

**FRANCIS
V.
SIRISENA AND OTHERS**

SUPREME COURT
SHARVANANDA, A.C.J., WIMALARATNE, J. AND COLIN THOME, J.
C. A. NO. 95/77 (F).
S.C. NO. 52/82.
M.C. (CIVIL) KANDY NO. 719/RE.
NOVEMBER 2, 1983.

Civil Procedure — Civil Procedure Code, Cap XXV Substitution of parties in a Rent and Ejectment Action — Application of section 36(3) of Rent Act No. 7 of 1972.

In an action for rent and ejectment the tenant died after institution of the action and the Defendants-Appellants-Respondents who were his legal representatives were substituted in his stead. At the trial the learned Magistrate held that the substitution was in order and the Defendants-Appellants-Respondents appealed and the Court of Appeal allowed the appeal setting aside the judgment of the Magistrate on the ground that S.36(3) of the Rent Act of 1972 had not been complied with. The Plaintiff-Respondent-Appellant appealed.

Held —

S. 36 of the Rent Act applies only where a tenant dies before action is instituted against him. The question of who takes the tenant's place in a pending suit for the continuity of the action already instituted should be decided in accordance with Chapter XXV of the Civil Procedure Code.

Case referred to :

Hensman v. Mary Stephen — 55 N.L.R. 89

APPEAL against an order of the Court of Appeal.

H. L. de Silva, S.A. with *Faiz Mustapha* for Plaintiff-Respondent-Appellant.

P. Somatillekam for Defendants-Appellants-Respondents.

Cur. adv. vult

November 18, 1983
WIMALARATNE, J.

We made order on 2.11.83 allowing this Appeal and setting aside the Judgment of the Court of Appeal dated 15.10.81 with costs in both Courts. We now give our reasons.

This was an action instituted by the Plaintiff for the ejectment of the original Defendant P. Sirisena from rent controlled premises, and for the recovery of arrears of rent and damages. The Plaintiff gave the Defendant notice on 29.4.75 to quit the premises on or before 31.7.75. This action was thereafter instituted on 13.8.75. On the summons returnable date, which was 3.12.75, a medical certificate was submitted on behalf of the Defendant who was given time till 11.2.76 to file answer. The Defendant died on 19.12.75. Thereupon the Plaintiff took steps on 23.6.76 to substitute the legal representatives of the deceased Defendant, namely the 1st substituted Defendant who is the widow and the 2nd to 5th substituted Defendants who are the children of the deceased. This step was taken, under section 572(5) of the Administration of Justice Law No. 25 of 1975. This substitution was allowed by the learned Magistrate and the substituted defendants filed answer in which they took up the position that as the Plaintiff had not taken steps in terms of section 36(3) of the Rent Act, No. 7 of 1972, the substitution was invalid, and asked for a dismissal of the action.

Section 36 of the Rent Act is in these terms :—

“(1) Notwithstanding anything in any other law, the succeeding provisions of this section shall have effect in the event of the death of the tenant of any premises. For the purposes of this sub-section, a person shall be deemed to be the tenant of any premises notwithstanding that his tenancy of such premises has been terminated by the expiry of the notice of the termination of the tenancy given by the landlord thereof, if at the time of his death he was in occupation of such premises.

(2) Any person who—

(a) in the case of residential premises the annual value of which does not exceed the relevant amount and which has been let prior to the date of commencement of this Act —

(i) is the surviving spouse or child, parent, brother or sister of the deceased tenant of the premises or was a dependant of the deceased tenant immediately prior to his death ; and

(ii) was a member of the household of the deceased tenant (whether in those premises or in any other premises) during the whole of the period of three months preceding his death ;

[(b) & (c) not relevant for the purposes of this case.] shall, subject to any order of the board as hereinafter provided, be deemed for the purposes of this Act to be the tenant of the premises :

(3) The landlord of any premises referred to in subsection (1) shall make application to the board for an order declaring which, if any, of the persons who may be deemed to be the tenants under sub-section (2) shall be the person who shall for the purpose of this Act be deemed to be the tenant of the premises.

(4) Where an application is made under subsection (3), the board shall, after notice to all persons who may be deemed to be the tenants under sub-section (2) and after due inquiry, make order declaring which, if any, of such persons shall be the person who shall for the purposes of this Act be deemed to be the tenant of the premises.

(5) Any person declared under subsection (4) as the person who shall for the purposes of this Act be deemed to be the tenant of the premises shall be so deemed with effect from the first day of the month succeeding that in which the death of the deceased tenant occurred, and the provisions of this Act shall apply accordingly”.

The learned Magistrate held (a) that the Defendant has been in arrears of rent for three months or more after it had become due, (b) that there was no proof of the rent so being in arrears on

account of the tenant's illness or unemployment and (c) that section 36 of the Rent Act had no application in the case of the death of a tenant against whom action had already been filed. He accordingly entered judgment for the Plaintiff.

The Court of Appeal appears to have been attracted by the argument that on the death of the tenant a new tenancy had been created ; that all the persons who satisfied the conditions stipulated in section 36(2) are deemed to be the new tenants, and in such a situation it was incumbent on the landlord to have obtained from the Rent Board an order under subsection (3) declaring which, if any, of those persons shall be the person who shall for the purposes of the Act be deemed to be the tenant of the premises. As the Plaintiff had not taken this step the Court of Appeal allowed the Appeal, set aside the judgment of the Magistrate and dismissed the Plaintiff's action with costs. The Court however granted the Plaintiff leave to appeal to this Court, formulating the following substantial question of law.

“(a) Whether the petitioner was correct in law in substituting the next of kin to the deceased tenant who was the defendant in the action in the District Court ; or

(b) Whether the plaintiff should have applied to the Rent Board under Section 36(3) of the Rent Act for a determination of the person who is deemed to be the tenant.”

The Court of Appeal appears to have misunderstood the purpose of section 36. The earlier Rent Restriction Act, No. 29 of 1948, contained a provision in section 18 which was interpreted in the case of *Hensman v. Mary Stephen* to mean that when a tenant died after notice to quit, it was not open to the surviving spouse of such tenant to continue in occupation as tenant unless the spouse had given written notice to the landlord within a specified short period from which the death occurred, to the effect that she proposed to continue in occupation as tenant. Many a person who was entitled to continue the tenancy on the death of the tenant lost this right by not having given such notice.

invariably due to ignorance or oversight, especially after a bereavement. Section 36 of the Rent Act of 1972 was enacted to remedy that situation. The landlord has no choice but to accept as tenants all the persons who satisfy the conditions stipulated in S.36(2), because they are deemed to be the tenants from the date of the death of the original tenant.

But landlords would have innumerable problems in being saddled with a large number of persons "deemed to be tenants". One has only to visualise the case of a tenant dying leaving behind a spouse, five or six children, parents, and perhaps a few brothers and sisters who were members of the household of the deceased during the period of three months before his death. From whom is he to claim the rent? To whom is he to issue rent receipts? Which of them is he to recognise as tenant for the purposes of the Act? It is in order to resolve these difficulties that subsection (3) provides the landlord an opportunity of making application to the Rent Board for the purpose of obtaining an order declaring which of such persons is to be deemed the tenant for the purposes of the Act.

The Board will necessarily take time to make its order which can be only after due inquiry and after notice to all persons who may be deemed to be the tenants under sub-section (3). Any order may be canvassed before the Board of Review. All that procedure is bound to take considerable time, and the legislature has provided in subsection 6 that the landlord shall not be entitled **to institute** any action or proceedings for ejection on the ground that the rent has been in arrears for any period ending on the date on which the Board made order under subsection 4. This is also a circumstance which supports the view that section 36 contemplates a situation which may arise before an action is instituted.

It seems to me, therefore, that section 36 of the Rent Act has application only where a tenant, be he a contractual tenant or a statutory tenant, dies **before** action is instituted against him, and **not after**. Where the tenant dies after action is instituted against him, the problem that arises is not a question of substantive law

but one of procedure, as to who if any takes his place for the purpose of the continuity of the action already instituted; and for a solution one has to have recourse to Chapter XXV of the Civil Procedure Code which makes provision for the continuation of actions after the alteration of a party's status. Section 398 (1) of the Civil Procedure Code (like section 572(5) of the Administration of Justice Law) provides that "in case of the death of a sole defendant where the right to sue survives, the Plaintiff may make an application to the Court, specifying the name, description and place of abode of any person whom he alleges to be the legal representative of the deceased defendant, and whom he desires to be made the defendant in his stead. The Court shall thereupon, on being satisfied that there are grounds therefor, enter the name of such representative in the record in the place of such defendant, and shall issue summons to such representative to appear on a day to be therein mentioned to defend the action, and the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant and had been a party to the former proceedings in the action".

The moment the original tenant was in arrears of rent for the stipulated period a course of action arose to the landlord to sue the tenant for ejection and recovery of such arrears. On the death of the tenant after institution of action, the cause of action which survived could be enforced against the legal representative of the deceased tenant in the same proceedings. The Plaintiff has, therefore, followed the correct procedure in making the application for the substitution of the legal representatives of the deceased Defendant and the Court was right in allowing that application and making the substitution. The Court of Appeal has erred in setting aside the judgment and decree entered by the learned Magistrate. For these reasons we allow this appeal and set aside the judgment of the Court of Appeal with costs in both counts.

SHARVANANDA, A.C.J. — I agree

COLIN THOME, J. — I agree

Appeal allowed.