

CHITTAMBALAM
v
DE MEL

COURT OF APPEAL
AMARATUNGA, J. AND
WIMALACHANDRA, J.
C.A.NO. 367/2004
D.C., MT. LAVINIA 601/2000/RE

Writ pending Appeal – Substantial question of law – Premises excepted – Rent Act, No.7 of 1972, section 2(4)C – Benefit – Is there an onus on plaintiff to establish that he was in occupation of premises on 01.01.1980?

Held :

- (1) What is relevant under section 2(4) C is not whether the plaintiff himself occupied the relevant premises on 01.01.1980, as its owner *but* whether the premises were occupied on that day *by its owner* (whether it be the plaintiff or not is immaterial) or by a tenant.

APPLICATION for leave to appeal from the order of the District Court of Mt. Lavinia.

Case referred to:

- (1) *Hettiarachchi v Hettiarachchi* – (1994) 2 SRI LR 188

R.E. Thambiratnam with *K.M. Sasangan* for petitioner.

Upali de Almeida for respondent.

Cur.adv.vult

October 20, 2004

GAMINI AMARATUNGA, J.

This is an application for leave to appeal against the order allowing plaintiff respondent's application to execute the decree pending appeal. In the action filed by the plaintiff for the recovery of premises No. 27/1, Melbourne Avenue, Colombo 4, and for the other relief claimed in the plaint, judgment was entered for the plaintiff. After the defendant-petitioner filed an appeal against the judgment the

plaintiff filed an application to execute the decree pending the determination of the appeal.

The defendant-petitioner had filed his objections to the plaintiff's application. Thereafter the parties have agreed to conclude the inquiry by filing written submissions. After both parties filed their written submissions, the learned judge has made order dated 21.9.2004 allowing the plaintiff's application to execute the decree pending appeal. This application is against that order. On 23.9.2004, upon the *ex parte* application of the defendant-petitioner, this court issued an order staying the execution of the writ of possession. Upon the appearance of the plaintiff respondent, submissions of both parties were heard on the question of granting leave to appeal and the continuation of the stay order. 10

In his objections the defendant has stated that if execution pending appeal is allowed, it would result in causing substantial loss to him. In addition he has also stated that a substantial question of law exists to be decided in the appeal. 20

The substantial question of law urged was whether the premises in question is premises to which the Rent Act applied. The learned trial Judge in the judgment dated 10.2/2003, has held that the premises in question was premises exempted from the provisions of the Rent Act under section 2(4) (c) of the said Act.

The Premises in question is situated within the limits of the Colombo Municipal Council. According to the evidence led in the case the premises earlier belonged to the plaintiff's mother who occupied it on 1st January 1980 and at that time the plaintiff also occupied the same premises along with her mother. The plaintiff became the owner of the premises in 1986 upon a deed executed by her mother. It was also in evidence that the premises were let to the defendant in 1986 upon a deed executed by her mother. It was also in evidence that the premises were let to the defendant in 1998. Section 2(4) (c) of the Rent Act which is relevant reads as "residential premises occupied by the owner on January 1st 1980 and let on or after that date." The provisions of the Rent Act do not apply to such premises. 30 40

The submission was made to us that in order to claim exemption under the above provision the plaintiff should have occupied the premises in question on 1.1.1980 and since the plaintiff was not

the owner as at that date the plaintiff could not claim the benefit of that provision and accordingly the question whether the plaintiff discharged her burden to establish that the provisions of the Rent Act did not apply to the premises in question is a substantial question of law to be decided in the appeal. In support of this contention the case of *Hettiarachchi v Hettiarachchi* ⁽¹⁾ was cited.

Reliance was placed on the judgment of G.P.S. de Silva, C.J. where His Lordship has said that in order to claim the benefit of section 2(4)(c) the onus is on the plaintiff to establish that he was in occupation of the premises on 1st January 1980. (2nd paragraph appearing in page 189). The learned Counsel for the petitioner laid great stress on the word plaintiff used by the learned Chief Justice, to support his contention that in order to claim the benefit of section 2(4)(c) the plaintiff in the present case had to show that she as owner occupied the premises as at 1.1.1980 and as the clear evidence was that she was not the owner as at... 1980, she was not entitled to claim the benefit of section 2(4)(c).

It is clear that His Lordship the Chief Justice has used the word "plaintiff" in the passage referred to above on the facts of that particular case. However the section does not refer to a plaintiff or to the landlord. Section 2(4)(c) as a definition of the premises to which the provisions of the Rent Act do not apply. In his judgment His Lordship has very clearly set out what is to be considered in deciding whether section 2(4)(c) is applicable. I quote below the relevant passage.

"Turning now to the wording in section 2(4)(c) of the Rent Act, it seems to me that the distinction drawn is between premises occupied by the owner as at 1st January 1980 and premises which had been let to a tenant on the said date, as submitted by Mr. Samarasekera for the plaintiff-appellant. Mr. Samarasekera rightly stressed that *the section is concerned with the nature of the occupation and the question of title is irrelevant*". (page 190, emphasis added).

What is therefore relevant is not whether the plaintiff herself occupied the relevant premises on 1.1.1980 as its owner, but whether the premises were occupied on that day by its owner (whether it be the plaintiff or not is immaterial) or by a tenant. On that aspect, the undisputed evidence was that as at the relevant

date, the plaintiff's mother who was the owner of the premises occupied it. This evidence clearly brings the premises in question within section 2(4)(c) of the Rent Act. Therefore the substantial question of law the petitioner sought to point out does not exist at all.

The complaint was also made that in deciding whether the premises in question is exempted from the provisions of the Rent Act, the learned trial Judge has applied the provisions of the amending Act, No. 26 of 2002 which cannot be taken into account in deciding the present case. It is true that the learned judge has referred to that Act, but the judgement indicates that the case has been decided without relying on the provisions of the amending Act.

The other substantial question of law raised by the learned counsel was that after the period for which the premises were let, the defendant petitioner had become a statutory tenant. However the evidence was that before the expiry of the period of the lease, the plaintiff has terminated the lease by notice marked and produced as P4. Accordingly the question of considering whether the defendant could claim the benefit of the concept of statutory tenant does not arise.

The defendant-petitioner has not given evidence at the trial or in the inquiry relating to execution pending appeal. The learned Judge has therefore concluded that in the absence of any evidence relating to substantial loss, the defendant-petitioner has failed to prove that execution of the decree would cause him substantial loss. The submission of the learned counsel for the petitioner was that the petitioner has paid as rent a large sum in excess of the rent payable for the premises and since evidence of such over payment is available on record in the case, it is not necessary to prove the same at the inquiry by giving evidence again.

However the claim that there was over payment of rent was based on the contention that the premises in question are governed by the provisions of the Rent Act. Once it is decided that the premises do not come within the provisions of the Rent Act, the question of over payment does not arise.

For the reasons set out above, I agree with the conclusion of the learned Judge that the defendant-petitioner has failed to satisfy

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Court that execution pending appeal would result in causing substantial loss to him or that there are substantial questions of law to be decided in the appeal. Accordingly there is no basis to grant leave to appeal against the order dated 21.9.2004. The leave to appeal application is therefore dismissed with costs in a sum of Rs.2500/-.

WIMALACHANDRA, J. - I agree.

Application dismissed.