

**GILBERT AND COMPANY ENGINEERING (PVT.) LTD.
v
A.B. DE SILVA AND SONS LTD.**

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 438/2004
DC COLOMBO 9483/RE
JUNE 20, 2005
MARCH 9, 2006

Evidence Ordinance , section 65, section 66-66(1) – Notice to produce documents? - What is the sole object? - Can a party object to the production of a copy of a document while denying the receipt thereof?

As the defendant disregarded the notice to quit, action was instituted to evict the defendant. The defendant's position was he was never a tenant.

At the trial, the plaintiff sought to produce a copy of a letter sent to the defendant informing him to pay a certain sum as the rent for a specified month. The defendant objected on the ground that notice had not been given to the defendant under section 66 of the Evidence Ordinance to produce the original document. This objection was overruled by Court.

Held:

- (1) Rules as to notice to produce documents are found in section 65 Evidence Ordinance. Notice is required in order to give the opposing party sufficient opportunity to produce the document. When the defendant states that he did not receive such a document, there is no requirement to give notice to the defendant— the defendant has denied tenancy and the receipt of the document.
- (2) The document may be useful for Court to decide the question of tenancy.

APPLICATION for leave to appeal from an order of the District Court of Colombo.

Case referred to:

(1) *Joonos v Chandraratne* 1993 1Sri LR 86 at 92.

Thisath Wijegunawardane with *Sadun Withana* for defendant-petitioner.
C.E. de Silva for plaintiff-respondent.

March 16, 2007

WIMALACHANDRA, J.

This is an application for leave to appeal from an order of the learned Additional District Judge of Colombo dated 2.11.2004. The plaintiff-respondent (plaintiff) instituted the action bearing No. 9483/RE in the District Court of Colombo against the defendant-petitioner (defendant) *inter alia* for the ejection of the defendant from the premises in suit.

It was the plaintiff's case that he rented the premises to the defendant on a monthly rental of Rs. 763/75 on a tenancy agreement. As the defendant effected unauthorised structural alterations in the said premises without the approval of the plaintiff, and the local authority, the notice to quit was sent by the plaintiff on 8.4.2003 terminating the tenancy with effect from 31.5.2003. As the defendant had disregarded the notice to quit, the plaintiff instituted this action on 8.7.2003. The defendant filed answer denying the several averments in the plaint and pleaded that he was never a tenant of the plaintiff in the premises in suit and prayed for the dismissal of the action.

After framing issues, the case proceeded to trial. At the trial the plaintiff sought to produce a copy of a letter dated 9.4.2002 sent to the defendant informing him to pay a sum of Rs. 595/08 as the rent for the month of March 2002. The defendant objected to the said document being marked on the ground that notice had not been given to the defendant under section 66 of the Evidence Ordinance to produce the original document.

The learned Counsel for the defendant submitted that the said document sought to be produced by the plaintiff is a copy of a letter of demand requiring the defendant to pay rent and it does not fall into the category of a notice. The learned Counsel submitted that section 66(1) of the Evidence Ordinance applies only to notices and not to letters of demand. The learned Counsel further submitted that the denial of the receipt of the said letter by the defendant is not an excuse for the plaintiff not to give notice under section 66 of the Evidence Ordinance.

It is not in dispute that in the answer filed by the defendant he has denied tenancy and denied the receipt of the said document. It appears that the said document dated 9.4.2002 was a notice informing the defendant that he is in arrears of rent in a sum of Rs. 595/08 for the month of March 2002 in respect of the premises in suit and demanding the payment of the same. The tenant is bound to pay the rent to the landlord when informed by the landlord, unless he is not in arrears of rent.

Rules as to notice to produce documents are found in section 66 of the Evidence Ordinance. Section 66 states as follows:

"Secondary evidence of the contents of the documents referred to in section 65, subsection (1), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the documents is, or to his proctor, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:

Section 66 (1) when the document to be proved is itself a notice;

Section 66 (2) to (6) are omitted"

In my view notice is required in order to give the opposing party sufficient opportunity to produce the document. When the defendant states that he did not receive such a document, there is no requirement to give notice to the defendant. The defendant in this case has denied the tenancy and the receipt of the said document.

Cross on Evidence, 6th edition at p.606 states thus:

"In certain circumstances, service of notice to produce is excused, and a party may adduce secondary evidence of the contents of a document if the original is not produced by the opponent. The most important case in which this is so is when the document in question is itself a notice."

The proviso to section 66 of the Evidence Ordinance states that notice shall not be required in order to render secondary evidence admissible under section 66(1) when the document to be proved is itself a notice [Section 66(2) to (6) are omitted].

The purpose of giving notice to produce the original in terms of section 66 of the Evidence Ordinance is explained by Justice Dheeraratne in *Joonos v Chandraratne*⁽¹⁾ at 92 in the following words;

"By paragraph 12 of the plaint, the plaintiff-respondent has averred that by letter dated 15.1.1983 he gave one year's notice in writing of the termination of the tenancyThe defendant-appellant denied the plaintiff-respondent's averment. The direct inference of that denial is that the plaintiff-respondent did not send such a notice to the defendant-appellant and therefore the defendant-appellant did not receive the same. In this context, it would be a sheer pretence to give notice to the defendant-appellant to produce the original of the notice. It is difficult to imagine that the law expects the plaintiff-respondent to indulge in such a meaningless charade. Notice to produce (the original) is not served in order to give the opponent notice that the document mentioned in it will be used by the other party, and thus enable the opponent to prepare counter evidence, but so as to exclude the objection that all reasonable steps have not been taken to procure the original document."

Thus it will be seen that the sole object of a notice to produce is to enable the other party (defendant) to have the document in Court to produce it if he likes and if he does not, to enable his opponent (the plaintiff) to give secondary evidence thereof, so as to exclude the argument that the latter has not taken all reasonable means to obtain the original which he must do before he can be permitted to make use of secondary evidence.

In the circumstances I am of the view that in the instant case the learned Judge has correctly exercised the discretion in terms of section 66 and admitted the copy of the document to be produced. In any event the defendant cannot object to the production of the copy

of the said document dated 9.4.2002 while denying the receipt thereof. The said document may be useful for the Court to decide the question of tenancy in respect of the premises in suit.

For these reasons, leave to appeal against the order of the learned Additional District Judge dated 2.11.2004 is refused with costs fixed at Rs. 7,500/-. The learned District Judge is directed to give precedence to this case and to conclude the same as expeditiously as possible.

Application refused.