

**WIJETUNGE
v.
THANGARAJAH**

COURT OF APPEAL
ISMAIL, J. (P/CA)
TILAKAWARDANE, J.
C.A. NO. 248/98 (LG)
D.C. NEGOMBO NO. 5235/L
DECEMBER 9, 1998

Rei Vindicatio – Title admitted – Ejectment resisted on the ground of lawful occupation and tenancy – Right to begin the case?

Held:

1. In a Vindicatory action when the legal title to the premises is admitted the burden of proof is on the defendant to show that he is in lawful occupation.
2. The trial Judge erred in holding that the burden of proving that the defendant is in wrongful and unlawful possession is on the plaintiff.
3. The defendant would have to begin her case.

APPLICATION for leave to Appeal – Leave been granted.

Cases referred to:

1. *Theivandran v. Ramanathan Chettiar* – 1986 2SLR 219 at 222.
2. *Beebi Johara v. Warusavitharana* – 1998 3 SLR 9.
3. *Candappa nee Bastian v. Ponnambalam Pillai* – 1993 1 SLR 184 at 187.

Gamini Jayasinghe for plaintiff-petitioner

K. S. Rathnavel for defendant-respondent.

Cur. adv. vult.

January 18, 1999.

ISMAIL, J. (P/CA)

The plaintiff-petitioner was granted leave to appeal from the order of the District Judge dated 7.10.98 by which the plaintiff-petitioner has been directed to begin her case and establish that she is entitled to the relief prayed for in the plaint.

The plaintiff-petitioner by her plaint dated 15.2.96 prayed for declaration of title to the land and premises the subject-matter of the action, damages for wrongful occupation from 16.11.94 and for the ejection of the defendant-respondent from the said premises.

The defendant by her amended answer dated 3.4.98 pleaded, *inter alia* that the plaint did not reveal a cause of action, that she has been in occupation of the premises as a tenant for a period of over 30 years and that she is entitled to the protection of the Rent Act.

At the commencement of the trial on 14.9.98, as it was admitted that the plaintiff-petitioner is the owner of the premises in suit, the issue suggested on behalf of the plaintiff-petitioner was as to whether she was therefore entitled to the relief for declaration of title and ejection as set out in paragraphs (a) & (b) of the prayer to the plaint. It is to be noted that the plaintiff-petitioner did not raise an issue in respect of damages as prayed for in the plaint.

The defendant-respondent then suggested the following issues numbered 2 to 5.

- (2) Is the property described in the plaint covered by the provisions of the Rent Act, No. 7 of 1972?
- (3) Is the defendant the tenant of the said premises?
- (4) Does the plaint disclose a cause of action?
- (5) If any one or more of the above issues are answered in favour of the defendant, is the plaintiff entitled to maintain this action?

The counsel for the plaintiff-petitioner then adverted to the pleadings, the admission recorded and the issues raised and submitted that in a *rei vindicatio* action where legal title is admitted but where the ejectment is resisted on the ground of lawful occupation, the burden of proving tenancy shift to the defendant together with the consequential right to begin the case.

The trial judge in his order dated 7.10.98 has rejected this contention. Taking into consideration also the denial by the defendant of a cause of action accruing to the plaintiff, he has held that in the absence of an admission in this regard, the burden of proving wrongful occupation of the premises by the defendant is on the plaintiff who had to establish her right to the relief sought by her.

However, it has been consistently held that in a vindicatory action when the legal title to the premises is admitted, the burden of proof is on the defendant to show that he is in lawful occupation. Sharvananda, J. in *Theivandran v. Ramanathan Chettiar*⁽¹⁾ at 222 stated as follows:

"In a vindicatory action the claimant need merely prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence, when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is lawful possession".

This statement was quoted with approval by G. P. S. de Silva, C.J. in *Beebi Johora v. Warusavithana*,⁽²⁾ see also *Candappa nee Bastian v. Ponnambalam Pilla*⁽³⁾ at 187 where G. P. S. de Silva, C.J. stated as follows:

"Since title to the premises was admittedly in the plaintiff, the burden is on the defendant to show by what right he was in occupation of the premises."

In view of the authorities referred to above, since the title to the premises was admittedly in the plaintiff, the trial judge erred in holding that the burden of proving that the defendant is in wrongful and unlawful possession of the premises is on the plaintiff. The issue suggested by the defendant as to whether the plaint discloses a cause of action also place the burden of proof on the plaintiff and require him to begin the case.

We, therefore, hold that the defendant would have to begin her case. The order of the District Judge dated 7.10.98 is set aside.

The appeal is allowed but without costs.

SHIRANEE TILAKAWARDANE, J. – I agree.

Appeal allowed.