SANIPALA
v.
BAMUNUSINGHE

COURT OF APPEAL.
L. H. G. WEERASEKERA, J.
DR. ANANDA GRERO, J.
C.A. 314/84(F).
D.C. MATARA 41/RE
AUGUST 31, 1994.

Rei-Vindicatio Action – Tenancy – Licensee – Judicial Evaluation of Evidence – Authenticity of documents – Role of a Trial Judge.

Plaintiff-Respondent sought a declaration of Title to the land in question. The Defendant-Appellant was alleged to be a licensee, who attempted to create a Tenancy. The Learned District Judge accepted the Plaintiff-Respondent's claim.

Held:

(1) Though (V2) has been evaluated and considered with P5 and P6 no evaluation or examination of V2 has been made with V6. There has been no proper evaluation of the Evidence of the Grama Sevaka. No evaluation of whether D2 is authentic or not has been made though it was suggested to the contrary.

(2) What was sought to be evaluated is the content of the document (V2) without evaluating its authenticity and if authentic only then it would have required evaluation as to its content and legal import.

***Per* Weerasekera, J.**

> "Trial Judges should concern themselves not merely to be umpires in a friendly game of shadow strategy but should themselves investigate by means of questions and incisive and in-depth inquiry on the facts presented by Evidence and attempt to determine and thereby ascertain the truth so that they may be in a position to evaluate judicially the evidence presented."

APPEAL from the Judgment of the District Court of Matara.

Case referred to:

1. *Santhern Pulle v. Kathiresa Pulle* – 39 C.L.W. 01.

Faiz Musthapha, P.C. with *A. Panditharatne* for Defendant-Appellant.
N. R. M. Daluwatta, P.C. with *Daya Guruge* for Plaintiff-Respondent.

Cur. adv. vult.

October 11, 1995.
WEERASEKERA, J.

Plaintiff-Respondent sought a declaration of title to the land described in the schedule to the plaint bearing premises No. 83, Rahula Road, Matara. Plaintiff-Respondents position was that the Defendant-Appellant was in possession of the land and premises and that the Defendant-Appellant who was the licencee though requested in 1980 by Arnolis to deliver vacant possession did not do so. That thereafter the Defendant-Respondent by P1 attempted to create a tenancy by the deposit of rent for the months of October, November and December 1981, which was returned by the Plaintiff by P2 and that by P3 on 11.03.82 the day after P2 made a complaint to the Grama Sevaka.

The Defendant-Appellants position was that he took the premises in dispute on rent from the plaintiff's father Arnolis who is now dead and claimed to be a monthly tenant of the Plaintiff-Respondent in terms the Rent Act.

The question that had to be determined was whether the Defendant-Appellant was a licencee under Plaintiff-Respondent's father Arnolis and subsequently under the Plaintiff-Respondent or whether the Defendant-Appellant was a tenant.

This appeal is from the judgment of the Learned District Judge of Matara dated 28.8.84 declaring the Defendant's Appellant a licencee and the Plaintiff's-Respondent claim being upheld.

Learned President's Counsel for the Defendant Appellant urged that on a consideration of the judgment there has been no proper judicial evaluation of the Defendant-Appellant's case.

To recapitulate the evidence on behalf of the Plaintiff-Respondent briefly, it was their case that Defendant's Brother who gave evidence in support of the Defendant-Respondent was instrumental in getting the premises from Arnolis temporarily until the Defendant-appellant repaired his parental house as he was Arnolis wife's sister's son. That Arnolis orally requested the return of the premises in 1980 after which by P2 by the deposit of rent with the local authority the Defendant-Appellant attempted to create a tenancy and by P3 a complaint was

made by the Plaintiff-Respondent. The evidence led on behalf of the Defendant-Appellant was that the agreed rent was 50/- per month and that as the owner of the premises was his uncle the Defendant-Appellant he insisted on no receipts. That when Arnolis started to make demands for the return of the premises from 2.1.81, he made a complaint against Arnolis to the Grama Sevaka marked P1 and in consequence Arnolis made a statement V2 to the Grama Sevaka, where he stated that the Defendant-Appellant gave him Fifty Rupees monthly though not as rent. The Grama Sevaka who had served in this area for about 21 years produced V1 & V2 and testified to the fact that Arnolis signed V2. The signature on V2 is denied by a sister of the Plaintiff-Respondent regrettably though not by the Plaintiff-Respondent for reasons undisclosed. in order to support the denial of the signature on V2 and to suggest it was fraudulent the Plaintiff-Respondent produced documents P5 & P6. Whilst the Defendant-Appellant in order to support his assertion that V2 was in fact signed by Arnolis and that he signed differently at different times produced document V6.

On a careful examination of the judgment of the Learned District Judge of Matara dated 28.8.84, I find that though V2 has been evaluated and considered with P5 and P6 no evaluation or examination of V2 has been made with document V6. I also find that no proper evaluation of the evidence of the Grama Sevaka an Official against whom nothing is alleged and who had served in this area for 21 years has been made. No evaluation of the evidence of the Defendant-Appellant as to his inability to produce Rent Receipts has been attempted in the light of his evidence of the close relationship between Arnolis and the Defendant-Appellant. No evaluation of whether D2 is authentic or not has been made though it was suggested to the contrary. What was sought to be evaluated is the content of V2 without evaluating its authenticity and if authentic only then it would have required evaluation as to its content and legal import. It is my view that this judgment is seriously devoid of judicial evaluation of the Defendant-Appellant's case as a whole.

Though I would not go so far as to subscribe to the view that where there are two sides facing one another and manoeuvring for position and who for strategic reasons or through misconception or default fail to call witnesses or produce documents or by investigative

cross-examination reveal the truth the judge should enter the arena of conflict. Trial Judges should concern themselves not merely to be umpires in a friendly game of shadow strategy but should themselves investigate by means of questions and incisive and indepth inquiry on the facts presented by evidence and attempt to determine and thereby ascertain the truth so that they may be in a position to evaluate judicially the evidence presented.

The Learned District Judge has sought to accept the version of the Plaintiff-Appellant as it seems to me on not only grounds not although insufficient but without a proper evaluation of the Defendant-Appellant's case. In this case the Learned District Judge has not had the facts fully before him nor as he might have done exercised with indepth and incisive investigation of what was the truth nor has he evaluated even whatever evidence was available to him from the Defendant-Appellant's position.

In these circumstances, I cannot but agree with the sentiment expressed by Bertram C.J. in the case of Santhern Pulle v. Kathiresa Pulle [1] where it was

> **Held** "that where it appears to the Appeal Court that the Learned Trial Judge had to choose between the version of the opposing parties and adopted the version of one party, on grounds not all together sufficient while there exist certain points in favour of the other party which points have not been properly investigated, the justice of the case requires that the judgment should be pro-forma be set aside and the case remitted for a new trial where all the facts may be fully investigated".

For the reasons set out I set aside the judgment of the Learned District Judge of Matara, dated 28.8.84 and remit the case back to the District Court of Matara for a new trial *de-nevo.*

The Defendant-Appellant will be entitled to costs of this appeal fixed at Rs. 1,500/-

DR. ANANDA GRERO, J. – I agree.

Appeal allowed.