SIVAPATHAM
V.
BALASINGHAM AND OTHERS

SUPREME COURT
VICTOR PERERA, J. COLIN THOME, J., AND SOZA, J.
S.C. APPEAL NO. 30/82: C.A. APPLICATION NO. 124/79:
C. R. COLOMBO 1552/L.
JUNE 29 AND 30, 1983.

Landlord and tenant — Monthly tenancy — Licencee — Action for a declaration for exclusive use and enjoyment and permanent injunction restraining interference with possession — Civil Procedure Code, Sections 121, 134 and 175.

The Plaintiff-Appellant claiming to be a monthly tenant of the rear portion of premises No. 7, 57th Lane, Wellawatte under the 5th defendant-respondent, filed action against the Defendants-Respondents for a declaration for the exclusive use and enjoyment of the said portion and for a permanent injunction restraining from interfering with his possession.

Held —

The Plaintiff-Appellant has not established a right of tenancy of the premises. At most he was a licensee.

Section 134 of the Civil Procedure Code contemplates a case of a person whose value as a witness was unknown to the parties to the action but became apparent during the course of the trial and it is for that reason the words "not named as a witness by a party to the action" have been used.

Cases referred to:

1. *Rewata Thero v. Horatala* 14 C.L.W. 155

2. *Hendrik Kure v. Saibu Marikar* (1901) 4 N.L.R. 148.

3. *Tikiri Banda v. Loku Menika* (1965) N.L.R. 342.

APPEAL from an Order of the Court of Appeal.

H. L. de Silva with *S. A. Parathalingam* for the Appellant.

S. Nadesan, Q.C. with *K. Kanag Iswaran* and *S. H. M. Reeza* for the Respondents.

Cur. adv. vult

July 18, 1983
VICTOR PERERA, J.

The Plaintiff-Appellant claiming to be a monthly tenant of the rear portion of premises No. 7, 57th Lane, Wellawatte, under the 5th Defendant-Respondent filed this action against the Defendants-Respondents for a declaration that he was entitled to the exclusive use and enjoyment of the said portion and for a permanent injunction restraining them from interfering with his possession.

The 5th Defendant-Respondent is admittedly a 'Sangam' or Cultural Society duly incorporated and had purchased the said land and building in extent about 42 perches for the purpose of the activities of the Society. The premises No. 7 in 57th Lane were, as averred in paragraph 2 of the plaint, is the registered office of the said Society. The front portion consists of an office room in which 4th respondent, the Secretary resides, another room which is used as a library occupied by the Librarian and two other rooms used as tuition classes for students. The rear portion consists of 4 rooms. There is no evidence that the rear portion was ever rented out to any person. There was some evidence that some young people who had been allowed to occupy the same, had created trouble and had been got rid of. There is no evidence whatsoever that the 5th Defendant-Respondent wanted to rent out the said portion to anybody or that he was on the look-out for a tenant.

Mr. V. Arulambalam, a senior Lawyer was the Vice President of the Society from 1949 to December 1966 and the President from December 1966 to December 1969. In 1970 Mr. Arulambalam had left the Society. Apart from the General Committee, there was an Establishment Committee, and he was the Chairman of this Committee from 1964 to 1966. In December 1969, the 1st Defendant-Respondent was elected President and thereafter Mr. Arulambalam abandoned the Society.

It was in 1964 while Mr. Arulambalam was the Chairman of the Establishment Committee that the Plaintiff-Appellant and his

family came into occupation of the rear portion of the said premises. While the Defendants-Respondents allege that the Plaintiff-Appellant came into occupation on the 1st of August 1964 the Plaintiff-Appellant claims to have come into occupation in June 1964. Mr. Arulambalam was the first witness called for the Plaintiff-Appellant. When he gave evidence in June 1971 he was not a member of the Society. He testified that the Plaintiff-Appellant came into occupation in June 1964. He said he knew personally the terms on which the Plaintiff-Appellant came into occupation of the said premises. When asked what the terms were, he stated, "the terms were that the plaintiff should pay Rs.160/- per month. He paid two months advance. That Rs. 160/- was paid for the use and occupation of that part of the premises". He further stated "he did not know how the plaintiff regarded this payment of Rs.160/- but as far as the Society was concerned Rs. 160/- was accounted as a donation." On an examination of the evidence of this witness it is quite clear that he was trying to assist the plaintiff-appellant as he himself had left the Society in 1970, and he displayed some measure of hostility to the Society and to its office-bearers particularly the Secretary, the 4th defendant-respondent. When he was shown a letter dated 4.7.64 (D9) sent by the Plaintiff-Appellant and his wife to the Society from 40/2, Hampden Lane, Wellawatte, requesting help in regard to securing a dwelling place for a short time for themselves as their landlord had given them one month's notice to quit, he categorically stated "the plaintiff **had not come into occupation of the premises prior to the date of this letter.** He came into occupation after that letter". This letter bore his endorsement 'recommended' dated 7th July 1964. Shortly after that he contradicted himself by stating that the Plaintiff-Appellant came into occupation before this letter D9.

This evidence of this witness had to be tested by his own conduct evidenced by this letter. There was a meeting of the Establishment Committee on 7.7.64 under his Chairmanship. The minutes of that meeting were produced (D10) and the same was signed by this witness. It had been recorded that at the request of the Principal Saiva Mangaiyar Vidyalayam and others, it was decided to help Mrs.Sivapatham (Plaintiff-Appellant's wife) by giving her temporary accommodation to live with her family.

Further the Committee had decided to accept Rs. 160/- which was **offered as a donation to the Society** and to give them accommodation from 1.8.64. By letter dated 1.7.64 (D12) Miss Kasipillai, the Principal, requested the Society to give the Plaintiff-Appellant and his family temporary accommodation, on their promise to vacate the premises at any time the Sangam requested them to do so. This position was further confirmed by a subsequent meeting of the Establishment Committee at its meeting dated 19.7.64 (D11) again under the Chairmanship of this witness.

These three documents which were admitted by this witness contradicted his oral evidence when he purports to state that the Plaintiff-Appellant came into occupation in June 1964. The oral evidence has to be further tested by reference to the record of the minutes of the Executive Committee of the Society on 31.7.64 (D1a.). At that meeting the plan for the construction of the new building had been submitted, and steps were to be taken to construct the building and the Plaintiff-Appellant and his family were to be given 3 months notice to vacate the premises. The minutes of the meeting of the Establishment Committee dated 2.2.69 (D34) show that verbal notice had been given, that the Plaintiff-Appellant continued to occupy the premises and this witness was requested to get Miss Kasipillai, the Principal, to persuade the family to vacate the premises. The documents D4 dated 13.2.69, D3 dated 21.7.67, D5 dated 29.6.69, D6 dated 31.9.69 and D7 dated 29.11.69, all support the version given by the defendants-respondents and contradict this witness convincingly.

The Commissioner of Requests had failed to examine and evaluate the oral evidence of this witness sufficiently. If he had done this he would have realised that this witness not only contradicted himself on material facts but was proved to have in 1971 altered the position he himself had agreed to and ratified with due responsibility when he was the Chairman of the Establishment Committee from 1964 to 1969 and also the President of the Society.

The next witness called was the Plaintiff-Appellant himself. He too stated that he came into occupation of the premises in June 1964. In his plaint he had pleaded that he paid Rs. 160/- per month as rent. But in his evidence he stated that he paid Rs. 150/- monthly as rent and Rs.10/- per month for the use of electricity. He denied that Miss Kasipillai was approached by his wife or him to secure this accommodation when he was shown his own letter dated 4.7.79 (D9). He admitted his signature but denied his wife's signature. He contradicted himself in regard to the exact date of the termination of his tenancy at Hampden Lane. However, he admitted that as the previous tenancy was in existence till July, the Society agreed to take rent from 1st August and took a further 2 months' advance. This evidence contradicted his earlier position that he came into occupation in June 1964 and that he paid three months rent for June, July and August 1964. This witness' evidence is teeming with falsehoods and the Commissioner of Requests in this instance too had failed to examine and evaluate his evidence by referring to the documents signed by this witness and his wife.

The Plaintiff had in June 1970 listed as his witness among others one E.P. Chelliah. Mr. Arunambalam was called as the 1st witness and thereafter the Plaintiff-Appellant. While the Plaintiff-Appellant was giving his evidence it would appear from the proceedings that the Plaintiff-Appellant's Counsel who had originally given an undertaking to call E.P. Chelliah as his witness was not going to be called as a witness although up to then several statements alleged to have been made by E.P. Chelliah to the other witnesses and to the Plaintiff-Appellant had been recorded as evidence. After submissions made by Counsel for the Plaintiff and Defendants, the Court made the following Order :—

> "I find that quite an amount of evidence has been led that E. P. Chelliah said this and that. If Chelliah is not to be called as a witness the record will be teeming with hearsay evidence. Besides, it seems to me, in the interests of ascertaining the truth, Chelliah is a necessary party. Acting under section 134 of the Civil Procedure Code, I decide to call E. P. Chelliah as a witness to be examined."

Thereafter the Plaintiff-Appellant continued his evidence and at the end of his evidence the Plaintiff-Appellant closed his case without calling E. P. Chelliah as a witness.

At this stage the Court decided to examine Chelliah. Counsel for the Plaintiff-Appellant objected as it was unusual to call a witness before both parties had closed their case. The Judge made the following order :—

> "In this case, I decided to act under Section 134 of the Civil Procedure Code. It is difficult to understand what Mr. Fernando says. Usually this type of decision is made by Courts. What Chelliah stated has been repeatedly said by the plaintiff in answer to a number of questions put by Counsel, I am satisfied, at this stage, that the plaintiff has finished his evidence in relation to what Chelliah has stated. It would be appropriate, therefore, to call Chelliah at this stage".

Thereafter the Court called E. P. Chelliah as a witness. The Court elicited a great deal of evidence from this witness and thereafter the witness was examined by Counsel for the Plaintiff-Appellant and by Counsel for the Defendants-Respondents. The finding of the trial judge in this case was greatly influenced by the evidence of this witness Chelliah and what he is alleged to have told the Plaintiff-Appellant. In his judgment he states, "If there is one person who knows anything about the nature of the transactions relating to the plaintiff's occupation of these premises, it is Chelliah. Therefore I have carefully considered his evidence keeping in mind his answers against the Society or at least the Committee".

Mr. S. Nadesan, Q.C. for the Defendants-Respondents submitted that the evidence of this witness had been improperly recorded and that this evidence should not be taken into consideration at all. He referred us to Section 134 of the Civil Procedure Code, which reads as follows:—

> "134. Subject to the rules of this Ordinance as to attendance and appearance, if the Court at any time thinks it necessary

to examine **any person other than a party to the action, and not named as a witness by a party to the action,** the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed; and may examine him as a witness or require him to produce such document".

This Section clearly gives the Court power to examine any person other than a party to the action and not named as a witness by a party to the action. In this case E. P. Chelliah is the 3rd witness named in the Plaintiff-Appellant's list of witnesses. The Plaintiff-Appellant did not choose to call him as a witness and closed his case. It was therefcre the duty of the Court to strike out the hearsay evidence and examine the evidence placed before it by the Plaintiff-Appellant. The other objectionable feature of this episode is that this evidence was recorded not after the close of the case by both parties but before the Defendants could call their evidence, a course of action which was greatly prejudicial to the Defendants-Respondents case as the Defendants-Respondents' witness was confronted with this inadmissible evidence under cross-examination. In any event there were no special circumstances even to justify this witness being called at the close of the case by Court.

It is unfortunate that the trial judge entered the arena, as it were, and decided to record the evidence of this witness who was abandoned by the party who had named him as a witness. As Nihill J. stated in the case of *Rewata Thero v. Horatala* (1):

> "It is no part of a judge's duty in a civil action to fill in the deficiencies in the case of one of the disputants by calling evidence on his own".

Section 121 of the Code provides for the filing of a list of the witnesses parties intend calling and Section 175 of the Code has clearly provided that no witness shall be called on behalf of a party unless such witness shall have been included in the list of witnesses previously filed. The Court, however, has been given a discretion under special circumstances in the interest of justice

to allow a party to call such a person as a witness. But where a witness's name appears on a list and is not called by the party who listed his name, the Court has no power to call that witness to give evidence.

Mr. H. L. de Silva, Senior Counsel for the Plaintiff-Appellant cited the case of *Hendrik Kure v. Saibu Marikar* (2) in support of the course adopted by the trial judge. But that case has no application. The Supreme Court decided in that case that it was competent to a District Court after both parties had closed their case to call on its own motion a **witness not cited by the parties** and inform itself of any relevant point that required elucidation. He also relied on the case of *Rewata Thero v. Horatala* (supra). In that case the Supreme Court approved the course of action adopted by the trial judge to call expert evidence in regard to a thumb impression which was discovered on a document during the trial. The Defendant himself denied that it was his thumb impression and invited the Court to act in that manner. In both these cases the witnesses called were not named in the list of witnesses.

I take the view that Section 134 contemplates a case of a person whose value as a witness was unknown to the parties to the action but became apparent during the course of the trial and it is for that reason the words "not named as a witness by a party to the action" have been used. The evidence of E. P. Chelliah has in the circumstances been illegally recorded by the judge and the whole of his evidence has been illegally admitted and his evidence therefore cannot form the basis of the judgment in this case. The Supreme Court took a similar view where the evidence of a witness whose name was not included in the list of witnesses filed in accordance with Section 121 of Civil Procedure Code was called by a party giving the Court the impression that he had been listed as a witness — vide *Tikiri Banda v. Loku Menika* (3).

Thus the only oral evidence the Plaintiff-Appellant could rely on is that of Mr. V. Arulampalam and that of the Plaintiff-Appellant himself excluding therefrom any hearsay evidence in regard to what E. P. Chelliah said. The documents produced

clearly demonstrate that the oral evidence cannot be relied on. On the basis of the documents it has been clearly established that the Plaintiff-Appellant at his request and on the request of Miss Kasipillai had been allowed temporary accommodation in the rear portion of the building. The Plaintiff-Appellant had offered to help the Society in some way or another in consideration of this accommodation. The Plaintiff-Appellant had, however, offered to make a monthly donation which was accepted by the 5th Defendant-Respondent. There is no doubt that a senior lawyer like Mr. Arulambalam would have advised this course of action in the best interest of the Society. The 5th respondent, when it became necessary to put up the new building which had been in contemplation for several years, gave the Plaintiff-Appellant verbal notice of three months to quit the premises. The Plaintiff-Appellant asked for and received several extensions of time to vacate but thereafter with the backing of Mr. Arulambalam he had decided to set up a claim of tenancy and has successfully stalled any proceedings for ejectment for well over 9 years. On a consideration of the entirety of the evidence both oral and documentary, I hold that the Plaintiff-Appellant had not established a right of tenancy of the said premises. At most he was a licensee.

The order of the Court of Appeal therefore is affirmed subject to what is stated above and the Plaintiff-Appellant's action is dismissed with costs in the original Court, the Court of Appeal and in this Court.

COLIN THOME, J. — I agree.

SOZA, J. — I agree

Appeal dismissed.