JUDGMENTS

Civil Law.

STAMP DUTY ACT

Supreme Court.

Seylan Bank Limited Vs Samdo Macky Sportdwear (Pvt) Ltd and another.

S.C.CHC Appeal Nos. 44/2007 and 45/2007, HC(Civil) Nos.239/04(1) & 207/02(1).

Decided on 26th June 2008 by S.N.Silva, C.J., Ms. Shiranee
Tilakawardane, J. & Andrew Somawansa, J.

Whether the stamps duty payable on the Guarantee Bond executed for security of repayment of monies, Regulation 7 made by the Minister under Section 69 of Stamps Duty Act No.43 of 1982, Section 2 and 5 of Stamps Duty Act. Is the Guarantee Bond is a Bond under the Regulation 7 made under Stamps Duty Act by Extra Ordinary Gazette Notice No.224/3, dated 20th December 1082 as amended by the Order published by the Minister of Finance under the Gazette No.948/15 dated 6th November 1996.

Only issue involved in the case was whether the Guarantee Bond which was executed by the Guarantors as a security for repayment of the monies granted to the Principal debtor was liable to be stamp duty under and in terms of Stamp Duty Act and regulations mentioned therein.

When the Appellant sought to produce with the Affidavit a Guarantee Bond marked "P9", the Learned Commercial High Court Judge held that the said Guarantee Bond was not sufficiently stamped and the Petitioner would be afforded a final opportunity to supply the deficiency. The Petitioner moved in Appeal to Supreme Court.

Her Ladyship. Shirani Tilakawardane, J. of the Supreme Court *inter alia*, held that

It is common ground that the only matter to be decided whether the Guarantee Bond marked "P9" is liable for the payment of stamp duty under Section 7 of the amended regulations which, by subsection 7(a) mandates the payment of stamp duty on "a Bond, pledge, Bill of Sale or Mortgage for any definite and certain sum of money affecting any property other than any aircraft registered under the Air Navigation Act (Chapter 365)....." *As it is clearly is not within the meaning of "pledge" "bill of sale" or "mortgage" the only matter to be admittedly determined is whether it is a "bond".*

"a "Bond" contemplated by the language of Subsection 7(a) of Regulation made under Stamp Duty Act has to be one where the money obtained is secured by, and correlated to property. Document P9 did not, at the time of the creation of the principal covenant, seek to secure or refer to property. In other words it was not a bond that bound property for the payment of the money.

In constructing the meaning of the word bond in the context of Subsection 7(a), the accrual of the obligation to pay money should precede the performance or non-performance of the specified act of payment. This is an essential distinction as even though the performance or non performance of the specified act is incumbent upon obligor, the obligation to pay does not precede the performance or non performance of the Act. Documents P9 in this context is just an agreement to pay and can not be considered as a bond as envisaged in terms of Subsection 7(a) referred to above. Document P9 is merely an agreement to pay with consequences for default, with no attestation and no obligation by Deed. As such, documents does not warrant stamp duty as a Bond under the Stamp Duty Regulations.

The Supreme Court sought to distinguish the earlier judgement of the Supreme Court of **Ceylease Finnancial Services Limited V. Sriyalatha and another SC** (CHC (Appeal) No.48/2004, SCM 11.12.2006 on the basis that in the said Ceylease case the Defendant had entered in to a bond with the security of the property-more particularly, a vehicle-that was mortgaged and which could be considered movable property. No such arrangements exist in the current actions that suggest their inclusion within Section 7 of the Stamp Duty Regulations.

Ref. No.01/6-8/2008

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JUDGMENTS

TENANCY

Supreme Court

Olupathge Bomithra Jayatha Silva Vs Namdawathi Hewa Jayasinghe,

SC Appeal No.38/2004,
CA No.1005/2000(F)
DC Mt. Lavinia Case No.661/96/L,

Decided on 1st February 2008.

Decided by S.N.Silva, C.J., Ms. Shiranee Tilakawardane, J. & S.Marsof, J.

Protection of Rent Act NO.07 of 1972, Contract of Tenancy, Attornment, Continued occupation without paying rents and attornment, Trespasser.

The Petitioner instituted an action in the District Court of Mt. Lavinia *inter alia*, praying for a declaration of title to the property described in the schedule to the Plaint and ejectment of the Respondent.

The Petitioner became the owner of the undivided portion of the subject property by Deed bearing No.1090 dated 6th March 10978 attested by D.W.Samaraweera, Notary Public and subsequently, in terms of final partition of decree became the owner of the property described in the schedule to the Plaint.

Though the Respondent was aware of the partition decree, the Respondent took no steps whatsoever either to attorn or pay rents to the Petitioner. When the Notice to Quit was served on the Respondent *inter alia*, highlighting the failure to attorn the Petitioner as the landlord, the Respondent deliberately avoided in replying the same.

The Respondent took up the position that the her father one D.H.Jayasinghe was the tenant of the said property since 1964 on a monthly rental of Rs.35/- and the tenancy had not been terminated by a lawful notice to quit in terms of the provisions of the Rent Act No.07 of 1972 and hence no cause of action has accrued to sue the Respondent.

Her Ladyship, Shiranee Tilakawardene, J. decided that In the case of **Lalitha Perera V. Padmakanthi 1987 2 SLR 1,** it was held that attornment is the act of the tenant putting one person in place of another as his landlord. In any case of attornment the tenant acknowledges the land-lordship of a person other than his original landlord.

In the above case, the Respondent had expressly refused to accept the Appellant as the landlord, and had not agreed to pay rents; therefore there is no privity of contract established between the parties, there being no relationship of landlord and tenant between them.

Despite knowing this fact the Respondent had refused or offered a conditional acceptance as to the ownership of the Petitioner and accordingly she has failed to pay the rent due for the premises. Thus, in the light of the above, the Respondent had repudiated the contract of tenancy and accordingly the Respondent is not entitled to any further notice in terms of the Rent Act. *In terms of the evidence of the Respondent, the Respondent has persisted in conduct which is fundamentally inconsistent with a contract of tenancy, though to suit her convenience at this stage she seeks protection under the contract which her own act she has clearly repudiated.*

In the case of **Gunesekara V. Ginadasa (1998) 2 SLR 115,** Fernando J. held that " It seems to me that while it is legitimate initially to infer attornment from continued occupation, thus establishing privity of contract between the parties, another principle of attornment must sometimes yield. *When the occupier persists in conduct which is fundamentally inconsistent with a contract of tenancy, and amounts to a repudiation of that presumed contract, the transferee has the option either to treat the tenancy as subsisting and to sue for arrears of rent and ejectment (as in David Perera V Madanayake) or to accept the occupiers repudiation of the tenancy and to proceed against him as a trespasser."*

Ref. No.02/6-8/2008

CIVIL PROCEDURE CODE

Supreme Court

Jeewani Investments (Pvt) Limited Vs M.P.W.Perera,

SC Appeal No.108/2006,
CA No.886/94(F),
D.C.Colombo Case No.15513/L

Decided by Jayasinghe J., Amaratunga, J and Marsoof J.

JUDGMENTS

Civil Procedure Code Sec. 24 and 27. Can the Attorney-at-law who is not the registered attorney-at-law on record in the original Court file a re-listing application in the Court of Appeal and whether such application filed in that manner is valid.

The issue that arisen in the case was whether the Attorney-at-law who is not the registered attorney-at-law on record in the original Court can file a re-listing application in the Court of Appeal and whether such application filed in that manner is valid.

His Lordship Jayasinghe J. held that

In the case of **Saravanapavan Vs. Kandasamydurai (1984) 1 SLR 268,** his Lordship, Seneviratne J.(P/CA) held that in a leave to appeal application which originates in the Court of Appeal, the proxy can be filed either by the registered attorney in the original court or by any other attorney-at-law. The reasoning of Seneviratne J. was that unlike a final appeal, the proceeding in a leave to appeal application originates in the Court of Appeal and as such a party can appoint a registered attorney other that the registered attorney in the original Court for the purpose of a leave to appeal application made in the Court of Appeal.

Having considered the Section 24 and 27(1) of the Civil Procedure Code, His Lordship Jauasinghe J. further held that

When the relevant parts of the two provisions of Section 24 and 27(1) of the Civil Procedure Code read together, it is clear that any application to any Court may be made by a registered attorney duly appointed by the party in writing and that such writing shall be filed in Court. *A leave to appeal application, though it is connected to proceedings pending in an original Court, is not an application commenced in the original but commenced in the Court of Appeal and section 24 and 27(1) of the Civil Procedure Code enable a party to appoint a registered attorney for the purpose of such application. There is no requirement that registered attorney so appointed shall be the same registered attorney on record for the proceedings in the original Court. Unlike a leave to appeal application*, a final appeal commences with the filling of the notice of appeal and petition of appeal in the original Court by the Registered attorney on record and the original court thereafter transmit the record to the Court of appeal and appeal proceedings in the Court of Appeal are a continuation of the proceedings commended in the original Court.

The Former Supreme Court in **Gunesekara vs De Zoysa (52 NLR 357)** has held that a revision application in a civil case can be initialled by a proctor other than the proctor whose proxy was filed in the original court. For the reasons set out above, *I hold that in other applications commenced in the Court of appeal such as relisting application and application for leave to appeal notwithstanding lapse of time which have no bearing on the proceedings taken in an original Court, a party is entitled to appoint a registered attorney other than the registered attorney in the original Court.*

Ref. No.03/6-8/2008

COLOMBO LAW SOCIETY NEWS

Microsoft Office Application Training specially designed for lawyers. (Certificate Course) The Course will be conducted by DMS Computer Company and classes held in their Training Centre.The course fee Rs. 6500/-. More details could be obtained from the CLS office.

A Labour Seminar (Certificate) will be held at the BASL Auditorium on 6th September 2008.

Neethi Kekulu - A stage for emerging talents of the Children of lawyers will be held on 12th October 2008 at the Elphinstone Theatre at 6.00 pm. The entries are closed and 36 entries have been received.

HULFTSDORP LAW JOURNAL - The 1st Edition of the Law Journal published by the Colombo Law Society will launched on 25th August 2008

The cleaning of the Library, Lounge, office and the Restaurant of the Law Society has been handed over to Abans Janitorial services.

The Joint Committee of District Court Judges, Lawyers, Registrars and senior staff of the District Court of Colombo had its 3rd Meeting recently. The proposals of all parties for the more effective administration of the courts have been implaemented and the lawyers in Colombo are now satisfied with the outcome of these meetings. The meetings are attended by the Hon. District Judge, Additional District Judges, representatives of over 12 instructing firms and the key office bearers of the Society.