

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

In the matter of an Application under Section 754 of
the Civil Procedure Code

Court of Appeal No. (Deceased)
CA 480/2000(F)
DC Colombo Case No: 15586/L

D.E. Jayasinghe
No.1, Mahabuthgamuwa, Angoda
Plaintiff

Vs.

1. A.M.K.P.Nona (Deceased)
No.235, Megoda Kollonnawa
Wellampitiya.
2. Ranasinghe Arachchige Piyasena
3. Ranasinghe Arachchige Irene
4. Ranasinghe Arachchige Miyurin
5. Ranasinghe Arachchige Gunasena
All of No.235, Megoda Kollonnawa
Wellampitiya.

Substituted-Defendants

AND

2. Ranasinghe Arachchige Piyasena
5. Ranasinghe Arachchige Gunasena
Both of No.235, Megoda Kollonnawa
Wellampitiya.

Substituted – Defendant- Appellants

Vs

(Deceased) D.E. Jayasinghe

No.1, Mahabuthgamuwa, Angoda.

1. (A) Sanpinona Sendanayaka
Of 81, Mahabuthgamuwa, Angoda.
2. (B) Nihal Jayasinghe
Of No.2/3A, Mahabuthgamuwa,
Angoda.
- 3 (C) Noel de Nelson Jayasinghe
Of 349/B, Kudabuthgamuwa,
Angoda.

- 4 (D) Saman Jayashantha Jayasinghe
Of 2/4/A, Mahabuthgamuwa
Angoda.
- 5 (E) Ranjula Jayasinghe
Of 8L, Mahabuthgamuwa, Angoda.
- Substituted -Plaintiff -Respondents**
3. Ranasinghe Arachchige Irene
4. Ranasinghe Arachchige Miyurin
Both of No.235, Megoda Kollonnawa
Wellampitiya.

**Substituted-Defendant-Respondents
AND NOW BETWEEN**

2. Ranasinghe Arachchige Piyasena
5. Ranasinghe Arachchige Gunasena
Both of No.235, Megoda Kollonnawa
Wellampitiya.

**Substituted – Defendant- Appellants
Vs**

- (Deceased) D.E. Jayasinghe
No.1, Mahabuthgamuwa, Angoda
- 1(A) Sanpinona Sendanayaka
Of 81, Mahabuthgamuwa, Angoda.
- 2 (B) Nihal Jayasinghe
Of No.2/3A, Mahabuthgamuwa,
Angoda.
- 3 (C) Noel de Nelson Jayasinghe
Of 349/B, Kudabuthgamuwa,
Angoda.
- 4 (D) Saman Jayashantha Jayasinghe
Of 2/4/A, Mahabuthgamuwa
Angoda.
- 5(E) Ranjula Jayasinghe
Of 8L, Mahabuthgamuwa, Angoda.
- Substituted -Plaintiff –Respondents**
3. Ranasinghe Arachchige Irene
4. Ranasinghe Arachchige Miyurin
Both of No.235, Megoda Kollonnawa
Wellampitiya.

Before: N. Bandula Karunarathna J.

&

R. Gurusinghe J.

Counsel: Jagath Wickremanayake with Migara Doss Instructed by Jayantha Dollawatta for the Plaintiff –Respondent.

and Vishwa De Livera Tennakoon with Lilani Ganegama for the Intervenant –Appellants.

Written Submissions: By the Plaintiff –Respondent on 03/05/2019

By the Substituted Defendant –Appellants on 19/09/2018

Argued on: 08/05/2019

Judgment on: 25/03/2021

N. Bandula Karunarathna J.

The Plaintiff - Respondent (hereinafter sometimes referred to as the "Plaintiff") instituted an action in the District Court on or around 17th October 1991, sought from Court *inter alia* as follows:

- a. For ejection of the original Defendant and her servants, agents and those who are holding under her from the premises more fully described in the schedule to the plaint (hereinafter sometimes referred to as "the subject property").
- b. For a judgement amounting to a sum of Rs.1,800/- as damages and a sum of Rs.50/- per month until the Defendant is ejected from the subject property and the Plaintiff's possession is restored.

The Plaintiff claims that he became the lawful owner of the subject property in or around 30th September 1963. The Original Defendant entered the subject property with leave and license of the Plaintiff and no rent has been obtained from the Defendant by the Plaintiff. Thereafter, the Plaintiff sent a quit notice to the Defendant on or around 5th August 1988, and the Defendant failed to leave the subject property despite the warning of the Plaintiff. The Defendant has been in possession of the subject property and has been causing damages to the Plaintiff from 1st October 1998, amounting to a sum of Rs.50/- per month.

Since the lawful ownership of the Plaintiff was admitted, the Defendant started her case and the original Defendant, Manandewage Sumanawathie (on behalf of the National Housing Commission), one Gunadasa Perera (on behalf of the Kotikawatte Municipal Council) gave evidence on behalf of the Defendant and produced as evidence documents marked from "V1" to "V8". After the conclusion of the case of the Defendant, the original Defendant passed away and accordingly Substituted Defendant-Respondents (hereinafter sometimes referred to as "the substituted Defendants") were submitted in the place of the original Defendant.

The Plaintiff states that the Defendant has failed in establishing the Contract of Tenancy in respect of the subject property. The title of the subject property was not disputed by the Defendant and in fact the Defendant had admitted the Plaintiff as the lawful owner of the subject property. It is therefore submitted by the Plaintiff that the burden shifted on to the Defendant to prove the contract of tenancy, but the Defendant failed to establish the same.

The Plaintiff also claims that the unavailability of the documents relied upon by the Defendant does not bar the Plaintiff from reaping the fruits of the Judgement. The function of the Appeal Court is to consider as to whether the trial Judge has applied correct standards and procedure in inferring, and mere unavailability of documents at the appeal stage would not amount to setting aside a judgement. Therefore, it is submitted by the Plaintiff that the position of the Defendant on unavailability of documents cannot hinder the Plaintiff from reaping the fruits of the judgement dated 24.04.2000 by the learned District Judge.

The Defendant, in response, states *inter alia* that the corpus is owned by the Plaintiff and that the Defendant had taken the corpus on rent in 1971 and that the Defendant is occupying the said premises as the lawful tenant by paying rent and therefore the said corpus is subject to the provisions of the Rent Act.

The Defendant states that on 12.04.1971 the Defendant legally rented and came into occupation as a legal tenant of the said premises. Since then till end of 1984 the relevant rental was paid to the Plaintiff and was accepted by the Plaintiff although the Plaintiff did not issue any receipts for the payments. The Plaintiff owns more than four houses and in the same period the Defendant's daughter rented another house from Plaintiff which is owned by him. In 1982 the Plaintiff was preparing to sell the premises in suit and the Defendant intending to purchase this property made an application to the Commissioner for National Housing under the Provisions of Section 13 of the Ceiling of Housing Property.

The Defendant states that according to the said application the Commissioner for National Housing made an inquiry in 1984 and the Plaintiff stated that he has no intention of selling the said house anymore and further stated that the Defendant is not a Tenant but only a Licensee. Thereafter, the Plaintiff refused to accept the house rental from month of January 1985 and the Defendant deposited the relevant house rental to Kotikawatte – Mulleriyawa Town Council. In 1984 the Plaintiff gave up the idea of selling the corpus and after 6 – 7 years the Plaintiff has filed

this case to cancel the legal tenancy of the Defendant and to eject the Defendant and the substituted Defendants who are the children of the Defendant.

In the circumstances aforesaid, the Defendant states that it is imperative to decide and determine whether the premises in suit was occupied by the original Defendant (now deceased) as a tenant as per the position of the Appellants or as a licensee as contended by the Respondents. If the original Defendant was a tenant then the provisions of the Rent Act would apply, and as such the procedure laid down in Section 22 of the said Act must be complied with for the purpose of ejection. The question of whether the original Defendant was a tenant or a licensee must be decided on a balance of probabilities.

The document marked as V1 and V2 which were marked and proven during trial is evidence of the fact that there was a move by the Plaintiff to sell the corpus in the early part of 1984 and further that the original Defendant requested to purchase it from the Housing Development Authority (Commissioner for National Housing) by way of the application V1. Thereafter, the Housing Development Authority (Commissioner for National Housing) fixed this case for inquiry at which inquiry both the original Defendant and Plaintiff gave evidence. This evidence is marked as V2.

The testimony on the contents of document marked V2 is given by M.D. Sumanawathie an Officer of the Housing Development Authority (Commissioner for National Housing) who confirms that the position taken by both the Appellant and Respondent in this trial was taken by them at the stage of that inquiry i.e. in the year 1984.

The Defendant states that at this inquiry the Plaintiff who originally wanted to sell the premises in question retracts from his original intention and says that he does not wish to proceed with the sale as he wishes to bestow the said premises on his children. It is only thereafter that the original Defendant starts paying the rent to the authorized person instead of the landlord. This is confirmed by document marked V4 which has been confirmed by G. Perera Mulleriyawa, Kotikawatta Divisional Secretariat.

The Defendant states that the document marked V4 is a summary of the rent paid in respect of the premises in suit. After 4 years since the said inquiry took place at the National Housing Development Authority (Commissioner for National Housing) the original Plaintiff purportedly issued a Notice to quit marked as P1 dated 05.08.1988. After over 3 years since the said notice the plaint in the instant case was filed i.e. 17.10.1991.

The Defendant states that it is also imperative to note that the Plaintiff took over 4 years to issue the said notice to quit even after becoming aware that the original Defendant does not consider herself to be a licensee. Further, ejection proceedings were instituted over 3 years thereafter. the Latin phrase *main Vigilantibus Et Non Dormientibus Jura Subveniunt* which means that the law assists those that are vigilant with their rights, and not those that sleep thereupon, is one that has great relevance in this instance.

The Defendant states that in any event, the Plaintiff has consistently taken up the position that the Plaintiff granted leave and license to the original Defendant and her children on a sympathetic basis. If so would it not have been probable that the purported notice to quit ought to have been issued in closer proximity to when the original Defendant offered to buy the premises from the Plaintiff i.e. after 1984 and not in 1987.

The Defendant states that it is clear that the Plaintiff has in fact taken well over 7 years to institute proceedings against the original Defendant to eject her well after she stopped paying her rent.

Another material point the Defendants embark upon is the fact that ought to consider is that at times material to this action, the Plaintiff had leased out of his other houses to the daughter of the original Defendant. This was revealed by non-other the Plaintiff himself during cross examination (vide page 140 of the Appeal brief).

Therefore, the Defendants submit that there is a high probability that the Plaintiff would have not only given a house on lease to the original Defendant's daughter but also to the original Defendant during the same period.

Subsequent to a thorough analysis of the arguments of the Plaintiff and the Defendant, it is pertinent to note that even though the Defendant claimed that she paid rent in respect of the subject property since 1971 when they came into possession of the subject property, she failed to produce receipts or any other document of such payment. Therefore, it is submitted by the Plaintiff that the Defendant had failed to adduce sufficient evidence in order to prove the existence of a contract of tenancy between the Plaintiff and the Defendant.

In *George Wille's book of "Landlord and tenant in South Africa"* it is stated that ;
"A lease is formed by the consent or agreement of the parties on three essential points: (1) that the object of the contract is to let and hire (2) Ascertained property (3) At a fixed rent. The parties to the contract must of course, be capable of contracting, their consent must be freely given, and the purpose of the contract must not be illegal..."

In order to form a lease agreement, the above said pre-requisites have to be fulfilled but none of the requirements have been adhered to by the Defendant.

MARY BEATRICE AND OTHERS v. SENEVIRATNE SLR 1997 - Volume 1, Page No - 197

The plaintiff-respondent instituted action to eject the original defendant from the house in question. It was the position of the plaintiff that the house was leased out to the original defendant's husband by a Deed of lease (P6) and on his widow and children were permitted to reside in the house. The original defendant died after the institution of the action. The substituted defendants-appellants denied the Deed of Lease, and claimed title to the premises by prescription. The District Court held with the plaintiff. On appeal -

Held:

1. The leases (P5 and P6) were established and proved. The defendants are estopped from asserting title in view of the fact that the substituted defendants' father had acquiesced in the rights of the plaintiff as owner of the subject matter. The predecessor of the defendants was the lessee of the thatched house only, if he had any claim or title to the land and the trees there was no necessity for them to enter into P5 and P6.

2. Even assuming that the defendant had become owner of the entire premises, it was not open to him to refuse to surrender possession. He must first give LIP possession and then it would be open to him to litigate about the ownership.

3. The defendants are not entitled to dispute the title of the plaintiff. The plaintiff need not institute an action in rem.

In EDIRISINGHE v. CHARLIS SINGHO SLR 2000 - Volume 3, Page No - 380

The Commissioner after Inquiry, directed that the Respondent, who claimed to be the tenant cultivator be restored to possession on the basis that he had been evicted by the Appellant who became the owner of the field under Deed No. 2469. This Order was affirmed by the High Court. On Appeal.

Further, the following portion of the evidence shows the intention and/or objective of the Plaintiff in granting the possession to the Defendant. ;

“ප්‍ර: ඔහු කියා සිටියා, තමන් ඔහුගේ කුලි නිවැසියන් නොවේ කියා?

උ: නැහැ.

ප්‍ර: කොමසාරිස්තුමා ඉදිරියේ කිව්වාද? නැද්ද?

උ: එයා කිව්වා අපි පිනට ඉන්නවා කියලා.

ප්‍ර: එක තමන්, ජයසිංහ මහතාත් අතර කුලි ගිවිසුමක් හටගත්තේ නැත කිව්වා?

උ: ඉන්න පමණක් නොවේ, කන්න දෙනවා කියා කිව්වා”.

(Evidence of the Plaintiff at page 125 of the appeal brief)

“ප්‍ර: මේ ගෙට වින්තිකාරයා ආවේ කොහොමද?

උ: ඉන්න තැනක් නැහැ කියලා මගෙන් ඉල්ලුවා?

ප්‍ර: තමන් මොකද කළේ?

උ: දුක දැකලා ඉන්න දුන්නා

ප්‍ර: කොහෙද?

උ: ඒ ගෙයි”?

It could therefore be seen that the Plaintiff has given his consent for the Defendant to possess the subject property upon sympathy and the objective of this consent was merely Plaintiff's sympathy towards the Defendant and has never had an oral or written agreement to let and hire.

Moreover, it could also be noted that even though the Defendant claimed to have paid rent, there is no evidence adduced in order to prove the same as illustrated below

“ප්‍ර: 71 සිට 81 දක්වා කුලී ගෙව්වා කියන කාරණාව ඔප්පු කරන්න මොනම ලියවිල්ලක්වත් නැහැ කට්ටි කියනවා හැර.

උ: ඒ මහත්තයා දීලත් නැහැ. අපි ඉල්ලුවෙත් නැහැ. අපට ඉඩම ඉල්ලලා හිරිහැර වෙනකොට අපි නිවාස දෙපාර්තමේන්තුවට ගියේ.

ප්‍ර: ඒ කවදාද?

උ: දන්නේ නැහැ. මම දැනගත්තට කල්පනාවක් නැහැ”.

Further, the amount purported to have paid as rent to the Municipal Council lacks consistency and in turn breaks Defendant's position of the contract of tenancy.

- “ උ : ගෙවල් කුලී ගෙවා තිබෙනවා
 ප්‍ර : 85. 01. 20.?
 උ : ඊට කලින් තිබෙනවා?
 ප්‍ර : 1984, 83, 82 ඊට කලින් අවුරුද්දේ නැහැ?
 උ : නැහැ
 ප්‍ර : 1985 වර්ෂයට තමයි ආරම්භ කර තිබෙන්නේ?
 උ : ඔව්
 ප්‍ර : 1985 වර්ෂයට තුන්පාරක් ගෙවා තිබෙනවා මේ ලේඛණය අනුව?
 උ : ඔව්
 ප්‍ර : ඊළඟට 87 වර්ෂයේ ගෙවා තිබෙනවා
 උ : ඔව්
 ප්‍ර : 87 වර්ෂය සඳහා රු.100ක් ගෙවල තිබෙනවා 1987. 2. 9
 උ : ඔව්
 ප්‍ර : 1987 අගෝස්තු ගෙවා තිබෙනවා රු.100ක්?
 උ : ඔව්
 ප්‍ර : ඊළඟට 1983. 3. 10 ගෙවා තිබෙනවා 180යි
 උ : ඔව්
 ප්‍ර : ඊට පසු ගෙවල තිබෙනවද?
 උ : මේ ලේඛනයේ ගෙවල නැහැ”.

It is also imperative to note that upon the fact that he has been the lawful owner of the subject property and had given the subject property unto the defendant with the leave and license. In case of license, legal possession continues to vest with the owner and the licensee is permitted to use the property for a particular purpose. The Defendant came into possession of the subject property in 1971 and had been there with the leave and license of the Plaintiff, Plaintiff has never

accepted any money from the Defendant as rent, even the rent purported to have paid to municipal council has not been obtained by the Plaintiff.

The Defendant was in possession of the subject property with the leave and license of the Plaintiff and Plaintiff has a right to revoke the license granted to the Defendant. Therefore, when a person is in possession with leave of the owner and when a notice to quit is forwarded to him asking for peaceful and vacant possession of that property, the licensee is bound to quit the said property.

In an Indian case of *Associated Hotels of India Pvt Ltd Vs R.N. Kapoor (1960) 1 SCR 368 (SC 1959)* Subra Rao J. held as below;

“.....If a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a license. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose’. But for the permission, his occupation would be unlawful. It does not create in his favor any estate or interest in the property”.

Therefore, it could be seen that there has been a license granted to the defendant and when she was asked to quit by the lawful owner, she was bound to quit and restore the vacant and peaceful possession of the subject property to the Plaintiff.

The notice to quit marked as “*படி 1*” therefore amounts to termination of the license granted by the Plaintiff, and thereafter the Defendant is no longer a licensee and has no right to possess the subject property.

In the said circumstances, it could be concluded that the Defendant has been in possession of the subject property as a licensee and therefore the Plaintiff has the right to revoke the license granted by the Plaintiff. The appeal is hereby dismissed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal