

KAMALA PERERA
v
LIYANAPATHIRANA

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 604/95 (F)
DC COLOMBO 6393/RE
MAY 30, 2007

Rent Act 5 of 1972 – Section 28 – Section 28 (1) – Non occupation of premises – Non-occupying tenant – Constructive occupation? – Genuine and lawful cause – Landlord not informed – Possession requires not merely an animus possidendi but a corpus possessionis – Exclusive possession of dependents of the tenant. Possession through outsiders – Difference.

Action was filed to evict the defendant-appellant tenant in terms of Section 28 of the Rent Act. The defendant-appellant's position was that he left for Singapore for employment for a total period of 3 years, and the defendant's mother and sister were kept at the premises, and she had the intention to return at the end of the period of employment. It was the position of the defendant-appellant that he had 'constructive occupation' as a result of his mother and sister occupying the premises.

The plaintiff-respondent contend that, the defendant-appellant was not in possession for a continuous period of 4 years, and that there was no reasonable cause for non-occupation, and the electoral registers prove the occupation of the premises by outsiders.

The trial Judge held with the plaintiff-respondent.

Held:

- (1) Section 28 envisages a reasonable cause of the tenant to be absent from the premises in question for a continuous period of 6 months to avoid ejection. It has to be genuine and a lawful cause to get the protection of the statute for a tenant.
- (2) The period spent outside the Island by the tenant is admitted, the version of the tenant does not indicate as to whether the landlord was informed about the departure.

- (3) There is an absence of exclusive possession of the dependents of the tenant. There were outsiders in the premises. Possession by unknown persons should be only with the landlords' consent.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

- (1) *Subendranathan v Dr. S. Ponnampalam* – 1985 – Sri LR 205
- (2) *In Re Samy – Hussain Appellate Law Recorder* – 2005 (2) 9
- (3) *Weerasingham and another v De Silva* – 2002 – 2 Sri LR 233
- (4) *Fonseka v Gulamhussein* – 1978/79 – 2 Sri LR 312
- (5) *Siththi Fausiya v Harun Kareem* – 1990 – 2 Sri LR 154
- (6) *Mahinda v Periapperuma* – 1996 – 2 Sri LR 90
- (7) *Pir Mohamed v Kadhibhoy* – 60 NLR 186
- (8) *Skinner v Geary* – 1931 – 2 KB 546
- (9) *Amarasekera v Gunapala* – 73 NLR 469

V. Kulatunga for defendant-appellant

C.E. de Silva for plaintiff-respondent

September 4, 2007

ANIL GOONERATNE, J.

This was an action filed in the District Court of Colombo for ejection of the tenant (defendant-appellant) in terms of section 28 of the Rent Act on the basis of non-occupation of residential premises for a period of 6 months without any reasonable cause and damages. The appeal arises from the judgment dated 18.7.95 entered in favour of the respondent landlord, as prayed for in the plaint. 01

The fact of tenancy and that the premises is a residential premises were admitted at the trial. Parties proceeded to trial on 12 issues. The defendant tenant filed answer through her power of Attorney holder and pleaded *inter alia* that the defendant-appellant tenant left for Singapore for employment on or about 18th August 1984 on a contract of employment for period of two years initially, which was extended for a further period of 2 years. The defendant-appellant contends the following matters. 10

- (a) Defendant's mother and sister were kept at the premises in suit with the intention of the defendant's return to the island at the end of the period of employment.

- (b) Plaintiff admitted in cross examination that mother and sister were at the premises in dispute.
- (c) Defendant went abroad with the intention of returning to Sri Lanka. 20
- (d) Defendant maintains constructive occupation as a result of her sister and mother occupying the premises.

The substituted-plaintiff-respondent contends.

- (i) Defendant-appellant was not in occupation of the premises in suit from 18.8.84 for a continuous period of 4 years. As such the burden is on the defendant to prove, reasonable cause for non-occupation.
- (ii) The electoral registers marked P2-P4 proves occupation of the premises by outsiders and persons unknown to the original plaintiff. 30
- (iii) A valid notice to quit dispatched to defendant terminating tenancy.
- (iv) Defendant failed to prove a reasonable cause as required in terms of section 28(1) of the Rent Act.

Several authorities were cited by counsel on either side. I refer to those authorities very briefly and demonstrate below the gist of it, before considering the evidence and the judgment of the District Court, to ascertain the position urged by both parties.

- (a) *Subendranathan v Dr. S. Ponnampalam*⁽¹⁾ occupation by the tenant's wife and children was constructive occupation by the tenant. 40

In the case in hand it is the position of the tenant that during her absence the old mother and sister occupied the premises.

- (b) In *Re Samy*⁽²⁾ at page 9. If the premises are occupied exclusively by the dependants in the absence of the tenant, the landlord should be informed of such occupation and landlords should consent.

It is my view also that the landlord as the owner of the premises should be aware of the state of his own premises and as to who and who are occupying the premises. 50

(c) *Weerasingham and another v De Silva*⁽³⁾ temporary absence of tenant with intention to return within a reasonable period should not deprive tenant of the protection under the Rent Act. However if the house is kept closed or exclusively occupied by strangers, tenant cannot avert eviction.

(d) *Fonseka v Gulamhussein*⁽⁴⁾ occupation through a license is not protected by section 28(1) of the Rent Act, unless there is reasonable cause. Otherwise tenant is liable to be ejected. Consent of landlord if some other person is placed in the premises would be necessary. 60

(e) *Siththi Fausiya v Harun Kareem*⁽⁵⁾. No formal requisites for a notice of termination except period of duration to quit specified by statute.

(f) *Mahinda v Periapperuma*⁽⁶⁾. Proper period of notice is relevant.

The eviction of the tenant is relied upon by the respondent in terms of section 28(1) of the Rent Act. The said section reads thus ... 70

"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 premise."

The said section envisages a reasonable cause of the tenant, to be absent from the premises in question for a continuous period of 6 months to avoid ejectment. It has to be a genuine and a lawful cause to get the protection of the statute for a tenant, to resist eviction. It is a special statutory right given to the landlord to eject the tenant. 80

The District Judge has taken the view that defendant's evidence does not disprove the plaintiff's evidence and plaintiff's version. The

learned District Judge has accepted the evidence of the plaintiff. It is observed by the Trial Court Judge that plaintiff testified that one Daya Weerasekera was having a wood workshop in the premises and that the plaintiff had not given his consent for such purpose. Further the plaintiff had not been informed about defendant's departure from the island to Singapore. Extracts from electoral registers were marked in evidence as P2 – P4, and Daya Weerasekera's name had been included in those documents pertaining to the premises in dispute. The Trial Court Judge also observes that defendant does not deny Daya Weerasekera's role in the premises and as such plaintiff's version is more probable on this aspect and plaintiff's version is acceptable. Defendant's stay in Singapore for 2 years and extension of her stay for a further 2 years is not disputed. 90

The evidence relied upon by the appellant could be summarised as follows. As demonstrated in the written submissions.

- (a) The Power of Attorney holder gives the reason for her sister leaving the island to seek employment. That is to find money for a family member to cover medical expenses. 100
- (b) Tenant would return to the island and occupy the premises.
- (c) Since August 1984 rent paid from the money recovered by her sister (tenant).
- (d) Landlord's son visited the premises in October 1984.
- (e) Premises occupied by family member and not by any outsider.

The period spent outside the island by the tenant is admitted. The version of the tenant does not indicate as to whether the landlord was informed about the departure from the island. Daya Weerasekera's role or occupation of the premises, is also not specifically denied by the appellant. As such Trial Court Judge cannot be faulted for accepting respondent's version. Claim of the landlord must necessarily be preferred to that of a non-occupying tenant. Daya Weerasekera was in no sense privy to the contract of tenancy. 110

In the written submissions the appellant emphasis the fact that the tenant had the intention to return to Sri Lanka. The position of Daya Weerasekera was denied by the tenant. Tenant also suggest

constructive tenancy by occupation of her mother and sister the power of attorney holder. The answer given by the District Judge to issue No. 1 and 5 is faulted by the appellant. 120

The evidence of the original landlord is that he visited the premises in question in December 1984 and found several outsiders inside the premises. It is also in evidence that no permission had been given to any person of Daya Weerasekera to have a wood workshop. Documents P1-P4 has been admitted in evidence, and there was no objection to those documents at the close of the case.

The learned District Judge has preferred to accept the version of the respondent and rejected the story of the appellant in connection with the premises in question. However it is apparent from the evidence placed before the original court that no permission of landlord was obtained prior to departure of the tenant from the island and that there is an absence of exclusive possession of the dependents of the tenant. There is no reason to disbelieve the evidence of the original landlord who maintained that there were outsiders in the premises. Long absence of the tenant is also not disputed. Possession by unknown persons should be only with landlords consent. I cannot see any such consent given by the respondent from the evidence led at the trial. 130 140

At this point I would also refer to some case law and certain authorities where the position of non-occupation of tenant has been discussed. Although earlier view as in the case of *Pir Mohamed v Kadhibhoy*⁽⁷⁾ Basnayake, J. disapproved adoption of English Law principles to our Rent Restriction Act, one cannot in today's context reject English Law principles as regards the Rent Act No. 7 of 1972 (with Amendments) to ascertain the question of non-occupation.

In *Skinner v Geary*⁽⁸⁾ Tenant Geary had lived elsewhere for ten years, and the premises were occupied by his relations and by his sister, presumably as tenants at will. The occupation of the relations and the sister was not for the purpose of preserving the house for the tenant, and at no time did the tenant contemplate residing in the house again, **Scrutton L.J.** dealt with the history of the Rent Restriction Acts in England, and observed that the statutory tenant's right was not a right of property but purely a personal right to occupy the premises. In his view, the fundamental principle of the Act was "to 150

protect a resident in a dwelling house, not to protect a person who is not resident in a dwelling house."

In *Amarasekera v Gunapala*⁽⁹⁾, Alles J. had no hesitation in holding that the defendant came within the definition of a 'non-occupying tenant'. So far as the gist of this concept was concerned, reliance was placed on the law as expounded in the English authorities. In *Robson v Headland*. Lord Tucker, speaking for the Court of Appeal, applied the principle of a 'non-occupying tenant' to the case of a divorced wife who, the Court held, was a stranger to the husband. In *Brown v Brash and Ambrose* the Court of Appeal (Scott, Bucknill and Asquith L.JJ). Sought to explain what was meant by a non-occupying tenant'. Asquith L.J. conceded that the absence of the tenant from the premises may be denied if he coupled and clothed his inward intention with some formal, outward and visible sign such as installing a caretaker or representative, be it a relative or not, with the status of a licensee and with the function of preserving the premises for his ultimate home-coming. Acquith L.J. said "Possession in fact requires not merely an *animus possidendi* but a *corpus possessionis* – namely, some visible state of affairs in which the *animus possidendi* finds expression.

Therefore I am inclined to accept the views of the learned District Judge and hold that the appellant has not satisfied the Original Court that there was a reasonable cause to absent herself for over 6 months from the premises in question. As such the appellant cannot seek to get the protection of the Rent Act. Therefore the respondent would be entitled to a decree for the ejection of the tenant from the premises in dispute. The judgment of the District Court is affirmed. Appeal dismissed with costs, fixed at Rs. 10,000/-.

EKANAYAKE, J. - I agree.

Appeal dismissed.