SIRIWARDENA
v.
HEWAGE

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
RAMANATHAN, J. AND
WIJETUNGA, J.
S.C. APPEAL NO. 8/96.
C.A. NO. 452/75 (F).
D.C. COLOMBO 2391/ED.
DECEMBER 17, 1996 AND FEBRUARY 27, 1997.

Landlord and Tenant – Sub-letting of premises – Requirement of exclusive occupation of a part of the premises – Section 9 of the Rent Restriction Act – Section 10 of The Rent Act.

The plaintiff as Landlord sued his tenant the defendant for ejectment on the ground that the latter had sub-let a portion of the premises in suit to the added defendant. The evidence led in support of the alleged sub-letting included the evidence of a Grama Sevaka who had issued a certificate that the added defendant and her daughter were resident at the premises in suit, a letter from the defendant to the same effect, a writing signed by the added defendant that she was a tenant of a part of the premises and house-holders lists. The evidence showed that all this material had been prepared to help the added defendant's daughter to gain admission to a school. But the child failed to gain admission to the school as the school authorities were not satisfied that neither the added defendant nor her daughter resided at the premises. The Grama Sevaka himself did not state in evidence that the added defendant in fact occupied a room.

Held:

1. The essential test in every case is whether there is evidence from which one can infer that there is at least some part of the premises over which the tenant has, by agreement, placed the sub-tenant in exclusive occupation. There is no evidence of exclusive occupation of a separate portion of the premises by the added defendant.

2. Even though the requirement of exclusive occupation of the premises was not expressly provided in section 9 of the Rent Restriction Act as in the case of sub-letting under section 10 of the Rent Act, exclusive occupation has to be established even in a case where the action is instituted in terms of the provisions of section 9 of the Rent Restriction Act.

Cases referred to:

1. *Suppiah Pillai v. Muthukaruppan Pillai* 54 N.L.R. 572.
2. *Jayawardena v. Kandiah* 71 N.L.R. 380.

APPEAL from judgment of the Court of Appeal.

R. K. W. Goonesekera with *Aravinda R.I. Athurupana* for the plaintiff-appellant.

Faiz Musthapha, P.C. with *Sanjeewa Jayawardena* for the substituted defendant-respondent.

Cur. adv. vult.

May 2, 1997.

G. P. S. DE SILVA, C.J.

The plaintiff, as landlord, instituted these proceedings on 1st March 1971, seeking, *inter alia,* the ejectment of his tenant, the original defendant, from the premises in suit. The ground of ejectment relied on was sub-letting a portion of the premises to the added defendant. After trial, the District Court held with the plaintiff and the defendant preferred an appeal to the Court of Appeal. While the appeal was pending the original defendant died and his daughter was substituted in his place. The appeal of the defendant was successful and the Court of Appeal set aside the judgment of the District Court and the plaintiff's action was dismissed. Hence the present appeal to this court by the plaintiff.

The defendant in his answer denied the allegation of sub-letting the premises to the added defendant. By way of further answer the defendant pleaded that the added defendant prior to her marriage resided in the premises which are situated next to the premises in suit and that after her marriage she went to Homagama to reside in her husband's house. On or about the 15th October 1970, the added defendant, who was well known to the defendant, came and requested him "to state that she and her child resided at the defendant's house for the sole purpose of qualifying for admission to Ananda Balika Vidyalaya as the defendant's house is situated near Ananda Balika Vidyalaya." (Paragraph 4 of the answer). The added defendant too in her answer denied the allegation of sub-letting. In

paragraph 5 of her answer she specifically averred that she has not been at any time in constructive or physical occupation as tenant of any portion of the premises in suit. She further pleaded that on or about the "15th October 1970 she requested the defendant to state to the Grama Sevaka that she resided at the defendant's house for the sole purpose of qualifying her daughter for admission to the Ananda Balika Vidyalaya as the defendant's house is situated in close proximity to the said Ananda Balika Vidyalaya."

It is not in dispute that the original defendant, now deceased, was in occupation of the premises from 1942 and the plaintiff became the owner of the premises in or about 1966. The Court of Appeal reversed the judgment of the District Court on the basis that (a) there was no evidence to support the finding that the added defendant who was alleged to be the sub-tenant resided at the premises, and (b) that in any event, there was no proof that the added defendant was in exclusive occupation of a defined portion of the house.

The plaintiff's case rested on the evidence of Siriwardena, the plaintiff's husband, Piyasena Alwis, the Grama Sevaka of the area, and in particular the documents marked P4, P5, P6, P7 and P8. According to Siriwardena, in 1970 he received information that the defendant had sub-let the premises. However, he did not know to whom the premises had been sub-let; he had not visited the premises to verify the informations received. He made a statement to the Grama Sevaka on 6.10.70 (P1) stating that a portion of the premises had been sub-let and requesting him to inquire into it. Subsequently, he had learnt from the Grama sevaka that "there was somebody residing there" and that it was the added defendant. He further testified that the Grama Sevaka told him that the defendant was occupying "one room" and that it was "the 2nd room" which he thought may be the "store room." The notice to quit (P2) was sent and in reply to P2 the defendant denied the allegation that he had sub-let the premises (P3).

On a consideration of the evidence of Siriwardena it would appear that he has merely stated what he learnt from the Grama Sevaka, and his evidence does not in any way advance the case of the Plaintiff.

The Grama Sevaka's evidence was that he recorded the complaint of Siriwardena and that he went for inquiry. He further stated that the added defendant who was anxious to admit her child to Ananda Balika Vidyalaya brought a letter from the defendant (P4). P4 is dated 24.10.70 and is addressed to the Grama Sevaka; admittedly it was written and signed by the defendant. By P4 the defendant had certified that the added defendant and her daughter had been residing at the premises in suit for the last 5 years. According to the Grama Sevaka, he had visited the premises in suit earlier and issued the certificate of residence marked D1. It is to be noted that D1 and P4 bear the same date, namely 24.10.70. By D1 the Grama Sevaka certified that the added defendant and her daughter were resident in the premises in suit. The house-holder's list number and the rice ration book number have also been noted in D1. Admittedly, the added defendant was not present when the Grama Sevaka visited the premises. However, according to the Grama Sevaka "the people in that house showed me the **place** where she resides and I gave her a certificate." It is a matter of the utmost significance that in answer to court the Grama Sevaka further stated that he did not know how the added defendant was residing there, **whether she was a boarder or a tenant.** He conceded that he had not made an entry in his official diary in regard to his claim that he visited the premises in suit. It is very relevant to note that the Grama Sevaka's evidence was that the inmates of the house showed him the **place** where the added defendant resided. Nowhere in his evidence does he state that the added defendant occupied a "room" as claimed by Siriwardena.

P4 apart, the other important document relied on by the plaintiff is P5. P5 which is dated **27.10.70** has been written by the Grama Sevaka and admittedly signed by the added defendant. The added defendant has stated in P5 that she is permanently residing with her daughter at the premises in suit for the last one year and eight months, and what is more, she further stated that she pays a sum of Rs. 35/- as rent for her occupation. P5 could reasonably be construed as an admission of sub-tenancy. The added defendant in her evidence explained the circumstances in which she came to sign P5. She was sent for by the Grama Sevaka on 27.10.70 and she received the message when she was at her work place, the General

Hospital, Colombo. She then proceeded to the office of the Grama Sevaka who had told her that the certificate of residence (D1) he had given was not sufficient and that he wanted a writing from her. She had not brought her spectacles and the Grama Sevaka wrote the contents of P5 and she signed it. It is difficult to understand the need for P5 when the Grama Sevaka had three days earlier issued the certificate of residence, D1. The cross-examination of the Grama Sevaka in regard to the circumstances in which P5 came to be written throws grave doubt as to the *bona fides* of the conduct of the Grama Sevaka. The evidence reads thus:

Q. You issued this certificate on 24.10.70 (D1)?

A. Yes.

Q. You got this letter from the added defendant on 27.10.70 (P5)?

A. Yes.

Q. As far as you are concerned once a certificate of residence is given the matter is completed?

A. Yes.

Q. After the certificate was issued on 24.10.70 when did Gunawathie (added defendant) come to see you?

A. No answer.

Q. I put it to you that after you issued this certificate, D1, the plaintiff came and saw you and thereafter you went in search of Gunawathie (added defendant) and asked her to come and see you?

A. Gunawathie did not come and see me.

Q. Can you give any reason why Gunawathie came to see you after 24.10.70?

A. No answer.

On a consideration of the above evidence, it would appear that the circumstances in which P5 came into existence lend support to the suggestion made in cross-examination that P5 was obtained by the Grama Sevaka to advance the case of the plaintiff. The District Court

has totally failed to address itself to the infirmities in P5. It seems to me that it is a document on which no court, acting reasonably, could have placed any reliance.

The plaintiff relied heavily on the document P4 referred to above. The defendant who gave P4 to the added defendant stated that it was at the request of the added defendant that he gave the letter P4 addressed to the Grama Sevaka and it was given purely to assist the added defendant in getting her child admitted to Ananda Balika Vidyalaya which is about half a mile away from the premises in suit. His position clearly was that neither the added defendant nor her child was ever in occupation of the premises, although he gave the letter P4. No doubt P4 constitutes an admission against the defendant but it is not conclusive. The added defendant gave evidence in support of the defendant. It seems to me that P4 has to be considered in the light of the following important facts which are not in dispute: (1) The plaintiff has not seen the added defendant in the premises; (2) the Grama Sevaka has stated that the added defendant was not present at the premises at the time of his visit; (3) it is in evidence that the added defendant's daughter could not gain admission to the school for the reason that the Janatha Committee which inspected the premises found that neither the added defendant nor her daughter resided at the premises in suit. The District Judge has totally failed to consider these relevant items of a evidence in assessing the evidentiary value of P4.

P6, P7 and P8 are the other documents relied on by the plaintiff. They are the householder's lists for the years 1968, 1970, and 1971 respectively. It is true that these lists have been signed by the defendant and the names of the added defendant and her daughter have been included as occupants of the premises. However, it is to be noted that according to P6 the total number of persons in occupation of the premises was no less than 17. On the other hand, according to the evidence of Siriwardena this was a small house and it was very unlikely that as many as 17 persons would have resided in that house. P7 too contains the names of as many as 14 persons. These facts in my view lend credence to the evidence of the defendant that he was trying to help parents who were seeking to admit their children to schools in close proximity to his residence.

The burden was clearly on the plaintiff to establish first, that the added defendant was in occupation of a portion of the premises. On a consideration of the entirety of the evidence, both oral and documentary, I am inclined to the view that the evidence on this point was weak and tenuous. In any event, the mere fact of occupation of a portion of the premises is quite insufficient to discharge the burden that lay on the plaintiff. There is the further essential requirement which the plaintiff must establish, namely that the added defendant was in **exclusive** occupation of a portion of the premises. On this crucial aspect of the case there is **no evidence.** As stated earlier, nowhere in his evidence has the Grama Sevaka stated that the added defendant occupied a room. And the District Court has completely overlooked the vital question of exclusive occupation.

Mr. R. K. W. Goonesekera, Counsel for the plaintiff-appellant submitted that "sub-letting under the **Rent Restriction Act** which applies to this case since the action was instituted in 1971 does not require exclusive occupation of a defined and separate part over which the landlord has relinquished his right of control. This condition was introduced only by the Rent Act section 10(1) when compared with the Rent Restriction Act, section 9". The provisions of section 9 of the Rent Restriction Act directly arose for consideration by Gratiaen J., in *Suppiah Pillai v. Muttukaruppa Pillai*[1]. The case for the plaintiff's was that the 1st defendant (the tenant) had in breach of section 9(1) of the Rent Restriction Act sub-let portions of the premises to the 2nd and 3rd defendants. Dealing with the concept of sub-letting postulated in section 9 Gratiaen J., expressed himself in the following terms:

> "There is nothing in the provisions of the Act from which one may legitimately infer that the concept of "sub-letting" prohibited by section 9 is different to that in which the term is properly understood under the Roman Dutch Law which governs transactions of this kind in Ceylon. It is essential to the formation of a contract of tenancy (or of sub-tenancy) that the "thing hired" is capable of ascertainment as an identifiable entity occupied by the tenant (or sub-tenant as the case may be) to the exclusion not only of trespassers but of the landlord (or tenant) himself. As Wille puts it 'The parties must definitely agree upon the same property as being the subject matter of the contract and (in the case of a written lease) the subject matter must be defined or described with

a degree or precision which will enable it to be identified without recourse to the evidence of the parties concerned, otherwise no lease is formed' – Landlord and Tenant in South Africa (3rd Ed) p. 24. It follows that no breach of section 9(1) of the Act is committed if a tenant, while himself remaining in occupation of the leased premises, merely permits someone else to share their use and enjoyment with him ... " I agree with Mr. Choksy that a valid sub-letting can effectively take place without any structural demarcation of the portion sub-let from the rest of the premises; but the essential test in every case is whether there is evidence from which one can infer that there is at least some part of the premises over which the tenant has, by agreement, placed the sub-tenant in exclusive occupation. No such evidence is to be found in the present case, and the plaintiffs have not established that, since the date of his agreement with the 2nd and 3rd defendants, the 1st defendant, qua tenant, ceased to occupy or to exercise his general control over, any portion of the premises".

The same view was taken by H. N. G. Fernando, C.J., in *Jayawardena v. Kandiah*[2]. I therefore find myself unable to agree with the contention of Mr. Goonesekera that section 9 of the Rent Restriction Act does not require proof of exclusive occupation of a separate portion of the premises.

Since there is no evidence in the case before us of "exclusive occupation" of a separate portion of the premises by the added defendant, I am of the opinion that the Court of Appeal was justified in setting aside the judgment of the District Court and dismissing the plaintiff's action.

For these reasons, the appeal fails and is dismissed, but in all the circumstances without costs. I would also direct that the order for costs made against the plaintiff in the judgment of the Court of Appeal be deleted.

RAMANATHAN, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.