

GUNASEKARA AND ANOTHER
v.
JAYAKUMAR

SUPREME COURT
FERNANDO, J.,
GUNASEKERA, J. AND
ISMAIL, J.
SC APPEAL NO. 98/98
CA NO. 581/84 (F)
DC COLOMBO NO. 2112/SPL
26 FEBRUARY, 5 APRIL AND 28 MAY, 2001

Lease – Lease of premises – Termination of lease bond – Grant of a second lease of the same premises by the owner to another – Whether the lessee under the first lease may claim rights of a statutory tenant after the grant of the second lease – Action by first lessee against the owner – Failure to pray for declaration of tenancy and ejectment – Grant of writ of ejectment against owner – Jurisdiction of the Court – Validity of plaintiff's claim.

The defendants-appellants (the defendants) owned the premises in suit (the premises) which the original plaintiff-respondent (the plaintiff) had used for the running of a toddy tavern on a government licence from 1971 until the end of 1980. For this purpose the plaintiff had also obtained annual leases from the defendants except for the last year. But, the plaintiff had paid the usual rental of Rs. 7,500 for that year as well.

Thereafter, two other persons N and T were granted the licence to conduct a toddy tavern at the said premises for the period 01. 01. 1981 to 31. 12. 1981; and they obtained from the defendants a formal lease dated 10. 12. 1980 and possession of the premises from the plaintiff on or about 31. 12. 1980. In 1982 also N and T continued to do business there and remained in occupation having paid rental to the defendants though without a formal lease bond.

On 29. 12. 1981 the plaintiff instituted action against the defendants claiming that he was the tenant in occupation of the premises and that the defendants at the instigation of the second highest bidder for the tavern for 1982 were making arrangements to disturb the plaintiff's possession. The plaintiff prayed for a declaration that he is entitled to the undisturbed and uninterrupted possession of the premises. However, the plaintiff did not pray for a declaration that he was the tenant of the premises nor for the ejectment of the defendant or anyone

else, and for a delivery of possession. Issue No. 11 raised on behalf of the plaintiff shows that he was claiming to have become a statutory tenant of the defendants after the expiry of his formal lease.

The trial Judge granted a declaration that the plaintiff was the tenant of the premises and made order for the ejectment of the defendants and all persons holding under them and for the delivery or possession of the premises to the plaintiff. The writ for delivery of possession to the plaintiff was executed.

Held:

- (1) In the absence of a prayer for such relief the District Judge had acted in excess of jurisdiction in granting a declaration that the plaintiff was the tenant of the premises and in ordering the ejectment of the defendant and delivery of possession to the plaintiff.
- (2) The lease in favour of the plaintiff had come to an end on 31. 12. 1980 when he willingly surrendered possession of the premises to the new lessees from 01. 01. 1981 enabling the owner to deal with the property as he wished. From 01. 01. 1981 the plaintiff's claim to have been the tenant came to an end. The Court of Appeal erred in taking the view that a monthly tenant or an overholding lessee can only be ejected by a decree of court and not by private arrangement.
- (3) The lease in favour of N and T had not expired at the time when the action was instituted on 29. 12. 1981; and they were in lawful occupation of the premises, hence the plaintiff had no right to possession of the premises at the date of the institution of the action.

Cases referred to :

1. *Sirinivasa Thero v. Sudassi Thero* – 63 NLR 311.
2. *Ibrahim Sanbo v. Mansoor* – 54 NLR 217.
3. *Gunaratne v. Thelenis* – 47 NLR 433.
4. *Premaratne v. Suppiah* – 64 NLR 276.
5. *Fernando v. Ponrajah* – 68 NLR 575.

APPEAL from the judgment of the Court of Appeal.

P. A. D. Samarasekera, PC with *R. Y. D. Jayasekera* for appellants.

A. K. Premadasa, PC with *S. A. Parathalingam* and *C. E. de Silva* for respondents.

April 05, 2002

GUNASEKERA, J.

The defendants-appellants were the owners of premises bearing 1
assessment Nos. 128, 130, 134, 136 and 136/ 1-2, Korteboam Street,
Kotahena (which are hereinafter referred to as the premises). The said
premises have been used for over 25 years for the purpose of running
a toddy tavern. It had been the practice of the successful tenderer
who secures a license from the Government Agent, Colombo, to obtain
a lease from the appellants to carry on business in the said premises.
The plaintiff-respondent had been the successful tenderer for several
years commencing from 1971 and for the duration of such years he
had obtained annual leases from the defendants-appellants and had 10
carried on the business of running the toddy tavern in the said
premises. For the year 1979 too the plaintiff-respondent had obtained
the lease dated 28. 12. 1978 (marked P6) for the period 01. 01. 1979
to 31. 12. 1979 having paid a rental of Rs. 7,500 for the year.
He had been the successful tenderer for the year 1980 as well
and had continued to run the toddy tavern in the said premises
from 01. 01. 1980 to 31. 12. 1980 having paid the same rental of
Rs. 7,500 to the defendants-appellants, but without obtaining a
formal lease for that year.

The successful tenderers for the year 1981 had been two persons. 20
Nadarajah and Thangavelu, who had obtained a license (marked B)
from the Government Agent to run the tavern for the period
01. 01. 1981 to 31. 12. 1981. Having obtained the license (marked
B) from the Government Agent they had entered into a lease bond
No. 6970 dated 10. 12. 1980 (marked VI) with the defendants-
appellants and had obtained possession of the said premises from
the plaintiff-respondent on or about 31. 12. 1980. In the following year

too the said Nadarajah and Thangavelu had carried on the business in the said premises having paid the rental to the defendants-appellants but without a formal lease. The successful tenderer to run 30 the tavern for the following year, namely, 1983 had been one Duncan Fernando who had carried on the business in the said premises, having obtained a lease from the defendant-appellants.

The plaintiff-respondent instituted this action on 29. 12. 1981 on the basis that he was the tenant in occupation of the said premises and that the defendants-appellants at the instigation of the second highest bidder for the tender to run the tavern in 1982 were making arrangements to disturb the plaintiff-respondent's possession. By way of relief, *inter alia*, the plaintiff-respondent prayed for a declaration 40 that he is entitled to the undisturbed and uninterrupted possession of the said premises. It is to be noted that in the plaint the plaintiff-respondent did not ask for a declaration that he was the tenant of the premises nor did he ask for the ejection of the defendants-appellants or anyone else and for the delivery of possession.

In the answer the defendants-appellants denied that the plaintiff-respondent was the tenant of the premises in 1981 and that he was in occupation of the premises that year. It was further pleaded that the premises had been given on an annual lease to Nadarajah and Thangavelu upon lease bond No. 6970 dated 10. 12. 1980 and that possession of the premises had been taken over by them and that 50 they had carried on the business of running the toddy tavern from 01. 01. 1981 having obtained a license to do so for the period 01. 01. 1981 to 31. 12. 1981 and prayed that the plaintiff's action be dismissed.

At the trial the following issues were raised on behalf of the plaintiff –

- (1) was the plaintiff, the tenant of the 1st and 2nd defendants in the premises referred to in paragraph 2 and in the schedule to the plaint?
- (2) Is the premises in question subject to the provisions of the 60 Rent Act?
- (3) Were the defendants jointly disturbing and interfering with the possession of the plaintiff?
- (4) If issues 1-3 are answered in the affirmative is the plaintiff entitled to the relief prayed for?

The following issues were raised on behalf of the defendants:

- (5) Has the premises in question been leased to Nadarajah and Thangavelu on 01. 01. 1981?
- (6) Were Nadarajah and Thangavelu the tenants of the said premises from January, 1981? 70
- (7) (a) Did Nadarajah and Thangavelu obtain the license to run the tavern in 1982?

(b) Are they in occupation of the said premises even at present?
- (8) Did the lease in favour of the plaintiff come to an end on 31. 12. 1980?
- (9) (a) Has the plaintiff not paid any rent for the year 1981?

(b) Has the plaintiff carried on any business in the said premises in 1981?

- (10) If issues 5-9 are answered in the affirmative can the plaintiff⁸⁰ have and maintain this action?

A consequential issue No. 11 was raised on behalf of the plaintiff.

- (11) Did the plaintiff become the statutory tenant of the defendants upon the expiry of the lease No. 3200?
- (12) If issue No. 11 is answered in the affirmative is the plaintiff entitled to the relief prayed for?

At the trial only the plaintiff and 1st defendant gave evidence. The Additional District Judge having accepted the evidence that Nadarajah and Thangavelu were lessees of the premises in 1981, who had possession and carried on the business of running the toddy⁹⁰ tavern, has in his judgment stated that all this was done with the knowledge and consent of the plaintiff-respondent and further, although the plaintiff-respondent was not in possession during that year and that there was no break in his tenancy and proceeded to grant a declaration that the plaintiff-respondent was the tenant of the said premises and made order ejecting the defendant-appellants and all persons holding under them.

Aggrieved by the judgment of the learned Additional District Judge the defendants-appellants preferred an appeal to the Court of Appeal. The plaintiff-respondent died on 01. 10. 1993 during the pendency¹⁰⁰ of the appeal to the Court of Appeal and upon an application made on 23. 03. 1994 Krishnan Jayakumar, the eldest son of the plaintiff was substituted as the substituted plaintiff-respondent.

After hearing submissions of counsel and upon a consideration of the written submissions their Lordships of the Court of Appeal by

judgment dated 27. 03. 1998 dismissed the appeal and affirmed the judgment of the learned Additional District Judge. Special leave to appeal was granted on the questions set out in paragraphs 16 (b) – (j) and 18 of the application for special leave filed by the defendant-appellants which are as follows:

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- (1) The Court of Appeal in paragraph 2 of the judgment has held "the defendants thereafter leased it (the premises in question) to two people, namely, S. A. Nadarajah and P. K. Thangavelu on Lease Bond No. 6970 of 10. 12. 1980 who did business therein. They were the lessees for the years 1981, 1982 and thereafter it was given out again on similar terms to one D. Fernando, but the plaintiff remained the monthly tenant of the premises, as he was not ejected by a Decree of Court". The above findings, it is respectfully submitted, are contradictory and incorrect;
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- (2) The Court of Appeal has as pointed out above recognised that when the plaint was filed in 1981 there were the lessees Nadarajah and Thangavelu carrying on business in the premises under and by virtue of Lease Bond No. 6970 but at the same time the Court has expressed the view that the plaintiff who was no longer in the premises had a continuation of his tenancy for the reason that he was not ejected by a Decree of Court;
 - (3) The Court of Appeal it is submitted was in gross error when it came to the conclusion that "it is an accepted principle of law that a monthly tenant or an overholding lessee can only be ejected by a Decree of Court and not by private arrangement".

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- (4) Both Courts have completely failed to appreciate that after Nadarajah and Thangavelu had obtained the license from the Government Agent and a notarial lease from the defendants for the entire year commencing from 01. 01. 1981, the plaintiff himself had surrendered and handed over the premises to the said lessees and thus his rights of tenancy had lawfully come to an end; 140
- (5) In any event, there could not have existed at the same time a lease in favour of Nadarajah and Thangavelu and a monthly tenancy in favour of the plaintiff in respect of the same premises;
- (6) It was not even suggested that the plaintiff had sublet the premises to Nadarajah and Thangavelu or that they had paid any rent to the plaintiff in respect of the year 1981;
- (7) The plaint in this action was filed on 29. 12. 1981 during the subsistence of lease No. 6970 (VI) and the rights of parties had to be decided as at that date. The plaintiff had no tenancy and no occupation of the premises at that date although the 150
plaint had been presented on the false premise that he was in occupation and needed injunctive relief to prevent any interference with his occupation;
- (8) The writing dated 31. 12. 1980 (A6) produced by the plaintiff himself clearly proves that the plaintiff had surrendered the premises to the defendants' lessees and thereafter had only an expectation that at the expiration of the lease he could get back the premises on a new lease/tenancy, but it clearly proved that during the whole of the year 1981 the plaintiff was not a tenant and had no possession; 160

- (9) The plaintiff's assertion that he had tendered rents to the defendants for the year 1981 was denied by the defendants although the plaintiff marked a copy of a letter with which the payment was said to have been forwarded, fail to produce any proof of posting of such letter nor did he produce any evidence that any such payment had been realised from his bank. Both Courts were clearly in error in taking the view that he had paid rents for the year 1981.
- (10) The defendants also plead that the question whether a person who had surrendered a lease and ceased to occupy the premises ¹⁷⁰ would have a tenancy of the premises while other lessees under a notarial lease from the owners are in occupation of the premises, is an important question of law and a question of general and public importance.

The main question that arises for determination in this appeal is whether the plaintiff-respondent when he handed over possession of the premises to Nadarajah and Thangavelu who had obtained the lease 6970 (VI) for the period 01. 01. 1981 to 31. 12. 1981 and when the aforesaid Nadarajah and Thangavelu admittedly carried on business in the said premises during the whole of 1981, and even ¹⁸⁰ in 1982 can it be said that the plaintiff continued to be the tenant of the premises in 1981. The further questions that arises for determination are:

- (1) Could the plaintiff have any rights in the premises at the date of the plaint, namely, 29. 12. 1981?
- (2) Could the trial Judge have given him the reliefs which were not prayed for in the plaint?

At the hearing of this appeal it was submitted by learned President's Counsel appearing for the appellants that the plaintiff came to Court on the false premise that he was the tenant in actual occupation of 190 the premises seeking to protect his occupation and did not pray for a declaration that he is the tenant nor did he ask for delivery of possession of the premises to him and also did not ask for an order of ejectment against the defendants or anyone else, but however, the learned District Judge in his judgment, granted him a declaration that he is a tenant, an order for ejectment of the defendants and directed the delivery of possession of the premises be given to the plaintiff. It was his contention that the rights of parties were to be determined on the date of the institution of an action. He submitted that the plaint was filed on 29. 12. 1981 at a time Nadarajah and Thangavelu were 200 in occupation of the premises upon lease bond 6970 (VI) and the learned District Judge had no jurisdiction to grant the reliefs that had not been prayed for in the plaint. He cited the case of *Siriniwasa Thero v. Sudassi Thero*⁽¹⁾ – that was a case where a Buddhist Priest sued three other Priests for a declaration that he was entitled to the office of *Viharadhipathy*, incumbent and trustee of a *Vihara* and *Pansala* and to the management and control of their temporalities. He did not ask for possession of any property. He obtained judgment and decree as prayed for and upon his application to execute the decree, writ of possession was issued in respect of a room in the 210 *Pansala*. It was held that the decree entered in the action could not be construed as one which decreed possession of any property.

The decree could not be said to fall within section 217 (c) of the Civil Procedure Code which relates to a decree commanding the person against whom it operates to yield up possession of immovable property nor could it fall within section 323 which applies if the decree or order is "for the recovery of possession of immovable property or any share thereof by the judgment creditor, or if it directs the judgment debtor to yield or deliver up possession thereof to the judgment creditor".

The position of the judgment creditor was no better than that of a plaintiff who obtains a declaration of title to immovable property without also obtaining a declaration of his rights to immediate possession of that property.

It was further held that "inasmuch as the Court acted without jurisdiction in issuing the writ, the person who has been dispossessed of property in consequence of the execution of the writ was entitled to be restored to possession. In such a case a Court of justice has inherent power to repair the injury done to a party by its act". 230

In the instant case it was brought to our notice that in CA Revision Application No. 1100/85 the counsel for the plaintiff-respondent had informed the Court that writ for delivery of possession to the plaintiff-respondent had been executed. I am inclined to agree with the contention of the learned President's Counsel that the learned District Judge had acted in excess of jurisdiction in granting a declaration that the plaintiff-respondent is the tenant of the premises and in ordering the ejection of the defendants and in directing that delivery of possession be given to the plaintiff-respondent.

It was also submitted by learned President's Counsel for the 240 defendants-appellants that the Court of Appeal having accepted that Nadarajah and Thangavelu were in possession of the premises in the year 1981 upon lease bond No. 6970 and carried on business in the said premises being the new lessees was in error when it held that the plaintiff remained the monthly tenant of the premises as he was not ejected by a decree of Court. It was contended that the Court of Appeal had held that the only way by which a tenancy could come to an end was upon a decree of ejection issued by a competent Court. Dealing with the submissions made on behalf of the defendants-appellants the fact that Nadarajah and Thangavelu carried on business 250 in the premises after obtaining the lease (VI) after the plaintiff had willingly surrendered his right to possession as evidenced by 'A6' which was produced by the plaintiff himself enabling the owner to deal with

the premises as he wished is one of the ways in which a tenancy can come to an end, it was submitted that the Court of Appeal was in error when it held that "It is an accepted principle of law that a monthly tenant or overholding lessee can only be ejected by a decree of Court and not by private arrangement was a proposition that is not tenable".

It was submitted by learned counsel that all the text books on ²⁶⁰ landlord and tenant referred to several ways in which a tenancy can come to an end. Surrender of the premises by a tenant is clearly one of the ways in which a tenancy can come to an end.

In the case of *Ibrahim Saibo v. Mansoor*⁽²⁾ at 224 it was held that the only two ways in which the statutory protection given to a tenant comes to an end are:

- (1) by the handing back of the premises to the landlord; and
- (2) by the order of a competent Court that is to say a Court acting with jurisdiction.

In support of the contention of learned President's Counsel that ²⁷⁰ a tenancy may come to an end by handing back possession of the premises to the landlord, he cited Wille *Landlord and Tenant in South Africa – 4th edition, part 4*, dealing with termination of leases at page 246 "that a lease for a definite period of time terminates *ipso jure* upon the affluxion of such period" and at page 253 where it is stated that "a lease may be terminated at any time by mutual agreement or consent of the parties".

He also cited Thambiah *Landlord and Tenant in Ceylon, 1st edition – chapter 23, page 152*, dealing with the termination of a lease where it is stated that "where a lease is entered into for a specific term ²⁸⁰ the lease terminates at the expiration of the term", and page 159 where

it is stated that "a lease may be terminated by mutual agreement or consent of the parties".

In the instant case admittedly the lease that the plaintiff had from the defendants came to an end on 31. 12. 1980 and possession was handed over to the new lessees Nadarajah and Thangavelu from 01. 01. 1981 and the plaintiff's claim to have been the tenant came to an end. Thus, I am in agreement with the contention of learned counsel for the appellants that the Court of Appeal erred in taking the view that "it is an accepted principle of law that a monthly tenant²⁹⁰ or an overholding lessee can only be ejected by a decree of Court and not by private arrangement".

I am unable to agree with the contention of learned President's Counsel who appeared for the respondent that the plaintiff's tenancy continued notwithstanding the fact that a fresh lease was granted in favour of Nadarajah and Thangavelu and possession of the premises was taken over by them from 01. 01. 1981. On the admitted evidence in this case both learned Additional District Judge and their Lordships of the Court of Appeal have come to a specific finding that Nadarajah and Thangavelu were in occupation in the premises in question upon³⁰⁰ a valid lease which had been produced as (VI).

The plaintiff's position in re-examination was that he placed Nadarajah and Thangavelu in possession of the premises in 1981 and that they gave him a letter and the said letter had already been produced marked "A6" (vide page 320) of the brief. The learned Additional District Judge in his judgment at pages 282 and 283 as well as their Lordships of the Court of Appeal in their judgment at page 4 have placed reliance on that letter to hold that the said letter establishes the fact that the plaintiff-respondent did not give up the tenancy. However, I find that the said letter relied upon by the learned³¹⁰ Additional District Judge as well as their Lordships of the Court of Appeal had not, in fact, been marked and produced in evidence. Therefore, both Courts have erred in having assumed that the letter

was produced in evidence. In any event I am of the view that the said letter does not establish that the plaintiff-respondent had not given up his tenancy for the reason that according to his own evidence Nadarajah and Thangavelu had been placed in possession of the premises after they obtained the lease "VI" from the defendants-appellants and continued to run the toddy tavern in the said premises from 01. 01. 1981.

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I am of the view that the facts of *Gunaratne v Thelenis*,⁽³⁾ *Premaratne v. Suppiah*⁽⁴⁾ and *Fernando v. Ponrajah*⁽⁵⁾ relied upon by learned President's Counsel for the plaintiff-respondent have no application to the facts of the instant case.

On the admitted evidence in this case, it is clear that the lease in favour of Nadarajah and Thangavelu had not expired at the time the action was instituted on 29. 12. 1981 and that they were in lawful occupation of the premises in question. The plaintiff had no right to possession of the premises as at the date of the institution of the action. Thus, I am of the view that this appeal must succeed.

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I, therefore, set aside the order of the Court of Appeal dated 27. 03. 1998 and the judgment of the learned Additional District Judge dated 25. 04. 1984 and dismiss the plaintiff-respondent's action with costs in this Court and the Courts below in a sum of Rs. 40,000 payable to the defendants-appellants. I further direct that the defendants-appellants be restored to possession of the premises in question.

FERNANDO, J. – I agree.

ISMAL, J. – I agree.

Appeal allowed.