

ABDUL KALYOOM & OTHERS
v.
MOHAMED MANSOOR

COURT OF APPEAL.

WIJETUNGA, J. & S. U. DE SILVA, J.
C.A. 538/79.

D.C. COLOMBO D/1880/RE.
MARCH 10 & 11, 1988.

Landlord and tenant—Business premises—Death of Tenant—Devolution of Tenancy Rights—Rent Restriction Act s. 18—Rent Act s. 36.

Tenancy rights being personal do not pass to the tenant's heirs but under the Rent Laws special provision has been made for such tenancy rights to pass to successors eligible under the special statutory criteria—section 18 of the Rent Restriction Act and now section 36 of the Rent Act of 1972. While under S. 18 of the Rent Restriction Act succession to the tenancy would depend upon the eligible person giving written notice to the landlord, under S. 36 of the Rent Act, no such notice is required. The eligible person succeeds to the tenancy without such notice.

Under S. 36(3) of the Rent Act the landlord is obliged to apply to the Rent Board for an order declaring which if any of the persons who may be deemed to be tenants under subsection 2 shall be the person who shall for the purpose of the Act be the tenant. In every situation where prima facie there are one or more persons eligible to succeed to the deceased tenant on the stipulated criteria the landlord is obliged to make an application to the Board for a determination.

The Board has exclusive power to make a positive order declaring that a person who is qualified to succeed to the deceased tenant on the criteria stipulated in section 36(2), is the tenant for the purpose of the Act or to make a negative order declaring that no

such person will succeed the deceased tenant. Consequently, an action filed by a landlord in the regular Courts, without making an application to the Board, will fail, if it is established that any of the defendants may be deemed a tenant of the premises in terms of section 36(2).

As regards business premises the following categories of persons are eligible to succeed to the deceased tenant (s. 36(2) (c)): spouse or child of the deceased tenant, a partner in the business carried on by the deceased tenant, any heir to the business carried on by the deceased tenant, the executor or administrator of the estate of the deceased tenant. Where the spouse or child is concerned, the further criteria should be satisfied that such person is carrying on the business carried on by the deceased, for the purpose of being eligible. There is no prohibition against the spouse or the children from carrying on the business in partnership or in collaboration with an outsider. The question is whether the spouse or children are carrying on substantially the same business as was carried on by the deceased tenant.

The 1st and 3rd defendant – respondents satisfy the criteria and are deemed to be the tenants and are not in wrongful occupation of the premises.

Cases referred to:

- (1) *Abdul Hafool v. Muttu Bathool* (1957) 58 NLR 409.
- (2) *Fernando v. de Silva* (1966) 69 NLR 164.
- (3) *Wickremasinghe v. Abdul Raheem* (1954) 56 NLR 280.
- (4) *Karunaratne v. Fernando* (1970) 73 NLR 457.

APPEAL from judgment of the District Court of Colombo.

K. N. Choksy P.C. with *R. Manikkawasagam* and *B. Muthunayagam* for plaintiff – appellants.

H. S. A. Hassan with *J. Waffa* for 1st to 3rd defendants – respondents.

Cur. Adv. vult.

May 06, 1988

S. N. SILVA, J.

The plaintiffs-appellants instituted this action in the District Court of Colombo seeking the ejection of the defendants-respondents from the premises described in the schedule to the plaint and for recovery of damages.

According to the plaint the defendants have been in unlawful occupation of the premises from 27.8.1975. The 1st, 2nd and 3rd defendants filed answer denying that they are in unlawful occupation. They claimed to be in occupation as lawful tenants and averred that the 4th to 8th defendants are their employees.

It is common ground that the premises in question bearing assessment number 46, 2nd Cross Street, Colombo 11 is a business premises as defined in Section 48 of the Rent Act No. 7 of 1972. Mohamed Abdul Majeed carried on a business under the name of 'Mohamed Stores' at the said premises. The plaintiffs purchased the premises on 29.4.1974 and Majeed continued as tenant of the premises but the monthly rental was deposited at the Rent Department of the Colombo Municipal Council. Majeed died on 27.8.1975 and the main issue of the plaintiffs is that the defendants are in unlawful occupation since that date. The 1st, 2nd and 3rd defendants claimed that after the death of Majeed they became tenants of the premises in terms of Section 36(2) (c) of the Rent Act No. 7 of 1972.

The learned District Judge after trial held that the 1st and 3rd defendants are deemed to be tenants of the premises in terms of Section 36 (2) (c) of the Rent Act, and dismissed the action with costs.

Submissions made by Counsel on both sides at the hearing of this appeal related to the interpretation of Section 36 of the Rent Act.

In the case of *Abdul Hafool v. Muttu Bathool* (1), Basnayake, C. J. held that under the Roman Dutch Law a tenancy terminated with the death of the tenant and that tenancy rights being personal did not pass to the heirs. In a later case, that is, *Fernando v. de Silva* (2), H. N. G. Fernando, C. J. expressed certain doubts about the correctness of this decision. However, it is clear on authority that at common law a monthly tenancy would ordinarily terminate inter alia upon the death of the tenant. (Voet 19.2.9, Roman Dutch Law by R. W. Lee-5th Edition, page 308). This legal consequence arising upon the death of the tenant was departed from by Section 18 of the Rent Restriction Act (Cap. 274 L.E.C. 1956) which provided for the continuance of the tenancy on the death of the tenant, in respect of residential premises, upon certain criteria being satisfied. Section 18 laid down the criteria to be met by a person to succeed to a deceased tenant (which I would refer to as 'eligibility') and the procedure regulating such succession. Eligibility was specified in Section 18 (2) (a) & (b). The procedure for succession was that any person eligible in terms of the stipulated criteria was entitled to give notice to the landlord within a specified period that he proposes to continue in occupation of the premises as a tenant. Thereupon, subject to an order of the Rent

Control Board such person is deemed for the purposes of the Act to be the tenant of the premises. Section 18(3) provided for the landlord to dispute the eligibility of the person to continue as tenant by making an application to the Rent Control Board for that purpose. The Board was empowered to make an order that the person was not entitled to give notice to the landlord in terms of section 18 (2). Section 18 (4) provided for situations where more than one person gave notice to the landlord in terms of Section 18 (2). In such event, either the landlord or any of the persons giving notice could make an application to the Board for an order declaring which if any, of the persons giving notice shall be deemed to be the tenant of the premises. Section 18 was amended by Act No. 10 of 1961 which extended the applicability of the provision to all premises covered by the Rent Restriction Act and also extended the period within which notice may be given to the landlord in terms of Section 18 (2).

The corresponding provision of the Rent Act No. 7 of 1972 is Section 36. The relevant portions of Section 36 are as follows:

"36(1) Notwithstanding anything in any other law, the succeeding provisions of this Section shall have effect in the event of the death of the tenant of any premises.....

(2) Any person who—

(a)

(b)

(c) in the case of business premises:—

(i) is the surviving spouse or the child of the deceased tenant, where such spouse or child carries on in such premises the business carried on by the deceased tenant; or

(ii) is a partner in the business, or heir to the business, carried on by the deceased tenant; or

(iii) is the executor or administrator of the estate of the deceased tenant,

shall, subject to any order of the board as hereinafter provided, be deemed for the purposes of this Act to be the tenant of the premises.

provided.....

- (3) The landlord of any premises referred to in subsection (1) shall make application to the board for an order declaring which, if any, of the persons who may be deemed to be the tenants under subsection (2) shall be the person who shall for the purposes of this Act be deemed to be the tenant of the premises.
- (4) Where an application is made under subsection (3), the board shall, after notice to all persons who may be deemed to be the tenants under subsection (2) and after due inquiry, make order declaring which, if any, of such persons shall be the persons who shall for the purposes of this Act be deemed to be the tenants of the premises."

It is seen that Section 36 of the Rent Act follows the scheme in Section 18 of the Rent Restriction Act in so far as stipulating the criteria to succeed to the deceased tenant. In this respect the only difference is that the criteria is stipulated separately for two categories of residential premises (Section 36 (2) (a) and (b)) and for business premises (Section 36 (2) (c)). The provisions with regard to residential premises would not be relevant for the purposes of this case.

As regards the procedure for succession to the tenancy, Section 36 of the Rent Act shows a clear departure from Section 18 of the Rent Restriction Act. Section 36 (2) specifically provides that any person who is eligible to succeed in terms of the criteria stipulated in sub-paragraph (a), (b) and (c) "shall subject to any order of the board as hereinafter provided be deemed for the purposes of the Act to be the tenant of the premises." It is to be noted that in terms of Section 18 the person eligible to succeed is so deemed as tenant only upon written notice given by him to the landlord. No such notice is required under Section 36.

The next stage of the succession procedure reveals more differences. In terms of section 18 of the Rent Restriction Act, it is not mandatory on the landlord to make an application to the Board on receipt of a notice from a person claiming eligibility to succeed to the deceased tenant. The landlord may make such application, at his discretion, if he disputes the eligibility of such person to succeed to the deceased tenant. Where more than one person has given notice it is open to any such person as well to make an application to the board.

On the contrary, Section 36(3) of the Rent Act makes it mandatory on the landlord to make "an application to the board for an order declaring which if any of the persons who may be deemed to be tenants under subsection 2 shall be the person who shall for the purposes of the Act be the tenant."

It is to be noted that a person eligible to succeed to the tenancy has no locus standi to make such application to the board as under section 18 of the Rent Restriction Act.

A question arises as to the circumstances in which it becomes mandatory on the landlord to make an application to the board in terms of section 36(3) of the Rent Act.

Counsel for the plaintiffs-appellants submitted that the obligation of the landlord to make an application to the board arises only when a person eligible to succeed to the deceased tenant notifies the landlord that he is so eligible. He further submitted that Section 36(3) is analogous with Section 18(4) of the Rent Restriction Act. *This submission ignores the salient differences between Section 18 of the Rent Restriction Act and Section 36 of the Rent Act, on the aspect of giving notice to the landlord by a person eligible to succeed to the tenancy. As noted above, under Section 18 a person eligible to succeed to the tenancy is deemed a tenant only upon giving notice to the landlord, whereas, under Section 36 a person eligible to succeed is ipso facto deemed a tenant. On this aspect the provisions of Section 36 are explicit and it is not open to the Court to graft a portion of the old law to Section 36 by means of interpretation, as suggested by Counsel. In my view, the answer to this question lies in the words used in Section 36(3) and (4). In terms of Section 36(3), the landlord has to make an application to the board for an order as to "which, if any, of the persons who may be deemed to be tenant under subsection (2) shall be the person who shall for the purposes of this Act be deemed to be the tenants of premises."*

In terms of Section 36(4) the board is obliged to notice "all persons who may be deemed to be tenants under subsection (2)." It is clear from the words found in both subsections that it is mandatory on the landlord to make an application to the board when there is any person who may be deemed a tenant of the premises in terms of Section 36(2). In other words in every situation where prima facie there are one or more persons eligible to succeed to the deceased tenant on the

criteria stipulated in Section 36(2)(a) or (b) or (c) the landlord is required to make an application to the board. The inquiry before the board will result, in a positive declaration that one of such persons is the tenant of the premises for the purposes of the Act or, in a negative declaration that no one is eligible to succeed to the deceased tenant. In the event of the board making a negative declaration, the contract of tenancy will terminate by the operation of the common law as stated above.

The next question relates to the nature of the power vested in the board to decide on the continuance of the tenancy and the impact it has on an action instituted by the landlord in the regular Courts. As noted above, there is similarity in the provisions contained in section 18 of the Rent Restriction Act and section 36 of the Rent Act in this respect. In effect, under both Sections, the board decides which if any of the persons eligible to succeed to the tenancy shall be the tenant for the purposes of the Act. The Supreme Court has previously considered the provisions of section 18 of the Rent Restriction Act, in two cases relied upon by the Counsel for the defendant-respondents. These cases are *Wickramasinghe v. Abdul Raheem* (3) and *Karunaratne v. Fernando* (4). Both cases related to situations where notice had been given to the landlord in terms of Section 18(2) but the landlord refrained from making an application to the board as required under this section. Instead, the landlord filed action in the District Court for the ejectment of the occupants. The dicta of the Supreme Court in both cases was that, where a notice has been received by the landlord in terms of Section 18(2), if he disputes the eligibility of the person claiming to succeed the deceased tenant, he is obliged to make an application to the board for a decision whether that person is entitled to succeed the deceased tenant. The judgments proceeded on the basis that the jurisdiction of the board in this regard is exclusive and cannot be shared by any other tribunal. In the case of *Wickremasinghe v. Abdul Raheem* (supra) de Silva, J. made the following observations with regard to the provisions of Section 18(2) of the Rent Restriction Act:

"Such person shall, subject to any order of the Board as hereinafter provided, be deemed to be the tenant" appearing in subsection (2) make it abundantly clear that the Board has the exclusive right to determine whether or not the person giving the notice is entitled to give that notice. This right cannot be exercised or shared by any other tribunal.

Subsection (2) is one of many instances to be found in the Act where a statutory fiction has been created—in this case an artificial construction being given to the word “tenant”. The subsection also provides the only method by which the “tenant” so created can be divested of this artificial character, viz: by an order of the board, as provided in sub-section (3). In this case no such application was made by the plaintiff and the defendant must therefore be considered the tenant of the premises, provided that conditions contained in subsection (1) have been satisfied.”

In the case of *Karunaratne v. Fernando* (supra) Sirimanne, J. made a similar observation as follows:

“The legislature has thought it fit that the Board should decide certain questions which arise under the Act, without the necessity for expensive and often tardy litigation in the Courts. The question whether a person who has given notice under Section 18(2) is one who is entitled to do so is a very simple one which the Board can speedily decide. I take the view that the plaintiffs in this case on receipt of notice D15 from the defendant should have if he challenged her right to continue in occupation as a tenant, taken the matter before the Board instead of resorting to the expedient of filing an action for declaration of title and ejection.”

Applying the dicta of the Supreme Court, to the interpretation of section 36 of the Rent Act, I hold that in terms of section 36(4) the Board has an exclusive power to make, a positive order declaring that any person who may be eligible to succeed to the deceased tenant on the criteria stipulated in section 36(2), is the tenant for the purposes of the Act or, a negative order declaring that no such person will succeed the deceased tenant. Consequently, an action filed by a landlord in the regular Courts, without making an application to the Board, will fail, if it is established that any of the Defendants may be deemed a tenant of the premises in terms of section 36(2).

It now remains to be considered whether any of the Defendants in this case may be deemed a tenant in terms of section 36(2) of the Rent Act. Considering the provisions in section 36(2)(c) as regards business premises, the following categories of persons are eligible to succeed to the deceased tenant:

- (i) spouse of the deceased tenant;
- (ii) any child of the deceased tenant;

- (iii) a partner in the business carried on by the deceased tenant;
- (iv) any heir to the business carried on by the deceased tenant;
- (v) the executor or the administrator of the estate of the deceased tenant.

The categories of persons described in (i) and (ii) above, should satisfy the further criteria of carrying on the business carried on by the deceased, for the purposes of being eligible.

It is not disputed that the 1st and 3rd Defendants-Respondents are son and daughter respectively of the deceased tenant. Documents 3D8, 3D9 and 3D10 relate to the testamentary proceedings had under the Administration of Justice Law with regard to the estate of the deceased tenant. The 1st Defendant-Respondent has been duly appointed as administrator of the estate. In terms of the agreed scheme of distribution contained in 3D10 the 1st and 3rd Defendants-Respondents inherit one half share each of the property of Mohamedia Stores. Therefore the 1st Defendant-Respondent comes within the classes of persons described in (ii), (iv) and (v) above. The 3rd Defendant-Respondent is within the category of persons described in (ii) and (v) above.

Counsel for the Plaintiff-Appellants submitted that the 1st and 3rd Defendant-Respondents cannot succeed to the tenancy as persons coming within category (ii) above since they fail to satisfy the further criteria of carrying on the business carried on by the deceased tenant. Counsel contended that the 1st and 3rd Defendant-Respondents fail on two grounds, viz:

- (i) a comparison of the two certificates issued under the Business Names Ordinance to the deceased (P15) and to the 1st, 2nd and 3rd Defendants-Respondents (P18) in respect of Mohamedia Stores, reveals that the latter certificate has additional lines of business reflected in the registration.

However, a comparison of the two certificates also shows that they have common lines of business, such as dealers in textiles, and exporters of Ceylon produce. In any event, the mere fact that the certificate of registration discloses additional lines of business does not establish that the 1st and 3rd Defendant-Respondents are carrying on a business that is different to what was carried on by the

deceased tenant. The 1st Plaintiff-Appellant who gave evidence, has not stated that the business carried on by the Defendants-Respondents is different to that of the deceased tenant.

- (ii) that the 1st and 3rd Defendants-Respondents have taken on the 2nd Defendant-Respondent (being the husband of the 3rd Defendant) a person who does not come within the classes of persons who are eligible to succeed to the tenancy, as a partner in the business and as such they are not carrying on the business that was carried on by the deceased tenant.

The basis of this contention is that the spouse or children in order to be eligible to succeed to the tenancy should carry on the business by themselves and not in partnership or in collaboration with others. On a plain reading of section 36(2) there is no prohibition against the spouse or the children from carrying on the business in partnership or in collaboration with an outsider. Bringing in a new partner or a collaborator does not mean that the business becomes different from what was carried on by the deceased tenant.

In my view, the question is whether the spouse or children are carrying on substantially the same business as carried on by the deceased tenant. Considering the evidence of the 2nd Defendant-Respondent, as accepted by the learned District Judge, I am of the view that the further criteria is satisfied.

As regards the eligibility of the 1st and 3rd Defendants-Respondents to succeed to the tenancy as coming within categories (iv) and (v) Counsel for the Plaintiffs-Appellants submitted that even in respect of those categories it must be shown that the persons are carrying on the same business that the deceased tenant carried on. On this basis he urged the grounds stated above to show that the 1st and 3rd Defendants-Respondents are not carrying on the business that was carried on by the deceased tenant. The analysis of section 36(2)(c) referred to above shows that in respect of the categories of persons eligible to succeed, other than the spouse or children, it is not necessary to satisfy the further criteria that they are carrying on the business of the deceased. This criteria is restricted to the classes of persons coming within the description of spouse or children of the deceased. Therefore the submission of Counsel should necessarily fail in this respect.

For the reasons stated above I uphold the finding of the learned District Judge that the 1st and 3rd Defendant-Respondents are deemed to be tenants of the premises in terms of section 36(2) of the Rent Act. Accordingly the tenancy in respect of the premises does not terminate upon the death of the deceased tenant and the Plaintiffs-Appellants cannot have and maintain the action on the basis that the Defendants-Respondents are in wrongful and unlawful occupation of the premises. The appeal of the Plaintiffs-Appellants is dismissed with costs.

WIJETUNGA, J. — I agree.

Appeal dismissed.
