FONSEKA

v.

GULAMHUSSEIN

SUPREME COURT.
WEERARATNE, J., SHARVANANDA, J. AND WANASUNDERA, J.
S. C. APPEAL No. 29/79, C. A. 725/75 (F); C. R. COLOMBO 4394/ED.
FEBRUARY 5, 1981.

Rent Act, No. 7 of 1972, section 28 (1) Action for ejectment on the ground of non-occupation by tenant - Premises in suit occupied by employees of a company of which tenant the Managing Director - Landlord entitled to judgment.

This action was filed by the plaintiff for the ejectment of his tenant, the defendant, under the provisions of section 28 (1) of Rent Act, No. 7 of 1972, on the ground of non-occupation for a continuous period of over six months without reasonable cause. The defendant came into occupation under a tenancy agreement dated 10.3.1945 and it was common ground that for a period of five years prior to the institution of this action he had resided elsewhere. These premises were during this period occupied by employees of Savoy Theatres Ltd., a company of which the defendant was Managing Director. Having analysed the evidence placed before Court, the learned Magistrate entered judgment in favour of the plaintiff. The defendant's appeal to the Court of Appeal was also dismissed. On appeal to the Supreme Court

Held

The defendant had ceased to occupy the premises in suit for over the period of six months stipulated by section 28 of the Rent Act. The occupation of the premises by the employees of Savoy Theatres Ltd., which was a distinct legal entity, was not, in the circumstances occupation by the defendant and the plaintiff's action must succeed.

Cases referred to

(1) *Sabapathy v. Kularatne, (1951) 52 N.L.R. 425.*
(2) *Suriya v. Board of Trustees of Maradana Mosque, (1954) 55 N.L.R. 309; 50 C.L.W. 45.*
(3) *Pir Mohamed v. Kadibhoy, (1957) 60 N.L.R. 186.*
(4) *Amarasekera v. Gunapala, (1970) 73 N.L.R. 469.*
(5) *Wijeratne v. Dschou, (1974) 77 N.L.R. 157.*
(6) *Samarawickrema v. Senanayake, S.C. 21/73—D.C. Kandy 22104, S. C. Minutes of 23.11.77*
(7) *Skinner v. Geary, (1931) 2 K.B. 546; (1931) All E.R. Rep. 302.*
(8) *Dando v. Hitchcock, (1954) 2 Q.B. 317; (1954) 3 W.L.R. 76; (1954) 2 All E.R. 535.*
(9) *Salomon v. Salomon & Co., (1897) A.C. 22; (1895-9) All E.R. Rep. 33; 75 L.T. 426; 13 T.L.R. 46.*

APPEAL from a judgment of the Court of Appeal.

A. C. Gooneratne, Q.C. with *D. R. P. Guonatillake,* for the defendant-appellant.
C. Thiagalingam, Q.C. with *K. Kanag-Isvaran,* for the plaintiff-respondent.

Cur.adv. vult.

March 18, 1981.

WEERARATNE, J.

This is an action instituted by the plaintiff, the land-lord to have the defendant, the tenant ejected from the premises No. 5, Rohini Road, Colombo 6, on the ground that he had ceased without reasonable cause to occupy the said premises for a continuous period of over 6 months, under section 28 (1) of the Rent Act, No. 7 of 1972.

It would be convenient to set out the salient facts which have given rise to the legal question which has to be determined in this case.

It was common ground at the trial that the defendant went into occupation of the premises under the tenancy agreement dated 10th March, 1945, marked P1, and that for a period of five years prior to the institution of this action, he had been residing at Queens Avenue, Colombo 3, during which time the employees of the Savoy Theatres Ltd., of which the defendant was the Managing Director, were occupying the premises in suit. Then although he stated in his evidence that at the time he signed P1 he made it clear that the premises will be used by his employees, later in the course of his evidence he conceded that neither in the tenancy agreement (P1), nor in his letters to the plaintiff was there any suggestion made in regard to his renting out the premises for his employees. Further when the plaintiff was cross-examined by counsel for the defendant, there was no question put to him bearing on the occupation of the premises by the defendant's employees on the basis that the premises were taken for them.

It would thus be seen that there was no proof that the plaintiff had either expressly or impliedly consented to the use or occupation of the premises by the employees of the defendant. On the other hand in his letter (P3) the plaintiff requested the defendent to give over possession of the premises as he was no longer in occupation of it and was residing elsewhere.

The Magistrate, having analysed the evidence refers to document (P6) wherein the defendant states that in 1945 he occupied the premises along with his family and that he continues to occupy the premises with his staff (which I presume to be

business employees). The defendant goes on to state that, ". . . the only difference now being that I occupy No. 37, Alfred Place, besides the above. . ." In this connection the Magistrate states, "Although he may have done so it cannot be said that the premises in suit was given to the defendant for the use and occupation of his employees." *If that was so he could have got the plaintiff to provide for it in P1.* P1 clearly states that the land-lord wanted the defendant to be his tenant of the premises. The magistrate held that consequently a cause of action has accrued to the plaintiff to have the defendant ejected under section 28(1) of the Rent Act and entered judgment accordingly in favour of the plaintiff.

The Court of Appeal too held in favour of the plaintiff and dismissed the defendant's appeal.

The sole question to be determined is whether under section 28 (1) of the Rent Act of 1972, occupancy of residential premises by the employees of Savoy Theatres Ltd., of which the defendant was the major shareholder and Managing Director, is occupation by the tenant even though the defendant tenant resided elsewhere. The assumption of the defendant was that Savoy Theatres Ltd., which is an incorporated company with the controlling interest therein enjoyed by him, was his alter ego and that its employees were his employees.

Learned counsel for the defendant submitted that the premise had been occupied by his employees to the knowledge of the plaintiff without any dispute, and that consequently the plaintiff has acquiesced in the defendant's occupancy of the premises through employees working in the Savoy Cinema. In regard to this submission it is in point to mention that the tenancy agreement (P1) entered on 1st March, 1945, makes no provision for any employees. Reference may be made to the document (P4) dated 30th November, 1961, in which the plaintiff gave notice to the defendant to quit the premises and deliver possession on the ground that the latter had sub-let the premises to others. Thereafter even though a plaint was prepared by the plaintiff's lawyers the latter did not think that any useful purpose would be served by filing action since the Rent Act of 1948, which was applicable at that time, afforded no relief in the situation the plaintiff was placed. The situation changed however with the implementation of the Rent Act of 1972 which contained the

provisions of section 28 (1). It was the plaintiff's contention that there was no acquiescence by him to the defendant's "employees" occupation of the premises.

The Court of Appeal held that section 28 of the Rent Act of 1972 gives no protection to a tenant of residential premises who has ceased to be in actual physical occupation for a period of 6 months prior to the institution of action for ejectment. The Court further stated that the fact that the mode of occupation was through the tenant's employees will not be a reasonable cause within the meaning of section 28, if that mode of occupation has not been with the express or implied consent of the land-lord, which in this instance has not been proved.

A scrutiny of the Rent Act of 1948 indicates that it is intended largely to protect the tenant of premises in such areas as are covered by the Act. There are for instance specific provisions setting out restrictions in regard to increases of rent (sections 3 and 4) and a detailed method of computing the authorised rent (section 5). There is a prohibition against excessive premiums and advance payments (section 8). Section 13 of the Act contains restrictions of the right to institute proceedings for ejectment of the tenant. Sections 14 and 18 give further protection to the tenant. Protection of the land-lord is provided only in the obvious situations of the tenant sub-letting the premises, or part of it without the prior consent of the land-lord (section 7), or the tenant using the premises for any purpose other than that of residence (sections 9 and 10). The only circumstances in which a tenant could be ejected by a land-lord apart from sections 9 and 10 of the Act are set out in section 13 (1) of the Act.

The concept of the "non-occupying" tenant has been discussed in a number of local and English cases. In a case reported in (1) Gratiaen, J. considered for the first time the case of such a tenant. He said at page 426,

> "In my opinion a non-occupying tenant in the sense in which that term has been explained in *Brown v. Brash (1948) 1 AER 922,* should be regarded as having forfeited the special statutory protection afforded by the provisions of the Rent Restriction Ordinance."

In (2) Gratiaen, J. stated at page 310,

> *"Brown v. Brash* which declared that a non-occupying

tenant *prima facie* forfeits his status as a statutory tenant under the Rent Act must not be misunderstood. In 52 N.L.R. 425 I intended only to accept the decision that questions of relative hardship cannot arise where the tenant has completely abandoned possession of the premises, and thereby removed himself from the protective orbit of the Act. But a tenant who lawfully sub-lets a premises can in no sense be equated . . . Such instances, as far as I am aware, have not arisen in any action instituted in Ceylon and I do not doubt if they do, the Courts would refuse to interpret the local Act as to permit the tenant to claim protection. But in the normal cases the land-lord can only obtain an order for ejectment by one or other of the conditions specified in the Act."

In the above two cases Justice Gratiaen inclined in favour of the English judicial concept of the "non-occupying" tenant, but as he himself stated in the latter case, the question itself did not directly arise for decision in either of the two cases decided by him (vide page 310 of the latter case).

In the case of *Pir Mohamed v. Kadibhoy* (3), Basnayake, C. J. stated that the English concept of the "non-occupying" tenant finds no place in our Rent Act.

In the case reported in (4), Alles, J. held that since the defendant in the case was a non-occupying tenant, he was not entitled to claim the protection of the Act. He referred to the view taken by Justice Gratiaen, but makes no reference to Justice Basnayake's judgment. This was the first case where the point directly arose.

In the case of *Wijeyratne v. Dschou* (5), Justice Sharvananda had to consider this question which arose in a direct form. He expressed the view that non-occupation is not one of the grounds for ejectment under the 1948 Act as amended by the 1966 Act. He however states, "We are glad to note that the Legislature has now become alive to the *casus omissus* and has provided by section 28 for such a contingency."

In *Samarawickrema v. Senanayake* (6) Justice Wanasundera delivering the judgment of the Divisional Bench held that it was not competent for the Court to entertain an action for the ejectment of a tenant on the ground of non-occupancy without the authorisation of the Rent Control Board.

Mr. A. C. Gooneratne, Q.C., cited the judgment of Wanasundera, J. for our consideration in the light of the different views expressed by the learned Judges in the cases cited therein. He conceded that the case of *Samarawickrema v. Senanayake* proceeded on the premises of an earlier Act prior to the 1972 Rent Act.

To my mind the conflict of judicial opinion in Sri Lanka which was resolved by a Divisional Bench in *Samarawickrema v. Senanayake* has now ceased to be of significance by reason of section 28 of the Rent Act of 1972. It is now clear by reason of the 1972 Act that a court has jurisdiction under section 28 to enter an order for the ejectment of a non-occupying tenant in an action for ejectment of the tenant filed by the land-lord.

Section 28 reads as follows:

> "(1) Notwithstanding anything in any other provisions of this Act, where the tenant of any residential premises has ceased to occupy such premises, without reasonable cause, for a continuous period of not less than six months, the landlord of such premises shall be entitled in an action instituted in a court of competent jurisdiction to a decree for the ejectment of such tenant from such premises."

This section stands by itself. It has not been made part of section 22, which provides the grounds for ejectment. The narrow restrictions or pre-conditions contained in section 22 do not fetter or circumscribe an action instituted by a landlord under section 28. It applies to all residential premises irrespective of the standard rent. Section 28 commences with the use of the words "notwithstanding anything in any other provisions of this Act...". It would also be noticed that sub-section 2 even prescribes a special mode for the service of summons. The normal requirement of personal service has been dispensed with. Further, section 28 not merely confers jurisdiction, but also sets out all the constituent elements of such an action. They are:

(*a*) The premises must be residential (not business).

(*b*) The tenant should have ceased to occupy such premises.

(*c*) The non-occupation must be for a continuous period of at least 6 months.

(*d*) The non-occupation should have been without reasonable cause.

The items (a) and (c) are capable of easy determination. Item (d) would not arise unless the tenant gives some excuse for non-occupation. In item (b) the words, "ceased to occupy", might be open to judicial interpretation because section 28 does not specify as to what is meant by the phrase, "...ceased to occupy..."

Mr. Thiagalingam, Q.C., in the course of his submissions stated that there are three situations that could be contemplated:

(1) Where the tenant continues to live with his servants. Then both are protected.

(2) If the tenant goes abroad with the intention of coming back within a reasonable time, his servants are protected. However,

(3) occupation by the employees of a concern of which the tenant is the Managing Director (as the defendant in this case), would not be protected.

Mr. Thiagalingam argued that the protection of the Rent Act extends only to the occupation by the tenant's servants and not to his business employees. The phrase "ceased to occupy" takes within its sweep a number of situations in regard to occupancy which have to be given consideration. If we take for instance the case where the tenant lives with his servants it seems quite practical and obvious that both should be protected. If the tenant goes abroad, leaving his servants to look after the household until his return, such occupation by his servants must be protected. Accordingly, it seems reasonable that mere absence from the house will not deprive a statutory tenant of his protection under the Rent Act, if he regards it as a residence and has an intention to return there and there is evidence of his intentions in the form of his domestic servants or caretaker who are left behind to look after the home and occupy it during his absence. What then is the position in regard to a case such as this, where the defendant takes a house on rent and allows the employees of a company (the Savoy Theatres Ltd.) of which he is the Managing-Director, to be in occupation? He has not made it a term of his tenancy agreement (P1) that the employees too be permitted to occupy the premises along with him. The defendant subsequently leaves the said premises with his family and takes residence elsewhere leaving behind the employees of the cinema in occupation of the premises taken by him. The premises in question was undoubtedly

residential. The defendant was not in physical occupation of the premises for a continuous period of over 6 months. There was a finding by the Magistrate that the non-occupation of the defendant was "without reasonable cause", within the meaning of section 28. Accordingly all the elements of section 28 of the Rent Act of 1972 were subscribed to by the plaintiff who is the landlord. The only question is whether in the circumstances set out above, the tenant has "ceased to occupy such premises", within the meaning of the Act. Mr. Thiagalingam for the plaintiff strenuously argued that the said employees of the Savoy Theatres Ltd., are strangers who can receive no protection on the basis that their occupation is through the defendant. Learned counsel further submitted that the Rent Act does not apply to employees of a concern of which the defendant is the Managing Director. He went on to submit that a company (the Savoy Theatres Ltd.) cannot be in occupation of residential premises, take a place as tenant since it cannot reside there, but that it could occupy business premises only for business purposes. Learned counsel in concluding his submissions stated that the simple point is that the defendant took the premises on rent and ceased to occupy it thereafter and that accordingly the provisions of section 28 of the Rent Act are clearly applicable.

Whilst with respect I agree with Justice Wanasundera that English decisions and doctrines must be used carefully and with discrimination, I am inclined to believe that in seeking to interpret the phrase "ceased to occupy" in section 28 (1), the decisions of the English Courts relating to non-occupation under the English Rent Acts are helpful in determining the criteria of non occupancy. In the case of *Skinner v. Geary* (7), the tenant had lived elsewhere for over ten years and had placed his relations and sister in possession. The occupation of the relations and sister was not for the purpose of preserving the house for the tenant. The circumstances indicated that the tenant had no intention of returning, but was keeping the tenancy going so as to provide a place of residence for his relations and sister. It was held that he had ceased to occupy.

The observation of Lord Goddard in the case of *Dando v. Hitchcock* (8), does commend itself in regard to the meaning that could be given to the words "ceased to occupy" in our Rent Act. He said, "Where there is a tenant who does not live in the house, never intends to live in the house, and declares that his intention is never to live in it, I can see no reason why his tenancy should be protected to enable him to keep in the house a Manager or a

partner, or anyone else it may be convenient to have there."

It seems to me that the defendant's absence from the premises for about five years since he took residence there initially gives rise to the inference that he has "ceased to occupy such premises" within the meaning of the phrase in section 28 of the Rent Act. Neither the Savoy Theatres Ltd. nor its employees had any dealings with the plaintiff in respect of the said premises. It was decided in *Salomon v. Salomon* (9), by the House of Lords, that a company and the individual or individuals forming a company were separate legal entities, however complete the control might be by one or more of the company. The fundamental fallacy in the defendant's argument was the assumption that the employees of Savoy Theatres Ltd. were his employees because of the control he exercises over the company. In law the Savoy Theatres Ltd. is a distinct legal entity and its employees are in law not the employees of the defendant. In the circumstances the occupation of the premises by such employees cannot be regarded as occupation by the defendant. The defendant in this view of the matter had ceased to occupy the premises in suit for much more than the six months sitipulated by section 28 of the Rent Act.

The appeal is accordingly dismissed with costs.

SHARVANANDA, J.—I agree.

WANASUNDERA, J.—I agree.

Appeal dismissed.