# TIKIRI BANDA
v.
# PATHUMA BEEBEE AND OTHERS

COURT OF APPEAL
WEERASURIYA, J.,
JAYAWICKREMA, J.
C.A. NO. 909/92 (F)
D.C. KANDY NO. 14048/L
APRIL 29TH, 1998
JUNE 30TH, 1998

*Rei Vindicatio Action – House set on fire – Is there a valid contract of tenancy if subject matter is completely destroyed – Relief of specific performance – S. 145 (1) Evidence Ordinance.*

The plaintiff-appellant instituted action seeking a declarartion of title to the land and ejectment of the defendant-respondents therefrom. The District Judge held that the plaintiff-appellant had set fire to the house in question and observing that the house that was burnt down was renovated subject to an order made by the Rent Board which was based on the premise that there existed a building which could be repaired, dismissed the action of the plaintiff-appellant; on appeal.

**Held:**

1. Where a building which is the subject matter is burnt down without the fault of the landlord or tenant, the contract is at an end.

2. The trial Judge on a preponderance of evidence led came to a finding that the plaintiff-appellant had set fire to the house. This is a finding of primary fact by a trial Judge who had seen and heard the witness based upon the credibility of such witness, which is entitled to great weight and utmost consideration.

3. The order of the Rent Board was based on the premise that there existed a building which could be repaired.

   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 buildings.

**APPEAL** from the District Court of Kandy.

**Cases referred to:**

1. *De Silva v. Seneviratne* – 1981 2 SLR 7.
2. *Giffry v. De Silva* – 69 NLR 81.
3. *Bayley v. Harwood* – 1954 (3) 498 AD.
4. *Weinberg v. Weinberg Pvt Ltd.*, 1951 (3) SA 272 (U).

*Rohan Sahabandu* with *P. Y. D. Jayasekera* for plaintiff-appellant.

*N. R. M. Daluwatta,* PC, with *Murshid Maharoof* for defendant-respondents.

*Cur. adv. vult.*

August 17, 1998.

**WEERASURIYA, J.**

The plaintiff-appellant by plaint dated 16.01.1984, instituted action in the District Court of Kandy against the defendant-respondents seeking a declaration of title to the land described in the schedule to the plaint, ejectment of the defendant-respondents therefrom and damages. The defendant-respondents in their answer sought a dismissal of action. The case proceeded to trial on 20 issues and the learned District Judge by his judgment dated 02.10.1992 dismissed the action of the plaintiff with costs. It is from the aforesaid judgment that this appeal has been lodged.

The case of the plaintiff-appellant was presented at the hearing of this appeal on the following grounds:

(1) that the trial Judge had erred in holding that the plaintiff-appellant had set fire to the house and that the house was subsequently renovated;

(2) that the trial Judge had erred in holding that there was a valid contract of tenancy subsisting; and

(3) that in any event the defendant-respondents are not entitled to the relief of specific performance in a contract of letting and hiring, where the subject matter is completely destroyed.

Learned counsel for the plaintiff-appellant contended that the trial Judge had failed to analyse the evidence in proper perspective. He drew our attention to the evidence of Pathirana who was a neighbour of defendant-respondents with regard to his inability to testify as to the person who set fire to the house. Pathirana in his evidence had stated that he witnessed the house being burnt but however, he was unable to identify the person who set fire.

Learned counsel for the plaintiff-appellant dealt with the evidence of the 1st defendant-respondent in the light of a statement she had made to the police which was produced at the trial marked D9. In this statement the 1st defendant-respondent had referred to a person called Dissanayake, the father of Saliya as the person who had a firebrand in his hand. It would appear that in D9, although a person called Dissanayake was described as the father of Saliya who had a firebrand, the subsequent narration reveal, that he was the person who had bought the property in suit and who had asked them to leave the house and against whom an application was pending in the Rent Board. That description could be a factor to identify the person in addition to having been referred to as Dissanayake. It would be of interest to note that the full name of the plaintiff-appellant was Dissanayake Mudiyanselage Tikiri Banda as evidenced by the description given at the time he gave evidence. Further, the document marked D7 which was an application to the Rent Board of Kandy referred to a person called Saliya Bandara as a co-respondent.

Further, attention of the witness was not drawn to this portion of the statement to enable her to explain the discrepancy. It is to be noted that section 145 (1) of the Evidence Ordinance requires that attention of a witness must be drawn to any portion of a statement which is inconsistent, to enable the witness to explain the inconsistency before such portion could be produced as a contradiction. It is regrettable that this procedure was not followed when Pathuma Beebe gave evidence in the District Court.

Learned counsel stressed that plaintiff-appellant was not prosecuted for causing mischief by setting fire to the house occupied by the defendant-respondents. He argued that non-prosecution could mean that the authorities considered the complaint made by the 1st defendant-respondent as false. Admittedly, there was no material elicited to suggest that the police had treated the complaint of 1st defendant-

respondent as false. The failure on the part of the authorities to prosecute the plaintiff-appellant cannot be treated as a vital factor considering the background of violence against an ethnic group, in coming to a conclusion about the truth or otherwise of the complaint.

The learned trial Judge on a preponderance of evidence had come to a finding that the plaintiff-appellant had set fire to the house. This is a finding of primary fact by a trial Judge who had seen and heard the witness based upon the credibility of such witness, which is entitled to great weight and utmost consideration Vide *De Silva v. Seneviratne*[1].

The trial Judge had come to a finding that the house that was burnt down was renovated by the defendant-respondents subsequent to an order made by the Rent Board. Learned counsel for the plaintiff-appellant sought to challenge the findings of the District Judge on the basis that he had failed to evaluate the evidence in the proper perspective. In the 8th column of the application to the Rent Board marked D2, requiring the nature of relief sought, Sultan had referred to reconstruction of the house (P4). Further, there was a reference to a statement in D9 that the walls of the house had been pulled down on the following morning. Pathirana had testified that the house was burnt and there were cracks on the walls. However, Grama Seva Niladari of the area, Seneviratne Banda who gave evidence on behalf of the plaintiff-appellant had testified that he saw the building when he went to inquire on the complaint made by the plaintiff-appellant without making any reference to the complete destruction of such building. There appears to be a contradiction between the evidence of 1st defendant-respondent and her statement to the police. However, attention of witness was not drawn to the portion of the statement in respect of pulling down of walls before it was sought to be marked as a contradiction. It would thus appear that on the evidence of Grama Seva Niladari no substantial damage had been caused to the walls as a result of the fire. However, the disclosure that the walls had been pulled down on the following morning did not contain any reference to a person responsible for such an act. It is also relevant to note that upon an application to the Rent Board an inquiry had been held without the participation of the plaintiff-appellant who had been duly noticed and the Rent Board allowed the application of Sultan to repair the house. The order of the Rent Board was based on the premise that there existed a building which could be repaired. It is

noteworthy that at the trial it was elicited that the roof contained cadjan and zinc sheets and from available material it could be safely inferred that the building was not a massive structure. The plaintiff-appellant had failed to lead any expert evidence on the extent and scale of the damage caused to the house as a result of the fire.

Having examined the evidence with care, it seems to me that there is no basis to interfere with the findings of the District Judge.

Wille in Landlord and Tenant in South Africa (4th edition) at page 249 states as follows:

> "If the subject matter of a lease is completely destroyed, without the fault of either the landlord or the tenant, the lease is at an end,. In such a case the tenant is not liable for rent after the date of destruction, but only for rent prior to that date; nor is he liable for the damage. The landlord, again is not liable in damages for breach of contract.
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> If, however, the subject matter of the lease is not completely destroyed, the lease is not at an end. In the case of a house being let, if that is completely burnt, the lease comes to an end, even though the land remains, but not where the tenant is still able to exercise many of his rights under the lease notwithstanding the complete destruction of the buildings.
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> If the destruction of the leased property is due to the default or negligence of the tenant, he remains liable for payment of the full rent for the unexpired period of the lease; he must in addition, pay the actual value of the property destroyed, and the landlord need not wait until the expiration of the lease before claiming such damages".

Wille's Principles of South African Law by J. T. R. Gibson (7th edition) in chapter XXV under contracts in general at page 377 contains the following:

> "Where performance of the obligation by the debtor becomes impossible, either physically or legally, after the contract was made, the debtor is discharged from liability if he was prevented from *performing* his obligation by *vis major* or *casus fortuitus* but not if the impossibility was due to his own fault. For instance, if a house is let and it is destroyed by fire without the fault of

the lessee, for example, by lightning, the lease is at an end and the lessee need pay no further rent; but if the fire is due to the negligence of the lessee, the lease continues and he remains liable for rent accruing after the fire".

It is manifest that destruction of the subject matter does not *ipso facto* signify the termination of contract of tenancy.

In the case of *Giffry v. De Silva*[2] it was observed that where a building which is the subject matter is burnt without the fault of the landlord or tenant the contract is at an end. The cases of *Bayley v. Harwood*[3] and *Weinberg v. Weinberg Brothers Pvt. Ltd.*[4] cited by learned counsel for plaintiff-appellant are not cases wherein the fault for the destruction of the subject matter was attributed to the landlord, and cosequently are not helpful to arrive at a decision in this case.

Learned counsel for the plaintiff-appellant submitted that in any event the relief that a tenant is entitled where destruction of the subject matter was due to the fault of the landlord would be an action for damages and not for a relief of specific performance. Learned counsel made reference to page 977 of Law of Contracts by Prof. Weeramantry wherein the principles governing the grant of specific performance were discussed.

It is to be noted that specific performance is a discretionary remedy. However, certain principles have been evolved which guide the court in the exercise of such discretion. It is to be observed that specific performance will not be granted where the court cannot supervise the execution of the contract. Further, it is an accepted principle in this regard that where damages are an adequate remedy specific performance will not be granted.

It is to be recalled that in the instant case, after an inquiry by the Rent Board by its order dated 11.10.1983, allowed the application of Sultan who was the tenant of this house to repair the damaged building on conditions approved by the Rent Board.

In the circumstances, it seems to me that there is no basis to interfere with the findings of the District Judge. Therefore, I dismiss this appeal with costs.

**JAYAWICKREMA, J.** – I agree.

*Appeal dismissed.*