

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

B.D.H. Premadasa
Maha Borakanda,
Karadeniya.

Plaintiff -Appellant

Hansani Lakshika Munasinghe
Borakandawatta,
Karadeniya.

Substituted-Plaintiff-Appellant

C.A. NO.829/98
DC.BALAPITIYA
CASE NO.1675/L

VS

B.H.Dayawathie
Indiketiya,
Godahena,
Ambalangoda.

Defendant -Respondent

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

COUNSEL : Wickrema Jayathilaka for the Substituted-Plaintiff-Appellant.

Kushan de Alwis P C with Chamath Fernando and
Miss. D.Abeysena for the Defendant-Respondent

ARGUED ON : **05.06.2013**

DECIDED ON : **27. 08.2013**

CHITRASIRI, J.

This is an appeal seeking to set aside the judgment dated 24.04.1998 of the learned District Judge of Balapitiya. The Plaintiff-Appellant (hereinafter referred to as the plaintiff) also sought to have a judgment entered in his favour as prayed for in the amended plaint dated 18.03.1993. In that amended plaint, the plaintiff averred *inter alia* that the defendant-respondent (hereinafter

referred to as the defendant) being his younger sister, was permitted by him to occupy the house bearing No.HL1/343 situated in the land named Provident Estate. In the answer of the defendant, she has claimed prescriptive rights to the land where the house in which she lives. Admittedly, it is the house claimed by the appellant.

In paragraph 3 of the said amended plaint, it is stated that the plaintiff being the owner of the land on which the disputed house is situated, he permitted the defendant to occupy the same without rent being received. The first issue has been raised exactly on the way; the said paragraph 3 is worded. However, the defendant has claimed that she has prescribed to the land where the disputed house is found and the issue bearing No.7 has been raised to establish the said claim of the defendant. In such a situation, it is difficult to understand the reason as to why the Court accepted the plaintiff's issue bearing No.1 which had been framed admitting the ownership of the disputed premises when in fact the defendant has disputed the same.

Be that as it may, in the amended plaint of the plaintiff, it is stated that he gave permission for the defendant to occupy the house and subsequently terminated the said permission given to her by the letter dated 28.12.1990. Therefore, upon perusal of the amended plaint and the issues suggested by the plaintiff, it is seen that the cause of action alleged to have arisen to the plaintiff is on the basis of terminating the leave and license given by him to the defendant to occupy the house where she is in occupation. [Paragraphs 3 and 7

of the amended plaint] Hence, it is clear that this is not an action to have a declaration of title to the land in dispute but it is an action filed to evict the defendant on the basis of terminating the license given by the plaintiff to the defendant. Hence, it is clear that it is immaterial to prove ownership of the plaintiff to the disputed land in this instance as this action is not to have a declaration of title to the premises claimed by the plaintiff.

In a case filed to obtain possession of an immovable property on the basis of terminating the license or permission given to occupy or possess the same, then it is the duty of the plaintiff in such an action to establish that he permitted the defendant to occupy the premises in suit and the said permission has been duly terminated. I will now turn to consider the law in this regard.

In the case of **Ruberu and another vs. Wijesooriya [1998 (1) S.L.R. 58]**

It was held thus:

“Whether, it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (defendant-respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute title of the plaintiff-appellant without whose permission he would not have got it.”

The law in this regard had been discussed by **Shirani Bandaranayake, J** (as she was then) in the case of **Reginald Fernando vs. Pabilinahamy and others [2005 (1) S.L.R.at 31]** as well. In that case, she has stated as follows:

“There is one other aspect, which I wish to pursue before I depart from this judgment. Learned President’s Counsel for the plaintiff submitted that in a case where action has been institute on the basis of leave and license and/ or landlord and tenant and if the plaintiff proves that he is the licensor and/or the landlord and that the defendant is his licensee and/or tenant, the plaintiff is entitled to ejectment notwithstanding the fact that he is not the owner of the premises.”

The decisions referred to above show that it is the burden of the plaintiff, in this case too, to establish that he allowed the defendant to occupy the house and subsequently terminated the said permission given to her. The plaintiff in his oral testimony has stated that he gave permission for the defendant to occupy the house without rent being received. However, the defendant has vehemently denied the fact that she came into occupation with the permission of her brother who is the plaintiff. The defendant has taken a further step and has stated that she on her own with the assistance of her husband entered the premises in dispute in the year 1968 or even before, since it was bear land then. [vide pages 175-176 in the appeal brief] Indeed the defendant’s longstanding possession to the land where the house claimed by the plaintiff is situated had been admitted by the plaintiff himself.

At this stage, it is appropriate to refer to a few items of evidence of the plaintiff in relation to the permission supposed to have given by him for the defendant to occupy the premises in suit. The said evidence is as follows.

- ප්‍ර. තමන් මේ නඩුවේ එන්තරවාසියක් යැව්වා තමන්ගේ නීතිඥ මහතා මගින් ?
- උ. ඔව්.
- ප්‍ර. ඒක තමන් ඉදිරිපත් කර තිබෙනවා පැ.2 වශයෙන් ?
- උ. ඔව්.
- ප්‍ර. මේ ලියවිල්ලේවත් තමන් කොතැනකවත් සඳහන් කර නැහැ මේ නඩුවේ විත්තිකරුට මේ ගේ ඉන්න දුන්නේ කවදා කියාවත් දිනයක් සඳහන් කර නැහැ ?
- උ. දිනයක් සඳහන් කර නැහැ.
- ප්‍ර. තමන් ග්‍රාම සේවක මහතාට කරන ලද ලියවිල්ලේවත් කවදා මේ ඉඩමේ විත්තිකාරියට පදිංචියට ආවාද කියා සඳහන් කර නැහැ ?
- උ. නැහැ.
- ප්‍ර. විත්තිකාරිය “බී” අක්ෂරය කැබැල්ල සම්පූර්ණයෙන් හුක්වී විදිනවා ?
- උ. ඔව්.

(vide page 146 in the appeal brief)

Aforesaid evidence show that the plaintiff in his evidence has admitted that he does not have any documentary proof to establish permitting the defendant to occupy the house. The date or the period in which the plaintiff permitted the defendant to occupy the house has not been revealed, either in the amended plaint or in the letter sent to the defendant marked P2 by which the plaintiff alleged that he terminated the license given to the defendant.

Hence, it is seen that no other evidence than the oral testimony of the plaintiff is found to establish the date or at least the period and/or the manner

and/or the circumstances under which the plaintiff gave permission for the defendant to occupy the house in dispute. On the other hand, the defendant has stated that she never obtain permission from the plaintiff to begin possessing the land where she lives. Having considered those circumstances, the learned District Judge in his judgment has stated thus:

“ඉහත සඳහන් අදාළ නිවස තමන්ට හිමි බව සහ තමන්ගේ අවසරය මත විත්තිකාරිය පදිංචි වූ බව ඔප්පු කිරීම පැමිණිලිකරුගේ වගකීමකි. ඔහු එසේ ඔප්පු නොකලහොත් ඔහුගේ (පැමිණිලිකරුගේ) ඉල්ලීම නිෂ්ප්‍රභා විය යුතුය. පැමිණිල්ලේ තුන්වන ඡේදය අනුව පැමිණිලිකරු විසින් ඔහුගේ අවසරය මත විත්තිකාරියට පදිංචි වීමට ඉඩදී ඇත. එහෙත් එසේ අවසර දී පදිංචියට ඉඩ දුන්නේ කවදාද යන්න එහි සඳහන් නොවේ. එසේම මෙම නිවසේ බුක්තිය ඉල්ලා නීතීඥ මහතා විසින් විත්තිකාරියට යවන ලද ලිපියේද (පැ.2) පදිංචියට පැමිණි දිනය සඳහන් කර නැත. එහෙත් පැමිණිලිකරු සාක්ෂි දෙමින් කියා සිටියේ විත්තිකාරිය තමන්ගේ අවසරය පිට 1983 දී පදිංචියට පැමිණි බවය. එහෙත් ඒ සම්බන්ධයෙන් පැමිණිලිකරු කිසිදු ලේඛනයක් ඉදිරිපත් කර නැත. ඒ වගේම පදිංචියට පැමිණි දිනය පැමිණිල්ලේ හෝ පැ.2 ලේඛනයේ සඳහන් කිරීමට පැමිණිලිකරු අපොහොසත් වී ඇත. එහෙත් එසේ සඳහන් නොකිරීමට පැහැදිලි හේතුවක්ද පැමිණිලිකරු විසින් ඉදිරිපත් කර නැත. විශේෂයෙන්ම විත්තිකාරිය පැමිණිලිකරුගේ හිමිකම් අභියෝගයට ලක් කරන අවස්ථාවක පැමිණිලිකරු සිය ස්ථාවරය පැහැදිලිව ඉදිරිපත් කිරීම ඔහුගේ වගකීමකි. පැමිණිලිකරුගේ අවසරය මත විත්තිකාරිය පදිංචියට අවේ නම් පදිංචියට ආ දිනය පැමිණිලිකරු විසින් සඳහන් කල යුතුව තිබුණි.”

[vide Page 196 of the appeal brief]

In the circumstances, it is clear that the plaintiff in this instance has failed to establish that he permitted the defendant to occupy the premises in suit. Hence, he cannot succeed in a case based on a cause of action that has arisen on the basis of terminating the leave and license given to the defendant.

I wish to state one other aspect in this connection. Basically, it is necessary to retain control over the premises in suit by the person who permitted another to occupy or possess the same in a case filed to evict the licensee on the basis of terminating the license given. In this regard, Professor G.L.Peiris in his book titled **Landlord and Tenant, [Volume II at page 55]** has stated as follows:

“The essential quality of a license, as distinguished from a lease, is that the owner retains control, actual or notional, over the premises.”

This criterion was applied in the case of **Amarasinghe V. Abdul Sheriff [1918 (5) C.W.R. 227]** as well.

In the case at hand, the defendant has claimed prescriptive title to the premises in suit. She has claimed prescriptive rights to a land in extent of quarter an acre where the house claimed by the plaintiff is found. Evidence reveals that the defendant had been in occupation of this premises since the year 1968. The defendant has explained the way in which she commenced possession of this land in the year 1968 and the manner in which she has been in possession of the premises in suit until this case was filed. She has not

allowed the plaintiff to have control over the premises during this period. That evidence had gone into the record without any contradictions been marked. On the other hand, No evidence is forthcoming to show that the plaintiff had control over the premises from the time the defendant commenced her possession of the land.

Accordingly, it is my view that the plaintiff in this instance having failed to establish control over the premises claimed by the defendant cannot consider himself as the person who permitted the defendant to occupy the house in dispute.

Moreover, as discussed hereinbefore, the totality of the evidence and the manner in which those had been evaluated by the learned District Judge, it is clear that the plaintiff has failed to establish that he permitted the defendant to occupy the house in question. Without proving the permission of the plaintiff for the defendant to occupy the disputed house, plaintiff cannot obtain relief in an action filed relying on a cause of action that has arisen upon terminating the leave and license given to the defendant.

In the circumstances, I do not see any error on the part of the learned trial Judge, as to the way in which he has evaluated the evidence on the question of permission alleged to have given by the plaintiff to the defendant to occupy the house and also of the decision that he has arrived at accordingly.

Therefore, the plaintiff is not in a position to obtain the reliefs prayed for in the amended plaint having failed to establish that he gave permission for the defendant to stay at the premises in dispute.

For the aforesaid reasons, I am not inclined to interfere with the decision of the learned District Judge. Accordingly, this appeal is dismissed with costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL