

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

K.M.S.Abuthahir,
No.3/3, Poornawatte,
Mahaiyawa, Kandy.

Defendant – Appellant

Kanthasamy Vyapuri,
No.86,Srimavo Bandaranaike Mawatha,
Kandy.

Plaintiff-Respondent

C.A.676/98 (F)

D.C.KANDY CASE NO.2437/RE

BEFORE : **K.T.CHITRASIRI, J**

COUNSEL : Rohan Sahabandu, P. C.with Hasitha Amarasinghe, Attorney-at-Law for the Defendant - Appellant
C.V.Vivekananthan with Ms.Pansy N.Joseph and Shyamali Liyanage Attorneys-at-Law for the Plaintiff - Respondent.

ARGUED ON : **11.12.2012**

WRITTEN SUBMISSIONS FILED ON : **15. 01. 2013**

DECIDED ON : **31. 01. 2013**

CHITRASIRI, J

This appeal of the defendant-appellant (hereinafter referred to as the defendant) had been filed seeking to set aside the judgment dated 20.05.1998 delivered by the learned District Judge of Kandy on 19.06.1998. By that judgment the learned District Judge made order in favour of the plaintiff-respondent (hereinafter referred to as the plaintiff) allowing him to obtain possession of the land referred to in the schedule to the plaint, evicting the defendant, his agents and all those who are holding under him.

In the plaint, the plaintiff having mentioned that he is the owner of the premises in suit had prayed that the defendant be evicted therefrom on the basis that he is a trespasser to the land. In that plaint it is also mentioned, the way in which the plaintiff became entitled to the premises in suit. The plaintiff has further stated that the defendant being a permanent resident elsewhere had allowed a third party to occupy the premises and accordingly he had treated all of them as trespasses. The defendant in his answer had claimed tenancy rights to the premises in suit.

Ownership of the premises had not been disputed and it was recorded as an admission as well, at the commencement of the trial. The plaintiff became entitled to the land by execution of the Deed 693 which is dated 15.05.1982. It was marked as P1 in evidence. The defendant had not challenged the said deed of the plaintiff. Hence, there is no doubt as to the title of the plaintiff to the premises in suit. Moreover, in paragraph 7 of the answer the defendant had not questioned or objected to the rights claimed by the plaintiff to the premises in suit. It was also admitted that the premises in suit is subjected to the provisions of the Rent Act No.7 of 1972.

Consequent upon becoming the owner of the premises, the plaintiff has sent the letter dated 22.05.1982 marked P3 to M.K.K.Mohideen alias Seyadu Saheer requesting him to recognize the plaintiff as the owner of the premises. Said Mohideen alias Seyadu Saheer is also known as Kachchi Mohideen. The letter P3 was sent to Seyadu Saheer considering him as the tenant of the premises. In the said letter P3, it is stated that the plaintiff had purchased the property by deed bearing No.693 dated 15.05.1982 attested by T.B.H.Dunuwille, Notary Public. The reason for him to send this letter to Seyadu Saheer treating him as the tenant was that it is the name of Mohideen alias Seyadu Saheer that appears as the tenant in the registers maintained at the Municipal Council, Kandy. Relevant entries in those registers had been marked and produced in evidence at the trial. Particularly, the last two pages of the document marked P5 which is titled as the rent ledger maintained by the Municipality show that the tenant at the time the plaintiff purchased the property is Seyadu Mohideen. Also, it must be noted that the defendant's name is not appearing in the respective registers, to indicate that he was the tenant at the time the letter P3 was sent or even for many years thereafter.

I will now turn to consider the law relevant to the issue at hand. As referred to above, the plaintiff is the owner of the premises in suit at all material times. It is trite law that an owner of a land has the right to eject trespasses therefrom by legal means. This position was accepted in the case of **Khan v. Jayaweera (1994) 2 SLR at 233**. In that decision, it was held that once the plaintiff had established the ownership and the termination of the license to stay, he is entitled to judgment.

As mentioned hereinbefore, the evidence adduced on behalf of the plaintiff, he had established his title to the land. The tenant of the premises according to the registers

at the Municipality, namely Seyadu Saheer had not replied to the letter P3 sent to him in order to recognize the ownership of the plaintiff. Therefore, on the basis of the law referred to in the above decision, tenant Seyadu Saheer becomes a trespasser and then the plaintiff is entitled to obtain possession of the premises in suit evicting said Seyad Saheer, his successors, agents and all those who are in occupation under him including the defendant, all of them being trespassers as far as the evidence of the plaintiff is concerned. This position had been accepted in **Hameed alias Abdul Rahman V Weerasinghe and others. [1989 (1) SLR 217]** In that decision G.P.S.De Silva J. (as he then was) held that where the tenant dies and his widow fails to attorn to the landlord, the widow cannot claim tenancy rights. Also, in the case of **Gunasekara V Jinadasa [1996 SLR (Vol 2) 115]**, it was held in the following manner.

When the occupier persists in conduct by not accepting the new owner and continues to deposit the rent in the father's name, then it becomes fundamentally inconsistent with the contract of tenancy and amounts to a repudiation of that contract, the transferee has the option **either** to treat the tenancy as subsisting and to sue for arrears of rent and ejection **or to accept the occupiers repudiation of the tenancy and to proceed against him as a trespasser.**

However, the defendant denying the fact that he is a trespasser had claimed tenancy rights to the premises in suit. This position taken up by the defendant, it being a fact within his knowledge, should establish by him. In other words, it is the burden of the defendant in this case to establish his tenancy rights to the premises. Then, it is the duty of the Court to ascertain whether the defendant has discharged his burden on the standard required in a civil suit namely on balance of probabilities, in establishing his

tenancy rights to the premises. If the defendant is successful in doing so, he has the right to be in occupation of the premises.

Indeed, this fact has been put in issue by the defendant though he had not referred to a particular section of the Rent Act that he had relied upon. Those issues in order to establish that the defendant succeeded to the tenancy of his father Mohideen alias Seyadu Shaheer alias Kachchi Mohideen read thus:

- (17) විත්තිකරු කුලී නිවසියෙක් වශයෙන් එම දේපල බුක්ති විදින්නේද?
- (18) එසේ නම් විත්තිකරුට 1972 අංක 7 දරණ ගෙවල් කුලී පනත යටතේ වරප්‍රසාද ලබාගත හැකිද?
- (19) එසේ නම් පැමිණිලිකරුට විත්තිකරුට විරුද්ධව මෙම නඩුව පැවරීමට හෝ පවත්වාගෙන යාමට අයිතියක් ඇද්ද?

As admitted by the parties, the provisions of the Rent Act are applicable to the tenancy rights of the defendant in this instance. Therefore, Sections 36(2) (a) and 36(2) (b) of the Rent Act No.7 of 1972 are the provisions relevant to the issue at hand because the premises in suit had been used as residential premises and then it falls within the category of “Residential Premises”. Also, it must be noted that there is no evidence found to establish that it was used as business premises. The evidence found at page 78 of the brief clearly shows that this is residential premises. Those Sections in the Rent Act with regard to the succession of tenancy rights in respect of residential premises read thus:

36(2). Any person who –

- (a) in the case of residential premises the annual value of which does not exceed the relevant amount and which has been let prior to the date of commencement of this Act -**

(i) *is the surviving spouse or child, parent, brother or sister of the deceased tenant of the premises or was a dependant of the deceased tenant immediately prior to his death; and*

(ii) *was a member of the household of the deceased tenant (whether in those premises or in any other premises) during the whole of the period of three months preceding his death; or*

(b) *in the case of residential premises other than those referred to in paragraph (a) –*

(i) *is the surviving spouse or the child (where the child is not less than eighteen years of age) of the deceased tenant; and*

(ii) *was a member of the household of the deceased tenant (whether in those premises or in any other premises) during the whole of the period of three months preceding his death; or*

In terms of Section 36(2) (a) above in the Rent Act, annual value of the premises in suit plays a vital role in the event, the defendant is to succeed to the tenancy of his father. The defendant has neither pleaded the annual value of the premises in his answer nor has he raised an issue to that effect. Also, not an iota of evidence as to the annual value of the premises is forthcoming in this instance. Therefore, the defendant is not in a position to have the cover of section 36(2) (a) of the Rent Act in order to succeed to the tenancy of his father without establishing the annual value of the premises in suit.

Section 36(2) (b) refers to the residential premises other than those referred to in 36 (2) (a). Accordingly, the defendant *inter alia* will have to prove that he is a child who has reached 18 years of age, of the tenant Seyadu Mohideen at the time the contract of

tenancy of the father came to an end. The evidence relevant thereto, if summarized, is as follows. Admittedly, Kachchi Mohideen had been the tenant of the premises in suit at the time the plaintiff purchased the property in question. (paragraph 5 of the plaint and paragraph 4 of the answer). The defendant in paragraph 5 of his answer had stated that his father Kachchi Mohideen died in nineteen sixties. In evidence too, he has clearly stated that his father Kachchi Mohideen died in the year 1960 (proceedings at page 152 of the brief). In evidence he has further said that he was 8 years in age when his father passed away. (page 164 of the brief) According to the birth certificate of the defendant which was marked V1, he was born on 6.8.1953. Accordingly, by the time the father of the defendant who was the tenant of the premises passed away, defendant was a child of 7 years in age.

As mentioned before, in terms of Section 36 (2)(b) of the Rent Act No.7 of 1972, only a child above the age of 18 years is entitled to succeed to a tenancy of either parent. Section 36 (2) (b) (i) mentioned above, is very clear on this point. Therefore, the defendant, him being 8 years of age at the time of the death of his tenant-father is not entitled to succeed to the tenancy of his father under section 36(2)(b) as well.

Learned Counsel for the defendant has assisted Court on this point by referring to the following authorities.

- *Senanayake v. Peter De Silva (1986) 2 S.L.R.405.*
- *Hameed alias Abdul Rahman v. Weerasinghe & others (1989) 1 S.L.R. 217.*
- *Gunasekera v. Jinadasa (1996) 2 S.L.R.115.*

The defendant also has marked several documents particularly the document marked V44, to prove that he had been occupying the premises as its tenant. However, those payments had been made considering one Farook, who was the owner of the

premises prior to the plaintiff, as the owner. Nevertheless, the rent receipts produced by the defendant himself show that the rent had been paid not by him but by his father even after the death of the father. If he has succeeded to the tenancy of his father by then the name of the defendant should appear in those registers. According to the plaintiff, it is the reason for him to send the letter P3 in the name of the father of the defendant. Without succeeding to the tenancy of his father in the manner stipulated in the Rent Act, he cannot rely on the payments made in the name of his deceased father in order to claim tenancy rights to the premises. In the circumstances, the defendant is not in a position to claim him as the tenant of the premises by paying rent to the previous owner Farook.

In the circumstances, it is clear that the defendant is not entitled to succeed to the tenancy of his father Kachchi Mohideed in terms of Sections 36(2) (a) or 36(2) (b) of the Rent Act No.7 of 1972. Accordingly, it is my considered view that the defendant in this instance has failed to establish that he succeeded to the tenancy rights of his father Seyadu Saheer alias Kachchi Mohideen to the premises in suit.

For the aforesaid reasons, I am not inclined to interfere with the findings of the learned District Judge. In the circumstances, the appeal of the defendant-appellant shall fail. The defendant should pay to the plaintiff-respondent, the costs of the appeal as well.

Appeal dismissed with costs.

JUDGE OF THE COURT OF APPEAL