

**SUBENDRANATHAN**

v.

**DR. S. PONNAMPALAM**

COURT OF APPEAL

SENEVIRATNE, J. (PRESIDENT) AND JAMEEL, J.

S.C. (C.A.) 376/77 – D.C. MOUNT LAVINIA CASE No. 1072/RE.

JANUARY 9, 1985.

*Landlord and Tenant – Rent and Ejectment – Cessation of occupation continuously for not less than six months – Section 28 (1) of the Rent Act No. 7 of 1972 – Occupation of wife and children.*

The defendant who was the tenant of the plaintiff left for Malaysia on 26.11.1973 on an employment contract for two years. He left his wife and children behind in the premises but they too joined the defendant in Malaysia on 25.2.1974. On 25.11.1975 the defendant and his family returned. The plaintiff filed this suit on

28.6.1974 alleging that as the defendant his tenant had ceased to occupy the premises without reasonable cause for a continuous period of not less than six months he (the plaintiff) was entitled to a decree for ejection. The District Judge found for the plaintiff and the defendant appealed.

**Held —**

In respect of the law pertaining to the Rent Act the tenant's spouse and their children have a right, not merely a licence, to occupy the house taken on rent by the tenant. The occupation of the tenant's wife and children was constructively occupation by the tenant. As the defendant's wife and children left for Malaysia only on 25.2.1974 and as the action was instituted on 28.6.1974 it was badly constituted and not maintainable as it was filed before the lapse of six months from the departure of the wife and children.

**Cases referred to :**

- (1) *Alwis v. Kulatunge* (1970) 73 NLR 337 (DB).
- (2) *Canekaratne v. Canekaratne* (1968) 71 NLR 522.
- (3) *National Provincial Bank Limited v. Ainsworth* [1965] AC 1175, 1152.
- (4) *Brown v. Draper* [1944] 1 KBD 309.

APPEAL from the District Court of Mount Lavinia.

*Siva Rajaratnam* with *S. Mahendran* for defendant-appellant.

*H. L. de Silva, P.C.* with *N. S. A. Goonetilleke* and *J. de Almeida Gunaratne* for plaintiff-respondent.

*Cur. adv. vult.*

April 3, 1985.

**SENEVIRATNE, J. (President C/A)**

The plaintiff-appellant filed this action on 28.6.74 in the District Court of Mt. Lavinia seeking to eject his tenant B. Subendranathan from the premises No. 169 1/2, Canal Bank Road, Wellawatte. The Plaintiff alleged that the defendant had from October 1973 ceased to occupy the said premises for a continuous period of not less than six months within the meaning of section 28 (1) of the Rent Act No. 7 of 1972, and thereby forfeited his tenancy rights in respect of the said premises and ceased to be its tenant. Section 28 (1) of the Rent Act referred to is as follows :

"Notwithstanding anything in any other provisions of this Act, where the tenant of any residential premises has ceased to occupy such premises, without reasonable cause, for a continuous period of not less than six months, the landlord of such premises shall be entitled in an action instituted in a court of competent jurisdiction to a decree for the ejection of such tenant from such premises".

The defendant filed answer stating that he left Sri Lanka on 26.11.1973 to take up an appointment in Malaysia on contract for 2 years, that his stay in Malaysia was purely temporary for the purpose of employment and that he had not ceased to occupy the premises without reasonable cause within the meaning of section 28 (1) of the Rent Act. The answer further stated that after he left Sri Lanka on 26.11.1973 his wife and children continued to occupy the said premises until 25.2.1974 when they left to Malaysia to join the defendant. The main plea taken up by the defendant was set out as follows : – When this action was originally instituted on 28.6.74 the plaintiff was not entitled to do so inasmuch as the defendant's wife and children were in occupation of the said premises until 25.2.74. Hence a continuous period of not less than six months of non-occupation within the meaning of section 28 (1) of the Rent Act has not elapsed when this action was instituted. The defendant also averred that the plaintiff had failed to terminate the tenancy between the parties in respect of the premises, and hence cannot maintain this action.

At the trial several issues were raised, of which I will refer to issues (1) and (2) in respect of which this appeal can be decided.

Issue No. (1) – Has the defendant ceased to occupy the premises in suit for a continuous period of not less than six months as set out in paras 2 and 3 of column 1 of the amended plaint ?

(2) – If so, is the plaintiff entitled to eject the defendant and all those holding under him from the said premises.

The learned District Judge has answered both these issues in the affirmative and those findings are some of the findings which have made the Judge give judgment for the plaintiff-respondent in this appeal. The defendant has appealed from this judgment.

As stated earlier, in the plaint the plaintiff has specifically stated that the defendant left for Malaysia in about October, 1973. The plaintiff in his evidence has stated that he heard that the defendant and family went to Malaysia in November, 1973. Again the plaintiff has stated in

his evidence – “I thought that the defendant’s wife also left”. The learned Judge in his judgment has held that the following facts have been proved and admitted also by both parties :—

- (1) That the defendant was the tenant of the plaintiff in the premises in question ;
- (2) That on 26.11.73 the defendant alone left for Malaysia for a job ;
- (3) Till 25.2.74 the defendant’s wife and children lived in these premises and on this date left for Malaysia ;
- (4) On 20.9.75 the defendant and family visited Ceylon and got back their ration books ;
- (5) On 22.11.75 again the defendant and family left for Malaysia, and the ration books were returned ;
- (6) The defendant came to Ceylon on 12.3.77 for his mother’s death. On 20.3.77, the defendant returned to Malaysia.

The learned Judge held that the action has been filed on 28.6.74 six months after the defendant left for Malaysia : that, the defendant had been away for six months when the plaint was filed. As stated earlier this appeal can be decided on issues (1) and (2) set out above, and for the purpose of this appeal it is not necessary for the Court to decide issue No. (3) – Whether the defendant ceased to occupy the said premises without reasonable cause within the meaning of section 28(1) of the Rent Act, No. 7 of 1972, which the learned Judge has answered in the affirmative. As regards Issue No. (1) the learned Judge’s finding in the affirmative has been based on this reasoning. He has held that the defendant has ceased to occupy the premises without reasonable cause for a continuous period of not less than six months. In coming to this conclusion the learned Judge has restricted the operation of section 28 to the “tenant” only. If the defendant’s wife and children are considered as having a right to occupy the premises let to the defendant, after the defendant went to Malaysia, as it has been held that the defendant’s wife and children left for Malaysia only on 25.2.74, six months had not elapsed when the action was filed on 28.6.74.

The learned Judge held that the defendant has ceased to occupy the premises for a continuous period of six months. His finding in favour of the plaintiff on this point is due to the following reason—(at page 97)—The learned Judge has held as follows :—

“Section 28(1) of the Rent Act refers to the “tenant” only. This section does not mention the members of the family of the tenant. As such, if a tenant without reasonable cause ceased to occupy the premises for a continuous period of not less than six months, I am of the view that a landlord can eject the tenant from such premises”.

On this reasoning the learned Judge does not accept the right of a tenant's spouse and children to occupy a premises rented by one spouse. In this instance the learned Judge does not recognise in relation to section 28(1) of the Rent Act the right of the defendant's wife and children to occupy the said premises rented out by the defendant. The learned Judge has given a very narrow interpretation to the phrase “tenant of any residential premises”. The learned Judge has failed to realise that the occupancy of the defendant's wife and children of the said premises till 25.2.74 was constructively the occupation by the defendant himself.

I am of the view that in coming to the above conclusion the learned Judge has fallen into a gross error and misdirection in law. It has always been recognised in respect of the law pertaining to the Rent Act that a spouse (and their children) have a right, not merely a licence, to occupy the house taken on rent by a spouse for the family. The occupation by the spouse (and children) of the tenant has always been considered by the law as occupation by the tenant. This principle has been approved and adopted even in cases of spouses who were estranged. I will first refer to a relevant local case, which though it deals with the situation of an estranged wife and husband, also deals with the right of a wife to occupy the house of which her husband is the tenant. In the case of *Mrs. A. E. Alwis, v. D. S. Kulatunge and Another*, (1), the landlord sued his tenant for ejection from the premises on the ground of arrears of rent. At that time the tenant-husband was estranged from his wife and living apart. The house was occupied by his wife and children. Due to this estrangement the husband-tenant on the date of trial consented to judgment which led to the issue of a writ of ejection against his wife and children. The deserted wife intervened in the action to stay writ of

execution. In this case their Lordships held that both under the principles of Rent Control Legislation and on the principles of Roman Dutch Law the wife cannot be deprived by the landlord of her right of occupation unless and until the tenant-spouse is duly deprived of his protection in accordance with the law. Till such time she has the status, both in relation to the tenant and in relation to the landlord, of a protected person.

The case of *N. J. Canekeratne, v. R. M. D. Canekeratne*, (2) was decided in the context of a wife deserted by her husband. This case also recognised the right of a wife to live in the matrimonial home in her own right as the wife.

The learned Judge has held that section 28 (1) of the Act refers only to the tenant (that is, does not refer to the family of the tenant) and in contradistinction he has referred to section 29 (5) of the Act which refers to the "landlord or any member of the family". This is one of the reasons which has led the learned Judge to restrict the term "tenant" in section 28 (1) to the tenant alone (and not his family). In coming to this conclusion the learned Judge has overlooked the fact that section 29 (2) deals with the landlord entering into a written agreement with the tenant and a term of that agreement is that the tenant will occupy the premises till such time the premises will be required for "occupation as a residence for the landlord or any member of his family". Section 29 (5) is a penal provision arising from an agreement entered into under section 29 (2) of the Act. Thus the reference to the "landlord or any member of the family" in section 29 (2) springs from the agreement entered into in terms of section 29 (5) of the Act. The Rent Act in several sections refers to the family of the landlord and the family of the tenant. Section 22 (1) (b) makes provision for a landlord to file action against the tenant on the basis that the premises are "reasonably required for occupation as a residence for the landlord or any member of the family of the landlord . . . . .". Section 36(1) deals with the continuance of tenancy upon death of the tenant. The first person mentioned among the category of persons who will "be deemed for the purpose of this Act to be the tenant of the premises", in terms of section 36(1) of the Act "is the surviving spouse".

In the House of Lords case *National Provincial Bank Limited v. Ainsworth* (3) Lord Wilberforce held as follows :

"In rent cases, the wife's occupation has to be treated as the husband's so as to give her the benefit, against the landlord, of the tenant's statutory protection". In the case of *Brown v. Draper* (4), it was held "that the wife's possession must be regarded as that of the husband and could not be treated as unlawful so long as the husband had the right to claim the protection of the Acts".

For the reasons given above I hold that the learned Judge was in error in law when he restricted the term "tenant" in section 28(1) to the "tenant" only, that is the defendant in this case. I hold that the occupation of this house by the wife and children of the defendant from 26.11.73 up to 25.2.74, must be deemed to be occupation by the defendant in this action. As such when action was filed on 28.6.74 the defendant "had not ceased to occupy such premises without reasonable cause for a continuous period of not less than six months" for the plaintiff to become entitled to institute this action for ejection of the defendant-tenant. I will answer issue Nos. (1) and (2) as follows :

Issue No. (1) : No.

Issue No. (2) : No.

In view of my answers to issues (1) and (2) I hold that this action is badly constituted and should be dismissed. Due to this finding there is no need for me to consider the issue No. (3)-

Has the defendant ceased to occupy the said premises without reasonable cause within the meaning of section 28(1) of the Rent Act, No. 7 of 1972 ?

and issue No. (4)-

Has the plaintiff terminated the contract of tenancy with the defendant by due and lawful notice ?

The appeal is allowed with costs.

JAMEEL, J.- I agree.

*Appeal allowed.*