DEEN
v.
RAUF

COURT OF APPEAL
WEERASURIYA, J., AND
DISSANAYAKE, J.
CA NO. 19/94 (F)
DC MT LAVINIA NO. 612/SPL
JANUARY 17, 2001
FEBRUARY 22, 2001

Rent Act, No. 7 of 1972 – Repudiation of contract of tenancy – Plea of mistake – Conduct of parties – Attornment.

The plaintiff-respondent instituted action seeking to eject the defendant-appellant from the premises in question. It was the position of the plaintiff-respondent that she requested the defendant-appellant to send all arrears of rent and to continue to pay rents in the future. The defendant-appellant, whilst acknowledging the title had sent a cheque as settlement of all arrears upto December, 1987, to the Rent Control Board. Thereafter, by another cheque rents upto 1988 has been remitted, however, these two cheques were drawn in favour of one R, the deceased husband of the plaintiff-respondent – crossed 'not negotiable'. The District Court in the circumstances held that, there was a repudiation of the contract of tenancy.

On appeal –

Held:

(1) Though there was no unequivocal refusal to recognise the plaintiff-respondent as the landlord, in the letter by the defendant-appellant, her conduct in sending two cheques crossed 'not negotiable' drawn in favour of R – the deceased husband of the plaintiff-respondent is a clear manifestation of her intention to deprive the plaintiff-respondent of the rent.

(2) The facts of this case, with a background of a bitter relationship would lead to the irresistible conclusion that it would never be a mistake but a deliberate act. This conduct is an act of repudiation of the present contract of tenancy.

APPEAL from the judgment of the District Court of Mt. Lavinia.

Cases referred to:

1. *Violet Perera v. Asilin* – 1996 1 SLR 1.
2. *Lalitha Perera v. Padmakanthi* – 1987 2 SLR 1.
3. *Seelawathie v. Ediriweera* – 1992 2 SLR 170.
4. *Gunasekera v. Jinadasa* – 1996 2 SLR 115 (DB).

P. A. D. Samarasekera, PC with *S. Mahenthiran* for defendant-appellant.

P. Vimalachanthiran for plaintiff-respondent.

Cur. adv. vult.

June 22, 2001

WEERASURIYA, J.

The plaintiff-respondent by her plaint dated 09. 03. 1988, instituted action against the defendant-appellant seeking her ejectment from the premises described in the schedule to the plaint and damages in a sum of Rs. 2,500 per month from 13. 11. 1986.

The defendant-appellant in her answer whilst denying averments in the plaint, prayed for dismissal of the action. This case proceeded to trial on ten issues and at the conclusion of the case, learned District Judge by his judgment dated 18. 01. 1994, entered judgment for the plaintiff-respondent as prayed for in the plaint. This appeal has been filed against the aforesaid judgment.

At the hearing of this appeal, learned President's Counsel for the defendant-appellant contended that learned District Judge has misdirected himself in holding that there was a repudiation of the tenancy by the defendant-appellant.

The case of the plaintiff-respondent rested on the basis that she became entitled to the premises in suit by virtue of deed of gift bearing

No. 233, dated 15. 02. 1979 executed by her husband J. M. Rauf. Since the defendant-appellant failed to pay rent after the death of Rauf, the plaintiff-respondent by her letter dated 19. 11. 1987 (P1), called upon the defendant-appellant to pay arrears of rent and the defendant-appellant sent two cheques with a crossing 'not negotiable', drawn in favour of her deceased husband in settlement of arrears of rent for the period upto December, 1988. Thereafter, before the summons returnable date the defendant-appellant has sent two money orders for the amounts specified in the two cheques.

The main issue before the District Judge was whether the defendant-appellant had failed to attorn to the plaintiff-respondent in terms of her letter dated 19. 11. 1987 (P1).

The contention of learned President's Counsel that the learned District Judge has misdirected himself in holding that there was a repudiation of the contract of tenancy stems mainly from his plea that the conduct of the defendant-appellant amounted to a mistake which cannot form the basis for a finding of repudiation of tenancy. He contended that letter dated 23. 11. 1987 (P2) by the defendant-appellant to the plaintiff-respondent would clear all doubts relating to the question of attornment. In support of this contention learned President's Counsel laid emphasis on the definition of the doctrine of repudiation as found in Stroud's *Law Dictionary* and Cooper's *South African Law of Landlord and Tenant.*

Repudiation as defined in Stroud's *Judicial Dictionary* (vol. 4, 5th edition 1986 at page 2249) is in the following terms:

"Repudiation in relation to contract may mean –

(a) ***a denial that there was a contract in the sense of an actual consensus ad idem,***

(b) ***a claim that apparent consent was vitiated by fraud, duress, mistake or illegality,***

(c) *a claim that the contract is not binding owing to a failure of condition or breach of duty which invalidates the contract,*

(d) *an unequivocal refusal to proceed with an admittedly binding contract, or most commonly,*

(e) *an anticipatory breach whereby one party to a contract indicates an intention not to be bound thereby, where upon the other party accepts the repudiation and re scinds the contract . . . There must be a conscious act (of repudiation) in relation to the contract in question . . ."*

Cooper in his *South African Law of Landlord and Tenant* (1973 edition at page 293) defines the doctrine of repudiation as follows :

"Repudiation of a lease occurs when one of the parties indicates an intention not to be bound by the contract. A party may do so expressly, eg. by unlawfully cancelling the lease and requesting the lessee to vacate the premises. Repudiation may be inferred also from a party's conduct, eg. the lessee vacating the premises and returning the keys to the lessor.

Repudiation will be inferred where a party exhibits a deliberate and unequivocal intention no longer to be bound by the contract."

It is necessary to set down following the facts before I proceed to consider the plea of mistake as adverted to by learned President's Counsel. The defendant-appellant was the sister of Mohamed Rauf, the deceased husband of the plaintiff-respondent, who before his death on 12. 11. 1986 gifted the property in suit to the plaintiff-respondent reserving life interest to himself as evident from deed of gift bearing No. 233 dated 15. 12. 1979 attested by S. Bagiranathan marked P9.

Since there was a failure on the part of the defendant-appellant to remit the rent, the plaintiff-respondent by her letter dated 19. 11. 1987, requested the defendant-appellant to send all arrears

of rent and to continue to pay rents in the future. In that letter, the plaintiff-respondent made reference to the fact that she is the owner of the premises in suit which she alleged was known to the defendant-appellant. In response to this letter, the defendant-appellant by her letter dated 23. 11. 1987 whilst acknowledging the receipt of the letter dated 19. 11. 1987, laid the blame at the Municipality for the delay in the payment of rent on account of its failure to credit the amounts paid as rates and taxes expeditiously. She stated in this letter that a Bank of Ceylon cheque has been sent to the Rent Control Board settling all arrears upto December, 1987.

The question to be examined is whether the defendant-appellant has by her conduct repudiated the presumed contract of tenancy.

The learned President's Counsel for the defendant-appellant contended that letter dated 23. 11. 1987 (P2) was a clear manifestation of defendant-appellant's willingness to attorn to the plaintiff-respondent.

The letter (P2) is a direct reply to the letter by the plaintiff-respondent (P1) demanding payment of rent together with arrears of rent since the death of her husband.

As adverted to by learned President's Counsel this letter could be described *ex facie* as a compliance with the demand of the plaintiff-respondent to tender the arrears of rent.

Nevertheless, on a careful examination of the contents of this letter the manner in which compliance of the demand for payment of rent was met, has come into conflict with the purported objective of payment.

The letter refers to a cheque bearing No. A71 631763 (P3) sent to the Rent Control Board as settlement of all arrears of rent upto the end of December, 1987. Thereafter, by another cheque bearing No. 631169 (P4) rents upto December, 1988, has been remitted.

The two significant features of these two cheques are :

(*a*) that they contain a crossing 'not negotiable' and

(*b*) that both are drawn in favour of J. M. Rauf the deceased husband of the plaintiff-respondent.

Therefore, the resultant position would be that despite a purported willingness to comply with the demand for payment of arrears of rent, the rents that were remitted were in the name of the former landlord.

The crucial matter that arises for consideration is whether this conduct of the defendant-appellant could be described as a mistake as alleged by learned President's Counsel.

In examining the plea of mistake it would be necessary to examine the position adverted to by the defendant-appellant in her answer. In paragraph 7 of the answer the defendant-appellant averred that she has lawfully and duly paid all arrears of rent. In paragraph 8 of the answer she put the plaintiff-respondent to strict proof of all the material averments in the plaint. However, in her evidence the defendant-appellant sought to explain the drawing of two cheques in favour of Rauf (the deceased husband of the plaintiff-respondent) on the basis of persisting with the earlier practice of drawing cheques in favour of him (Rauf). Thus, it would be clear that neither in the answer nor in her evidence, has the defendant-appellant, claimed that owing to a mistake, she has drawn the two cheques in favour of Rauf.

The sending of two Money Orders subsequent to the filing of plaint has to be viewed as conduct emanating from legal advice as they were sent after a meeting with her lawyer.

Another factor which seems to have a significant bearing on the conduct of the defendant-appellant is the relationship of the defendant-appellant, *vis-a-vis*, plaintiff-respondent after her marriage with Rauf. It was common ground that plaintiff-respondent was the second wife

of Rauf. In the answer, the defendant-appellant has averred that while the former wife was alive the plaintiff-respondent has contracted the marriage with Rauf seeming to suggest the inference that while the first marriage was subsisting the second marriage has been contracted. This suggestion containing in that averment was found to be incorrect as the marriage certificate (P9) revealed that marriage between Rauf and the plaintiff-respondent has been effected after the dissolution of the former marriage.

The evidence of the plaintiff-respondent that defendant-appellant has never visited them and that they were compelled to sell house bearing No. 4, adjoining the premises in suit owing to the animosity, the defendant-appellant bore towards them remain unchallenged. The resentment that the defendant-appellant had towards the plaintiff-respondent since the marriage has found expression in averment 4 of the answer which could be described as an act of malice suggesting an inference of a marriage under Muslim Law with a person who has four children, while the first wife was still alive. When one considers these facts forming the background as to the relationship between the plaintiff-respondent and the defendant-appellant, the non-payment of rent to the plaintiff-appellant assumes much significance. Therefore, the question is, to what extent this conduct would amount to repudiation of the contract of tenancy.

In this regard, it would be useful to examine the conduct of tenants as revealed in some reported cases where it was considered that such conduct fell short of compliance of the obligation of the tenant to pay rent to the landlord.

In *Violet Perera v. Asilin*[1] where the defendant on being duly informed that the tenanted premises had been gifted to the plaintiff, after calling for a copy of the deed from the plaintiff's mother (former landlord) and receiving no response continued to deposit the rent in the Municipality in favour of the plaintiff's mother (former landlord) it was held that the tenant cannot be regarded as having paid the rent to the landlord of the premises.

In *Lalitha Perera v. Padmakanthi*[2] where the defendant was the tenant of the premises under the father of the plaintiff, and after the premises were gifted to the plaintiff (daughter) informed of the change of ownership and requested the defendant to pay rent to the plaintiff, it was held that continuance in occupation without attorning to the new owner (landlord), the defendant is liable to be sued in ejectment.

In *Seelawathie v. Ediriweera*[3] the rented premises were gifted to the plaintiff and the tenant was apprised of the change of ownership and of the transferee's option to take possession of the premises with the tenant in occupation. Since there was no reply to that letter, and the tenant continued in occupation, the Attorney-at-law of the plaintiff informed the tenant that the plaintiff had become the owner of the premises and called upon the tenant to attorn and to pay rent. The tenant merely acknowledged the receipt of the letter without prejudice to his rights under the provisions of the Rent Act and the Ceiling on Housing Property Law. Thereafter, when the notice to quit was given requiring the tenant to quit the premises, he replied that house was vested with the Commissioner of National Housing and as the previous owners had charged excess rent he is not obliged to pay rent till the excess amount is covered in full. It was held that the landlord was entitled to the relief of ejectment of the tenant.

In *Gunasekera v. Jinadasa*[4] where plaintiff's father (landlord) and the plaintiff informed the defendant that the property had been gifted to the plaintiff and called upon the tenant to pay rent to him (plaintiff) and the defendant continued to occupy the premises and deposited the rent in the father's name, it was held that since the defendant has failed to attorn to the plaintiff-appellant, he was a trespasser.

This case laid down the principle that payment to the authorised person in the name of the person who is not the landlord does not discharge the tenant's obligation to the landlord.

In the present case, though there was no unequivocal refusal to recognise the plaintiff-respondent as the landlord in the letter by the defendant-appellant, her conduct in sending two cheques with a crossing 'not negotiable' drawn in favour of Rauf, is a clear manifestation of her intention to deprive the plaintiff-respondent of the rent. The question may be justifiably posed as to whether the defendant-appellant was naive and puerile to pretend that those two cheques could be cashed by the plaintiff-respondent. The facts enumerated above viewed with the background of a bitter relationship would lead to the irresistible conclusion, that it could never be a mistake but a deliberate act. Thus, this conduct would be correctly described as an act of repudiation of the present contract of tenancy.

In *Seelawathie v. Ediriweera* (*supra*) it was held that continuance in occupation by the tenant (with notice of the transferee's election to recognise the tenant) constitutes an exercise of the tenant's option to acknowledge the transferee as landlord, establishing privity of contract between the parties and that no other act or conduct is necessary.

In *Gunasekera v. Jinadasa* (*supra*) the principle was laid down that while it is legitimate initially to infer attornment from continued occupation, thus establishing privity of contract between the parties, another principle of law of contract comes into play in such circumstances to which the presumption of attornment must sometimes yield. When the occupier persists in conduct which is fundamentally inconsistent with a contract of tenancy, and amounts to repudiation of that presumed contract the transferee has the option either to treat the tenancy as subsisting and to sue for arrears of rent and ejectment or to accept the occupiers repudiation of the tenancy and to proceed against him as a trespasser.

For the foregoing reasons, I proceed to dismiss this appeal with costs.

DISSANAYAKE, J. – I agree.

Appeal dismissed.