

CHANDRASENA
v.
ALFRED SILVA

COURT OF APPEAL.
DR. RANARAJA, J.
C.A. 301/89(F)
D.C. BALAPITIYA 129/RE
DECEMBER 03, 1996.

*Rent Act 5 of 1972 – Sub-letting – Without written consent – Exclusive possession
– Waiver and Condonation.*

Held:

1. A breach by the tenant of the prohibitions against sub-letting could be waived by the landlord expressly or impliedly.

Waiver and Condonation are not always the same as consent.

2. When the tenant has sub-let without the landlords' written consent, the landlord must elect whether or not to treat the contract as terminated. He must make his election forthwith and not so long after wards as to suggest condonation or waiver.
3. There is sufficient evidence to show that the previous landlord had not objected to sub-letting and therefore implicitly condoned the 1st defendant's conduct and waived his right to eject him by filing action forthwith.

APPEAL from the District Court of Balapitiya.

Case referred to:

1. *Carder v. Menike* – 1983– BALR Vol. 1 Part 1 – Page 38.

A. K. Premadasa, P.C. for plaintiff-appellant.

C. S. Hettihewa for defendant-respondent.

Cur. adv. vult.

December 10, 1996

RANARAJA, J.

The plaintiff instituted action for, ejection of the defendants from premises No. 52, and 52 2/1, Wiligoda, Ambalangoda, recovery of arrears of rent and damages from the 1st defendant-tenant, on the grounds of sub-letting and arrears of rent. The 1st to 3rd defendants filed a joint answer stating that the 1st defendant took the premises on a monthly rental of Rs. 250/- in 1964, from one K. K. Handy Silva, the father of the plaintiff, who died in 1975. Thereafter, the plaintiff's mother received the rent on behalf of the plaintiff. They pleaded further that the said Handy Silva and thereafter the plaintiff had condoned the sub-letting of the upper floors. That the authorised monthly rent for the premises was not more than Rs. 110/-, and counterclaimed a sum of Rs. 5040/- overpaid for the period September 1982 to September 1985.

At the commencement of the trial, the 1st defendant admitted that he was the tenant of the premises under the plaintiff. Trial commenced on 14 issues, at the conclusion of which, Judgment was entered dismissing the plaintiff's action with costs. This appeal is from that Judgment.

The learned counsel for the plaintiff-appellant submitted that the District Judge was in error in holding that there was condonation of the sub-letting in the absence of any evidence.

Section 10(1) of the Rent Act provides;

“For the purposes of this Act, any part of any premises shall be deemed to have been let or sublet to any person, if, and only if, such

person is in exclusive possession, in consideration of the payment of rent, of such part, and such part is a defined and separate part over which the landlord or the tenant as the case may be, has for the time being relinquished his right of control; and no person shall be deemed to be the tenant or the sub-tenant of any part of any premises by reason solely of the fact that he is permitted to use a room or rooms in such premises”.

Section 10 (7) of the Act reads;

“Nothing in sub-section (2), sub-section (5) or sub-section (6) shall apply to the sub-letting of any premises or part thereof without the prior consent in writing of the landlord, where such premises or part had been sub-let prior to the date of commencement of this Act to any person, so long as that person continues to be the sub-tenant of the premises or part thereof”.

“A breach by the tenant of the prohibition against sub-letting could be waived by the landlord expressly or impliedly. Waiver and condonation are not always the same as consent. When the tenant has sub-let without his written consent, the landlord must elect whether or not to treat the contract as terminated. He must make his election forthwith and not so long afterwards as to suggest condonation or waiver”. See *Carder v. Menike*⁽¹⁾.

To succeed in her action, the plaintiff had to prove that the 1st defendant had after, the Rent Act came into force, sublet without her written consent, defined and separate parts of the premises in suit, to the 2nd to 4th defendants, which the 1st defendant had given exclusive possession to the 2nd to 4th defendants and over which the 1st defendant had relinquished control, in consideration of rent paid by the 2nd to 4th defendants. Further, that she had instituted action to eject them no sooner she became aware of such sub-letting.

The defendants have admitted that the 2nd and 3rd defendants have occupied rooms in the said premises, without payment of rent to the 1st defendant, for over ten years. They claim, since the plaintiff

has shown no objection, she has by her conduct, impliedly condoned their occupation of the said rooms.

The plaintiff claims to be the landlord of the premises from 01/08/1980. She made complaint P1, to the Grama Sevaka on 01/02/1984, stating that the 1st defendant who took on rent the said premises from her father in 1964, had sublet parts thereof to the 2nd, 3rd and 4th defendants. She had requested the Grama Sevaka to obtain statements of the defendants, which he did. The 1st defendant by statement P3, has denied any sub-letting. The 2nd defendant by statement P4 admitted running a 'Record bar' with the permission of the 3rd defendant in the balcony of the 2nd floor, without paying any rent. The 3rd defendant had in statement P5 admitted taking on rent the upper floor 14 years earlier from the 1st defendant at a monthly rental of Rs. 125/-. According to the statement P6 made by the 4th defendant, he holds 'Karate Classes' on the 3rd floor with the permission of the 3rd defendant, without payment of any rent. The plaintiff and her brother, who gave evidence were not aware when the 3rd defendant came to occupy the upper floors. Nor was the Grama Sevaka, who recorded statements P1, P3, P4, P5 and P6, able to enlighten, when the 3rd defendant commenced business at the premises.

The 1st defendant has during the course of his evidence stated that after taking the premises on rent in 1963, he sub-let the upper floors to the 3rd defendant in 1972, and that the plaintiff's father, who was the landlord at the time, had no objection to such sub-letting and did not object to the 2nd defendant carrying on a "Record bar" in the balcony of the 2nd floor from 1976. This evidence is corroborated by the evidence of the 3rd defendant, who stated as far as he could remember, he took the upper floor on rent from the 1st defendant in or about 1970-71. In 1985, he had permitted the 2nd defendant to commence a 'Record bar' in the balcony of the 1st floor without charging any rent. The 4th defendant held 'Karate' Classes on the 2nd floor. He paid no rent either to the 1st or 3rd defendants. This evidence is corroborated by documents P3 to P6, produced by the plaintiff herself. The fact that the 3rd defendant had registered his business in 1974, is disclosed by witness Jayawardena.

The plaintiff has not led any evidence to contradict the evidence led by the defendants or dislodge that evidence. In the result, there was sufficient evidence to show that; (a) the sub-letting by the 1st defendant to the 3rd defendant was prior to the operation of the Rent Act, (b) the previous landlord had not objected to that subletting and therefore implicitly condoned the 1st defendant's conduct and waived his right to eject him from the premises by filing action forthwith, (c) the sub-tenant-3rd defendant who took on rent the upper floors in 1970-71 continued to occupy that portion of the building after the Act, (d) the 2nd and 4th defendants are the 3rd defendant's licensees, (e) the receipts produced by the 1st defendant show he has deposited the rents due with the Local Authority.

The Judgment of the District Judge is therefore affirmed. The appeal is dismissed with costs fixed at Rs. 5000/-.

Appeal dismissed.

Note by Editor: *The Supreme Court on 10.11.97 refused special leave to appeal to the Supreme Court in SC SPLA 260/97.*