# CASIE CHETTY
# v.
# SENANAYAKE

COURT OF APPEAL.
EDUSSURIYA, J.,
JAYASINGHE, J.
C.A. NO. 746/90 (F).
D.C. COLOMBO NO. 6972/RE.
MAY 11, 1999.

*Rent Act s. 22 (5) – Arrears of rent – Valid termination of tenancy – Quit notice – Civil Procedure Code – ss. 121, 175, 175 (2) – Producing a document not in the list – Reasoning.*

The plaintiff-appellant instituted action for an order of ejectment on the ground of arrears of rent; the defendant-respondent filed answer, admitting that he was in arrears, but stated that, he fell into arrears as there was a refusal to accept the rent and further pleaded that – there has been no valid termination of the tenancy. Court held with the defendant-respondent.

On Appeal –

**Held:**

1. Proof of posting of a registered article is not the only mode of such proof, if available it is good and reliable evidence.

2. A document is required to be included in the list of documents (s. 121 CPC) and if not included shall not without leave of Court be received in evidence at the trial, however, documents produced in cross-examination of the witness of the opposite party or handed over to a witness to refresh his memory, are not covered under s. 121 CPC.

"In exercising discretion under s. 175 CPC where it is sought to call a witness whose name was not in the list, the paramount consideration for the Judge is the ascertainment of the truth and not the desire of a litigant to be placed at an advantage by some technicality" –

*Per* Jayasinghe, J.

> "There have been instances in the past where Courts have relied on the evidence of Attorneys-at-law to support the claim that documents were in fact despatched."

*Per* Jayasinghe, J.

> "It is my view that document P2A should have been admitted by the learned District Judge as parties who appear ought not to be allowed to use the judicial machinery to achieve ends which are patently ulterior."

**APPEAL** from the judgment of the District Court of Colombo.

**Cases referred to:**

1. *Girantha v. Madiya* – 50 NLR 519.
2. *Savary Muttu v. Edwin de Silva* – 5 NLR 394.

*M. S. A. Hassan* with *Ms. Safaya Hassan* for plaintiff-respondent.

*J. C. Boange* for the defendant-respondent.

*Cur. adv. vult.*

September 01, 1999.

## JAYASINGHE, J.

The plaintiff instituted action in the District Court of Colombo for an order of ejectment of the defendant from the premises in suit No. 63, Gemunu Mawatha, Pattiya, Kelaniya, on the ground of arrears of rent from June, 1974, to August, 1986; for an order for arrears in a sum of Rs. 3,256/05 in respect of the said period; for damages in a sum of Rs. 100 per month from September, 1986, until the plaintiff is restored to possession and for costs.

The defendant filed answer; admitted that he was in arrears as averred by the plaintiff; that the defendant fell into arrears as there was a refusal to accept the rent; he claimed relief under section 22 (5) of the Rent Act.

The defendant put in issue that there has been no valid termination of the tenancy which the plaintiff claimed existed between the plaintiff and the defendant.

The plaintiff gave evidence at the trial and produced document marked P2 which was addressed to the defendant where the plaintiff has been nominated as the landlord of the said premises by his sisters. Produced P3 which the plaintiff wrote to the defendant informing the defendant that he has succeeded as the landlord. He also produced P1 a copy of the quit notice. The plaintiff called Henry Peiris, Attorney-at-law, to support his contention that the quit notice was in fact sent by registered post.

The defendant giving evidence admitted that he was in arrears of rent. It was due to his failing health and for want of an income. He denied that he ever received P1.

The learned Additional District Judge has observed that the Court must be primarily satisfied that the quit notice has, in fact, been returned by the defendant. He is quite right. But, the satisfaction must emerge on a reasonable and a practical evaluation made by the trial Judge. Particularly, in a case where the defendant had admitted that he was in arrears of rent, an admission by him that he had received the quit notice will effectively seal his fate.

It is, therefore, absolutely necessary for the trial Judge to examine all the attendant circumstances evolved before Court before he accepts the defendant's denial that the notice to quit was not in fact sent. Proof of posting of a registered article is not the only mode of such proof. If available it is good and reliable evidence in given circumstances. There can also be some other ways as well. In this instance

Henry Peiris, Attorney-at-law, testified on oath that P1 was in fact sent to the defendant under registered post. His evidence has not been assailed. When the defendant was giving evidence the plaintiff sought to mark P2 a list of registered letters received by the post office. The learned Additional District Judge refused the plaintiff to produce the said document along with the registered article as it has not been listed as a document by the plaintiff. The section 175 (2) provides: that . . .

A document which is required to be included in the list of documents filed in Court by a party as provided by section 121 and which is not included, shall not without leave of Court, be received in evidence at the trial of the action: provided, that nothing in this subsection shall apply to documents produced in cross-examination of the witness of the opposite party or handed over to a witness merely to refresh his memory.

The counsel for the plaintiff sought to contradict the defendant producing as "P2A" a list of registered letters that Henry Peiris, Attorney-at-law, had sent to the Post Office, Borella, for transmission according to which Article No. 4 was the registered letter addressed to the defendant F. V. P. Senanayake and the registered postal article receipt issued by the Post Office, Borella, the same day. In *Girantha v. Madiya*[1] section 175 (1), came up for interpretation. Section 175 (1) provides that no witness shall be called on behalf of any party unless such witness shall have been included in the list of witnesses previously filed in Court by such party as provided by section 121.

Provided, however, that the Court may in its discretion, if special circumstances appear to it to render such a course advisable in the interests of justice, permit a witness to be examined, although such witness may not have been included in such list aforesaid;

Gratien, J. observed that in exercising discretion under section 175 of the Civil Procedure Code where it is sought to call a witness whose name was not in the list filed before the trial *the paramount*

*consideration for the Judge is the ascertainment of the truth and not the desire of a litigant to be placed at an advantage by some technicality.* I am inclined to extend the same reasoning in respect of subsection (2) of section 175 as well. There appears to be no justification to place the defendant at an advantage relying on a technicality. In my view the trial Judge erred in disallowing the production of P2A. *There have been instances in the past where Courts* have relied on the evidence of Attorneys-at-law to support the claim that documents were in fact despatched. In *Savary Muttu v. Edwin de Silva*[2] Court acted on the evidence given by the plaintiff's proctor that he sent the notice to quit by registered post. Though this evidence was led in different circumstances, the principle of substituting the Attorney's evidence to support the transmission of the quit notice to the defendant has been accepted by our Courts. It is my view that the document P2A should have been admitted by the learned Additional District Judge as parties who appear before Court ought not to be allowed to use the judicial machinery to achieve ends which are patently ulterior.

Having regard to the evidence of Henry Peiris, I hold that the plaintiff has duly terminated the tenancy of the defendant on the ground of arrears of rent. I, accordingly, set aside the judgment of the learned Additional District Judge and enter judgment for the plaintiff as prayed for with taxed costs.

**EDUSSURIYA, J. (P/CA)** – I agree.

*Appeal allowed.*