

In the Court of Appeal of the Democratic  
Socialist Republic of Sri Lanka

CA1300/96 F  
DC Kandy 16053/L

Don Barnis  
Hewavitharana,  
No 52, Matale Rd,  
Ambatenna, Katugastota.

**Defendant –Appellant**

Don Nimal Hewavidana,  
No 52, Matale Rd,  
Ambatenna, Katugastota

**Substituted Defendant --  
Appellant**

Vs

Kusuma Ranatunga,  
Wasana,  
Bollegoda Road,  
Ambatenna

**Plaintiff-Respondent**

Before: A W A Salam,J  
Counsel : S Wiritamulla for substituted defendant-appellant and U S R  
Perera for the plaintiff-respondent.  
Argued on : 30.03.2011  
Written Submissions filed on : 23.06.2011 and 23.08.2011  
Decided on: 09.01.2012

---

A W Abdus Salam, J

The defendant has preferred the instant appeal from the judgment entered against him *inter alia* for ejectment in a *rei vindicatio* action filed by the plaintiff. The learned district judge holding that the defendant is a statutory tenant allowed the prayer for ejectment, based on arrears of rent.

The basic facts and the background of the dispute relevant to the appeal need to be set out briefly for lucidity. The case of the plaintiff *inter alia* was that she is the owner of the land and premises morefully set out in the schedule to the plaint and Hewavitharana Podiappuhamy, the deceased brother of the defendant was the tenant. The defendant who is alleged to have come to attend the funeral of Podiappuhamy had sought the permission of the plaintiff to stay in the premises for a short period of time to facilitate the removal of the movables belonging to the deceased from the premises and upon permission being granted he is said to be overstaying in the premises as a trespasser. Having unsuccessfully charged the defendant for criminal trespass in the Primary Court by way of a private plaint the plaintiff filed the present case seeking a declaration of title and ejectment of the defendant.

The defendant took up the position that he is a lawful tenant of the plaintiff by reason of his having run a tea kiosk along with his deceased brother in partnership and that he succeeded to the tenancy on the demise of his brother. Explaining his tenancy rights, the defendant stated that even prior to the death of his brother, when the latter became a monk; it was he who carried on the tea kiosk.

The learned district judge having carefully considered the evidence adduced on behalf of both parties came to the conclusion that the defendant is a statutory tenant by reason of his having run the tea kiosk along with his brother. Even otherwise, according to the trial judge, the defendant being the sole heir of the deceased tenant should have succeeded to the tenancy.

The learned district judge has in fact adverted himself to section 36 (2) (c) of the Rent Act No 7 of 1972 which provides *inter alia* for a surviving partner of a business to be deemed as a tenant for the purpose of the Act.

purpose of the Act. The learned district judge, after meticulous analysis of the evidence adduced at the trial and having finally decided to attach more credibility to the version of the defendant, than that of the plaintiff, had come to the conclusion that the defendant should be deemed as the tenant of the premises. Having come to this finding, the learned district judge should have then proceeded to dismiss the plaintiff's action. Quite surprisingly, the learned district judge has thereafter gone into the question of arrears of rent, which was never the case of the plaintiff.

As regards the question of arrears of rent, the learned district judge decided that the defendant is liable to be ejected, although he is a statutory tenant by reason of his not having paid the monthly rental for a long period of time. By this exercise, the trial judge has introduced into the plaintiff's case a new cause of action for ejection of the tenant of the premises for arrears of rent. This has in fact resulted in the violation of section 150 of the Civil Procedure Code.

The finding of the learned district judge on the issue relating to areas of rent, which was not the case pleaded by the plaintiff has resulted in a serious miscarriage of justice and in my opinion the impugned judgment cannot be allowed to stand on that account.

As the finding of the learned district judge that the defendant is a statutory tenant is faultless on the evidence placed before him, I am of the opinion that to mete out justice plaintiff's action should be dismissed resulting in the failure to establish that the possession of the defendant is unlawful.

For the aforementioned reasons, I set aside the judgment and decrees entered by the learned district judge and dismiss the plaintiff's action. There shall be no costs.

Judge of the Court of Appeal