

494/99(F)

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

Jayawardene Liyanage Gunadasa
No.449, Elvitigala Mawatha,
Colombo 5.

Plaintiff

C.A. Case No:-494/99(F)

D.C.Colombo Case No:-16657/L

V.

Narangodage Amarapala
No.449, Elvitigala Mawatha,
Colombo 5.

Defendant

AND NOW BETWEEN

Jayawardena Liyanage Gunadasa
No.449, Elvitigala Mawatha,
Colombo 5.

Plaintiff-Appellant (deceased)

1a.Gamekankanamge Gunawathie
No.01/11, Samaranayake Road,
Kolonnawa.

1b.Jayawardene Liyanage Prasanna,
Sampath, No 01/11, Samaranayake
Road, Kolonnawa.

1c.Jayawardene Liyanage Lasantha
Krishan, No.01/11, Samaranayake
Road, Kolonnawa.

1d.Jayawardene Liyanage Achini
Kashmira, No.01/11, Samaranayake
Road, Kolonnawa.

Substituted-Plaintiff-Appellants

Narangodage Amarapala,
No.449, Elvitigala Mawatha,
Colombo 5.

Defendant-Respondent (deceased)

1a.Indra Josephine Jayasinghe
No.449, Elvitigala Mawatha,
Colombo 5.

1b.Narangodage Ishan Dilantha
No.449, Elvitigala Mawatha,
Colombo 5.

1c.Narangodage Hasini Chathurani
No.449, Elvitigala Mawatha,

Colombo 5.

Substituted-Defendant-Respondents

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

Counsel:-Asthika Devendra with Sunali Jayasuriya for the
Substituted- Plaintiff-Appellants

Dr.Jayatissa de Costa with Wijeratne Hewage for the
Substituted-Defendant-Respondents

Argued On:-22.11.2013/16.01.2014

Written Submissions:-18.02.2014

Decided On:-02.02.2016

H.N.J.Perera, J.

The deceased plaintiff-appellant instituted action against the deceased defendant-respondent in the District Court of Colombo seeking the ejectment of the defendant and his family members and agents from the premises described in the schedule to the plaint and for damages.

It was the position of the plaintiff that he was the tenant of one Vishwalingam Thilklerajah and in November 1990, the plaintiff allowed the defendant to occupy the disputed part of the premises described in the schedule to the plaint temporarily on leave and license of the plaintiff on the request of the defendant. The plaintiff-appellant informed the defendant to vacate the premises in suit in November 1992 since the defendant had taken undue advantage of the leave and license of the plaintiff. Thereafter the plaintiff sent a notice dated 20.12.1993 through his Attorney-at-Law terminating leave and license and demanding the defendant to vacate the premises on or before 31.01 1994. However the defendant failed to comply with the same. It was the position of the

plaintiff that the defendant had continued to occupy the said premises illegally and unlawfully since 01.02.1994 which has caused a loss of Rs.500/-to the plaintiff monthly.

The defendant filed his answer stating that the owner of the said premises is a person name Vishwalingam Thillairajah and the defendant came to occupy the said land in 1971 as a tenant of the said Thillairajah. The defendant further averred that he paid rent to the said Thillairajah and he has not come to collect the rent from 1983. Since the boutique belonging to the plaintiff was acquired by the State under the Gazette dated 22.07.1976 bearing No 219/24, the plaintiff obtained the permission of the defendant to keep his belongings in the said premises. It was the position of the defendant that after Thillairajah's death in 1985, the plaintiff commenced a boutique at the said premises.

Both parties have admitted that the title to the said premises is with one Vishwalingam Thillerajah.

The case of the plaintiff was solely based on the premise that he granted leave and license to the defendant to occupy the premises in suit from November 1990. After trial the learned District Judge delivered judgment on 01.06.1999 in favour of the defendant dismissing the plaint. Aggrieved by the said judgment of the learned trial Judge the plaintiff-appellant had preferred this appeal to this court.

It was the contention of the Counsel for the plaintiff-appellant that the learned trial Judge has failed to correctly evaluate the oral and documentary evidence produced by the plaintiff-appellant.

The learned trial Judge has held that the defendant's version is corroborated by two other witnesses. That as the plaintiff came into possession under V. Thillerajah there was no requirement for him to give leave and license to the defendant. The learned trial Judge has further

held that the plaintiff did not have the authority to grant leave and license when he did not have title to the property.

It was submitted on behalf of the plaintiff-appellant that even though the plaintiff-appellant has not called up any witnesses on his behalf, he has proved his position clearly by his own oral evidence and the documentary evidence which has been marked as P1 to P17.

The plaintiff in his evidence has produced the document marked P 1 without any objection from the defendant. According to the said document it is evident that the defendant has paid rent for the said premises at the Municipal Council of Colombo in the defendant's name stating that the plaintiff is the owner of the said premises. It was contended on behalf of the plaintiff-appellant that the defendant was unaware of the real owner of the said premises until 1992 and he had believed the plaintiff had allowed the defendant to occupy the premises. It is evident from the said document marked P1 that the defendant has attempted to pay the rent under the plaintiff-appellant's name only in 1992. It was contended on behalf of the plaintiff-appellant that the defendant's position that he came to occupy the said premises in 1971 as a tenant of V.Thillerajah cannot be believed.

The plaintiff has marked and produced the said document without any objection from the defendant. The defendant has denied that he has paid any rent in the name of the plaintiff to the Municipal Council. Yet he has failed to challenge the said document marked P1 when it was marked and produced by the plaintiff. The plaintiff has clearly established by documentary evidence that the defendant has paid rent in the plaintiff's name at the Municipal Council Colombo. The plaintiff has closed his case marking documents P1 to P 17 without any objections from the defendant. The *cursus curiae* of the original civil court followed for more than three decades in this country is that the failure to object to

documents, when read at the closure of the case of a particular party would render them as evidence for all purposes of the law. Balapitiya Gunananda Thero V. Tallale Methananda Thero [1977] 2 Sri.L.R 101, Silva V. Kindersley 18 N.L.R 85.

Both parties have admitted that the title to the said premises is with one Vishwalingam Thillerajah. The plaintiff's position is that from the year 1970 the plaintiff has been the tenant of the said V.Thillerajah. To substantiate the said position the plaintiff has marked and produced the correspondence between him and the said V.Thillerajah as P 13 to P17. These documents have been read into evidence without any objection from the defendant. In P 16 Thillerajah has stated referring to the plaintiff that "that I am the owner of the shop and that you are my tenant ever since you came to occupation and you have been paying me the rent Rs.50/-long for several years."

It was the position of the plaintiff that he was residing at the said premises as a tenant of Thillerajah from the year 1970 and the defendant came into possession on his leave and license in 1990. The plaintiff has produced letters marked P13 to P16 that were exchanged between the plaintiff and Thillerajah and it is clearly evident from these letters that the plaintiff was the tenant of Thillerajah and that the plaintiff paid a monthly rental to him.

Further according to the document marked as P12, the plaintiff had stated that he commenced his boutique at the said premises in 1971. The said business had been registered in the year 1991.

The defendant has taken up the position that he came in to the possession of the said premises in 1971 under V.Thillerajah. But as per the document marked P11, the defendant has entered his name in the Electoral Register of Colombo in 1992. According to P11 the defendant's name has been registered in the 4th place of the list whereas the

plaintiff's name is the 1st name. This clearly shows that the defendant's name has been registered after the name of the plaintiff. These evidence indicate that after the plaintiff requested the defendant to quit the said premises in 1992 the defendant has taken steps to register his name in the Electoral Registry and pay a monthly rent to the Municipal Council to show that he was a tenant of the plaintiff.

The defendant has not produced any documentary evidence to prove that he was a tenant of V.Thillerajah. Although he has stated that he was in possession of the said premises as a tenant of V.Thillerajah from 1971, the documents marked as P6 to P10 clearly establish the fact that the defendant had been residing in the Akmeemana and Galle electoral divisions from 1971 to 1987 and not in Colombo as claimed by him. Whereas according to the document marked P10 the plaintiff had stated that he commenced his boutique at the said premises in 1971. The witness Rathnayake Mudiyanseelage Wijeratne who was summoned by the defendant to give evidence on his behalf has stated that the plaintiff came into the possession of the said premises bearing No 449 after 1977.

In this case the plaintiff has been able to contradict the positions taken by the defendant by documentary evidence. The two witnesses who were summoned to give evidence on behalf of the defendant had stated that the defendant came to the said premises in 1971 prior to the plaintiff. But the witness Wijeratne has stated that the plaintiff came to reside at the said premises after the place he was residing at that time was demolished for road development in 1977. It was his position that the plaintiff was residing in the opposite side of the road in No. 442 prior to that date.

The defendant has admitted that he does not possess any documents or receipts to prove that he was a tenant under V.Thillerajah. The plaintiff's position was that he was the tenant of V. Thillerajah from 1971. He has

produced a number of documents to prove the same. The evidence of the defendant and his witness show that at least from 1976 the plaintiff has been residing at the said premises No.449 doing business.

The defendant in his answer has taken up the position that he was the tenant of the said premises No.449 under V.Thillerajah from the year 1971. He has further stated that the plaintiff came to reside at the said premises with his leave and license in 1976 after the plaintiff's boutique was acquired by the State in 1976. It was the defendant's position that the plaintiff was occupying a boutique opposite the road from 1971 until it was demolished in 1976.

When one consider the evidence of the two witnesses who has given evidence on behalf of the defendant it is clearly seen that they were not quite aware of the relationship the plaintiff and the defendant had with each other. They were not able to say whether the defendant was the tenant of the said V.Thillerajah or not. The defendant has clearly failed to lead evidence and prove that he came into occupation of the said premises as a tenant of V.Thillerajah. Although the defendant has stated that he occupied the said premises as a tenant of V.Thillerajah in 1971 and paid rent to him, the defendant has failed to produce any documentary evidence to prove the same. The defendant has marked a document as V8 an envelop in which a letter had been sent to the defendant mentioning the address of the premises in suit. The day stamp of the postal authority gives the date as December 1989. In my opinion this document merely shows that a letter had been sent to the defendant to the given address. It does not in any way prove that the defendant was occupying the said premises as a tenant of V. Thillerajah or conclusively prove that in fact the defendant was residing at the said address at that time.

In reply to the letter P4 the quit notice, the defendant has simply denied the leave and license of the plaintiff from his letter dated 19.03.1993 marked P5 , but has not stated that he is the tenant of V.Thillerajah and the plaintiff came to the premises in 1976 with the leave and license of the defendant. The defendant has for the first time in his answer has taken up the position that the plaintiff came into the premises in 1976 with the leave and license of the defendant. The conduct of the defendant clearly shows that he has tried to take up the position that he was the tenant of the plaintiff by paying rent to the Colombo Municipal Council in 1992 and also by entering his name in the Colombo Electoral Registry in 1992. The plaintiff has at the very first opportunity he got, when he came to know that the defendant has deposited rent to the Municipal Council as his tenant, has by his letter marked P5 clearly denied the said position. The defendant has not, until he filed his answer in this case taken up the position that the plaintiff was occupying the said premises with his leave and license. The defendant has not taken steps to terminate the said leave and license granted to the plaintiff and has clearly failed to state so in P5 prior to filing of his answer.

The plaintiff has by documentary evidence clearly establish that he was the tenant of V. Thillerajah from the year 1971 and that he occupied the said premises and did business at the said place from the year 1971 and that the defendant was occupying a part of the premises described in the second schedule to the plaint with his leave and license from the year 1990. Even though the plaintiff-appellant has not called any other witnesses on his behalf, he has proved his position clearly by his own evidence and the documentary evidence which has been marked as P1 to P17 (a) without any objection.

Even though the defendant –respondent has taken up the position that he has come to occupy the said premises in 1971 as a tenant of V.Thillerajah, he has failed to prove the same on balance of probability.

The learned trial Judge has erred in law when she held that the plaintiff has no authority to grant leave and license to the defendant since the plaintiff has no title to the said premises.

In *Ruberu and another V. Wijesooriya* (1998) 1 Sri.L.R 58 it was held that:-

“Whether it is a licensee or lessee, the question of title is foreign to a suit in ejectment against either. The licensee obtaining possession is deemed to obtain it upon terms that he will not dispute the title of the plaintiff without whose permission he would not have got it. The effect of Section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must first quit the land. The fact that the licensee obtained possession from the plaintiff is perforce an admission of the fact that the title resides in the plaintiff.”

In *Reginald Fernando V. Pabilinahamy and others* (2005) 1 Sri.L.R 31 it was held that where the plaintiff (licensor) established that the defendant was a licensee, the plaintiff is entitled to take steps for ejectment of the defendant whether or not the plaintiff was the owner of the land.

Section 116 of the Evidence Ordinance reads as follows:-

116. No tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and

no person who came upon any immovable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given.”

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 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 the 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 ground the findings of fact by a trial Judge should be reversed then the Appellate Court "ought not to shrink from that task."

In my opinion it has been clearly established in this case that the defendant has entered and possessed the said portion of the premises described in the schedule to the plaint with the permission of the plaintiff and has possessed the same as a licensee of the plaintiff. In the circumstances, the plaintiff as the licensor is entitled to eject the defendant who is his licensee from the premises in question.

Considering the totality of the evidence and circumstances before this court, issues are answered as follows:

- I. Yes
- II. Yes
- III. Yes
- IV. Yes
- V. Yes.

- VI. Yes
- VII. Yes
- VIII. No.
- IX. Yes
- X. Not proved.
- XI. Not relevant
- XII. No
- XIII. No
- XIV. No
- XV. Does not arise.
- XVI. Yes
- XVII. Yes
- XVIII. Yes
- XIX. Yes.
- XX. Yes.

For the reasons set out above, I hold that the plaintiff-appellant is entitled to the relief claimed by this appeal. Accordingly, I allow the appeal and set aside the judgment of the learned trial Judge dated 01.06.1999 and enter judgment as prayed for in the plaint. The damages claimed appear to be reasonable and therefore I have allowed prayer (c) together with taxed costs in both courts.

The appeal of the plaintiff-appellant is allowed with costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL