VANDERBONA
v.
JUSTIN PERERA

SUPREME COURT.
SHARVANANDA, C. J. RANASINGHE, J. AND L. H.DE ALWIS, J.
S. C. APPEAL No. 16/84 – S. C. SPL. LA. 78/83. – CA No. 238/78(F).
D. C. COLOMBO No.D/1948/RE.
MAY 13, 1985.

Landlord and tenant – Arrears of rent for over three months – Initial burden of proof – Best evidence rule.

In a suit for rent and ejectment on the ground of arrears there was conflicting testimony on the question whether the defendant (tenant) was in arrears of rent. The defendant's position was that she paid rent regularly but the plaintiff though she issued receipts for the payments of rent for the first three months of the tenancy (up to May 1972), did not issue receipts for the payments of rent thereafter which she had made through her sons. Hence, rents from November 1975 were paid by Money Order and from February 1976 by deposit with the Town Council, Dalugama. The District Judge held that the defendant was not in arrears and dismissed the suit. The Court of Appeal reversed this

decision holding that the burden of proof of payment was on the defendant and she had failed to call her sons as witnesses and so produce the best evidence available on the question of payment.

Held –

(1) The initial burden of proof of arrears of rent is on the landlord as the allegation of arrears though a negative allegation forms an essential part of the landlord's case. Once both parties have adduced their evidence the question of onus becomes immaterial. Onus will then become a determining fact if the evidence pro and con is so evenly balanced that the tribunal can come to no conclusion.

(2) The best evidence rule is now whittled down and though the non-production of the best evidence may be a matter for comment or may affect the weight of the evidence that has been produced, it is not true that the best evidence must be given to prove a fact. The appellant's evidence of payment of rent through her sons is admissible but the weight to be attached to such evidence in view of her failure to call her sons will be a matter for the court to decide on a consideration of the entirety of the evidence in the case.

(3) The District Judge's findings are supported by the evidence.

Cases referred to :

(1) *Saunadhigal v. Veeramma Reddi AIR 1922 Madras 292 (P. C.).*

(2) *King v. Peter Nonis (1947) 49 NLR 16, 17.*

APPEAL from the Court of Appeal.

H. L. de. Silva, P. C. with *K. C. Tillekeratne* for defendant-respondent-appellant.

H. W. Jayawardene, Q. C. with *L. C. Seneviratne, P. C. Lakshman Perera* and *Miss T. Keenavinna* for plaintiff-appellant-respondent.

Cur. adv. vult.

June 24, 1985.

L. H. DE ALWIS, J.

The plaintiff-apellant-respondent (referred to hereinafter as the respondent) instituted an action in the District Court of Colombo for the ejectment of his tenant, the defendant–respondent–appellant respondent) instituted an action in the District Court of Colombo for the ejectment of his tenant, the defendant – respondent – appellant (referred to hereinafter as the appellant) from the premises in suit and proceeded to trial solely on the ground that the appellant was in arrears of rent for over three months. The learned District Judge held that the appellant was not in arrears of rent and dismissed the respondent's action with costs. The respondent appealed to the Court of Appeal against the judgment and the Court of Appeal reversed the finding of the District Judge and entered judgment in favour of the respondent for the ejectment of the appellant, arrears of rent, damages and costs. The appellant now appeals to this court, after first obtaining special leave, against the judgment of the Court of Appeal.

Learned Counsel for the appellant contended that the Court of Appeal erred in law in placing the burden on the appellant to prove that she paid the rent regularly and was not in arrears on the footing that the respondent does not have to prove a negative, namely, that he did not receive the monthly rent.

Plaint was filed by the respondent on 12.08.1976 under the Administration of Justice Law No. 25 of 1975, which was then in operation. The respondent purchased the premises in 1971 from one Dias who had let them to the appellant. The appellant attorned to the respondent and paid him the rent. The respondent's case, according to his plaint, is that the appellant paid him rent only up to the end of May 1972 and fell into arrears for about 3 1/2 years. On the 16th of February 1976, he gave the appellant notice to quit the premises on or before 31.05.1976 through his Attorney-at-Law, but the appellant failed to vacate the premises, and he filed this action.

The appellant's position is that she paid the monthly rent regularly up to date and is not in arrears. The respondent issued her receipts, D1 to D3, for only the first three months commencing December 1971 and thereafter stopped doing so. The respondent's son married in October 1975 and when the appellant learnt that the respondent was seeking to evict her from the house in order to give it to his son, she sent the rent by Money Orders accompanied by letters D7 and D6, for the months of November and December 1975 and January 1976 respectively. Thereafter one Leena Dias claimed ownership of the house, and the appellant deposited the rent with the Town Council, Dalugama and obtained receipts D7 to D25.

In this state of the pleadings, it becomes necessary to determine on whom the burden lies to prove that the rent was in arrears.

Section 22 of the Rent Act No. 7 of 1972 prohibits an action or proceedings for ejectment of the tenant of any premises being instituted in or entertained by any Court, unless where, inter alia, the rent of such premises has been in arrears. The burden therefore lay clearly on the plaintiff in this action to prove that the tenant was in arrears of rent. The respondent, accordingly framed his first issue (as translated) in the following manner:

"Has the defendant been in arrears of rent for three months or more between 01.06.72 and 31.05.76".

The rule regulating the burden of proof is contained in sections 101 to 103 of the Evidence Ordinance. "The true meaning of the rule," states Monir in the Law of Evidence, 5th Ed. page 400, in regard to those sections of the Indian Evidence Act, (which correspond with ours) is –

"that he who asks the court to believe in the existence of a certain fact or set of facts, must prove that fact or set of facts exist. Non-existence of a fact is as much a fact as the existence of a fact and, therefore, the non-existence of a fact is as much within the meaning of sections 103 and 101 as the existence of a fact. Thus interpreted, these two sections of the Evidence Act may be taken to lay down the general rule that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on such party, and that is how the rule is stated in the English cases". . . . . Monir then elaborates it as follows : "the rule applicable to all such cases is that where a claim or defence rests upon a negative allegation, the one asserting such claim or defence is not relieved of the onus probandi by reason of the form of the allegation, or the inconvenience of proving a negative. Where in order to show a right to relief, it becomes necessary for a party, under the substantive law, to prove the non-existence of a fact, the burden of proving such 'negative allegation' will be on him . . . . . and indeed, in every case in which the plaintiff grounds his right of action upon a negative allegation and the establishment of this negative is consequently an essential element in support of his claim. . ."

The Court of Appeal was therefore clearly in error when it took the view that the plaintiff-respondent does not have to prove a negative and placed the burden of proving the payment of rent on the defendant-appellant.

Of course, as learned Counsel for the respondent contended, once the initial burden of proof on the plaintiff is discharged and the evidence of the two parties is led, the question is not looked at from the point of view of onus. Learned Counsel cited the Indian case of *Saunadhigal v. Veeramma Reddi* (1) where it was held by the Board that when the entire evidence on both sides is before the court, the debate as to the onus is purely academic. Where the relevant facts are before the court, all that remains for decision is what inference should be drawn from them. Monir in the Law of Evidence, 5th Ed. at page 603, referring to this case states –

"But where both parties have adduced evidence on the issue in support of their respective allegations, the question of onus becomes immaterial, as the conclusion reached does not depend on the question of onus, but depends on the evidence produced by the parties. The strict meaning of the term onus probandi is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. Onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no conclusion. Then the onus will determine the matter. But if the tribunal, after weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered. . . . . where each side has adduced its evidence, the question of onus of proof loses the importance which at one stage it had, and would only resume its importance if on considering the evidence as a whole, irrespective of which side adduced it, the court is left with reasonable doubt on any material question."

I am of opinion that this is the correct approach to the consideration of the evidence in this case.

In the present case, we have, on the one hand, the evidence of the respondent that the appellant ceased to pay rent after May 1972, and in December 1975, sent a Money Order for Rs. 350 as rent for November and December 1975 and another Money Order for Rs. 175 as rent for January, 1976. Thereafter she deposited the rent with the Town Council, Dalugama.

The appellant, on the other hand, stated that she paid rent for the premises regularly from December 1971 and produced three receipts D1 to D3 in acknowledgment of the payment of the rent for the first three months. Thereafter the respondent ceased to issue her any receipt and she made no request for them because of the trust she had in him. She said she used to send the rent through her two sons. But her sons were not called to give evidence to support her. The Court of Appeal took the view that consequently her evidence was hearsay and observed that the trial Judge had not given his mind to that aspect of the matter. Having taken the view that the burden of proving the payment of rent was on the tenant, the Court of Appeal came to the conclusion that that burden had not been discharged. I fail to see how the appellant's evidence can be dubbed hearsay. The

appellant was not cross-examined on this point and no evidence was elicited from her that her sons had informed her that they handed the rent to the plaintiff. It may well have been that the appellant took it for granted that the rent had reached the hands of the respondent because no demand was made for it therafter, that is, according to her case that she continued paying rent.

Learned Counsel for the respondent argued that in view of the respondent's denial of the payment of rent by the appellant after May 1972, the latter should have placed the best evidence possible of its payment by calling her sons as witnesses. It was contended that the failure to lead the best evidence available should result in the exclusion of the inferior evidence that has been placed before court. But Dr. G. L. Peiris on The Law of Evidence in Sri Lanka, at page 290 says –

> "The best evidence rule which was considered sacrosanct by the English courts during the last century, has now been whittled down in scope to such an extent that English writers have been prompted to speak of 'the remains of the rule'. One authority on the law of evidence has justifiably concluded that 'Perhaps the most conspicuous feature of the modern law is its persistent recession from this once famous principle.' The numerous departures sanctioned by the Evidence Ordinance of Ceylon from the best evidence rule, viewed both as an inclusionary and as an exclusionary doctrine, render this conclusion applicable to the law of Ceylon as well. . . . ."

In the *King v. Peter Nonis,* (2) Windham, J., with whom Howard, C. J., agreed said :

> "In any case, what is the meaning of 'best evidence', in the English Law sense ? It certainly does not and never did mean that no other direct evidence of the fact in dispute could be tendered. Its meaning is rather that the best evidence must be given of which the nature of the case permits. . . . . The 'best evidence' rule in England has been subjected to a whittling down process for over a century, and today it is not true that the best evidence must be given, though its non-production where available may be a matter for comment and may affect the weight to be attached to the evidence which is produced in its stead."

"In the present day, then, it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally accepted." *Phipson on Evidence*, 13th Ed. (1952) pg. 70."

The appellant's evidence of the payment of rent through her sons is therefore admissible although the weight to be attached to it, in view of her failure to call her sons in support, is a matter for the court to decide, on a consideration of the entirety of the evidence in the case.

The appellant's evidence is that she sent the rent regularly through her sons from December 1971 and that the respondent issued her receipts for only the first three months. Thereafter she paid the rent from November 1975 by Money Order when she learnt that the respondent was attempting to eject her from the house in order to give it to his son who had just got married, and then deposited the rent with the Town Council, Dalugama, when a dispute arose over the ownership of the house. It is significant that the respondent's son admittedly married in October 1975 and it was then only that the appellant paid the rent by Money Order evidently to have proof of the payment since, according to her, the respondent was not in the habit of issuing her receipts for the rents. The respondent on the other hand states that he issued the appellant receipts for rent up to May 1972 and thereafter had no occasion to issue any receipts because the appellant ceased to pay rent. His version is that he told the appellant that he had purchased the house for his son and asked the appellant to quit and hand over the house when his son got married. The appellant replied that she could not pay rent until she found another house, and that was the reason the respondent gave for not taking any action to recover the arrears of rent.

The appellant admittedly had the financial capacity to pay the rent. One would have thought that the appellant's failure to pay rent from May 1972 would have afforded the respondent a splendid opportunity of instituting an action to eject her on the ground of arrears of rent. But he waited for over three and a half years to do so. It is inconceivable that the respondent would have let the rent fall into arrears for such a long period without taking any action to recover it and to eject the appellant by filing action promptly, especially as he desperately needed the house for his son who was about to get

married. The learned trial Judge has refused to accept the respondent's evidence on this point and I see no reason to disagree with him.

Learned Counsel for the respondent contended that the respondent may have deliberately allowed the rent to accumulate beyond the means of the appellant to tender it on or before the date fixed in the summons under section 22 (3) (c) of the Rent Act when action was filed. This was not the reason given by the respondent at the trial for letting the rent fall into arrears, and cannot be accepted.

The appellant's case all along was that receipts were issued to her only for the first three months ending February 1972, and she has produced them marked D1 to D3. The respondent admitted the issue of these rent receipts but went on to say further that he issued receipts up to May 1972, and stopped when the appellant ceased paying rent. The rent receipts up to May, according to the respondent, were issued from the same receipt book as D1 to D3. The respondent could easily have produced the counterfoils of these receipts from that book and shown up the falsity of the appellant's evidence that receipts were issued for only the first three months of payment, but did not do so.

Another circumstance that bears out the appellant's version is that in the letter D7 dated 31.12.75 accompanying the first Money Order for Rs. 350 the appellant specifically states that the amount is sent as rent for the months of November and December 1975, that is, on the basis that rent up to October 1975 had been paid regularly by her. The respondent admitted receipt of the Money Order and letter, but failed to deny promptly that assertion and to state that the money would be set off as damages for June and July 1972, if, as was his case, the appellant was in arrears of rent from 1.6.72.

It is noteworthy that no receipt was issued even for this payment. Indeed no reference is made at all to this payment in the notice to quit dated 15.2.76 (D4) sent by the respondent's lawyer to the appellant.

Again on 6.2.76 the appellant sent another letter D6 with a Money Order for Rs. 175 as rent for January 1976, on the basis that all the earlier rents had been paid. The respondent however has not replied immediately challenging this position. In the notice to quit D4, however, sent later, on 15.2.76 by his lawyer, he sought for the first time, to set this payment off, as damages for the month of May 1972,

on the ground that the appellant was in arrears from that month. But in his plaint and evidence he has admitted the payment of rent for that month.

Having regard to all these circumstances the Court of Appeal in my view, was not justified in interfering with the finding of the District Judge that rent had been regularly paid by the appellant.

I am of opinion that the judgment of the District Judge is correct and must be affirmed. I set aside the judgment of the Court of Appeal and allow the appeal with costs in the Court of Appeal and in this Court and affirm the judgment of the District Judge dismissing plaintiff's action with costs.

SHARVANANDA, C. J. – I agree.

RANASINGHE, J. – I agree

Appeal allowed.