

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Appeal under and in terms Article 128  
(2) of the Constitution

**Kariyawasam Bendigodagamage Premawathi**

No. 83,

Rajagiriya Road,

Rajagiriya.

**Plaintiff**

**SC Appeal 212/2014**

SC SPL LA 141/2014

CA Appeal 1037/99 (F)

DC Colombo Case No. 17595/L

**Vs,**

**Mahavithanage Dona Engalthinahamy (deceased)**

No. 100,

Rajagiriya Road,

Rajagiriya.

**Defendant**

**And**

**Kariyawasam Bendigodagamage Premawathi**

No. 83,

Rajagiriya Road,

Rajagiriya.

**Plaintiff-Appellant-Petitioner**

**Vs.**

**Paranavithanage Don Jayathilake Perera**

No. 100,

Rajagiriya Road,

Rajagiriya.

**Substituted Defendant- Respondent- Respondent**

**And Now Between****Kariyawasam Bendigodagamage Premawathi**

No. 83,  
Rajagiriya Road,  
Rajagiriya.

**Plaintiff-Appellant-Petitioner-Appellant****Vs,****Paranavithanage Don Jayathilake Perera (dead)**

No. 100,  
Rajagiriya Road,  
Rajagiriya.

**Paranavithanage Don Nishantha Kumara Perera**

No. 100,  
Rajagiriya Road,  
Rajagiriya.

**Substituted Defendant- Respondent-Respondent**

**Before:** Justice Vijith K. Malalgoda, PC  
Justice E.A.G.R. Amarasekara  
Justice Yasantha Kodagoda, PC

**Counsel:** Jagath Wickramanayake, PC with Ms. Gimhani Jayaweera for the Plaintiff-Appellant-Appellant  
Sanath Weerasinghe with Jayalath Hissella for the Defendant-Respondent-Respondent

Argued on: 01.07.2020

Judgment on:10.03.2021

## **Vijith K. Malalgoda PC J**

The Plaintiff-Appellant-Appellant (hereinafter referred to as “the Appellant”) instituted proceedings before the District Court of Colombo, against the original Defendant namely, Mahavithanage Dona Engalthinahamy seeking *inter alia* a declaration of title and ejectment from the premises described in the Second Schedule to the Plaint. However, the substituted Defendant-Respondent-Respondent (hereinafter referred to as “the Respondent”) has filed his answer denying the averments contended in the plaint and took up the position that the said premises is governed by the Rent Act No 07 of 1972 (hereinafter referred to as “the Rent Act”) and prayed for a dismissal of the action, as he was the lawful tenant of the premises in question.

At the trial 8 issues were framed and no admissions were recorded on behalf of the parties. Based on the evidence led at the trial, the learned Judge of the District Court had delivered Judgment dated 02<sup>nd</sup> of December 1999 dismissing the plaint. Being aggrieved by the said Judgment of the District Court, the Appellant appealed to the Court of Appeal, but the said appeal too was dismissed by the Court of Appeal by its judgement dated 26<sup>th</sup> on June 2014.

The Appellant had preferred the instant appeal against the said judgement of the Court of Appeal. This Court on 14<sup>th</sup> November 2014, having heard the submissions made by the Counsel for the Appellant, granted Special Leave on the following questions of law, which reads as follows:

- i. Is the Judgment dated 26<sup>th</sup> June 2014 by the Court of Appeal wrong in Law?
- ii. Has the Court of Appeal erred in law in failing to consider that neither the Defendant nor the Substituted Defendant were/are tenants of the Appellant in relation to the premises in suit?
- iii. Has the Court of Appeal erred in law in failing to consider that the Defendant and the substituted Defendant have failed to discharge the burden of proving their right to possession of the premises in suit?

As revealed before us, the original position taken by the Appellant before the District Court was that the Appellant being the lawful owner of the premises referred to in the schedule, is entitled for the declaration and ejectment of the original Defendant namely Mahavithanage Dona Engalthinahamy who was in illegal occupation of the said premises claiming to be a tenant. The Appellant had further denied the tenancy of the said Defendant.

In the said plaint there is no reference to any tenancy agreement with any person by the Appellant or by the Appellant's predecessor in title. The original Defendant Engalthinahamy had passed away immediately after the instant case was filed before the District Court and Paranavithanage Don Jayathilake Perera the son of Engalthinahamy was substituted in her place (the Respondent)

Even though the Respondent did not directly admit the Appellant's title to the land by his answer, he took up the position that until the death of his father Martin Perera, he was the tenant of the Appellant and the Appellant's predecessor in title. The Appellant has accepted the rent deposited at the Municipal Council by late Martin Perera and after the death of his father, his mother namely Mahavithanage Dona Engalthinahamy succeeded to the tenancy by operation of law and similarly he too succeeded to the tenancy on the demise of his mother by operation of law. It was the position of the Respondent that both his late mother and himself were occupants of the said premises during the tenancy of his late father.

As further observed by this court, the plaint before the District Court was instituted seeking a Declaration of Title and to eject the Defendant (the Respondent) from the premises in question. However, the evidence transpired a vindicatory action in order to recover possession of the said property.

Availability of a vindicatory action as against a Declaratory action was discussed by *Gratiaen J* in the case of ***Pathirana Vs. Jayasundara 58 NLR 169 at page 173*** as follows;

“A decree for a declaration of title may, of course be obtained by way of additional relief *either* in a *rei vindicatio* action proper (which is in truth an action *in rem*) or in a lessor's action against his overholding tenant (which is an action *in personam*). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of contractual relationship which forbids a denial that the lessor is the true owner”

Therefore, it is necessary to consider whether the Appellant had succeeded in establishing a vindicatory action before the District Court. This position was considered both, by the learned District Judge who delivered the original judgment, as well as their Lordships of the Court of Appeal. In the absence of any valid challenge by the Respondent to the title of the property in question, the learned District Judge had correctly decided the title to the property in question in favour of the Appellant as follows;

“මෙම ස්ථානයට අදාල අයිතිය සම්බන්ධයෙන් පැහැදිලි සාක්ෂි පැමිණිල්ලෙන් ඉදිරිපත් කර ඇත. පැ.1 වශයෙන් ඉදිරිපත් කර ඇති ප්‍රසිද්ධ නොතාරිස් ජේ. ඒ. රොබට් පෙරේරා යන අයගේ අංක 1623 දරණ ඔප්පුව මගින් මේ ස්ථානයේ අයිතිය පැමිණිලිකාරිය සතුවී ඇත. ඒ බව සනාථ කරමින් ඇය සාක්ෂි ඉදිරිපත් කර ඇත. පැමිණිලිකාරියගෙන් ඒ සම්බන්ධයෙන් හරස් ප්‍රශ්න විත්තිය අසා ඇතත් පැමිණිලිකාරිය සතු එකී අයිතිවාසිකම දුර්වල කිරීමට තරම් බලවත් සාක්ෂියක් විත්තියෙන් ඉදිරිපත් නොකරන ලදී. ස්ථානයට අදාල අයිතිය සම්බන්ධයෙන් පැමිණිලිකාරිය දී ඇති එම සාක්ෂිය බිඳ හෙලීමට ද විත්තියට පුළුවන්කමක් ලැබී නැත. ඒ අනුව මෙම ස්ථානයට අදාල අයිතිය සම්බන්ධයෙන් පැමිණිලිකාරිය දී ඇති එම සාක්ෂිය පිළිගනිමින්, නඩුවට අදාල ස්ථානයේ අයිතිය පැමිණිලිකාරිය සතු බව තීරණය කරමි.” [at page 105 of the brief]

Even though there was no dispute with regard to the paper title of the property or ownership, the action was mainly intended to eject the original Defendant and the Respondent in the instant appeal who were the wife and the child of the original tenant, said Martin Perera. The main contention of this action and the evidence led before the trial seems to be, the ejectment of the original Defendant and the Respondent, after the death of Martin Perera. In this regard, the Appellant took up the position that the original defendant as well as the Respondent were unlawful occupiers of the said property but not tenants under the provisions of the Rent Act.

At this juncture, it is important to consider whether the original Defendant or the Respondent in the instant appeal are protected tenants under the provisions of the Rent Act. The Appellant in her evidence before the District Court admitted that Martin Perera was the tenant of the property in question until his death and the original defendant was his wife and the Respondent was his son. Appellant admitted the above fact in her evidence as follows;

- ප්‍ර: තමා කොයි අවස්ථාවකදීවත් උත්සාහ කලේ නෑ මේ විත්තිකරුගේ මව්වත් පියාවත් මේ විත්තිකරුවන් ඔය ස්ථානයේ කුලී කරුවන් ලෙස සිටියා කියලා කියන්න?
- උ: පියා කුලී නිවසියෙක් කියලා පිලිගන්නවා. ඊට පසුව අහිත් අය කුලී ගෙව්වේ නෑ. මිය ගිය අය නමින්මයි කුලී ගෙව්වේ.
- ප්‍ර: තමා පියා කිව්වේ මාටින් පෙරේරාට?
- උ: ඔව්
- ප්‍ර: එතකොට මාටින් පෙරේරා කුලී නිවසියෙක් ?
- උ: ඔව්

.....

ප්‍ර: මාටින් පෙරේරා කෝට්ටේ නගර සභාවේ තැන්පත් කරපු කුලී මුදල් තමා කෝට්ටේ නගර සභාවෙන් ලබා ගන්නා ?

උ: ඔව්

[At page 82 of the brief: Evidence given by the Appellant at the trial dated 9<sup>th</sup> of December 1998]

Even though the Appellant accepted Martin Perera as the tenant, the position taken by the Appellant with regard to the original Defendant and the Respondent was that, none of them were accepted as the tenants of the property in question since Engalthinahamy the original Defendant and Jayathilake Perera the Respondent continued to deposit the rent to the Municipality under the name of Martin Perera. Neither of them had made any application either to the rent board or to the Appellant, requesting them to continue as the tenants at the premises in question.

When considering the above argument, it is necessary to first consider whether the premises in question is governed by the Rent Act. The facts of the case clearly shows that the tenancy of the Martin Perera was admitted by the Appellant while giving evidence at the trial. Further, there was an application before the Rent Board, but no objection was raised on the ground of lack of jurisdiction. Other than that, the rent of the premises was continuously deposited at the Municipality during the latter part of the time of Martin Perera which was accepted by the Plaintiff. In the said circumstances I have no doubt in concluding that the premises in question is covered by the provisions of the Rent Act.

In the above context, it is necessary to consider the legality of the position taken up by the Appellant before this court.

Section 36 of the Rent Act deals with the question of the continuance of a tenancy upon the death of the tenant. Under Common law, the contract of tenancy comes to an end on the death of the tenant. Therefore, it is open for the landlord to decide who his tenant should be. On the other hand, under Section 18 of the Rent Restriction Act, No. 29 of 1948, it was possible for certain persons to continue the tenancy on the death of the tenant with giving notice prescribed by the said Act to the landlord [vide: *Karunaratne vs Fernando*, 73 NLR 457]. In the said circumstances the failure to give such notice would result in him losing his right to continue with the Tenancy.

However, with the introduction of the new Rent Act, the question of such notice does not arise, since giving of notice by prospective tenant has been excluded and the Section 36 of the Rent Act precisely defines the continuance of the tenancy after the death of the tenant. Therefore, giving notice is not required to continue the tenancy. Under this section, the landlord has no choice and is bound to accept as tenant one of the persons specified in the said section.

Section 36 reads as follows;

**Section 36;**

(1) Notwithstanding anything in any other law, the succeeding provisions of this section shall have effect in the event of the death of the tenant of any premises. For the purposes of this subsection, a person shall be deemed to be the tenant of any premises notwithstanding that his tenancy of such premises has been terminated by the expiry of the notice of the termination of the tenancy given by the landlord thereof, if at the time of his death he was in occupation of such premises.

(2) Any person who-

- a) in the case of residential premises, is the surviving spouse or child or parent or unmarried brother or sister of the deceased tenant or brother or sister of the deceased tenant if he was unmarried at the time of death, and was a member of the household of the deceased tenant during the whole of the period of six months immediately preceding his death, and
- b) .....

In the Court of Appeal decision of ***Abdul Kalyoom and others vs Mohomed Mansoor (1988) 1 SLR 361***, *S. N Silva J* (as he then was) has examined the said Section 36 as follows;

“Tenancy right being personal do not pass to the tenant’s heirs but under the Rent Laws special provision has been made for such tenancy rights to pass to successors eligible under the special statutory criteria – Section 18 of the Rent Restriction Act and now Section 36 of the Rent Act of 1972. While under S. 18 of the Rent Restriction Act succession to the tenancy would depend upon the eligible person giving written notice to the landlord, under S. 36 of the Rent Act, no such notice is required. The eligible person succeeds to the tenancy without such notice.....”

As observed by this court, the Appellant had not disputed the fact, that the original Defendant and the Respondent were the surviving, or the lawful spouse and the child of the said tenant, Martin Perera.

- ප්‍ර: 72. 11. 23 වෙනිදා වෙනකොට උසාවියේ ඉන්න විත්තිකරු මේ ස්ථානයේ බුක්තියේ සිටියා කියලා තමා දන්නවාද? 72. 11. 23 වෙනිදා වෙනකොට අද අධිකරණයේ සිටින විත්තිකරු අදාල ස්ථානයේ බුක්තියේ සිටියා නේද?
- උ: මාටින් පෙරේරා සමඟ තමා සිටියේ.
- ප්‍ර: මාටින් පෙරේරා කියන්නේ කවුද?
- උ: එයාගේ පියා. විත්තිකරුගේ පියා.

[At page 68 & 69 of the Brief: Evidence given by the Appellant at the trial dated 9<sup>th</sup> of December 1998]

Further,

- ප්‍ර: ඒ අනුව තමා දන්නවා 43 ඉඳලා තමාට කියන්න බැරි වුනත් , සාමාන්‍යයෙන් තමාගේ තේරෙන වයසේ ඉඳලා කවුද පදිංචි වෙලා හිටියේ කියලා ?
- උ: මාටින් පෙරේරා සමඟ එයාගේ දරුවෝ පදිංචි වෙලා හිටියා
- ප්‍ර: මාටින් පෙරේරා ඇරෙන්න කවුද තව පදිංචි වෙලා හිටියේ ?
- උ: එංගල්තිනානාමි
- ප්‍ර: මාටින් පෙරේරාගේ කවුද එංගල්තිනානාමි ?
- උ: පවුල
- ප්‍ර: තව කවුද පදිංචි වෙලා හිටියේ ?
- උ: දරුවෝ හිටියා
- ප්‍ර: අද අධිකරණයේ ඉන්නේ මාටින් පෙරේරාගේ දරුවෙක් නේද ?
- උ: ඔව්

[At page 71 & 72 of the brief: Evidence given by the Appellant at the trial dated 9<sup>th</sup> of December 1998]

It is trite law that if the material facts are not challenged at the trial, there is no need to prove such undisputed facts. Accordingly, the evidence at the trial reveals the acceptance of this relationship by the Appellant. In the said circumstances, it is observed that the Respondent is entitled to continue with the tenancy following the death of the tenant, said Martin Perera. [*Croos Vs. Sakaff (1998) 1 SLR 68*]



However, the Appellant argued that, there cannot be double succession, based on the death of the Original Defendant but I do not think it is necessary to consider the said argument at this juncture, since the court has to decide the case as at the date of instituting the action.

The next argument of the Appellant was the Respondent's failure to attorn their names as the new tenants. However, on the perusal of the submissions made by the Counsel for the Appellant with regard to the attornment and presumption of attornment, it is clear that this question will only arise if there is a change of the ownership. There was no change of ownership in the instant case after the death of Martin Perera whose tenancy was not in dispute. In addition, as already observed in this judgement, no notice is required to be given to the landlord, under Section 36 of the Rent Act.

The learned Judge of the District Court has clearly discussed this point in the Judgment, as;

“අරඳෝර්න්මන්ට් යනුවෙන් සඳහන් කරන්නේ, යම් කිසි ස්ථානයකට ඇති අයිතිය වෙනස්වීම පිළිබඳව දැනුම් දීම මත, කුලී නිවසියා විසින් ක්‍රියා කර තිබිය යුතුය යන්නයි. එසේ නම් මෙහිදී බල පැවැත් වෙන්නේ, අයිතිය වෙනස්වීම පිළිබඳව කුලී නිවසියාට දැනුම් දීමයි. මෙම ස්ථානයේ අයිතිය පැමිණිලිකාරිය බව පිළිගනිමින් මාටින් පෙරේරා යන අය කුලී ගෙවා ඇති අතර , එම කුලිය පැමිණිලිකාරිය විසින් භාරගෙනද ඇත. ඉන් අනතුරුව පැමිණිලිකාරිය සතු අයිතිය වෙනස් වීමක් සිදුව නොමැත. කුලී ගෙවන අය වෙනස් වුවත් අයිතිකාරියගේ නමින් තවදුරටත් සියලුම මුදල් තැන්පත් කර ඇති බව ඉදිරිපත් වී ඇති සියලුම සාක්ෂි අනුව පැහැදිලි වන කරුණකි. එසේ නම් අරඳෝර්න්මන්ට් යන ක්‍රියාව මෙම නඩුවට අදාළ කර ගත නොහැකි කරුණකි .....”

[At page 109 of the brief]

The Appellant has further argued that the said Respondent has failed to pay the rent and therefore, he was in unlawful occupation of the said premises. During the trial before the District Court, the documents marked V1 to V9 were submitted as evidence to show the rent deposited with the Municipal Council which was accepted by the Appellant.

On the other hand, the evidence of the Witness from the Municipal Council revealed that the original Defendant and the Respondent too had continued to pay rent to the Municipal Council under the name of the said Martin Perera (*vide*: page 97 to 100 of the Appeal brief). Although the Appellant has

collected the rent deposited by said Martin Perera, she did not collect the rent deposited by the Respondent in the absence of a new contract between the Appellant and the Defendant.

In this regard the Appellant took up the position that the original Defendant as well as the Respondent have failed to pay the rent in their names and therefore, she refused to accept those payments.

The situation which had arisen in the instant case can be considered under the provisions of Section 36 (3) of the Rent Act which reads as follows;

“the Landlord of any premises referred to in subsection (1) shall make application, to the board for an order declaring which, if any, of the persons who may be deemed to be the tenants under subsection (2) shall be the person who shall for the purposes of this Act be deemed to be the tenant of the premises.”

The above requirement under the Rent Act was discussed by *Sarath N Silva J* in ***Abdul Kalyoom and Others Vs. Mohamed Mansoor (Supra)*** as follows;

“Under the section 36 (3) of the Rent Act the landlord is obliged to apply to the Rent Board for an order declaring which if any of the persons who may be deemed to be tenants under subsection 2 shall be the person who shall for the purpose of the Act be the tenant. In every situation where prima facie there are one or more persons eligible to succeed to the deceased tenant on the stipulated criteria the landlord is obliged to make an application to the Board for a determination.

The Board has exclusive power to make positive order declaring that a person who is qualified to succeed to the deceased tenant on the criteria stipulated in Section 36 (2), is the tenant for the purpose of the Act or to make a negative order declaring that no such person will succeed the deceased tenant. Consequently, an action filed by a landlord in the regular courts, without making an application to the Board, will fail, if it is established that any of the Defendants may be deemed a tenant of the premises in terms of section 36 (2)”

In this regard, it is also necessary to consider the provisions of Section 36 (6) of the Rent Act. The said provisions reads thus;

“Notwithstanding anything in any other provisions of this Act, the landlord of any premises referred to in subsection (1) shall not be entitled to institute any action or proceedings for the

ejection from such premises of any person referred to in subsection (2) of the ground that the rent of such premises has been in arrear for any period ending on the date on which the board made order under subsection (4).”

When considering the above provisions of the Act, specially, sections 36 (1), (2), (3) and (6) it appears that the Appellant had failed to follow the provisions of the Act after the death of Martin Perera, even though he had accepted that Martin Perera was his tenant whilst giving evidence before the District Court. In those circumstances the Original Defendant and/or the Respondent cannot be found fault for making the payment in the name of the deceased tenant Martin Perera.

The succeeding tenants are also entitled to make payments with the authorized person as stipulated in Section 21 of the Rent Act.

In these circumstances it is useful to consider the provisions of Section 21 of the Rent Act which relates to the payment of rent by a tenant.

**Section 21** states as follows;

- (1) The tenant of any premises may pay the rent of the premises to the authorized person instead of the landlord
- (2) .....
- (3) Where the rent of any premises is paid to the authorized person, the authorized person shall issue to the tenant of the premises a receipt in acknowledgment of such payment, and shall transmit the amount of such payment to the landlord of the premises. It shall be the duty of such landlord to issue to the authorized person a receipt in acknowledgment of the amount so transmitted to him
- (4) In this section, “authorized person”, with reference to any premises, means the Mayor or Chairman of the local authority within whose administrative limits the premises are situated or the person authorized in writing by the Mayor or Chairman to receive rents paid under this section or where the Minister so determines the board of the area within which the premises are situated.

Accordingly, it is possible for a tenant, in the event of the landlord refusing to accept rent, or for any other cause, to pay the rent of the premises to the authorized person instead of the landlord. Payment of the rent to the authorized person shall be deemed to be payment to the landlord. Further, this

section does not stipulate that the rent should be paid in the name of the personal representative or the deceased tenant. The facts of the instant case reveal that the original Defendant and the Respondent too had continued to pay the rent to the authorized person under the name of the deceased tenant since the land lord had refused to accept the Rent even from the tenant Martin Perera when he was alive. Therefore, it is incorrect to argue that the original defendant as well as the Respondent had failed to pay the rent, when they deposited the rent with the authorized person in the name of the deceased tenant Martin Perera.

In the case of the ***Huseniya Vs. Jayawardena and Another 1981 (1) SLR 93 SC***, it was held that, when depositing rent in the Municipal Council, it has to be paid in the name of the tenant or on behalf of the tenant. [Vide: ***DMJ De Silva Vs. Mallika Perera 1989 (2) SLR 352***]

Accordingly, it is crystal clear that the original Defendant and the Respondent were the lawful successors to the tenancy, Martin Perera. Upon the death of the tenant, continuance of the tenancy is statutorily recognized and there is no requirement to attorn their names as new tenants.

When considering the material already discussed in my judgement, it is clear that the Respondent was successful in establishing before the District Court that the Defendant was the statutory tenant of the Appellant and therefore entitled to continue with the tenancy agreement and therefore to continue as the tenant of the Appellant. In the said circumstances, it is further observed that the Appellant was not entitled to bring a suit to vindicate title and therefore it is misconceived in law.

When coming to the above conclusion I am further mindful of the decision in ***Hewamallika Vs. Soma Munasinghe (1982) 1 SLR 339***, where *Soza J* has observed;

“.....As it would appear, the Plaintiff filed the present action without any prior demand. Hence the defendant’s pleading that she is not aware of the plaintiff’s title is justified. The Plaintiff really stands in the shoes of his father as landlord and is therefore not entitled to bring a suit to vindicate title. Presently the defendant has acknowledged plaintiff’s title. It is not denied that rents due in respect of these premises are being paid in the plaintiff’s name to the Colombo Municipality. The defendant’s contention that she is the tenant of these premises under the plaintiff is entitled to succeed. She is entitled to the protection of the Rent Laws. In any event tenancy has not been terminated. In these circumstances a vindicatory suit is misconceived and does not lie.”

In ***Mensina Vs. Joslin reported in 1 Sris Kantha's Law Report 76***, it was further held, that

“..... The plaintiff was not entitled to institute a vindicatory action as the Defendant had become his tenant by the operation of law.”

“..... The plaintiff however has not brought the action on the contract of tenancy that has arisen in his favour by operation of law. He has brought the action for declaration of title and for the ejectment of the defendant as a trespasser. This action is therefore misconceived”

In the said circumstances, this court is of the opinion that the Appellant cannot bring an action on *rei vindicatio* since the tenancy agreement had continued between the Appellant and the Respondent upon the death of the original tenant, the said Martin Perera. Based on the evidence led before the trial court, this Court can further conclude that the Respondent has a right to possess the land in suit.

When answering the questions of law raised in the instant appeal, this court accepts the analysis of the evidence clearly made by the trial judge and the judgment delivered by the Court of Appeal. I therefore answer the questions of law raised in this case in favour of the Respondent.

Accordingly, the judgments of the Court of Appeal and the District Court are affirmed by this Court.

Appeal dismissed.

**Judge of the Supreme Court**

**Justice E. A. G. R. Amarasekara**

**I agree,**

**Judge of the Supreme Court**

**Justice Yasantha Kodagoda PC**

**I agree,**

**Judge of the Supreme Court**