SAMY

v

HUSSAIN

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
C.A. 803/93 (F)
D.C. GALLE NO. 267/RE
FEBRUARY 21,
MARCH 13 AND
APRIL 4, 2002

Rent Act, No. 7 of 1972, section 28 – Non occupation for a period of over six months – Intention – Occupation by a dependant – Who is a dependant – Burden of proof – Civil Procedure Code, sections 178 and 179 – Evidence de-bene-esse.

The plaintiff-appellant instituted action for the ejectment of the tenant, the defendant-respondent on the ground that he had ceased to occupy the premises for a period of over 6 months.

The defendant-respondent contended that on the death of his father, he became the tenant, and continued to occupy the premises with his mother, sisters and their children, and he being the only bread winner in the family. had to leave the premises temporarily for employment abroad, and his mother, brother, sisters and their children continued to occupy the premises. The defendant-respondent contended that he never intended to vacate.

The trial judge held with the defendant-respondent.

On appeal –

Held:

(i) In terms of section 28, the burden of proving that a tenant of any residential premises has ceased to occupy such premises without reasonable cause is on the landlord.

(ii) The tenant has to satisfy court that he had good reason not to be in occupation himself beyond the specified period and not that there was reasonable cause for the mother, brothers and sisters to be there.

(iii) The finding of fact that the defendant-respondent had gone abroad is not correct.

(iv) The defendant-respondent was present in court on 27.4.1992, and there is evidence that he came back in 1991. It appears that he had not taken any interest in this case; he has not given a power of attorney to anyone or have his evidence recorded in terms of section 178 - *evidence de bene esse*.

(v) The defendant-respondent has totally failed to establish that he has an abiding interest to keep alive the contract of tenancy he entered into with the plaintiff-appellant.

APPEAL from the judgment of the District Court of Galle.

Cases referred to:

1. *Jinadasa v Pius* (1981) 2 Sri LR 417
2. *Brown* v *Brash* - (1948) 1 All ER 922.
3. *Amarasekera* v *Gunapala* - 73 NLR 469
4. *Sabapathy* v *Kularatne* - 52 NLR 425
5. *Suriya* v *Board of Trustees of the Maradana Mosque* - 59 NLR 309
6. *Fonseka* v *Gulamhussein* - (1981) 1 Sri LR 77

7. *Cave* v *Flick* - (1954) 2 All ER 441

N.S.A. Hassan with *S. Hassan* for plaintiff-appellant.

Saumya Amerasekera with *J. Munaweera* for defendant-respondent

Cur.adv.vult.

May 24, 2002

SOMAWANSA, J.

The plaintiff-appellant instituted action No. 267/RE in the District Court of Galle for the ejectment of his tenant, the defendant-respondent on the ground that he had ceased to occupy the residential premises in suit for a period of over 6 months as contemplated by section 28 of the Rent Act, No. 7 of 1972.

The position taken up by the defendant-respondent was that on the death of his father in 1985 he became the tenant of this premises and continued to occupy the premises with his mother, brother, sisters and their children. That he being the only bread winner in the family had to leave the premises temporarily for employment in Riyadh in the early part of 1989 in order to support and maintain his mother, brother, sisters and their children who continued to occupy the premises in suit. It is his contention that he never intended to cease his occupation of the premises and prayed for a dismissal of the action of the plaintiff-appellant.

At the commencement of the trial, it was admitted by the parties that the premises in suit is residential premises, bearing No. 150 Kong Tree Road, Galle, that the defendant-respondent is the lawful tenant of the premises and the premises are rent controlled. The plaintiff-appellant raised 03 issues while the defendant-respondent raised 04 issues. At the conclusion of the trial the learned District Judge by his judgment dated 30.11.1993 held in favour of the defendant-respondent and dismissed the plaintiff-appellant's action. It is from this judgment that the plaintiff-appellant has lodged this appeal.

The main contention of the counsel for the plaintiff-appellant has been that the mother, brother, sisters and their children do not fall into a category of dependants of the defendant-respondent in view of section 48 of the Rent Act. Therefore occupation of the premises in suit by them cannot be construed as occupation by or on behalf of the defendant-respondent. I am inclined to take the view that this is not a matter that attracts much importance in view of the trend of thought in the decided cases which I will deal with shortly.

Section 28 of the Rent Act, No. 7 of 1972 reads as follows:

> "(1) 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 ejectment of such tenant from such premises."

In terms of this section the burden of proving that a tenant of any residential premises has ceased to occupy such premises without a reasonable cause for a continuous period of not less than six months is on the landlord of such premises. In the instant case it is common ground that the defendant-respondent who is the tenant of the residential premises in suit had ceased to occupy the premises in suit for a period over 6 months prior to the institution of this action. This position is admitted by the sister of the defendant-respondent who was the only witness called on behalf of the defendant-respondent. So that the only question that remains to be answered is whether the defendant-respondent ceased to occupy the premises without any reasonable cause shifts on to the defendant-respondent. Unfortunately, the defendant-respondent was not available to clarify this point. However in his answer the defendant-respondent avers that he has gone abroad temporarily for employment, that his mother, sister and their children occupy the premises and that he never intended to cease his occupation. Further he avers that he would return to the island soon. The answer was filed in 1991 August. However till the conclusion of the case on 16.09.93 the defendant-respondent was not present in court.

According to the evidence of Masika Noor Mohamed the sole witness for the defendant-respondent her brother the defendant-respondent went to Saudi Arabia in 1988 and stayed till 1991 in which year he returned to the premises in suit. Thereafter in November 1992 he went again to Saudi Arabia. While he was here he attended to this case, gave instructions to the lawyers and on one occasion he was present in court. The all important question is whether the defendant-respondent has an intention of coming back to these premises or not. To answer this question the defendant-respondent was not available and his sister who was occupying the premises came forward to give evidence as to what the intention of the defendant-respondent was.

As observed by Rodrigo, J. in *Jinadasa* v *Pieris* [1] the concept of a "non-occupying tenant" as explained in *Brown* v *Brash* [2] has dominated judgments in the few local cases in which this point arose for consideration. In that case the concept was expressed as follows:

> "The absence of the tenant from the premises may be averted if he coupled and clothed his inward intention to use it as his home with some formal, outward and visual sign such as installing a care-taker or representative, be it a relation or not, with the status of a licencee and with the function of preserving these premises for his ultimate homecoming.... Apart from authority, in principle, possession in fact (for it is possession in fact and and not with possession in law we are here concerned) requires not merely an '*animus possidendi*' but a '*corpus possessionis*' viz: some visible state of affairs in which the '*animus possidendi*' finds expression."

In *Amarasekera* v *Gunapala* [3], the facts were, the tenant who had taken the premises for his own residence resided there for three or four years and thereafter resided elsewhere. The premises were used for occupation by his business employee and also for a store and office. Alles, J. applied the concept of "non-occupying tenant" stated in *Brown* v *Brash* (*supra*) and held with the landlord. According to Rodrigo, J. this was the first time in our courts that a judgment was entered against a tenant in ejectment for non occupation by the tenant personally.

Gratian, J. in *Sabapathy* v *Kularatne* [4] and in *Suriya* v *Board of Trustees of the Maradana Mosque* [5] applied the concept of *Brown* v *Brash* (*supra*) but in the latter case held that the principles of *Brown* v *Brash* (*supra*) if correctly understood did not penalise a tenant who had lawfully sub let the premises.

Sharvananda, J. as he then was took a different view in considering the Rent Act of 1948 as amended and did not apply the concept of *Brown* v *Brash* (*supra*). However in the recent case of *Fonseka* v *Gulamhussein* [6].

> "The ejectment of the tenant was sought in terms of s. 28(1) of the Rent Act of 1972 on the ground that the tenant who was the Managing Director of Savoy Theatres Ltd., has put in as the occupants of the premises rented the employees of the Cinema and the tenant is residing elsewhere. The view was taken by Weeraratne, J. that the premises are in the occupation of strangers, the Cinema being a separate legal entity. The premises had been rented by the tenant personally for occupation as a residence by him and his family. In the result, the tenant was held liable to be ejected on the doctrine of *Brown* v *Brash*."

In *Cave* v *Flick* [7] the premises were occupied by the tenant's parents and sister. It was held that the tenant forfeited the protection of the Act.

In the instant case what the tenant had to satisfy court was that he had good reason not to be in occupation himself beyond the specified period and not that there was reasonable cause for his mother, brother and sister to be there. Rodrigo, J. observed in *Jinadasa* v *Peiris* (*supra*)

> "The reasonable cause contemplated in the section is, among others, such as the house being under major repairs or the tenant has been on vacation or business which has taken him out of the area. The tenant is given a period of grace of six months. He can be absent with or without cause for this period. But if he is away for a longer period he must give an explanation that is acceptable. This explanation must amount to reasonable cause within the meaning of s 28 (1)

of the Act. It is not possible or desirable to give an exhaustive definition of "reasonable cause". It is defined in the Act to "include a cause sanctioned by the Board". But the doctrine of "non-occupying tenant" as enunciated in *Brown* v *Brash* and followed with reference to s 28(1) of the Act in *Fonseka* v *Gulamhussein* excludes occupation of the premises by relatives and strangers and business employees of the tenant as reasonable cause for non-occupation. That the tenant has found it more convenient to house his relatives or anybody else to whom he had obligations is not a reason or cause within the meaning of the provision to avert eviction. The provision, it is reasonable to assume, was intended by the legislature to provide for situations covered by the concept of "non-occupying tenant" that had received judicial consideration in courts and for which no provision has been made earlier.

Section 28(1) is not directed at the relationship to the tenant of the occupants of the house that he is no longer occupying. The tenancy is personal. See *Skinner* v *Geary*. Therefore the tenant must occupy the house himself. He can, of course, temporarily keep anybody else in the house if he is not there but for the sole purpose and function of preserving it for his ultimate home coming. That is the rationale of the judgments in the cases cited above where the tenant has been held liable to be ejected."

R.E. Megarry in his book *The Rent Acts* ,5th edition p. 124:

"Temporary absence. The temporary absence of a tenant who intends to return to live in the premises within a reasonable period will not deprive him of the protection of the Acts as where there is absence due to illness or war service, or where the tenant is in the Army of occupation of Germany, or is a ship's captain at sea or had the intention of returning to the premises (which were in London) after the war and the bombing were over.

Even where there is an absence of the tenant sufficiently prolonged or unintermittent to compel the *prima facie* inference of a ceaser of possession or occupation (which is a question

of fact and degree), this is not conclusive but puts the onus on the tenant to show that his statutory tenancy nevertheless continues. To do this, he must show not only an *animus revertendi* but also a *corpus possidendi*, i.e. 'some visible state of affairs in which the *animus possidendi* finds expression' such as the occupation of the premises by some licensee of his, whether a relation or not. (e.g. his wife, sister or family or a servant) with the function of preserving the premises for the tenant's ultimate homecoming, or perhaps by the leaving on the premises of 'deliberate symbols of continued occupation', such as furniture."

On an examination of the evidence led in this case the only evidence available to establish the fact that the defendant-respondent has gone abroad for employment is that of the evidence of his sister Noor Mohammed. No other evidence either documentary or oral has been led to establish this point. Though the learned District Judge was of the view that this fact is corroborated by the evidence of the Grama Sevaka Niladari who was called to give evidence by the plaintiff-appellant. However it appears that this finding of fact is not correct when one examines his evidence on this point. It is clear that it was not his personal knowledge but he had come to know through others that the defendant-respondent had gone abroad for employment and so on this point we are left with the evidence of the sister only and so it is with regard to the intention of the defendant-respondent to return.

It appears that when the defendant-respondent came back in 1991 he did take an interest in this case by giving instructions to his lawyers to prepare his answer etc., and according to proceedings dated 27.04.1992 he was present in court on that day but thereafter he was never present in court. He did not give evidence nor did he indicate to court that due to some unavoidable circumstances he was unable to come to court or to give evidence or prevented from so doing.

If the defendant had any intention or interest in occupying the premises as his residence he would have taken a keener interest in protecting his rights. For instance, by giving his power of attorney to someone, or have his evidence recorded in terms of section 178 of the Civil Procedure Code (evidence *de bene esse*) or in terms of

section 179 of the Civil Procedure Code. I am inclined to take the view that the defendant-respondent has totally failed to establish that he has an abiding interest to keep alive the contract of tenancy he entered into with the plaintiff-appellant in 1985.

For the foregoing reasons, I am inclined to take the view that the alleged dependents of the tenant in the instant case are not in occupation of the premises temporarily to keep it for the tenant's ultimate homecoming. It is commendable that one should find accommodation for one's dependent relatives. But if the premises are to be occupied by them exclusively without the tenant himself being in occupation, it is nothing but fair that the landlord should be informed and he should consent to it. In view of section 28 it is not open to the defendant-respondent to put his relatives in the premises permanently behind the landlord's back.

For these reasons, I set aside the judgment of the learned District Judge dated 30.11.1993 and direct the learned District Judge to enter judgment for the plaintiff-respondent as prayed for in his prayer to the plaint. The appeal is allowed with costs.

DISSANAYAKE, J. - I agree

Appeal allowed.