IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal from a judgment of the Civil Appellate High Court.

Don Andrayas Rajapaksa,
No. 62, Hakmana Road,
Gabadaveediya, Matara.

SC APPEAL No. 120/09
SC/HC CA/LA No. 194/2009
SP/HCCA/Matara/0023/2001(F)
DC/Matara/358/RE

Plaintiff

Vs

Gnanapala Weerakoon
Rathnayake, Aluthkade
alias Middeniyekade,
Hettiyawala East,
Puhulwella,
Kirinda.

Defendant

AND BETWEEN

Don Andrayas Rajapaksa,
No. 62, Hakmana Road,
Gabadaveediya, Matara.

Plaintiff Appellant

Vs

Gnanapala Weerakoon
Rathnayake, Aluthkade

alias Middeniyekade,
Hettiyawala East,
Puhulwella,
Kirinda.

Defendant Respondent

AND NOW BETWEEN

Gnanapala Weerakoon
Rathnayake, Aluthkade
alias Middeniyekade,
Hettiyawala East,
Puhulwella,
Kirinda.

Defendant Respondent Appellant

Vs

Don Andrayas Rajapaksa,
No. 62, Hakmana Road,
Gabadaveediya, Matara.

Plaintiff Appellant Respondent

Shirantha Pushpalal Rajapaksa,
No. 62D, Gabadaveediya, Matara.

Substituted Plaintiff Appellant Respondent.

BEFORE : S. EVA WANASUNDERA PCJ,
ANIL GOONERATNE J. &
VIJITH K. MALALGODA PCJ.

COUNSEL : Rohan Sahabandu PC for the Defendant Respondent Appellant.
Dr. S.F.A. Coorey with Ms. Sudarshani Coorey and Ms. Sithara Jayasundera for the Substituted Plaintiff Appellant Respondent.

ARGUED ON : 03.07.2017.

DECIDED ON : 01.08.2017.

S. EVA WANASUNDERA PCJ.

Leave to Appeal was granted on the questions of law enumerated in paragraph 24(a), (b), (c) and (d) of the Petition dated 25.08.2009. They read as follows:-

1. Has the Plaintiff established before Court that there was a tenancy agreement between parties?
2. Has the Plaintiff established before Court that the Defendant is in arrears of rent from 01.01.1986?
3. Could the High Court act on legally inadmissible and speculative evidence to prove the alleged contract of tenancy?
4. On a disputed question of fact, does the decision of the Learned District Judge attract more weightage than the opinion of the High Court?

The Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff) instituted action in the District Court of Matara on 12.09.1995 against the Defendant Respondent Appellant (hereinafter referred to as the Defendant) to eject him from the business premises of which he was a tenant, for non payment of rentals from 01.01.1986. The rent was Rs.90/- per month and the Plaintiff had gone before the Mediation Board prior to action being filed as a pre requisite before filing action. The amount of rentals due was Rs. 10170/- . The non-settlement certificate issued by the Mediation Board was also filed of record.

The Defendant denied tenancy. It was accepted that the premises are governed by the provisions of the Rent Act. A quit notice had been sent on

17.02.1995 and the Defendant had refused to go and as such the Plaintiff had decided to file action. The Defendant's position was that he came into the occupation of the premises in 1977 as the tenant of one Rajapakse for a monthly rental of Rs. 25/- and since then he had been conducting his business in the said premises and paid rentals but however, he states that **he had no tenancy contract with the Plaintiff.**

The trial commenced with three admissions and 13 issues. The Plaintiff gave evidence and marked documents P1 to P5. The Plaintiff gave evidence on 13.07.1998, 16.06.1999 and on 22.03.2000 and he had been cross examined at length by the counsel for the Defendant. The Plaintiff's counsel closed his case marking in evidence, the documents P1 to P5 without any objection. Prior to closing the case, both parties agreed that the letter P1, which was the quit notice need not be proven by leading evidence through any other person. Theafter, the Defendant's lawyer requested that he be given another date to lead evidence for the defence. Court put off the case for further trial on 15.01.2001. On that day, the Attorney at Law for the Defendant had informed court that he did not have any instructions from his client to appear on his behalf any more. The documents were then submitted to court by the Plaintiff's counsel. The District Judge who heard the case fixed it for judgment on 24.01.2001. The Judgment was delivered on 24.01.2001 **dismissing the Plaint**. It was a short two A4 page judgment. The basis for the dismissal was that it was **not proved** that there was **a contract of tenancy** between the Plaintiff and the Defendant. The trial Judge also held that the evidence adduced in the action was not sufficient to establish that the Defendant had taken the premises on rent from the Plaintiff.

The Plaintiff appealed against the said judgment to the Civil Appellate High Court. The judgment in the Appeal was delivered on 29.07.2009 allowing the Appeal and granting what the Plaintiff prayed for in the Plaint, namely for ejectment, recovery of arrears of rent at a monthly rate lesser than claimed in the Plaint, recovery of damages with costs of the suit in Appeal.

The ground for filing action for ejectment of the Defendant was that there was arrears of rent for well over three months after rent became due and that the tenancy had then been terminated. The Defendant in his answer denied tenancy under the Plaintiff and asserted that he was the tenant of one Amarapala Rajapakse who was a brother of the Plaintiff. I observe that the Defendant defaulted in his appearance in Court on the day which was specifically granted by court for the defense.

The High Court Judges had pointed out that the **standard of proof is based on a mere balance of probability.** The High Court analyzed the evidence led in the District Court and determined that the Defendant was **the tenant of the Plaintiff in respect of the premises in suit.** The Defendant had admitted the receipt of the quit notice by which tenancy was terminated but did not respond to the same. The Defendant could have replied to the Plaintiff and easily stated that he was not the tenant of the Plaintiff, if it was in fact so. The Defendant had not replied at all. The documents supportive of the oral evidence of the Plaintiff were produced in evidence without any objections. Those documents confirmed the stance of the Plaintiff. The Plaintiff was the uncle of the Defendant and that was the reason for having kept on asking for arrears of rent and having waited for very long before action was finally filed to eject the Defendant. Within the course of this protracted suit in Appeal the Plaintiff has passed away and now there is a substituted Plaintiff Appellant Respondent.

The Defendant did not give evidence to contradict the position taken up by the Plaintiff at the trial. In the case of ***Edrick de Silva Vs Chandradasa de Silva 1967, 70 NLR 169,*** it was held that " Where the Petitioner has led evidence sufficient in law to prove his status, i. e. *a factum probandum*, the failure of the Respondent to adduce evidence which contradicts it adds a new factor in favour of the Petitioner. There is then an additional ' matter before court ', which the definition in Sec. 3 of the Evidence Ordinance requires the Court to take into account, namely that the evidence led by the Petitioner is uncontradicted. The failure to take account of this circumstance is a non-direction amounting to a misdirection in law. " Then again, in the case ***of Cinemas Ltd. Vs Sounderarajan 1998, 2 SLR 16,*** it was held that **"** Where one party to a litigation leads prima facie evidence and the adversary fails to lead contradicting evidence by cross examination and also fails to lead evidence in rebuttal, it is a 'matter' falling within the definition of the word 'proof' in the Evidence Ordinance and failure to take cognizance of this feature and matter is a non-direction amounting to a misdirection." I find that the High Court has analyzed the evidence taking into account the fact that the Defendant had failed to give evidence or even failed to contradict the evidence on record by cross examination and thus, has correctly answered the issues in accordance with the evidence.

The Defendant's Counsel has quoted the dicta from **Fradd Vs Brown and Company Ltd. 20 NLR 282** and the cases which followed the said case, namely,

Munasinghe Vs Vidanage 69 NLR 97, A.G. Vs Gnanapragasam 68 NLR 49, Perera Vs Dias 59 NLR 1, to substantiate the position that the Appellate Court could not overrule or could very rarely overrule the opinion of a trial judge who has had the priceless advantage of having seen and heard and observed the demeanor of the witnesses. Yet, even though I do not wish to quote from all the four cases quoted by the Defendant's counsel, I wish to quote from the case of ***M.P.Munasinghe Vs C.P.Vidanage and Another 69 NLR 97***, which was decided by the Privy Council which consisted of Lord Guest, Lord Pearce, Lord Upjohn, Lord Pearson and Sir Frederic Sellers as Judges. It was held that 'the jurisdiction of an appellate court to review the record of the evidence in order to determine whether the conclusion reached by the trial judge upon that evidence should stand, has to be exercised with caution.' The said Judges quoted a paragraph from the case of **Watt or Thomas Vs Thomas 1947 A.C. 484 at pp 485-6** within the aforementioned Munasinghe case. It reads – per Viscount Simon " If there is **no evidence to support a particular conclusion** (and this is really a question of law) the **Appellate Court will not hesitate so to decide**. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the Appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. **This is not to say that the judge of the first instance can be treated as infallible** in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

I am of the opinion that in the case in hand, the High Court has read the oral evidence which was supported by proven documentary evidence in the District Court ; analyzed them in the proper perspective on a balance of probability and answered the issues correctly, thus granting the reliefs prayed for by the Plaintiff in accordance with the ratio decidendi of the aforementioned cases .

I answer the questions of law number 1 and 2 in the affirmative. With regard to question number 3, I hold that the High Court has correctly acted on the evidence led before the trial judge, on the basis of a correct balance of probability and arrived at the conclusion that there was a contract of tenancy between the Plaintiff and the Defendant. The question number 4 is answered

by me in this way, i.e. that, any disputed question of fact in any civil case has to be determined by taking the oral evidence as well as the documentary evidence before the trial judge **as a whole within the case** ; the decision of the District Judge depends on the analysis of evidence he makes on a balance of probability; the opinion of the Appellate High Court also depends on the analysis of the same evidence on a balance of probability; and therefore, it cannot be said that the decision of the District Judge attract more weightage than the opinion of the High Court Judge, even though the District Judge has had the advantage of seeing the demeanor of the witness. In the case in hand, the District Judge has not taken the advantage of having seen, heard and observed the witness when he decided that there was not sufficient evidence before court to prove his case when the documents produced by the Plaintiff were not objected to and cross examined to elicit evidence to the contrary by the counsel for the Defendant. Neither did the Defendant give evidence at the trial.

The Civil Appellate High Court has analyzed the evidence on paper with the contents of the documents proven in court without any objections by the other contesting party , on a balance of probability and concluded that the Plaintiff had proven his case to get the reliefs prayed for in the Plaint.

I confirm the judgment of the Civil Appellate High Court dated 29.07.2009 and set aside the judgment of the District Judge dated 24.01.2001. The Appeal is dismissed with costs of suit in all courts.

Judge of the Supreme Court

Anil Gooneratne J.
I agree.

Judge of the Supreme Court

Vijith K. Malalgoda J.
I agree.

Judge of the Supreme Court