SAMEEN AND ANOTHER
V.
CEYLON HOTELS LTD.

COURT OF APPEAL
DHEERARATNE, J. (PRESIDENT C/A) and PALAKIDNAR, J.
C.A. 567/79 (F)
D.C. COLOMBO 3030/RE
MAY 3, 4, 5, and 6, 1988.

Landlord and tenant — Description of agreement as a licence — Ingredients of a tenancy — Requirements of licence.

A contract of tenancy is featured by an object to let and hire, ascertained premises and fixed rent. In the last resort it is a question of intention. The mere description of an agreement as a licence will not make it one. Was only a personal privilege intended ?

The fact that there was no exclusiveness of possession of the area occupied in that the owner could change its location the prohibition against assignment of the benefits without written consent, the provision for termination at 24 hours notice for any breach of conditions in the agreement, the stringent nature of the control and supervision implied in the provision and the limited duration of the occupancy, show that the occupancy was of a personal nature and a licence.

Cases referred to :

1. *Addis Combo Estates Ltd. v. Crabbe* [1957] 3 All E.R. 563
2. *Booker v. Palmer* [1942] 2 All E.R. 676
3. *Errington v. Errington and Woods* [1952] K.B. 290
4. *Street v. Mountford* [1985] 2 All E.R. 289
5. *Radaich v. Smith* 101 C.L.R. (Australia) 209. 218
6. *Hadjiloueas v. Crean* 1987 3 A.E.R. 1008
7. *Sivagnanda v. Bishop of Kandy* 55 NLR 130
8. *Ratnam v. Perera* 64 NLR 198.

APPEAL from judgment of the District Court of Colombo.

Dr. H.W. Jayewardene, Q.C. with *Ifthikar Hussain, Harsha Gunasekera* and *Miss Keenawinna* for Appellants.

H.L. de Silva, P.C. with *G. Dayasiri* and *L.N. de Silva* for Respondents.

Cur. adv. vult.

July 27, 1988

PALAKIDNAR, J.

The two Plaintiffs-Appellants entered into an agreement with the Defendant Hotel to display and sell gems, jewellery and curios to customers and visitors of the Hotel in a defined area shown as premises number 7 in the sketch marked P1 at the trial.

The Plaintiffs were to pay licence fees of Rs. 3500/- a month. The tenure of such business was two years commencing from 1-9-76.

On 28-9-78 after the expiry of the two year term the Plaintiffs instituted this action for a declaration that the agreement was of no force or avail in law and a further declaration that they were tenants of the Defendant Hotel. The only issue raised at the trial was ' whether the Plaintiffs were tenants of the premises in suit ?'

The learned trail Judge after a careful evaluation of the evidence led has held that the Plaintiffs were not tenants. He observed that the Plaintiffs did not show that the premises were governed by the Rent Act.

The Plaintiffs in asking for a declaration that the agreement marked P2 was of no force or avail in law on the footing that it violates section 2 of the Prevention of Frauds Ordinance have according to the finding of the learned trial Judge become trespassers because an informal lease cannot create a monthly tenancy unless it is notarially executed.

It was the contention of the Counsel for the Appellants that although the agreement termed the occupation as a licence and the rent licensee fees the features of the actual relationship that subsisted between the Plaintiffs and the Defendant were that of landlord and tenant as governed by the Roman Dutch Law of locatio conducti. It was featured by an object to let and hire, ascertained premises and fixed rent.

In this background authorities that have drawn the distinction between licensees and tenants were submitted. The case of *Addis Combo Estates Ltd.* v. *Crabbe* (1) was considered. It enunciated the principle that the relationship was determined by law and not by description given by the parties. The view of *Lord Green M.R.* in *Booker* v. *Palmer* (2) referred to by the learned trial Judge was that the question whether or not the parties to an agreement intend to create as between themselves the relationship of landlord and tenant must in the last resort be a question of intention.

The relevant view of *Denning C.J. in Errington* v. *Errington and Woods* (3) was also urged by Counsel at the argument in appeal.

> " Although a person who is let into exclusive possession is prima facie considered to be a tenant nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot form a tenancy into a licence by merely by calling it one. But if the circumstances and conduct of the parties show that all that was intended was the occupier should be granted a personal privilege with no interest in land he will be held to be a licensee only. "

The exclusive possession of premises number 7 in sketch P1 was strongly relied on by Appellants' Counsel as a feature of the tenancy agreement. But the clauses in the agreement reveal aspects which erode into the exclusiveness of the possession itself. The Plaintiffs could display items which were referred to in clause 12 and only during hours named by the Company. Clause 18 permits a control of the staff by the Defendant. There is a further right given to the Defendant to move the Plaintiff's business to any other part of the shopping area.

The object of letting and hiring the premises cannot be inferred from the agreement. The agreement shows that the object was to provide amenities and facilities to customers and visitors to the Hotel. The right granted is a purely personal one. There is a prohibition in the agreement against assigning the entire benefits or any one of them under clause 5 without the previous consent in writing by the Defendant ; The agreement itself was terminable by the Defendant-Company at twenty four hours' notice for any breach (clause 6) of a condition in which there was agreement between the parties.

In the case of *Street* v. *Mountford* (4) it was held that a tenancy arose whenever there was a grant of exclusive possession for a fixed periodic term at a stated rent unless special circumstances existed which negatived a presumption of tenancy. Vide Lord Templeman's speech. He quoted Lord Green's view referred to earlier in this judgment. He also referred to Lord Denning's view in *Errington v. Errington* also quoted earlier in this judgment. It emphasised that there should be exceptional circumstances to negative a tenancy clearly inferred from the express agreement between the parties.

In Radaich v. *Smith* (5) it was held by Taylor, J. at page 218 that the test of exclusive possession in deciding a tenancy could give rise to misgivings because it may not correspond to realities — In the same judgment *Windayer, J. at page 222* considered the distinction by stating that the fundamental right which a tenant has that distinguishes him from the position of a licensee is an interest in land and distinct from a personal permission to enter the premises and use it for some stipulated purpose.

In the recent case of *Hadjiloueas* v. *Crean* (6) these authorities have been reviewed with special reference to Lord Templeman's views in *Street* v. *Mountford* (*Supra*). Lord Justice Mustill quoted thus

> " Exclusive possession is of first importance in considering whether an occupier is a tenant, exclusive possession is not decisive because an occupier who enjoys exclusive possession is not necessarily a tenant. " — page 1020.

Local cases pertaining to the subject under discussion were also cited by Counsel for the Appellants. In the case of *Sivagnanda* v. *Bishop of Kandy* (7) the position of the claim of tenancy by the occupancy of a prospective purchaser of the land was examined and it was held based on the facts that he was a licensee. In the case of *Ratnam* v. *Perera* (8) it was held that mere use of words in an agreement could not determine the nature and quality of the rights.

In the present case the conclusions of the trial Judge in the judgment appealed from are unexceptionable. He has considered the object of the agreement and in our view a parallel can be drawn to the front house of a theatre or a stall in a railway station where refreshments are served to the facilities that the Defendant sought to provide its customers and visitors.

The stringent nature of the control and supervision implied in the provisions of the agreement makes it clear that the occupancy of the Plaintiffs was of a personal nature which could not be assigned to anyone and limited in duration. It certainly did not convey any interest in the land.

Therefore the conclusion arrived at by the learned trial Judge is in our view correct and he has answered the issue in accordance with the law and the facts of this case.

We see no reason to interfere with the decision of the learned Judge in the circumstances and dismiss the appeal with costs fixed at Rs. 525.

Dheeraratne, J., — I agree.

Appeal dismissed.

DAYA WETHTHASINGHE
V.
MALA RANAWAKA

COURT OF APPEAL
WIJETUNGA J. AND S.N. SILVA J.
C.A. APPLICATION 181/88.
D.C. MT. LAVINIA 2478/RE.
MARCH 29 AND 30, 1988.

Civil Procedure — Transfer of Case — Judicature Act. No. 2 of 1978. S. 46 — Bias — Expediency — Stay-Order Made per incuriam.

In a tenancy case the main dispute was whether the premises let were residential premises or business premises and whether they were excepted premises. During the hearing the Judge suggested a settlement but differences on the quantum of rent the defendant should pay stalled the settlement. An inspection was suggested and made by the Court. The Judge noted on inspection that it was incontrovertible that the premises were not being used at all as a residence and further observed that the rental of Rs. 20,000 per month demanded by the plaintiff (against Rs. 5000 offered by the defendant) was reasonable. The case could not be settled and the defendants applied for a transfer of the case to another Judge in the interests of a fair and impartial trial. On the application being supported order was made staying further proceedings until the day after the notice returnable date. The plaintiff filed objections and submitted that the stay order had been made *per incuriam*.

Held :

1. The stay order was not one made *per incuriam*. It had not been made in ignorance of any previous decisions of the Court or of a court of co-ordinate or higher jurisdiction or in ignorance of a statute or a long standing rule of the common law.

2. A party seeking to establish bias undertakes a heavy burden of proof. Mere reasonable suspicion is not enough. A Judicial officer is a person with a legally trained mind and court will not lightly entertain an allegation of bias. The petitioner had failed to establish bias.

3. Is the transfer expedient on any other ground ? In view of the Judge's note that it was incontrovertible that the premises were not being used at all as a residence of the defendant, the credibility of the defendant would be affected. Expedient means ' advisable in the interests of Justice '. In view of the Judge's observation which certainly affects the credibility of the defendant — petitioner, the interests of Justice demand that the case be heard by another Judge.

Cases referred to :—

1. *Billimoria* v. *Minister of Land* [1978-79] 1 Sri L R 10
2. *Perera* v. *Hasheeb* Sriskantha Vol. 1 p. 133, 145
3. *Simon* v. *The Commissioner of National Housing* 75 NLR 471
4. *Re Ratnagopal* 70 NLR 409
5. *Jinasena* v. *Commercial Invesment and Finance Co. Ltd.* [1985] 1 Sri L R 238

Application for transfer of case in terms of section 46 of the Judicature Act.

Faiz Mustapha P.C. with *S. Mahenthiran, M.S.M. Suhaid* and *H. Vitanachchi* for defendant—petitioner.

Miss Maureen Seneviratne P.C. with *S. Monelingam* for plaintiff-respondent.

Cur. adv. vult.

July 26, 1988

WIJETUNGA, J.

This is an application by the defendant-petitioner for an order directing that the above action of the District Court of Mt. Lavinia be tried by another Judge or be transferred to any other court of competent jurisdiction, in terms of section 46 of the Judicature Act.

The petitioner avers that plaintiff-respondent instituted action bearing No. 2222/RE in the District Court of Mt. Lavinia on 18.8.84 against him, praying for his eviction from premises No. 40/1, Dickman's Road, Colombo 5 on the basis that the said premises were residential premises. The defendant-petitioner filed answer in the said case on 29.4.85 and the plaintiff-respondent withdrew the said action.

Thereafter, the plaintiff-respondent instituted the present action bearing No. 2478/RE in the District Court of Mt. Lavinia against the defendant-petitioner on 18.1.86, praying for his eviction from the said premises. In the plaint it was averred inter alia (i) that the said premises had been assessed as business premises from October, 1985 and constituted ' excepted premises ' within the meaning of the Rent Act, (ii) that the defendant-petitioner had failed to quit and vacate the said premises upon being noticed to do so by 31.1.86 and (iii) that the plaintiff-respondent estimated the damages at Rs. 20,000 p.m.

The defendant-petitioner filed answer denying the allegations in the plaint and pleading that the said premises had originally been assessed as residential premises and that the purported assessment as business premises was void as being in violation of Section 12 of the Rent Act, since the conversion was effected without the permission of the Commissioner of National Housing and stating that the said premises was used for residential purposes.

The case was taken up for trial on 26.1.88.

A number of issues were raised. The mother of the plaintiff-respondent was called as a witness and the examination-in-chief of this witness commenced. Shortly after the examination-in-chief was resumed after the luncheon adjournment, the learned Additional District Judge suggested that it would be desirable if steps were taken to settle the case. Learned counsel for the plaintiff-respondent stated that though she was not in favour of a settlement, in deference to court she would put the suggestion made by court to her client and after discussion with the plaintiff-respondent informed court that the plaintiff-respondent was claiming a minimum of Rs. 20,000 p.m. as rent. Counsel for the defendant-petitioner stated that as a matter of adjustment the defendant-petitioner was agreeable to pay a monthly rental of Rs. 5000. The learned Additional District Judge then observed that there was a wide disparity in the quantum of rental suggested by the parties and inquired whether the parties would consent to an inspection of the premises by court in order to fix the quantum of rental. The parties agreed to such an inspection by way of a settlement.

Thereafter, the learned Additional District Judge visited the premises. After the inspection the proceedings were re-commenced. The discussion relating to the rental was resumed and counsel for the defendant-petitioner indicated that he was prepared to pay a little more than the sum of Rs. 5000 suggested earlier. The plaintiff-respondent, however, was not agreeable to this suggestion. The court too stated that the rental of Rs. 20,000 claimed by the plaintiff-respondent appeared to be reasonable. However, it was not possible to bring about a settlement and the case was refixed for trial on 8.3.88 and 19.4.88.

The trial judge recorded his observations of the inspection in the following terms :—

" The following incontrovertible facts which were pointed out by the plaintiff were evident from the inspection, viz. :—

1. These premises are being used as an office.
2. Repairs have been effected to the premises.
3. The premises are not being used at all as a residence of the defendant. "

He further observed that although it can be accepted that the defendant used the premises as his professional office, yet it did not appear that the premises were used mainly for such a purpose. In other words, it appeared that the premises were mainly used as a commercial establishment.

The defendant-petitioner states that the parties agreed to the inspection by the court purely for the purpose of fixing a rental in the event of a settlement and that the observations recorded by the learned Additional District Judge on his own inititiative constituted a premature determination of the primary issue in the case. In the circumstances, the defendant-petitioner apprehends that he would be prejudiced by the said observations and a fair and impartial trial cannot be had in the particular court. He, therefore, submits that it is expedient that the case be transferred to another court.

He had also sought an order staying further proceedings in the said case until the final determination of this application.

On 2.3.88 this application was supported in open court by learned President's Counsel for the defendant-petitioner and the court made order that notice do issue on the respondent for 24.3.88 and that the proceedings be stayed in terms of paragraph (b) of the prayer to the petition till 25.3.88.

The plaintiff-respondent filed objections on 21.3.88 and moved that the defendant-petitioner's application be dismissed and the stay order be not extended.

Learned President's Counsel for the plaintiff-respondent contended that notice and stay order had been granted by the court per incuriam as the learned trial judge had rightly recorded his observations after the inspection and that this was not a ground on which the case can be taken out of his hands. She further submitted that the observations are for the purpose of determining the rent and if he did not so record his observations, there would be a complaint of prejudice. As the material date for the purposes of this case is October, 1985 when it was first assessed as business premises, the recording of observations by the judge in 1988 does not decide the issue in the case. It was her submission that in an application for transfer of a case such as this, the onus of establishing sufficient grounds lies heavily on the petitioner and such jurisdiction should be exercised with extreme caution.

On the other hand, learned President's Counsel for the defendant-petitioner argued that in view of the observations recorded by the trial judge, the law renders him incompetent to hear this case and he has disqualified himself from doing so. He submitted that the scope of the inspection was limited to the fixation of the quantum of rent but the learned judge had over-stepped the mark and had proceeded to decide the substantive issue in the case. Although he would have acted bona fide and no impropriety is alleged, yet he cannot now assess the evidence in the case fairly in the light of his observations. While the defendant-petitioner had in his answer stated that the premises in suit continue to be residential premises, the judge has made the observation that it is beyond controversy that the premises are being used as an office and are not being used at all as a residence of the defendant. It was his submission that the judge's observations in regard to user are not warranted, that being a question of fact and law. The larger interests of justice, therefore, demand that the case be sent before another judge.

I shall now deal with the submission that notice and stay order had been granted per incuriam. I have already adverted to the matters that led to the making of the observations complained of. The defendant-petitioner has, in his petition to this court, set out the circumstances relevant to the matter in issue, supported by

his affidavit and has also annexed thereto a copy of the plaint, answer and the proceedings in the case. Thus, there was available to this court at that stage, the material necessary for the due consideration of the question of transfer. On the application being supported, we were satisfied that prima facie there was a case made out regarding the feasibility of transfer, if not on the ground that a fair and impartial trial cannot be had in the particular court, at least on the basis that it is so expedient on any other ground.

In *Billimoria* v. *Minister of Lands*, (1) Samarakoon C.J. refers to a number of authorities on what a decision per incuriam is. Applying those principles to the instant case, I am unable to persuade myself that the court has acted in ignorance of any previous decisions of this court or of a court of co-ordinate or higher jurisdiction or in ignorance of a statute or a long standing rule of the common law.

As the trial in this case stood re-fixed for 8.3.88 and 19.4.88, it became necessary to stay further proceedings in the District Court, as otherwise the final order on this application could have been rendered nugatory. As was said in *Billimoria's case* (supra), 'the interests of justice required that a stay order be made as an interim measure'.

I am still of the view that the order made after due consideration by this court on 2.3.88 for issue of notice on the plaintiff-respondent and for stay of proceedings is not one made per incuriam.

This brings me to the main question viz. whether the facts and circumstances of this case warrant its transfer. Can it be said that in view of the observations recorded by the judge, a fair and impartial trial cannot be had before him? No doubt the observations are in the nature of very strong findings of fact and have been termed by the judge as incontrovertible. Yet, would this result in bias on the part of the judge? Even though no impropriety is alleged, the onus of establishing bias lies heavily on the petitioner.

In *Perera* v. *Hasheeb*, (2) G.P.S. de Silva, J. made the observation that it must be remembered that a judicial officer is one with a trained legal mind, that it is a serious matter to allege bias against a judicial officer and that this court would not lightly entertain such an allegation.

In *Simon* v. *The Commissioner of National Housing*, (3) it has been held that the inquiring officer must be disinterested and unbiased, but a decision of his is not liable to be quashed on the ground merely of the reasonable suspicion of the party aggrieved unless it is proved that there was a real likelihood that the inquiring officer was biased against the party aggrieved.

Again, in *Re Ratnagopal*, (4) the court held that the proper test to be applied is an objective one and formulated it as follows : Would a reasonable man, in all the circumstances of the case, believe that there was a real likelihood of the Commissioner being biased against him ?

These authorities are indicative of the heavy burden that lies on the petitioner to establish bias. Where the person concerned is a trained judicial officer, the onus, to my mind is even greater. On a careful consideration of the facts and circumstances of this case, I am unable to say that the defendant-petitioner has discharged this burden. His application for transfer of this case on the ground that a fair and impartial trial cannot be had in the particular court must, therefore, fail.

However, learned counsel for the defendant-petitioner also relied on the alternative ground viz. that it is so expedient on any other ground. In *Perera* v. *Hasheeb* (supra) it has been held that the expression ' expedient ' in the context means advisable in the interests of justice.

As mentioned earlier, the judge has come to certain strong findings in consequence of the inspection, which he has termed ' incontrovertible facts '. One such finding is that ' the premises are not being used at all as residence of the defendant '.

What is the defendant-petitioner's position in regard to this aspect of the matter ? He categorically states in his answer that the premises in question continue to be residential premises

governed by the Rent Act No. 7 of 1972. An issue too has been raised in these very terms. If it is an ' incontrovertible fact ' that ' the premises are not being used at all as a residence of the defendant ', can it continue to be residential premises governed by the Rent Act ?

It has been held in *Jinasena* v. *Commercial Investment and Finance Co. Ltd.* (5) that although the description given in the Assessment Register is relevant to determine whether the premises are business premises or residential premises and affords *prima facie* evidence as to whether the premises have been assessed as residential or business premises, such description is not conclusive on the issue whether the premises are business premises or residential premises.

Residential premises are premises for the time being occupied wholly or mainly for the purpose of residence and business premises mean any premises other than residential premises.

In that case, despite the description in the Assessment Register that the premises were business premises, it was held to be residential premises on the basis that the premises were occupied mainly for residence.

It is not disputed that the words ' for the time being ' mean the time at which the action is instituted. In the instant case, the action was instituted in February, 1986, whereas the inspection took place in January, 1988. But, one cannot lose sight of the fact that the judge's findings certainly affect the credibility of the defendant-petitioner.

In these circumstances, I am of the view that it would be in the interests of justice that this case be heard by another judge.

Therefore, I make order that the case be transferred to any other judge of the District Court of Mt. Lavinia.

The defendant-petitioner will be entitled to the costs of this application.

S. N. SILVA, J., — I agree.

Application allowed.