

GUNASEKERA AND ANOTHER
v.
LATIFF

COURT OF APPEAL

DE SILVA, J.,

WEERASURIYA, J.

C.A. NO. 895/97

D.C. COLOMBO NO. 15040/L

FEBRUARY 2, 1999

Rei Vindicatio Action – Defendant claims to be tenant – Who should begin? Civil Procedure Code – S. 150, Evidence Ordinance S. 101, 102, 103.

The plaintiff-respondent instituted action seeking a Declaration of Title, ejection of the defendants and damages. The defendants claimed to be the tenants of the premises.

Held:

1. Ordinarily the plaintiff has the right to begin, but where the defendant admits plaintiff's story and contends on some point of law or additional facts to be alleged by him, that the plaintiff is not entitled to any part of the relief, he claims, the defendant has the right to begin.
2. The question as to the party who should begin the case is linked to the question on whom the burden of proof lies in a suit.
3. While S. 101 Evidence Ordinance is concerned with the duty to prove a case as a whole, viz the overall burden of proof S. 103 regulates the burden

of proof as to a particular fact, however the devolution of the overall burden is governed by S. 102 which declares that the burden of proof lies on that person who would fail if no such evidence at all were given on either side. 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 he is in lawful possession – defendant must begin the case.

APPLICATION in Revision from the Order of the District Court of Colombo.

Cases referred to:

1. *Candappa nee Bastian v. Ponnambalampillai* – 1993 1 SLR 124 at 187.
2. *Theivandran v. Ramanathan Chettiar* – 1986 2 SLR 219.

Nihal Jayamanne, PC with *Noorani Amerasinghe* for defendant-petitioner.

S. Sivarasa, PC with *N. R. Sivendran* for plaintiff-respondent.

Cur. adv. vult.

March 30, 1999.

WEERASURIYA, J.

The plaintiff-respondent (hereinafter referred to as the plaintiff) by her plaint dated 28. 06. 1990, instituted action against the defendant-petitioners (hereinafter referred to as the defendants), seeking a declaration of title to the premises morefully described in the schedule to the plaint, ejectment of the defendants therefrom and damages. The defendants in their answer sought dismissal of the action on the ground that they were the tenants of the premises.

On 22. 03. 1996, the case came up for trial wherein two admissions were recorded relating to the jurisdiction and ownership of the premises as set out in paragraphs 2 and 3 of the plaint. Thereafter,

the plaintiff raised 2 issues and the defendants raised 10 issues. When further trial commenced on 12.05.1997, learned counsel for the plaintiff contended that the burden lay on the defendants to begin the case. Learned counsel for the defendants objected to this application whereupon the District Judge having directed the parties to tender written submissions by his order dated 14. 10. 1997, allowed the application of the plaintiff directing the defendants to begin the case. It is from the aforesaid order that this application for revision has been filed.

At the hearing of this application, learned President's Counsel for the defendants submitted that the District Judge had misdirected himself by holding that the burden lay on the defendants to begin the case. He contended that the burden to prove the facts constituting unlawful possession of the defendants as set out in paragraphs 2 - 8 of the plaint lay with the plaintiff.

The facts and circumstances set out in the plaint to establish the unlawful possession of the defendants were founded on the following basis, namely –

- (a) that at the time the plaintiff purchased the premises from the original owner Abbasbhoy by deed No. 2677 dated 16. 12. 1977 Panikkar Thomas Mathews was its tenant carrying on the business called Bombay Harmonium and thereafter he attorned to the plaintiff;
- (b) That Panikkar Thomas Mathews died in 1986 and the rent had been paid by the defendants falsely representing that Thomas Mathews was still alive;
- (c) that on the death of Thomas Mathews tenancy had come to an end.

Paragraphs 2 and 3 of the plaint admitted by the defendants at the commencement of the trial read as follows:

- "(2) One Abbasbhoy Mulla Musajee was the original owner of two adjacent premises bearing assessment Nos. 122 and 124 of Sea Street, Pettah, Colombo 11. The subject-matter of this action is premises No. 122, Sea Street, Pettah, Colombo 11, morefully described in schedule hereto.
- (3) Upon deed No. 2677 dated 16.12.1977 attested by Mr. Humza Zaheed, Notary Public, Colombo, the said Abbasbhoy Mulla Musajee sold and transferred the said premises described in the schedule hereto to the plaintiff above-named who became the absolute owner of the said premises No. 122, Sea Street, Colombo 11."

In terms of the provisions of section 150 of the Civil Procedure Code, the party having the right to begin is required to state his case giving the substance of the facts which he proposes to establish by evidence. Ordinarily the plaintiff has the right to begin, but where the defendant admits plaintiff's story and contends on some point of law, or additional facts to be alleged by him, that the plaintiff is not entitled to any part of the relief he claims, the defendant has the right to begin.

The question as to the party who should begin the case is linked to the question on whom the burden of proof lies in a suit or proceeding. The general rule dealing with the burden of proof is contained in section 101 of the Evidence Ordinance which provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist. This provision recognises the principle that a party must bear the burden of establishing the facts on which he relies for the remedy he seeks.

Section 103 of the Evidence Ordinance which makes provision for burden of proof as to any particular fact stipulates that burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. It would be clear therefore, while section 101 is concerned with the duty to prove a case as a whole, namely, the overall burden of proof, section 103 regulates *burden of proof* as to a particular fact.

However, the devolution of the overall burden is governed by section 102 which declares that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Learned President's Counsel for the defendants submitted that if no evidence is led by the plaintiff to explain the circumstances under which he accepted rent after 1986 the plaintiff's action for ejection fails.

The admission by the defendants that the plaintiff had acquired ownership of the premises by deed No. 2677 dated 16.12.1977, attested by Humza Zaheed, Notary Public, entitles the plaintiff to obtain a declaration that he is the lawful owner of the premises in suit.

The averments in paragraph 7 of the plaint was to the effect that on the death of Panikkar Thomas Mathews, tenancy in respect of the premises came to an end. While denying the averments in the said paragraph, the defendants in paragraph 5 of their answer averred that tenants of the said premises, from time to time, were the persons who carried on the said business under the name, style and firm of "Bombay Harmonium Company". In paragraph 6 of the answer, the defendants also averred that the present tenants of the said firm are the 1st and 2nd defendants and another person by the name of Jayapala. It is pertinent to observe that there was reference neither to a partnership at the time P. Thomas Mathews

attorned to the plaintiff nor to a partnership at the time of the death of P. Thomas Mathews or that they were subtenants or licensees under him at any time. It is to be noted that occupation by a subtenant or licensee of the tenant is not in law, unlawful occupation. The statutory protection afforded to a tenant can always be availed of by his subtenant or licensee.

Therefore, on the basis of the material disclosed in the answer, there was no basis for a new contract of tenancy in respect of the premises being created between the plaintiff and the defendants.

It was observed in *Candappa nee Bastien v. Ponnambalampilla*⁽¹⁾ at 187 as follows:

"Since title to the premises was admittedly in the plaintiff, the burden was on the defendant to show by what right he was in occupation of the premises."

In *Theivandaran v. Ramanathan Chettiar*⁽²⁾ it was held that when the legal title to the premises is admitted or proved to be in the plaintiff the burden of proof is on the defendants to show he is in lawful possession.

It would be seen, therefore, that the plaintiff is entitled as the absolute owner of the premises to the possession of such premises. If the defendants claim that they are the tenants of the premises in suit, burden lies on them to prove that fact, and on their failure the plaintiff would be entitled to an order of ejectment of the defendants from the premises in suit.

In view of the foregoing reasons, the contention of the learned counsel for the defendants that the burden lay with the plaintiff to begin the case is untenable.

Learned District Judge upon a consideration of the material before him had arrived at a finding that defendants must begin the case. Having examined the admissions and totality of averments in the plaint and the answer, there is no reason to interfere with the findings of the District Judge. Therefore, this application is refused with costs.

DE SILVA, J. – I agree.

Application dismissed.