

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

1. Jayawardene Liyanage Gunadasa,
No. 449,
Elvitigala Mawatha,
Colombo 05.
Plaintiff

SC APPEAL NO: SC/APPEAL/159/2016

SC SPL LA NO: SC/SPL/LA/39/2016

CA CASE NO: CA/494/99(F)

DC COLOMBO NO: 16657/L

Vs.

1. Narangodage Amarapala,
No. 449,
Elvitigala Mawatha,
Colombo 05.
Defendant

AND BETWEEN

1. Jayawardene Liyanage Gunadasa,
(Deceased)
No. 449,
Elvitigala Mawatha,
Colombo 05.
Plaintiff-Appellant

- 1A. Gamekankanamge Gunawathie,
No. 01/11,
Samaranayake Road,
Kolonnawa.
- 1B. Jayawardeneliyanage Prasanna,
No. 01/11,
Samaranayake Road,
Kolonnawa.
- 1C. Jayawardeneliyanage Lasantha,
No. 01/11,
Samaranayake Road,
Kolonnawa.
- 1D. Jayawardeneliyanage Achini
No. 01/11,
Samaranayake Road,
Kolonnawa.
- Substituted Plaintiff- Appellants

Vs.

1. Narangodage Amrapala,
(Deceased)
No. 449,
Elvitigala Mawatha,
Colombo 05.
- Defendant-Respondent
- 1A. Indra Josephine Jayasinghe,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.

- 1B. Narangodage Ishan Dilantha,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.
- 1C. Narangodage Hasini Chathurani,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.
- Substituted Defendant-
Respondents

AND NOW BETWEEN

- 1A. Indra Josephine Jayasinghe,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.
- 1B. Narangodage Ishan Dilantha,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.
- 1C. Narangodage Hasini Chathurani,
No. 449/1A,
Elvitigala Mawatha,
Colombo 05.
- Substituted Defendant-
Respondent- Petitioners

Vs.

- 1A. Gamekankanamge Gunawathie,
No. 01/11,
Samaranayake Road, Kolonnawa.

1B. Jayawardeneliyanage Prasanna,
No. 01/11, Samaranayake Road,
Kolonnawa.

1C. Jayawardeneliyanage Lasantha,
No. 01/11, Samaranayake Road,
Kolonnawa.

1D. Jayawardeneliyanage Achini
No. 01/11, Samaranayake Road,
Kolonnawa.

Substituted Plaintiff- Appellant-
Respondents

Before: P. Padman Surasena, J.
Yasantha Kodagoda, P.C., J.
Mahinda Samayawardhena, J.

Counsel: Dr. Jayatissa de Costa, P.C., with D.D.P.
Dasanayake for the Substituted Defendant-
Respondent-Appellant.
Asthika Devendra with Nihara Gooneratne for the
Substituted 1A to 1D Plaintiff-Appellant-
Respondents.

Written submissions:

by 1A to 1D Plaintiff-Appellant-Respondents on
01.11.2018

by 1A to 1C Defendant-Respondent-Petitioners on
16.11.2016

Argued on: 15.02.2022

Decided on: 20.05.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action in the District Court seeking ejectment of the defendant from the premises in suit and damages on the basis that the defendant is in unlawful possession of the premises, the leave and license given to him by the plaintiff having been terminated by P4 effective from 31.01.1994. The defendant sought dismissal of the plaintiff's action on the basis that the plaintiff was the defendant's licensee whereas he (the defendant) was the tenant of the owner of the premises, namely Thillairajah. The fact that Thillairajah was the owner of the premises is undisputed. After trial, the District Court held with the defendant and dismissed the plaintiff's action. On appeal by the plaintiff, the Court of Appeal set aside the judgment of the District Court and entered judgment for the plaintiff. Hence this appeal by the defendant to this Court.

This Court granted leave to appeal to the defendant on three questions of law, which are, verbatim, as follows:

- (a) Has the Court of Appeal erred in not considering that the leave and license alleged to have been granted to the defendant by the plaintiff has not been established?
- (b) Has the Court of Appeal erred in not considering the fact that the defendant had been possessing the property in dispute long before November 1990, the month in which the plaintiff alleged to have given leave and license to the defendant which fact clearly establishes that the defendant had not entered into the premises on the leave and license of the plaintiff?
- (c) Has the Court of Appeal erred in stressing that the defendant has failed to prove tenancy with V. Thillairajah

despite the fact that the fundamental issue of the case was whether the defendant came to the premises on the leave and license of the plaintiff?

The first and second questions relate to the burden of proof and the third to the onus of proof.

Although the defendant's case, as crystallised in the issues raised before the District Court, was that he was the tenant of Thillairajah, he admitted in evidence that he did not have any receipts issued by Thillairajah acknowledging payment of rent. He also admitted that there was not a single correspondence between him and Thillairajah. Conversely, the plaintiff marked several letters exchanged between him and Thillairajah manifesting the relationship between them as landlord and tenant. In one of those letters, namely P16 dated 20.07.1985, Thillairajah *inter alia* says "*I am the owner of the shop and that you are my tenant ever since you got into occupation and you have been paying me the rent so long for several years.*"

Moreover, as evidenced by P1 dated 16.11.1992, the defendant deposited rent in respect of the premises for November 1992 in the Colombo Municipal Council in the name of the plaintiff stating that the plaintiff was his landlord. The Colombo Municipal Council transmitted the rent by way of a Money Order to the plaintiff in terms of section 21 of the Rent Act. Immediately thereafter, the plaintiff by P2 informed the Colombo Municipal Council that he is not prepared to accept the rent for the reasons stated therein.

It is significant to note that none of those documents tendered in evidence was marked "subject to proof". Further, the plaintiff was

never cross-examined on P1. The defendant's vague and belated attempt to disown P1 in his evidence shall be rejected as an afterthought. The contention of the defendant that P1 was not proved is unsustainable. A party cannot make a complaint to the Trial Court or the Appellate Court that a document has not been proved when he remained silent at the time of the document being marked in evidence: section 154(3) of the Civil Procedure Code.

There is no necessity to refer to all the documents marked by the plaintiff in evidence. P16 and P1 respectively are in my view more than sufficient to prove that the plaintiff, not the defendant, is the tenant of Thillairajah and the defendant is in occupation of the premises under the plaintiff.

One of the main issues raised by the defendant in the District Court was that when Thillairajah was admittedly the owner of the premises, the plaintiff could not have given leave and license to the defendant to occupy the premises. Although this issue had been answered in favour of the defendant by the District Court, the Court of Appeal rightly reversed that finding. The plaintiff need not be the owner of the premises to give leave and license to the defendant to occupy the premises. A licensee can become a licensor if he permits a third party to occupy the premises. Once the license of the latter is later terminated, he must vacate the premises. He is estopped from challenging or questioning the authority of the licensor to grant him leave and license: section 116 of the Evidence Ordinance. (*Mary Beatrice v. Seneviratne* [1997] 1 Sri LR 197, *Wimala Perera v. Kalyani Sriyalatha* [2011] 1 Sri LR 182, *Ahamed Saheed v. Abdul Hameed*, SC/APPEAL/4/2013, SC Minutes of 23.05.2018)

By the third question of law, the defendant argues that the Court of Appeal misapplied the onus of proof, in that the Court was more concerned about the defendant's claim that he was the tenant of Thillairajah when the real issue to be decided was whether the defendant was the licensee of the plaintiff. I am afraid I cannot agree with this line of argument. The Court of Appeal addressed its mind to the real issue, i.e. whether the defendant was the licensee of the plaintiff. In resolving that issue, the Court of Appeal also rightly considered the matter put in issue by the defendant himself in the District Court, i.e. whether he (the defendant) was the tenant of Thillairajah. This is not shifting the burden of proof to the defendant.

This is not a criminal case where the accused is entitled to remain silent allowing the prosecution to prove the case beyond reasonable doubt. This is a civil case where the plaintiff shall prove his case on a balance or preponderance of probabilities. This means the plaintiff in a civil case should prove that his version is more probable or more likely than that of the defendant. In a civil case as much as in a criminal case the defendant can remain silent, as the overall burden lies with the plaintiff. If he remains silent, the Court can *inter alia* draw a presumption against him: illustration (f) of section 114 of the Evidence Ordinance. If the defendant elects to give evidence and/or lead evidence on his behalf, the Court is entitled to consider such evidence to decide whether the plaintiff proved his case. If that is not permissible, there is no purpose in allowing the defendant to lead evidence in a civil case.

I answer all three questions of law in the negative and affirm the judgment of the Court of Appeal. The appeal is dismissed with costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Yasantha Kodagoda, P.C., J.

I agree.

Judge of the Supreme Court