

JAYAWARDENA
v.
WANIGASEKERA AND OTHERS

COURT OF APPEAL
SENEVIRATNE, J. (PRESIDENT) AND MOONEMALLE, J.
C.A. 151/79.
D.C. KANDY 878/RE.
JANUARY 15 AND 18, 1985.

Landlord and tenant - Rent and ejectment - Test of monthly tenancy - Licensee

The original plaintiff was the trustee of the Sadhachara Buddhista Kutangana Samithiya which owned premises No. 87, Peradeniya Road, Kandy, where Dhamma classes were conducted on Saturdays and Sundays and community religious observances on Poya days. The plaintiff permitted one Nihal Jayawardana the son of the defendant to

conduct tuition classes on the days of the week except Saturdays, Sundays and Poya Days. Nihal Jayawardena had paid Rs. 900 through the defendant which plaintiff claimed was for effecting certain repairs to the building. Nihal Jayawardena died and thereafter the defendant entered into occupation of the premises and refused to vacate them. The plaintiff sued the defendant for ejection. The defendant claimed he was the tenant of the premises relying on the payment of Rs. 900 and certain monthly payments of Rs. 150 and the electricity and water bills.

Held—

The best test for establishing a tenancy is proof of the payment of rent. The best evidence of the payment of rent is the rent receipts. The absence of rent receipts, however could be explained where the landlord refuses to issue receipts. Complete and effectual control over the premises is also relevant.

In the absence of rent receipts the payment of the Rs. 900 is referable to the settlement of expenses on account of repairs and the payment of Rs. 150 monthly is explainable as being for the use of the furniture and the payment of electricity and water dues as a payment for electricity and water facilities being made available to the students, did not make the transaction a tenancy. The defendant was only a licensee and was liable to be ejected.

APPEAL from judgment of the District Court of Kandy.

E. R. S. R. Coomaraswamy, P. C., with S. C. B. Walgampaya, Rohan de Alwis and Gamini Jayasinghe for defendant-appellant.

A. C. Gooneratne, O.C., with M. Salwature for substituted plaintiff-respondents.

Cur. adv. vult.

February 22, 1985.

MOONEMALLE, J.

The plaintiff sought the ejection of the defendant from premises No. 97, Peradeniya Road, Kandy, and for damages. The plaintiff's case was that he was the trustee of the Sadhachara Bauddha Kulangana Samithiya which owned the said premises. Dhamma classes are conducted in these premises on Saturdays and Sundays, and community religious observances are carried out on Poya days, and meetings of the Samithiya are also held there. The plaintiff stated that he had permitted one Nihal Jayawardena, the son of the defendant to conduct tuition classes in these premises during the week except on Saturdays, Sundays and Poya days. For certain repairs to be done in the premises for the purpose of conducting the classes, Nihal Jayawardena had sent him Rs. 900 through the defendant. Sometime before the institution of this action, Nihal

Jayawardena died. The plaintiff alleges that thereafter the defendant entered into unlawful occupation of the premises and refused to vacate the same. The plaintiff then instituted this action.

The defendant, on the other hand, denied that there was any arrangement between the plaintiff and Nihal Jayawardena in respect of these premises. His position was that the plaintiff gave the premises on rent to him on a monthly rental of Rs. 150. He also stated that he had deposited with the plaintiff a sum of Rs. 900 being six months rent. He claimed that he was the tenant of the premises and was entitled to the protection of the Rent Act.

The only issue raised in this action was whether the defendant was the monthly tenant of the plaintiff in respect of the premises in suit. In the course of the judgment, the learned District Judge dismantled the issue into two component issues which are as follows :

- (a) Was it the defendant who was the other party to whatever arrangement there was with the plaintiff in respect of the disputed premises ?
- (b) If so, was that arrangement a contract of tenancy eligible for the protection under the Rent Restriction laws of the country.

The learned District Judge answered issue (a) in favour of the defendant and issue (b) in favour of the plaintiff, and entered judgment for the ejection of the defendant from the said premises. This appeal is from that judgment.

Learned President's Counsel on behalf of the defendant submitted that the defendant had discharged the burden of proving that he was a tenant of these premises, and that the learned District Judge by faulty reasoning held otherwise. He submitted that the reasons given by the learned District Judge for his findings could not be sustained as they were based on speculation. He further submitted that no documents were produced by the plaintiff which contradicted the defendant's case.

Learned Queen's Counsel on behalf of the plaintiff submitted that the learned District Judge delivered a well considered and reasoned out judgment, and that the inferences drawn by him were from the documents produced at the trial.

There is no dispute that the burden rested on the defendant to establish that he was the tenant of the premises in suit. It has been accepted by the learned District Judge that the defendant had tendered to the plaintiff a cheque for Rs. 900 dated 24.12.70 (D 2) and a cheque (D 3) for Rs. 150 in his favour. Both these sums had been credited to the plaintiff's bank account. D 1 is the acknowledgment by the plaintiff of the receipt of Rs. 900. The learned District Judge has also accepted the position that a monthly sum of Rs. 150 was paid by the defendant to the plaintiff. The mere fact that the defendant had deposited a sum of Rs. 900 with the plaintiff and also paid him Rs. 150 monthly does not lead to the necessary inference that the Rs. 900 was a deposit of six months' rent and the payment of Rs. 150 a month was payment of monthly rent in respect of the premises in suit.

The best test for establishing a tenancy is proof of the payment of rent. The best evidence of the payment of rent is the rent receipts. In the present action no receipts were produced where there is a reference to payment of rent. The absence of rent receipts however could be explained where the landlord refuses to issue receipts to the tenant. In the present case there is no evidence that the defendant had asked the plaintiff for rent receipts and that the plaintiff refused to issue them. Had this payment of Rs. 900 been a deposit of six months' rent, the defendant could have obtained a receipt to that effect. The acknowledgment D 1 was written in the presence of the defendant. Even with regard to the issue of the cheque P 3 there is nothing to show that it was for payment of rent. According to the defendant the plaintiff had wanted him to make the monthly payments is cash. Such payments are not supported by any rent receipts. Then, the defendant stated that the plaintiff wanted him to pay Rs. 1,000 to the watcher who was leaving, and to set off that amount against rent. Even in this instance there are no rent receipts. There was nothing to prevent the defendant from obtaining from the plaintiff rent receipts for these payments. The only evidence the defendant relied on to prove that payments made by him to the plaintiff were for rent in respect of the premises in suit are D 1, D 2, D 3, D 4 A a cheque for Rs. 50, D 4 B a cheque for Rs. 150 which was returned to the defendant, and the ipse dixit of the defendant. In my view, this evidence is not sufficient to establish that the payment of Rs. 900 was a deposit for six months' rent, and that the other payments made by the defendant to the plaintiff were for rent in respect of these

premises. The learned District Judge in considering the evidence of the plaintiff addressed his mind to the fact that the plaintiff was ninety years old when he gave evidence. He at no stage rejected the plaintiff's evidence as false. The plaintiff's position was that the deposit made by Nihal Jayawardena was for certain alterations to the premises for the purpose of holding the tuition classes but the learned District Judge thought that the deposit was taken as a precaution for possible damage to the premises, furniture and other equipment. Then he was of the view that the Rs. 150 monthly payment was for the use of the furniture in the premises, and that this monthly levy of Rs. 150 did not convert mere occupancy to one of tenancy. I see no reason to disagree with these findings.

Regarding the question as to who had complete and effectual control over the premises, it is of note that neither the defendant nor anyone on his behalf resided in the premises. But the Society had its watcher residing in the premises who was obviously there to look after the entire premises. The Society had its office in the premises where its registers and other office requirements were stored. It is an admitted fact that the defendant was given the use of the Society's furniture which were used on Saturdays and Sundays for Dhamma Classes.

The Society conducted Dhamma Classes on Saturdays and Sundays. Sermons were preached on Poya days, and religious meetings were held on special occasions. The tuition classes of the defendant were held only during week days. According to the defendant, after he began the tutory, his son joined him. Thereafter he handed over the running of the tutory to his son. The tuition classes were evidently conducted in the evenings after 4 p.m. particularly because Nihal Jayawardena was a Government teacher attached to the Kandy Convent and had his free time only in the evenings after school hours. Even pupils attending school were free to attend the tuition classes only after school hours. Thus, the use of the premises for holding tuition classes would only be for a few hours on each of the five days of the week. The electricity and water bills were naturally paid by the defendant as these facilities were available to the students attending the tuition classes.

According to the defendant, when he took these premises on rent, he permitted the Society the use of these premises for its religious activities. Now, the primary object of the Society purchasing these

premises was evidently to have its headquarters there, and also to hold Dhamma Classes and conduct other religious activities there. Thus, it is highly improbable that this Society would surrender its rights of occupation of the only building it owned to a tenant whose permission had to be obtained to conduct its own religious affairs. On a consideration of the totality of the evidence, it appears to me that it was the plaintiff and not the defendant who had exclusive and effective control of these premises. In my view, the plaintiff has allowed the defendant the mere use of the premises during the week days when it is not used by the Society. The evidence led in this case proved that the defendant is nothing more than a mere licensee of the plaintiff. The mere payment of Rs. 150 monthly by a licensee to the licensor does not convert the status of a licensee to that of a tenant.

On a consideration of the totality of the evidence both oral and documentary, I hold that the learned District Judge's finding that the defendant is a licensee of the plaintiff who is not entitled to the protection of the Rent Act is correct. I see no reason to disturb that finding. The judgment and decree entered in this case are affirmed. I dismiss the appeal with costs.

SENEVIRATNE, J.—I agree.

Appeal dismissed.
