

MUTHUKRISHNA
v.
GOMES AND OTHERS

COURT OF APPEAL
WIJEYARATNE J. AND
GUNASEKERA J.
C.A. APPLICATION
NO. 1344/90 WITH
C.A./L.A 210/90
APRIL 28, 1993.

Rent and ejectment – Preliminary issue – Succession to tenancy – Civil Procedure Code s. 147 – Rent Act No. 7 of 1972, s. 36 (3).

Plaintiff filed a rent and ejectment suit against her tenant. Plaintiff died pending action and her heirs were substituted. The defendant filed answer claiming that her husband who was the tenant had died leaving a Last Will devising the premises in suit to his widow (defendant), three children and a brother. It was contended that an application should be made by the landlady for an order under section 36(3) of the Rent Act as to who should be treated as the tenant. The substituted plaintiffs denied that the defendant was the widow. The suit was filed against her. The issue of whether the defendant was a widow was tried as a preliminary issue.

Held:

(1) Under section 147 of the Civil Procedure Code for a case to be disposed of on a preliminary issue, it should be a pure question of law which goes to the root of the case.

(2) As the plaintiff was alleging that the defendant has no rights and is in the position of a trespasser, it was open to her to file action without making an application to the Rent Board under section 36(3). According to the plaintiff defendant does not come within the classes of persons enumerated in section 36(2) (c) (i) of the Rent Act. If the defendant adduces proof that she is the lawful wife of the deceased tenant plaintiff's action will be dismissed.

Per Wijeyaratna J: "Judges of original courts should, as far as practicable, go through the entire trial and answer all the issues unless they are certain that a pure question of law without the leading of evidence (apart from formal evidence) can dispose of the case".

Cases referred to:

1. *Abdul Kalyoom v. Mohamed Mansoor* (1980) 1 Sri LR 361.
2. *David v. Asoka Kumar* 65 C.L.W. 25, 29.

3. *Supramani Ayer v. Chengarapillai* 2 NLR 17.
4. *Gauder v. Gauder* 1 Current Law Reports 11.
5. *Yatindra Nath Chaudhury and Another v. Hari Charan Chaudhuri* AIR 1915 Calcutta 87.

APPLICATION for revision from the Order of the District Court of Mount Lavinia.

A. K. Premadasa P.C. with S. Mandaleswaran for defendant-petitioner.
D. R. P. Goonatillake for substituted plaintiffs-respondents.

Cur adv vult.

June 18th, 1993.

WIJAYARATNE, J.

The original plaintiff-respondent, H. A. Jane Gomes, (who had since died on 15.4.91) filed this action on 3.2.85 against the defendant-petitioner to eject the defendant-petitioner from the premises described in the plaint on the basis that they were business premises and they were rented out on a monthly rent to Ramasamy Muthukrishna who had died on 4.7.85, and that the defendant-petitioner who claims to be his wife is asserting that she has tenancy rights and is unlawfully and illegally carrying on a business in the said premises.

It is averred in the plaint that the notice to quit dated 22.10.85 was sent through her Attorney-at-Law asking the defendant-petitioner to quit the premises on or about 30.11.85. Therefore she had sought an ejectment order against her.

After the death of the plaintiff-respondent her heirs have been added as substituted 1 to 9 plaintiffs-respondents.

The defendant filed answer admitting the receipt of the notice to quit and stated that the said Ramasamy Muthukrishna died leaving a Last Will and Testament bearing No. 851 dated 12.2.80 attested by S. Balendra, Notary Public, and the said Last Will is being proved in testamentary proceedings No. 1511/T of the District Court of Mt. Lavinia, that the defendant is the widow and she has three children, Ramaswamy, Radakrishnan and Raghavan, and that by the said Last Will the tenancy of the deceased in the said premises and the business of the "Mysore Cafe" that was carried on in the premises

was devised and bequeathed to the defendant and the said children and also to Ramaswamy Muthukrishna, a brother of the deceased.

It is further averred in the answer that under section 36 (2) (c) of the Rent Act and under the said Last Will the defendant is entitled to occupy the said premises as tenant. It is also averred that in any event the plaintiff cannot have and maintain this action as she has failed to comply with section 36(3) of the Rent Act.

By a motion dated 6.3.90 this answer had been amended by adding a new paragraph No.6 stating that the plaintiff made an application bearing No. 25974 to the Rent Board of Colombo for the determination of the authorised rent under section 34 of the Rent Act and the Board accordingly made an order on 9.9.88 determining the authorised rent.

By virtue of the said application and the order it is stated that the defendant has by law become the tenant of the plaintiff and that in any event the plaintiff is estopped from denying that the defendant is the tenant.

The trial was taken up on 25.10.90 on which date the following admissions were recorded:—

- (1) That Ramaswamy Muthukrishna was the previous tenant.
- (2) That Ramaswamy Muthukrishna died on or about 4.7.88.
- (3) That the premises in dispute are business premises.
- (4) That these premises are subject to the Rent Act.
- (5) That after the death of Ramaswamy Muthukrishna the defendant was carrying on business in these premises.
- (6) That the defendant was carrying on a business called Mysore Cafe (in these premises).

Thereafter the following issues were raised:—

On behalf of the plaintiff:

- (1) After the death of the defendant a predecessor as tenant, is the defendant lawfully entitled to succeed to the tenancy?
- (2) If the answer to issue No. (1) is "No", is the plaintiff entitled to maintain this action?

On behalf of the defendant:

- (3) As the plaintiff has not obtained an order from the Rent Board under section 36(3) of the Rent Act, can the plaintiff maintain this action?
- (4) In any event, under section 36(2) (c) (i) and (ii), did the defendant become the succeeding tenant?
- (5) (a) In view of the matters stated in paragraph 6 of the amended answer, did the defendant succeed to the tenancy?
(b) Is the plaintiff estopped from denying that the defendant is the tenant?

Further issues on behalf of the plaintiff:

- (6) Is the application made on 8.8.88 to the Rent Board of Colombo an act of the plaintiff?
- (7) If the answer to this issue is "No", is the plaintiff estopped as alleged?

As there were no objections to these the learned District Judge accepted all these issues.

Thereafter it is recorded that as the plaintiff has no objections to the amendment of the answer by motion dated 6.3.90 the amendment was accepted by court.

When the case was taken up for trial after the lunch interval, learned counsel for the defendant submitted that under section 36(3)

of the Rent Act it was the duty of the plaintiff as landlady to have made an application to the Rent Board for an order declaring which person shall be the tenant of these premises. He submitted that there is an automatic transmission of the tenancy under the Rent Act (unlike under the earlier Rent Restriction Act) and that in the event of an uncertainty it was the duty of the landlady to have applied to the Rent Board. The Board will go into the matter and having regard to the provisions of section 36(2) (c) decide which person or persons are entitled to be the tenant. He also cited the decision of this court in *Abdul Kalyoom v. Mohamed Mansoor* ⁽¹⁾ which lays down that the landlord is obliged under section 36(3) to apply to the Board for an order declaring which of several persons may be deemed to be the tenant. The Board has exclusive power to make an order on the criteria stipulated in section 36(2). He also submitted that it is not open to the plaintiff to file this type of action on the basis that the defendant is a trespasser, but the plaintiff is obliged to go to the Rent Board under section 36(3).

Learned counsel for the plaintiff on the other hand submitted that the plaintiff in paragraph 5 of the plaint has specifically stated that she is not accepting the defendant as the lawful wife of the previous tenant. Therefore she has no right to succeed.

Thereafter both parties had agreed that issue No. 3 should be taken up as a preliminary issue under section 147 of the Civil Procedure Code and the parties were agreeable to submit written submissions on the matter.

After written submissions were tendered the learned District Judge made his order dated 3.12.90.

In this order dated 3.12.90 the learned District Judge has stated that the plaintiff is not accepting the relationship of Ramaswamy Muthukrishna to any of the parties named in the answer and therefore it was the duty of the defendant to prove the relationship. In particular the plaintiff in her plaint has stated that the defendant claims to be the lawful wife. Therefore it was the duty of the defendant to have proved such relationship as was necessary to bring the defendant and the parties disclosed in the answer as those coming within section 36(2) (c). In the absence of such proof he was unable to

make a decision on issue No.3 that the plaintiff was unable to maintain the action.

Accordingly he made order that the case be fixed for further trial.

The defendant-petitioner has filed this application for revision in this court on 26.12.90 to set aside the said order dated 13.12.90 of the learned District Judge and to make order answering the said issue in favour of the defendant-petitioner and to dismiss the plaintiff's action. An stay order was also sought.

A connected leave to appeal application bearing No. C.A./L.A. 210/90 has also been filed.

At the hearing in this court Mr. A. K. Premadasa, P.C., reiterated the submissions made before the learned District Judge and strongly relied on the decision in *Abdul Kalyoom's* case referred to above, which lays down that the landlord has to apply to the Rent Board to decide among competing claims for tenancy as provided by section 36(3). He submitted that the landlord cannot come directly to court treating a claimant as a trespasser, but he should refer the matter to the Rent Board under section 36(3).

Mr. D. R. P. Goonatillake for the substituted plaintiffs-respondents submitted that there is no legal proof that the defendant-petitioner was the lawful wife of Ramaswamy Muthukrishna and that she was carrying on the business of the deceased tenant.

I must begin by stating that this case is a very good example of the danger of trying to decide a case on a preliminary issue of law in terms of section 147 of the Civil Procedure Code.

As stated by Viscount Radcliffe in the Privy Council case of *David v. Asoka Kumar*.⁽²⁾

"Useful as the argument of preliminary issues can be when their determination can safely be foreseen as conclusive of the whole action in which they arise, experience shows that very great care is needed in the selection of the proper occasion for

allowing such procedure. Otherwise the hoped – for shortening of proceedings and saving of costs may prove in the end to have only the contrary effect to that which is intended. This, unfortunately, is one of such cases.”

It is important to note that under section 147 for a case to be disposed of on a preliminary issue it should be a pure question of law which goes to the root of the case *Supramani Ayer v. Changarapillai*.⁽³⁾

In the case of *Gauder v. Gauder*,⁽⁴⁾ Wendt J. stated as follows at page 13:-

“An issue of law can only arise upon facts, and those facts must first be ascertained, by agreement of parties, or by proof. The Court cannot try such a question as this: ‘Assuming (but without admitting) the facts stated in defendants’ answer to be true, do they afford any defence to the action?’ ”.

An issue requiring the recording of detailed evidence is not a preliminary issue which can be dealt with under section 147. It is only a pure question of law which goes to the root of the case that can be taken up as a preliminary issue. For instance an issue of *res judicata* going to the root of the case can be taken as a preliminary issue and tried first, but here some formal documentary evidence will have to be marked in evidence like the pleadings and the judgment in the previous suit.

In the Indian case of *Yatindra Nath Chaudhury and Another v. Hari Charan Chaudhuri*⁽⁵⁾ it was held that as the trial of a case piecemeal might lead to protracted litigation and serious inconvenience and involve the parties in heavy costs if the case is taken repeatedly on appeal to a superior tribunal, it is much to be desired that in appealable cases the courts below should, as far as may be practicable, pronounce their opinion on all the important points and decide on all the issues joined.

It was also held in this case that a court acts quite illegally if it treats issues which really raise mixed questions of law and fact as involving only pure questions of law, and decides them as such without taking any evidence.

It is well to bear in mind that sections 756 (2) to (7) provide a procedure to appeal to this court (i.e. Court of Appeal) against any order of court made in the course of any civil action. Leave of this court has first to be obtained.

Section 756(7) states that upon leave to appeal being granted all proceedings in the original court shall be stayed pending the outcome of this appeal.

It is notorious that sometimes frivolous appeals are filed against orders made in the original court for the purpose of staying and delaying proceedings.

Therefore the judges of original courts should, as far as practicable, go through the entire trial and answer all the issues unless they are certain that a pure question of law without the leading of evidence (apart from formal evidence) can dispose of the case.

Here in this case the fact that the defendant-petitioner was the lawful wife of Ramaswamy Muthukrishna was not admitted by the plaintiff, nor the fact that the defendant-petitioner was carrying on business of the deceased tenant. Therefore it was incumbent on the defendant-petitioner to have led evidence to prove these facts, which she has failed to do.

Hence the learned District Judge has correctly answered issue No. 3 stating that the plaintiff can maintain the action.

In *Abdul Kalyoom's case (supra)*, at pages 366 and 368, S.N. Silva J. stated as follows:-

"... In terms of Section 36(3), the landlord has to make an application to the board for an order as to which, if any, of the persons who may be deemed to be tenant under subsection (2) shall be the person who shall for the purposes of the Act be deemed to be the tenants of premises.

In terms of Section 36(4) the Board is obliged to notice "all persons who may be deemed to be tenants under subsection (2)". It is clear from the words found in both subsections that it is mandatory on the landlord to make an application to the Board when there is any person who may be deemed a tenant of the premises in terms of Section 36(2). In other words in every situation where *prima facie* there are one or more persons eligible to succeed to the deceased tenant on the criteria stipulated in Section 36(2) (a) or (b) or (c) the landlord is required to make an application to the Board. The inquiry before the Board will result, in a positive declaration that one of such persons is the tenant of the premises for the purposes of the Act or, in a negative declaration that no one is eligible to succeed to the deceased tenant. In the event of the Board making a negative declaration, the contract of tenancy will terminate by the operation of the common law as stated above.

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I hold that in terms of section 36 (4) the Board has an exclusive power to make, a positive order declaring that any person who may be eligible to succeed to the deceased tenant on the criteria stipulated in section 36 (2), is the tenant for the purposes of the Act or, a negative order declaring that no such person will succeed the deceased tenant. Consequently, an action filed by a landlord in the regular Courts, without making an application to the Board, will fail, if it is established that any of the defendants may be deemed a tenant of the premises in terms of section 36 (2)."

I am in respectful agreement with these observations.

However, if the plaintiff alleges that the defendant has no rights, and is in the position of a trespasser (as is alleged in this case), then it is open to the landlord to file an action in a court of law to eject the trespasser without making an application to the Rent Board under section 36 (3). It should be noted that a Rent Board has no power to order the ejection of a trespasser. Therefore I cannot accept the submission of Mr. A. K. Premadasa that in this case the plaintiff should have made an application to the Rent Board under section 36 (3), because it is the position of the plaintiff that the defendant does not come within the classes of persons enumerated in section 36(2) (c) (i). Therefore I will leave it open to the defendant-petitioner even at a subsequent stage of the trial to adduce proof that she is the lawful wife of the Ramasamy Muthukrishna and that she is carrying on the business of the deceased tenant in these premises; in which event the plaintiff's action will have to be dismissed.

I affirm the order dated 13.12.90 and dismiss this application with costs payable by the defendant-petitioner to the plaintiff-respondent, but it is open to the defendant-petitioner to adduce evidence of the matters stated above (under section 36(2) (c) (i) when the trial is resumed.

In view of this order the connected leave to appeal application bearing No. C.A./L.A. 210/90 stands dismissed without costs.

GUNASEKERA, J. – I agree.

Application dismissed.