

AHRIFF
v.
RAZIK

COURT OF APPEAL.

G. P. S. DE SILVA, J. AND JAMEEL, J.

C.A. 28/80 (F). D.C. MOUNT LAVINIA 253/RE.

JANUARY 15 AND 16, 1985.

Tenancy – Death of tenant – Notice in terms of section 18 of the Rent Restriction Act, No. 28 of 1948 – Licensee – Requirement of notice to quit.

The plaintiff's mother was the tenant of the premises in suit. She died in 1963 and the plaintiff gave written notice to the landlord in terms of section 18 of the Rent Restriction Act that he proposed to continue the tenancy. The defendant who is a brother of the plaintiff and their sisters consented to the plaintiff giving such notice. Later the plaintiff sought to have the defendant ejected alleging that the latter was only a licensee. The defendant claimed that the plaintiff took the tenancy for and on behalf of himself (defendant) and he is entitled to continue in occupation of a portion of the premises. The defendant claimed he was a joint tenant or sub-tenant. He denied receipt of notice to quit although the plaintiff said he had given such a notice.

Held –

The only person who can be deemed to be the tenant of the premises is the person who is entitled and who has in fact given written notice in terms of section 18 of the Rent Restriction Act to the landlord. The fact that the defendant and the other members of the family in occupation of the premises gave their consent to the plaintiff gives them no rights whatsoever.

Defendant's occupation was only that of a licensee.

The defendant however was entitled to notice of the revocation of his licence. Notice was necessary because defendant whether as a sub-tenant or licensee was claiming to occupy the premises under the plaintiff, and not against him. Service of notice had however not been proved. Hence the suit fails.

Cases referred to :

- (1) *Muttu Natchia v. Patuma Natchia* (1895) 1 NLR 21.
- (2) *Sundra Ammal v. Juse Appu* (1934) 36 NLR 400.
- (3) *Pedrick v. Mendis* (1959) 62 NLR 471.
- (4) *Hassan v. Negaris* (1969) 75 NLR 335.
- (5) *Ranasinghe v. Premadharna and Another* [1985] 1 SLR 63

APPEAL from judgment of the District Court, Mount-Lavinia.

E. Guneratne for plaintiff-appellant.

Nihal Singaravelu with *Jaindran* for defendant-respondent.

Cur. adv. vult.

February 28, 1985.

G. P. S. DE SILVA, J.

The plaintiff instituted this action against the defendant for ejectment from the premises in suit and for recovery of damages. The plaintiff is the brother of the defendant. The plaintiff, the defendant and their four sisters have admittedly been in occupation of the premises since 1941. At that time their father was the tenant of the premises and the landlord was one Vythialingam. The father died in 1951 and thereafter the mother became the tenant. The mother too died in 1963. Thereupon it was the plaintiff who gave written notice to the landlord in terms of section 18 of the Rent Restriction Act (Chap. 274) "to the effect that he proposes to continue in occupation of the premises as the tenant thereof". It is in evidence that the defendant and his sisters consented to the plaintiff giving notice in terms of section 18, the plaintiff being the eldest in the family. The feelings between the plaintiff and the defendant were cordial until about 1973 and differences appear to have arisen between the parties after the marriage of the defendant.

The case for the plaintiff was that he was the sole tenant of the premises after the death of his mother and the defendant occupied a portion of the premises with his leave and licence. The plaintiff averred in his plaint that the defendant is falsely claiming to be a tenant under the plaintiff and that the plaintiff by writing dated 9th May 1975 gave notice to the defendant to quit and deliver possession of the portion of the premises occupied by him on or before 30th June 1975.

The defendant in his answer denied the receipt of the notice dated 9th May 1975. He further averred that upon the death of their mother in 1963, the plaintiff took the tenancy for and on behalf of the defendant and that he is accordingly entitled to continue in occupation of a portion of the premises. He also pleaded that he has paid the plaintiff Rs.30/- per month as rent since September 1963 and that in any event he is a sub-tenant of a portion of the premises and is entitled to the protection of the Rent Act No. 7 of 1972. At the trial 3 issues were raised on behalf of the plaintiff :

- (1) Was the defendant living in a portion of the premises described in the Schedule to the plaint with the leave and licence of the plaintiff ?
- (2) Did the plaintiff terminate the leave and licence given to the defendant by notice dated 9.5.75 ?
- (3) If issues (1) and (2) are answered in the affirmative is the plaintiff entitled to the relief prayed for in the plaint ?

The following issues were raised on behalf of the defendant :-

- (5) Was the defendant residing in the premises in 1941 ?
- (6) Was the father of the plaintiff and the defendant the tenant of the premises from 1941-1951 ?
- (7) Was the mother of the plaintiff and the defendant the tenant of the premises from 1951-1963 ?
- (8) After the death of the mother in 1963 did the plaintiff become the tenant of the premises at the request of the defendant and other members of the family ?
- (9) If issues 5-8 are answered in the affirmative, has the defendant a right to reside in the premises ?
- (10) In any event is the defendant a tenant under the plaintiff ?
- (11) If issue 10 is answered in the affirmative can the plaintiff maintain this action ?

It was agreed between the parties that issues 5, 6 and 7 should be answered in the affirmative.

After trial the District Judge answered issue (1) in the negative, issue (2) as 'not proved', issues (8) and (9) in the affirmative. On issue (10) his finding was that the defendant was a sub-tenant of the premises. The action was dismissed and the plaintiff has now appealed against the judgment and decree.

Mr. Gunaratne, counsel for the plaintiff-appellant, submitted that the trial Judge's answer to issue No. (1) is incorrect and further contended that even if issue No. (8) is answered in the affirmative the defendant does not acquire any rights under section 18 of the Rent Restriction Act. The defendant in his evidence admitted that the plaintiff alone gave notice to the landlord in terms of section 18 of the Rent restriction Act, No. 29 of 1948 (Chap. 274). The evidence clearly establishes the fact that the plaintiff gave notice to the landlord in terms of section 18 at the request of and with the concurrence of the defendant and the other members of the family. Thus the trial Judge's answer to issue (8) is correct. Does this then mean that the plaintiff and the defendant are joint tenants ?

In my view, Mr. Gunaratne is right in his submission that the only person who can "be deemed to be the tenant of the premises" is the person who is entitled and who has in fact given written notice in terms of section 18 of the Rent Restriction Act to the landlord. The fact that the defendant and the other members of the family in occupation of the premises gave their consent to the plaintiff gives them no rights whatsoever. It is true that the defendant had the right to give notice under section 18. But he failed to do so. Section 18(4) expressly provides as to what would happen in the event of notice being given by more than one person. It is the Rent Control Board that would decide as to who would be deemed to be the tenant. Thus Mr. Gunaratne's contention that section 18 does not contemplate a plurality of tenants is well founded. Moreover, the fact that the defendant did not give notice in terms of section 18 and he consented to the plaintiff giving notice would only mean that he had waived the right he had to give such notice. It was the plaintiff alone who had complied with the provisions of section 18 and it is he alone who would be deemed to be the tenant of the premises. I accordingly hold that the trial Judge's answer to issue (9) is erroneous for it implies that the plaintiff and the defendant were joint tenants of the premises.

What then is the position of the defendant in so far as his right to occupy the premises is concerned? At the time the plaintiff gave notice in terms of section 18 the defendant was already in occupation of the premises. He occupied the premises as a licensee both under his father and his mother. Mr. Singaravelu, Counsel for the defendant-respondent did not contend the contrary. Once the plaintiff acquired a statutory right under section 18 and the defendant continued to occupy the premises, it seems to me that he continued to occupy the premises as a licensee and no more. His occupation of the premises was in the same capacity as it was when his parents were the tenants. I am therefore of the view that the trial judge was in error when he answered issue No.(1) in the negative.

But the matter does not rest there. The trial Judge, has held that the plaintiff has failed to prove the termination of the licence. The defendant in his answer denied the receipt of the notice and the burden was clearly on the plaintiff to prove that the licence was revoked. Mr. Gunaratne did not challenge the finding of the District Judge that the notice of termination of the licence has not been proved to have been received by the defendant. Counsel's contention, however, was that the defendant having in his answer denied that he was the licensee, was not entitled to a notice terminating the licence. He relied on the cases of *Muttu Natchia et al v. Patuma Natchia et al* (1), *Sundra Ammal v. Juse Appu* (2), *Pedrick v. Mendis* (3) and *Hassan v. Negaris* (4), which lay down the principle that a tenant who disclaims tenancy is not entitled to a valid notice to quit, in support of his submission that the defendant is not entitled to a notice revoking the licence.

With this submission, I am afraid I cannot agree. It is very relevant to note that in his answer the defendant whilst denying that he was a licensee under the plaintiff specifically pleaded that since the death of his mother he was in any event a sub-tenant under the plaintiff. This was a matter that was put in issue at the trial-wide issue No.(10). In other words, the defendant's position was that he was holding under the plaintiff. It was not his position that he was holding adversely to the plaintiff, in defiance of the plaintiff's rights. The principle enunciated in the cases cited by Mr. Gunaratne has no application to the instant case, having regard to the averments in the answer and the

issues raised on behalf of the defendant. Browne J. in *Muttu Natchia et al v. Patuma Natchia et al (supra)* laid down the principle in the following terms :— "The plaint in this case sufficiently averred that the defendant, after entering and holding as tenant of the plaintiff, *had disclaimed to hold of him and put him at defiance*. It was unnecessary therefore that the plaintiff, as he did, should have averred or have sought to prove any notice to quit given by him to the defendant, and the defendant was not entitled to have the action dismissed because no valid notice was given". (The emphasis is mine). It is manifest that the defendant in the present case has not "disclaimed to hold of him and put him at defiance".

This question was considered very recently by a Bench of five Judges of the Supreme Court in *Ranasinghe v. Premadharma and Another* (5). That was a case where the plaintiff sued the defendants, her tenants, for ejection on the ground of arrears of rent. The defendants based their right to occupation of the premises not on any tenancy under the plaintiff but on an independent title of their own, namely *jus retentionis*. The Supreme Court held that in such a case the defendant who denies the tenancy is not entitled to insist on a termination of the tenancy. In the course of his judgment the learned Chief Justice expressed himself thus :

"How can a person who denies the tenancy be entitled to insist on a proper termination of the tenancy which, according to him never existed. A defendant cannot be allowed to deny the existence of the contract of tenancy and in the same breath claim the benefits of that contract ; the doctrine of 'approbate and reprobate' forbids this. It is only when the defendant admits the contract that he can claim the benefits of the contract The fundamental object of the Rent Act is to give the tenant security of tenure by preventing the landlord from evicting him without an order of court and forbidding the court to make an order for possession except on certain specific grounds. That security of tenure is not to be vouched to a person who repudiates the very basis of the Act, viz. the relationship of landlord and tenant and who claims possession of the premises, *not under the plaintiff, but against him*". (The emphasis is mine).

In the appeal before us the defendant claimed a joint tenancy with the plaintiff or alternatively that he was the sub-tenant under the plaintiff. He never denied tenancy. The defendant never claimed a right of occupation against the plaintiff. Whether it be in the capacity of a licensee or a sub-tenant, his claim to occupy the premises was always one under the plaintiff and not against him. Therefore the principle relied on by Mr. Gunaratne has no application to the instant case.

Accordingly I hold that the District Judge rightly answered issue No. (2) in the negative. The plaintiff's action must therefore be dismissed. The appeal fails and is dismissed with costs fixed at Rs. 210.

JAMEEL, J. – I agree.

Appeal dismissed.