

## SUPREME COURT

Benjamin Perera

Vs.

Gunawardena

*S.C. Appeal 78/81 – C.A. Appeal 92/73 – CA (LA) 73/81 – C.R  
Colombo 3893/RE*

*Licence to occupy – continuing cause of action after notice to quit.*

The Appellant had been in occupation of premises No. 457/3 Negombo Road, Wattala for many years under Respondent's sister. In the meantime the Appellant constructed a house on the same premises and went into occupation of it.

In 1943 Respondent purchased the land on which Appellant had constructed the house, from his sister. On 20.7.63 the appellant acknowledged in writing the respondent's ownership of the premises and stated that he (Appellant) was in occupation of the premises free of rent with the permission of the Respondent. On 26.2.67 Respondent gave notice to Appellant to vacate the premises by 31.3.67. Appellant did not vacate the premises and Respondent filed action praying for ejection and damages from 1.4.67. This action was dismissed on 27.3.72.

Respondent then issued another Notice demanding vacant possession of premises on 30.4.72. Appellant did not comply.

- Held*
1. Appellant's continuing occupation of the premises after notice dated 26.2.67 gives rise to a continuing cause of action. He is an overholding licensee and not a trespasser. He cannot deny the title of his landlord and occupation for any length of time will not give him title.
  2. The second notice including statement that Respondent "had permitted you to occupy free of rent" was a valid notice.

**APPEAL** from Judgment of the Court of Appeal.

**Before:** Samarakoon, Q.C., C.J., Ratwatte, J., and  
Victor Perera, J.

**Counsel:** I. G. N. Jacoleyn Seneviratne with  
Nihal Jayamanne  
for the Defendant-Appellant.

E.S. Amerasinghe, Senior Attorney with  
D.R.P. Goonetillake for the  
Plaintiff-Respondent.

**Argued on:** 4th March, 1982

**Decided on:** 19th March, 1982

*Cur. adv. vult.*

## SAMARAKOON, C.J.

The Court of Appeal has granted the Appellant leave to appeal to this Court on the following question of law:-

“Whether after tenancy has been terminated by notice several years ago the continuance of the occupation of the premises by the Defendant was as a tenant, or as a trespasser and whether the second notice on the basis that he was a tenant was a valid one.”

The Appellant (tenant referred to above) had been in occupation of premises No. 457/3, Negombo Road, Wattala, for many years under the Respondent's sister. He had in the meantime constructed a house on the land and was residing in it. In 1943 the Respondent purchased these premises from his sister. On the 20th July 1965 the Appellant gave the Respondent a writing P2 whereby he acknowledged the Respondent's ownership of the premises and stated that he was in occupation of the premises free of rent with the Respondent's permission. On the 26th February, 1967, by a writing D2 the Respondent gave the appellant notice to vacate the premises at the expiration of the 31st day of March 1967. The Appellant did not comply and the Respondent instituted action No. 2067/ED on the 16th November, 1970, praying for the ejection of the Appellant and for damages from 1st April, 1967. This action proved abortive due to the want of a certificate from the Chairman of the Conciliation Board of Wattala. The action was not maintainable and was therefore dismissed on the 27th March, 1972. The Respondent then noticed the Appellant to quit and deliver vacant possession of the premises at the end of the 30th day of April, 1972. (D3). The Appellant replied that he was in occupation of the premises in his own right and therefore refused to comply with the request in D3. Hence this action which was instituted in the Court of Requests on the 12th October 1972.

The plaint in this case states in paragraph 2 thereof that the Appellant was in occupation “with the leave and licence” of the Respondent free of rent. “Leave and licence” is only an intensified form of acquiescence” per Pereira J. in *Mohamadul vs. Babun* (3 G.A.C. at 80). It merely shows the character and the nature of the occupation and is indicative of the fact that the occupation is neither

wrongful nor unlawful. A person who occupies a house free of rent by the sufferance of the owner is in law a tenant at will. *Rex vs. John Collett* (1823 Russ & Ry 498) It lasts as long "as the lessor should be willing" (Voet XIX 2 : 9). Such a tenancy is terminable at the will of the Landlord (ibid). Under our law however in such a tenancy the tenant cannot be turned out "neck and crop." He must be given reasonable notice (Tambiah: Landlord and Tenant page 32). When such a notice expires it is the duty of the tenant to deliver possession of the premises to the Landlord. This is an implied term of the contract Wille "Landlord and Tenant in South Africa" (Edn 4 p. 167). *Alvar Pillai vs. Karuppan* (4 N.L.R. 321 at 322). *Jinks vs. Edwards* (156 E.R. Exchequer 1045) and "if he remains in occupation of the property he is said to 'hold over' " and is liable in damages to the Landlord, in addition to ejection under order of Court." (Wille ibid p. 257). The action is one by the Landlord against the overholding tenant for ejection and restoration based on a breach of contract. "Privity of contract is the foundation of the right to relief" per Gratiaen J. in *Pathirana vs. Jayasundera* (58 N.L.R. 169 at 173).

It has been argued that the Appellant in this case was a trespasser at the time of the action and not a licensee. He is neither — he is an overholding licensee. Trespass, if it can be called that, is on the occupation and not on the ownership. He cannot in law deny the title he Landlord and thereby acquire title to the property. Nor can his physical occupation as an overholding licensee for any length of time give him title to the property. His continuing occupation gives rise to a continuing cause of action. I therefore cannot agree with the contention that the cause of action arose on the expiry of the notice D2 and was thereafter prescribed in 3 years in terms of section 10 of the Prescription Ordinance.

The next question is whether the notice D3 is a valid notice. The first paragraph of it reads thus -

"We are instructed by our client Mr. R.A. Gunawardena of No. 24 Station Road, Wattala that he had permitted you to occupy free of rent premises No. 457/3 Negombo Road, Wattala. Our client requires vacant possession of the said premises."

The words relied on are "had permitted you to occupy." This

refers to some past period of time and is consistent with a reference to the period anterior to 1st April 1967 (D2). It is then a perfectly innocuous statement relating to the history of the occupation. The second para of D3 is a request to vacate the premises. It is the second request to the Appellant and comes at a time when he is an overholding licensee. It creates no legal complications. It merely gives the overholding licensee a second opportunity to deliver possession. The only person who suffers by relying on D3 is the Respondent himself as he now restricts his damages to a period commencing 1st May, 1972, whereas if he relied on D2 his claim for damages would have commenced from 1st April, 1967.

For the above reasons I hold that the Appellant's continued occupation of the premises after the notice D2 was in breach of contract constituting him an overholding licensee and that the notice D3 was a valid one. I therefore dismiss the appeal with costs.

Ratwatte, J. — I agree.

Victor Perera, J. — I agree.

*Appeal dismissed*