STATE BANK OF INDIA
v.
RAJAPAKSE

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.,
CA NO. 83/90 (F)
DC COLOMBO NO. 4087/ZL
JUNE 26, 2000,
JULY 14, 2000 AND
OCTOBER 19, 2000

Landlord and Tenant – Informal tenancy agreement – Tenant carrying out alterations to premises – Temporary or permanent constructions – What is alteration? – Common law rights of parties – Housing and Town improvement Ordinance, sections 6 (1) and (2) – Unauthorized structures.

The plaintiff-respondent instituted action as the tenant of the 1st floor premises rented out to him seeking a delaration that he is entitled to carry out *inter alia* rearrangement and improvement of the premises and further sought a permanent injunction restraining any obstruction to the construction of a mezzanine floor from the defendant-appellant (landlord).

After trial the District Court entered judgment in favour of the plaintiff-respondent.

In appeal it was contended that the said construction was unauthorised and that it was a permanent structure and that the tenant is not entitled to construct permanennt structures without the landlord's permission.

Held:

(1) The plaintiff-respondent did have neither the permission of the defendant-appellant nor the approval of the Mayor when he constructed the mezzanine floor.

(2) The construction exposed the plaintiff-respondent for prosecution by the Colombo Municipal Council.

(3) The facts in the case show that the mezzanine floor is a structural alteration to the premises in suit, of a permanent nature.

Per Dissanayake, J.,

"Under the Common Law a tenant is entitled to carry out alterations which involved superficial or surface changes as opposed to permanent alterations."

"A building is a structure and an alteration of a structure must be structural."

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *Inspector of Local Board v. Peeris* – 8 CWR 53.
2. *Nesaduray v. Amerasinghe* – 39 NLR 246 at 248.
3. *Canagasingham v. Urban Council, Trincomalee* – 50 NLR 191.
4. *The Clarke* – 1902 – 2 ch 327.
5. *Less and Another v. Bornstein and Another* – (1948) 4 South African Law Law Reports 333 at 339.
6. *White v. Ryan* – 1932 Ir R 69.
7. *Bickmare v. Dinmer* – 1903 (1) ch 158.
8. *South Wales Aluminium Co. v. Neath Assessment Committee* – (1943) 2 ALL ER 487.
9. *Hobday v. Nicol* – 113 LJ KB 264.
10. *West Minster Council v. London Country Council* – 1902 (1) KB 326.
11. *LCC v. Jann* – (1954) 1 WLR 371.
12. *Thomas v. Benjumin Scaffolding Contracts* – (1980) 79 LGR 702.

Mano Dewasagayam for the defendant-appellant.

Bimal Rajapakse with *G. K. Hirimuthugoda* and *Ajith Anawarathne* for plaintiff-respondent.

Cur. adv. vult.

February 09, 2001

DISSANAYAKE, J.

The plaintiff-respondent by his plaint dated 06. 04. 1982 filed this action 1
as the tenant of the 1st floor in premises bearing No. 18 1/2 in the State Bank of India Building rented out to him by its owner the defendant-appellant seeking a declaration from the District Court that he is entitled to carry out internal decoration, redecoration, rearrange-

ment and improvement to the premises as are necessary for the plaintiff's business, from time to time, in order to put the premises for reasonable use.

Having commenced construction of a mezzanine floor on 7th March, 1982, the plaintiff-respondent sought a permanent and an interim injunction from the District Court restraining any obstruction from the defendant-appellant.

The defendant-appellant filed answer praying for a dismissal of the plaintiff-respondent's action and seeking a mandatory order for demolition of the mezzanine floor and damages in a sum of Rs. 5,000 up-to-date of answer and continuing damages at Rs. 1,000 per month up-to-date of demolition of the said mezzanine floor.

The case proceeded to trial on 13 issues and the learned Additional District Judge by his judgment dated 21. 02. 1990 entered judgment for the plaintiff-respondent as prayed for with costs.

The defendant-appellant had lodged this appeal from the aforesaid judgment.

Learned Counsel for the defendant-appellant contended that the learned District Judge was in error when he came to the finding that the construction of the mezzanine floor was only a temporary construction.

Learned Counsel for the defendant-appellant further contended that there was an admission by the plaintiff-respondent that he had constructed the said mezzanine floor and that he failed to obtain the approval of the Municipal Council, which shows that by constructing the said mezzanine floor he had contravened the provisions of the law.

The following matters were admitted by the parties at the trial :

(1) The defendant-appellant was a tenant of the plaintiff-respondent in respect of premises No. 18 1/2, First floor, State Bank of India;

(2) The plaintiff-respondent constructed the mezzanine floor;

(3) The plaintiff-respondent did not obtain the permission of the Colombo Municipal Council or the Mayor before constructing the said mezzanine floor;

(4) The plaintiff-respondent commenced construction on 6. 3. 82 and completed it under authority of an interim injunction issued by Court;

(5) The plaintiff-respondent constructed the said mezzanine floor without obtaining the permission of the defendant-appellant;

(6) The plaintiff-respondent constructed the said mezzanine floor with the intention of increasing his office space.

Learned Counsel for the defendant-appellant drew the attention of Court to section 6 (1) of the Housing and Town Improvement Ordinance which provided that construction of the following alterations to buildings required the approval of the Mayor or the Municipal Council:

(*a*) Construction of a door or window in an external wall (section 6 (2) (*b*)).

(*b*) Construction of an internal partition (section 6 (2) (*c*)).

(*c*) Alteration of the internal arrangements of a building which affects any change in the open space attached to the building or its ventilation (section 6 (2) (*d*)).

(*d*) Addition of any room or other structure (section 6 (2) (**e**)).

He cited the following cases which dealt with certain alterations which came under section 6 (2) of the Housing and Town Improvement Ordinance :

(1) *Inspector of the Local Board v. Peeris*[1] where it was held by reference of section 6 (2) (*c*) of the Housing and Town Improvement Ordinance, that the construction of a partition inside the house which was partly of bricks and partly of venition shutters with glass panes was a violation of section 6 (1) of the Ordinance;

(2) *Nesaduray v. Amerasinghe*[2] at 248 where Fernando, AJ, took the view that the alteration in section 6 (2) means "some work which resulted in the alteration or conversion".

(3) *Canagasingham v. Urban Council, Trincomalee*[3] where it was observed by Basnayake, J. (as his Lordship was then) "that an examination of section 6 (2) of the Housing and Town Improvement Ordinance reveals that the object of the legislation is to phohibit unauthorised alterations of buildings unless done according to approved plans".

It is to be observed that the premises in suit was let by the defendant-appellant to the plaintiff-respondent on an informal tenancy agreement dated 31. 12. 1975 (P1).

According to the terms of the said contract of tenancy the premises was let to the plaintiff-respondent for the purpose of using it as an office.

The said contract of tenancy (P1) did not contain any provision relating to making of any kind of alterations, to the building structural

or otherwise. however, clause (*c*) of the said contract of tenancy (P1) prohibited any change in electric wiring without the written consent of the landlord.

Since the said contract of tenancy subsisted between the parties at the time of filing of this action their respective rights have to be determined on the said contract of tenancy and on the principles of common law relating to landlord and tenant, which is the Roman-Dutch Law.

In the book *"Landlord and Tenant in South Africa"* by Wille, 5th edition in Chapter XIII under the heading "Contract, Use of Lease Property (Buildings)", at page 235 it is stated thus :

> "From the negative point of view the tenant may not use the building unreasonably or improperly, or for a purpose other than that for which they were let to him, nor may convert the nature of, or make alterations to, the property or a portion of it; for example, he may not convert a dwelling house into a shop or a stable." Where the tenant of a shop was not allowed to make "structural alterations," without the consent of the landlord, it was held that for any alteration it was necessary for carrying on the business for which the premises was let was not a structural alteration unless it involved a permanent alteration of the premises as opposed to mere superficial or surface changes."

Therefore, it is apparent that under the common law a tenant is entitled to carry out alterations which involved superficial or surface changes as opposed to permanent alterations.

To comprehend the meaning of the words "alteration" and "structural" it is helpful to have recourse to Judicial Dictionaries.

In "Strouds Judicial Dictionary" (4th edition) 1971, the meaning of the word "alteration" is given as probably, an alteration, in premises which will discharge an insurer, means generally a permanent alteration or user and not something mere casual and temporary.

In "Words and Phrases Judicially Defined" vol. 1 (1946) by Roland Burrows at page 168 it is stated that : "an alteration in building must be structural alteration". *Quoting Re Clarke's Settlement*[4] (Buckley, J.), the author states that : "a building is a structure, and an alteration of a structure must be structural".

In the case of *Less and Another v. Bornstein and Another*[5] at 339 Searle, J. stated thus: "Now in my opinion, in the circumstances, without defining the term "structural alterations" for the purpose of clause 10 of the lease, it must be limited to alterations or additions which (*a*) are permanent in their nature and (*b*) which alter the form or structure of the premises as opposed to alterations of a superficial nature which merely alter the surface. Alterations as to fittings and fixtures for the purpose of converting the premises for the ordinary conducting of the business for which they were let, would not, in my view, amount to "structural alterations" – vide *White v. Ryan*[6] even though the annexing of such fixtures might include the boring of holes in or plugging the actual walls or structure of the buildings – vide *Leigh v. Taylor*[7], *Bickmore v. Dimmer*[8]. It would seem to follow therefrom that any alteration necessary or essential for the carrying on the trade for which the premises are let would not be a "structural alteration" unless it involes an actual permanent alteration of the structure of the premises themselves as opposed to mere superficial or surface changes".

In "Strouds Judicial Dictionary" vol. 5 (5th edition) (1986) at page 2513 meaning of the word structure is given as –

(1) in its ordinary sense, means something which is constructed in the way of being built up as is a building (*South Wales Aluminium Co. v. Neath Assessment Committee*[9]).

(2) Although the question what is a structure is a question of fact, the question what is a structure within the meaning of a particular statute or regulation is a mixed question of law and fact (*Hobday v. Nicol*[10] at 2514) it is stated thus :

" . . . (*b*) A stand constructed of wood, except its nails, for enabling spectators to view a street procession was a "wooden structure" within London Building Act, 1894 (C. ccxiii), s 84; it was not a "building or structure of a temporary character", within s. 83 (*Westminster Council v. London County Council*[11]).

(*j*) a car shelter is a "structure" within s. 22 of the London Buildings Act 1930 (20 & 21 Geo. 5 c. Clvii (*L. C. C. v. Jann*[12]).

(*k*) Scaffolding erected to support seating for theatrical performance has been held to be a "structure" for the purposes of s. 30 of the London Buildings Acts (Amendment) Act 1939 (C. XCVII) *Thomas v. Benjamin Scaffolding Contracts*[13].

According to the evidence led in the instant case it was revealed that, the plaintiff-respondent constructed a mezzanine floor which was 39 feet by 13 feet 9 inches and fitted on timber beams at 6 feet 6 feet 2 inches intervals which were fixed to timber columns that were driven into the concrete floor cutting those small areas of the timber floor at the points they were fitted to the floor.

The evidence also revealed that the premises was let out for the purpose of using it as an office. The floor area which was 696 square feet was increased to 1,100 square feet by the construction of the said mezzanine floor. Because of the said construction, the premises in suit had been partitioned into a ground floor and a mezzanine floor and thereby constructed an additional room. New electric cables have been used to fix 4 air-conditioners and 6 fluorescent lamps that were fitted, without the written permission of the defendant-appellant.

There were 11 desks 2 filing cabinets on the mezzanine floor, and about 20 people could be accommodated on the said mezzanine floor, whereas earlier there was only room for 4 persons to work in the said premises.

It was also revealed in the evidence that if the mezzanine floor was fitted to the entire area of the building it would cause damage to the building, but in this case no damage was caused to the building.

Admittedly, the plaintiff-respondent neither did have the permission of the defendant-appellant nor the approval of the Mayor or the Colombo Municipal Council, when he constructed the said mezzanine floor.

It is to be observed that the aforesaid construction also exposed the plaintiff-respondent for prosecution by the Colombo Municipal Council under section 6 (2) of the Housing and Town Improvement Ordinance, as per report of Structural Engineer Milroy Pèrera dated 15. 4. 1982 (D3).

Therefore, the matter that arises for decision of this Court is whether the construction of the said mezzanine floor is a structural alteration of a permanent nature or a mere superficial or surface change.

I am of the view a tenant of a premises is entitled only to carry out superficial or surface changes to put the premises into reasonable use, for the purpose for which it was let, like for example changing the furniture and fittings, changing the colour of the paint on the walls or using of some decorative material, etc., and a tenant is certainly not entitled to construct an additional room or an additional floor and thereby increase the floor area without the consent of the landlord, even if such construction is done with timber and can be dismantled easily. To detemine whether the said mezzanine floor erected by the the plaintiff-respondent was a temporary or a permanent one, the following facts that transpired in the testimony of Milroy Perera Structural Engineer need careful examination.

The said mezzanine floor was 39 feet x 12' 9" was made out of planks which were about one inch in thickness.

The floor was fixed onto timber beams which lay across and along the border of the said floor. The said timber beams were fitted onto 18 timber columns which were fixed near the inner walls of the building at 6 feet and 6' 2" intervals. These columns were driven into the concrete floor. Small areas of the timber floor, where the said timber columns were driven into the concrete floor, were cut.

The said mezzanine floor was built to carry the weight of 11 desks, filing cabinets, steel cupboards, book racks and the weight of the employees who used the said furniture. The said structure was able to carry the weight of an office. The question whether the said structure was temporary or permanent depended on the period to which the said structure was intended to be used. If the person who constructed the said structure did not dismantle it, it would become a permanent structure. Generally, the question whether a structure was temporary or pemanent depended on the intention of the person who erected it. The said mezzanine floor had been in existence for 6 years up to the time Milroy Perera gave evidence in the District Court.

It is to be noted that from the above facts which were revealed on the testimony of Milroy Perera, that the said mezzanine floor, although constructed out of timber is a structural alteration to the premises in suit, of a permanent nature.

Therefore, I hold that the construction of the said mezzanine floor to the premises in suit was a structural alteration, of a permanent nature.

I set aside the judgment of the learned District Judge and enter judgment for the defendant-appellant as prayed for in the answer of the defendant-appellant.

WEERASURIYA, J. – I agree.

Appeal allowed.