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

Ven. Thalawe Sumanatissa Thero.
Viharadhipathi,
Kawantissa Rajamaha Viharaya,
Pallegama,
Embilipitiya.

C.A. No. 457, 491, 550 / 96 F

Plaintiff

D.C. Embilipitiya
Nos. 3943/L, 3945/L, 3944/L

Vs.

Vidanagamage Dhanapala,
"Dharmapala Brothers"
Moraketiya Road,
Pallegama, Embilipitiya.

Defendant

And Now Between

Vidanagamage Dhanapala,
"Dharmapala Brothers"
Moraketiya Road,
Pallegama,
Embilipitiya.

Defendant-Appellant

Vs

Ven. Thalawe Sumanatissa Thero.
Viharadhipathi,
Kawantissa Rajamaha Viharaya,
Pallegama,
Embilipitiya.

Plaintiff -Respondent

Ven. Thalawe Sumanatissa Thero.
Viharadhipathi,
Kawantissa Rajamaha Viharaya,
Pallegama,
Embilipitiya.

C.A. No. 491 / 96 F

Plaintiff

D.C. Embilipitiya No. 3945 /L

Vs.

Vidanagamage Ariyapala,
"Dharmapala Brothers"
Moraketiya Road,
Pallegama
Embilipitiya.

Defendant

And Now Between

Vidanagamage Ariyapala,
"Dharmapala Brothers"
Moraketiya Road,
Pallegama,
Embilipitiya.

Defendant-Appellant

Vs

Ven. Thalawe Sumanatissa Thero.
Viharadhipathi,
Kawantissa Rajamaha Viharaya,
Pallegama,
Embilipitiya.

Plaintiff -Respondent

Ven. Thalawe Sumanatissa Thero.
Viharadhipathi,
Kawantissa Rajamaha Viharaya,
Pallegama,
Embilipitiya.

Plaintiff

C.A. No. 550 / 96 F

D.C. Embilipitiya No. 3944/L

Vs.

Vidanagamage Dhanapala,
"Dharmapala Brothers"
Moraketiya Road,
Pallegama,
Embilipitiya.

Defendant

And Now Between

Vidanagamage Dhanapala,
"Dharmapala Brothers"
Moraketiya Road,
Pallegama,
Embilipitiya.

Defendant-Appellant

Vs

Ven. Thalawe Sumanatissa Thero.
Viharadhipathi,
Kawantissa Rajamaha Viharaya,
Pallegama,
Embilipitiya.

Plaintiff -Respondent

BEFORE : UPALY ABEYRATHNE, J.

COUNSEL : D.M.G. Dissanayake for the Defendant Appellant

: P.L. Gunawardena for the Plaintiff Respondent

ARGUED ON : 19.12.2012

DECIDED ON : 25.06.2013

UPALY ABEYRATHNE, J.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted the said 03 actions in the District Court of Embilipitiya seeking for a declaration of title and ejectment of the Defendant Appellants (hereinafter referred to as the Appellants) from the lands described in the schedules to the plaints in the said 03 actions.

The Appellants filed answer praying for a dismissal of the Respondent's said actions. The Appellants have further taken up the position that they have become the tenant of the said premises. After trial the learned Additional District Judge delivered judgments in all three cases in favour of the Respondent. Being aggrieved by the said three judgments dated 27.06.1996 the Appellants have appealed to this Court.

In their answers the Appellants have admitted paragraphs 04 and 05 of the plaints. Accordingly the Appellants have admitted the facts that there had been lease agreements entered between the Appellants and the Respondent and at the end of the agreed period of time the vacant possession of the said premises to be

handed over to the Respondent in the event the said lease agreements were not renewed extending the lease period.

At the hearing of the appeals the learned counsel for the Appellants submitted that the Appellants do not wish to canvass the correctness of the judgments of the said three cases since the said judgments have been delivered after considering the pleadings and the documents placed before the trial court. But surprisingly the learned Counsel contended that the Appellants are not in possession of the subject matters of the said actions and hence the Respondent cannot have and maintain the actions.

It is interesting to note that the Appellants have admitted the respective lease agreements and also have pleaded the protection of the Rent Act. In the same breath they have submitted that they are not in possession of the premises. If that was the case and if they were not in possession of the lands in suits why did they plead protection under the Rent Act? It appears from the said conduct of the Appellants that they are in possession of the premises in suits.

On the other hand the Appellants have not taken up this position at the trial court. The Appellants are now taking a fresh matter for the first time in appeal. It is well settled law that a new fact which was not raised in the issues or in the course of the trial cannot be taken up for the first time in appeal.

In the case of Setha vs. Weerakoon 49 NLR 225 Howard C.J. stated that "A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has

before it all the requisite material for deciding the point, or the question is one of law and nothing more."

In the case of Candappa vs. Ponambalampillai (1993) 1 SLR 184 Supreme Court held that "A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial such case not being one which raises a pure question of law."

In the case of Alwis vs. Piyasena Fernando (1993) 1 SLR 119 G. P. S. de Silva, C.J. held that "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."

In the case of M. R. Fernando & Co. Ltd. Vs. Union Trust & Investment Ltd. C.A. No. 729 / 96 F (D.C. Colombo No. 40900 / MPH) (CA Minutes 15.10.2010) it was held that "Thus it is apparent from section 146 of the Code that a civil case should proceed to trial upon issues and determine the same. It means that if a particular fact is not raised as an issue at the trial before the trial judge; such fact cannot be raised as an issue for the first time before Appellate Courts."

In the said circumstances I reject the said submission of the learned counsel for the Appellants. For the foregoing reasons, I dismiss the appeals in CA 457 / 96 F, 491 / 96 F and 550 / 96 F with costs.

Appeals dismissed.

Judge of the Court of Appeal