

**BEEBI JOHARA**  
**v.**  
**WARUSAVITHANA**

SUPREME COURT  
G. P. S. DE SILVA, C.J.,  
WADUGODAPITIYA, J. AND  
GUNASEKERA, J.  
S.C. APPEAL NO. 70/97  
C.A. NO. 45/88 (F)  
D.C. ANURADHAPURA NO. 11811/L  
24TH JUNE, 1998

*Vindictory suit – Claim of tenancy–Burden of establishing lawful possession – Duty of the court where defendant's claim is defective – S. 165 of the Evidence Ordinance – S. 134 of the Civil Procedure Code.*

The plaintiff had leased the premises owned by her to the defendant for 4 years. She alleged that the defendant failed to hand over possession of the premises after the expiry of the lease. The defendant admitted the lease but pleaded that the premises were governed by the Rent Act and claimed to continue in occupation of the premises as a statutory tenant. But the document which the defendant produced in support of his claim was inadequate.

**Held:**

1. The burden of proof is on the defendant to show that he is in lawful possession of the premises. The defendant failed to discharge the burden; hence the plaintiff was entitled to judgment.
2. Where the evidence is inadequate, the District Court is not required to ensure the production of relevant evidence before giving judgment.

*Per G. P. S. de Silva, CJ.*

"Neither section 134 of the Civil Procedure Code nor section 165 of the Evidence Ordinance was meant to fill in the gaps in the presentation of its case by a party to the action. While these sections confer a power upon the court, they do not place a burden upon the court".

**Cases referred to:**

1. *Theivandran v. Ramanathan Chettiyar* (1986) 2 Sri LR 219 at 222.
2. *Rewata Thero v. Haratala* 14 CLW 155.

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

*Faisz Musthapha PC with N. M. Shaheed, R. Ameen and Ms. F. M. Sulaiman* for the plaintiff-appellant.

*F. C. Perera with Upali Ponnampereuma* for the defendant-respondent.

*Cur. adv. vult.*

July 14, 1998

**G. P. S. DE SILVA, CJ.**

The plaintiff instituted these proceedings in July, 1986, seeking a declaration of title to premises No. 60, Market Place, New Town, Anuradhapura, ejection of the defendant and damages for unlawful possession of the premises. In her plaint she averred (a) that she is the owner of the premises, (b) that by agreement dated 20.2.82 (marked P1 at the trial) she leased the premises to the defendant for a period of 4 years from 1.3.82 on a monthly rental of Rs. 600, (c) that the period of the lease expired on 28.2.86 but the defendant

has failed to hand over possession of the premises to the plaintiff and remains in unlawful possession from 1.3.86, (d) that the defendant has failed to pay rent from September, 1985.

The defendant in his answer admitted the lease (P1) but pleaded that the premises were governed by the Rent Act and that as a "statutory tenant" he was entitled to continue in occupation of the premises. On this basis the defendant raised the issues Nos. 6 and 7. Having admitted the lease P1, the burden was on the defendant to establish his plea that he was the "statutory tenant" of the premises in suit. After trial, the District Court held with the defendant and dismissed the plaintiff's action. The plaintiff preferred an appeal against the judgment of the District Court to the Court of Appeal. The Court of Appeal while setting aside the judgment of the District Court proceeded to order a *trial de novo*. In the appeal before us, the plaintiff's complaint is against the order for a trial de novo.

Special leave to appeal to this court was granted on the following matters;

- (a) Did the Court of Appeal err in directing a re-trial in the circumstances of the case:
- (b) Did the Court of Appeal err in holding that the District Court was obliged to ensure "that inadequate information is not placed before it to come to its conclusions" and consequently misdirected itself in ordering a re-trial.

The main issue in the case was whether the premises were subject to the provisions of the Rent Act, and whether the defendant was in the position of a "statutory tenant" upon the expiry of the period of 4 years set out in the lease P1. As stated earlier, the burden of proof was on the defendant in as much as he had admitted the execution of the lease P1 and the ownership of the plaintiff. ". . . when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant *to show that he is in lawful possession.*" per Sharvananda CJ, in *Theivandran v. Ramanathan Chettiar*<sup>(1)</sup> at 222.

To prove "lawful possession" the defendant relied on "V2" and "V1". "V2" is the Gazette notification whereby the Urban Council limits of Anuradhapura were brought within the provisions of the Rent Act. The document which was challenged by the plaintiff and strongly relied on by the defendant both before the District Court and the Court of Appeal was "V1". This document "V1" purported to be an extract from the assessment register for the year 1968 issued by the Chairman of the Urban Council, Anuradhapura. However, as pointed out by Mr. Mustapha for the plaintiff-appellant, the Urban Council-Anuradhapura was not in existence in 1968. The reason is that by the Anuradhapura Preservation Board Act, No. 32 of 1961, the Anuradhapura Preservation Board was set up with effect from 13.6.61 to administer the town of Anuradhapura. A new Urban Council was constituted after the enactment of the Transfer of Powers (Anuradhapura Preservation Board) Law No. 25 of 1974. Thus "V1" could not have been issued by the Chairman of the Urban Council, Anuradhapura. In fact the District Judge himself expressed the view that it is unclear as to which authority made the assessment shown in "V1" for the year 1968. Nevertheless the District Judge, relying on "V1", which specified the annual value for 1968 as Rs. 1,304 held that the premises in suit were not "excepted premises" within the meaning of Regulation 3 of the schedule to the Rent Act.

Commenting on the above finding of the District Judge the Court of Appeal stated: "The trial Judge came to his finding without ensuring that all extracts from the Assessment Register from the year of first assessment were produced. He also did not ascertain as to which was the local authority in charge of such assessment . . . After all when a Judge has to come to a conclusion based on the assessments made by the local authorities with regard to any premises in suit, the court must ensure the filing of all relevant extracts from the Assessment Registers. The court should not sit back and say that it would give its determination only on what is placed before it. The court has a duty to make sure that inadequate information is not placed before it to come to its conclusion . . ." (emphasis added).

It must be noted that the proceedings before the District Court were "adversarial" in character. The Court of Appeal was in error when it

placed a burden on the District Court "to make sure that inadequate information is not placed before it. . . ." As a general proposition, "it is no part of a Judge's duty in a civil action to fill in the deficiencies in a case of one of the disputants by calling evidence on his own." per Nihill, J. in *Rewata Thero v. Horatala*<sup>(2)</sup> Sections 150, 151 and 163 of the Civil Procedure Code indicate that the burden is on each party to lead such evidence as is necessary to establish his case or his defence, having regard to the issues upon which the case proceeds to trial.

In the present case, the burden was clearly on the defendant to establish that his possession of the premises was lawful. For this purpose the defendant relied largely on "V1". The Court of Appeal correctly held that "V1" was "inadequate" to establish the case for the defendant. The necessary consequence is that the defence set up at the trial has failed. The plaintiff having discharged the burden that lay upon her, was entitled to judgment. In this view of the matter, the Court of Appeal was in error in making an order for a trial *de novo* with all the attendant delay and expense. Already 10 years have passed since the institution of the action and, what is more, the defendant has failed to pay rent to the plaintiff since September, 1985.

Finally, I wish to refer to section 134 of the Civil Procedure Code and section 165 of the Evidence Ordinance. Mr. F. C. Perera for the defendant-respondent relied on section 134 of the Civil Procedure Code in support of the view taken by the Court of Appeal. Section 134 of the Civil Procedure Code no doubt confers on the District Court the power "of its own motion" to summon any person as a witness to give evidence or to produce any document in his possession. Section 165 of the Evidence Ordinance confers *inter alia* the power on the Judge to "order the production of any document or thing". These are "enabling provisions" intended to be cautiously and sparingly used in the interests of justice. Neither section 134 of the Civil Procedure Code nor section 165 of the Evidence Ordinance was meant to fill in the gaps in the presentation of its case by a party to the action. While these provisions confer a power upon the court, they do not place a burden upon the court; they do not detract from the "adversarial" nature of the proceedings before the court.

For these reasons, I vary the judgment of the Court of Appeal by deleting that part of the judgment ordering a trial *de novo* and I direct the District Court to enter judgment for the plaintiff as prayed for in the plaint. The defendant must pay the plaintiff a sum of Rs. 2,500 as costs of appeal.

**WADUGODAPITIYA, J.** – I agree.

**GUNASEKERA, J.** – I agree.

*Judgment of the Court of Appeal varied.*

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