

ANANDA THERO
v.
APPUHAMY AND OTHERS

COURT OF APPEAL.

GOONEWARDENE, J. AND VIKNARAJAH, J.

C.A. No. 301/79 (F).

D.C. KANDY No. 10313/L.

JANUARY 28, 1988.

Rei Vindicatio suit—Lease by Viharadhipathy—Validity of assignment of lease by Last Will of lessee—S. 30 of the Buddhist Temporalities Ordinance—Creation of tenancy by payment of rent and possession—S. 36(2) of the Rent Act.

With prior permission from the Public Trustee the Viharadhipathy leased the premises in suit which was one of the temporalities of the temple to one Edwin Fernando. On Edwin Fernando's death in terms of his Last Will 1st added defendant claimed that the original 1st defendant Appuhamy her deceased husband became entitled to the leasehold interests and on Appuhamy's death she and her seven children became entitled to the said interests. After Edwin Fernando's death rents were accepted from Appuhamy and after his death from his widow the 1st added defendant. The 4th defendant independently claimed to have entered the premises on a writing dated 23.8.1956 from a predecessor of the plaintiff priest and at his (4th defendant's) expense constructed a building thereon.

The District Judge held that Edwin Fernando's assignment of the lease by Last Will was not valid without the consent of the Public Trustee (the Lease Deed itself and S. 30 of the Buddhist Temporalities Ordinance prohibiting assignment without such consent). Yet Edwin Fernando was a tenant until his death in 1969. Thereafter Appuhamy the 1st defendant (though not entitled in law to succeed to the tenancy) was himself a tenant having been in exclusive possession of the premises from 1969 to 1973 and having paid rent (receipts 1D4 and 1D5) to plaintiff's predecessor. On his (1st defendant's) death in 1973 the 1st added defendant his widow stepped into his shoes by virtue of the provisions of S. 36(2) of the Rent Act. In appeal—

Held—

(1) The earlier receipts were paid on account of Edwin Fernando (some even after his death) showing the receipts were routinely issued. The receipts 1D4 and 1D5 though showing that rent was received from Appuhamy residing on the land cannot assume a significance that he was a tenant as Appuhamy was himself residing with Edwin Fernando and the fact of the lease to Edwin Fernando was also noted on the receipts 1D4 and 1D5. These payments were therefore all on account of Edwin Fernando and did not establish the relationship of landlord and tenant between Appuhamy and the Viharadhipathy.

(2) The 4th defendant for his part failed to prove the writing upon which he claimed to have entered the land. His oral evidence appeared to suggest he was acting in concert with the other defendants.

APPEAL from judgment of the District Court of Kandy.

Dr. H. W. Jayawardene, Q.C. with L. C. Seneviratne, P.C. Lakshman Perera, Miss T. Keenawinne and H. Amerasekera for plaintiff-appellant.

P. L. Goonewardene for 4th defendant-respondent.

Cur. adv. vult.

March 10, 1988.

GOONEWARDENE, J.

In this action the plaintiff-appellant in his capacity of Viharadhipathy and Trustee of the Malwatte Vihara came into the District Court and sought a declaration that he is entitled to possess the land and premises described in the plaint bearing assessment numbers 6 and 6/1, Victoria Drive, Kandy on the basis that it was the property of the Vihara. He sought to recover possession of the premises by ejecting the 1st to 4th defendants who were brought in as parties said to be acting jointly and in collusion and claimed damages from them for unlawfully possessing these premises.

The 1st defendant died pendente lite and his widow was substituted in his place and figures in this appeal as the 1st added defendant respondent. At the commencement of the trial the District Judge was informed that the 2nd and 3rd defendants had left the premises and the plaintiff sought against them only a formal order of ejectment, whereas the plaintiff's claim in the action was resisted by the 1st added defendant and the 4th defendant.

There was no dispute that the property belongs to the Vihara and it would appear that the Rent Act No. 7 of 1972 was at the relevant time in operation in this area.

On 7th June 1927 one Edwin Fernando upon deed P1 obtained a lease of these premises from the then Trustee of the Malwatte Vihara for a period of ten years. Under the requirements of the law in force at the time, namely Ordinance No. 8 of 1905, the sanction of the District Committee of Kandy had been previously obtained to effect this lease.

On the 4th June 1940 upon deed of lease P2 the Controlling Viharadhipathy of Malwatte Vihara once again leased these premises to Edwin Fernando for a period of twenty years. Permission to do so had been obtained from the Public Trustee, a requirement of section 29(1)(a) of the present Buddhist Temporalities Ordinance by then in operation.

On the 30th of May 1961 upon deed of lease P3 these premises described by reference to assessment numbers as 6 and 6/1, Victoria Drive, Kandy were once again leased by the Controlling Viharadhipathy of Malwatte Vihara to the said Edwin Fernando for a further period of twenty years the prior permission of the Public Trustee to do so having been obtained. It is to be observed that this period of twenty years is now at an end.

The case of the plaintiff was that the lease upon P3 was personal to Edwin Fernando and that upon his death in 1969, by operation of law it terminated and the defendants were thereafter in unlawful possession of the premises.

The case set up by the 1st added defendant was that in terms of Edwin Fernando's Last Will 1D6, the 1st defendant Appuhamy her deceased husband became entitled to the leasehold interests of Edwin Fernando and upon his death such interests devolved upon her and her seven children. She claimed that she was not liable to be ejected from the premises on the basis that after Edwin Fernando's death the rents payable in respect of the premises were accepted from Appuhamy and after him from her and that she became the tenant of the plaintiff and protected by the provisions of the Rent Act which were applicable to these premises.

The 4th defendant's case was that he entered upon the premises on a writing dated 23rd August 1955 given by Saranankara Thero the then Trustee and Controlling Viharadhipathy and at his own expense he constructed a building thereon. His position was that he never acted in concert with the other defendants and that his claim was not linked to any lease of the premises to Edwin Fernando.

The initial approach adopted by the District Judge was undoubtedly a correct one that since the ownership of the property was admitted, the burden was on the defendants to show that they had a right to

remain on the subject matter. He accepted the contention of the plaintiff that by virtue of a condition contained in P6 no assignment of the lease created thereby was permissible without the consent of the Public Trustee, a like provision also occurring in section 30 of the Buddhist Temporalities Ordinance. Its effect, he held, was sufficiently extensive to cover the case of the devise of his leasehold interests made by Edwin Fernando upon his Last Will. 1D6 to Appuhamy the deceased 1st defendant and that accordingly such devise was null and void as in the event the sanction of the Public Trustee had not been obtained. The District Judge however proceeded to hold that although Edwin Fernando in effect made this assignment by his Last Will without such sanction, he did not by virtue of the assignment being null and void become a trespasser but that he continued to be the tenant of the premises under the plaintiff's predecessor till his death in 1969 whereupon Appuhamy the 1st defendant (although not entitled in law to succeed to the tenancy under section 18 of the then applicable Act No. 29 of 1948) having been in exclusive possession of the premises from 1969 to 1973 and having paid rent to the plaintiff's predecessor must be deemed to have become the tenant of the premises and that such tenancy continued till his death in 1973 whereupon the 1st added defendant his widow stepped into his shoes by virtue of the provisions of section 36(2) of the present Rent Act. He concluded accordingly that the 1st added defendant cannot be evicted otherwise than in accordance with the provisions of section 22 of the Rent Act and that she had not even had her contract of tenancy terminated by notice. These latter findings of the District Judge are assailed in this appeal.

With respect to the case of the 4th defendant the District Judge held that he was a licensee as he paid no rent to the Viharadhipathy and as such not entitled to the protection of the Rent Act. He concluded however that since his claim was not linked in any way to Edwin Fernando or those claiming under him, he was not liable to be ejected in the action as constituted as it could not be said that he was acting in concert and collusion with the other defendants.

The result was that the District Judge dismissed the plaintiff's action and hence this appeal.

It would be convenient to deal first with the questions arising out of the aspects of the case presented by the 1st added defendant

respondent. It must be pointed out to begin with that the District Judge was in error in concluding that Edwin Fernando at any time held the property otherwise than under P3 and in accordance with its terms. His Last Will 1D6 became operative only after his death in 1969 and not before as the District Judge imagined and the purported assignment made upon it therefore in any event could not take effect, if at all, earlier. Since the District Judge himself held the assignment on 1D6 to be null and void by virtue of both the provisions of section 30 of the Buddhist Temporalities Ordinance and the provisions of P3 the position the Appuhamy the deceased 1st defendant became the tenant of the premises becomes tenable only if a contractual tenancy commenced between him and the plaintiff (or plaintiff's predecessor) after the death of Edwin Fernando. As the District Judge correctly observed the burden was on the 1st added defendant to establish this, and that the District Judge appeared to think she did by the production of the documents 1D4 and 1D5. That these documents which are rent receipts for the periods 15.5.71 to 15.5.1972 and 15.5.1972 to 15.5.1973 respectively have this effect I cannot agree. The earliest receipt produced namely 1D1 refers to lease rent received from Edwin Fernando for the period May 1962 to May 1963 in respect of the premises numbers 6 and 6/1, Victoria Drive. The next receipt 1D2 refers to lease rent received from Edwin Fernando for the period 15th May 1969 to 15th May 1970 in respect of, as the receipt shows, Poyamalu Vihara land belonging to Poyamalu Vihara leased to him. The next receipt 1D3 is in terms similar to 1D2, but was for the period 15th May 1970 to 15th May 1971 and it purports to show that this rent was received on 10th June 1970 from Edwin Fernando which clearly was at a point of time when he was already dead, a fact which tends to support a view that all these receipts had been routinely issued. The receipts 1D1 to 1D3 make no mention of Appuhamy. The receipt 1D4 which covers the period 15th May 1971 to 15th May 1972 refers to lease rent received for such period in respect of Poyamalu Vihara land belonging to Poyamalu Vihara and leased to Edwin Fernando. 1D5 is in like terms but with reference to the period 15th May 1972 to 15th May 1973 and it and 1D4 both show that this rent was received from Appuhamy residing on the land. As I see it, the fact that Appuhamy was said to be residing on the land cannot assume a significance that he was the tenant, the 1st added defendant's own case being that he was residing with Edwin Fernando on the land; nor the fact that he had paid the rent as referred to in 1D4 and 1D5, inasmuch as the further statement appearing on the face of

these documents that the premises had been leased to Edwin Fernando must connote upon any reasonable view that Appuhamy was making these payments on account of Edwin Fernando.

In the circumstances of this case one cannot in any event, in my view, read into these documents anything more than they state so as to infer that a relationship of landlord and tenant existed between Appuhamy the deceased 1st defendant on the one part and the Viharadhipathy of the temple on the other. When one has regard to the case set up by the 1st added defendant to my mind it is not possible to do so. It was her contention that the leasehold interests of Edwin Fernando were devised by his Last will 1D6 to Appuhamy her deceased husband as I have already pointed out. The reference to these leasehold interests must necessarily be a reference to them in respect of premises numbers 6 and 6/1, Victoria Drive, Kandy which were those leased upon P3 and also those referred to in the plaint. The Last Will 1D6 however purported to deal differently with three buildings standing on the property leased, namely (1) premises No. 6, Victoria Drive, (2) premises No. 6/1, Victoria Drive and (3) an annex attached to premises No. 6, Victoria Drive. With respect to premises No. 6, Victoria Drive, Edwin Fernando purported to devise to Appuhamy and five named children of Appuhamy the unexpired term of the lease. With respect to premises No. 6/1, Victoria Drive he purported to devise the premises themselves (and not a leasehold interest) to Appuhamy subject to the life interest of the 1st added defendant (the evidence of the 1st added defendant was that this was constructed by her husband and herself although upon P3 the deed of lease they are shown to have been leased to Edwin Fernando). With regard to the annex attached to premises No. 6, Victoria Drive, he purported to devise the annex itself (and not any leasehold interest in it) to one Asoka Kamalagoda (perhaps another child of Appuhamy). If then, as was the case of the 1st added defendant, the Last Will of Edwin Fernando 1D6 was given effect to after his death, the contents of the rent receipts 1D4 and 1D5, and indeed 1D2 and 1D3 as well, all of which are not with reference to assessment numbers makes it impossible to decide what they refer to. How in this state of things the District Judge was able to conclude with any degree of probability that there existed a relationship of landlord and tenant between the Viharadhipathy on the one hand and Appuhamy on the other so as to shelter the 1st added defendant behind the protection afforded by the Rent Act I am at a loss to understand.

I think that the District Judge drew a wrong inference from the contents of 1D4 and 1D5 and the other evidence placed before him to the effect that it was demonstrated that there existed a tenancy between Appuhamy on the one hand and the plaintiff's predecessor on the other. The District Judge's conclusion that the 1st added defendant is protected by the Rent Act fails and cannot be sustained.

The next question is whether the findings of the District Judge with respect to the case of the 4th defendant must remain undisturbed. The 4th defendant's position was that he was on the premises independent of any claim under Edwin Fernando or those linked to him. Admittedly he entered the premises at a time when the property was under lease to Edwin Fernando who was in possession under the lease. If as he claimed he entered the property upon a writing dated 23rd August 1955 given by the predecessor of the plaintiff it was his burden to prove that. No such writing was produced and the 4th defendant must then be considered to have failed to discharge his burden. In evidence he claimed that he never paid any rent to the Viharadhipathy of the Vihara but by contrast he has admitted that he paid rent to Appuhamy. His evidence rendered into English is "I know Appuhamy well. We are both car drivers. We associated closely. — When I was building the house he got me to sign a document. That was to pay rent. In accordance with the document I signed I paid rent". Quite apart from the 4th defendant failing to discharge his burden by producing the writing upon which he claimed he entered the land, his oral testimony upon a balance suggests the correctness of the plaintiff's claim that he was acting in concert with the other defendants. A corollary that follows this view that the 4th defendant's presence on the premises is linked to Edwin Fernando or persons claiming under him, I think, subjects him to the terms of the lease P3 which preclude the making of any claim for compensation in respect of improvements effected to the premises. The District Judge's conclusion in respect of the plaintiff's case against the 4th defendant also must stand reversed.

I take the view that the District Judge misdirected himself with respect to the material issued before him which resulted in his arriving at a wrong decision in the case. The judgment of the District Judge is therefore set aside and the appeal is allowed granting judgment for the plaintiff as prayed for with costs payable by the 1st added defendant and the 4th defendant both here and in the Court below. However the

relief the plaintiff will be entitled to against the 2nd and 3rd defendants will not include an order for payment of damages.

VIKNARAJAH, J. – I agree.

Appeal allowed but without damages against 2nd and 3rd defendants.
