

JAYAWARDENA

v.

DE VESSER

COURT OF APPEAL
JAYASINGHE, J.
JAYAWICKREMA, J.
CA NO. 1000/97
DC COLOMBO 5905/ZL
JUNE 17TH, 1999
MAY 19TH, 2000

Rent Act No. 7 of 1972 - S.36 - Consent Decree - Defendant entitled to remain in occupation until his death - Death of Defendant - Application to substitute - Application under S.36 Rent Act, S.398 - Civil Procedure Code - Common Law - contract falling outside Rent Act - Continuation of action after the alteration of a parties' status.

Plaintiff-Petitioner instituted action seeking a declaration of title and ejectment. Settlement of consent was reached. Defendant entitled to remain in occupation until his death, and after his death, his heirs to have no right to occupy the said premises or claim any relief under S.36.

The Defendant died and the Plaintiff sought to substitute the present Petitioner for the purpose of executing the decree. This was allowed by the District Court.

In Revision, it was contended that the Respondent is not entitled to succeed as the terms of settlement did not provide for ejectment of the Petitioner after the death of the deceased Defendant; and the landlord and the tenant cannot take away the rights given to the surviving spouse under S.36.

Held :

(i) When the parties reached a settlement and consent decree entered, the deceased Defendant in effect surrendered his tenancy and thereafter a new contract of tenancy for a fixed term was created between the parties.

(ii) There was thus the emergence of a contractual tenancy which was determined with the death of the Defendant.

(iii) The said tenancy was a common law contract which fell outside the Rent Act. Hence, the Petitioner is not entitled to come under S.36 and claim tenancy as provided by S.36.

(iv) S.36 has application only where a tenant dies before action is instituted against him and not after. When the tenant dies after action is instituted the problem that arises is not a question of substantive law but one of procedure and for a solution one has to have recourse to Cap. 25, Civil Procedure Code for the continuation of a parties status.

(v) It is redundant to incorporate in the decree that Writ of execution will lie upon the death of the deceased as it is a consequential step the Petitioner must take.

APPLICATION in Revision from an order of the District Court of Colombo.

Cases referred to :

1. *Abdul Rahaman v. Marimuthu* 52 NLR 503
2. *Thiagarajah v. Perera* (1983) 1 SLR 384
3. *L.D. Frances v. J.W. Sirisena* (1983) 2 SLR 50
4. *Hensmen v. Stephen* 58 NLR 467
5. *Karunaratna v. Fernando* - 73 NLR 457

A.K. Premadasa P.C., with *C.E. de Silva* for Petitioner.

Ikram Mohamed P.C., with *Tisath Wijegunasekera* for Respondent.

Cur. adv. vult.

September 14, 2000.

JAYASINGHE, J.

The Plaintiff-Petitioner-Respondent instituted action against P.L.C. Jayawardena the deceased Defendant for -

- a. a declaration of title to the upstairs premises bearing assessment No. 594-1/1, Nawala Road, Rjagiriya.
- b. ejectment of the deceased Defendant therefrom.

The trial commenced on 03. 08. 1990 and on 06. 05. 1992 the Plaintiff and the deceased Defendant reached a settlement of consent and decree entered accordingly.

According to the settlement reached -

- a. the Defendant was entitled to remain in occupation of the premises in dispute until his death.

-
- b. that upon the death of the Defendant the heirs of the Defendant shall have no right to occupy the said premises and that the Plaintiff is entitled to possession thereof.
 - c. that the Defendant agrees to continue to deposit a sum of Rs. 177/- presently made in the Urban Council of Kotte.
 - d. that the Plaintiff shall be entitled to withdraw the said monies so deposited at the Kotte Urban Council upon the Plaintiff establishing ownership to the said premises.
 - e. that the heirs of the Defendant shall not be entitled to claim any rights under Section 36 of the Rent Act.

Parties thereafter signed the record and decree entered.

Parties were represented by Counsel.

The Defendant died on 21. 02. 1997 and the Plaintiff thereafter filed application "X-5" to substitute the present Petitioner for the purpose of execution the decree and thereafter the Plaintiff filed amended petition "X-10".

The present Petitioner filed objections "X-11" pleading among other things:

- a. that a decree capable of being executed has not been entered.
- b. that the trial is still pending.
- c. that under the said settlement, writ of possession cannot be issued or executed either against the deceased Defendant or the Petitioner.
- d. that the deceased Defendant was a tenant of the said premises up to the time of his death and that the Petitioner has succeeded to the tenancy under Section 36 of the Rent Act No. 07 of 1972 and prayed that she be substituted under Section 398 of the Civil Procedure Code.

The learned District Judge made order on 21. 11. 1997 allowing substitution of the present Petitioner as Defendant 1A "X-13". Thereafter the Plaintiff made an application to execute the decree.

Being aggrieved by the said order "X-13" the present Petitioner moved in revision.

Mr. Premadasa, President's Counsel submitted that the Plaintiff-Petitioner-Respondent is not entitled to succeed as the terms of settlement "X-4" did not provide for ejectment of the Petitioner after the death of the deceased Defendant. He relied on *Abdul Rahaman v. Marimuttu*⁽¹⁾ where Gratiaen, J. held that: "where a landlord sues his tenant for ejectment and a consent decree is entered by which inter alia the Defendant is permitted to remain as a tenant for a further stated period, writ of ejectment cannot be issued in the same action at the end of the stated period unless the consent decree has expressly provided that writ of ejectment can issue as a matter of course after the expiry of such period."

He submitted that a decree capable of being executed has not been entered and hence the trial is still pending.

Mr. Premadasa also submitted that the Defendant was the tenant of the said premises up to the time of his death and therefore the Petitioner as the surviving spouse is entitled to the benefit under Section 36. He went on to submit that the landlord and the tenant cannot in law and has no right to take away the rights given to the surviving spouse under Section 36.

Mr. Ikram Mohamed, President's counsel submitted that upon the death of the Defendant the Plaintiff made an application under Section 341 of the Civil Procedure Code seeking the appointment of a legal representative to execute the decree that was entered on 06. 05. 1992.

In *Thiyagarajah v. Perera*⁽²⁾ Soza, J. observed that;

At the outset it is well to remember, that in execution proceedings statutory procedures are so designed as to assist the judgment creditor to recover the fruits of his judgment and not to afford facilities to the judgment debtor to defeat or delay the execution of the decree of Court.”

“A comparative examination of the provisions of our Civil Procedure Code on the question of decrees can leave no doubt that provision in section 341 to make the legal representatives a party respondent is there to ensure that he receives notice of the application for execution. It should be emphasized that the notice under this section should call upon the legal representative to show cause why the decree should not be executed against him . . . The notice should show cause against the application for execution and not to the application for substitution. In showing cause against the application for execution one of the defences open to the party noticed could be that he has been wrongly substituted as legal representative.”

He submitted that the substitution effected under Section 341 is an application made *ex-parte* and once substitution is done notice should be issued on the substituted legal representative to show cause why writ should not be executed.

Mr. Mohamed, P.C. submitted that Section 36 applies where a person dies as a tenant of the premises. It has no application where the tenancy has ceased at the time of death. Mr. Mohamed argued that the submission of Mr. Premadasa that the Petitioner being the widow is entitled to succeed to the tenancy under Section 36 is erroneous in that the Defendants tenancy rights terminated with the consent decree being entered as far back as 1992 and hence the surviving spouse could not avail herself of the benefit under Section 36. He relied on *L.D. Francis v. J.W. Sirisena*⁽³⁾ where Wimalaratne, J. held that; Section 36 of the Rent Act has no application where the tenant dies after an action has been instituted. He stated that

“it seems to me therefore that Section 36 of the Rent Act has application only where a tenant, be he a contractual tenant or a statutory tenant dies before action is instituted against him and not after. Where the tenant dies after the action is instituted against him, the problem that arises is not a question of substantive law but one of procedure as to who if any takes his place for the purpose of the continuity of the action already instituted and for a solution one has to have recourse to Chapter 25 of the Civil Procedure Code for the continuation of action after the alteration of a parties status.

In *Hensmen v. Stephen*⁽⁴⁾. The landlord let certain residential premises to which the Rent Restriction Act applied on a monthly tenancy to one Stephen. She filed action against him for ejectment on 08. 08. 1951 having previously given due notice terminating the contractual tenancy. The landlord claimed that the tenant Stephen was not entitled to statutory protection from ejectment because inter alia the premises were reasonably required as a residence for herself and her family. Stephen died pending the action for ejectment but his widow purported to serve notice on the landlord that she proposed as a surviving spouse of the deceased tenant to continue in occupation of the premises as tenant. The Commissioner of Requests held that the wife was entitled to avail herself of the provisions of Section 18 of the Rent Restriction Act which provided for the continuance of the tenancy on the death of the tenant. It was the contention of the landlord that Stephen had ceased to be a tenant long before his widow purported to invoke Section 18. Gratiaen, J. took the view that Section 18 of the Rent Restriction Act had no application where the original contractual tenancy has been determined according to the common law and all that the former tenant thereafter enjoyed was a statutory protection which was personal to him. Gratiaen, J. expressed the view that Section 18 only permits the widow or a relation of a deceased tenant to claim a fresh tenancy if the latter was a tenant in the strict sense of the term. That is if there was still subsisting at the time of the death a contractual tenancy between the landlord and himself. However in

Karunaratne v. Fernando⁽⁵⁾ Sirimanne, J. stated that it is fairly obvious that the legislature intended to extend the same protection which the tenant enjoyed to his widow, children or dependants . . . to give the word tenant a restricted meaning of contractual tenant would defeat the very purpose, of the legislation. It would expose the deceased tenants family to the very danger which that section was intended to avert, for a landlord by resorting to the simple device of sending a tenant a notice to quit could, by his unilateral act bring the operation of Section 18 to a standstill. This conflict between the decisions in *Hensmen v. Steven*(*Supra*) and *Karunaratne v. Fernando*(*Supra*) was finally resolved by Section 36 of the Rent Act of 1972.

It is to be noted that in *Hensmen v. Stephen*(*Supra*) the landlord has instituted action against the tenant for ejection and the matter was pending before Court and in *Karunaratne v. Fernando*(*Supra*) the tenant has died after quit notice was served on him. Both Gratiean, J. and Sirimanne, J. sought to interpret the application of Section 18 of the Rent Restriction Act according to their respective thinking but in both cases the deceased tenant remained a tenant "in the strict sense of the term". However in the present case the tenancy has been determined and consent decree entered. Mr. Premadasa argued that the landlord and the tenant cannot in law and have no right to take away the rights given to the surviving spouse. There is no quarrel on that. But there was no "surviving spouse" when the consent decree was entered. Suppose the settlement was for the tenant to leave the premises at the end of two years and the tenant died before the expiry of that two year period could the surviving wife claim to succeed to the tenancy under Section 36? I think not. Here the deceased Defendant surrendered the tenancy which he could rightfully do. Situation may have been different if the present Petitioner sought substitution under Section 398 alleging fraud or collusion between the landlord and the deceased Defendant. There was no such allegation. On the contrary she sought to claim the benefit under Section 36 on the basis of a surviving spouse.

When the parties reached a settlement and the consent decree entered setting out the terms of settlement as set out in 'X-4' the deceased Defendant in effect surrendered his tenancy and thereafter a new contract of tenancy for a fixed term was created between the parties. There was therefore the emergence of a contractual tenancy which was determined with the death of the deceased Defendant. The said tenancy was a common law contract which fell outside the operation of the Rent Act. Hence it is my view that the Petitioner is not entitled to come under Section 36 and claim tenancy as provided for under Section 36.

It is also relevant to mention that in terms of the agreement arrived at between the deceased Defendant and the Plaintiff, the deceased Defendant only agreed to deposit the sum of Rs. 177/- hitherto being deposited at the Kotte Urban Council and the word "rent" has been carefully left out. However, in *Karunaratne v. Fernando(Supra)* it was held that "acceptance of rent by a landlord after notice to quit has been given by him to the tenant does not by itself operate to renew the contract of tenancy if there is evidence showing that there was no *consensus ad idem* between the parties for such a renewal of the contract". The Plaintiff merely gave the Defendant a concession in that he was allowed to remain until his death and sought to execute the decree soon after the death of the deceased Defendant.

Mr. A.K. Premadasa, P.C. also submitted that the terms of settlement 'X-4' did not provide for ejectment. In *Abdul Rahuman v. Marimuttu(Supra)*. The Plaintiff sued the Defendant for ejectment and damages. However the action was settled and of consent a decree was entered by which inter alia the Defendant was to be permitted to remain as a tenant for period of 1 1/2 years at an agreed monthly rental of Rs. 75/- payable each month. The consent decree provided writ of ejectment was to issue forthwith if the Defendant defaulted in the due payment of the rent.

However the consent decree was silent as to what should happen at the expiration of the 1 1/2 years as agreed between parties. The Defendant died before the expiry of the 1 1/2 year period. The administratrix of the estate asked -

- (a) to be substituted as the Plaintiff and
- (b) for writ of ejectment as the said 1 1/2 years has expired. Gratiaen, J. stated "as the consent decree did not provide for what was to happen at the expiry of the tenancy it seems to me that the only remedy available to the original Plaintiff and upon his death to his successors in law was to enforce these contractual rights in a regular action. It is not permissible to imply any term by which the parties could be presumed to have agreed that writ of ejectment could issue as a matter of course after the expiry of the tenancy. Existence of such an implied term must be ruled out because there is an express agreement providing for writ of ejectment to issue in certain other eventuality . . .". Writ of ejectment will not issue as a matter of course. It can only issue on application. If the judgment debtor fails to comply with the judgment and decree entered against him then it is inevitable that the judgment creditor would come back to Court for execution. As to whether there is an express provision in the decree for execution or it is there by implication does not arise.

It is redundant to incorporate in the decree that writ of execution will lie upon the death of the deceased as it is a consequential step the Plaintiff must take as Soza, J. says in *Thiagarajah v. Peiris (Supra)* that execution proceedings are so designed to assist the judgment creditor to recover the fruits of his judgment and not to afford facilities to the judgment debtor to defeat or delay the execution of the decree of Court. However, if the writ was to issue without notice then it is imperative that the decree contains a stipulation to that effect.

It is very relevant to mention that there is a judgment and a decree entered. It has not been set aside by a Superior Court. Therefore the judgment creditor could seek satisfaction of the decree. An application for substitution under Section 398 therefore has no legal basis and is misconceived in law.

As regards Mr. Premadasa's submission that the Respondent is not entitled to a declaration of title to the entire upstairs of the premises No. 594-1/1, Nawala Road. Rajagiriya as her entitlement is only to an undivided 1/2 share of the upstairs, it is unnecessary to go into this aspect as it is a matter to be resolved between the co-owners. The consent decree entered did not relate to the Plaintiff's ownership.

The Petitioner's application for revision is dismissed with costs fixed at Rs. 2500/-

JAYAWICKRAMA, J. - I agree.

Application dismissed.