the petition of appeal tendered by the 2nd Respondent-appellant is not signed.

The question whether this court can grant relief under Section 759(2) of the Civil Procedure Code was considered by this Court.

Taking into consideration of the matters averred in the affidavit filed by the registered Attorney of the 2nd defendant-appellant, admittedly the reason for his failure to sign the petition of appeal was the gross negligence on his part. It has been held in the following cases that Section 759(2) of the Civil Procedure Code cannot be invoked to condone with the gross negligence, carelessness or neglect of the defaulting party or his registered attorney.

In this case too the registered attorney's failure to sign the petition of appeal goes to the validity of the petition of appeal and as such it is not curable under Section 759(2) of the Civil Procedure Code.

Therefore I uphold the preliminary objection of learned President's Counsel for the petitioner-respondent and dismiss the appeal of the 2nd respondent-appellant with cost.

(Cases referred – Perera Vs.Perera and another (1981) 2 SLR 41, Kiri Banda Vs.Ukku Banda (1984) 2 CALR 191 and Keerthiratne Vs.Udena Jayasekera (1990) 2 SLR 346)

CONTRACTS

Ref.02/03/2002.

Illegal contract – right to legal remedy.

P.L.Sumanadasa V. P.D.Karunadasa

C.A Appeal No.624/96(F)
D.C.Colombo Case No.6042/RE

Decided by T.B.Werasuriya, J. (P/CA) and D.J.de S.Balapatabendi, J. on 13.03.2002.

On the admission of the parties the premises which were let to the Defendant-Appellant was an unauthorized structure and hence cannot form the subject of a valid contract of tenancy. Therefore on this ground alone the Plaintiff-Respondent is not entitled to relief.

Weerasuriya, J. Held:

The Plaintiff-Respondent brought this action against the Defendant-Appellant seeking his ejectment from the premises described in the schedule to the plaint and damages from 06.06.1983.

The Defendant-Appellant in his answer whilst denying averments in the plaint prayed for dismissal of the action. This case proceeded to trial on 13 issues and at the conclusion of the case, the learned District Judge by his judgment dated 26/07/1996 entered judgment for the Plaintiff-Respondent as prayed for in paragraph a,b and c of the amended plaint. The present appeal is against the aforesaid judgment.

It was common ground that the Plaintiff-Respondent had leased the premises in suit to the Defendant-Appellant for a period of one year commencing from 03.06.1982 at an annual rental of Rs.720. It was also revealed that the land on which the building stood was a land belonging to Kotte Municipality.

The case of the Plaintiff-Respondent was that the premises in question was given the assessment No.1702 and that the Defendant-Appellant demolished that structure and put up a new structure. In evidence the Plaintiff-Respondent asserted that having put up a new structure the Defendant-Appellant extended it to incorporate a portion of another land belonging to Kotte Municipality on which stood a structure for dumping of garbage.

The parties were in agreement that the building was an unauthorized structure. Even the alleged structure put up by the Defendant-Appellant was also unauthorized as admittedly by him in his evidence.

The Plaintiff-Respondent has sought relief by way of ejectment of the Defendant-Appellant on the basis of expiry of a lease agreement entered into with the Plaintiff-Respondent for one year from June 1982. The Plaintiff-Respondent alleged that the Defendant-Appellant has failed to vacate the premises at the end of the lease agreement.

The question before us is whether the Plaintiff-Respondent is entitled in law to seek relief on the basis of a lease agreement which was manifestly illegal.

Therefore on the admission of the parties the premises which were let to the Defendant-Appellant was an unauthorized structure and that it cannot form the subject of a valid contract of tenancy. Therefore on this ground alone the Plaintiff-Respondent is not entitled to relief.

The plaintiff-Respondent, despite several amendments to the plaint did not take up the position that the Defendant-Appellant was a licencee under him and therefore at the termination of the license he is entitled to the relief of ejectment of the Defendant-Appellant.

Therefore the learned District Judge was in grave error in coming to a finding that at the termination of the lease agreement the Defendant-Appellant is required to hand over the premises to the Plaintiff-Respondent and vacate the premises in suit.

Therefore we set aside the judgment of the learned District Judge dated 26/07/1996. We direct that the parties must bear their own costs in this appeal.

(Case referred – Malwattage Vs.Dharmawardene (1991) 2 SLR 141)

INSURANCE

Ref.-03/03/2002.

Claiming damages as consequential loss on insurance policy.

Insurance Corporation of Sri Lanka v. Piyasena Seneviratne

C.A.No.1176/95(F), D.C.Colombo No.6098/M

Decided by T.B.Weerasuriya, J. (P/CA) and D.J.de S.Balapatabendi, J. on 07.03.2002.

It is a fundamental rule of insurance law that the insurer is only liable for losses proximately caused by the peril covered by the policy. It is a general rule applicable to contracts of insurance that if the insurance policy is a valued policy the amount recoverable by the assured is the agreed value.

Weerasuriya, J. (P/CA) Held:

The plaintiff-respondent brought this action against the defendant-appellant claiming a sum of Rs.200,000/= as damages for breach of the contract of insurance entered into with the defendant-appellant in respect of car bearing registered Number 15 Sri 2890

and a further sum of Rs.100,000/= and Rs,.5,000/= per month as consequential loss purportedly arising from the said breach of contract.

The defendant-appellant in its answer whilst denying liability prayed for dismissal of the action.

This case proceeded to trial on 14 issued and the learned District Judge by his judgment dated 11.01.1995, entered judgment for the plaintiff-respondent as prayed for in the plaint. The present appeal is from the aforesaid judgment.

The plaintiff-respondent was the owner of motor car bearing registration No.15 Sri 2890 and on or about 28.12.1987, the plaintiff-respondent and the defendant-appellant entered into a contract of insurance in respect of the said motor car, for a sum of Rs.200,000/=. On or about 29.02.1988 the said motor car driven by the plaintiff-respondent met with an accident resulting in damages beyond repair. The plaintiff-respondent made his claim from the defendant-appellant for the total insured sum of Rs.200,000/=. The defendant-appellant offered a sum of Rs.190,000/= on a total loss basis and directed the plaintiff-respondent to surrender the damaged vehicle along with the relevant documents. Thereafter the defendant-appellant by letter dated 10.06.1983, acting contrary to the aforesaid offer, rejected the claim of the plaintiff-respondent on the ground that, he had violated the provisions of clause 5 of the general exceptions contained in the policy of insurance.

The finding of the learned District Judge that, there was a breach of the contract by the defendant-appellant and therefore it was liable to pay Rs.200,000/= remain unassailed, since learned Counsel for the defendant-appellant did not seek to canvass it.

However, the question that arises for determination in this appeal is whether the plaintiff-respondent is entitled to claim damages as consequential loss purportedly arising from the said breach of contract.

The contention that no liability could be attached to the defendant-appellant to pay damages for any consequential loss purportedly incurred by the plaintiff-respondent was founded on the following basis.

(a) that in the law of contracts doctrine of remoteness of damages prevents a claim for damages arising from consequential loss.

(b) That the law of insurance does not permit recovery of consequential loss and

(c) That clause 1 in the policy of insurance (P1) exempts the defendant-appellant from any liability to pay any consequential loss.

It is a fundamental rule of insurance law that the insurer is only liable for losses proximately caused by the peril covered by the policy.

It is general rule applicable to contracts of insurance that if the insurance policy is a valued policy the amount recoverable by the assured is the agreed value.

I proceeded to set aside that part of the judgment relating to the award of Rs.100,000/= and RS.5,000/= per mensum as consequential loss.

In the circumstances, the plaintiff-respondent would be entitled to claim only Rs.200,000/= with legal interest from the defendant-appellant.

The learned District Judge is directed to vary the decree accordingly.

(Cases referred – Hadley Vs.Baxendale (1854- 9 Ex 341), Victoria Laundry Vs.Newman (1949 Vol.2 KB 528).

LEASE

Ref 04/03/2002

Possessory Action - witnesses

K Ariyadasa v Kadawathpedige Sapin Kulatunga

C.A.568/93 D.C. KURUNEGALA 2632/L

Decided by N.E. DISSANAYAKE, J. & A.M. SOMAWANSA, J. on 13.12.2001.

The learned District Judge had a great advantage of seeing the witnesses in the witness box and observing their demeanour which this court is deprived of.

A.M. Somawansa, J. Held:

The plaintiff-appellant instituted this action in the District Court of Kurunegala for a declaration of title to a land called "Welikandamukalana", for ejectment of the defendant-respondent from the said land and for damages. The plaintiff appellant's pleaded case was that on a Crown grant he became the owner of this land and permitted one Manikkuwa who was his uncle to look after the land on the condition that it was to be returned to the plaintiff-appellant whenever he wanted. However after the death of the said Manikkuwa in 1980, the defendant-respondent is in forcible possession of the said land. The defendant-respondent claimed that his father the said Manikkuwa possessed the land for over 40 years and by deed No: 4020 marked V3 transferred his rights to the defendant-respondent. He also claimed prescriptive rights to the land. There was also a claim in reconvention but it appears that this claim was not perused. The parties went to trial on 17 points of contest and the learned District Judge by his judgment dated 21.07.1993 held in favour of the defendant-respondent and dismissed the action with costs. It is from this judgment that the plaintiff-appellant has preferred this appeal.

At the commencement of the trial the parties admitted that there was no dispute as regards the corpus and that Manikkuwa died in 1980. Also it was admitted that by Crown grant marked P1, one Baiya and Peera the plaintiff-appellant in this case became owners of the entire land and they divided the land into two and possessed as two separate lands.

The learned District Judge in answering issue No: 01 held that the plaintiff-appellant and the said Baiya became the owners of the larger land by virtue of the said Crown grant marked PI. However the plaintiff-appellant's action was dismissed on the basis that Manikkuwa had prescribed to the land and he, by deed No: 4020 marked V3 had transferred his rights to the defendant-respondent.

In the instant case too by virtue of the Crown grant marked P1 the plaintiff-appellant is conferred with the legal title to the land therefore for the burden of proving prescriptive title is on the defendant-respondent and it appears that on a balance of probability the learned District Judge was satisfied that the defendant-respondent did prove his prescriptive rights to the land though at a certain stage in his judgment he says that the evidence of the defendant-respondent on a particular point is unbelievable and that this factor has weakened the defendant-respondent's case.

As the appeal involves questions of fact it is necessary to examine the evidence in some detail. The defendant-respondent's position is that although there is a grant in the name of the plaintiff-appellant. It was Manikkuwa the defendant's father who provided the consideration and therefore the land was held in trust by the plaintiff appellant. This fact the defendant-respondent failed to prove. There was no evidence

forthcoming other than the bare statement of the defendant-respondent to establish the fact of Manikkuwa providing the consideration and the learned District Judge has correctly rejected this claim. He further pleaded prescriptive title to the land in that his father Manikkuwa was in exclusive possession from 1929 and by deed No: 4020 dated 08.01.73 transferred his rights to the defendant-respondent. He specifically stated that at no time did the plaintiff-appellant possess the land in suit. To prove his prescriptive title to the land the defendant-respondent himself gave evidence and produced deed No: 4020 marked D3.

In addition Mahathun and Sarath Munasinghe two officers from Alawwa Village Council gave evidence and produced two documents marked D1 and D2 to establish that traders licence have been obtained from the year 1955 to 1986 for the grocery shop situated on this land and the receipt for payment of licence fees marked D8 to D34.

The defendant-respondent also led the evidence of former Village Headman Ratnayake who held office from 1952 to 1963, who personally knew land give evidence as regards the exclusive possession of the land in suit by Manikkuwa and on his death by the defendant-respondent and the fact that they ran a grocery shop on the land. He denied that the plaintiff-appellant ever possessed the land in suit.

The last witness to be called by the defendant-respondent was Wasthuwa the son of Baiya the admitted owner of the balance 1/2 share of this land who testified to the fact that Manikkuwa was in possession of the land from the time he could recollect and effected the improvements on the land and on his death the defendant respondent possessed and ran a boutique on the land and at no time did the plaintiff appellant possesses the land or took the produce or did any improvements to the land.

The plaintiff-appellant admitted in his evidence that Manikkuwa and on his death the defendant-respondent was in possession of the land in suit and the boutique thereon. However his pleaded case was that Manikkuwa was in possession with the plaintiff-appellant's leave and license and it was only on the death of the said Manikkuwa that the dispute arose with the defendant-respondent coming to forcible possession of the land. The plaintiff-appellant based his title on a Crown grant dated 7.12.1929 marked P1. As observed above the learned District Judge has come to a correct finding that on this Crown grant the plaintiff-appellant became the owner of the land in suit. Thereafter the plaintiff-appellant goes on to say that in 1942 he went to reside elsewhere and requested his uncle Manikkuwa to look after the land in suit. It is important to note here that the plaintiff-appellant is unable to give the date on which he requested his uncle Manikkuwa to look after the land nor is there any written or oral evidence other than the bare statement of the plaintiff-appellant that he requested Manikkuwa to look after the land in suit or that the said Manikkuwa came into possession with the leave and licence from the plaintiff-appellant. He further stated in evidence that he possessed the land through Manikkuwa. Though the plaintiff-appellant himself says that until the death or the said Manikkuw to whom he entrusted the land there was no dispute, it appears from his own document P2 the said Manikkuwa had filed case No.4437/L against him in the District Court of Kurunegala.

According to the plaint filed in case No.4437/L marked P2, Manikkuwa has prayed for the ejectment of the plaintiff-appellant who he says had forcibly entered the land in suit. It appears that according to the plaint in case No.4437/L the plaintiff appellant was in possession and that Manikkuwa was seeking to eject him. However on an examination of the evidence of Manikkuwa instituted the case on a apprehension that the plaintiff-appellant was seeking to forcibly oust him. However on an examination of the evidence of Manikkuwa given in the said case marked D5 it appears that Manikkuwa instituted the case on a apprehension that this plaintiff-appellant was seeking to forcibly oust him. However when Maikkuwa died, on an objection raised as regards substitution, the case was laid by as per proceedings dated 27.01.81 marked P4. The defendant respondent himself filed case No. 1307/L marked P5 and this case too was withdrawn as per proceedings dated 26.06.85 marked P7. However it may be noted that the defendant respondent too had filed the case again on a apprehension of forcible entry by the plaintiff-appellant. In the circumstances these to cases do not assist the plaintiff appellant's position but strengthen the position taken up by the defendant-respondent. In any event, as observed earlier the plaintiff-appellant has admitted the fact that Manikkuwa as far as 1942 and on his death the defendant-respondent is in possession of the land and boutique thereon.

Wimalasena, a nephew of the plaintiff-appellant also gave evidence on behalf of the plaintiff-appellant to establish the fact that it was the plaintiff-appellant and not Manikkuwa who possessed the land in suit. On an examination of his evidence too like the plaintiff-appellant's evidence is unconvincing. According to this witness Manikkuwa had come to the land some where in 1946 or 1947 and 1960 started a boutique. Though the plaintiff-appellant in his evidence never mentioned the name of one Simon his witness Wimalasena says in his evidence that in 1956 one Simon was running the boutique. In the light of the about reasoning, I am inclined to take the view that there is ample evidence to support the findings of the learned District Judge that the defendant-respondent had established prescriptive title to the land in suit. The learned District Judge believed the evidence adduced by the defendant-respondent. I see no justification for its rejection by this Court. I might also say that the learned District Judge had a great advantage of seeing the witnesses in the witness box and observing their demeanour which this court is deprived of. The learned District Judge also has carefully analyses the evidence in this case and has arrived at a correct finding.

I see no reason to disturb the judgment of the learned District Judge. Accordingly I dismiss the appeal with costs.

(Case referred - Siyaneris v Jayasinghe Udenis de Silva 52NLR 289)

RENT AND EJECTMENT

Ref.-05/03/2002

Sec.146 of CPC – subletting – long delay to deliver the judgment.

W.Wickremaratna v. Hema Udugamkorala and another

C/A 435/89 (F)

Decided by N.E.Dissanayake, J. and A.M.Somawansa, J. on 15.03.2002.

A.M.Somawansa, J. Held:

The plaintiff-respondent instituted action No.RE/109 in the District Court of Matara for the ejectment of the 1st defendant-respondent and the 2nd defendant-appellant from premises No.97 more fully described in the Schedule to the plaint, for restoration of possession of the said premises and for recovery of compensation from the 1st defendant-

respondent on the basis that the 1st defendant-respondent who was the tenant of the plaintiff-respondent has sub-let the premises to the 2nd defendant-appellant without the consent of the plaintiff-respondent. The position taken up by the 1st defendant-respondent was that the contract of tenancy he had with the plaintiff-respondent was terminated in 1976 when he surrendered the possession of the premises to the plaintiff-respondent. It was the position of the 2nd defendant-appelant that he took on rent the premises in suit from the plaintiff-respondent in 1981 and is occupying the said premises lawfully as the plaintiff-respondent's monthly tenant. Thus the defendant-respondent as well as the defendant-appellant denied that there was any contract of sub-letting. The parties proceeded to trial on 8 issues and the learned District Judge by his judgement pronounced on 21.04.89 held in favour of the plaintiff-Respondent . It is from this judgment that the 2nd defendant-appellant has preferred this appeal.

In the instant case the dispute between the plaintiff-respondent and the 1st defendant-respondent is the fact of sub-letting the premises in suit by the 1st defendant-respondent to the 2nd defendant-appellant. However there is no issue raised on sub-letting.

Only the second issue point to the 2nd defendant-appellant and here again there is no mention of any sub-letting by the 1st t defendant-respondent. Strangely it is worded that the plaintiff-respondent herself as having rented out the premises in suit without her own consent to the 2nd defendant-appellant. Clearly the issue is incorrect and the learned District Judge has gone on to answer the issue in the affirmative without correcting the same. In the circumstances it is very obvious that the learned District Judge has failed to discharge the responsibility placed on him to record correctly the points of contest for determination and has failed to comply with the provisions of Section 146(2).

On the examination of the judgment it appears that the learned District Judge had been in a state of confusion right from the beginning and had arrived at certain findings not based or supported by the evidence led in this case.

The learned District Judge has answered issues 4 and 5 in the affirmative, thus accepting two contradictory positions. On one had the learned District Judge by answering issue 4 in the affirmative has accepted the position that the 1st defendant-respondent as tenant of the plaintiff-respondent occupied the premises in suit from 1971 to 1976 only. Thus the 1st defendant-respondent ceased to be the plaintiff-respondent's tenant as from the year 1976. On the other hand, by answering issue no.5 in the affirmative the learned District Judge goes on to accept a contrary position. In that even after the year 1976 there was a tenancy agreement between the plaintiff-respondent and the 1st defendant-respondent. This again does to show that the learned District Judge was in a state of confusion even when he answered the issues.

On the examination of the evidence led in this case the 2nd defendant-appellant has admitted as from 1981 he was in occupation of the premises in suit. The plaintiff-respondent's position is that on 17.07.1984 the 1st defendant-respondent who was the tenant of the plaintiff-respondent sub-let the premises to the 2nd defendant-appellant. The 2nd defendant-appellant claimed that he was the tenant of the plaintiff-respondent. There was no tenancy agreement or rent receipts produced. The plaintiff-respondent mostly depended on the oral evidence that of the plaintiff-respondent's husband's and the Grama Sevaka's evidence. Recording of evidence was concluded on 30.06.1987.

Before the learned District Judge could deliver the judgment, he went on transfer. He prepared the judgment and returned the same to District Court, Matara on 27.09.1980 nearly 1 year and 3 months after the conclusion of recording evidence.

The reasoning in the judgment and the conflicting nature of the answers all go to show that the learned District Judge was in a state of confusion when he prepared the judgment and answered the issues. Though the delay in preparing the judgment as from the date of tendering of written submissions is nearly 9 months. Still it appears a situation has arisen similar to that described in the case cited above.

In the light of the above reasoning I am of the view that the judgment of the learned District Judge dated 21.04.89 cannot be made to stand and should be set aside. In the circumstances, I set aside the judgment of the learned District Judge and order a trial de novo. Appeal allowed with costs.

(Cases referred Pathmawathie vs. Jayasekera (1997 (1) SLR 248, Kulatunge vs. Samarasinghe (1990 (1) SLR 244.)

Begining of the New Era *Contd from page 2*

undertaken in the last year. In the coming year, it is hoped to make radical changes in the above programmes so that these educational programmes would be more responsive to the needs and requirements of the membership.

In the past year, the annual National Law Conference was held under the theme "Rule of Law and Good Governance". The Social and Welfare activities of the Bar continued unabated. "Neethi Ranga I" was held in Colombo and "Neethi Ranga II" was held in the outstations in Negombo.

I pledge that the Bar Association under my stewardship will keep faith with its objectives, remain independent and non political and serve its members and society as a whole.

I place on record my deep debt of gratitude to each and every member of the Executive Committee and in particular to the Deputy President, Mr. L.C. Seneviratne, President's Counsel, and to the Secretary and Treasurer of the Bar Association of Sri Lanka. The Executive Committee worked as a team and it was a pleasure to work with such a cooperative Executive Committee.

May I be permitted to conclude on a personal note. I express my sincere gratitude to my family and in particular to my wife for her support and tolerance, to my late mother for her courage in adversity, to my alma mater St. Thomas' College, Mount Lavinia for the ideals inculcated in me and to my senior, the late Mr. G.F. Sethukavaler, President's Counsel, for his simplicity and for his example. To all of them I owe debts which I cannot hope to repay.