

1958

Present : Weerasooriya, J.S. RAMASAMY, Appellant, *and* D. D. FONSEKA, Respondent*S. C. 11—C. R. Colombo, 66165 (R. E.)**Fresh evidence—Admissibility.*

In an application to lead certain fresh evidence in the form of two documents which were stated to have been discovered subsequent to the trial in the present case—

Held, that fresh evidence would not be permitted to be adduced unless it is of a decisive nature; it must be such that, on a new trial being ordered, it would almost certainly prove that an erroneous decision had been given.

APPEAL from a judgment of the Court of Requests, Colombo.

H. W. Jayewardene, Q.C., with *Vernon Wijetunge*, for defendant-appellant.

J. A. L. Cooray, for plaintiff-respondent.

September 23, 1958. WEERASOORIYA, J.—

The preliminary matter argued before me was the application of the defendant-appellant to be permitted to lead certain fresh evidence in the form of two documents which are stated to have been discovered subsequent to the trial in this case. These documents consist of—

- (1) A certificate of registration issued under the Business Names Ordinance (Cap. 120) and containing particulars relating to the firm of Thomas Rodrigo and Sons which commenced business on the 1st October, 1956; and
- (2) An extract from the register of motor vehicles maintained under the Motor Traffic Act, No. 14 of 1951, showing that on the 5th of March, 1958, the motor vehicle to which the extract refers was transferred by the then owner to one Mr. Michael Fernando of 21, Negombo Road, Kochchikade.

In this case the plaintiff-respondent sued for the ejection of the defendant-appellant from premises No. 29, Lauries Place, Colombo, on the ground that the premises were required for occupation by the plaintiff's daughter, Mrs. Agnes Fernando. The plaintiff is also owner of the adjoining premises No. 33, Lauries Place, and the evidence is that those premises were in the occupation of Mrs. Lena Fernando, another daughter of the plaintiff, and the wife of Michael Joseph Fernando. The Commissioner of Requests after trial gave judgment for the plaintiff holding that premises No. 29 were reasonably required for occupation by his daughter, Mrs. Agnes Fernando. In considering whether there were any alternative premises belonging to the plaintiff which Mrs. Agnes Fernando could have occupied in place of the premises which were the

subject matter of the suit, the Commissioner held that the adjoining premises, No. 33, Lauries Place, were not available as they were in the occupation of the plaintiff's other daughter, Mrs. Lena Fernando. The defendant submits that the two new documents which he seeks to put in evidence would show that at the time when the trial took place premises No. 33, Lauries Place, were really vacant, though ostensibly in the occupation of Mrs. Lena Fernando, and that she was in point of fact living with her husband, Michael Joseph Fernando, at "Beatrice Villa", Katuneriya, Negombo.

The first of the documents is, however, nothing more than a copy of the original statement furnished on the 24th October, 1956, relating to the firm of Thomas Rodrigo and Sons which commenced business on the 1st October, 1956. Certain of the particulars in that statement describe Michael Joseph Fernando as a partner of the firm and his residence as "Beatrice Villa", Katuneriya. In the affidavit filed by the defendant he says that this document shows that Mr. Michael Joseph Fernando's present address is "Beatrice Villa", Katuneriya, but as Mr. Cooray who appears for the plaintiff-respondent pointed out, all that the document shows is the position as on the date on which the statement was made, namely, the 24th October, 1956. It seems to me that if the defendant-appellant was relying on the fact that subsequent to the filing of this statement and up to the date of the trial no change in any of those particulars were notified under the Business Names Ordinance, a further certificate to that effect should have been obtained from the Registrar. It is not possible, therefore, to say from the particulars given in this statement that it has been established that the address of Michael Joseph Fernando continued to be "Beatrice Villa", Katuneriya, even at the date of the trial.

In regard to the second document the position is even more uncertain. It shows that the transferee of the motor car was one Mr. Michael Fernando whose address is given as 21, Negombo Road, Kochchikade. There is not only a difference in the name but there is also a difference in the address, and there is nothing except the bare averment of the defendant in his affidavit to indicate that Mr. Michael Fernando is the same person as Mr. Michael Joseph Fernando, the husband of Mrs. Lena Fernando.

As pointed out by this Court in the case, a note of which appears at page 74 of *1 Balasingham's Notes of Cases*, the fresh evidence which is sought to be admitted must be of a decisive nature or, to put it in other words, must be such that on a new trial being ordered would almost certainly prove that an erroneous decision had been given in the case. I do not think, therefore, that any useful purpose will be served in sending this case back in order to enable the defendant-appellant to adduce evidence of these documents.

The application is dismissed with costs, and the appeal will now be listed for argument in due course.

Application to lead fresh evidence dismissed.