**HASSAN**

**v.**

**IQBAL**

COURT OF APPEAL
WEERASURIYA, J.
UDALAGAMA, J.
C.A. 540/91
D.C. MATARA 177/RE
OCTOBER 4, 1999
JANUARY 11, 2000

*Rent Act - S.22(1)(d) - Deterioration owing to neglect and default - Duty to repair building - whose duty ? - Proving of Authorised Rent, on whom lies the burden ? Allegation of fact not denied - is it an admission ?*

The question in issue was whether the condition of the premises had deteriorated due to the default and neglect of the Defendant Respondent (tenant) within the meaning of S.22(1)(d).

**Held :**

(1) Tenant is liable to the landlord (plaintiff - appellant) for gross negligence as well as for fraud.

*Per* Weerasuriya, J.

"It is evident that the absence of Defendant - Respondent and keeping the premises closed had resulted in leaks of the roof and consequent seeping of rain water to the wooden floor in upstairs causing decay and cracking of walls. Therefore the conduct of the Defendant Respondent does not measure upto the standard of a prudent householder in the care and use of his property."

(2) District Judge was in grave error when he laid the responsibility on the Plaintiff Appellant to repair the leased premises without any intimation and permission by the Defendant Respondent.

(3) The burden is on the Defendant Respondent to prove the amount of authorised rent by the production of the Municipal Assessment, Register, secondary evidence could have been admitted only if the best evidence was for some reason not available.

(4) Though in the English Courts allegations of fact not denied specifically or by necessary implication are taken to be admitted, in the Code there is no such provision and the non denial of an allegation is not taken as an admission of it.

**APPEAL** from the Judgment of the District Court of Matara.

**Cases referred to :**

1. *Wijeratne v. Dschou* - 77 NLR 157
2. *Premaratne v. Oliver de Silva* - 55 NLR 448
3. *Pernando v. The Ceylon Tea Co. Ltd.*, - 3 SCR 35

*P. A. D. Samarasekera P. C.*, with *Keerthi Sri Gunawardena* for Plaintiff Appellant.

*M. S. A. Hassan* with *Ms Safaya Hassan* for Defendant Respondent.

*Cur. adv. vult.*

July 21, 2000.

**WEERASURIYA, J.**

The plaintiff-appellant by his plaint dated 06.06.1987, instituted action against the defendant-respondent seeking his ejectment from premises bearing No. 57, Galbokka Road, Weligama, morefully described in the schedule to the plaint, damages in a sum of Rs. 15,000/= and costs.

The defendant-respondent in his answer whilst denying averments in the plaint prayed for dismissal of the action. The case proceeded to trial on 12 issues and at the conclusion of the case, learned District Judge by his judgment dated 08. 10. 1991, dismissed the action. It is from the aforesaid judgment that this appeal has been lodged.

At the hearing of this appeal, learned President's Counsel appearing for the plaintiff-appellant submitted that the learned District Judge had misdirected himself in holding -

(a) that the duty of repairing the premises in suit lay with the plaintiff-appellant; and

(b) that the defendant-respondent is entitled to a judgment in a sum of Rs. 3830.79 being payments in excess of the authorised rent.

It is common ground that the defendant-respondent took the premises on rent on 01.06.1979 on a monthly rental of Rs. 140/= and carried on a business of purchase and sale of old jewellery. The defendant-respondent conceded that he left for Saudi Arabia in search of employment in 1983 and remained there till January 1989 barring a short visit to Sri Lanka in July 1986. However, his assertion was that during his absence, the business was carried on by his uncle Mohamed Marikkar.

The question in issue was whether the condition of the premises in suit had deteriorated due to the default and neglect of the defendant-respondent (the tenant) within the meaning of Section 22(1) (d) of the Rent Act. It is a question of fact to be determined in the light of the circumstances of each case whether the evidence placed before Court is adequate to warrant a finding that the condition of the leased premises has deteriorated owing to the neglect and default of the tenant.

Under the Roman Dutch Law, it is the duty of the tenant to use the leased premises with the degree of diligence which a prudent paterfamilias or householder would exercise in the care and preservation of his own property. Accordingly, a tenant is liable to the landlord for gross negligence as well as for fraud. (Voet 19.02.29)

It is to be observed that there was no evidence placed that at the commencement of the tenancy the premises were in a bad condition or unfit for use. It was revealed that the premises in suit were in a row with two other boutiques which were about hundred years old made out of cabok stones.

The Grama Seva Niladari who testified on behalf of the plaintiff-appellant described the premises in suit as a building

about 100 years old lying in close proximity to the railway track. Despite an attempt by the defendant-respondent to show that the premises were kept open for business, Grama Seva Niladari has noticed the boutique being kept open by Mohamed Marikkar an old and sickly person without any business being conducted for about 2 days. Therefore, that, business was conducted on a regular basis in the premises during the absence of the defendant-respondent had been rendered unacceptable by the aforesaid evidence of the Grama Seva Niladari. He also adverted to the fact that at the time of his inspection in January 1987 he found leaks in the roof which had resulted in the wooden planks in the upstairs getting decayed due to seepage of water and cracks on the front wall.

The defendant-respondent admitted that tiles were displaced and cracks had appeared on the walls. Despite his assertion that he replaced tiles which were displaced on his return from Saudi Arabia he conceded that he did not effect any repairs or made an application to the Rent Board to have repairs effected through the landlord.

It is common knowledge that when a building is unoccupied and kept closed, prompt and proper attention of a leak in the roof is not possible. Thus, it is evident that the absence of Defendant - Respondent and keeping the premises closed had resulted in leaks of the roof and consequent seeping of rain water to the wooden floor in upstairs causing decay and cracking of walls. Therefore, the conduct of the defendant-respondent does not measure upto the standard of a prudent householder in the care and use of his property.

It was held in *Wijeratne v. Dschou*[1] (that in terms of Section 12A(1)(d) of the Rent Restriction Act where the requirement was causing wilful damage) that it is only in the perspective of landlord and tenant relationship that question whether wilful damage has been caused should be determined.

It is to be observed that, in that case, the plaintiff (landlord) claimed ejectment of the defendant on the ground, inter alia, that the defendant had caused wilful damage to the premises within the meaning of Section 12A(1)(d) of the Rent Restriction Act by keeping the premises unoccupied and closed for a period of over 2 years. There was evidence that four rows of tiles were missing at the junction of the wall and the roof of the rear verandah with several large damp patches on the walls of the building. According to the architect to whom a commission was issued by Court, the damp patches were due to leaks which appeared in the roof during the period when the premises were not occupied and prompt attention had not been given to prevent the leaks from developing further and causing the dampness to penetrate into brick work and the plaster surface.

Meggary on Rent Acts (Vol.I - 11th Edition - Page 409) in dealing with the subject of deterioration of premises by waste or neglect under sub-head waste or neglect states that - Waste or neglect includes causing the floor of a house to sag by using a room for storing heavy bales of cloth, allowing a substantital deterioration in the house to be caused by damp due to tenant's failure to occupy the house during winter and doing nothing to prevent the garden becoming overgrown.

In the instant case, the learned District Judge had made a finding that the duty of repairing the building was on the plaintiff-appellant and he was at fault for failing to take steps to effect the necessary repairs. He had adverted to the fact that the upstairs being common with the premises bearing No.55 which was under the control of the plaintiff-appellant, he had the opportunity to inspect the roof and take necessary steps to repair the building. The fact that the upstairs was common and the defendant-respondent was in possession of the boutique room on the ground floor, would not absolve him from the duty of taking care of the leased premises by effecting the necessary repairs. The existence of a common upstairs below the roof of the premises in suit will in no way permit the plaintiff-appellant to carry out the repairs without the permission of the defendant-

respondent. Any interference with the leased premises by the plaintiff-appellant is not permissible as such premises were in the care and custody of the defendant-respondent and any such interference would have exposed him to the risk of prosecution for criminal trespass.

Learned District Judge was in grave error when he laid the responsibility on the plaintiff-appellant to repair the leased premises without any intimation and permission by the defendant-respondent.

The other question to be examined is whether the defendant-respondent has paid rent to the plaintiff-appellant in excess of the authorised rent. Learned President's Counsel for the plaintiff-appellant contended that defendant-respondent had neither produced an extract of the assessment register nor led evidence relating to assessment to determine the authorised rent.

It was held in *Premaratne v. Oliver de Silva*[2] that burden was on the defendant to prove the amount of authorised rent by the production of the municipal assessment register and that secondary evidence could have been admitted only if the best evidence was for some reason not available.

The defendant-respondent averred in his answer that the authorised rent was only Rs. 33.59. The plaintiff-appellant in his replication never sought to controvert that position but nevertheless stated that standard rent was below Rs. 100/=. It is to be noted that the plaint was presented in terms of Section 22(2) (II) (d) of the Rent Act on the basis that the standard rent of the premises exceed Rs. 100/=.

It has been held that although in the English Courts allegations of fact not denied specifically or by necessary implication are taken to be admitted, in our Code there is no such provision and the non-denial of an allegation is not taken

as an admission of it. (Vide *Fernando v. The Ceylon Tea Co. Ltd.*[3])

The defendant-respondent in the instant case neither produced an extract of the assessment register nor led any evidence relating to the authorised rent despite raising an issue on that. In the circumstances, there is no basis for the finding that authorised rent was Rs. 33.59 cents.

For the above reasons, I proceed to set aside the judgment of the learned District Judge dated 01.10.1991 and enter judgment for the plaintiff-appellant as prayed for in the plaint.

**UDALAGAMA, J.** - I agree.

*Appeal Allowed*