743/99(F)

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

M.V.Ranawaka,

No.628, Galle Road,

Colombo 3.

Plaintiff-Appellant

C.A.Case No:- 743/99(F)

D.C.Colombo Case No:-17034/L

V.

G.Dharmasena,

No.626C, Galle Road,

Colombo 3.

Defendant-Respondent

Before:-H.N.J.Perera, J.

Counsel:-C.E.De Silva with Anoma Gunathilake for the Plaintif-Appellant

Harsha Soza P.C with Rajindb Perera for the Defendant-Respondent

Argued On:-12.03.2014

Written Submissions:-28.04.2014/

Decided On:-13.08.2015

H.N.J.Perera, J.

The plaintiff-appellant instituted this action in the District Court of Colombo against the defendant-respondent praying for a declaration that the plaintiff-appellant is the owner of the premises more fully described in the 2nd schedule to the plaint and for the ejectment of the defendant-respondent and all those holding under defendant-respondent from the said premises and for damages.

The defendant-respondent filed answer denying the position of the plaintiff and seeking dismissal of the action on the basis that the Rent Act N0.7 of 1972 applies to the premises in suit, and that he is a protected tenant.

After trial the Learned District Judge delivered judgment on 17.08.1999 and dismissed the action of the plaintiff-appellant. Aggrieved by the said judgment of the Learned District Judge the plaintiff-appellant had preferred this appeal to this court.

It was the position of the plaintiff-appellant that under and by virtue of the deed bearing No.1005 dated 22.10.1964 Sithy Shukriya became the lawful owner of the premises more fully described in the 1st schedule to the plaint. The said Sithy Sukriya by deed bearing No 1890 dated 04.07.1992 conveyed the premises described in the 1st schedule to the plaint to the plaintiff-appellant. The said premises bearing assessment No.626, being a part of the premises described in the 1st schedule to the plaint forms the subject matter of this action and is more fully described in the 2nd schedule to the plaint. From about 30.01.1995 the defendant-

respondent is in unlawful possession of the said premises and claims to be the tenant of the said premises in suit.

It was the position of the defendant-respondent that the original owner of the premises in suit was S.D.G.Fonseka Goonawardene and the said Fonseka Goonawardena had given the premises in suit on rent to one Aris Appuhamy.That the said S.D.G.Fonseka Goonawardene conveyed this property to Sithy Shukriya.

The defendant-respondent's position was that the said Aris Appuhamy was the tenant of the said S.D.G.Fonseka Goonawardene and later of Sithy Sukriya who became the owner of the said premises. That the defendant-respondent was the sub-tenant of the said Aris Appuhamy and later became the tenant of Sithy Sukriya and for this reason the plaintiff- appellant had purchased the said premises subject to the said tenancy of the defendant-respondent .

The action from which this appeal arises, being a rei vindication action, the onus was clearly on the plaintiff-appellant to prove how he derived title to the land described in the schedule to the plaint. The moment title to the corpus in dispute is proved or admitted, like in this case the right to possess is presumed. In a vindicatory action when the legal title to the premises is admitted, the burden of proof is on the defendant to show that he is in lawful occupation. Wijetunge V. Thangarajah 1999 (1) S.L.R 53, Gunasekera and another V. Latiff 1999 (1) S.L.R 365.

Sharvananda, J. in Theivandran V. Ramanathan Chettiar 1986 (2) S.L.R 219 at 222 stated as follows"-

"In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to

possession, he may sue for the ejectment of any person in possession of it without his consent. Hence, when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession."

In Luwis Singho and Others V. Ponnamperuma [1996] 2 Sri.L.R 320. It was held that:-

(1)Actions for declaration of title and ejectment and Vindicatory actions are brought for the same purpose of recovery of property. In Rei-Vindication action the cause of action is based on the sole ground of the right of ownership, in such action proof is required that:-

(a)The plaintiff is the owner of the land in question, i.e he has the dominium and,

(b)That the land is in the possession of the defendant

Even if an owner never had possession it would not be a bar to a Vindicatory action.

Wille in his book "Principles of South African Law" (3rd edition) at page 190 discussing the right to possession, states:-

"The absolute owner of a thing is entitled to claim the possession of it; or, if he has the possession he may retain it. If he is illegally deprived of his possession, he may by means of vindication or reclaim recover possession from any person in whose the thing is found. In a vindicatory action the claimant need merely prove two facts, namely, that he is the owner of the thing and that the thing is in the possession of the defendant."

In this case there is no dispute that under and by virtue of the deed marked P2 bearing No. 1005, dated 22.10.1964, one Sithy Sukriya became the owner of the premises in suit. It is also admitted by parties

that by deed marked P3 bearing No.1890, dated 04.07.1992, the said Sithy Sukriya sold and conveyed the said premises in suit, to the plaintiff. Since title to the premises was admittedly in the plaintiff-appellant the burden is on the defendant-respondent to show by what right he was in occupation of the said premises. The admission by the defendant-respondent that the plaintiff-appellant had acquired ownership of the premises by deed marked P3 at the trial, entitles the plaintiff-appellant to obtain a declaration that he is the lawful owner of the premises in suit. If the defendant-respondent claim that he is the tenant of the premises in suit, burden lies on him to prove that fact, and on his failure the plaintiff-appellant would be entitled to an order of ejectment of the defendant-respondent from the premises in suit.

According to the defendant-respondent Aris Appuhamy was the tenant of the said Sithy Sukriya in respect of the premises in suit and the said Aris Appuhamy had paid monthly rent to the said Sithy Sukriya in respect of the premises in suit and the said Sithy Sukriya had accepted the said rent from the said Aris Appuhamy and had issued rent receipts to the said Aris Appuhamy. According to the evidence of the defendant-respondent Aris Appuhamy had died in 1979 and his wife has died in 1994. The defendant-respondent had been in occupation of the premises in suit as the subtenant of Aris Appuhamy and later as the tenant of Sithy Sukriya.

It was contended on behalf of the plaintiff-appellant that there was no evidence in this case to establish that the contract of tenancy between the said Sithy Sukriya on one part and the said Aris Appuhamy and after his death his heirs and his legal representatives on the other part, in respect of the premises in suit. The rent receipts marked by the defendant-respondent from V1 to V27 have been issued to Aris Appuhamy for payment of rent by the said Aris Appuhamy in respect of the premises in suit and not in the name of the defendant-respondent.

The last rent receipt is dated 31.01.1994, marked V19 and is for the payment of rent for the month of January 1994. The defendant in his evidence had admitted that the said receipts had been issued in the name of Aris Appuhamy and that after 1968 Sithy sukriya had signed them all. He also admitted in evidence that all the said receipts marked from V1 to V27 had been issued in the name of Aris Appuhamy and none had been issued in his name. In fact there is no evidence adduced in this case to prove that the said Sithy Sukriya had accepted rent from the defendant-respondent and had issued receipts to the defendant-respondent in respect of the premises in suit.

In Martin Singho and Two others V. Nanda Peiris and Two others [1995] 2 Sri.L.R 221 it was held that:-

"The best test of establishing tenancy is proof of payment of rent and the best evidence of payment of rent is rent receipts."

As contended by the Counsel for the plaintiff-appellant the defendant-respondent in this case had failed to produce any rent receipts issued in his name in proof of his tenancy.

V28 and V29 are letters written by M.Nawaaf Muktha and not by the landlord and the previous owner of the premises in suit, Sithy Sukriya. Even the document marked V 57 had been a letter written on the instructions of Nawaaf Mukthar on the basis that he is the landlord of the said premises and not on the instructions of the landlord and the previous owner Sithy Sukriya. The said letter marked V 57 had been addressed to the defendant-respondent and the plaintiff-appellant had marked a copy of a letter dated 14.02.1994 marked P1 addressed not to the defendant-respondent but to Mrs.Aris Appuhamy. It was contended on behalf of the plaintiff-appellant that the letter marked P1 proves that the tenant of the premises in suit had been Mrs Aris Appuhamy after the death of her husband and not the defendant-respondent.

Although the defendant-respondent had submitted to court that he will be calling the said Sithy Sukriya to give evidence at the trial of this case on behalf of the defendant-respondent, he has failed to do so. Even the document marked V 56 had not been signed by Sithy Sukriya but had been signed by her husband Nawaaf Mukthar. No explanation had been given in this case as to why the said document marked V 56 was issued when in fact Sithy Sukriya had issued rent receipts up to January 1994 on the basis that the said Aris Appuhamy is her tenant of the premises in suit and not the defendant-respondent.

The defendant-respondent further testified that he occupied the said premises as a tenant of Sithy Sukriya and that after the sale of the property to the plaintiff-appellant, Sithy Sukriya told him to pay the rent to the plaintiff-appellant, and that because the plaintiff-appellant did not accept the rent, he deposited the rent in the Rent Department of the Colombo Municipal Council. But the letter marked V57 dated 14th February 1994 clearly shows that the said letter had been sent to the defendant-respondent by Hussain Ahamed Attorney-at-Law on the instructions of Mr. Nawaaf Mukthar, on the basis that the said Mr.Nawaaf Mukthar is the land lord of the defendant-respondent and not on the instructions of Sithy Sukriya who is said to be the landlord of the defendant-appellant. The mere fact that rents have been deposited in the name of the plaintiff-appellant does not confirm that the defendant-respondent was in fact the tenant of Sithy Sukriya and that she had accepted the defendant-respondent as the tenant and has accepted rents from him. The defendant-respondent though had undertaken to summon the said Sithy Sukriya to give evidence on his behalf had failed to do so.

Section 114(f) of the Evidence Ordinance is as follows:-

114(f) The court may presume that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it.

Accordingly in the instant case the court could safely presume that the defendant did not do so as the evidence if produced be unfavorable to the defendant-respondent in this case. This court cannot agree with the contention of the Counsel for the defendant-respondent that the conduct and dealings between Sithy Sukriya, M.Nawaaf Mukthar and the defendant-respondent clearly show that a consensual tenancy between Sithy Sukriya and the defendant-respondent had been established.

The evidence that had been placed by the defendant-respondent shows that all the rent receipts had been issued in the name of Aris Appuhamy. The Learned trial Judge had concluded that the evidence disclose that after 1979 after the death of Aris Appuhamy the rent had been paid in Aris Appuhamy's name and that although the name of the defendant-respondent is not mentioned in the said rent receipts it is clear that the defendant-respondent had paid the said rent as there was a contract of tenancy between the defendant-respondent and Sithy Sukriya.

In Husseniya V. Jayawardene and another 1981 (1) S.L.R 93 it was held that a stranger to a contract without the authority of the tenant may validly discharge the tenants obligation to pay the rent, provided, the payment is made in the name of the tenant and for the benefit of the tenant. In this case the evidence clearly establish the fact that the said rent receipts had been issued in Aris Appuhamy's name and not in the name of the defendant-respondent. I cannot agree with the conclusion arrived by the learned trial Judge that there is evidence in this case to establish that by the conduct of the parties, a contract of tenancy exits between them. Although the Learned President's Counsel for the defendant-respondent submitted that the defendant-respondent had

not succeeded to the tenancy under the provisions of section 36(2) of the Rent Act No.7 of 1972, but had become the tenant of the premises in suit under said Sithy Sukriya by payment of rent, the defendant-respondent had failed to adduce evidence to establish a consensus ad idem between the said Sithy Sukriya and the defendant-respondent to create a contact of tenancy, in respect of the said premises.

In Bastian V. Panagoda 1998 (3) S.L.R 173 it was helf that:-

"Mere acceptance of rent cannot establish a tenancy where the owner has unequivocally repudiated the claim of tenancy. A contract of letting and hiring cannot arise except by agreement of parties. A tenancy by contract can only arise where the parties are ad idem as to its essential particulars."

In my view in the present case there is a significant absence of clear and specific evidence to establish a consensus ad idem between the said Sithy Sukriya and the defendant-respondent to create a contract of tenancy, in respect of the premises in suit. When the legal title to the premises is admitted to be in the plaintiff, the burden of proof is on the defendant-respondent to show he is in lawful possession. The defendant-respondent had clearly failed to discharge the said burden and therefore the plaintiff-appellant would be entitled to an order of ejectment of the defendant-respondent from the premises in suit and for damages.

The findings of fact by the Learned District Judge are mainly based on the trial Judge's evaluation of facts.

In De Silva V. Seneviratne (1981) 2 Sri.L.R 7, it was held that:-

(1)Where the findings on questions of fact are based upon the credibility of witnesses on the footing of the trial Judge's perception of such evidence, then such findings are entitled to great weight and the utmost

consideration and will be reversed only if it appears to the Appellate Court that the trial Judge has failed to make full use of his advantage of seeing and listening to the witnesses and the Appellate Court is convinced by the plainest consideration that it would be justified in doing so.

(2)That however where the findings of fact are based upon he trial Judge's evaluation of facts, the Appellate Court is then in as good a position as the trial Judge to evaluate such facts and no sanctity attaches to such findings of fact of a trial Judge.

(3)Where it appears to an Appellate Court that on either grounds the findings of fact by a trial Judge should be reversed then the Appellate Court "ought not to shrink from that task."

For reasons stated above I am of the opinion that the plaintiff-appellant has proved his title and the defendant-respondent has been unsuccessful in proving or establishing that he is the tenant of the premises in suit. Consequently I set aside the finding, judgment and decree of the Learned District Judge and answer issues No 1 and 2 in favour of the plaintiff-appellant.

Accordingly Learned District Judge of Colombo is directed to enter judgment in favour of the Plaintiff as prayed for in paragraph 1 to 4 in the prayer to the plaint. The plaintiff-appellant is entitled to the costs of this appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL