RATNAWEERA
v.
NANDAWATHI FERNANDO AND ANOTHER

COURT OF APPEAL
WIGNESWARAN, J.
C.A. NO. 405/83 (F)
D.C. PANADURA NO. 15691
SEPTEMBER 13, 1996.

Landlord and Tenant – Subletting – Requisites – Section 10 of Rent Act.

Held:

Under section 10 of the Rent Act subletting can be established if three matters are proved:

1. Sole and exclusive possession by the subtenant.

2. Such possession should relate to a defined portion of the premises.

3. Payment of rent in respect of the portion occupied or possessed.

Neither separate occupation nor payment of rent was proved and the occupation of the 2nd defendant-respondent were explained.

APPEAL from judgment of the District Judge of Panadura.

P. A. D. Samarasekera, PC with *S. Gunasekera* and *Parakrama Agalawatte* for 1st defendant-appellant.

N. R. M. Daluwatte, PC with *Raja Bandaranayake* and *Jagath Jayaratne* for plaintiff-respondent.

Cur. adv. vult.

February 25, 1997

C. V. WIGNESWARAN, J.

The plaintiff-respondent instituted this action against the 1st defendant-appellant and 2nd defendant-respondent for ejectment and for recovery of arrears of rent and damages in respect of premises No. 6, Dibbedda Road, Nalluruwa in Panadura.

The case was based on two grounds, viz:

(i) arrears of rent as from 01.12.76 and,
(ii) subletting of a portion of the premises by the 1st defendant-appellant to the 2nd defendant-respondent without written consent being obtained from the plaintiff.

The 2nd defendant-respondent left the premises around the time this action was filed. Thereby the case proceeded against the 1st defendant-appellant only, with permission of court.

Since rents claimed had been deposited by the 1st defendant-appellant with the Urban Council, Panadura, the plaintiff-respondent proceeded to trial only on the ground of subletting.

The plaintiff-respondent's position was that he originally rented out to the 1st defendant-appellant on or about 01.11.1971 the then existing premises at Rs. 65 per month. Thereafter the plaintiff alleged that he constructed an extension around 1973 and that portion together with the original premises was let as one premises on a monthly rental of Rs. 75 as from 01.09.1974 to the 1st defendant-appellant.

The 1st defendant-appellant denied that a new portion was constructed in 1973.

It was the case of the plaintiff-respondent that he saw the 2nd defendant-respondent in occupation of a portion of the premises and he deduced that it was the portion later put up by him and let to the 1st defendant-appellant.

The plaintiff-respondent thereafter made a complaint to the Grama Sevaka and an inquiry was held.

The 1st defendant-appellant took up the position that the 2nd defendant-respondent and his wife stayed temporarily to help them at the time the 1st defendant-appellant's wife gave birth to a child.

The learned District Judge of Panadura by his judgment dated 18.07.83 held in favour of the plaintiff-respondent. It is against that judgment this appeal has been preferred.

The learned President's Counsel appearing for the 1st defendant-appellant has taken up broadly the following matters:

(i) Section 10 of the Rent Act stipulates that to prove subletting three matters must be brought out in evidence, viz:

(a) sole and exclusive possession by the subtenant,
(b) such possession should relate to a defined portion of the premises let, and
(c) that there had been payment of rent in respect of such portion occupied or possessed. In this case neither separate occupation nor payment of any rent had been proved.

(ii) Adequate reasons for the occupation by the 2nd defendant-respondent and his wife had been given and therefore no inference of subletting could arise. Decision reported in 77 NLR page 403 was cited.

(iii) No evidence to support the finding of the learned District Judge appears on the face of the record.

These submissions would now be examined.

Section 10 of the Rent Act, No. 7 of 1972 reads as follows:

"10 (1) For the purposes of this Act, any part of any premises shall be deemed to have been let or sublet to any person, if, and only if, such person is in exclusive occupation, in consideration of the payment of rent, of such part, and such part is a defined and separate part over which the landlord or the tenant, as the case may be, has for the time being relinquished his right of control; and no person shall be deemed to be the tenant or the subtenant of any part of any premises by reason solely of the fact that he is permitted to use a room or rooms in such premises."

There is no doubt that the law expects –

(i) proof of exclusive occupation;

(ii) of a defined and separate part or portion of the premises let;

(iii) for which rent was paid.

The question is whether these ingredients were brought out in evidence in this case. The learned District Judge (at page 66 of the Brief) in his judgment accepted that an additional structure had been constructed. Then he says the 1st defendant-appellant *would have wanted* to have some benefit from this extra structure since he was not rich. Since the 1st defendant-appellant could not afford to keep two persons free of charge at home and feed them the learned Judge surmises that the 1st defendant-appellant *must have* let the newly built structure to the 2nd defendant-respondent. Then he concludes that since the plaintiff came to know about the subletting the 2nd defendant-respondent *might have* left the premises.

Apart from the learned District Judge finding a motive or need to sublet and concluding on the basis of such motive or need, he seems to have not come to a firm conclusion on the evidence led before him that there had in fact been subletting. Since it had been accepted that the 2nd defendant-respondent and his wife were living at the relevant time in the house let to the 1st defendant-appellant, coupling a plausible motive or need to that fact would no doubt have created an immediate temptation in the mind of the Judge to come to the conclusion that there had been subletting. But the law expects much more than mere surmises however plausible they may be. The three ingredients above-mentioned must be brought out in evidence to prove subletting. There was in this case no sufficient proof of *payment* of rent to a *defined* portion of the premises let, over which the 2nd defendant-respondent had sole and *exclusive* possession. The evidence points more to common living in the entire house based on mutual help rather than exclusive possession by the 2nd defendant-respondent of a part of the house. A number of reasons had been given as to why the 1st defendant-appellant called upon the 2nd defendant-respondent and his wife to stay with them. They are –

(i) the burglary that took place in 1977 which made it unsafe for the wife of the 1st defendant-appellant to live alone when the husband was out;

(ii) the birth of a child on 26.04.77 as evidenced by D3;

(iii) the itinerant nature of work carried on by the 1st defendant-appellant that took him away for days from home;

(iv) the need for help to look after 1st defendant-appellant's wife after her confinement.

(v) the 2nd defendant-respondent, a distant relative of the 1st defendant-appellant, falling into difficulties at the relevant time.

It could be asked in retrospect as to why a servant was not employed instead of calling a distant relative with his wife. May be it could have been done. But that does not diminish the plausibility or reasonableness of the decision of the 1st defendant-appellant to bring in the 2nd defendant-respondent and his wife to mutually help each other. When a reasonable explanation was given by the 1st defendant-appellant as to the presence of the 2nd defendant-respondent and his wife, it was incumbent on the part of the learned District Judge to have looked out for other facts which were either in consonance with or contrary to these explanatory facts.

On an examination of the evidence it is found that there were many ancillary facts which seemed to corroborate the explanation given by the 1st defendant-appellant. For example –

(i) the 2nd defendant-respondent's name had not got into the householder's list of the premises in suit;

(ii) all the furniture of the 2nd defendant-respondent had not been transferred to the premises in suit;

(iii) the Grama Sevaka who inspected the premises consequent to a complaint made by the plaintiff-respondent did not speak of any partitioning of the premises or exclusive occupation by the 2nd defendant-respondent.

(iv) the 1st defendant-appellant had told the Grama Sevaka that the 2nd defendant-respondent could be sent out at any time and also that he was a relation of his;

(v) even the document marked P2 which had been written to the plaintiff-respondent by the 2nd defendant-respondent did not mention of any payments of rent but only that 2nd defendant-respondent came to the premises for a short time only at the request of the 1st defendant-appellant.

All these were facts which made it just and reasonable for the learned District Judge to have accepted the 1st defendant-appellant's story.

As opposed to this it is found that the plaintiff-respondent went to the premises in suit only in 1972 and not in 1977 when the alleged subletting had taken place. (vide page 45 of the Brief). At page 44 he said that he was unaware that a child was born to 1st defendant-appellant's wife. He was even unaware that 1st defendant-appellant was married. The question then arises how the plaintiff could have known or seen anything regarding the exclusive occupation of a defined portion by the 2nd defendant-respondent on payment of a rent.

The learned President's Counsel for the plaintiff-respondent had sought to buttress the plaintiff-respondent's case by saying that no question was asked from the plaintiff in cross-examination as to how he saw the 2nd defendant-respondent occupying a portion of the premises. If asked the plaintiff-respondent would have explained, it was argued. But it was plaintiff-respondent's obligation to prove his case in accordance with the law.

Thus the learned Judge should have looked for evidence which made certain that the 2nd defendant-respondent did occupy exclusively an identifiable entity. (vide 54 NLR page 572). There was no evidence to that effect despite the Grama Sevaka visiting the premises in suit.

Clearly the learned District Judge had misdirected himself in coming to his conclusion that the 1st defendant-appellant had sublet the premises in suit to the 2nd defendant-respondent.

The conclusion by the learned District Judge based on surmises and suspicions is not borne out by the evidence.

I therefore set aside the judgment dated 18.07.1983. I also dismiss the plaintiff's case in the District Court of Panadura with taxed costs payable by the plaintiff-respondent to the 1st defendant-appellant both in the original Court as well as in this Court.

Appeal allowed.