

SIMON FERNANDO
v
BERNADETTE FERNANDO

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A 545/88 (F)
D.C. COLOMBO 21923/RE
FEBRUARY 11,
MAY 10 AND
JULY 3, 2002

Rent Act, No. 7 of 1972, sections 22 (1A) and 22 1 (bb) – Question of law taken up for the first time in appeal – Mixed question of law and fact – Evidence necessary – Prejudice caused to party.

The defendant-appellant contended that in view of the prohibition of instituting an action for ejection on the ground of reasonable requirement for residence/business spelt out in section 22 i (bb) the plaintiff-respondent cannot have and maintain this action.

Held:

- (i) This question of law has been taken for the first time in appeal. It was not taken up in the answer. No issue was raised on this question at the trial. It has not been raised in the notice of appeal and the petition of appeal and not even taken up when oral submissions were made; it was only taken up in the written submissions.
- (ii) It is settled law that a pure question of law which is not a mixed question of law and fact can be taken up for the first time in appeal *but* if it is a mixed question of fact and law it cannot be taken up.
- (iii) The question raised is a mixed question of law and fact.

APPEAL from the judgment of the District Court of Chilaw.

Cases referred to:

1. *Robert Ediriwickrema v U.B.G. Abeyunga* –C.A. 523/90 –D.C. Tangalle 8649/RE - CAM 14.7.95.
2. *Thalagala v Gangodawila Co-operative Society Ltd.*, 48 NLR 472
3. *Jayawickrema v Silva* — 76 NLR 427

A.K. Premadasa, P.C., with C.E. de Silva for defendant-appellant
Sunil Cooray with Chitrananda Liyanage for plaintiff-respondent.

Cur.adv.vult.

August 30, 2002

DISSANAYAKE, J.

The plaintiff-respondent instituted this action seeking ejection of the defendant-appellant from premises rented to him bearing No. 61, Bazaar Street, Chilaw, on the ground of reasonable requirement of occupation by him for the purpose of residence and carrying on a business in the premises and damages. 01

The defendant-appellant filed answer denying the averments in the plaint and prayed for dismissal of the plaintiff-respondent's action.

The case proceeded to trial on fifteen issues and at the conclusion of the trial the learned District Judge by his judgment dated 02.11.1988 entered judgment in favour of the plaintiff-respondent. 10

It is from the aforesaid judgment that this appeal is preferred.

At the hearing of the appeal before this Court learned President's Counsel appearing for the defendant-appellant contended that the learned District Judge was in error when he entered judgment in favour of the plaintiff-respondent for the following reasons:-

- (1) That the plaintiff-respondent who came to Court on the ground of reasonable requirement of the premises by her for the purpose of conducting a business had abandoned that ground and had proceeded on reasonable requirement of the premises for her residence. 20
- (2) That the plaintiff-respondent has failed to prove that he has given notice of action to the Commissioner of National Housing under section 22 (1A) of the Rent Act, No. 07 of 1972, prior to the institution of this action.

It is interesting to note that from averments of paragraphs 7, 8, 9, and 10 and the contents of issue No. 6 raised by the plaintiff-respondent taken along with her oral testimony it is clear that the plaintiff-respondent sought ejection of the defendant-appellant on the premise that the premises was reasonably required for the purposes of residence and for carrying on a business by her. 30

Therefore, the contention of the learned President's Counsel for the defendant-appellant that there was abandonment of the original cause of action is untenable.

In regard to the question whether a copy of the notice to quit had been sent to the Commissioner of National Housing it is pertinent to observe that the plaintiff-respondent in her testimony had stated that she sent a copy of the quit notice to the Commissioner of National Housing in compliance with the requirements of section 22 (1A) of the Rent Act. She asserted in her testimony to the fact that such a letter was posted under registered cover to the Commissioner of National Housing and she produced the postal article receipt marked P1A which bore the postal date stamp of 8th December 1982, and this position has not been contested by the defendant-appellant. 40

However after the conclusion of oral submissions, in the written submissions tendered to Court learned President's Counsel appearing for the defendant-appellant has taken up the legal argument that since the premises in suit had been let prior to coming into operation of the Rent Act, No. 7 of 1972, and since the standard rent of the premises is below Rs. 100/- per month and in view of the prohibition of instituting an action for ejection on the ground of reasonable requirement for residence or business spelt out in section 22 (i)(bb) of the Rent Act, he contended that the plaintiff-respondent cannot have and maintain this action. He cited the decision of the unreported case of this court of *Don Robert Ediriwickrema v U.B.G. Abeyatunga*¹ in support of his contention. 50

It has been held in *Thalagala v Gangodawila Co-operative Society Limited*² and *Jayawickrama v Silva*³ that a pure question of law which is not a question which is not mixed with questions of fact can be taken up for the first time in appeal. 60

This question of law has been taken for the first time in appeal. There was no mention of this in the averments of the answer filed by the defendant-appellant. There was no issue raised on this question at the trial. This question of law taken for the first time in the written submissions has not been raised in the notice of appeal and the petition of appeal too.

This matter was not even taken up at the time when counsel made oral arguments, in this case. It was only taken up in the written submissions tendered after oral arguments were concluded. It is settled law that a pure question of law which is not a mixed question of law and fact can be taken up for the first time in appeal but if it is a mixed question of fact and law it cannot be done. (*Vide Thalagala v Gangodawila Co-operative Society Ltd. and Jayawickrema v Silva (supra)*).

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In my view this question is not a pure question of law. It is a mixed question of fact and law. To resolve this question necessarily evidence led in the case has to be examined.

If this question was averred in the answer filed in the District Court by the defendant-appellant and raised in the form of an issue it would have afforded an opportunity to the plaintiff-respondent to explain the facts and the law relating to this question of law.

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Therefore I am of the view that this matter of law which is taken for the first time in appeal by way of written submissions will cause prejudice to the plaintiff-respondent, and hence I disallow it.

Therefore there is no basis for this Court to interfere with the judgment of the learned District Judge.

I dismiss the appeal with costs.

SOMAWANSA, J. - I agree.

Appeal dismissed.