

WIGNESWARAN
v. .
THAMBIPILLAY AND OTHERS

SUPREME COURT.
BANDARANAYAKE, J.
AMERASINGHE, J. AND
DHEERARATNE, J.,
S. C. NO. 35/91.
S. C. SPECIAL L. A. 155/90.
C.A APPLICATION NO 964/85.
APRIL 29 & 30 APRIL 1992

Landlord and Tenant - Settlement in rent and ejectment case - Proceeding before the Commissioner of National Housing - Vesting Order - Intention to abandon proceeding before Commissioner of National Housing - Section 13A of the Ceiling on Housing Property Law No. 1 of 1973 - Section 22(2) (bb) of Rent Act.

The plaintiff filed a rent and ejectment case against the 1st respondent on the ground of reasonable requirement on 6.11.1978. When the case was pending, Rent Act (Amendment) No. 55 of 1980 was passed and in terms of the new section 22(2) (bb) the petitioner deposited five years rent and in an amended plaint filed on 31.3.1984 prayed for ejectment. On 2.12.1983 when the case was pending the 1st respondent made an application to the Commissioner of National Housing in terms of section 13A of the Ceiling on Housing Property Law No. 1 of 1973 (as amended) to purchase the premises which were the subject matter of the tenancy. On 8.3.1984 the rent and ejectment case was settled on the basis that the 1st respondent tenant would buy the premises for an agreed figure payable in instalments. The 1st respondent defaulted payment and the plaintiff took out writ. When the fiscal proceeded to the premises to execute writ, he was confronted by the 1st respondent with the vesting order dated 18.10.1984 published in the Government Gazette dated 30.12.1984 vesting the premises with the Commissioner of National Housing. There was correspondence which showed that the 1st respondent had represented to the plaintiff that the application to the Commissioner of National Housing not be pursued. The case was decided on the question whether the Minister would have made the vesting order of 18.10.1984 had he known of the settlement arrived at in the District Court case on 8.3.1984 - a fact not disclosed to him.

Held :

(1) The conduct of the 1st respondent demonstrated a clear intention to abandon the application made to the Commissioner of National Housing.

(2) Had the Minister of National Housing been aware of the respondents agreement in court to purchase the property at a price he considered reasonable, he would have demurred from making the vesting order which he did. The inference that non-disclosure of the settlement arrived at in court would

not have affected the application made to the Commissioner was wrong. The non-disclosure was a breach of *Uberrima fides*.

APPEAL from judgment of the Court of Appeal.

Faiz Musthapha, P.C. with *Mahanama de Silva* for petitioner-appellant.

Mrs. Eva Wanasundera, S.C. for 2nd and 3rd respondents.

H. L. de Silva, P.C. with *P. A. D. Samarasekera, P.C.* with *A. P. Niles* for 1st respondent.

cur. adv. vult

(Note by Editor : The judgment of the Court of Appeal which was reversed by the above judgment is reported at (1992) 1 Sri L.R. 150.)

July 07, 1992.

DHEERARATNE, J.

This is an appeal from a judgment of the Court of Appeal refusing to quash the order (marked C) made by the Minister of National Housing on 18.10.1984 in terms of section 13A (6) of the Ceiling on Housing Property Law No 1 of 1973 (as amended) vesting premises No 37, Moor Street, Colombo 3, with the Commissioner of National Housing.

The petitioner (appellant) is the landlord and the 1st respondent the tenant of premises No 37, Moor Street, Colombo 6. On 26.7.1977 the petitioner gave the 1st respondent one year's notice of termination of the tenancy preparatory to filing action to have the 1st respondent ejected. Thereafter, action No. 667/RE was filed by the petitioner in the District Court of Mt. Lavinia on 6.11.1978 in terms of section 22(2)(b) of the Rent Act No. 7 of 1972 on the basis that the premises were required by the petitioner on the ground of reasonable requirement. In consequence of the Rent Act (amendment) No 55 of 1980 which came into operation on 12.12.1980, amended plaint was filed on 31.3.1981 in terms of section 22(2)(bb) the petitioner having deposited a sum of Rs. 20,374/50 with the Commissioner of National Housing to the credit of the 1st respondent which sum represented 5 years rent of the premises. "Reasonable requirement" was not a ground of ejectment under section 22(1)(bb).

On 2.12.1983, when the said case was pending, the 1st respondent made an application (marked D in these proceedings) to the Commissioner of National Housing, in terms of section 13A of the Ceiling on Housing Property Law No 1 of 1973 (as amended), to purchase the demised premises. In column 12 of that application, in answer to the question ; "Can action be instituted under the Rent Act No 7 of 1972 on the ground that such house is required for occupation as a residence of the landlord of such house or any member of the landlord's family"?, the 1st respondent answered : "No ; No action can be instituted and maintained on the Rent Act No 7 of 1972 by the landlord."

On 8.3.1984 case No 667/RE was settled. By the terms of the settlement (R1), the 1st respondent agreed to purchase the rented premises for a sum of Rs. 600,000 from the petitioner ; he agreed to pay Rs. 10,000 on or before 26.3.1983 ; a further sum of Rs. 40,000 on or before 30.6.1984 and the balance consideration of Rs. 500,000 on or before 31.12.1984. If the 1st respondent failed to pay the total consideration of Rs. 600,000 on or before 31.12.1984, he agreed that the petitioner will be entitled to take out writ to have him ejected from the premises.

The 1st respondent having deposited the sums of Rs. 10,000 and Rs. 40,000. defaulted in depositing the balance consideration as agreed. Consequently, the petitioner took out writ of ejectment. When the fiscal proceeded to the premises to execute the writ, he was confronted by the 1st respondent with the vesting order dated 18.10.1984 published in the Government Gazette dated 30.11.1984 (P1) vesting the premises with the Commissioner of National Housing. It is under those circumstances that the petitioner moved the Court of Appeal by way of writ to get the vesting order quashed.

Several submissions were made on behalf of the petitioner as to why we should interfere with the judgment of the Court of Appeal. The first was that the 1st respondent should be a tenant of the premises both at the point of time he made the application to the Commissioner of National Housing (2.12.1982) and at the time the vesting order was made by the Minister (18.10.1984). It was contended that the settlement entered in case No 667/RE on 8.3 1984 denuded the 1st respondent of his character of a tenant making him a prospective purchaser and a licensee on the premises. On the other

hand, learned counsel for the 1st respondent contended that the word "tenant", within the meaning of Law No 1 of 1973, covers both a contractual tenant and a statutory tenant, and that a statutory tenant does not lose his status of a tenant until he is ejected from the tenanted premises by an order of a competent court. It was also submitted that, inasmuch as this matter was neither urged before nor considered by the Court of Appeal, grave prejudice would be caused to the 1st respondent if we proceed to consider the matter for the first time. Secondly, it was submitted by learned counsel for the petitioner, that the petitioner was denied a fair hearing, in that she should have been given a copy of the report made by the Commissioner in terms of section 13A (5) or should have been made aware of its contents prior to the Minister making a decision to vest the property. However, in view of the order I propose making on the final submission made by learned counsel for the petitioner, I would refrain from expressing any opinion on the first two submissions.

The final submission made on behalf of the petitioner was that the Minister failed to consider the equities of the case in making the vesting order which he was obliged in law to consider. The question was posed as to whether the Minister would have made that vesting order had he been aware of the settlement entered in case No 667/RE of the District Court of Mt. Lavinia by which the 1st respondent agreed to purchase the property in question for a sum of Rs. 600,000 which sum was far in excess of an amount the petitioner would have ultimately received in the proceedings under the Ceiling on Housing Property Law. The Court of Appeal was of the view that the non-disclosure of the settlement arrived at in court would not have materially affected the Minister's decision to make the vesting order since the application for the purchase of the house was made prior to the settlement entered in the District Court.

As at 2.12.1983 when the application was made by the 1st respondent to the Commissioner of National Housing, the 1st respondent had received notice of the termination of his tenancy : plaint and amended plaint were filed in case No 667/RE and none of these matters were brought to the notice of the Commissioner. Even if the 1st respondent was under no legal obligation to disclose those facts, the Commissioner would have been more circumspect in considering whether to recommend vesting or not, had he known that there was pending litigation over the same subject matter. Furthermore, the

prospective actions by the Commissioner and the Minister in respect of such an application, are capable of rendering nugatory steps taken by a competent court in the exercise of its ordinary jurisdiction over the subject matter, which that court was already seized of.

It is material to consider the attitude of the 1st respondent towards prosecuting his application to the Commissioner. On the same day on which he made the application. viz. 2.12.1983, he wrote a letter (A) to the attorney of the petitioner in Sri Lanka, the petitioner being away in the U.S.A. at that time. The receipt of this letter was denied by the attorney : but since the registered article was produced, I shall assume that the letter was received. The material parts of the letter read :-

"Today I signed an application at the instance of my son, to the Commissioner of National Housing asking that the house be vested and transferred to me under the Ceiling on Housing Property Law.

But I do not wish to litigate, and have ill feelings with neighbours. We have seen these cases going on for years with such trouble to both sides."

"I still wish to buy this house at a reasonable price".

On 8.3.1984 case No 667/RE was settled as mentioned earlier, the 1st respondent agreeing to purchase the property by depositing a sum of Rs. 600,000 to the credit of the case. On the same day the 1st respondent wrote the letter marked C to the petitioner to her address in Sri Lanka. Although the petitioner denies having received this letter, since the postal article of registration was produced, I shall assume that the petitioner received the same. That letter reads :-

"Now that the case was settled, you must remember to inform and do something at the Housing Commissioner's end. You told me that you can speak to your friend there. Please attend to this, as my sons are not here at present. I am sick and it is inconvenient for me to go about to the Housing Commissioner's office. Housing Commissioner's reference is CH/1A/47/49591/245."

Subsequently, the 1st respondent proceeded to act on the basis of the settlement R1 by paying to court a sum of Rs. 10,000 before 26.3.1984 and Rs. 40,000 before 30.6.1984 quite ignoring his application to the Commissioner. The conduct of the 1st respondent is tantamount to representing to the petitioner unequivocally that he was not interested in prosecuting his application to the Commissioner which he was quite specific he "signed at the instance" of his son. He wanted the petitioner to do "something about it as his sons were away". He had expressed his desire to purchase the property at a "reasonable price"; and it may be inferred that this reasonable price was what he agreed upon when he came to a settlement in the District Court.

The advertisement in the *Ceylon Daily News* (XI) calling for objections from the petitioner who was named as the owner for the proposed vesting was published on 28.2.1984. The petitioner states that she did not see the advertisement. This is quite probable, because when the settlement was reached on 8.3.1984, nothing was mentioned to court about a pending application before the Commissioner. The conduct of the 1st respondent demonstrated a clear intention to abandon the application made to the Commissioner of National Housing.

I am of the view that, had the Minister of National Housing been aware of the respondent's agreement in court to purchase the property at a price he considered reasonable, he would have demurred from making the vesting order which he did. I am unable to agree with the opinion expressed by the Court of Appeal that non-disclosure of the settlement arrived at the court would not have affected the application made to the Commissioner and that this non-disclosure cannot be treated as a breach of *Uberrima fides*.

For the above reasons the appeal is allowed with costs fixed at Rs. 3000 payable by the 1st respondent to the petitioner. The application for writ is allowed.

BANDARANAYAKE, J. – I agree.

AMERASINGHE, J. – I agree.

Appeal allowed.