THAMBIRAJAH
v.
ABDUL KUDOOS DORAI AND OTHERS

COURT OF APPEAL,
WIJETUNGA, J. AND WIJEYARATNE, J.,
C.A. APPLICATION 1306/87,
D.C. COLOMBO 13479/P,
JANUARY 12, 1990.

Landlord and Tenant – Validity of tenancy where final decree for partition or sale under the Partition Law is entered – Position of sub-tenant – failure to serve notice of appeal on registered Attorney-at-Law – Sections 48 (1), 52(2) and 52 (2)(a) of the Partition Law – Rent Act S. 14 (1).

Held :

Any tenancy whatsoever in any area where the Rent Act, No. 7 of 1972 is in operation even though it is neither a lease at will nor for a period not exceeding one month would not be wiped out by a partition decree or a certificate of sale in a partition action even though such tenancy is not reserved in the interlocutory or final decree in the partition case.

A sub-tenant of premises which are governed by the Rent Act, No 7 of 1972, is entitled to the protection of Section 52 (2)(*b*) of the Partition Law, No 20 of 1977, read with Section 14 (1) of the Rent Act, provided he proves that –

(1) there is a lawful tenancy subsisting between the co-owner and the tenant ;

(2) he is a lawful sub-tenant of such tenant.

A sub-tenant can shelter behind the protection afforded to the tenant (his immediate landlord) if that protection has not ceased to exist even though the aforesaid sections refer only to a tenant and not to a sub-tenant

When the notice of appeal had not been served on registered Attorney-at-Law for respondent but on another Attorney-at-Law, who had appeared instructed by the registered Attorney-at-law, the notice of appeal had no validity and the District Judge could reject the appeal as the notice of appeal is the starting point and the foundation of the appeal procedure.

In such a case relief cannot be granted under Section 759 (2) of the Civil Procedure Code where the omission for complying with mandatory provisions was due to negligence, carelesness or neglect as it would lead to laxity and carelessness on the part of appellants.

Cases referred to :

(1) *Ranasinghe v. Marikar 73 NLR 631*
(2) *Hinniappuhamy v. Kumarasinghe 59 NLR 563*
(3) *Samarakoon v. Van Starrex 71 CLW 25*
(4) *Pararajasekeram v Vijeyaratnam 76 NLR 470*
(5) *Ukku Amma v. Jema 51 NLR 254*
(6) *Gunawardena v. Rajapakse 1 NLR 217*
(7) *Carron v. Fernando 35 NLR 352*
(8) *Isabella Perera Hamine v. Emalia Perera Hamine [1990] 1 Sri LR 8*
(9) *Ibrahim Saibo v. Mansoor 54 NLR 217*
(10) *Brown v. Draper (1944) 1 KB 309*
(11) *Katz v. Reading 1944 CPD 197*
(12) *Thelvandran v. Ramanathan Chettiar [1986] 2 Sri LR 219*
(13) *Jayawardena v. Wanigasekera [1985] 1 Sri LR 125*
(14) *Edward v. De Silva 46 NLR 342*
(15) *Kanakaratne v. De Silva S.C. 6/84 – CA/LA 2/83 – S C. Minutes of 05.06.1985*
(16) *Sumanaratne Bandara v Jayaratne C.A. Rev Application No. 1025/85 C A. Minutes of 26.06.1987*
(17) *Kiri Banda v. Ukku Banda [1986] 2 CALR 191*

APPLICATION in revision of order of the District Judge of Colombo

S. Mahenthiran for petitioner.

A A M. Marleen with *K. R. M Abdul Raheem* for plaintiff - respondent. Defendant - respondents absent and unrepresented

Cur. adv. vult.

September 06, 1990.

WIJEYARATNE, J.

In this case the plaintiff-respondent filed a partition action in respect of land and premises bearing assessment numbers 26/1, 26/2, 26/2A and 26/3, situated at Lilly Street, Slave Island, Colombo 2. The other two co-owners were the 2nd and 3rd respondents in this case. The final decree was entered on 10.07.1970, whereby the plaintiff-respondent was declared entitled to Lot 3 (in extent 10.51 perches) depicted in Final Partition Plan No. 235 dated 10.10.1977 made by Licensed Surveyor, L. S. Pitigala.

On 20.06.1980 the plaintiff-respondent made an application under Section 52(1) of the Partition Law, No. 21 of 1977, (hereinafter referred to as the Partition Law), seeking an order for the delivery of possession of the said Lot 3. The petitioner (M. Thambirajah) was asked to show cause why possession of the said Lot should not be granted to the plaintiff-respondent. The petitoner thereupon filed objections by petition and affidavit wherein he stated –

(1) that he is in lawful occupation of premises No. 26/1 (corresponding to Lot 3) Lilly Street, Colombo 2, as a sub-tenant of Mrs. Jane Nona Perera ;

(2) that he was entitled to the protection of the Rent Act, No. 7 of 1972 (hereinafter referred to as the Rent Act) ;

(3) that he objected to the handing over of possession of these premises to the plaintiff-respondent in violation of his rights under the said Rent Act.

In consequence, an inquiry was held by the learned District Judge. On behalf of the petitioner he himself and Suneetha Perera (daughter of Romiel Perera and Jane Nona Perera) gave evidence. Documents D1 to D16 were also marked in evidence.

On behalf of the plaintiff-respondent the plaintiff-respondent himself gave evidence.

The position of the petitioner was that Romiel Perera was a tenant under the 2nd respondent (Mohamed Farook Dorai) and on the death of the former his widow Jane Nona Perera became the tenant and later their daughter Suneetha Perera became the tenant and the petitioner was a sub-tenant under the last named.

The learned District Judge by his order dated 18.11.1986 held that P10, P11 and P12 established that Jane Nona Perera was a tenant, but in the absence of rent receipts he could not accept the position that Suneetha Perera was a tenant and the petitioner was a sub-tenant.

The learned District Judge has held that there is no proof that the petitioner paid rent to Suneetha Perera. He disallowed the petitioner's claim and made order that the plaintiff-respondent is entitled to obtain possession of these premises.

Being dissatisfied, the petitioner filed a notice of appeal. Before the appeal could be perfected on the motion of the Attorney-at-Law for the plaintiff-respondent, the learned District Judge had rejected the notice of appeal by his order dated 4.12.1986 (as there was a defect in the service of the said notice of appeal, in that the notice of appeal had not been served on the registered Attorney-at-Law but on another Attorney-at-Law who had appeared instructed by the registered Attorney-at-Law).

The succeeding District Judge has made order accepting the notice of appeal and thereafter the appeal was perfected.

The petitioner had also made an application under Section 765 of the Civil Procedure Code for an appeal notwithstanding the lapse of time. When the matter was taken up before this court under No. C.A. 106/87 on 2.11.1987, the learned Counsel for the petitioner had moved to withdraw this application and it was accordingly dismissed. It is stated that this application was withdrawn in this court by the learned Counsel for the petitioner on a mistaken notion of the law.

The petitioner has filed this present application in revision on 9.12.1987 to revise the aforesaid orders of the District Court dated 18.11.1986 and 4.12.1986.

The plaintiff-respondent has filed his objections dated 26.2.1988 along with an affidavit. The plaintiff-respondent has set out various grounds and said that the petitioner's application for relief should be rejected.

The main grounds of objections are –

(1) that there is no tenancy which could be protected under the Partition Law or the Rent Act ;

(2) that these premises are not "residential premises" within the meaning of Section 48 of the Rent Act ;

(3) that the subject-matter relates to a bare land and not "residential premises" within the meaning of Section 48 of the Rent Act ;

(4) that in any event this application cannot be maintained in view of the order dated 2.11.1987 made by this Court in Application No. C.A. 106/87.

At the hearing submissions were made by Mr. S. Mahenthiran for the petitioner that the order of the learned District Judge dated 4.12.1986 rejecting the notice of appeal was void and of no effect in law and cited various authorities in support. He also argued that owing to a misapprehension of the legal position, when the application to appeal notwithstanding the lapse of time came up for hearing on 2.11.1987, the said application was withdrawn and in consequence the application was dismissed. It is not necessary for this Court to decide on the validity of these submissions for the purpose of deciding this application.

The question before this Court is whether this is a fit case for this Court to exercise its extraordinary powers of revision in favour of the petitioner on the footing that he has a right to remain in occupation of these premises.

The law applicable is contained in Sections 48 (1) and 52 (2) and 52 (2) (*a*) of the Partition Law and Section 14 (1) of the Rent Act, where the rights of a tenant are protected even after a final decree of partition.

The sole question is whether Suneetha Perera is a tenant under the plaintiff-respondent or the defendants-respondents and if so whether the petitioner is a sub-tenant of hers and entitled to the protection of the Rent Act.

The learned Counsel for the plaintiff-respondent, Mr. Marleen, submitted that a sub-tenant is not protected by the aforesaid Sections.

I shall now consider the legal position of a sub-tenant. Section 48 (1) of the Partition Law provides that the right, share or interest awarded by any interlocutory or final decree in a partition action shall be free from all encumbrances whatsoever than those specified in the decree. The word "encumbrance" has been defined to mean any mortgage, lease, usufruct, servitude, life interest, trust or any interest whatsoever howsoever arising except a constructive trust, a lease at will or for a period not exceeding one month.

It is significant that Section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840, lays down that deeds affecting immovable property, other than a lease at will, or for any period not exceeding one month are to be executed before a Notary Public and two witnesses (except for any contract or agreement for the cultivation of paddy lands or chena lands for any period not exceeding twelve months if the consideration shall be that the cultivator is to give the land owner any share of the crop or produce).

Section 48 (1) of the Partition Act, No. 16 of 1951 contains provisions very similar to Section 48 (1) of the Partition Law.

In the case of *Ranasinghe v. Marikar*[1] in a partition case filed under the Partition Act, No. 16 of 1951 it was decided by a bench of five Judges of the Supreme Court that the rights of a monthly tenant are unaffected whether those rights are specified in the decree or not.

At the time of this decision the Rent Restriction Act, No. 29 of 1948, was in operation and this gave statutory protection to categories of tenants in the areas in which the Act was in operation. This Act was repealed and replaced by the Rent Act, which came into operation from 1st March, 1972 and gave similar protection in areas in which it was in operation. However, there was no provision in the Rent Restriction Act, No. 29 of 1948, which corresponded to Section 14 (1) of the Rent Act (which will be referred to later).

Section 48 (2) of the Partition Law goes further than the Partition Act, No. 16 of 1951 by specifically providing that a certificate of sale (after the sale is conducted and confirmed) is conclusive evidence of the purchaser's title to the land or lot free from all encumbrances whatsoever except a servitude which is expressly specified in the interlocutory decree and a lease at will or for a period not exceeding one month.

Thus it is seen that a lease at will or for a period not exceeding one month is not wiped out under a partition decree or by certificate of sale.

An agreement that the lease shall be at the will of the landlord is a lease at will or *precarium* (Voet 19.2.9).

The landlord can terminate such a lease at any time.

A tenancy at will terminates *ipso jure* on the death of the landlord.

A monthly lease for a period not exceeding one month is where the lease runs from month to month. The essence of such a tenancy is that it continues for successive periods until it is terminated by notice given by either party. In the absence of an agreement or custom as to the length of the notice, reasonable time in the case of monthly tenancy is one month and the notice of termination must be given so as to expire at the end of a monthly period, for a monthly lease runs from month to month and not for broken periods.

(Wille on Landlord and Tenant is South Africa, 1948 (4th Edition) page 42).

No particular formality is required to create such a lease.

Though the earlier view taken by the Courts of this country was that informal leases (not notarially executed for a period in excess of one month) could be regarded as being from month to month, more recent decisions are to the effect that they are null and void.

(Law of Contracts by Weeramantry, Vol. I, page 167; *Hinniappuhamy v. Kumarasinghe*[2], *Samarakoon v. Van Starrex*[3], *Parajasekeram v. Vijeyaratnam*[4]).

However, such a lease could be used for purely evidentiary purposes, for example, to establish leave and licence or to support a claim for compensation for improvements.

Under our law, if a lease is for a period exceeding one month it should be notarially executed and it is regarded as giving a species of ownership in land. (*Ukku Amma v. Jema*[5].)

A notarial lease is regarded as a *pro tanto* alienation (*Gunawardena v. Rajapakse*[6], and *Carron v. Fernando*[7].

It is very probably for the reason that a lease at will or a lease not exceeding one month need not be notarially executed that they are exempted from "encumbrances" within the meaning of Section 48(1) of the Partition Act, No. 16 of 1951, and Section 48(1) of the Partition Law.

The Partition Law is applicable to the whole of this country while the Rent Act is applicable only to those areas in which it has been brought into operation by law. In the case of a person who is declared entitled to a land under the final decree or who has purchased a land at a sale under

the Partition Law, he can apply under Section 52(1) of the said Law for an order for delivery of possession. Section 52(2)(*a*) provides that where the applicant seeks to evict any person in occupation of a land or a house standing on the land as a tenant for a period not exceeding one month, **who is liable to be ejected,** such application shall be by petition to which such person in occupation shall be made the respondent.

Thereafter Section 52(2)(*b*) provides that if the court determines that the respondent entered into occupation **prior to the date of the final decree of the certificate of sale** and **is entitled to continue in occupation of the house as tenant under the applicant,** the Court shall dismiss the petition ; otherwise the Court shall allow the application and direct that an order for delivery of possession be granted.

In the recent case of *Isabella Perera Hamine v. Emalia Perera Hamine*[8] it was held that the failure to notice and hear the respondent under Section 52(*a*) and (*b*) will render the order for possession void and the Court has inherent power to restore a tenant to possession.

If the land or the house is situated in an area where the Rent Act is not in operation, then the common law will apply. The protection of the Rent Act is not available. In this event, if there is an existing tenancy, it could be terminated by a valid notice (usually of one month's duration) and the tenant is not entitled to remain in occupation.

If the land or house is situated in an area where the Rent Act is in operation, then, in addition to Section 52(2)(*a*) and (*b*) of the Partition Law, Section 14(1) of the Rent Act too becomes applicable.

Section 14(1) of the Rent Act provides that, notwithstanding anything in any other law, the tenant of any residential premises which is purchased or which is allotted to a co-owner under a partition decree shall be deemed to be the tenant of such purchaser or co-owner.

In view of the fact that Section 14(1) begins with the words "Notwithstanding anything in any other law", it would appear that any tenancy whatsoever in any area where the Rent Act is in operation and where the premises are governed by the Rent Act, even though it is neither a lease at will nor for a period not exceeding one month, would not be wiped out by a decree for partition or a certificate of sale, **even though such tenancy is not expressly reserved in the interlocutory or**

final decree in the partition case. That this is so is confirmed by the provisions of Section 52(2)(*b*) of the Partition Law, where the Court is required to inquire into the question whether a tenant is entitled to continue in occupation. At that inquiry the tenant can plead the protection of the Rent Act.

The subject - matter of this action is situated within the Municipal limits of Colombo and hence is governed by the Rent Act.

The learned Counsel for the plaintiff-respondent has taken up the position that a sub-tenant is not given protection either under Section 14(1) of the Rent Act or under Section 52 (2) (*a*) and (*b*) of the Partition Law.

Hence the legal position of a sub-tenant in this context has to be considered. In the case of *Ibrahim Saibo v. Mansoor*[9] it was held by a bench of five judges of the Supreme Court that the statutory protection given by the Rent Restriction Act, No. 29 of 1948, to a tenant can always be relied on by the sub-tenant. Gratiaen, J., stated as follows in the said case at page 224 :–

> "The nature of the protection afforded by Rent Restriction Act to a sub-tenant must now be considered. This Act contains provisions regulating the lights and liabilities of a landlord and his tenant *inter se* and has no direct application to a sub-tenant *vis-a-vis* the head-landlord. It was held by Lord Greene M. R., in delivering the judgment of the Court of Appeal in the case of *Brown v. Draper*[10] which dealt with the case of a licensee of a tenant that the licensee 'cannot in her own right claim the protection of the Acts.' That proposition is equally true of our Rent Restriction Act and what is stated about a licensee is applicable equally to a sub-tenant. But a sub-tenant can shelter behind the protection afforded to the tenant (his immediate landlord) is that protection has not ceased to exist."

Conversely in the South African case of *Katz v. Reading*[11] Sutton, J., stated, "A sub-tenant cannot remain in occupation after the expiration of the main tenancy and the landlord is therefore entitled to an order of ejectment against the sub-tenant".

It is only subletting without the prior consent in writing of the landlord after the date of operation of the Rent Act (namely 1st March, 1972) which provides the ground for ejectment.

Thus there could be cases of subletting with the written consent of the landlord. Thus it is seen there are certain kinds of subletting which are perfectly lawful.

In the case of *Theivandran v. Ramanathan Chettiar*[12] in a *rei-vindicatio* action filed by a landlord it was held that the occupation by a sub-tenant or a licensee of the tenant is not an unlawful occuption.

As to whether the subletting is unlawful or illegal depends on the facts and circumstances of each case.

Section 48 of the Rent Act defines "landlord" as including any tenant who lets the premises or any part thereof to any sub-tenant. Similar provision is found in Section 10(8) of the Rent Act.

I am of the view therefore that a sub-tenant is entitled to the protection of Section 52(2)(*a*) and (*b*) of the Partition Law read with Section 14(1) of the Rent Act, provided he proves that the tenant is entitled to such protection and he himself proves that he is a lawful sub-tenant. In other words, the sub-tenant can shelter behind the protection of the tenant though the aforesaid sections of the Partition Law and the Rent Act refer to a tenant and not a sub-tenant.

In other words, a sub-tenant must prove that –

(*a*) there is a lawful tenancy subsisting between the co-owner and the tenant ;
(*b*) that he is a lawful sub-tenant of such tenant.

Next the question arises in this case before us, whether the petitioner has proved a valid subsisting tenancy between the 2nd respondent (Mohamed Farook Dorai) and Suneetha Perera and a valid sub-tenancy between Suneetha Perera and the Petitioner.

For this purpose I have examined the evidence in the case. Though Suneetha Perera has said in her evidence that she has rent receipts issued by the 2nd respondent, not a single rent receipt was produced in evidence. As laid down in the case of *Jayawardena v. Wanigasekera*[13] the best test for establishing a tenancy is proof of payment of rent for which the best evidence is the production of the rent receipts (unless the landlord refused to issue receipts). Here Suneetha Perera says rent receipts were issued, but none were produced in evidence.

Suneetha Perera at one point specifically says that she did not give the premises on rent to the petitioner. She goes on to say that when her mother requires money she gets it from Thambirajah (the petitioner). There is no evidence of payment of a fixed ascertainable rent.

The petitioner says there is a garage in the premises and he works as a tinker there. He says that he pays a portion of the profits as rent. He says he pays a sum of Rs. 200 or Rs. 250 per month.

The evidence is insufficient to establish a valid tenancy or a sub-tenancy among these parties though there may have been a tenancy with Jane Nona Perera.

The learned Additional District Judge has by his order dated 18.11.86 rejected the claim of the petitioner after analysing the evidence. There is no reason to interfere with that order, which is hereby affirmed.

Mr. S. Mahenthiran for the petitioner also submitted that the order dated 4.12.1986 rejecting the notice of appeal by the learned District Judge was bad in law. He submitted that the learned District Judge had no jurisdiction to reject the said notice of appeal, but it was his duty to forward the same to the higher court. He cited several decided cases including those of *Edward v. de Silva*[14] and *Kanakaratne v. de Silva*[15] and argued that it was the duty of the District Judge to have forwarded the appeal to this Court and also he submitted that in any event relief could be granted by this Court under Section 759 (2) of the Civil Procedure Code.

I have considered these submissions. I cannot accept the submission that the notice of appeal once accepted cannot be rejected.

Section 754 (4) of the Civil Procedure Code states –

"The notice of appeal shall be presented to the Court of first instance for this purpose by the party appellant or his registered attorney within a period of fourteen days from the date when the decree or order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of public holidays, and the Court to which the notice is so presented shall receive it and deal with it as hereinafter provided. If such conditions are not fulfilled, the Court shall refuse to receive it."

This means that the notice of appeal should be dealt with as set out in the succeeding section.

Section 755 (1) sets out the particulars which should be contained in the notice of appeal.

Section 755 (2) (*b*) lays down that the notice of appeal shall be accompanied by proof of service, on the respondent or on his registered attorney, of a copy of the notice of appeal, in the form of a written acknowledgment of the receipt of such notice or the registered postal receipt in proof of such service.

Thus it is seen that one of the imperative requirements of Section 755 (2) (*b*) is that a copy of the notice of appeal should be served on the registered Attorney-at-Law of the respondent. This has not been done in this case.

The purpose of this requirement is to appraise the registered Attorney-at-Law of the other party (the respondent) that an appeal is being filed and that the first step is being taken by tendering the notice of appeal. By the failure to serve a copy of the notice of appeal on the registered Attorney-at-Law for the plaintiff-respondent, neither he nor his client are aware that an appeal is being filed.

There was no valid notice of appeal as a copy of the notice was not served on the registered Attorney-at-Law for the plaintiff-respondent, which is a fundamental requirement. Therefore the learned District Judge has jurisdiction to reject the notice of appeal, which had no validity.

In this respect I follow the judgment in *Sumanaratne Bandara v. Jayaratne*[16] where it was held that where the notice of appeal was not duly stamped, the District Judge could reject the notice of appeal.

Section 759 (2) provides that in the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the relevant sections (other than the provision specifying the period within which any act or thing is to be done), the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms that it may deem just.

In the case of *Kiri Banda v. Ukku Banda*[17] where it was contended that where there has been a mistake, omission or defect on the part of the appellant in complying with the provisions of these sections, this Court should grant relief if it should be of opinion that the respondent has not been materially prejudiced, P.R.P. Perera, J., stated at page 194.

> "In my view, if this construction sought to be placed by learned Counsel of Sections 759 (2) is accepted, even where such failure is occasioned by gross negligence or carelessness or neglect on the defaulting party or his registered Attorney, it would result in such conduct being condoned by the Court. Further it would render nugatory express mandatory provisions of procedure. I regret I am unable to agree with these submissions."

In my view these observations apply with equal force to the facts of this case. To give relief under Section 759 (2) would lead to laxity and carelessness on the part of appellants.

In any event where the notice of appeal (which is the starting point and the foundation of the appeal procedure) is void, as in this case, it is not possible to give relief under Section 759 (2) of the Civil Procedure Code.

The order of the learned District Judge dated 4.12.1986 rejecting the notice of appeal is hereby affirmed.

Accordingly the application in revision is dismissed with costs payable by the petitioner to the plaintiff-respondent.

The plaintiff-respondent is entitled to an order for delivery of possession in terms of Section 52 (2) (*b*) of the Partition Law and the order made by this Court on 11.12.1987 restraining the respondents from dealing with the property is removed forthwith.

Wijetunge, J. – I agree.

Application dismissed.