

NANDAWATHIE SILVA
v.
MANURATNA

COURT OF APPEAL
WEERASURIYA, J. (P/CA) AND
BALAPATABENDI, J.
CA NO. 712/93 (F)
DC MT. LAVINIA NO. 1653/L
OCTOBER 26, AND
NOVEMBER 09, 2001

Rei Vindicatio Action – Tenant undertaking to vacate premises – Can the tenant contract out of statute?– Agreement conditional – Can action in any event be maintained?

The plaintiff-respondent instituted action seeking the ejectment of her tenant the defendant-appellant on the basis that the defendant tenant has expressly undertaken to leave the premises within one month and therefore she was a licensee under her. The District Court held in favour of the plaintiff-respondent.

On appeal –

Held:

- (1) The defendant-appellant being a tenant under the plaintiff is entitled to seek protection under the provisions of the Rent Act. Such statutory protection comes to an end only upon (a) by handing back of the premises to the landlord or (b) by order of a competent court.

It is open to a tenant to recall a promise to surrender possession.

- (2) The common law rights of a landlord to institute action for an order of ejectment of a tenant is curtailed by the provisions of the Rent Act.
- (3) A conditional agreement cannot form the basis for an order of ejectment.

APPEAL from the judgment of the District Court of Mt. Lavinia.

Cases referred to:

1. *Ibrahim v. Mansoor* – 54 NLR 217 (DB) at 224.
2. *Nugera v. Richardson* – 51 NLR 116.
3. *Dep v. Nagaratnam* – 56 NLR 262.

Dr. J. de Almeida Gunaratne for substituted defendant-appellant.

Gayan Perera for plaintiff-respondent.

Cur. adv. vult.

January 07, 2002

WEERASURIYA, J. (P/CA)

The plaintiff-respondent brought this action against the defendant-⁰¹ appellant seeking her ejection from the premises described in the schedule to the plaint. The defendant-appellant in her answer whilst denying averments in the plaint prayed for dismissal of the action.

This case proceeded to trial on 11 issues and at the conclusion of the case learned District Judge by his judgment dated 16. 09. 1993, entered judgment for the plaintiff-respondent. It is from the aforesaid judgment that this appeal has been preferred.

At the hearing of this appeal, the case of the defendant-appellant was presented on the following basis :

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- (a) That the document dated 16.11.1983 by which the defendant-appellant agreed to vacate the premises in suit is obnoxious to the provisions of the Rent Act.
- (b) That the said document (P2) establishes an interest in land and therefore in terms of section 2 of the Prevention of Frauds Ordinance it should be notarially attested.

- (c) That the said agreement being conditional, the plaintiff-respondent has no legal basis to seek the ejection of the defendant-appellant.

In order to consider the above submissions, it is necessary to set ²⁰ down the factual position briefly.

The plaintiff-respondent based this action on the ground that in terms of the document dated 16.11.1983, the defendant-appellant has expressly undertaken to leave the premises in suit within one month from the date thereof, and therefore she (the defendant-appellant) was a licensee under her.

It is common ground that the defendant-appellant was a tenant under Lidy Magdelene Welaratne and the plaintiff-respondent purchased the premises by deed of conveyance bearing No. 24 dated 22. 07. 1983 attested by S. I. Wijeratne, NP. The impugned agreement had been ³⁰ entered into on 16. 11. 1983 and therefore, it would be clear that it had been effected after the purchase of the property by the plaintiff-respondent. The defendant-appellant had undertaken to hand over the premises within one month from the date thereof. It is significant that plaintiff-respondent sought to assert that prior to the purchase of the premises in July, she had discussions with the defendant-appellant in respect of purchase of this property. The defendant-appellant too conceded that prior to the agreement she had discussions with the plaintiff-respondent, nevertheless it was never meant to suggest that they took place prior to the purchase of the premises in July. ⁴⁰

The contention that the document (P2) is illegal is based on the proposition that the tenant can never contract out of the protection afforded in terms of the Rent Act. The defendant-appellant being a tenant under Magdelene Welaratna is entitled to seek protection under the provisions of the Rent Act. It is to be mentioned that such statutory protection comes to an end only upon (a) by handing back of the premises to the landlord or (b) by order of a competent court. Therefore,

it is open to a tenant to recall a promise to surrender possession. (*vide Ibrahim Saibo v. Mansoor*⁽¹⁾ at 224).

It is to be observed that common law rights of a landlord to institute⁵⁰ action for an order of ejectment of a tenant is curtailed by the provisions of the Rent Act.

It was never the position of the plaintiff-respondent that the defendant-appellant has attorned to her. In the circumstances, the protection the defendant-appellant could claim against her landlord in terms of the Rent Act is equally applicable against the plaintiff-respondent who purchased the premises. However, this restriction is not applicable to compromises effected in a pending action as seen from the following cases :

In *Nugera v. Richardson*⁽²⁾ it was held that the limitations placed⁶⁰ on the jurisdiction of a court by the provisions of the Rent Restriction Ordinance in an action against a tenant who is unwilling to vacate the premises do not in any way fetter the right or the duty of the court to give effect to lawful compromise willingly entered into in a pending action between a landlord and his tenant.

In *Dep v. Nagaratnam*⁽³⁾ it was held that although parties cannot by agreement give the courts jurisdiction which the legislature has enacted that they are not to have, nevertheless a compromise after action which is advantageous to a party and secured to him by a decree subsequently entered of consent is not void as offending the⁷⁰ prohibition against waiver.

Therefore, it is manifest that the aforesaid agreement is ineffective as it seeks to contract outside the protection of the Rent Act with a person to whom the defendant-appellant has not even attorned as her lawful tenant.

The contention that the agreement was conditional on the defendant-appellant obtaining a house from Jayawadanagama has to be accepted on the testimony of the defendant-appellant. This position is seen on a close examination of the agreement itself marked P3. The defendant-appellant asserted that she made it known to the plaintiff-respondent⁸⁰ of her desire to return the money she obtained, on her failure to obtain the house from Jayawadanagama which was not heeded. A conditional agreement cannot form the basis for an order of ejectment.

In view of the above material, the other contention that the agreement creates an interest in land within the meaning of section 2 of the Prevention of Frauds Ordinance, need not be examined.

For the above reasons, I set aside the judgment of the learned District Judge dated 16. 09. 1993.

However, I make no order as to costs.

BALAPATABENDI, J. – I agree.

Appeal allowed.