

**CROOS**  
**v.**  
**SAKAFF**

COURT OF APPEAL  
WEERASEKERA, J.,  
WIGNESWARAN, J.  
C.A. NO. 749/85 (F)  
D.C. MATARA 5206/L  
FEBRUARY 2, 1995  
JANUARY 24, MARCH 21, 1996  
FEBRUARY 05, MAY 14, 1997  
JUNE 16, 1997.

*Rei Vindicatio Action – Rent Act No. 7 of 1972 S. 36 (2) (a) and S. 36 (3) – Succession to tenancy.*

The plaintiff-respondent filed action for declaration of title. It was her position that the premises in suit was let by her late husband to one L.S. and after the latter's death it was alleged that defendant-appellant was in unlawful occupation. The defendant-appellant's position was that he was a brother of the original tenant and that he had succeeded to the tenancy after the death of L.S. in terms of s. 36 (2) (a).

**Held:**

- (i) At most the evidence shows that the defendant-appellant was a half-brother or stepbrother of the deceased tenant. The relevant section does not include half/stepbrother into the category of a brother.
- (ii) There was no proof that the defendant-appellant was a member of the household of the original tenant during the period of 3 months preceding his death as required by S. 36 (ii).

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

**Cases referred to:**

1. *U. G. Ariya Kandi v. Mohamed A. W. F. Mohamed Sideek* S.C. 520/69 SCM 26.6.75.
- A. K. Premadasa, PC, with C. E. de Silva* for defendant-appellant.
- Faiz Musthapha, PC, with M. S. M. Suhaid* for plaintiff-respondent.

October 28, 1997

### **WIGNESWARAN, J.**

The plaintiff-respondent filed this action for declaration of title. Her position was that the premises in suit bearing assessment No. 79/1, Sri Dharmarama Mawatha, Fort, Matara, was let by her late husband to one Leonard Samarakoon. After the latter's death it was alleged that the defendant-appellant was in unlawful occupation.

The defendant-appellant's position was that he was a brother of the original tenant and that he had succeeded to the tenancy in November, 1974 after Leonard Samarakoon died on 23.11.1974 in terms of section 36 (2) (a) of the Rent Act.

After trial judgment was given in favour of the plaintiff-respondent on 06.12.1985.

The learned President's Counsel appearing for the defendant-appellant has taken up the following matters in appeal:

- (1) Under sec. 36 (2) (a) a parent, brother or sister becomes entitled to tenancy provided they had been members of the household of the deceased tenant for a period of 3 months preceding tenant's death. The defendant-appellant being a brother or halfbrother of Leonard Samarakoon was therefore entitled to claim tenancy.
- (2) Under section 36 (3) when several persons are entitled to tenancy the landlord must make an application to the Rent Board to ascertain as to which of the persons should be deemed to be the tenant. Until this is done persons entitled to tenancy cannot be ejected. Such an application to the Rent Board was not made in this instance.
- (3) A monthly tenancy is not terminated by the death of a tenant. The erstwhile tenant's successors did not become trespassers on the death of the tenant. (The decision in *U. G. Ariyanandi v. Mohamed A. W. F. Mohamed Sideek*<sup>(1)</sup> referred to).

- (4) Even if the defendant-appellant was deemed not a brother of Leonard Samarakoon (but only as a half-brother to whom the provisions of sec. 36 (2) (a) of the Rent Act would not apply), yet he was entitled to occupy the premises under his mother Marian Crooz and half-sister Irene Samarakoon.
- (5) The learned trial Judge erred in holding that the defendant-appellant was not residing in the premises in suit when his residence from 1973 was admitted in the plaint.

These submissions would now be examined—

It was admitted on 24.02.1983 (vide page 75 of the brief) that the provisions of the Rent Act applied to the premises in suit.

The relevant portions of section 36 (2) (a) of the Rent Act read as follows:

Any person who —

(a) in the case of residential premises the annual value of which does not exceed the relevant amount and which has been let prior to the date of commencement of this Act—

(i) is the surviving spouse or child, parent, brother or sister of the deceased tenant of the premises or was a dependant of the deceased tenant immediately prior to his death; and

(ii) was a member of the household of the deceased tenant (whether in those premises or in any other premises) during the whole of the period of three months preceding his death; shall subject to any order of the board as hereinafter provided be deemed for the purposes of this Act to be the tenant of the premises.

At most the evidence shows that the defendant-appellant was a half-brother or stepbrother of the deceased tenant. The relevant section does not include half-brother or stepbrother into the category of a brother.

The learned District Judge had come to a finding that the defendant-appellant was resident in Makola and that he occasionally visited the premises in suit. (vide P13).

Even when Leonard Samarakoon was living the defendant-appellant had attempted to establish tenancy rights to the premises in suit behind the back of Leonard Samarakoon. (vide P2). But by P3 the landlord at that time repudiated his claim. Applications by defendant-appellant dated 25.04.73 (P18) and 21.01.75 (P6) to the Rent Board claiming to be tenant of the premises in suit before and after the death of Leonard Samarakoon were both dismissed. In the later application the defendant-appellant failed to prove either he was a brother of deceased Leonard Samarakoon or that he was a member of the household of the deceased during the whole of the period of three months preceding Leonard Samarakoon's death. The defendant-appellant did not appeal against such order of the Rent Board.

Thus the learned District Judge was correct in holding that the defendant-appellant was not a surviving brother of Leonard Samarakoon nor his dependent immediately prior to Leonard Samarakoon's death. There was also no proof that the defendant-appellant was a member of the household of the original tenant during the period of 3 months preceding his death as required by section 36 (2) (a) (ii).

(2) Since the defendant-appellant was not a person who was deemed to be a tenant in terms of section 36 and since there was no contest as between Marian Crooz, Irene Samarakoon and the defendant-appellant as to who should succeed to tenancy there was no question of the plaintiff-respondent having to make an application to the Rent Board in terms of section 36 (3).

(3) Even the learned District Judge accepted the position that a monthly tenancy was not terminated by the death of the tenant. But since the defendant-appellant was neither a brother nor dependent of Leonard Samarakoon he was right in holding that the defendant-appellant became a trespasser.

(4) When the defendant-appellant failed to establish that he came under the provisions of section 36 (2) of the Rent Act he attempted to take a new position that Marian Crooz who was the mother of the original tenant had succeeded to the tenancy on her son's death and

that Marian Crooz had permitted defendant-appellant to occupy the premises in suit. This position is inconsistent with the original position taken up by the defendant-appellant in his pleadings and at the trial. In any event neither Marian Crooz nor Irene Samarakoon claimed tenancy. Therefore the question of the defendant-appellant becoming a licensee of either of them nor a dependent of Marian Crooz does not arise.

(5) The finding by the District Judge that the defendant-appellant was resident at Makola was based on a consideration of the Gampaha case filed to eject defendant-appellant from the premises he occupied at Makola and many other facts. Even though paragraph 10 of the plaint had indirectly admitted to the defendant-appellant residing in the premises in suit such reference by itself cannot preclude the court coming to its decision independently on the evidence led in the case. In any event no admission was recorded on the basis of paragraph 10 of the plaint that the plaintiff admitted residence by the defendant on the premises in suit for a period of over 3 months prior to the death of Leonard Samarakoon. The evidence is overwhelming that the defendant-appellant had resided elsewhere but tried to assert tenancy to the premises in suit even during the lifetime of Leonard Samarakoon and then after his death but that such assertions were not accepted by the Rent Board.

Under the circumstances this court finds no reason to interfere with the judgment of the learned District Judge, Matara, dated 06.12.85. The appeal is dismissed with *incurred* costs payable to the plaintiff-respondent by the defendant-appellant.

**WEERASEKERA, J.** – I agree.

*Appeal dismissed.*