

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

SC (LA)Appeal No. 70/2016

SC/HCCA/LA/No. 576/2014

WP/HCCA/LA/AV/1151/10(F)

D.C. Homagama Case No. 5241/EJ

1. Gnanawathie Abeysinghe
2. Ruvini Sandamali Abeysinghe

Both of 47, Depanama, Pannipitiya.

PLAINTIFF

Vs.

1. D. A. Yahampath
170, "Ranasiri"
Horana Road,
Kottawa, Pannipitiya.

DECEASED – 1ST DEFENDANT

- 1A. Padukkage Dona Premalatha Gunawardena
- 2B. Yahampath Arachchige Don Kavinda Kanchuka
- 1C. Yahampath Arachchige Dona Nishani Namalika

All of 170, "Ranasiri"
Horana Road,
Kottawa, Pannipitiya.

SUBSTITUTED 1ST DEFENDANT

2. D. Mahinda Ranasinghe
45, Kottawa, Pannipitiya

DEFENDANTS

AND BETWEEN

- 1A. Padukkage Dona Premalatha Gunawardena
- 2B. Yahampath Arachchige Don Kavinda Kanchuka
- 1C. Yahampath Arachchige Dona Nishani Namalika

All of "Ranasiri"
No. 170, Horana Road,
Kottawa, Pannipitiya.

SUBSTITUTED 1ST DEFENDANT-APPELLANTS

Vs.

1. Gnanawathie Abeysinghe
47, Depanama, Pannipitiya.
2. Ruvini Sandamali Abeysinghe

Appearing by her Power of Attorney Holder
Rathnamali Sirikanthi Abeysinghe Dissanayake.

Both of 47, Depanama, Pannipitiya.

PLAINTIFF-RESPONDENTS

- 2 D. Mahinda Ranasinghe
45, Kottawa, Pannipitiya

2ND DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1. Gnanawathie Abeysinghe
47, Depanama, Pannipitiya.
2. Ruvini Sandamali Abeysinghe

Appearing by her Power of Attorney Holder
Rathnamali Sirikanthi Abeysinghe Dissanayake.

of 47, Depanama, Pannipitiya.

PLAINTIFFS-RESPONDENTS-PETITIONERS

Vs.

- 1A. Padukkage Dona Premalatha Gunawardena
- 2B. Yahampath Arachchige Don Kavinda Kanchuka
- 1C. Yahampath Arachchige Dona Nishani Namalika

All of "Ranasiri"
No. 170, Horana Road,
Kottawa, Pannipitiya.

SUBSTITUTED 1ST DEFENDANT-APPELLANTS-RESPONDENTS

- 3. D. Mahinda Ranasinghe
45, Kottawa, Pannipitiya

2ND DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: B. P. Aluwihare P.C., J.
Sisira J de. Abrew J. &
Anil Gooneratne J.

COUNSEL: Nihal Jayamanne P.C. with Ms. Noorani Amarasinghe
for the Plaintiff-Respondent-Appellant

Seevali Amitirigala with Pathum Wijepala instructed by Sudath
Wickremaratne for the Substituted 1st Defendant-Appellant-
Respondent

WRITTEN SUBMISSIONS TENDERED ON:

02.05.23016 (By the Appellant)
13.06.2016 (By the Respondent)

ARGUED ON: 13.11.2017

DECIDED ON: 07.12.2017

GOONERATNE J.

This is an appeal in an action in ejectment by the Plaintiffs and the 1st Plaintiff being the landlady and the 2nd Plaintiff, the owner of the premises in dispute. The question that arises for decision is whether the 2nd Defendant was a sub-tenant and whether sub-tenancy has been established. At the hearing of this appeal the other question of unauthorised alterations was not taken up for argument and learned counsel of both parties did not press on this issue. At the trial it had been admitted that:

- (a) Premises in dispute is subject to the Rent Act of 1972
- (b) Premises in dispute is No. 88
- (c) It is a business premises
- (d) That the person called 'Alice' expired

The learned District Judge of Homagama held in favour of the Plaintiffs, but, the Civil Appellate High Court set aside the Judgment of the District Court. This court on 21.03.2016 granted Leave to Appeal on the following two questions of law.

- (1) Did the Honourable High Court Judge err in not taking into consideration the totality of the evidence, both documentary and oral in coming into the conclusion that the Plaintiffs have not established the burden of establishing a sub tenancy?

(2) Did the Honourable High court Judges err in not taking into consideration, that once the 2nd Defendant admits that he is in possession, and the 1st Defendant is claimed by the Plaintiff to be the tenant; then the burden is on the 2nd Defendant to show that he is in occupation on a different basis other than of a sub tenant?

Parties proceeded to trial on 29 issues. There is no specific admission on ownership of the property in dispute which was not contested by the Defendant party. The 2nd Defendant got title to the property from her grand-parents and parents. The 1st Plaintiff was the 2nd Plaintiff's mother. It is also noted that the 2nd Defendant did not appeal to the High Court from the Judgment of the learned District Judge.

The premises in dispute is situated in the heart of Kottawa town, which is a business premises. Alice the grand-mother of 2nd Plaintiff died on 02.05.1998. After her death the property vested on the 2nd Plaintiff absolutely. 2nd Plaintiff was a student at that time and the 1st Plaintiff, the mother of 2nd Plaintiff collected rents as landlady from 1st Defendant and continued to rent out the premises to the 1st Defendant. The 1st Defendant in or about June 2000 did certain structural alterations without any consent or permission of the 1st Plaintiff and also subsequently sub-let the premises to the 2nd Defendant. In brief the above is the version of the Plaintiffs.

The case of the Defendants was that one Don Ranasinghe the 2nd Defendant's father was the tenant of the premises in dispute for over 50 years and was carrying on business of a eating joint (ආපන ශාලාව) on 26.06.1932 the above R.W. Ranasinghe handed over the business to the 2nd Defendant. The 1st Defendant too was involved in the business and the question of sub-letting does not arise. Whilst the trial was proceeding the 1st Defendant died and in his place the wife, son and daughter 1A, 1B & 1C Defendants-Appellant-Respondents were substituted. Defendant party relies heavily on the Judgment of *Perera Vs. Seneviratne 77 NLR 402* which held that the land lord who pleads sub-tenancy has to discharge the burden by proving that some person occupied premises and also paid rent for his occupation. Learned counsel for the Defendant-Respondent relies on Section 101 of the Evidence Ordinance. Learned counsel also argued that the 1st Defendant was not the tenant, and it was the 2nd Defendant who was the tenant.

It is important to ascertain the correct tenant of the 1st Plaintiff. In this connection the 1st Plaintiff produced counter foils of the rent receipts issued to the 1st Defendant. It was marked and produced as පූ5 and පූ6. I find that the learned trial Judge has given her mind to same and arrived at the conclusion by accepting both පූ5 and පූ6 to be genuine (Pg. 4 of Judgment and folio 539) on the other hand the Defendants produce V2 – V5 to prove that a partnership was

carried on between 1st Defendant and 2nd Defendant's father who was one William Ranasinghe from the year 1943, as 'Ranasiri Hotel'. The business registration was produced as V3 but no rent receipts produced by the Defendant party. Documents V2 is a tax evasion letter by William Ranasinghe from the Income Tax Department. Address of same is 'Ranasiri' Hotel. V3 is a business registration of 1983. V4 is a document from the Local Authority on payment of Rates. V5 is a loan application to the People's Bank. All these have been produced by the Defendant party to establish a partnership business and the Address (not clear).

Trial Judge observed that no rent receipts were produced by the Defendant party nor was 2nd Defendant or his father was called to give evidence. I observe that the best method to prove tenancy is to produce the rent receipts which the Plaintiff has done. I also note that the learned trial Judge has disbelieved the stance taken by the Defendant party. (Folio 540)

The question of the best evidence to be led is discussed in the case of Jayawardena Vs. Wanigasekera 1985 (1) SLR 125. It is the rent receipt. As such the position of the Defendants that the 2nd Defendant was the tenant is rejected by this court and the court below, the District Court. The trial Judge has correctly dealt with this position in the Judgment at folio 541 of the record. As such the tenant of the premises in dispute was the 1st Defendant, and to say it was the

2nd Defendant was nothing but an attempt to mislead court. I also observe that the Civil Appellate Court has in view of the created confusion by the Defendant party as to who was the tenant, was under a duty to examine this position prior to deciding on the issue of sub-tenancy.

It is not the function of an Appellate Court to re-write the evidence, but in a given circumstances it is desirable to consider the evidence and decide whether the lower court has properly applied the evidence to the facts of the case and decide on the law. The 1st Plaintiff in her evidence at folio 444 categorically stated that from 2001 January the business of the rented out premises was not continuously carried out and it was closed. Employees were found and she came to know that the 1st Defendant was ill. The 1st Defendant having recovered from the illness paid the arrears of rent. It was further stated by this Plaintiff that the shop was closed but some renovations were being done. She inspected the premises and found some bed and some furniture brought into the premises. A ceiling had been fixed, floor broken, walls erected within the premises and work was in progress. All this evidence is found at folios 445 to 447. At folio 446 evidence reveal 1st Plaintiff noticed an extension to the kitchen and an encroachment of land from behind. On sub-letting the following evidence noted. Plaintiff met Yahampath (1st Defendant) and asked him what was all this.

ප්‍ර: එතකොට තමා යහමිපත්ගෙන් ඇහුවාද?

උ :මම ඔහු හමිබ වෙනින ගෙදරට ගියා. ගිනින් ඇහුවා ඇයි කඩය මෙහෙම කරන්නේ කියා. ඔයා අසනීපයෙන් ඉන්නේ. එයා අවුරුදු 5කට කඩය රණසිංහ මහත්තයාට (2 වෙනි විත්තිකරුට) දෙනවා කිව්වා. මම ඒකට විරුද්ද වුනා. මම කිව්වා මහත්තයා කඩය කාටවත් දෙන්නේ නැතුව පුනාට දෙන්න මහත්තයාගේ කියා. පිට කෙනෙකුට දෙන්න එපා කිව්වා. මම කීප සැරයක් කිව්වා කඩය දෙන්න එපා. පුනා ලව්වා කරන්න කියා. අපි අඩු කුලියට වුනත් එහෙම කරන්න එකග වුනා. ඒත් එයා 2 වෙනි විත්තිකරුට අකුරු බද්දට දුන්නා.

ප්‍ර: තමා අධිකරණයට ඉදිරිපත් කරලා තියෙනවා පැ 4 කියා ඒ සම්බන්ධව දියණිය විසින් පොලිසියට කල පැමිණිල්ල?

උ: ඔව්

The above evidence remains uncontradicted.

At pg. 17 and folio 485 it is in evidence that the 2nd Defendant sent the rent by post but the Plaintiff returned it. Ranasinghe is at present doing business in the shop. At folio 457 the evidence is that the 2nd Defendant is having a pastry shop. I would at this point prefer to refer to the case of *Samad Vs. Samsudeen and another 2003(2) SLR 235 per Somawansa J.* “Burden of proving subletting is with the Plaintiff-Respondent. However once the Plaintiff proves that the premises had been in the exclusive occupation of a 3rd party other than a tenant as in the instant case in the absence of any explanation by the tenant

or the 3rd party showing that there is no subletting court has to draw the presumption that it is a case of subletting by the tenant to the 3rd party”.

It is so in the case in hand. Defendant party has taken pains to establish partnership. Renovation done without Plaintiff's consent. There is 1st Defendant's own evidence that 2nd Defendant took over the business. Further Plaintiff's uncontradicted evidence on this point is relevant. All this shows subletting. 2nd Defendant never gave evidence. That would have been of great assistance to court if evidence was given by the 2nd Defendant. As such court could draw adverse inference and draw the presumption available by law. Court may presume existence of certain facts (Section 114 of Evidence Ordinance). Illustration (F) is relevant to the circumstances of this case.

In an action instituted by a landlord to eject his tenant on the grounds that the tenant has sublet a portion of the rented premises, the landlord's evidence is sufficient to establish a prima facie case of subletting, the burden is on the tenant to furnish evidence in rebuttal. In the case in hand the Defendant party failed to lead any evidence in this regard.

In Seyed Mohamed Vs. Meera Pillai 70 NLR 237

The question was whether the defendant had, in contravention of section 9 of the Rent Restriction Act, sub-let a part of the premises rented to him by the plaintiff. The evidence disclosed that one A.C was in sole and exclusive occupation of a room of the premises and that he carried on business in that room. The defendant took up the position that no rent was

paid to him by A.C and that the latter had been let into occupation of the room before the defendant became the tenant of the premises.

Held, that, in the absence of acceptable evidence to explain A.C's occupation, the only inference was that A.C was in occupation as a sub-tenant paying rent to the defendant.

Held further, that, where sub-letting is continued, there is a continued breach by the tenant of the statutory provision against sub-letting.

Azhar Vs. Fernando 76 NLR 118

Where in an action instituted by a landlord to eject his tenant on the ground that the tenant has sublet a portion of the rented premises, the landlord's evidence is sufficient to establish a prima facie case of subletting, the burden is then on the tenant to furnish evidence in rebuttal.

The learned High Court Judges have failed to consider the position that as stated above the burden is on the Defendant party to give cogent reasons and discharge that burden. To decide on subletting the true nature of the transaction by parties and totality of surrounding circumstances would be decisive to determine such position. I am of the view that the so called partnership suggested by Defendants was another crafty attempt of the Defendant party to take the court on a long path to create some confusion, similar situation was considered in *Abdul Latiff Vs. Seyed Mohamed 72 NLR 20*. Held when a tenant of a rent controlled premises enters into a "partnership" agreement with a person in relation to the premises but such agreement is only

a blind to cover the subletting of the premises, the tenant and subtenant are liable to be ejected if the landlord has not given his permission.

The learned District Judge has very carefully analysed the evidence and the facts of this case. In that Judgment at folio 545 of the brief it is stated that the Defendant in their written submissions had admitted the Plaintiff's documents produced at the trial. Trial Judge observes that Plaintiff's evidence on the point is genuine and no reason to doubt it. It is stated that the 2nd Defendant got into the business by the later part of 1999. At this stage the trial Judge refer to the evidence on point and makes observation of sub-tenancy, it is correct in the context of the case in hand. It is as follows:

ප්‍ර: මම නමාට යෝජනා කරනවා 2005 වර්ෂයේ 2 වන වින්තිකරු හඬුවට අදාළ ස්ථානය හැර ගියා කියලා?

උ: නැහැ ස්වාමිනි, 99 මුල් භාගයේ නමයි මහින්ද රණසිංහ මේකට සම්බන්ධ වෙලා මගේ පියා මට කිව්වා අධ්‍යාපන කටයුතු නිසා මේකට එන්න එපා කියලා. 2005 මගේ අධ්‍යාපන කටයුතු ඉවර වුණා. ඊට පස්සේ මම එම කටයුතු කරගෙන ගියා.

ප්‍ර: පැමිණිලිකාරිය කියා සිටින කාලසීමාව තුළ නමයි නමා කියන විදියට ක්‍රියාකාරී විදියට 2 වන වින්තිකරු ව්‍යාපාරයට සම්බන්ධ වුණා?

ප්‍ර: ඔහු රෙදි නිෂ්පාදන ආයතනයක කළමනාකරු ලෙස කටයුතු කර නිසා ඔහු වැඩිපුර හෝටලයට ආවේ නැහැ. නමුත් මාගේ පියා රෝගාතුර වෙලා හිටපු නිසා

මගේ අධ්‍යාපන කටයුතු නිසා නමයි මහින්ද රණසිංහ කරගෙට යන්න කියලා කිව්වේ.
ඊට පස්සේ නමයි හෝටලය භාරගත්තේ.

ඉහත සියලු කරුණු සලකා බැලීමේදී පෙනී යන්නේ පැමිණිලිකාරිය විසින් කියා සිටින කාලසීමාව තුළ 2 වන වින්තිකරු අදාළ පරිශ්‍රයේ ව්‍යාපාරික කටයුතු කරගෙන ගොස් ඇති බවත් 2005 වර්ෂයේ ඉන් ඉමුවත් වී ඇති බවත්ය. මෙම කරුණු දැනගත් වහාම පැමිණිලිකාරිය විසින් හෝමාගම පොලීසියට පැමිණිල්ලක් කොට මෙම නඩුව පවරා ඇත. කෙසේ වෙතත් පැමිණිල්ල විසින් 1 වන වින්තිකරු අදාළ පරිශ්‍රයේ කුලී නිවැසියා බවට වැඩිබර සාක්ෂි මත සනාථ කොට ඇති බැවින් ඉහත තීන්දුව පරිදි ම 2 වන වින්තිකරු විසින් විෂය වස්තුවේ රුදි සිටින්නේ එහි අතුරු බදුකරු වශයෙන් බවට අධිකරණයේ පුර්ව නිගමනය කිරීමට සිදු වේ.

In all the facts and circumstances of this case I set aside the Judgment of the High Court and affirm the Judgment of the learned District Judge. I answer the questions of law as 'Yes' in the affirmative. The trial Judge has correctly dealt with all primary facts. I see no valid basis to interfere with same, vide 1993(1) SLR 119; 20 NLR 332; 20 NLR 282. The effect of Sections 10(2) and 10(5) of the Rent Act No. 1972 is that unauthorised sub-letting of premises falling within the purview of the Act, by the tenant to a third party, confers on the landlord or landlady as the case may be, the right to a decree for ejection of the tenant and sub-tenant.

I Order costs payable by the Substituted Defendants to both Plaintiffs in a sum of Rs. 100,000/- and to be paid to each of the Plaintiffs the said sum of Rs. 100,000/-.

Appeal allowed as above with costs.

JUDGE OF THE SUPREME COURT

B.P. Aluwihare P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew J.

I agree.

JUDGE OF THE SUPREME COURT