

BANDULA AND ANOTHER

V.

KARTHELI APPUHAMY.

COURT OF APPEAL
WJETUNGE, J., AND S.N. SILVA, J.
C.A. NO. 571/81 (FINAL).
D.C. NEGOMBO NO. 583/R.E.,
MARCH 08, 1988.

Landlord and Tenant — Termination of tenancy — Can occupant denying landlord's title claim failure to terminate tenancy by notice?

Where the defendant entered the premises on a contract of tenancy from the original owners but upon the latter's demise continued in occupation without payment of rent to the heirs and in fact repudiated the tenancy and claimed the premises himself, he is not entitled to claim that a notice terminating the tenancy he was denying was essential for a successful suit in eviction.

APPEAL from a judgment of the District Court of Negombo.

Case referred to:

Ranasinghe v. Premadharma and others (1985) 1 Sri L.R. 63

A. C. Goonaratne O.C. with *C. Ladduwahetty* for the plaintiffs — appellants.

F. C. Perera for the defendant — respondent.

Cur. adv. vult.

April 29, 1988

S. N. SILVA, J.

This action was instituted by the two plaintiffs against the defendant to eject the defendant from the premises described in the first paragraph to the annex of the plaint and to recover damages. The cause of action of the plaintiffs was that the defendant who entered the premises under the predecessor-in-title of the plaintiffs continued in occupation upon the leave and licence of the owners, that the plaintiffs terminated the leave and licence and that the defendant is in unlawful occupation of the premises causing damage to the plaintiffs. The plaintiffs sought relief by way of ejectment of the defendant and the recovery of damages. The defendant denied the cause of action and pleaded that he was a tenant of the premises and that the tenancy had not been terminated according to law. The learned District Judge by his judgment dated 24.2.1981, held with the plaintiffs that they are the present owners of the premises but, held against the plaintiffs on the issue that the defendant was in occupation of the premises upon a leave and licence and accordingly dismissed the action with costs. The finding of the learned District Judge was that the defendant was a tenant of the premises and the tenancy was not terminated according to law.

At the hearing of this appeal, Counsel for the plaintiffs—appellants argued that the learned District Judge misdirected himself on the evidence in holding that the defendant continued

to be in occupation of the premises as a tenant. Counsel submitted that the learned District Judge has not considered the following items of evidence:—

- (i) the evidence of the Defendant who specifically stated in evidence-in-chief, that he was the owner of the premises by virtue of possession and denied that the plaintiffs were owners;
- (ii) document marked P3 which is a letter dated 26.3.1974 sent by the defendant which shows that the defendant was in occupation of the premises upon leave and licence and not as a tenant.

Counsel relied on a judgment of a Divisional Bench of the Supreme Court in the case of *Ranasinghe vs. Premadharma and others*⁽¹⁾ where it was held that a person who denied tenancy is not entitled to due notice of a termination of the tenancy.

Counsel for the defendant conceded that the learned District Judge has not considered the two items of evidence referred to above but argued that documents marked D1, and D2, establish a tenancy in respect of the premises.

At this stage I shall briefly set out the facts relevant to the case. One Abraham Appuhamy was the owner of the premises and in 1966 he died leaving as his heirs the 1st plaintiff, Peiris Appuhamy and Gunaratne, each of whom became entitled to 1/3 share of the property. In 1969 Peiris Appuhamy gifted his 1/3 share to the 2nd plaintiff. In 1975 Gunaratne transferred his 1/3 share to the 1st plaintiff. Thus the 1st plaintiff became entitled to 2/3 shares and the 2nd plaintiff to 1/3 share, of the premises.

By writing dated 10.6.1964, marked D1, the said Abraham Appuhamy "rented out" the premises to the defendant for a period of five years at a monthly rental of Rs. 10/-. The defendant was allowed to make improvements to the land and to put up any buildings. The defendant stated that he paid rent to Abraham Appuhamy as stipulated in the document marked 'D1'.

and after the death of Abraham Appuhamy in 1966 he paid rent to Gunaratne. The 2nd plaintiff who gave evidence specifically denied that any rent was paid to Gunaratne or to any of the other co-owners after the death of Abraham Appuhamy.

In 1974 a complaint was made by the owners of the premises against the defendant to the Wattala-Mābole Conciliation Board. On 21.7.1974 the dispute was settled by the Conciliation Board on the basis that the defendant will vacate the premises at the end of January, 1975 and the owners will make an *ex gratia* payment of a sum of Rs. 600/- to the defendant. The defendant resiled from this settlement and the Conciliation Board issued a certificate permitting the owners to institute action in Court.

It is clear from the evidence that the defendant entered the premises upon a monthly tenancy contracted with Abraham Appuhamy. The question arises whether this tenancy continued beyond the life time of Abraham Appuhamy. The defendant stated that he paid rent for a certain period to Gunaratne being one of the co-owners but that he did not obtain any receipts. He produces a document marked D2 as the only receipt he obtained from Gunaratne. The plaintiffs disputed this receipt. It appears from an examination of the evidence that the defendant had not proved that the receipt had been given by Gunaratne who died several years before the trial. The learned District Judge too has not acted on the document marked D2. The document itself bears a date "2.28.76". It appears to be a reference to the 28th of February, 1976. If so, the receipt had been given after the dispute was referred to the Conciliation Board in 1974. It is most unlikely that Gunaratne who made the complaint to the Conciliation Board would have given a receipt to the Defendant after the Defendant resiled from the agreement that was entered into. Furthermore, according to the narration of title in the plaint which is adopted by the learned District Judge, Gunaratna's share had been transferred on 30.1.1975. In these circumstances no reliance can be placed on the document marked D2 to establish that the defendant paid rent after the death of Abraham Appuhamy. On the contrary, the defendant clearly stated in evidence that he had not paid rent for five or six years. It is in this context that the evidence of the defendant-

appellants becomes most significant. This portion of evidence is recorded as follows:

"මම මේ ගරු අධිකරණයට කියා සිටින්නේ මට
ඉඩම හුක්කියෙන් අයිති වෙනවායි කියලයි. මම
තව දුරටත් කියා සිටින්නේ මේක පැමිණිලිකරුවන්ට
අයිති නැහැ. අයිති මටයි කියලි."

Therefore Counsel for the plaintiffs-appellants could rightly rely upon the judgment of the Divisional Bench of the Supreme Court in the case of *Ranasinghe vs. Premadharma* (Supra). In that case Sharvananda, C.J. in his judgment dealt with this matter as follows:

"How can a person who denies the tenancy be entitled to insist on a proper termination of the tenancy which, according to him, never existed. A Defendant cannot be allowed to deny the existence of the contract of tenancy and in the same breath claim the benefits of that contract: the doctrine of "approbate and reprobate" forbids this. It is only when the defendant admits the contract that he can claim the benefits of the contract."

On a consideration of the evidence and the law, in particular as stated in the judgment of the Divisional Bench of the Supreme Court, I am of the view that the learned District Judge was in error when he concluded that the Plaintiff's action should fail because the contract of tenancy was not terminated.

The learned Judge has rightly decided that the plaintiffs are entitled to the premises as the successors of Abraham Appuhamy. The evidence of the 2nd plaintiff that the successor of Abraham Appuhamy permitted the defendant to remain on the land and at a later stage requested him to leave is borne out by letter marked P3. This letter dated 26.3.1974 was sent by the defendant to the 2nd plaintiff. There, the defendant has clearly stated that he has not been in a position to leave the premises because he did not find another place that was suitable. Further, the defendant has offered to buy

the premises if it was being sold by the owners. In my view this letter puts beyond doubt the inference that the plaintiffs terminated the licence given to the defendant to occupy the premises. Accordingly I set aside the judgment and decree entered in this case. Judgment is entered in favour of the plaintiffs-appellants for the ejection of the defendant-respondent from the premises, and for the recovery of damages as prayed for in the plaint. I allow the appeal of the plaintiffs—appellants with costs of contest and costs in this Court.

WIJETUNGA, J.

I agree.

Appeal allowed.