

**HAMEED *alias* ABDUL RAHMAN  
V.  
WEERASINGHE AND OTHERS**

SUPREME COURT.  
G. P. S. DE SILVA, J.  
MARK FERNANDO; J. AND  
AMERASINGHE, J.  
S. C. APPEAL NO: 13/86.  
C: A. NO: 104/78 (F).  
D: C: MATARA NO: 3433/L.  
FEBRUARY 27, 1989.

*Landlord and tenant — Deceased tenant's wife's failure to attorn — requisites of a  
plaint — Averment and proof of title in a rei vindicatio suit — Action on trespass  
where title is not disputed.*

Where the tenant dies and his widow fails to attorn to the landlord, the widow cannot claim tenancy rights.

Under the Civil Procedure Code it is only necessary to plead the relevant facts constituting the action. It is not necessary to categorize the cause of action.

In a vindicatory suit, it is necessary to aver and prove title but where title is not disputed a plaintiff may sue only for ejectment. Although the plaintiff had not pleaded his title, his averment that the widow of the deceased tenant is in occupation without his permission and without paying rent is sufficient to found an action on trespass. No objection having been taken at the trial to any deficiency in the plaint re setting out title, it cannot be raised in appeal.

**Case referred to :**

*Theivandran v. Ramanathan Chettiar* — [1986] 2 Sri LR 219, 222.

**APPEAL** from judgment of Court of Appeal.

*N. R. M. Daluwatte, P.C.* with *Mrs. D. K. Gabadage* and *Manohara de Silva* for Plaintiff-Appellant.

*K. Abeypala* for 1st Defendant-Respondent.

Substituted 2nd Defendant-Respondent and 3rd Defendant-Respondent are absent and unrepresented.

*Cur. adv. vult.*

March 16, 1989.

**G. P. S. De Silya, J.**

The plaintiff instituted these proceedings seeking the ejection of the 1st, 2nd and 3rd defendants from the premises in suit and claiming damages at the rate of Rs. 25/- per mensem from February, 1971. In her plaint dated 30th December, 1971, she averred that (i) the tenant of the premises was E. J. A. John who died on 5th January, 1971, (ii) John had paid rent up to the end of January, 1971, and (iii) the 1st defendant was the widow of the deceased tenant John. These facts were admitted by the 1st defendant in her answer. The plaintiff further pleaded that after the death of John neither the 1st defendant nor any of his heirs paid any rent nor sought her permission to continue to occupy the premises as her tenant. As regards the 2nd and 3rd defendants, it was the case of the plaintiff that the deceased John had sub-let the premises to them without her knowledge.

The 1st defendant's position as set out in her answer and focussed in the issue raised on her behalf at the trial was that upon her husband's death the plaintiff accepted her as her tenant. After trial, the District Judge held, (a) that the 1st defendant was the tenant of the premises; (b) that the 2nd and 3rd defendants were not sub-tenants but were employees under the deceased John. The action was accordingly dismissed.

The plaintiff thereupon lodged an appeal to the Court of Appeal. The Court of Appeal affirmed the finding of the District Court that the 2nd and 3rd defendants were employees under John and thereafter were employees under the 1st defendant and that they had no status independent of the 1st defendant. At the hearing before us, Mr. Daluwatte for the plaintiff-appellant, did not canvass this finding.

The Court of Appeal, however, reversed the finding of the District Court that the 1st defendant is the tenant under the plaintiff. On this crucial issue the Court of Appeal expressed itself in the following terms:—

"On the evidence it is manifest that the first defendant has not attorned to the plaintiff after the death of her husband nor had she obtained the protection of the Rent Acts by way of any

application made under the statute. She has no privity of contract either directly or by attornment nor is there a nexus created by operation of law". This finding is amply supported by the evidence on record and Mr. Abeypala, counsel for the 1st defendant-respondent, very properly did not challenge it. Incidentally, I wish to add that the reference to the Rent Acts in the above passage must be read as a reference to the Rent Restriction Act (Chap. 274 of the 1956 Revised Edition of the Legislative Enactments), the action having been filed in 1971.

Although the Court of Appeal arrived at the finding that the 1st defendant was not a tenant under the plaintiff, as claimed by the 1st defendant, (and this was the basis upon which the 1st defendant sought to justify her continued occupation of the premises after the death of John) yet the action was dismissed solely on the ground that the plaintiff "does not disclose a valid cause of action as known to our law". The Court of Appeal concluded: — "The plaintiff in this case is not based on a contract of tenancy nor does it contain the elements required for a possessory or a vindicatory action . . . . The absence of a valid cause of action is a pure question of law and can be raised at any stage". It was this part of the judgment of the Court of Appeal that was assailed by Mr. Daluwatte.

In the first place, it is right to state that the plea that the plaintiff does not disclose a cause of action was not pleaded in the answers of the defendants nor was an issue on this point raised at the trial. Section 40 of the Civil Procedure Code sets out the requisites of a plaintiff. It provides inter alia, that the plaintiff shall contain "a plain and concise statement of the circumstances constituting each cause of action, and where and when it arose . . . ." (Section 40(d)). Thus it is clear that under our procedural law, there is no need to categorize the cause of action as being based on a particular form of action. All that is required is to plead the relevant facts constituting the cause of action.

The question that arises on this appeal is whether this action cannot be maintained for the reason that the plaintiff does not disclose a cause of action. On a scrutiny of the plaintiff, I am of the

view that it discloses a cause of action based on trespass. Apart from the averment that the 1st defendant is the widow of the deceased tenant, John, there is the following significant statement in paragraph 5 of the plaint:— "After the death of the said tenant E. J. A. John, his widow the 1st defendant nor any of his heirs paid any rent nor sought the permission of the plaintiff to continue as a tenant or tenants of the premises referred to above as required by law". Admittedly, the provisions of section 18 of the Rent Restriction Act were not complied with. The result was that the 1st defendant could not thereafter have claimed the protection of the Rent Restriction Act. What paragraph 5 of the plaint **in effect** avers is that upon the death of John the 1st defendant's right to remain in occupation of the premises ceased. In other words, the widow's continued occupation of the premises was unlawful.

It is true, as submitted by Mr. Abeypala, there are no averments in the plaint setting out the plaintiff's title to the premises nor has the plaintiff sought a declaration that she is the owner of the premises. This is no doubt a defect in the plaint, but could the 1st defendant rely on it at the stage of appeal, in the absence of a specific objection in the answer and the matter not having been put in issue at the trial? I think not, particularly in view of section 46(2) (d) of the Civil Procedure Code. Had the specific objection, namely that the plaint does not disclose a cause of action, been taken in the answer, the plaintiff may well have moved to amend the plaint. The plaint not being happily worded, an appropriate amendment could easily have remedied the defect in the pleadings. Moreover, the issues show the nature of the dispute between the parties, namely the character of the occupation of the premises by the 1st defendant. Was the 1st defendant a trespasser as averred by the plaintiff or was she a tenant under the plaintiff? Therefore, even assuming that the issue whether the plaint discloses a cause of action is a pure question of law, I am of opinion that in the facts and circumstances of this case, it is not a question that could properly have been raised at the stage of appeal and answered in favour of the defendants. In doing so, the Court of Appeal was in error.

Mr. Abeypala was right in his submission that in a *rei vindicatio* action the plaintiff must aver and prove his title to the premises in suit. This is the general rule, but in the instant case the pleadings, the issues and the evidence on record clearly show that at no stage did any of the defendants dispute the plaintiff's title to the premises. What is more, the deceased tenant could not have disputed the plaintiff's title (Section 116 of the Evidence Ordinance). A fortiori, the 1st defendant, his widow and a member of his family could not have disputed the plaintiff's title to the premises. In these circumstances, the defect in the plaint ceased to be material.

The plaintiff's title not having been disputed by the 1st defendant, the burden clearly was on the 1st defendant to show by what right she continued to occupy the premises after the death of John. This principle was referred to by Sharvananda, C. J. in *Theivandran vs. Ramanathan Chettiar*, (1) "An owner of a land has the right to possession of it and hence is entitled to sue for the ejection of a trespasser. . . . Basing his claim on his ownership, which entitles him to possession, he may sue for the ejection 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 in lawful possession".

In the case before us, the 1st defendant's position was that she was the tenant under the plaintiff after her husband's death, and therefore her possession was lawful. As stated earlier, that plea was rightly rejected by the Court of Appeal. The plaintiff, therefore, must succeed in her action for ejection and damages.

The appeal is accordingly allowed and the judgment of the Court of Appeal dismissing the plaintiff's action is set aside. We direct that decree for ejection be entered as prayed for in paragraph (a) of the prayer to the plaint dated 30th December;

1971. The plaintiff is also entitled to damages from the 1st defendant in a sum of Rs. 25/- per mensem from February 1971 till she is restored to possession of the premises in suit. The 1st defendant must pay the plaintiff costs of proceedings in the District Court as well as a sum of Rs. 750/- as costs of appeal both in the Court of Appeal and this Court.

**MARK FERNANDO, J.** — I agree.

**AMERASINGHE, J.** — I agree.

*Appeal allowed*

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