

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

In the matter of an application for
leave to Appeal

M.J.Marikkar

Plaintiff

SC (LA) Appeal 165/14
SC HCCA LA No. 230/2012
CP HCCA KAN 69/2011 (FA)
D.C. Kandy No.16773/L

-vs-

Jayatunga

Defendant

Between

Jayatunga

Defendant-Appellant

Vs.

Sithy Zarooha Zuhair

Substituted Plaintiff-Respondent

Now between

Sithy Zarooha Zuhair
No.98/1, Pieris Mawatha,
Kalubowila,
Dehiwala.

Substituted Plaintiff-Respondent-
Petitioner

B.H.R.Jayatunga,
No.172/1/1, Madawala Road,
Katugastota.

Defendant-Appellant-Respondent.

BEFORE: Eva Wanasundera, PC, J
B.P.Aluwihare, PC, J &
Upaly Abeyrathne, J.

COUNSEL: Rohan Sahabandu, PC for the Substituted-Plaintiff-
Respondent-Appellant.
Harsha Soza, PC with Upendra Walgampaya for the
Defendant-Appellant-Respondent

ARGUED ON: 21.09.2015

DECIDED ON: 04.08.2017

ALUWIHARE, PC, J:

On or around 29th June, 1991, a fire broke out in the city of Kandy and as a result number of business premises along Yatinuwara Veediya had sustained damage. Two of these premises were Nos. 4 and 6, Yatinuwara Veediya which were owned by the original Plaintiff Mohammed Javad Marrikkar. Both these

premises had been given out on rent, and at the time of the fire the defendant who was engaged in business was the tenant.

The position of the original Plaintiff's was that the building had been so extensively damaged that it could not be used without effecting repairs and the tenancy had come to an end. On that basis the Plaintiff filed an action in the District Court seeking a declaration that the tenancy of the Defendant had come to an end and also sought an order for the ejectment of the Defendant from the rented premises. After trial, the learned District Judge held with the Plaintiff and granted the relief sought in the plaint.

Aggrieved by the said judgment, the Defendant appealed to the High Court of Civil Appeals, Kandy and the learned judges of the High Court of Civil Appeals, by their judgement dated 17th May, 2012, allowed the appeal of the Defendant. While the matter was pending before the District Court the Plaintiff had died and the daughter of the Plaintiff had been substituted in room and place of her father.

Aggrieved by the judgment of the High Court of Civil Appeals, the substituted-Plaintiff-Respondent (hereinafter referred to as the Substituted-Plaintiff) sought leave to appeal from this Court and leave was granted on the following questions of law.

- (i) Did the learned High Court Judges err in holding that for the contract of tenancy to come to an end, the entire building had to be completely destroyed by the fire?
- (ii) In the circumstances of the case has the contract of tenancy come to an end, due to the premises being gutted?

The respective positions that were taken up by the disputing parties are quite straightforward. The Plaintiff's position was that the premises were destroyed by the fire and as a result the tenancy had come to an end. The Defendant's position was that although part of the premises had sustained some damage due to the fire, the contract of tenancy remained intact, and prayed for dismissal of the Plaintiff's action.

It was argued on behalf of the Substituted-Plaintiff that, the issue as to whether the premises were completely destroyed by the fire or not is a question of fact, and the learned District Judge who had the benefit of judging the credibility of the witnesses, had come to a finding of fact in favour of the Plaintiff, that the building was destroyed and the tenancy had come to an end.

At the trial before the District Court the Plaintiff had given evidence. A few other witnesses also had testified on behalf of the plaintiff. Defendant did not testify nor did he offer any evidence on his behalf, but had challenged the evidence placed by the Plaintiff to show that the premises in question was in fact in a usable state and that he had continued to run his business from the premises after effecting some repairs.

I find that the extent of damage caused to the building is pivotal to the question of law this court is called upon to decide.

I wish, however, to address on the applicable law before I deal with the facts. A somewhat similar issue came up for adjudication in the case of Giffry vs. De Silva 69N.L.R 281. In the case referred to, the defendant gave a premises, he owned at Main Street Panadura on rent to the plaintiff. A fire broke out in these premises and the plaintiff vacated them in consequence of the damage caused by the fire. The defendant put up a new building there and the plaintiff

moved in and took possession of the building. It was clear from the evidence that the damage was so extensive that the plaintiff could not remain in occupation of the building. Chief Justice Sansoni observing that, it had been proved by evidence that after the fire the plaintiff vacated the premises and had given up possession to the defendant, stated that “the law is clear that where a building which is the subject of a lease is burnt down, without the fault of the landlord or the tenant, the contract is at an end.”

In the case of Samuel V. Mohideen 71N.L.R 451, the court held that where a fire breaks out in the leased urban tenement and the damage is so extensive, that the tenement can no longer be regarded as still in existence for the tenancy to continue. In the case of Samuel V. Mohideen, the evidence led at the trial had shown the leased premises could no longer be used as a building. The court held in such a case, where the leased tenement is so extensively damaged that it can no longer be used, for the purpose for which it was leased, it is impossible to say that the premises are still in existence for the tenancy to continue.

Justice Ranaraja in the case of Abeyasinghe vs. Abeysekera 1995 2 S.L.R followed the decision in Samuel v. Mohideen (supra) and held that when the building is extensively damaged and cannot be used for the purpose for which it was leased, one cannot say the tenancy continues. On this point Wille (Landlord and Tenant 4th Edition page 249) states that “in a contract of tenancy, the tenant is entitled to the use and occupation of the building and if there is no building to use and occupy there is no contract. If the building is completely destroyed the contract comes to an end, even though the land remains”

H.W Tambiah (Landlord and Tenant 1st Edition 158) holds the view that “under the Roman Dutch law if the thing leased out is destroyed by unforeseen

misfortune the lease is terminated. But where the property is not completely destroyed the lease is not at an end if the tenant can still exercise many of his rights, despite the partial destruction of the property. A similar view had been expressed by Dr Wijeydasa Rajapaksa in his book the law of property Vol IV Landlord and Tenant at pg. 204. He says “in the case of a house being let, if that is completely burnt, the lease comes to an end, but not where the tenant is able to exercise many of his rights under the lease notwithstanding the complete destruction of the building.

Thus the issue that needs to be addressed is whether after the fire the defendant was able to exercise many of his rights as a tenant. This fact can only be decided, in my opinion, upon analysing the evidence placed at the trial.

The original plaintiff who testified had said that both premises, No 4 and No.6 were destroyed. He admitted, however, that the walls remained intact and what was destroyed was the roof, upper floor windows and the doors. He had also admitted that the building was not damaged beyond repair. The plaintiff also had admitted that the defendant resumed his business activities after the fire from the same premises. His evidence was that after two days the defendant commenced his business. He also admitted whatever repairs that were needed to be effected were repairs that could be done within two days.

The plaintiff also called Mohammed Anzar Omar a chartered engineer who had visited the premises more than two years after the fire for an inspection and for a report. His evidence was that the tile roof had been replaced with zinc sheets and in addition he had further testified that the rear windows and a door had been boarded up. He had also observed that new doors had been fixed inside the building. Under cross examination, the witness had admitted that from its

appearance, the ground floor did not seem to have been affected by the fire. He also admitted that he presumed that the entire roof had been destroyed by the fire. He had also stated that he was told that the building had a tiled roof and at the time of inspection it was covered with zinc sheets. With regard to the condition of the wooden floor, of the upper floor, the evidence of the witness appears to be infirm. At one point the witness had said that the wooden floor had got completely destroyed due to the fire and under cross examination the witness had said that at the time he went to inspect the building, the wooden floor had been repaired.

The pivotal issue that needs to be decided is whether the Defendant was able to exercise many of his rights under the lease notwithstanding the destruction caused to the building.

The evidence is that the Defendant had never surrendered the possession of the premises and on the Plaintiff's own admission, he (the Defendant) commenced his business activities after two days of the occurrence. There is also evidence that the ground floor of the building was not affected due to the fire.

When one considers the totality of the evidence, I am of the view that the Plaintiff had not established that the building was destroyed to an extent where the Defendant was unable to exercise his rights, as a tenant.

Considering the above, the Judges of the High Court of Civil Appeals cannot be faulted for concluding, in the light of the evidence, that the tenancy had not come to an end as a result of the fire.

Accordingly I answer the questions of law in the negative and dismiss the appeal

In the circumstances of this case I order no costs

Appeal dismissed

JUDGE OF THE SUPREME COURT

JUSTICE EVA WANASUDERA P.C

JUDGE OF THE SUPREME COURT

JUSTICE UPALY ABEYRATHNE

JUDGE OF THE SUPREME COURT