

**BASTIAN
v.
PANAGODA**

SUPREME COURT
G. P. S. DE SILVA, CJ.,
WIJETUNGA, J.,
BANDARANAYAKE, J.
S.C. APPEAL NO. 67/96
C.A. NO. 319/89(F)
D.C. COLOMBO NO. 5347/ZL
SEPTEMBER 30, 1998

Landlord and Tenant – Plea of tenancy in suit for declaration of title – Acceptance of rent – Certificate of tenancy.

Mere acceptance of rent cannot establish a tenancy where the owner has unequivocally repudiated the claim of tenancy. A contract of letting and hiring cannot arise except by agreement of parties. A tenancy by contract can only arise where the parties are *ad idem* as to its essential particulars.

Although a certificate of tenancy is *prima facie* evidence of the facts stated therein, it is not conclusive evidence. Where the evidentiary value of the certificate of tenancy is displaced by the evidence on record to the contrary, the claim based on the certificate of tenancy fails.

Cases referred to:

1. *Fernando v. Samaraweera* 52 NLR 278, 283.
2. *Dolawatta v. Gamage* (1989) 2 Sri LR 327, 332, 333.

APPEAL from judgment of the Court of Appeal.

P. A. D. Samarasekera, P.C with *A. A. M. Marleen* for defendant-appellant.

A. K. Premadasa, P.C with *C. E. de Silva* or substituted plaintiff-respondent.

Cur. adv. vult.

October 15, 1998

G. P. S. DE SILVA, CJ.

The plaintiff as administratrix of the estate of Edwin Fernando instituted these proceedings on 25th November, 1986, against the defendant seeking (a) a declaration that the plaintiff and her 3 children are entitled to the premises in suit, (b) ejection of the defendant and (c) recovery of damages. Edwin Fernando died on 18.10.85. There was no serious dispute at the trial in regard to Edwin Fernando's title to the premises, and the District Court held with the plaintiff on the issue of title. The case for the plaintiff is that the defendant is in wrongful and unlawful occupation of the premises. The defendant, however, contends that he was a tenant under Edwin Fernando and continues to be a tenant under the plaintiff. After trial, the District Court rejected the defendant's claim that he was a tenant under Edwin Fernando and entered judgment for the plaintiff. The defendant's appeal to the Court of Appeal was unsuccessful. Hence the present appeal to this court by the defendant.

The defendant's grandfather Albert Bastian was admittedly the tenant under Edwin Fernando. Albert Bastian died on 4.8.73. The defendant's father Frank Bastian predeceased his grandfather in the year 1967. The defendant's claim to tenancy is on a two-fold basis. In the first place, it is urged, that Edwin Fernando accepted payments of rent made by him from August, 1973 to January, 1976, through the Rent Department of the Municipal Council, Colombo, without any protest. By reason of the acceptance of rent, it is submitted, that the defendant had become the tenant of the premises in his own right. Secondly, the defendant relies strongly on the certificate of tenancy dated 22.8.81 (D4) issued by the Rent Board in his favour in terms of section 35 (2) of the Rent Act.

As regards the defendant's claim to tenancy based on the acceptance of rent, it is necessary to consider the course of conduct between the parties as *evidenced by the documents* produced at the trial. Upon the death of Albert Bastian on 4.8.73, the Attorney-at-law of the defendant wrote P11 dated 15.8.73 informing Edwin Fernando that

Albert Bastian the tenant had died on 4.8.73 and that the defendant is claiming the tenancy. The Attorney-at-law of Edwin Fernando replied P11 by letter dated 21.8.73 (P12) stating that the defendant was not entitled to the tenancy in terms of section 36 of the Rent Act. It was further stated in P12 "If your client does not immediately vacate the said premises, legal steps will be taken to have him ejected therefrom". Thus within a very short time of the death of Albert Bastian the defendant's claim to tenancy was totally rejected. It is to be noted that the defendant was the grandson of the deceased tenant. Moreover, the evidence establishes that he was not a dependant of the deceased tenant.

The letter P10 dated 24.9.73 addressed to the Rent Department of the Municipal Council, Colombo, by Edwin Fernando is of the utmost importance. In this letter Edwin Fernando informs the Municipal Council that the defendant is in forcible occupation of the premises, the tenant had died on 4.8.73, and the rent paid for August, 1973, is returned. The Municipal Council was further directed not to accept any money paid by the defendant since he intends taking "legal action". It is true that thereafter Edwin Fernando had accepted certain payments but no receipts were issued until 1976. The receipts for February, April, May and July, 1976, issued by Edwin Fernando specifically state that the money is accepted *"without prejudice to my rights"*.

It was strongly urged on behalf of the defendant that Edwin Fernando had accepted payments made by the defendant by way of rent from August, 1973 to January, 1976, unconditionally and without protest. It seems to me that the documentary evidence is not in accord with this submission. In any event, the mere acceptance of rent cannot, in the facts and circumstances of this case, establish a contract of tenancy between Edwin Fernando and the defendant. As stated earlier, immediately upon the death of Albert Bastian (the admitted tenant) Edwin Fernando unequivocally repudiated the defendant's claim of tenancy. There is nothing in the evidence to suggest that Edwin Fernando at anytime thereafter resiled from this position. "A contract of letting and hiring cannot arise except by agreement of parties. A tenancy by contract can only arise where the parties are *ad idem*

as to its essential particulars". Per Basnayake, J. in *Fernando v. Samaraweera*⁽¹⁾ at 283.

I now turn to the defendant's claim of tenancy based on the certificate of tenancy issued in terms of section 35 of the Rent Act. It is true that the certificate is "*prima facie* evidence of the facts stated therein". The meaning of the expression "*prima facie* evidence" was carefully considered by Ranasinghe, J. (as he then was) in *Dolawatta v. Gamage*⁽²⁾. "*Prima facie*" evidence is certainly not conclusive evidence. Therefore the facts set out in the certificate of tenancy can be rebutted by other cogent evidence. In my view, the documentary evidence referred to above constitutes strong evidence which clearly and unambiguously negatives an intention on the part of Edwin Fernando to create a contract of tenancy between himself and the defendant. In other words, the evidentiary value of the certificate of tenancy has been displaced by the evidence on record to the contrary. Thus the claim of the defendant based on the "certificate of tenancy" fails.

For these reasons the judgment of the Court of Appeal is affirmed and the appeal is dismissed with costs fixed at Rs. 2,500.

WIJETUNGA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Appeal dismissed.