

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF  
SRI LANKA**

SC APPEAL 122/17

SC HC (CA) LA 271/16

APPEAL NO. WP/HCCA/KAL/121/2010 (F)

D.C KALUTARA CASE NO. 4976/L

Manatungage Isilin Nona,

Moragalla, Beruwala.

**PLAINTIFF**

**-VS-**

Seneriya Ranasinghe Pathmarajah

Liyanaarachchi,

Joseph Coorey Mawatha,

Bonnalagoda, Beruwala.

**DEFENDANT**

**AND BETWEEN**

Manatungage Isilin Nona,

Moragalla, Beruwala.

**PLAINTIFF- APPELLANT**

**-VS-**

Seneriya Ranasinghe Pathmarajah

Liyanaarachchi,

Joseph Coorey Mawatha,

Bonnalagoda, Beruwala.

**DEFENDANT- RESPONDENT**

**AND NOW BETWEEN**

Seneriya Ranasinghe Pathmarajah  
Liyanaarachchi,  
Joseph Coorey Mawatha,  
Bonnalagoda, Beruwala.

**DEFENDANT- RESPONDENT-  
PETITIONER**

**-VS-**

Manatungage Isilin Nona,  
Moragalla, Beruwala.

**PLAINTIFF- APPELLANT-  
RESPONDENT**

**Before:** Jayantha Jayasuriya, PC, CJ  
Murdu N.B. Fernando, PC, J  
E.A.G.R. Amarasekara, J

**Counsel:** Hemasiri Withanachchi with Shantha Karunadhara for the Defendant-Respondent-  
Appellant

M.D.J Bandara with Upali Alwis instructed by Mrs. Yamuna Kumari for the Plaintiff-Appellant- Respondent

**Argued on:** 06.09.2022

**Decided on:**28.11.2024

**E.A.G.R. Amarasekara, J**

This is an appeal by the Defendant- Respondent-Petitioner (hereinafter sometimes referred to as the Defendant) against the Judgment of the Civil Appellate High Court of the Western Province Holden at Kalutara dated 04.05.2016 allowing the appeal of the Plaintiff-Appellant-Respondent (hereinafter sometimes referred to as the Plaintiff) by which the said Civil Appellate High Court set aside the Judgment of the District Court of Kalutara dated 25.08.2010.

As per the Plaint filed on 07.11.2000 in the District Court of Kalutara, the Plaintiff described the chain of title and cause of action as follows:

- By Deed of Partition No. 1394 dated 27.07.1988 one Bellana Vithanage Ariyadasa Rodrigo became entitled to Lot 2 of the land called 'Kandewatte', described in the schedule to the Plaint and the said Ariyadasa Rodrigo by Deed No. 4501 dated 03.01.1991 had transferred the same to one Pettakuttige Sarath Silva. The aforesaid Sarath Silva by Deed No. 4620 dated 21.03.1991 had transferred the said land to Don Asel Wickramasiri and, by Deed No.4650 dated 24.04.1991 said Asel Wickramasiri had transferred the same to Manatungage Isilin Nona, the Plaintiff.
- Further, the Plaintiff and her predecessors-in-title were in uninterrupted and undisturbed possession thereof for over ten years and thereby had acquired prescriptive title thereto.
- The Plaintiff by Agreement No. 1453 dated 23.03.1994 leased out the said property for a period of 99 years to one Rosa Schneider of Gerpinger Strasse 35, 83404, Ainring, Germany subject to the terms and conditions in the said agreement for construction of a building thereon.

- However, the said Rosa had never entered the land in suit and failed to construct any building or effect any improvements thereon, and hence the said Lease Agreement is illegal and cannot be enforceable.
- The Plaintiff is the owner of the said land and, the Defendant on or about 04.11.2000 had forcibly and unlawfully entered the said land without any rights thereto with the objective to put up a wall to separate the part of land and/or a building thereon and heaped up building materials in the said property and as a result the Plaintiff had made a complaint to the Beruwala Police on the same date in that regard.

As a result, the Plaintiff had prayed for a declaration of title as the sole owner of the land described in the Schedule to the Plaint, to evict the Defendant and all persons holding under him while restoring the peaceful possession to the Plaintiff and, for damages etc.

It must be observed that even though, the Plaintiff had averred that the said lease agreement with the German national Rosa Schneider is illegal and invalid, and thus, indicated that right to possess the land was with the Plaintiff, said Rosa Schneider had not been made a party to the plaint to ascertain a finding in the Plaintiff's favour. This is important as her prayers in the plaint are not merely for declaration of her title to the subject matter in dispute, but also include a prayer for ejectment of the Defendant. If the Defendant's actions, which were allegedly violative of the plaintiff's rights as an owner, represent the said lessee's right to possess, the plaintiff's prayers for ejectment would naturally have to fail as this Court should not come to a finding that the said lease was invalid and unenforceable without giving an opportunity for the said German National to respond to such position through her answer and giving an opportunity to take part in trial as a party. Otherwise, such a conclusion would be based on a violation of the rule *audi alteram partem*. However, it is observed that said Rosa Schneider came as a witness for the Defendant.

The Defendant filed the Answer dated 10.07.2002 and, among other things, stated that:

- The Defendant admitted the averments in paragraphs 2,3, and 4 of the plaint which showed the chain of title of the Plaintiff and her ownership to the land in dispute.
- By Lease Agreement No. 1453 dated 23.04.1994 attested by M. A. M. Hanapi, Notary Public, the Plaintiff had entered into a lease agreement for a period of 99 years in respect of the said property with a German National called Rosa Schneider and in view of the

consideration paid thereof and the benefit derived by the Plaintiff therefrom, the Plaintiff is estopped from denying the legal validity thereof and, the said lease agreement is a valid agreement.

- The Plaintiff, after execution of the said lease agreement, was attempting to deprive the said Rosa Schneider of her lawful right in respect of the said property by institution of the instant action and thereby has attempted to unjustly enrich at the expense of the said Rosa Schneider.
- The Plaintiff, after the execution of the said deed of lease, had refused to deliver the possession thereof to the said Rosa Schneider and consequent to the Plaintiff's conduct which prevented the said Rosa Schneider from possessing, occupying and improving the same, said Rosa had instituted D.C Kalutara Case No.4600/L and in terms of the Decree entered therein the possession was delivered to the said lessee, Rosa Schneider. Therefore, the pleadings, issues, Judgment and Decree in the said action would operate as facts that have been decided against the Plaintiff.
- The said Rosa Schneider having secured the possession thereof had entered into an agreement to put up a wall around the land with the Defendant and in terms of the said agreement the Defendant had commenced to construct a boundary wall on the said land on behalf of the said Rosa Schneider.
- The Plaintiff knowing well that the Defendant was looking after the interests of the said Rosa Schneider in respect of the said land, had made a false complaint to the Police, when the said Rosa Schneider was out of the country, in order to deprive her of her right to possess the land in issue and thereby to have the Judgment and the Decree entered in Case No. 4600/L ineffective.
- No cause of action had arisen to file an action against him and, the Plaintiff should not be allowed to disentitle the right to possession of said Rosa schneider in an indirect manner.
- Further, the Plaintiff cannot continue this action against the Defendant without adding Rosa Schneider.

In consequence, the Defendant *inter alia* prayed;

- to dismiss the Plaintiff's action
- to declare Rosa Schneider as the lessee to the said property described in the Plaint.

- to declare that the Plaintiff has no rights to disturb the possession of Rosa Schneider and her agents.
- To declare that the Plaintiff is estopped from refusing the said lease agreement and directly or indirectly interfering with the possession of said Rosa Schneider, and
- To decide that the plaint, answer, issues, judgment and decree in the said case No. 4600/L are matters decided against the Plaintiff.

The plain reading of the answer indicates that the Defendant does not claim any right of possession of his own. He neither as a licensee nor in any other capacity claims that he has a right to possess. He admits the title of the Plaintiff to the land in dispute but says that the land in dispute had been leased out to aforesaid Rosa Schneider and, the Plaintiff is estopped from denying the validity of the said lease agreement. He has also taken up the position that what has been decided in the case No. 4600/L between the Plaintiff and said Rosa Schneider, will operate as facts already decided against the Plaintiff. In my view, the position taken by the Defendant is rather that the principles relating to issue estoppel applies against the Plaintiff than decision in the said case operate as *res judicata* between the parties to the instant case. In other words, it is the position of the Defendant that the lessor and lessee relationship between the Plaintiff and Rosa Schneider had been already decided and the Plaintiff cannot dispute that issue again and she is estopped from doing that. The Defendant's position is that he did what was requested by said Rosa Schneider in terms of an agreement between him and Rosa Schneider to put up a wall and what he did falls within the rights of Rosa Schneider to possess the land as what he did was not for him but for Rosa Schneider in terms of the agreement between him and Rosa Schneider.

It appears that no party had taken up any objection regarding the non-joinder of parties prior to the commencement of trial as contemplated by section 22 of the Civil Procedure Code. Thus, such positions, if any, as to the non-joinder has to be considered as waived in relation to claims in the plaint as well as to the claims in reconvention in the answer.

Thereafter, the Court fixed the case for trial, and on 17.05.2004, the parties had admitted that Bellanawithana Ariyadasa who acquired title in terms of the partition deed No. 1394 dated 24.07.1998 is the original owner of the land. As indicated above, in fact, the chain of title of the Plaintiff and the fact that she is the owner of the disputed land had been admitted in the answer. That ownership has not been disputed even during the trial even though, there is no clear admission

had been recorded in that regard as per the proceedings available in the appeal brief. The parties to the action have raised 17 issues before the District Court. Issues No. 01 to No. 06 were raised by the Plaintiff. When perusing the said six issues, it is clear that, even though the Plaintiff has raised issues regarding the execution of the deed of lease, no issue had been raised to challenge the validity of the said deed of lease indicating that Plaintiff had abandoned the position taken to that effect in the plaint. Issues No. 07 to 15 were raised by the Defendant and those issues do not reflect any claim of a right to the disputed land by the Defendant and they reflect the position taken in the answer that the actions of the Defendant were done as per the instruction given by aforesaid Rosa Schneider. Issue No.9 clearly shows that the Defendant's position was that the Plaintiff is estopped from challenging the judgment and decree in the case No. 4600/L and not that the said judgment and decree operate as res judicata between the parties to this action where the defendant was a not a party to the said action. Thereafter, consequential Issues No. 16 and 17 have been raised by the Plaintiffs, putting in issue that whether the said case No. 4600/L was an action between the Plaintiff and said Rosa Schneider and, the decision in the said case is limited to the finding that Rosa Schneider is the lessee of the disputed land.

During the trial at the original Court, the Plaintiff gave evidence, marked documents P1 to P6 to prove her title and the execution of the deed of lease and closed the case of the Plaintiff. In her evidence she had categorically admitted that;

- She leased out the property to Rosa Schneider for 99 years by executing a deed of lease and Rosa Schneider has a right to build on the property,
- The lease was given to put up a two storied house and she does not want to challenge the said deed of lease,
- Rosa Schneider got her rights through the said deed of lease.
- Rosa Schneider can possess the land till the end of lease period in terms of the deed of lease. (See pages 87,89,93,96,97,98,99,108,110 and 111 of the brief and the aforesaid deed No. 1458 in this regard.)

Further, the Plaintiff, while giving evidence, appears to have stated that she made a police complaint when the Defendant made an attempt to put up the wall and the Defendant tendered a letter of authority given by Rosa Schneider. – vide page 111 of the brief. It appears that the Plaintiff wanted to express the view that Rosa Schneider should have come to the land to exercise

possession, even for the building of the Wall- vide pages 88,90 and 101. To exercise possession, one need not be present in the land. For example, an owner or a lessee who has the right to possess a land in Kurunegala may reside far away in Galle and sends a person to pluck coconuts to Kurunegala land and he need not be personally present during the harvesting of coconuts. By sending that person, the owner or the lessee does not intend to give any license to possess the land to that person. That person only has a contractual relation to do the task entrusted to him and has permission to enter the land for that purpose. In fact, the owner or the lessee exercises his right to possess through that person. Similarly, if the Defendant was authorized by the said Rosa Schneider to put up a wall, Rosa Schneider was exercising her right to possess the land as the lessee through the Defendant.

Wille defines possession as *'the physical control by a person of a corporeal thing with the intention of keeping the control of it for his own benefit'*<sup>1</sup>. Thus, possession contains a physical element (detentio) and a mental element (*animus possidendi*).

*'Detentio does not necessarily require immediate physical control. It is sufficient for a person to have the power at his will of dealing with a thing as he likes and of excluding others. A person does not lose his detentio of property by the mere act of leaving the property, if it is within his power to resume occupation subsequently.'*<sup>2</sup>

*'Possession may be secured and maintained not only in person but derivatively through an agent or representative.'*<sup>3</sup>

The Plaintiff appears to have relied on a term in the said deed of lease which states that when the lessee is out of the island, the lessor shall look after the property as a caretaker. It appears that the relationship between the lessor and lessee has been strained as indicated by filing of the action in 4600/L. However, the caretaker was appointed to look after the property and it cannot be construed to say that the caretaker can disturb the right to possess by the Defendant as the lessee. In fact, the caretaker should have accommodated the exercise of such rights by the lessee. In **Abdul Aziz Vs Abdul Rahim** 12 N L R 330 at 339", It was held that *'A lessee under a valid lease from the owner*

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<sup>1</sup> The Law of Property in Sri Lanka, Volume 1 by G.L.Peiris at page 320

<sup>2</sup> Ibid at page 321

<sup>3</sup> Ibid at page 321



*is dominus or owner for the term of his lease; he is owner during that term as against all the world, including his lessor.*

Subsequently, the Defendant, Rosa Schneider and Kolamba Muhandiramge Chandradasa (the Record Keeper of the District Court of Kalutara) gave evidence for the defense and marked documents V1 to V41 and closed the case of the Defendant. It is alleged that most of these documents have been issued or dated after the filing of the action. Some of them have been tendered subject to proof but no such objection has been reiterated at the close of the Defendant's case. The letter marked V38 giving authority to the Defendant is also dated 12.07.06. The Defendant has explained that it was tendered in evidence as the one given during the time of the incident has been misplaced - vide page 129 of the brief. Irrespective of those documents, the Defendant and said Rosa Schneider have clearly demonstrated in evidence, how the authority and money were given to the Defendant to put up a wall around the land in dispute. The Defendant has stated that he was acting with permission given by said Rosa Schneider and denied that he entered the land by force.

The said Rosa Schneider has given evidence to show how he funded the purchasing of the land and how it ended up in executing a deed of lease in her name. She has also confirmed the position of the Defendant that she authorized the Defendant to put up a boundary wall. She has also explained that she had to file the District Court action No. 4600/L to get the possession of the land. The aforesaid witness Chandradasa has tendered the original case record of said action No. 4600/L to the District Court along with certified copies of the relevant documents in evidence.

The learned Additional District Judge in the District Court of Kalutara delivered the Judgment dated 25.08.2010 in favour of the Defendant and dismissed the action of the Plaintiff *inter alia* giving following reasons:

- The Plaintiff has become the owner of the land described in the schedule to the plaint owing to the deeds marked P1, P3, P4 and P5.
- The Plaintiff has given the said land on lease to the German National, Rosa Schneider for 99 years by executing deed No.1453 marked P6.
- Both parties have accepted the validity of the said deed of lease.

- Whatever the deficiencies in the documents that had given authority to act as an agent or licensee (නියෝජිතයකු/ අවසරලාභියකු) of said Rosa Schneider, Rosa Schneider had given evidence and clearly indicated that she gave permission and consent to the Defendant to do certain acts relating to the disputed land and, thus the Defendant prepared to put up a wall as an agent or licensee (නියෝජිතයකු/ අවසරලාභියකු) of the said Rosa Schneider.
- Even though, the Condition No. 5 in the lease agreement, P6 states that lessor shall look after the said premises as caretaker when the lessee is out of the island, it does not prevent the lessee from possessing the said property through an agent, when the lessee is out of the island.
- The Lease agreement P6 does not contain any condition that the lessor should possess the premises when the lessee is not in the island.
- Even though, the 2<sup>nd</sup> condition in the lease agreement is to build a two storied building in the land, there is no time limit as to the completion of the said building. However, putting up a wall for the protection of the property is not an unreasonable act.
- In terms of the Lease Agreement P6, Judgment, decree, Fiscal Report of the delivery of possession and the Order dated 06.03.2002 in Case No. 4600/L, said Rosa Schneider is the lawful possessor of the land in dispute and as such, the Plaintiff is not entitled to reclaim the property.
- Since the lease agreement P6 was in operation, said Rosa Schneider being the lessee is entitled to possess the said property personally or through an agent.
- Therefore, the Defendant had not entered the said property unlawfully, forcibly or as a trespasser, and entered thereon while acting as an agent of the said Rosa Schneider and also on her leave and license. Hence, the Plaintiff is not entitled to claim for ejectment of the Defendant.

The term ‘අවසරලාභියකු’ in Sinhala used in the District Court Judgment as indicated above may sometimes give a wider meaning to indicate one who was permitted to possess the land and enjoy its fruits. However, the position taken in the answer by the Defendant, which is also reflected in the issues raised by the Defendant, is that he owing to a contract to put up a wall he acted on the instructions of the said Rosa Schneider indicating that he did the alleged acts with the permission and instructions of the lessee, Rosa Schneider who has the right to possess the land. Such

permission does not indicate that the Defendant was given the right to possess the land. Hence, in my view, the term ‘අවසරලාභියකු’ in the District Court Judgment has to be understood in this limited sense as one who was given the permission to do the agreed tasks. Even it is considered what is meant by the learned District Judge is the wider meaning to include the right of possession as a licensee, what is relied on by the Defendant is the permission given by the lessee to do the tasks as agreed between the Defendant and the Lessee as reflected by issue No. 10 framed by the Defendant. Even the issue No. 3 framed by the Plaintiff herself is important in this regard since, if the alleged unlawful acts done by the Defendant were done with the consent and instruction of the lessee who has the right to possess, the Plaintiff’s case cannot succeed.

The learned District Judge while accepting the Plaintiff as the owner of the property in dispute, held that Plaintiff is not entitled to the other reliefs including the prayer for the eviction of the Defendant as prayed in the plaint due to the aforesaid reasons given in the judgment. Thus, the plaint was dismissed subject to taxed costs. The basis for the dismissal of the plaint appears to be the failure to prove a cause of action against the Defendant since the Defendant entered to the land with the permission of Rosa Schneider as her agent.

In the appeal made to the Civil Appellate High Court of the Western Province Holden in Kalutara by the Plaintiff, the learned Judges of the said High Court set aside the District Court Judgment dated 25.08.2010 and held in favour of the Plaintiff on the following grounds:

- The Plaintiff instituted action against the Defendant seeking *inter alia* for a declaration of title.
- The Defendant sought a declaration that Rosa Schneider is the lessee of the premises and moves for a dismissal of the action on the ground of *Res Judicata*.
- The learned District Judge dismissed the action on the basis *inter alia* that the doctrine of *Res Judicata* operates against the Plaintiff.
- Admittedly the said Rosa Schneider was the lessee for 99 years and she filed the DC Kalutara action No. 4600/L to recover the possession where the judgment was given in her favour.
- The Defendant was not a party to the said action No. 4600/L and the cause of action in the said case was against the lessor to recover possession and, the cause of action in the instant

case is against the Defendant to eject him while claiming for a declaration of title in favour of the Plaintiff.

- The principle of *res judicata* does not apply to the instant case since the parties and cause of action are totally different between the Case No. 4600/L and the instant action.
- As the Plaintiff is the lessor, the Defendant cannot dispute the title of the Plaintiff to the corpus in terms of section 116 of the Evidence Ordinance. Moreover, the Plaintiff's title was well established with the title deeds produced.
- The Plaintiff is entitled to get her rights declared and the Defendant has no legal right to be in possession of the subject matter.
- According to the lease agreement, when the lessee is abroad, the lessor should look after the premises as a caretaker. As such, the Defendant cannot be in possession on behalf of the lessee. Since the Defendant failed to establish any legal right to be in possession, he is liable to be ejected.
- The Defendant in his answer, sought a declaration that said Rosa Schneider is a lawful lessee of the premises. It is to be noted that the Defendant cannot maintain such a relief in this case on behalf of another person who is not a party to the action.

While allowing the appeal with costs, the learned High Court Judges dismissed the cross claim of the Defendant.

Being aggrieved by the above Civil Appellate High Court Judgment, the Defendant appealed to this Court. When the leave to appeal application was supported, this Court granted leave on 02.06.2016 on the questions of law set out in paragraph 17(i), (iii), (iv), (v), (vi), and (viii) of the petition dated 02.06.2016, which will be referred to and answered at the end of this Judgment.

The reasons given by the learned High Court Judges clearly indicate that they erred in several aspects in their judgment. Once the issues are framed, the pleadings recede to the background and what the court has to decide are crystalized in the issues so framed- vide **Hanaffi Vs Nallamma (1998) 1 Sri L R 73**. The learned High Court Judges erroneously identified that the Defendant sought a dismissal on the ground of *Res Judicata* relying on the decision made in case No. 4600/L. As explained above, the Defendant has raised issue No. 9 to question whether the Plaintiff is estopped due to the judgment, decree and pleadings in the said case. He has not raised a question whether the said action operate as *res judicata* between the parties to the instant action. In other

words, the position of the Defendant is that the Plaintiff is estopped from denying that Rosa Schneider is the lessee of the land in dispute and she is entitled to the possession of the same. The defense of the Defendant is not that the cause of action is *res judicata*, but he came to the land on the instruction and permission of the said Rosa Schneider who has the right to possession as the lessee. In fact, the Plaintiff, contrary to the averments in her plaint that the said lease is not valid, has admitted in evidence as mentioned above, that there is a valid lease agreement between the Plaintiff and Rosa Schneider and the said Rosa Schneider is entitled to possess till the end of lease period which is 99 years. The learned District Judge considered the filing of action No. 4600/L and its outcome as evidence but the dismissal was based on the fact that the Defendant was not a trespasser but a person who came to the land as an agent or one who was permitted by the said lessee to do a task as instructed by the said lessee. This misapprehension that the learned District Judge dismissed the plaint on the ground of *res judicata* appears to be the main reason for the setting aside of the District Court Judgment. Even it is assumed that the learned District Judge considered it wrongly as *res judicata* between the parties to the instant action, it is not the only reason to refuse eviction of the Defendant. The Judgment clearly indicates that the learned District Judge correctly decided that the Defendant did not act as an unlawful entrant or a trespasser.

The learned High Court Judges in their judgment has stated that, as mentioned above, the Defendant cannot dispute the ownership of the Plaintiff and the Plaintiff's title is well established with the title deeds tendered in evidence. In fact, the Defendant has not challenged the title of the Plaintiff. The Defendant's stance is that the Plaintiff being the owner leased out the property to Rosa Schneider and he came to the land on the instruction of said lessee who has the right to possess. Even the learned District Judge in his judgment has accepted the Plaintiff's title but correctly refused to grant relief including the declaration of title as no cause of action has been proved against the Defendant as he was not a trespasser. Without proving a cause of action, one cannot claim for the reliefs prayed for. Thus, the learned High Court Judges erred in stating that the Plaintiff is entitled to get her rights declared. The learned High Court Judges have also stated that the Defendant has no right to be in possession of the subject matter. In fact, the issues framed by the Defendant do not indicate that the Defendant has claimed any right to possess for his own benefit. On the other hand, other than dismissing the plaint, the learned District Judge had not granted any other relief prayed by the Defendant.

The learned High Court judges have expressed the view that as per the lease agreement, when the lessee is abroad, the lessor should look after the premises as a caretaker -vide clause 5 of the lease agreement. Therefore, the Defendant cannot be in possession on behalf of the lessee. As mentioned above, there is no provision in the lease agreement which says that when the lessee is abroad, she loses her right to possess. In fact, clause 6 states that “As care taker the lessor shall not be entitled to sub-let the demised premises without the written consent of the lessee”. This indicates that the intention was to keep the right to possess with the Defendant even when she is abroad. As explained above, one need not be present at the property to exercise his right to possess. During the trial at the original Court, the lessee, Rosa Schneider has given evidence to say that she permitted the Defendant to look after the said land as she relied on him and has lost the confidence and the faith kept on the Plaintiff (Vide pages 162 and 163 of the Brief). In fact, she had to file an action to obtain the possession of the land. Thus, it was reasonable to get the Defendant to do the needful in exercising her right to possess.

Even though the learned High Court Judges held that, since the Defendant failed to establish any legal right to be in possession, he is liable to be ejected, through the case presented by the Defendant in defense, the Defendant has not attempted to establish a right of his own to be in possession of the property. Basically, the issues framed by him raised a defense that he was acting on behalf of Rosa Schneider who has the right to possess and therefore he is not a trespasser. The aforesaid Rosa Schneider has given evidence to that effect.

The learned High Court Judges had stated that without making Rosa Schneider a party, the Defendant could not have sought a declaration that said Rosa Schneider is a lawful lessee of the premises. It must be noted that other than dismissing the plaint, the learned District Judge had not given any other relief as prayed for in the answer. However, the District Court has come to the conclusion that Rosa Schneider is the lawful lessee on evidence led at the trial. Even the Plaintiff has admitted that fact which was supported by the decision in the case No.4600/L, Lease Agreement marked P6 and the evidence of Rosa Schneider as well.

The facts discussed above indicate that the learned High Court Judges failed to consider whether the Plaintiff proved his cause of action, especially whether the Defendant was a trespasser or an unlawful entrant who acted unlawfully, when facts revealed that he merely acted on the authority given by the lessee who had the right to possess. Instead of finding whether the Plaintiff had proved

his cause of action, the learned High Court Judges had endeavored to find fault with the defense and some of its reliefs which were not granted by the learned District Judge. It is clear that the learned High Court Judges failed to grasp the crux of the matter that the right to possess the property was with the lessee and the Defendant's alleged acts were done with the authority of the lessee, and the lessee was exercising her right to possess through the Defendant. Therefore, the Defendant was not a trespasser, unlawful entrant, or a person who engaged in any unlawful activity against any lawful right of the Plaintiff. Hence, the judgment of the learned High Court Judges dated 09.03.2016 has to be set aside and dismissal of the plaint by the learned District Judge has to be restored.

In the above backdrop, I answer the questions of law as follows;

1. Did the Civil Appellate High Court err in Law by reversing the findings reached by the Learned Trial Judge on the issue of the possession of the Defendant acting as the agent/licensee of Rosa Schneider, the Lessee in 'P6' in the circumstances of this Case?

A. Answered in the affirmative. However, it was Rosa Schneider, the lessee who exercised her right to possess through the Defendant.

2. Was the Civil Appellate High Court in error by holding that the principle of res judicata would not apply to the instant case without appreciating that the findings reached in D.C Kalutara Case No. 4600/L, would apply to the instant case so far as it relates to the rights of the Lessor and Lessee in Indenture of Lease 'P6'?

A. No. principle of res judicata will not apply to the alleged cause of action as action has not been filed against the Defendant as the agent of the lessee Rosa Schneider but the Plaintiff is estopped from denying the fact that Rosa Schneider is the lessee and she has the right to possess. In fact, the Plaintiff has admitted those facts in evidence contrary to the averments in the plaint

3. Had the Learned Civil Appellate High Court Judges misdirected themselves when they held that the Plaintiff should possess the said premises on the basis of condition No. 5 in the said Lease Agreement, when the Lessee is out of the island, without taking into account the legal principles applicable to property taken on lease?

A. Answered in the affirmative. The Plaintiff is only a caretaker when the Lessee is out of the island, but there is no bar for the lessee to exercise her right to possess the property through an agent or servant etc.

4. Has the Civil Appellate High Court misdirected itself by holding that the Defendant has no legal rights to be in possession of the subject matter without appreciating that the Defendant acting as an agent of the said Rosa Schneider had commenced the constructions thereon as per the conditions set out in 'P6'?

A. Answered in the affirmative as the Defendant has not asked for a legal right to possess on his own right. He was acting on the instructions of the lessee who had the right to possess.

5. Have the Learned Civil Appellate High Court Judges misdirected themselves by misconstruing the Condition No. 5 in 'P6' in determining the possession of the Defendant in respect of the property in suit?

A. Answered in the affirmative. However, the Defendant was acting on the instructions of the lessee who had the right to possess.

6. Have the Learned Civil Appellate High Court Judges failed to take into account the condition No. 1 in 'P6' whereby the Lessee was entitled to sub-let the premises in suit without obtaining written consent of the Lessor?

A. This does not arise as there was no issue involved in subletting of the property.

It must be noted that the lease agreement was entered in 1994. The lessee had to file an action to take the possession of the property and even after that, lessee has not been able to possess the property without hindrance. Even after the answer revealed that the Defendant's acts were done with the consent of the lessee, the plaintiff proceeded to prosecute her case and finally it came up to the apex Court and the litigation has already consumed almost 20 years compared to the leased period of 99 years. The conduct of the Plaintiff has to be frowned upon and considered in imposing costs.

For the forgoing reasons, I allow this appeal and set aside the Judgment of the Civil Appellate High Court dated 04.05.2016 and restore the Judgment of the Learned District Judge dated 25.08.2010 to dismiss the plaint. The Defendant is entitled to twice the amount of costs of all three Courts.



Hence, this Appeal is allowed with costs as mentioned above.

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Judge of the Supreme Court

Hon. Jayantha Jayasuriya, PC, CJ

.....

I agree.

The Chief Justice

Hon. Murdu N.B. Fernando, PC, J

.....

I agree.

Judge of the Supreme Court