

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

In the matter of an appeal to the Court of
Appeal of the Democratic Socialist Republic
of Sri Lanka.

Mallika Seelawathie Gunawardane

"Sriyawasa", George E.De Silva Mw.

Kandy.

Plaintiff

C.A.L.A. Application No.514/97 (F)

D.C. Kandy Case No. 2092/RE

Vs

1. Sudirikku Henedige Bandulasena
No. 338/2, Sir Kuda Ratwatte Mw
Kandy.
2. Commissioner of National Housing
Department of National Housing
Colombo.

Defendants

AND

Mallika Seelawathie Gunawardane
(Deceased)

'Sriyawasa', George E.De Silva Mw
Kandy.

Plaintiff-Appellant

VS

1. Sudirukku Hennadilage
Bandulasena
(Deceased)
No. 338/2, Sir Kuda Ratwatte Mw
Kandy.

1A Sudirukku Hennedige Athula
Priyadarshana De Silva
No. 338/2, Sir Kuda Ratwatte Mw
Kandy.

2. Commissioner of National Housing
Department of National Housing
Colombo.

Defendant-Respondents

AND NOW BETWEEN

In the matter of an application for
substitution under section 760A of
the Civil Procedure Code as
amended.

Wickramatilake Gunawardane
327/2, George E. De Silva Mw
Kandy.

Petitioner

Vs

- 1A Sudirukku Hennedige Athula
Priyadarshana De Silva
No. 338/2, Sir Kuda Ratwatte Mw
Kandy.

3. Commissioner of National Housing
Department of National Housing
Colombo.

Defendant-Respondent-Respondent

1. Wijayalatha Gunawardane
2. Deepatilake Guanwardane
3. Anoma Gunawardane
4. Asoka Gunawardane
5. Liliyet Pushpanganie
Gunawardane

All of 327/4, George E. De Silva
Mawatha. Kandy.

Respondents

BEFORE

: Deepali Wijesundera J.

M.M.A. Gaffoor J.

COUNSEL

: Anurudda Dharmaratne with
Upendra Walgampaya for the
Plaintiff-Appellant

Kaminda De Alwis for the

1 (A) Defendant Respondent

ARGUED ON

: 16th March, 2015

DECIDED ON

: 23rd October, 2015

Deepali Wijesundera J.

The appellant had instituted an action against the respondent in the District Court of Kandy to eject the respondent from the premises described in the schedule to the plaint and also to claim arrears of rent and damages. The learned District Judge after the trial has dismissed the plaintiff's case on 21/01/1997 stating that the plaintiff had failed to prove there was arrears of rent in the absence of receipts and also that the appellant had waited four years to file action. He has also said that the appellant had failed to give notice to the second respondent *under sec. 22 (1) of the Rent Act* and also that the appellant owned two other houses.

The counsel for the appellant submitted that the learned District Judge erred in law in casting the burden of proving arrears of rent on the appellant, that it is the duty of the first respondent to show court that he was not in arrears of rent. The appellant stated after receiving the quit notice marked **P1** the first respondent deposited the rent at the municipal council of Kandy. Citing the judgment in **Saheed Vs Wickramanayake 1981 2 SLR 67** stated that a defendant who makes a positive assertion is required by the best evidence rule to produce evidence of payment. The first respondent who claimed he paid rent

without arrears did not prove to court that he paid for the period in which the appellant claims there are arrears.

The appellant stated that he never refused to accept rent from the first respondent and that the rent deposited at the Municipal Council Kandy is not deposited in the name of the appellant (documents marked as V7 to V16). The appellant cited the judgments in **Violet Pereira Vs Asilin Nona 1996 1 SLR 1** and **Gunasekera Vs Jinadasa 1996 2 SLR 115** stated that *"Payment of rent in the name of a person who is not the landlord does not discharge the tenant's obligation to the landlord"*. The first respondent in his evidence has not stated that he offered rent to the appellant after the letter of demand was received.

The appellant further stated that the first respondent has failed to prove he deposited rent for the months of September, October and November 1986 and failed to furnish receipts, and that the first respondent was in arrears of rent for more than four months as at the date of the plaint.

The appellant submitted that under Sec. 22 (1) (b) as being reasonably required for occupation for the son of the appellant who

resides in a Government house. He further stated that the learned District Judge had come to an erroneous finding that the appellant owns two other houses, on the two documents marked as **V2** and **V3** which are assessment extracts clearly indicates that it is a co-owned property.

The learned counsel for the first defendant respondents stated that the learned District Judge has very correctly analysed the evidence and come to the conclusion that the appellant had not proved the case. The respondent stated that *under Sec. 33 (2) of the Rent Act* it is the statutory duty of the landlord to issue receipts for the rent received. He further submitted that *under Sec. 22 (3) of the Rent Act* the appellant failed to send notices to the respondents.

The respondents further stated that by documents **V2 to V5** it shows that the appellant had more than one house.

Both parties have agreed that the owner of the property in dispute is the appellant. On perusal of rent receipts marked as **V1, V7 to V11** it is clear that the respondent was in arrears of rent before the case was filed in the District Court. After **V10** which is for rent in August 1986, **V11** is for January, February 1987 and December 1986 was paid on the 20th

of March 1987 after the District Court case was filed. (Plaint is dated 18/03/1987). The learned District Judge has misdirected himself when he said the respondent was not in arrears of rent. Receipts marked **V12 to V16** have been paid after the case was filed. Documents **V1** and **V6** which the respondents have marked and claimed the appellant gave them but the signature in these documents different from each other.

The deposit of money as rent to the Municipal Council does not amount to payment of rent by the first respondent since the receipts does not state to whom it is paid therefore the learned District Judge has erred again in law when he came to the finding that the said receipts are proof that the first respondent deposited rent and that he is not in arrears.

The learned District Judge has come to the conclusion that the Commissioner of National Housing and the respondent was not served notice *under Sec. 22 (1) (a)* of the said act. But document **P1** and **P1(a)** shows that the said procedure *under Sec. 22 (a)* has been followed by the plaintiff appellant.

The respondent argued that the appellant had more than one house and that the house was reasonably required by the appellant was not proved. This is not so documents marked V2 to V5 shows that the appellant is only a co-owner of the property mentioned in the extracts.

Sec. 22 (2) (bb) reads thus (Rent Amendment Act No. 55 of 1980).;

(2) In subsection (2) of that section, by the insertion, immediately after paragraph (b) of that subsection, of the following new paragraph:-

“(bb) in the case of premises let to a tenant, whether before or after the date of commencement of this Act, and where the landlord is the owner of not more than one residential premises-

(i) Such premises are in the opinion of the court reasonably required for occupation as a residence for the landlord or any member of the family of the landlord; or

(ii) The landlord of such premises has deposited prior to the institution of such action or proceedings a sum equivalent to five years’ rent with the Commissioner of National Housing for payment to the tenant; or”

As that'd in this section court has to decide the house is reasonably required for occupation of a member of the family. The appellant's son has given evidence in the District Court and said that they are living in official premises and they need a place to live when his wife retires from service, which I find is more than a reasonable requirement *under Sec. 22 (a) (bb)*.

For the afore stated reasons I decide to set aside the judgment dated 21/01/1997 of the learned District Judge of Kandy and grant relief as prayed for in the plaint of the plaintiff appellant.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor J.

I agree

JUDGE OF THE COURT OF APPEAL