

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

Mohamed Sherif Abdul Latif
No. 38, Boswell Place,
Colombo 6.

PLAINTIFF

C .A. 292/1998 (F)
D.C. Colombo 6879/RE

Vs.

1. D. M. C. Anura Gunasekera
2. Chandra Gunasekera

Both of No. 122, 124, Sea Street,
Pettah, Colombo 11.

DEFENDANTS

1. D. M. C. Anura Gunasekera
2. Chandra Gunasekera

Both of No. 122, 124, Sea Street,
Pettah, Colombo 11.

DEFENDANTS-APPELLANTS

Vs.

Mohamed Sherif Abdul Latif
No. 38, Boswell Place,
Colombo 6.

PLAINTIFF-RESPONDENT

AND NOW

Chandra Gunasekera
of No. 122, 124, Sea Street,
Pettah, Colombo 11.

**PROPOSED-SUBSTITUTED-
PETITIONER**

Vs.

Mohamed Sherif Abdul Latif
No. 38, Boswell Place,
Colombo 6.

**PLAINTIFF-RESPONDENT-
RESPONDENT**

BEFORE: Anil Gooneratne J.

COUNSEL: Defendant-Appellant is absent and unrepresented

S. Sivarasa P.C., N.R. Sivendran & D. Jayaweera
For the Plaintiff-Respondent

ARGUED ON: 5.11.2012

DECIDED ON: 12.11.2012

GOONERATNE J.

This was an action filed in the District Court of Colombo for a declaration of title to the premises described in the schedule to the plaint and ejectment/damages against the Defendant-Appellants. Amended plaint was

filed on 6.2.1990 after the Defendants admitted title of Plaintiff. The Plaintiff-Respondent by deed No. 2677 of 16.12.1977 became entitled to the premises in dispute. This appeal is from the judgment of the learned Additional District Judge, Colombo, dated 29.4.1998, who entered judgment in favour of the Plaintiff-Respondent. At the hearing of this appeal the Defendant-Appellants were absent and unrepresented. Even previously when this appeal was listed for hearing the Appellants were absent, and on 02.10.2012 the registered Attorney-at-Law for the Appellant informed this court that he has no instructions from his clients. This court has duly noticed the parties concerned. It appears to this court that the Appellants concerned, have failed to exercise due diligence to prosecute this appeal.

However learned President's Counsel for Plaintiff-Respondent assisted this court by his submissions who also supported the judgment of the learned District Judge. Perusal of the proceedings I find that Defendant-Appellant admitted title of Plaintiff, and accordingly trial judge at that point held that the Plaintiff is the owner of the premises in dispute, when the Plaintiff became the owner on or about 1977 by deed No. 2677, the tenant had been one M.T. Mathew. The said Mathew had accepted the Plaintiff as the owner and paid rents, but Mathew had having paid rents had requested

that rent receipts be issued in the name of the business called “the Kalaimagal and Company.” As such it was the position of the Defendant that the tenant would be the person who carry on business in the said premises from time to time. Rent receipt had been issued as stated above. Trial Judge observes that though rent receipts were issued in that way, the tenant and land lord would be the said P.T Mathew and the Plaintiff. The Defendants though attempted to prove that the tenancy agreement was between the Plaintiff and the business enterprise namely “The Kalaimagal and Company”, Trial Judge very correctly rejected that position. Under the Rent Act protection to a tenant is granted to the contract of tenancy and not to any other aspects as urged by the Defendant-Appellants.

It was the position of the Plaintiff-Respondent that the said P.T Mathew died and until 1986, Plaintiff was unaware of his death and the Defendants had been paying rent as aforesaid without disclosing the death of the said Mathew. Therefore the Defendant-Appellants were illegally carrying on the business in the said premises. In view of the illegal occupation of the Defendant-Appellants the Plaintiff refused to accept rent, and the Appellants had deposited rent with the Colombo Municipality, in the name of the above named business enterprise. Trial judge very correctly arrived at a conclusion that there was no agreement of tenancy between the

Defendant-Appellants and the Plaintiff-Respondent. I have noted the trial judge's views on same at folios 251/252 of the judgment which need not be repeated. I also find that the Appellant attempted to prove that the said Mathew was in a partnership business with another person. This fact was not known to the Plaintiff document V12 confirm this fact. Trial judge has rejected the position of a partnership which was unknown to Plaintiff.

I find that the trial judge has very carefully analysed the evidence and arrived at a conclusion. He has considered all primary and relevant facts which this court need not disturb. 1992 (1) SLR 119. It is clear that tenancy has not been proved. If that be so the Defendant-Respondents are in illegal occupation and need to be considered as trespassers. In an action rei vindicatio once title is proved the Plaintiff will have dominium and it is for the Defendant to prove his occupation by legal means. As such the burden is on Defendant-Appellant. That burden has not been properly discharged. I have noted the following authorities.

In *Siyaneris Vs. Udenis de Silva* 52 NLR 289..

(Privy Council decision) It was held that in an action for declaration of title to property, where the legal title was in the plaintiff and the property was in possession of the defendant, the burden of proof is on the defendant.

In the South African case *Myake Vs. Havemann* 1948 (3) S.A 457, the appellant division declared "Prima facie proof that the appellant is the owner and that the respondent is in

possession, entitles the appellant to an order giving him possession i.e to an order for ejection. The prima facie right of the owner could be met by the respondent by proof that he had been given the right of possession either by the appellant or by some to other person who was entitled to grant such right and that the right was till current”.

In Thames Vs. Guirguis 1953 (2) S.A 37, Clayden J. observed as owner seeking ejection can base his claim on his ownership. It would then be for occupier to set up and prove a right of occupation against the owner”.

In all the above circumstances I affirm the judgment of the trial Judge. Appeal dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL