SENANAYAKE

v.

SIRIWARDENE

COURT OF APPEAL
WIGNESWARAN, J.
TILAKAWARDANE, J.
C.A. 669/94(F)
D.C. HOMAGAMA 1841/RE
JUNE 9, 1999
SEPTEMBER 3, 1999

Minor - Lease of bare land by Parents - Ground Rent payable to the Credit of the Minor - Increase of rent from time to time - Is there a new agreement - Applicability S. 150 Civil Procedure Code.

The Parents of the Plaintiff - Appellant (Minor) entered into an agreement with the Defendant - Respondent in respect of a bare land for 15 years. The Defendant Respondent - was permitted to erect buildings. Upon attaining majority the Plaintiff - Appellant ratified the Lease, however upon the end of the period of 15 years the Defendant Respondent did not handover the land to the Plaintiff Appellant. Thereafter the Plaintiff-Appellant instituted the present action.

The District Court dismissed the Plaintiff - Appellant's action holding that by reason of increases from time to time in the monthly rentals there were fresh agreements and the Plaintiff Appellant was precluded from maintaining the action on the basis of the original agreement.

Held :

(i) Increase of rentals did not result in a new contract. A mere deviation with regard to a term in the original contractual document need not negate the whole document unless parties intended to terminate the contract set out therein -

Negotiating an increased rent does not give rise to a new contract but merely result in the variation of one *term* of the contract.

Per Wigneswaran J.,

"Courts are fast making use of technical grounds and traversing of procedural guidelines to dispose of cases without reaching out to

the core of the matters in issue and ascertain the truth to bring justice to the litigants. This tendency is most unfortunate. It could boomerang on the judiciary as well as the existing judicial system."

Appeal from the Judgment of the District Court of Homagama.

Case referred to :

1. Azeez Nee Husaniya Uvais vs. Mrs. P.I. Puniyawathie - 1991 Vol. IV Part I BASL Journal II.

P.A.D. Samarasekera P.C., with Harsha Soza for Plaintiff Appellant.

E.D. Wickramanayaka with Ajantha Cooray for Defendant Respondent.

Cur. adv. vult.

January 19, 2000

WIGNESWARAN, J.

By a deed of Indenture No. 2210 dated 19.01.1967 attested by D.J.B. Tantrimudaly, Notary Public of Gampaha, the parents of the Plaintiff-Appellant entered into an agreement with the Defendant - Respondent in respect of a land called ***Keenagahalanda*** situated in Homagama in extent 43 perches which land belonged to the Plaintiff-Appellant. At the time of the agreement she was a minor aged 17 years. The Defendant-Respondent was to pay Rs. 100/- per month as ground rent to the credit of the said minor Plaintiff-Appellant in respect of the bare land leased out for 15 years from 01.01.1967. The Defendant-Respondent was allowed to erect buildings on the land and use it to exhibit films. When the minor Plaintiff-Appellant attained majority she was to be persuaded to confirm or ratify the said agreement or enter into a fresh agreement with the Defendant-Respondent. If she refused to ratify or confirm or enter into a fresh agreement, then the Defendant-Respondent was to leave the premises within 6 months of such refusal. In such an event even the amount of compensation payable to the Defendant-Respondent was stipulated (i.e. Rs. 30000/-). The Defendant-Respondent was expected immediately after the expiry of the 15 years to remove the buildings erected by him and hand over vacant possession of the land leased out to him.

The Defendant-Respondent entered the land on the strength of the abovesaid agreement and put up a cinema hall on the land in suit called "***Apsara***". Upon attaining majority the Plaintiff-Appellant ratified the lease and had direct transactions with the Defendant-Respondent. (Vide page 166 of the Brief). Upon the end of the 15 years (i.e. on 31.12.1981) the Defendant-Respondent did not hand over the land in suit to the Plaintiff-Appellant. On 26.01.1982 (P2) a notice to quit was sent, though such notice was not necessary.

Then this case was filed on 19.07.1982. After trial the Additional District Judge, Homagama dismissed the Plaintiff's action by judgment dated 08.06.1994. This appeal relates to the said judgment.

The only question that has arisen for determination in this appeal is whether the learned Additional District Judge was correct in holding that by reason of increases time to time in the monthly rentals payable, there were fresh agreements between the parties and thereby whether the Plaintiff-Appellant was precluded from maintaining this action on the basis of the original agreement.

Learned President's Counsel appearing for the Plaintiff-Appellant submitted;

(i) that there was no issue before Court with regard to a fresh agreement and that it was a new position set up by the Defendant-Respondent contrary to the pleadings; and

(ii) that increase of rentals did not result in a new contract on the basis of the decision of the Supreme Court in *Azeez nee Husniya Uvais Vs. Mrs. P.L. Puniyawathie*[1].

Learned Senior Counsel for the Defendant-Respondent has countered;

(i) that the admission of the Plaintiff that there was a fresh agreement was in response to a clear and unambiguous question; and

(ii) that there was no provision in the lease agreement No. 2210 for a variation of the payment of rent and the premises in suit were not rent controlled premises only a bare land having been leased out. Thus the case referred to was materially different from the instant case.

Mr. Wickramanayake went on to argue that since the lease agreement had been superseded, the Plaintiff was not entitled to sue upon the basis of the lease.

These submissions would presently be examined.

When trial started on 23.07.1992 in this case, the following admissions and issues were accepted as per page 163 of the Brief.

Admissions

1. Execution of Lease Bond No. 2210 admitted.
2. At the time of execution that the Plaintiff was a minor, admitted.
3. Receipt of notice to quit dated 26.01.1982 admitted.

Issues

1. Did the lease terminate on 31.12.1981?
2. If so, is the Plaintiff entitled to ejectment as prayed for in the plaint.
3. How much is due to the Plaintiff as damages?
8. In any event since there is no issue raised by the Plaintiff with regard to the confirmation/ratification of the Lease Bond can the Plaintiff continue with this action?
10. If so, can the Plaintif have and maintain this action?

11. (a) Were the lessors on Deed No. 2210 M.K.D.W.S. Senanayake and Yasawathie Senanayake?

(b) If so, can the Plaintiff have and maintain this action?

None of the abovesaid issues referred to a fresh agreement between the Plaintiff and the Defendant. If there was a fresh agreement between the parties the Defendant would have been aware of it and would have raised an issue that the earlier Lease Bond does not bind the parties since a fresh agreement has come into being. He did not do so. All that his pleadings questioned was the right of the Plaintiff to file this action when the parties to Deed No. 2210 were her parents and that the ratification by the Plaintiff was not notarially attested. In other words the legal right of the Plaintiff to have and maintain this action was the crux of the defence set up by the Defendant. He never averred that the Plaintiff had entered into a fresh lease agreement wiht him. The answer filed by the Defendant never referred to such an agreement. (Vide answer at pages 122 to 126 of the Brief). If there was a fresh agreement the Defendant should have known about it. He then would have referred to it in his answer.

The relevant proceedings which gave rise to the submission by Counsel for the Defendant-Respondent that there was a fresh agreement between the parties is as follows:-

Cross examination of Plaintiff at pages 208, 209 and 210 of the Brief.

ප්‍ර - ඉන් පසුව තමා කලින් සඳහන් කල 1980 සැප්තැම්බර් මාසයේ සිට රුපියල් 200 බැගින් බාරගෙන තිබෙනවා ?

උ - ඔව්.

ප්‍ර - එසේ බාරගත්තේ තමා එකඟ වුනා එම කුලිය තමාට විත්තිකරු ගෙවන බවට ?

උ - චෙක්පත් මගින් ගෙවන බවට.

ප්‍ර - ඒ අනුව විත්තිකරු සහ තමා අතර තමා වැඩිවියට පත්වූවාට පසුව ගිවිසුමක් ඇති වුනා කුලිය සම්බන්ධයෙන් ?

උ - ඔව්.

ප්‍ර - කුලී ගෙවීවේ චෙක්පත් මගින්, කුලියට ගිවිසුමක් ඇති වුනා ? මුල් වතාවේ එම ගිවිසුම අනුව රුපියල් 150 යි ?

උ - ඔව්.

ප්‍ර - ඊට පසුව තමා සහ විත්තිකරු අතර ඇති වූ නව ගිවිසුමක් අනුව රුපියල් 175 බවට පත්වුනා ?

උ - ඔව්.

ප්‍ර - ඉන් පසුව 1980 ඔක්තෝම්බර් සිට තමා සහ විත්තිකරුගේ ගිවිසුම අනුව මාසයකට රුපියල් 200 කට එකඟ වුනා ?

උ - ඔව්.

ප්‍ර - ඒ අනුව එම ඉඩමේ විත්තිකරුගේ තත්ත්වය සම්බන්ධයෙන් තමා සහ විත්තිකරු අතර ඒ අවස්ථාවේ දී ගිවිසුමක් ඇති වුනා ?

උ - ඔව්.

ප්‍ර - එසේ ගිවිසුම ඇති වුනේ තමා වැඩිවියට පත්වූවාට පසුව ?

උ - ඔව්.

At this stage the Counsel for the Defendant moved to raise issue No. 12 as follows:-

12.(a) Was a fresh agreement reached between parties after the Plaintiff attained majority?

(b) Has such agreement been admitted by the Plaintiff in her evidence?

(c) If above issues (a) and (b) are answered in the affirmative can the Plaintiff proceed with this action?

Quite rightly this issue was refused by the learned District Judge, Homagama on 04.05.1993. (Vide page 228 of the Brief)

It is relevant to remember in this regard the following matters:-

(i) The Plaintiff in her examination in chief never mentioned about a fresh agreement.

(ii) Even during cross examination it was not the position of the Plaintiff that she asked for more rent and therefore the Defendant paid such amount.

(iii) All questions posed initially at pages 208 and 209 of the Brief in cross examination, related to the acceptance of enhanced rent. This acceptance was explained by the Plaintiff at page 222 of the Brief as follows:-

ප්‍ර - කුලිය රුපියල් 100 ට වැඩි ගණනක් ගෙවන්න පටන් ගත්තේ කොහොම ද?

උ - සුනිල් සිරිවර්ධන මහතා වැඩිකර ගෙව්ව, මම බාරගත්තා.

(iv) The "agreement" (ගිවිසුමක්) referred to in the question at page 209 of the Brief was in respect of the quantum of rent only. It did not relate to an entirely new agreement as such. At most it was only a variation of the terms of an existing contract. If in fact it was a fresh agreement the question arises - what were the other conditions of this fresh agreement; was it in writing or was it oral; did it terminate and germinate every time the Defendant-Respondent sent an enhanced rent etc.

The forwarding by a party to an existing contract of an enhanced rent and the acceptance by the other of such rent need not necessarily be viewed as a fresh agreement. In this case neither was a fresh agreement talked about by the Defendant in his answer nor did the answer given by the Plaintiff in respect of one aspect of an existing contract amount in fact to a fresh agreement.

The learned Additional District Judge, Homagama after the District Judge, Homagama on 04.05.1993 had refused to entertain issue No. 12, had come to her conclusions entirely on a matter based on issue No. 12 which was irrelevant to the case and rejected by Court earlier as irrelevant. The learned Additional District Judge had failed to consider the fact in her judgment dated 08.06.1994 that there was not a word mentioned with regard to a fresh agreement in the Defendant's answer, that the Defendant while giving evidence had changed his defence set out in the answer and in the issues and had referred to a non existing fresh agreement, that the Defendant had made a mountain out of the mole hill of an answer given by the Plaintiff in her cross examination and that the Defendant was not allowed to be cross examined which made the task of the Court even more vulnerable since questions should have been posed by Court itself to find out the truth. Courts are fast making use of technical grounds and traversing of procedural guidelines to dispose of cases without reaching out to the core of the matters in issue and ascertain the truth to bring justice to the litigants. This tendency is most unfortunate. It could boomerang on the judiciary as well as the existing judicial system. Mr. Batty Weerakoon Senior Counsel for the Plaintiff-Appellant seems to have come a little late to Court on 09.12.1993 after the conclusion of the Defendant-Appellant's evidence in chief. Meanwhile since the instructing Attorney-at-Law was unable to cross examine the Defendant-Respondent, an application for postponement was made by him but was refused. Court had then directed written submissions to be tendered on 11.01.1994 without allowing cross examination, according to the petition of appeal filed in this case (Vide page 35 of the Brief). There appears to have been no objections on the part of the Counsel for the Defendant-Respondent to the Plaintiff-Appellant's application for a date to cross examine the Defendant-Respondent. If need be, costs could have been ordered against the Plaintiff-Appellant rather than allow the Defendant-Respondent's patently questionable evidence to stand uncontradicted in the record. When Courts resort to such tough measures with regard to procedure they must remember

that their duties in those circumstances are far greater. The Court should then have itself questioned the Defendant-Respondent to get clarifications as to why his Answer did not refer to a fresh agreement between parties and so on. To smother the Plaintiff-Appellant with the authority of the power of Court and then grant a judgment on grounds not put forward in the issues, savours of arrogance if not partiality. The Court was duty bound to consider the question as to whether the Defendant-Respondent purposely abandoned his defenses as per his answer and put forward a different case merely on an innocent answer given by the Plaintiff-Appellant in her cross examination, since the Defendant-Respondent considered his original defence untenable. The Court was duty bound to consider whether the Defendant-Respondent could in the middle of the trial have enunciated a case materially different to that pleaded by him thus contravening the provisions of section 150 Explanation 2, Civil Procedure Code. The Court was duty bound to have examined the proceedings in this case in its totality to perceive the devious means adopted by the Defendant-Respondent who was expected to hand over the premises in suit by 01.01.1982, to protract and delay this case. Due to the length of time a case takes to conclude, Judges often lose sight of the various vicissitudes the case had gone through. The learned Additional District Judge in this case had failed to consider the fact that the Plaintiff-Appellant was the undisputed owner of the premises in suit and that she was entitled to recover possession of the premises in suit. The learned Judge should have realised the fact that issue No. 12 had earlier been disallowed and that that issue related to the same matter on the basis of which she dismissed the Plaintiff-Appellant's case. She had dismissed the case on the basis of a new position set up by the Defendant-Respondent which position as an issue had been disallowed earlier. The learned Additional District Judge had therefore erred in her findings. The answer given by the Plaintiff-Appellant during her cross examination was certainly not clear and unambiguous that there was in fact a fresh agreement as made out by Mr. Wickramanayake. It only referred to the acceptance of an enhanced rent which at most was a variation of the terms

of the earlier contract which was still in force. This matter will be dealt with under the next submission which deals with the decision in *Azeez nee Husniya Uvais Vs. Mrs. P.L. Puniyawathie* (supra).

It was the contention of Mr. Wickramanayake that there was no provision in the lease agreement No. 2210 for a variation of the payment of rent. If that argument is to be taken to its logical conclusion then the moment an unsolicited additional sum of rent was sent to the Plaintiff-Appellant and she accepted same, ipso facto the written deed of lease would have come to an end. If this was so the Answer of the Defendant-Respondent should have reflected this fact. It did not. A mere deviation with regard to a term in the original contractual document need not negate the whole document unless parties intended to terminate the contract set out therein. The Defendant-Respondent never spoke of such intention on the part of either parties at the time of such deviation or variation.

Whether a premises are rent controlled or not has nothing to do with a simple matter such as this. As stated by Justice Mark Fernando in *Azeez nee Husniya Uvais Vs. Mrs. P.L. Puniyawathie* (supra) "Where there is a subsisting contract of tenancy the variation of one term of that contract does not usually result in a new contract; negotiating an increased rent does not give rise to a new contract but merely result in the variation of one term of the contract."

Negotiation of an increased rent is not possible with regard to rent controlled premises.

The abovesaid observation of Justice Fernando must be deemed to have been made in respect of all premises rent controlled or not. The mere fact that an enhanced rent was sent by the Defendant-Respondent and it was accepted by the Plaintiff-Appellant could not have been considered as the termination of the earlier written contract of lease and the genesis of a fresh oral agreement. At most it was only a variation of one term of the contract still subsisting.

We have no difficulty in coming to the conclusion that the learned Additional District Judge, Homagama erred in her decision and therefore we set aside her judgment dated 08.06.1994. Even though the Defendant-Respondent's evidence-in-chief was not contradicted by cross examination, yet taking into consideration the fact that he came out with evidence unconnected to the defence put forward by him and materially different to the defence put forward by him we deem it necessary to ignore that evidence at least with regard to his inconsistent and opportunistic statements. We are satisfied that the totality of the evidence led was sufficient to grant the prayers prayed for in the amended plaint dated 14.07.1983 and accordingly enter judgment for the Plaintiff-Appellant as prayed for in the abovesaid amended plaint with incurred costs payable in both Courts by the Defendant-Respondent to the Plaintiff-Appellant. Enter decree accordingly.

Registrar of this Court is directed to forward the record without delay to the District Court of Homagama.

TILAKAWARDANE, J. - I agree.

Appeal allowed.