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

Chrisani Suweenetha Mariel
Lilian Karunaratne,
No. 4, Victoria Gardens,
Hokandara South,
Hokandara.
Plaintiff

SC APPEAL NO: SC/APPEAL/17/2015
SC LA NO: SC/HCCA/LA/463/2013
HCCA COLOMBO NO: WP/HCCA/COL/257/2008/F
DC COLOMBO CASE NO: 9643/RE

Vs.

P.R. Kotalawela,
No. 32-1/2 Castle Street,
(Dudley Senanayake Mawatha),
Colombo 8.
Defendant

AND BETWEEN

Chrisani Suweenetha Mariel
Lilian Karunaratne,
No. 4, Victoria Gardens,
Hokandara South,
Hokandara.
Plaintiff-Appellant

Vs.

P.R. Kotalawela,
No. 32-1/2 Castle Street,
(Dudley Senanayake Mawatha),
Colombo 8.
Defendant-Respondent

AND NOW BETWEEN

Chrisani Suweenetha Mariel
Lilian
Karunaratne,
No. 4, Victoria Gardens,
Hokandara South,
Hokandara.
Plaintiff-Appellant-Appellant

Vs.

P.R. Kotalawela,
No. 32-1/2 Castle Street,
(Dudley Senanayake Mawatha),
Colombo 8.
Defendant-Respondent-Respondent

Before: P. Padman Surasena, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Romesh de Silva, P.C., with Palitha Kumarasinghe, P.C., for the Plaintiff-Appellant-Appellant.
Maura Gunawansha, P.C., with Madhawa Wijayasiriwardena for the Defendant-Respondent-Respondent.

Argued on: 25.03.2021

Decided on: 30.04.2021

Mahinda Samayawardhena, J.

The Plaintiff filed this action seeking ejectment of the Defendant, whom the Plaintiff said was her tenant, from the premises in suit in terms of section 22(2)(bb)(ii) read with section 22(6) of the Rent Act, No.7 of 1972, as amended. The Plaintiff also claims damages from the Defendant from the date of termination of the tenancy until she is quieted in possession.

The said section of the Rent Act permits a landlord, who is the owner of not more than one residential premises, to seek ejectment of the tenant of any residential premises the standard rent of which for a month exceeds one hundred rupees, upon depositing with the Commissioner of National Housing a sum equivalent to five years' rent payable to the tenant, and with six months' notice in writing of the termination of the tenancy being given to the tenant.

The Defendant filed answer categorically stating that he was not the tenant of the Plaintiff and that he did not attorn to the Plaintiff upon the death of his previous landlord, i.e. the

father of the Plaintiff. The Defendant refused to attorn to the Plaintiff and pay rent to her despite repeated requests made in writing to do so. Instead, the Defendant deposited rent at the Rent Department of the Colombo Municipal Council in the name of the deceased landlord or his estate. He continued to do so even after the institution of the action whereby the Plaintiff clearly pleaded her title to the premises, which was accepted by the District Court in its Judgment. There is no necessity to go into detail on these matters as the Defendant admits that he is not the tenant of the Plaintiff and that he did not pay rent to the Plaintiff.

It is correct to say that the Defendant rests his case entirely on what he refers to as the statutory bar contained in section 22(7) of the Rent Act. He sought dismissal of the Plaintiff's action *in limine* on this basis. According to section 22(7)(b)(ii), no action can be instituted under section 22(2)(bb)(ii) if the ownership of such premises was acquired by the landlord on a date subsequent to the specified date by purchase, inheritance or gift other than inheritance or gift from a parent or spouse who had acquired ownership of such premises on a date prior or subsequent to the specified date by inheritance or gift from a parent or spouse. It is the position of the Defendant that the averments in the plaint itself demonstrate that the Plaintiff's mother, who alienated the premises to the Plaintiff, acquired title to the premises not from her parents or spouse but from her son and therefore the Plaintiff is statutorily barred from instituting this action.

The trial commenced with the raising of issues. After the issues of the Defendant, the Plaintiff raised a consequential issue, i.e. issue No.19, to say that in view of the fact that the

Defendant in his answer disputes the Plaintiff's ownership of the premises (and thereby denies tenancy), the Defendant is disentitled to the protection of the Rent Act. This is the crucial issue in this case. The Defendant's reliance on the aforesaid statutory bar becomes relevant only if this issue is answered against the Plaintiff.

The learned District Judge in his Judgment answered this issue against the Plaintiff. As seen from pages 15 and 16 of the Judgment, the learned District Judge did so on the ground that the protection of the Rent Act is attached to the premises and not to the tenancy. On this basis, he applied the statutory bar contained in section 22(7) of the Rent Act to dismiss the action of the Plaintiff. This is the fundamental mistake committed by the learned District Judge.

It is settled law that the entire protection of the Rent Act is attached to the contract of tenancy and not to the premises in suit despite the premises being technically governed by the Rent Act. If there is admittedly no valid contract of tenancy between the Plaintiff and the Defendant, the Defendant cannot shelter behind the protection of the Rent Act. This is what the Divisional Bench of the Supreme Court authoritatively held in *Imbuldeniya v. De Silva [1987] 1 Sri LR 367*, which has been followed by subsequent Supreme Court decisions including *Weerasena v. Perera [1991] 1 Sri LR 121*.

The Plaintiff thereafter appealed against the Judgment of the District Court. The Judgment of the High Court of Civil Appeal running into 66 pages is confusing. It is a reproduction of the extensive written submissions filed by both parties without any analysis. The learned High Court Judge first says the Defendant, having denied tenancy, is

disentitled to the protection of the Rent Act and therefore the District Judge was wrong to have answered issue No.19 against the Plaintiff (pages 60 and 61 of the Judgment), but thereafter says the Defendant is entitled to the benefit of section 22(7) of the Rent Act, and therefore the District Judge was right in dismissing the Plaintiff's action (page 65 of the Judgment). These two findings upon which the Judgment rests are clearly contradictory and irreconcilable. If the Defendant is disentitled to the protection of the Rent Act, how can he be granted the protection contained in section 22(7) of the Act? As I will explain below, section 22(7) has been enacted to protect "the tenant". If the Defendant himself declares he is not the tenant, how can he claim the advantage of section 22(7)? Ultimately, the High Court of Civil Appeal affirmed the Judgment of the District Court and dismissed the Plaintiff's appeal with costs.

This Court granted leave to appeal to the Plaintiff predominantly on the question whether the High Court of Civil Appeal erred in law when it dismissed the appeal of the Plaintiff despite having determined that the Defendant is not entitled to the protection of the Rent Act. I have already answered this question in favour of the Plaintiff.

When the Defendant expressly states in his answer or in his evidence that there is no tenancy agreement between him and the Plaintiff, he disqualifies himself from seeking relief under the Rent Act. In such circumstances, the Rent Act is wholly inapplicable and the Court is absolved from applying any of the fetters enumerated in section 22, which have been introduced to protect tenants and not mere occupants or trespassers of rent-controlled premises. The Rent Act

becomes applicable if and only if there is a contract of tenancy between the Plaintiff and the Defendant. In the absence of such an agreement, the Court has no right, either legitimate or moral, to impose tenancy on the Defendant to the detriment of the Plaintiff who is almost always the owner of the premises.

The High Court, having first correctly decided that the Defendant is disentitled to the protection of the Rent Act due to the denial of tenancy, was in error when it ultimately held that the Defendant was entitled to the protection afforded to a tenant under section 22(7) of the Rent Act.

A Divisional Bench of the Supreme Court presided over by Sharvananda C.J. in *Ranasinghe v. Premadharma [1985] 1 Sri LR 63 at 70* (with Wanasundera J. dissenting) held:

> *When the Defendant disclaims the tenancy pleaded by the Plaintiff he states definitely and unequivocally that there is no relationship of landlord and tenant between the Plaintiff and him to be protected by the Rent Act.*
>
> *The rationale of the above principle appears to be that a Defendant cannot approbate and reprobate. In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts one, he cannot afterwards assert the other; he cannot affirm and disaffirm. Hence a Defendant who denies tenancy cannot consistently claim the benefit of the tenancy which the Rent Act provides. For the*

> *protection of the Rent Act to be invoked the relationship of landlord and tenant, between the Plaintiff and him which is governed by the Rent Act should not be disputed by the Defendant.*

In the instant case the District Court held that the Plaintiff is the owner of the premises. The Defendant does not dispute this finding. Nor does the Defendant claim to be the tenant of the Plaintiff. The Plaintiff as the owner is entitled in law to occupy the premises. The burden of proof is then on the Defendant to show that he is in lawful possession. (*Beedi Johara v. Warusavithana [1998] 3 Sri LR 227, Gunasekera v. Latiff [1999] 1 Sri LR 365 at 370*) The Defendant attempted to justify his possession through the application of section 22(7) of the Rent Act whilst at the same time denying any contract of tenancy with the Plaintiff, which the law does not allow him to do.

Learned President's Counsel for the Defendant strenuously submits that the Plaintiff had two choices in seeking to eject the Defendant, one under common law and the other under the Rent Act, and having selected the latter, the Plaintiff cannot now abandon that course of action and seek to eject the Defendant under common law. This was raised as a question of law to be decided by this Court.

In my judgment, based on the facts and circumstances of this case, this question shall be answered against the Defendant.

It is true that the Plaintiff came before the District Court seeking ejectment of the Defendant under the Rent Act. But by his own conduct the Defendant ruled out the application

of the Rent Act. The Defendant has only himself to blame for his predicament.

I would have agreed with the learned President's Counsel in this regard if the Plaintiff had on her own attempted to present at the trial a case materially different from that pleaded in the plaint and which the Defendant was prepared to meet. That is not permissible.

It is settled law that no party can be allowed to make at the trial a case materially different from what he has placed on record. (*Hildon v. Munaweera [1997] 3 Sri LR 220, YMBA v. Abdul Azeez [1997] BLR 7, Gnananathan v. Premaardane [1999] 3 Sri LR 301, Ranasinghe v. Somawathie [2004] 2 Sri LR 154*) Explanation 2 to section 150 of the Civil Procedure Code reads:

> *The case enunciated must reasonably accord with the party's pleading, i.e., plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings.*

I must add that this principle is applicable not only at trial but also on appeal. An Appellant cannot present on appeal a case materially different to what was presented before the trial Court, unless the appeal is based on a pure question of law and not on a question of fact or mixed question of fact and law. (*Candappa nee Bastian v. Ponnambalampillai [1993] 1 Sri LR* 184, *Talwatte v. Somasunderam [1996] BLR 14,*

Janashakthi Insurance Co. Ltd. v. Umbichy Ltd. [2007] 2 Sri LR 39) Questions of fact or mixed questions of fact and law cannot be taken up for the first time on appeal. (*Hameed alias Abdul Rahman v. Weerasinghe [1989] 1 Sri LR 217, Simon Fernando v. Bernadette Fernando [2003] 2 Sri LR 158, Piyadasa v. Babanis [2006] 2 Sri LR 17 at 24, Leslin Jayasinghe v. Illangaratne [2006] 2 Sri LR 39 at 47*)

If I may recap, what happened in the instant case was when the Plaintiff sued the Defendant under the Rent Act on the basis that the Defendant was her tenant, the Defendant in his answer denied tenancy thereby eliminating the application of the Rent Act. It is against this backdrop that the Plaintiff was constrained to raise a consequential issue seeking the same relief, i.e. ejectment and damages, under common law. The Defendant did not object to it at that time. In any event, the Defendant could not have objected to it because the Plaintiff is entitled to raise consequential issues arising out of the Defendant's issues. What the Plaintiff did was not unusual. There are ample authorities to support the course of action adopted by the Plaintiff. However, learned President's Counsel submits that in those cases, unlike in the instant case, the Plaintiffs had come to Court seeking ejectment not under the Rent Act but under common law by way of *rei vindicatio* actions. I am unable to agree. Let me refer to a few of these cases.

In *Gunapala v. Babynona [1986] 2 Sri LR 374*, the Plaintiff filed a rent and ejectment action seeking ejectment of the Defendant on the basis that after the death of the original landlord, the Defendant having attorned to the Plaintiff refused to pay rent. The Defendant in the answer denied

tenancy between herself and the Plaintiff and further pleaded that the Plaintiff did not call on her to attorn. Both the District Court and the Court of Appeal dismissed the Plaintiff's action on the ground that the Defendant had not been made aware of the existence of the Deed by which the Plaintiff claimed the premises and hence was not bound to attorn to the Plaintiff. The Supreme Court allowed the appeal and in the course of the Judgment Sharvananda C.J. stated as follows at page 376:

> *It is true that the Plaintiff had framed this action on the basis that the Defendant attorned to him and had thereby become his tenant. But significantly the issues framed by him in this case departed from his pleadings and converted the action into a rei vindicatio action. The issues were raised by the Plaintiff on the basis that he claimed to be a co-owner of the premises and on the cessation of Simon's life-interest, the Defendant's possession was wrongful possession of the premises. The Defendant did not object to the issues framed by the Plaintiff. The case must be decided on the issues raised in the action.*

The Divisional Bench decision of the Supreme Court in *Ranasinghe v. Premadharma (supra)* is also a rent and ejectment case in which the Plaintiff filed action to eject the Defendants from premises admittedly governed by the Rent Act on the ground of arrears of rent. The Defendants in their answer denied tenancy as well as the receipt and validity of the notice to quit pleaded by the Plaintiff. After trial, the District Court held that the Defendants were in arrears of rent and entered Judgment for the Plaintiff. The District

Court further held that as the Defendants disclaimed tenancy under the Plaintiff it was not necessary in law for the Plaintiff to have given notice of termination of tenancy. The Court of Appeal set aside the order of ejectment of the Defendants and allowed the appeal. The decision of the Court of Appeal was founded on the ground that since the Defendant was a tenant under the Plaintiff in a rent-controlled premises, the Plaintiff could succeed in obtaining a decree for ejectment on the ground of arrears of rent, only if she established the requirements of sections 22(3) and 22(6) of the Rent Act, and since the Plaintiff had failed to establish that she had given three months' notice of the termination of the tenancy to the Defendants, the Court had no jurisdiction to grant the relief of ejectment notwithstanding the tenant had repudiated the contract of tenancy and did not claim the benefit of the Rent Act.

The Supreme Court set aside the Judgment of the Court of Appeal and restored the Judgment of the District Court and held:

> *The tenant is not entitled to notice because he had repudiated his tenancy. In such a case the landlord need not establish any one or more of the grounds of ejectment stipulated in section 22 of the Rent Act No. 7 of 1972 for success in his suit for ejectment.*

The same conclusion was arrived at in the Supreme Court case of *Kanthasamy v. Gnanasekeram [1983] 2 Sri LR 1*, which was relied upon by Sharvananda C.J. in *Ranasinghe v. Premadharma (supra).* In *Kanthasamy*'s case the Plaintiff sued the Defendant for ejectment under the Rent Act on the ground of reasonable requirement. The Defendant in the

answer denied tenancy. The Plaintiff then raised an issue whether a writ of ejectment could be granted against the Defendant upon the Defendant's denial of tenancy. The District Judge held that the Defendant was a tenant under the Plaintiff but, in view of the repudiation of tenancy, the Defendant was liable to be ejected. The Court of Appeal and the Supreme Court affirmed this decision.

In the instant case, the learned District Judge held that the Defendant is a tenant under the Plaintiff and the Plaintiff is entitled to seek ejectment of the Defendant in terms of section 22(2)(bb)(ii) of the Rent Act. However the learned District Judge refused to enter Judgment for the Plaintiff by application of section 22(7) of the Rent Act despite the Defendant's denial of tenancy. This is erroneous. Sharvananda C.J. in *Ranasinghe v. Premadharma (supra)* at page 71 elaborated:

> *Where the Defendant by his conduct or pleading makes it manifest that he does not regard that there exists the relationship of landlord and tenant between the Plaintiff and him, it will not be reasonable to include him in the concept of "tenant" envisaged by section 22 of the Rent Act although the court may determine, on the evidence before it, that he is in fact the tenant of the Plaintiff. Since such a person had by his words or conduct disclaimed the tenancy which entitles him to the protection of the Rent Act, it will be anomalous to grant him the protection of a tenancy, which, according to him, does not exist.*

The tenant cannot question the landlord's ownership of the premises; he has no right to do so. (Section 116 of the

Evidence Ordinance, *Pathirana v. Jayasundara (1955) 58 NLR 169 at 173*) In the instant case, the Defendant, by paragraphs 7, 8 and 12 of the answer, admits that: (a) the Plaintiff's father was his landlord; (b) upon the death of the Plaintiff's father, testamentary proceedings were instituted; and (c) he received P9 (by which the executor through an Attorney-at-Law informed him that the Plaintiff is the new owner of the premises and directed him to attorn to her). The content of P9 was repeated in several letters including P10 and P14. Hence the Defendant has no right to insist on copies of deeds to prove the Plaintiff's ownership of the premises and on that basis to refuse attornment and refuse payment of rent to the Plaintiff. If he does so, he becomes a trespasser. The Defendant is a trespasser from the time he refused to attorn to the Plaintiff.

In the plaint, the Plaintiff sought damages at the rate of Rs. 25,000 *per mensem* from the date of termination of the tenancy. The premises are situated at Castle Street, Colombo 8. The Defendant made a bare denial of this averment in the answer. The Defendant elected not to give evidence at the trial. The Plaintiff also gave specific evidence on this relief in her testimony, which was not challenged by the Defendant at all. Hence the Court can safely accept this uncontroverted evidence to hold that the said matter has been proved before Court. (*Edrick de Silva v. Chandradasa de Silva 1967) 70 NLR 169 at 174, Sudu Banda v. The Attorney-General [1998] 3 Sri LR 375 at 378-379*) The learned District Judge has not drawn any attention to this in the Judgment, although he perfunctorily answered issue No.8 against the Plaintiff presumably because of the misapplication of section 22(7) of the Rent Act.

The Judgment of the District Court insofar as it decided to dismiss the Plaintiff's action by application of section 22(7) of the Rent Act, and the Judgment of the High Court of Civil Appeal which affirmed the same are set aside and the appeal of the Plaintiff is allowed. The District Judge is directed to enter Judgment as prayed for in paragraphs (a)-(c) of the prayer to the plaint. The Plaintiff is entitled to costs in all three Courts.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court