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(i) It must establish quite objectively that a bodily injury is present.
(ii) The nature of the injury must be proved.
These are purely objective investigations.
(iii) It must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintended or some other kind of injury was intended.
Once these elements are proved to be present, the inquiry proceeds further.
(iv) It must be proved that the injury is sufficient to cause death in the ordinary course of nature.
This part of the inquiry is purely objective and inferential and has nothing to do with the intention of the offence.

(3) Once these four elements are established the offence is murder under Section 294

(v) It does not matter that there was no intention to cause death.
This part of the inquiry is purely objective and inferential and has nothing to do with the intention of the offence.

(vi) It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature.

Once the intention to cause bodily injury actually found to be present is proved, the rest of the inquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

HELD FURTHER :

(4) The dock statement is a bare denial except for the fact that he was at a certain place at the time of the incident. The dock statement does not create a reasonable doubt in the prosecution case - therefore though the trial Judge gave different reasons he has correctly rejected the dock statement.

Per **Sisira de Abrew, J.**

"The reason given by the trail Judge that he was rejecting the dock statement on the basis that the prosecution story was more probable than the defence story appears to be erroneous - the observation that the appellant should have given evidence is also wrong. We have considered the strong evidence led by the prosecution, in our opinion the above statements have not occasioned a miscarriage of justice - and no prejudice has been caused to the accused appellant"

APPEAL from the judgment of the High Court of Matara.

Cases referred to :

(1) *Fradd v. Brown and Co. 20 NLR 282 (PC)*
(2) *Alwis v. Piyasena Fernando - 1993 - 1 Sri LR 119*
(3) *Virsa Singh v. State of Punjab - AIR 1958. Vol 45*
(4) *Rajwant Singh v. State of Kerala - AIR 1966 SC 1874*
(5) *Hajinder Singh v. Delhi Administration AIR 1968 SC 867*
(6) State of Maharashtra v. Arum Selvam - *1989 Cr. L. J 191*

Dulinda Weerasuriya for accused - appellants.
Ayesha Jinasena SSC for *AG*

Cur. adv. vult.

September 14, 2007
Sisira de Abrew, J.

The accused appellant in this case was convicted of the murder of a man named Badahaddarage Gunapala and was sentenced to death. The accused - appellant was also convicted for causing hurt to one Ruwan Pathiranage Kamalawathie which is an offence under Section 315 of the Penal Code and was sentenced to six months rigorous imprisonment (R. 1)

This appeal is against the said convictions and the sentences. The second accused, who was charged along with the 1st accused on both counts, after the trial was acquitted by the learned trial Judge. The main ground urged by the learned Counsel for the appellant as militating against the maintenance of the convictions is that Kamalawathie, the eye witness, was not a credible witness.

Learned Counsel for the appellant contends that Kamalawathi, in her evidence, stated that injury No. - 1 was inflicted by the appellant with a tapping knife but according to the doctor injury No. - 1 could not have been caused by a tapping knife. He, therefore, contends that Kamalawathie was not a credible witness. I shall now examine this contention. Kamalawathie at no stage, stated that she saw the injury No. 1, which was on the right hand side of the head of the deceased, being inflicted by the appellant with a tapping knife. What Kamalawathie said was that she saw the injury on the back of the neck (injury No.12) being inflicted by the appellant with a tapping knife. Therefore the above contention has to be

rejected. Learned Counsel for the appellant, however, later admitted that he made a mistake on this point.

Kamalawathie throughout stated that the appellant was armed with a tapping knife. It was Kamalawathie's position that the injury on the back of the neck was caused by the appellant with a tapping knife. Kamalawathie did not see injury No. 1 being inflicted by the appellant. According to the doctor, injury No.1 could not have been caused by a tapping knife and to cause the injury No. 1 a heavy cutting weapon should be used. Counsel for the appellant, therefore, contends that injury No. 1 could not have been caused by the appellant. On the strength of these matters learned Counsel contends that Kamalawathie is not a credible witness. The doctor expressed the said opinion without examining the tapping knife which had got destroyed during a fire that broke out in the Magistrate Court. According to the Registrar of the Magistrate Court (M.C) a knife has been handed over to the M.C. as a production in this case. The blade of the knife was 9 inches long and the handle of the knife was 5 inches long.

It was the case for the prosecution that around 9.00 p.m on 06.12.1987 the appellant came near the doorstead of the deceased's house and called out the deceased. When the deceased followed by his wife, came to the door stead and made inquiries, the appellant attacked the deceased on his neck with a tapping knife. The deceased due to this attack fell on the ground. The appellant thereafter, dragged Kamalawathie, the wife of the deceased, from the door stead of the house to a place in the compound and attacked her with that tapping knife. This distance was about 35 to 40 feet. She sustained bleeding injuries. The appellant, thereafter, leaving Kamalawathie there, again came near the deceased and inflicted injuries on the deceased. *Vide* page 76 of the brief. The second accused at this time picked up a club and attacked the deceased. At this time Kamalawathie ran away from the scene of crime and informed a person called Kurun who was living about 1/4 of a mile away from the house of the deceased, about the attack on her husband by the appellant and the second accused. When Kamalawahie ran away, the appellant and the second accused were at the place where the deceased was lying fallen. *Vide* page 89 and 90. At page 79 of the brief she has, however, stated that when she was shouting the appellant and the second accused ran away from the scene. Counsel for the appellant therefore contents that witness Kamalawathie contradicted herself on this point. On this matter it has to be noted that

Kamalawathie was giving evidence after 14 years of the incident. We therefore think that due to human errors and weaknesses this kind of contradiction can occur. At pages 126, 127 and 128 of the brief she again confirms the position that when she ran way from the scene, the appellant and the 2nd accused were still attacking the deceased. Therefore it is seen that after the appellant inflected injuries on Kamalawathie she ran away from the scene of crime and the appellant and the 2nd accused were still present at the scene of crime. Therefore it is possible to argue that, at this particular time, the appellant, who had already inflicted injuries on the deceased inflicted injury No. 1 with the Kathy found by the Police at the scene of the crime. Thus, Kamalawathie may not have seen the injury No.1 being inflicted. It is pertinent to note that a blood stained Kathy was found by the police at the scene of crime. *Vide* page 238 of the brief. Kamalawathie says that she was attacked with a tapping knife. This shows that the Kathy was not used to attack Kamalawathie. There was no evidence to suggest that any of the accused sustained injuries. Only two persons sustained injures. They are the deceased and his wife Kamalawathie whose injuries were inflicted with a tapping knife. There was blood on the Kathy. All these circumstances will show that the Kathy had been used in the attack of the deceased. The question is : who used it. There was no direct evidence on this point. But when Kamalawathie ran away from the scene, the appellant and the second accused were attacking the deceased. When both accused at the inception, came to the door stead of the house of the deceased, the second accused was not carrying any weapon. The 2nd accused picked up a club from the compound of the deceased only after the appellant attacked the deceased. This was only a club but not a Kathy. There was no evidence to suggest that the 2nd accused was armed with any cutting weapon. Who had the desire to see cut injuries on the deceased? It was the appellant. Only four persons were present at the time of the incident. They were the deceased, his wife, the 2nd accused and the appellant. From the above circumstances the only inference that can be drawn is that the Kathy was used only by the appellant and he, using the Kathy, inflicted injury No. 1 on the deceased. This inference is the one and only, irresistible and inescapable inference that can be drawn from the facts of the case. Learned trial Judge was mindful of this inference. *Vide* page 286 of the brief. From the above facts, it is seen that Kamalawathie could not have seen the injury No.1 being inflicted.

As I pointed out earlier, Police found a blood stained kathy at the scene of crime when they visited the scene. It is seen that Kamalawathie had not

stated about a Kathy being used by the appellant and she had only stated what she had seen. Therefore it is reasonable to conclude that Kamalawathie gave evidence without exaggeration. Since the learned Counsel for the appellant contends that Kamalawathie is not a credible witness, following matters should be considered in order to appreciate the strength of the argument:

(1) Kamalawathie too sustained cut injuries. This shows that Kamalawathie was present at the scene of crime.
(2) Within a matter of minutes after the incident Kamalawathie went and told Kurun that the appellant and the 2nd accused had attacked her husband. Kurun in his evidence confirms this position.
(3) Kamalawathie disclosed the name of the appellant to the doctor as the person who inflicted injuries on her, *Vide* page 178 of the brief.
(4) She made a statement to the investigating officer at 8.30 a.m on the following day. The above items will show that Kamalawathie has passed the test of promptness.
(5) She had reasons to stay in the house of the deceased since she was the wife of the deceased.
(6) Kamalawathie's story is corroborated by the presence of blood stains at the door stead and in the compound.
(7) She has given evidence without exaggeration.

Entirety of Kamalawathie's evidence was not recorded before the learned trial Judge who convicted the appellant but a part of her evidence was recorded before the learned trial Judge who convicted the accused. Learned trial Judge at page 279 observed the demeanor of the witness and came to a favorable finding with regard to her credibility. Considering the above matters, we are of the opinion that Kamalawathie is a credible witness and we are unable to find fault with the learned trial Judge's finding, when he concluded that Kamalawathie was a credible witness. Court of Appeal will not lightly disturb a finding of a trial Judge with regard to the acceptance or rejection of a testimony of a witness, unless it is manifestly wrong, when the trial Judge has taken such a decision after observing the demeanor and the deportment of a witness. This is because the trial Judge has the priceless advantage to observe the demeanor and the deportment of the witness which the Court of Appeal does not have. In this regard I am guided by the judgment of the Privy Council in *Fradd v. Brown and Co.*[1] wherein Privy Council stated thus". It is rare that a decision of a Judge so

express, so explicit, upon a point of fact purely, is overruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in question of veracity so direct and so specific as these, a Court of Appeal will over - rule a Judge of first instance." Also see *Alwis v. Piyasena Fernando* [2] wherein Lord Chief Justice G. P. S. de Silva held thus: "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal". Having considered the above judicial decisions and the observation of the trial Judge we reject contention of the learned Counsel for the appellant that Kamalawathie was not a credible witness.

I have already discussed the inference that it was the appellant who inflicted injury No. 1 on the deceased and it could not have been seen by Kamalawathie. Considering all these matters, we are unable to find fault with the conclusion reached by the learned trial Judge that all cut injuries had been caused by the appellant.

Assuming without conceding that injury No. 1 was not caused by the appellant, I would like to consider the question whether the other 12 cut injuries found on the body of the deceased could have caused the death of the deceased. Doctor expressed the opinion that to cause injury No. 10,16 and 17 a heavy cutting instrument should be used but he also expressed the opinion that those injuries could have been caused by a sharp cutting weapon. There was no evidence to suggest that the knife used in this case was not a heavy one. According to the evidence of Kamalawathie the weapon used by the appellant is a tapping knife. Therefore injury No. 10,16,17 too could have been caused by the same weapon. The doctor at page 167 of the brief, expressed the opinion that apart from the injury No 1 the other cut injuries could have caused the death due to intense bleeding. This means the other 12 cut injuries when taken together were sufficient to cause death in the ordinary course of nature. Considering the above medical evidence. We are of the opinion that even without injury No. 1, the other 12 cut injuries could have caused the death of the deceased. Therefore the appellant can be convicted of the offence of the murder even under limb 3 of Section 294 of the Penal Code. In this contention I would like to consider the judgment of the Indian Supreme Court in *Virsa Singh*

v. State of Punjab.[3] The Indian Supreme Court in the above case discussing the third limb of Section 300 of the Indian Penal Code which is in terms identical with Section 294 of the Ceylon Penal Code observed as follows: "To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 thirdly.

First it must establish, quite objectively that a bodily injury is present:

Secondly the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintentional or that some other kind of injury was intended.

Once these elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the inquiry is purely objective and inferential and has nothing to do the intention of the offender. Once these four elements are established by the prosecution (and of course, the burden is on the prosecution throughout) the offence is murder under Section 300 it does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature ..... Once the intention to cause bodily injury actually found to be present is proved, the rest of the inquiry is purely objective and the only question is whether , as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death." This judgment was cited with approval in so many later cases such as *Rajwant Singh v. State of Kerala* [4] *Hajinder Singh v. Delhi Administration* [5] and *State of Maharashtra v. Arum Selvam.* [6]

The learned trial Judge at pase 276 favorably considered the question whether the accused is guilty of murder even without the injury No. 1 being inflicted.

Learned Counsel for the appellant referring to pages 292,293 and 294 of the brief contends that the approach by the learned trial Judge in evaluating

the dock statement was wrong. He also contends that the observation by the learned trial Judge that the appellant should have given evidence was wrong.

Learned trial Judge rejected the dock statement since it was fraught with falsehood. Further the learned trial Judge observed that the dock statement of the appellant was not capable of creating a reasonable doubt in the prosecution case. However the learned trial Judge , having considered the dock statement, concluded that the prosecution story is more probable than the defense story.

Learned trial Judge, having considered all these matters, rejected the dock statement. We have examined the dock statement of the 1st accused-appellant. It is a bare denial except for fact that he was at one Jayasinghe's place at the time of the incident. In our view the dock statement does not create a reasonable doubt in the prosecution case. Therefore learned trial Judge, though he gave different reasons, has correctly rejected the dock statement. The reason given by the learned trial Judge that he was rejecting the dock statement on the basis that the prosecution story was more probable than the defence story appears to be erroneous. The observation by the learned trial Judge that the appellant should have given evidence was also wrong. We have considered the strong evidence led by the prosecution in this case. In our opinion, the above statements made by the learned trial Judge have not occasioned a miscarriage of justice. We, therefore, acting under proviso to Article 138 of the Constitution and proviso to section 334 of Criminal Procedure Code, hold that no prejudice has been caused to the appellant by the above conclusion of the trial Judge. Considering all these matters, We hold that there is no merit in the contentions raised by the learned Counsel for the appellant. We affirm the convictions and the sentences imposed by learned trial Judge and dismiss the appeal.

RANJITH SILVA. J - I agree

Appeal dismissed.

JAYASEKARA
V
WIMALARATNE

COURT OF APPEAL
TILAKAWARDANE.J (P/CA)
WIJAYARATNE. J
CA 91/92 (F)
DC COLOMBO 7503/RE
JULY 25, 2003

Rent Act No. 7 of 1972 - Tenant attorning to new landlord - New contract? Reasonable requirement Section 18, Section 22 (1) B- Sections 27 (7) - Tenant in occupation prior to the predecessor in title of plaintiff acquiring title - Notice undated - Receipt admitted - specified date ? Rent Restriction Act 29 of 1948 - Compared.

The plaintiff - appellant instituted action seeking ejectment of the defendant - respondent from the premises in suit - on the ground of reasonable requirement. It was the position of the plaintiff that, the defendant was originally the tenant of her mother and had attorned to her as landlord and become her tenant since then, after the property was gifted to her by the mother. The defendant - respondent denied receiving the notice, and pleaded that the plaintiff- appellant was not entitled to recover possession on the ground of reasonable requirement in view of Section 22 (7), in as much as her occupation was from 1942 as the wife of the former tenant on whose death she succeeded to the tenancy.

The plaintiff gave notice under Section 22 (1) (b) terminating the tenancy. The defendant - respondent denied that she received the notice of termination of tenancy, and took up the position that the plaintiff-respondent is not entitled to recover possession on grounds of reasonable requirement in view of Section 22 (7) in as much as her occupation was since 1942 as wife of the former tenant on whose death she succeeded to the tenancy.

The District Court held that, the defendant-respondent came into occupation, after the Rent Act came into operation and held that the plaintiff - appellant failed to prove that notice as required under Section 22 (1) b was given and the plaintiff - appellant was not entitled to recover vacant possession on grounds of reasonable requirement in view of the position that the defendant -respondent was in occupation even prior to the predecessor in title of the plaintiff acquired title and the defendant - respondent succeeded to tenancy upon the death of her husband and it is not open to question the fact of notice under Section 18

after having continued as tenant since 1987 upon the death of the husband.

The trial judge held with the defendant - respondent.

Held:

(1) The plaintiff has led sufficient evidence to establish that a notice had been addressed to the defendant and the cover so addressed was delivered at the address mentioned therein.

Furthermore, there was a specific admission by defendant - respondent in her evidence that she received the notice requiring her to vacate the premises.

(2) The defendant entered into a new contract of tenancy first in 1967 with the mother of the plaintiff and secondly in 1988 attorned to the present plaintiff.

In the light of the specific admission by the defendant-respondent in her evidence that she received the notice requiring her to vacate the premises, the trial judge could not have held that there is no proof of the service of notice.

Per **Wijeyaratne**, J.

"The concept of 'specified date' should be linked to the Rent Restriction Law effective from 1948 and it could not hence be applied in the instant case to operate retrospectively from 1942 the Rent Restriction Act 29 of 1948 was not made retrospective by express enactment."

Held further:

(3) The defendant-respondent was the tenant of the mother of the plaintiff - respondent since 1967 and the plaintiff mother acquired title upon a gift from her mother, the previous landlord and the defendant-respondent attorned to the plaintiff-appellant on 1.3.1988 upon being called upon to do so. The defendant entered into a new contract of tenancy first in 1967 with the mother of the plaintiff and secondly on 1.3.1988 attorning to the present plaintiff.

(4) The trial judge who afforded the protection of Section 22 (7) to the defendant did not appear to consider the relevant facts. The trial Judge erred in law in affording protection to the defendant-respondent without first determining the occupation of the premises prior to 'specified date'.

(5) It is clear that for a surviving spouse to succeed to the tenancy, giving written notice is important - Section 18 - such notice would entitle him to a fresh contract of tenancy coming from the first day of the succeeding month.

Section 22 (7) of the Rent Act affords the protection to a tenant so succeeding to the deceased tenant only. The defendant - respondent as the tenant claiming the protection under Section 22 (7) should establish that she had succeeded to the tenancy of her late husband by giving notice under Section 18.

(6) The defendant has failed to establish such succession. Her continuance as tenant upon payment of rent for succeeding month, though sufficient to place her on footing of a tenant will not suffice to entitle her to reckon the period of occupation to the date of occupation of her deceased spouse.

(7) The date of occupation of the premises in suit by defendant has to be reckoned from the date of creation of the contract of tenancy only.

The attornment was on 1.3.1988 creating a fresh contract of tenancy the date of occupation by defendant would lawfully be reckoned from such date and such attornment admittedly was consequent to notice of the plaintiff acquiring ownership being given to her will not bar the plaintiff from instituting action.

Per Wijeratne, J

"Occupation in relation to the provisions of the Rent Act must be interpreted to mean the occupation as a tenant and not the simple occupier in any capacity because the Rent Act only regulates occupancy of tenant and none other".

(8) The trial judge erred in law when he refused to consider reasonableness of the requirement as he held against the plaintiff on other grounds. The defendant has not given any evidence of her requirements to continue in occupation or of any hardships she would face if she is to leave the premises - on the face of the record there is only the requirements of the plaintiff to establish and there is nothing Court could relatively assess. This issue on reasonable requirement should have been answered in the affirmative.

(9) The Plaintiff through unchallenged evidence has proved her reasonable requirement of the house.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to :

1. *University of Ceylon vs. Fernando* 59 NLR 9
2. *Guneratne vs. Appuhamy* 9 NLR 90
3. *Somasunderalingam vs. Lebbe* CA 47/90 - CAM 10.5.2002
4. *Arif vs. Razik* 1985 1 sri LR 162
5. *Ramen vs. Perera* 46 NLR 133
6. *Athukorale vs. Navarathnam* 49 NLR 461
7. *Gunasena vs. Sangarepillai* 219 NLR 473

Dr. J. de Almeida Gunaratne with *Kishali Pinto Jayawardane* for plaintiff appellant

Romesh de Silva PC with *Geethaka Gunawardane* for defendant - respondent.

Cur. adv. vult.

October 14, 2003

P. Wijeyaratne, J.

This is an appeal preferred by the plaintiff-appellant against the judgment and decree dated 19.02.1992 of the Additional District Judge of Colombo. The plaintiff - appellant instituted this action in June, 1990 against the defendant seeking ejectment of the defendant-respondent from the premises in suit and for recovery of damages. The action was filed on the ground that the premises in suit occupied by the defendant- respondent as tenant plaintiff was reasonably required by the plaintiff - appellant for her occupation or occupation of the member of her family. The action was on the basis that the defendant-respondent was her tenant and the premises are governed by the provisions of the Rent Act. The plaintiff - appellant pleaded that the defendant- respondent had attorned to her as landlord with effect from 01.03.1988 and became her tenant since then.

The plaintiff - appellant required the defendant - respondent to attorn to her as landlord after her acquisition of to the premises in suit on a deed of gift from her mother who was admittedly the landlord of the defendant-respondent prior to such attornment since 1967 consequent to the death of her husband who himself was the tenant of the premises in suit since 1945.

The plaintiff -appellant gave notice under section 22 (b) allegedly on 30.11.88 terminating the tenancy and requiring the defendant - appellant to hand over vacant possession of premises in suit on 31.12.1989.

The defendant - respondent filing answer admitted having attorned to the plaintiff as landlord on 01.03.1988 and denied that she received notice of termination of tenancy above referred to. In her answer the defendant - respondent took up position that the plaintiff - appellant was not entitled to recover possession of the premises in suit on grounds of reasonable requirement in view of the provisions of section 22 (7) of the Rent Act in as much as her occupation of the premises was since 1942 as wife of the former tenant on whose death she succeeded to the tenancy.

At the trial plaintiff-appellant, her mother and postal authorities gave evidence for the prosecution and the defendant-respondent gave evidence for the defense. The main thrust of the issues were on the question of notice in terms of section 22 (10 (b) being given and the protection the defendant-respondent claims under the provisions of section 22 (7) of the Rent Act by reason of her occupation of the premises prior to the present plaintiff acquiring title to the premises. The learned trial Judge made findings that the defendant-respondent came in to occupation of the premises in suit after the Rent Act came into operation in March, 1972 and held that the plaintiff-appellant failed to prove that notice as required by section 22 (1) (b) was given and in any event the plaintiff-appellant was not entitled to recover vacant possession on grounds of reasonable requirement in view of the position that the defendant- respondent was in occupation of the premises even prior to the predecessor -in-title of the plaintiff acquired title to the premises in suit and the defendant-respondent succeeded to tenancy upon death of her husband and it is now not open to question the fact of notice under section 18 of the Rent Restriction Act 29 of 1948 after her having continued as tenant since 1967 upon the death of her husband.

The plaintiff -appellant argued that the findings of the learned District Judge that the service of notice undated was not proved without the lawyer who sent the same being a witness to such fact was erroneous specially in view of the admission of the notice having been received by the defendant-appellant. The plaintiff had led sufficient evidence to establish that a notice had been addressed to the defendant and the cover so addressed was delivered at the address mentioned therein. These facts are sufficient to draw the presumption that notice had been given to the defendant - respondent. The decision of *University of Ceylon vs. Fernando* [1] is relevant to the facts of this case. However in light of the specific admission by the defendant-respondent her evidence that she received the notice requiring her to vacate the premises (Vide page 61 and 62) the learned District

Judge could not have held that there is no proof of the service of notice. The issue relating to the same should have been answered affirmative.

On behalf of the plaintiff-appellant it was also urged that application of section 22 (7) to the present case is erroneous so far as the tenancy of the defendant-respondent with the plaintiff-appellant is a new contract of tenancy created with the attornment on 01.03.1988 and hence the court need not have considered the period of occupation beyond the commencement of the new contract of tenancy entered into between the parties on 01.03.1988. The concept of "specified date" should be linked to the Rent Restriction Act effective from 1948 and it could not hence be applied in the instant case to operate retrospectively from 1942, as the Rent Restriction Act No. 29 of 1948 was not made retrospective by express enactment. Attention of court is drawn to the decision of *Gunaratne vs. Appuhamy*[2] and *Somasundralingam vs. Lebbe.* [3]

It is common ground that the defendant-respondent the tenant of the mother of plaintiff-respondent since 1967 and plaintiff's mother acquired title to the premises in suit in the year 1945 from her father. The present landlord, the plaintiff-appellant acquired title to the premises upon a gift given by her mother the previous landlord and the defendant-respondent attorned to the plaintiff - appellant on 01.03.1988 upon being called upon to do so. It is significant to note that the defendant entered into new contracts of tenancy of the premises first in 1967 with the mother of the plaintiff and secondly on 01.03.1988 attorning to the present plaintiff.

The facts are relevant to determine whether the provisions of section 22 (7) operate as a bar to the maintainability of this action. Section 22 (7) enacts,

> *"... .. .. .. Where the ownership of such premises was acquired by the landlord, on a date subsequent to the specified date, by purchase or by inheritance or gift other than inheritance or gift from a parent or spouse who had acquired ownership of such premises on a date prior to the specified date."*

Further, the proviso to such section states.

> *"In this subsection" specified date" means the date on which the tenant for the time being of the premises, or the tenant upon whose death the tenant for the time being succeeded to the tenancy*

under section 36 of this Act or section 18 of the Rent Restriction Act (No. 29 of 1948), came into occupation of the premises'.

In the present case, the learned district judge who afforded the protection of Section 22 (7) to the defendant did not appear to consider the relevant facts before applying the subsection to preclude the plaintiff from obtaining the decree for ejectment. He merely commented that it is not now open to the landlord to question the succession of the tenant upon the death of her husband by giving notice under section 18 of the Rent Restriction Act, after having continued to receive rent for several years on the basis of her tenancy of the premises. The learned District judge erred in law in affording such protection to the defendant-respondent without first determining the occupation of the premises prior to "specified date". According to the meaning of the "specified date" a tenant is only entitled to reckon the date of occupation of his or her deceased spouse only if he or she had succeeded to tenancy under the relevant provisions, in the instant case under section 18 of the Rent Restriction Act No. 29 of 1948.

In terms of Section 18 (2),

Any person who,

(a) is the surviving spouse ..... shall be entitled to give written notice to the landlord before the tenth day of the month succeeding .... And upon such written notice being given, such person shall.. ... be deemed for the purposes of this Act to be the tenant of the premises .... "

It is amply clear that for a surviving spouse to succeed to the tenancy, giving written notice in terms of section 18 is imperative *Arif v. Razik*[4] such notice would entitle him to a fresh contract of tenancy commencing from the first day of the succeeding month.

Subsection 22 (7) of the Rent Act No. 7 of 1972 affords the protection to a tenant so succeeding to the deceased tenant only. Thus it is most relevant that the defendant-respondent as the tenant claiming the protection under section 22 (7) should establish that she had succeeded to the tenancy of her late husband by giving notice in terms of section 18 of Rent Restriction Act. In the instant case the defendant has failed to establish such succession. Her continuing as tenant upon payment of rent for succeeding

months, though sufficient to place her on the footing of a "tenant", will not suffice to entitle her to reckon the period of occupation to the date of occupation of her deceased spouse.

Accordingly the date of occupation of the premises in suit by the defendant has to be reckoned from the date of creation of the contract of tenancy only. With admitted attornment on 01.03.1988 creating a fresh contract of tenancy, the date of occupation by the defendant would lawfully be reckoned from such date and such attornment admittedly was consequent to notice of the plaintiff acquiring ownership of the premises being given to her, will not bar the plaintiff from instituting and maintaining this action against the defendant. The defendant - respondent being the tenant of the mother of the plaintiff who gifted the property to the plaintiff in 1987, at best can only be given the benefit of her tenancy under the predecessor -in-title of the plaintiff and it is an admitted fact that her tenancy under the mother of the plaintiff was from 1967 only.

"Occupation" in relation to the provisions of the Rent Act must be interpreted to mean the occupation as a tenant and not the simple occupation in any other capacity because the Rent Act only regulates occupancy of tenant and none other. For instance Rent Act has no application or relevance to the occupation of a lessee, licensee or a trespasser or a boarder. Hence, the occupation referred to in the meaning of the term "specified date" should necessarily mean the occupation as a tenant only. In any event the Rent Act No. 7 of 1972 or Rent Restriction Act No. 29 of 1958 has no retrospective operation and cannot regulate or govern the occupation of a premises prior to such act coming into force vide *Gunaratne v Appuhamy (supra).*

It is also argued that the learned District Judge had erred in law when he decided that it is not necessary to answer the issue relating to the reasonable requirement of the premises by the plaintiff-appellant. The learned district Judge has held that in view of his answers to other issues, specially the issues relating to notice of termination of tenancy being given and the maintainability of the action, the question of reasonable requirement does not arise for consideration. It is apparent that the learned District Judge has mixed up priorities in considering the facts and answering issues. The prime concern of an action of this nature would be then to consider reasonableness of the requirement of this landlord, for, if the reasonable requirement is established only the court would have to consider

the fulfillment of other requirement of law such as, requisite notice being given and the operation of the bar stipulated in subsection 7 of section 22.

The learned Judge has erred in law when he refused to consider reasonableness of the requirement as he held against the plaintiff on other grounds. Upon a consideration of evidence on record it is evident that the plaintiff through unchallenged evidence has proved her requirement of the house for occupation and the defendant-respondent too has accepted (Page 107) the requirements of the plaintiff-appellant. However, the defendant has not given any evidence (even in her evidence in chief) of her requirements to continue in occupation of the premises or of any hardships she would face if she is to leave the premises.

Accordingly on the face of the record there is only the requirements of the plaintiff to establish and there is nothing court could relatively assess. Vide (*Ramen v. Perera)* [5] *(Athukorale v. Navaratnam)*[6] *(Gunasena v. Sangarapillai)* [7]

Thus it is apparent that on the evidence on record the learned District Judge should have answered the issue No. 1 in the affirmative.

Consequent to the above conclusions the appeal of the plaintiff appellant is allowed. The judgment of the District Judge dated 19.02.1992 and the decree entered thereon are set aside. Judgment is entered in favour of the plaintiff as prayed for in terms of prayer A. B and C of the plaint. However, it is directed that writ of ejectment should not be issued till 31.03.2004.

The appeal is allowed with costs in a sum of Rs. 8,000/-

Shiranee Tilakawardane, J. - I agree

Appeal allowed.

JAYASINGHE
V
LEELAWATHIE AND OTHERS

COURT OF APPEAL
WIMALACHANDRA.J
CALA 183/2005 (LG)
D.C. KEGALLE 3817/L
MARCH 31, 2006

Civil Procedure Code, Sections 121 (2), Sections 154 (3), Sections 175 (2) - Listing of documents - Cross examination - Documents tendered - Photocopy - Applicability of proviso to Section 175 (2) - Legally admissible ?- Genuine ? -Authentic ?

When a witness for the defendant was under cross examination, the plaintiff sought to mark a certain document through the witness; before marking the document it was shown to the witness who admitted that, the document has his signature. The document was a certified copy of a letter, ratified as a true copy. The plaintiff objected to the production on the basis that it is a photo copy.

The Court upheld the objection and further observed that the said document is not listed in terms of Section 121 (2).

Held :

(1) The trial Judge has totally ignored the 2nd proviso to *Section 175* (2) - the document was produced when the witness was under cross examination, the document could have been produced in cross examination though not listed, provided the document is authentic, genuine and reliable.

(2) (a) When a witness identifies the document by admitting his signature, authenticity is established.

(b) It was a photocopy of the original document certified by the Attorney - at - Law.

(c) Admission by one party constitutes primary evidence against him without the production of the original.

APPLICATION for leave to appeal from an order of the Additional District Judge, Kegalle.

M. S. A. Saheed for the plaintiff - petitioner
D. Jayasinghe for the defendant - respondents.

Cur. adv. vult.

October 12, 2006
WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the learned Additional District Judge of Kegalle dated 03.05.2005. Briefly the facts relevant to this application are as follows :

The plaintiff closed his case leading in evidence the documents marked P1 to P9. Thereafter the 1st defendant gave evidence and also called two witnesses Podinona and Jayasena, who is the brother of the plaintiff and the 1 st defendant. When Jayasena was under cross - examination, the counsel for the plaintiff sought to mark the document "P10" through the witness. Before marking the document it was shown to the witness, who admitted that the document has his signature. This document is a certified photocopy of a letter sent to the National Housing Development Authority, Kegalle, and the document is certified as a true photocopy by the plaintiff's Attorney - at - Law. The 1st defendant objected to the production of the document "P10" on the basis that it is a photocopy. On this objection raised by the 1st defendant's Attorney - at - Law, the learned judge directed the parties to tender written submissions on this objection. Thereafter the learned Additional District Judge delivered the order on 03.05.2005 refusing to allow the plaintiff to produce the said document through this witness. It is against this order the plaintiff has filed this application for leave to appeal.

In the instant case, when the document "P10" was shown to the witness he admitted his signature and said he had signed the document. At this stage the counsel for the 1 st defendant objected to this document being admitted on the sole ground that it is a photocopy. The learned Judge in his order held that since the original document was with the National Housing Development Authority, the plaintiff can call the National Housing Development Authority to produce the original. He also held that the said document is not listed in terms of section 121 (2) of the Civil Procedure Code.

In terms of the explanation to section 154 (3) of the Civil Procedure Code, when a document is tendered to a witness'" if the opposing party objects to its being admitted in evidence, then two questions arise for the Court.

Firstly, whether the document is authentic, in other words, is it what the party tendering it represents it to be;

Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it."

The trial Judge has totally ignored the 2nd proviso to section 175 (2) of the Civil Procedure Code when he held that the document in question was not listed in terms of section 121 (2) of the Civil Procedure Code. The trial Judge failed to appreciate that the said document was produced when the witness was under cross - examination.

Section 175 (2) states thus :

"A document which is required to be included in the list of documents filed in court by a party as provided by section 121 and which is not so included shall not, without the leave of the court, be received in evidence at the trial of the action :

Provided that nothing in this subsection shall apply to documents produced for cross examination of the witnesses of the opposite party or handed over to a witness merely to refresh his memory"

It will be seen that under the 2nd proviso to Section 175 (2) of the Civil Procedure Code the document could have been produced in cross - examination though not listed, provided that the said document is authentic, genuine and reliable, and if authentic, it constitutes legally admissible evidence. The author of the document (P10) is the 1st defendant, who was under cross-examination when the counsel for the plaintiff sought to produce the said document (P1 0) through him. He identified the document by admitting his signature and it was a certified photocopy of the original document certified by the Attorney - at - Law of the 1st defendant. When a witness identifies the document by admitting his signature, authenticity is established, a party relying on the contents of the document, for any purpose other than identifying it, must adduce primary evidence of its contents . The original document is the primary evidence. However an admission by one party constitutes primary evidence against him, without the production of the original. In most cases when the original document

is not with the maker of the document, secondary evidence will be given by means of a certified copy. Secondary evidence can consist of oral evidence being given of the contents of a document by a witness who is the maker of the document, who is able to recollect the content of the same.

For these reasons, leave to appeal is granted. I allow the appeal and set aside order of the learned Additional District Judge dated 3.5.2005.The plaintiff will be entitled to costs in a sum of Rs. 10,500/-.

Appeal allowed.

SIRIPALA
V.
LANEROLLE AND ANOTHER

COURT OF APPEAL
IMAM.J
SARATH DE ABREW.J
CA PHC APN 101/2007
MC GALLE 86042
HCRA601/07
AUGUST 30,31/2007
SEPTEMBER 12/2007
OCTOBER 18/2007

Primary Courts Procedure Act - section 66 - Order of Magistrate's Court - Revision in High Court dismissed - Revisionary jurisdiction of the Court of Appeal- When applicable ?- Discretionary remedy - Uberrima fides towards Court - Exceptional circumstance - Have to be pleaded ?

The petitioner instituted action in terms of section 66 of the Primary Courts Procedure Act. Action was dismissed. The Revision application filed in the High Court was also dismissed. The petitioner thereafter moved in Revision in the Court of Appeal. On an objection lodged that Revision does not lie.

Held :

(1) Revisionary power is a discretionary power and its exercise cannot be demanded as of right unlike the statutory remedy of appeal.

(2) Revision would lie if

(i) aggrieved party has no other remedy
(ii) if there is, then revision would be available if special circumstances could be shown to warrant it.
(iii) Party must come to court with clean hands and should not have contributed to the current situation.
(iv) he should have complied with the law at that time
(v) acts should have prejudiced his substantial rights
(vi) acts should have occasioned a failure of justice.

(3) General principles that have emerged from a galaxy of authorities is that revision will not lie where an appeal or other statutory remedy is available.

(4) Failure to avail himself of the alternative remedy of appeal would not necessarily be a bar to invoking the revisionary powers provided there are exceptional circumstances.

(5) Presence of exceptional circumstances by itself would not be sufficient if there is no express pleading to that effect in the petition whenever an application is made invoking the revisionary jurisdiction of the Court of Appeal.

(6) Petitioner has neither disclosed nor expressly pleaded exceptional circumstances that warrant intervention by way of revision.

Per **Sarath de Abrew**,J.

"It is a cardinal principle in revisionary jurisdiction that in order to invoke discretionary, revisionary powers the petitioner shall make a full disclosure of material facts known to her and thereby show *uberrima fides* towards Court. Deliberate non disclosure is fatal.

APPLICATION in Revision from an order of the High Court of Galle.

Cases referred to :

1. *T. Varapragasam and another v. S. A. Emmanual* CA931/84 (Rev) CAM 24.7.1991
2. *Thilagaratnam v. E. A. P. Edirisinghe 1982* - 1 Sri LR 56
3. *Camillus Ignatius v. OLC Uhana and another* - CA Rev. 907/89
4. *M. A. Sirisena v. C. D. Richard Arsala and others* - CA 536/84 CAM 24.10.1990
5. *Hotel Galaxy Ltd. v. Mercantile Hotel Management Ltd.* - 1987 1 Sri LR 05

6. *Urban Development Authority v. Ceylon Entertainments Ltd.* - CA 1319/ 2001 CAM 5.4.2002

Ransiri Fernando with Chandana Liyanage for petitioner - petitioner - petitioner

J. C. Weliamuna with Maduranga Ratnayake for respondent - respondent - respondent.

Cur. adv. vult.

June 05, 2008

Sarath De Abrew, J.

This is a revision application filed by the petitioner - petitioner -petitioner (hereinafter referred to as the petitioner) in order to set aside the impugned order dated 23.07.2007 (A9) of the High Court of Galle and the order dated 27.06.2007 (A7) of the Magistrate's Court of Galle respectively. The petitioner instituted action against the respondent - respondent - respondent (hereinafter referred to as the respondent) in terms of Section 66 of the Primary Courts Procedure Act regarding a dispute with regard to the possession of land called. "Halwaturegoda Kekunagaha Bedde" depicted as lot A in plan No. 1882 (P3) situated at Lelwala, Galle, wherein the petitioner claimed he had been forcibly dispossessed by the respondent. After granting interim relief, the learned Magistrate of Galle, after due inquiry, made order dismissing the action of the petitioner (A7). Thereafter the petitioner moved in revision in the High Court of Galle, whereupon the learned High Court Judge, after hearing the petitioner in support, refused to issue notice and made order dismissing the application (A9). Being aggrieved by the aforesaid orders, the petitioner has invoked the revisionary jurisdiction of this Court by filing this revision application in order to have the aforesaid orders set aside.

When the matter came up for support before this Court, learned Counsel for the respondent raised the following preliminary objections, and urged Court to uphold the preliminary objections and dismiss the application of the petitioner *in limine.*

(a) The Petitioner could not have filed and maintained the instant Revision Application without exercising the statutory right of appeal available thereof, and in any event the petitioner has failed to plead and demonstrate existence of exceptional or special circumstances and, in fact, there does not exist exceptional or special circumstances

warranting the exercise of the discretionary power of this Court by way of revision.

(b) The instant revision application should fail in as much as the petitioner has sought to revise the order of the learned Magistrate twice over (first in the High Court and now in the Court of Appeal) which is contrary to the legislative intent.

As both parties agreed that the aforesaid preliminary objections be decided by way of written submissions, both the petitioner and the respondent have filed written submissions along with case law authorities.

I have perused the petition as well as the entirety of the documentation annexed to the petition including the proceedings before the Galle Magistrate Court and the High Court, and the respective written submissions filed by both parties.

The revisionary power of this Court is a discretionary power and its exercise cannot be demanded as of right unlike the statutory remedy of Appeal. Certain pre-requisites have to be fulfilled by a petitioner to the satisfaction of this Court in order to successfully invoke the exercise of such discretionary power. This is best illustrated in *T. Varapragasan and another vs. A. Emanuel* [1] where it was held that the following tests have to be applied before the discretion of the Court of Appeal is exercised in favour of a party seeking the revisionary remedy.

(a) The aggrieved party should have no other remedy .

(b) If there was another remedy available to the aggrieved party, then revision would be available if special circumstances could be shown to warrant it.

(c) The aggrieved party must come to Court with clean hands and should not have contributed to the current situation.

(d) The aggrieved party should have complied with the law at that time.

(e) The acts complained of should have prejudiced his substantial rights.

(f) The acts or circumstances complained of should have occasioned a failure of justice.

The main contention of the Respondent is that not only has the petitioner failed to avail himself of the alternative remedy of the statutory right of appeal against the impugned order of the learned High Court Judge of Galle (A9), but also has failed to plead and demonstrate the existence of exceptional circumstances which would open the gate-way to revision.

The legal principle with regard to the above is succinctly stated by *L.H. De Alwis J in Thilagaratnam v. E A P Edirisinghe* [2] who remarked "though the Appellate Courts powers to act in revision were wide and would be exercised whether an appeal has been taken against the order of the original Court or not, such powers would be exercised only in exceptional circumstances."

Therefore the legal principle that failure to adopt the alternative remedy of Appeal would not necessarily be a bar to invoking the revisionary powers, provided there are exceptional circumstances, have been followed in several authorities and has now become settled law.

Eg: *Camillus Ignatius v. O. I. C. Uhana and others.* [3]
M. A. Sirisena v. C. D. Richard Arsala and others. [4]

In *Hotel Galaxy Ltd. V. Mercantile Hotel Management Ltd.* [5] *Sharvananda C. J.* reiterated "It is settled law that the exercise of revisionary powers of the Appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention."

The general principle that has emerged from a galaxy of such authorities is that revision will not lie where an appeal or other statutory remedy is available. It is only if the aggrieved party can show exceptional circumstances for seeking relief by way of revision, rather than by way of appeal when such appeal is available as of right, that the Court will exercise its revisionary jurisdiction in the interests of the due administration of Justice.

In the instant case the petitioner has not adopted the statutory right of appeal nor has he given any reasons for not doing so in the petition. Paragraph 13 of the Petition has set out several questions of law which could have been easily settled in an appeal. In fact paragraph 14 of the Petition reads "The Petitioner states that there are *well and sufficient issues of Law arising out of the order* of the learned High Court Judge marked A9 that deserve to be tested by an order of Your Lordship's Court". The petition therefore fails to demonstrate any exceptional circumstance or any error on the face of the record that would open the gateway for revision.

Even though the petitioner attempts to justify the recourse to revision as against appeal in his written submissions, it is well settled law that existence of such exceptional circumstances should be amply and clearly demonstrated in the petition itself.

In *Urban Development Authority v. Ceylon Entertainments Ltd. and another* [6] Nanayakakara J. held with Udalagama J. agreeing) that presence of exceptional circumstances by itself would not be sufficient if there is no express pleading to that effect in the Petition whenever an application is made invoking the revisionary jurisdiction of the Court of Appeal.

In the instant application the petitioner has neither disclosed nor expressly pleaded exceptional circumstances that warrant intervention by way of revision. In the event, *I am inclined to uphold the first preliminary objection raised by the respondent* and therefore do not proceed to consider the second ground.

However my task would not be complete if I fail to dwell on a very salient feature of this application, namely the application of the principle of *uberrima fides*. On a perusal of the totality of the pleadings, it is quite apparent that as disclosed in documents V4 and V25, the petitioner himself has been a party and signatory to a mortgage of a larger land which included the corpus in this case to the Peoples Bank who had acquired and sold the land in question to the respondent on the failure of the petitioner and others to redeem the mortgage and repay the loan to the Bank. However in paragraph 05 of the petition the petitioner vaguely refers to his brother having mortgaged part of the land to the People's Bank. In the proceedings before the Magistrate Court and the High Court, the petitioner has not sought to challenge the illuminating deed of mortgage V4. In the petition filed before the Magistrate Court (A 1) there is no reference at all to the aforesaid mortgage. By his failure to redeem the Mortgage, the petitioner too appears to have contributed to the current situation, which conduct accrues adversely against the petitioner in view of the *Varapragasam case* quoted above.

It is a cardinal principle in revisionary jurisdiction that in order to invoke discretionary revisionary powers the petitioner should made a full disclosure of material facts known to him and thereby show *uberrima fides* towards Court. Deliberate non- disclosure should be regarded as fatal to the application.

Eg : *Sirisena v. Richard Arsala and others (supra).* In the instant case the Petitioner has clearly infringed the aforesaid cardinal rule.

For the reasons stated above this Court is of the view that this is not a fit case to invoke the discretionary revisionary powers of this Court. Therefore I uphold the first preliminary objection raised by the respondent and dismiss the application of the petitioner *in limine*. In all the circumstances of this case I make no order as to costs.

The Registrar is directed to forward copies of this order to the learned High Court Judge and the learned Magistrate of Galle. Application is accordingly dismissed.

Imam, J. - I agree.

Preliminary objection upheld.

Application dismissed.

SEYLAN BANK LTD
V.
JUNAID

COURT OF APPEAL
EKANAYAKE.J
SRISKANDARAJAH.J
CALA 304/2003 (LG)
DC HAMBANTOTA 3421/SPL
JUNE 15, 2007

Recovery of Loans by Banks (Special Provisions) Act 4 of 1990 - Interim injunction issued - Requirements - Equitable relief - District Judge's conclusions erroneous - Appellate court taking a different view on the same matter and confirming order?

The plaintiff - respondent instituted action against the defendant Bank seeking *inter alia,* a declaration that the liability of the plaintiff, under two mortgage bonds should be confined to Rs. 200,000/-, a declaration that the plaintiff is entitled to release of the bonds after paying the aforesaid sum of Rs. 200,000/-. Further an interim injunction was sought restraining the defendant Bank from selling the mortgaged property.

The District Court issued the injunction on the ground that the plaintiff has a strong case in his favour by virtue of the fact that he had expressed his consent to settle the claim paying the money due on the bonds since the defendant Bank was possessed of his fixed deposit.

Held :

(1) The trial Judge's reasoning is erroneous, as the plaintiff caused to settle the amount due under the bond does not constitute a good ground for the plaintiff to pass the test of a *prima facie* case, which being the first and foremost requirement for the issuance of an interim injunction.

Held further :

(2) A party who seeks the aid of Court in granting an interim injunction must as a rule, be able to satisfy Court on three requirements.

(a) Has the plaintiff made out a *prima facie* case ?

(b) Does the balance of convenience lie in favour of the plaintiff ?

(c) Do the conduct and dealings of the parties justify the grant of the same - do equitable considerations favour the grant of same ?

(3) The plaintiff has passed all three tests.

Per **Chandra Ekanayake**, J.

"Though I am unable to agree with the reasons on which the trial judge had based his conclusions, for the reasons given I am inclined to hold the view that this is a fit instance to have granted the interim injunction.

Cases referred to :

1. *Jinadasa v. Weerasinghe* 31 NLR 33
2. *Preston v. Luck* (1884) 27 Ch. D 506
3. *F. D. Bandaranayake v State Film Corporation* - 1981 - 2 Sri LR 303
4. *Gulam Hussein v. Cohen* -1995 - 2 Sri LR - 365
5. *Dissanayake v. Agricultural and Industrial Corporation* - 64 NLR 283
6. *Yakkaduwa Sri Pragnamara Thero v. Minister of Education* - 71 NLR 506
7. *Ramachandra and Another v. Hatton National Bank* - 2006 - 1 Sri LR - 393