PIRAGALATHAN
v
SHANMUGAM

COURT OF APPEAL
SALAM, J.
CA 235/2000
DC BATTICALOA 284/E/97
MAY 25, 2006

Rent Act 7 of 1972 as amended by Act 12 of 1980 – 912 – Reasonable requirement Section 22(2) (bb), section 22(2) (ii)- One year's notice— Is it mandatory – Could this be split? – Notice to quit a condition precedent – Purchase of property over the Head of the tenant – Reasonable requirement – Is it available? – Fresh issues altering scope of action – Permissibility ? – Blowing hot and cold? – Civil Procedure Code section 46 (2) 1. Action barred by positive Rule of Law ? – Can the plaint be rejected later?

The plaintiff-respondent sued the defendant-appellant for ejectment from the premises in question on the ground of reasonable requirement – after giving him notice of termination of tenancy of 6 months. The District Court after granting the reliefs prayed for by the plaintiff went on to hold that the writ of possession should be deferred by 6 months, to ensure that, no prejudice is caused to the defendant. The position of the defendant was that the length of notice given is inadequate in law to file an ejectment suit under section 22 (6) – it should be one year

Held:

(1) In terms of section 22 (6), if the premises is required by the landlord on the ground of reasonable requirement either for himself or for any member of his family, then one years notice in writing of the termination of the tenancy should be given by the landlord to his tenant.

(2) This being a condition precedent, to the institution of legal proceedings, has to be complied strictly, prior to the institution of an action. Failure to do so, undeniably renders the purported action of the landlord, a mere futile exercise.

(3) The pleadings and evidence without any ambiguities point to the fact that the landlord has purchased the property, subsequent to the specified date over the head of the tenant- thus the plaintiff cannot maintain the action.

Held further

(4) If the suggested issues are permitted, it would not only radically alter the entire basis of the plaintiff's action, but place the defendant-appellant at a remarkably disadvantageous position, causing irreparable loss and immense prejudice to his case.

(5) Having come to Court on the basis that the provisions of the Rent Act would apply to the premises in suit, the plaintiff cannot be allowed to rescile from that position and take up an entirely different position. The doctrine of approbate and reprobate forbids the plaintiff-respondent from being allowed to take up the position that the premises in question is excepted from the operation of the Rent Act.

Per Abdul Salam, J.

"Failure on the part of the landlord to give the tenant proper notice to quit, would disentitle the landlord from maintaining an action for section 46(2)(1) of the Civil Procedure Code provides that when the action appears from the statement in the plaint to be barred by any positive rule of law, the plaint shall be rejected".

(6) Failure of the Court to reject a plaint at the time of presentation, where the cause of action is barred by a positive rule of law does not prevent the Court from rejecting the plaint later when the defect is subsequently brought to its notice – nor is the defendant estopped by the earlier acceptance of the plaint from seeking the rejection of the later.

APPEAL from the judgment of the District Court of Batticaloa

Case referred to:

1. *Hilmy* v *De Alwis* – 1980 – 2 Sri LR 207
2. *S. Ratnam* v *S.M.K. Dheen* – 70 NLR 21
3. *Divisional Forest Officer* v. *Sirisena* – 1990 – 1 Sri LR 44
4. *Kandasamy* v *Gnanasekeram* – SC 16.6.1983; SC App 60/82
5. *Sidebothom* v *Holland* –1895 – 1 QB 378, 383

S. Mandaleswaran with *P. Peramunagama* for defendant-appellant.
Faiz Musthapha PC with *Thushani Machado* for plaintiff-respondent.

Cur.adv.vult

April 30, 2007

ABDUL SALAM, J.

The plaintiff sued the defendant, his tenant, for ejectment from the residential premises in suit, (hereinafter at times referred to as "premises") on the ground of reasonable requirement. It was admitted that the premises is governed by the Rent Act and the plaintiff had purchased it while the defendant was in occupation as a tenant. The learned District Judge held that the plaintiff reasonably required the premises for his occupation, within the meaning of the Provisions of Rent Act No. 7 of 1972 and gave judgment for the plaintiff, to eject the defendant.

As regards the notice of termination of tenancy, which is considered to be a pre-requisite under the Act, the learned District Judge arrived at the finding that the plaintiff should have given notice of termination of tenancy of one year. However, he refrained from ruling that the said notice which extended to a period of 6 months, as being void in law, although he was persistently invited by the defendant to do so. Conversely, the learned trial judge held that the writ of possession should be deferred by 6 months, presumably to ensure that no prejudice is caused to the defendant- appellant by reason of the defective notice, relating to the termination of tenancy which fell short of 6 months of the required period as contemplated by section 22 (6). The present appeal has been preferred by the defendant-appellant against this judgment.

It is common ground that the plaintiff respondent by notice dated 30/9/1996, sought to terminate the tenancy upon the lapse of six months, on the ground that the premises was reasonably required by him, for his occupation. The defendant in his answer took up the position *inter alia*, that the said length of notice is inadequate in law to file an ejectment suit against him on the ground stated therein. One of the issues that came up for determination before the learned District Judge was the propriety of the notice of the termination of tenancy. The issue recorded at the commencement of the trial, pertaining to the notice of termination of tenancy, included the following.

1. Did the plaintiff by his letter dated 30/9/1996 terminate the said tenancy as the premises described in the schedule to the plaint were required for its own use and occupation?

2. If issue No: 1 is answered in the affirmative, is the defendant in unlawful possession of the said premises from 1/4/97, paying damages at Rupees 1000/- per month to the plaintiff?
3. If the issues No: 1 and 2 are answered in the affirmative, is the plaintiff entitled for judgment as prayed for in the plaint?
4. Does the notice of the plaintiff dated 30/9/1996 conform to law?
5. If issue No: 4 is answered in the negative, can the plaintiff maintain his action?

The learned District Judge answered the above issues in the following manner.

1. Yes.
2. The defendant is in unlawful possession.
3. Only prayer (a) of the plaint is allowed.
4. The period of notice required to terminate the tenancy was one year but only six months notice of termination has been given.
5. According to the answer given to issue No. 4, the issue of writ of possession will be deferred by six months.

As far as the present appeal is concerned, the factual existence of the reasonable requirement of the respondent, to repossess the rented premises was not seriously disputed. Consequently, the findings of the learned District Judge, relating to the comparative need of the landlord to repossess the rented premises, as opposed to the necessity of the tenant, to continue with his possession of the same, need not be addressed. However, it will be necessary to clear up one preliminary matter, in respect of which arguments were advanced at some length by the learned Counsel appearing for both sides. It relates to the question as to whether a landlord who purports to send out a notice to a tenant terminating the tenancy, which falls short of the required period, (contemplated by section 22(6) of the Act, as amended by section12 of Act No. 55 of 1980) can have and maintain an action, successfully for ejectment of the tenant on the ground that the premises is reasonably required for his occupation.

The question that the standard rent of the premises (as determined under section 4) and also as to whether the said

premises exceeds the relevant annual value, were never disputed at the trial. As a matter of fact, the trial proceeded on the tacit admission that the provisions of the Rent Act, were applicable to the premises in question and that the contract of tenancy was governed by the Act. This is quite clear from the averment contained in the plaint and the unqualified admission made in the answer. (paragraphs 3 of the plaint and 5 of the answer).

Arising from the above the learned trial judge, categorically held that the subject matter of the action is governed by the provisions of the Rent Act. He also proceeded to deliver his judgment, on the premise that the standard rent of the premises, is above Rs 100/-. It is clear from the record that the plaintiff respondent has not come to Court in ejectment of the tenant on the ground that he is the owner of a single residential premises as is contemplated by section 22(2)(bb) of the Rent Act. In other words the action in ejectment is based on section 22(2) (ii) of the Rent Act. In terms of section 22 (6) of the Rent Act, the nature of the written notice required to be given to the tenant of such premises should extend to a period of one year, as opposed to the proceedings in ejectment of premises let to a tenant, whether before or after the date of commencement of the Rent Act, on the ground of reasonable requirement of the premises for the occupation as a residence of the landlord or any member of his family, IF SUCH LANDLORD BE THE OWNER OF NOT MORE THAN ONE RESIDENTIAL PREMISES. section 22 (2)bb. (emphasis added). Hence, the learned District Judge has had no mis-apprehension as to the application of the relevant law, when he came to the conclusion that the nature of the notice required to terminate the tenancy of the defendant, was one that should extend to a year.

Despite the finding that one year's notice of termination of tenancy was imperative, to institute proceedings against the defendant, the learned District Judge held that the action was nevertheless maintainable, when instituted after notice of six months, as was admittedly dispatched to the defendant by the plaintiff. This line of reasoning presumably appears to be the out come of the approach adopted by the learned trial judge to regularize the patently defective notice of termination of tenancy.

The learned trial Judge has been greatly influenced by the unreasonable attitude of the defendant's failure to give up the

tenancy, despite the fact that he owned two residential premises in the same vicinity, of which he has disposed of one for valuable consideration, subsequent to his receiving the notice to quit. Motivated by his enthusiasm to meet out justice to both, the learned trial judge has disregarded the patent defect in the said notice and went on to defer the writ of possession by six months. This seems to be the solution, Court was able to find, to make good the damage caused by the defective notice of termination of tenancy. The attempt of the learned judge, to regularize the notice in question has had the outcome of the tenant being compelled to receive, notice to quit in piecemeal, in that 6 months notice by the Landlord prior to the institution of the action and yet a similar term of notice by Court, simultaneously with the pronouncement of the judgment. This has been done ensure that the defendant factually had one year notice, before he is forced out of the premises. Such a notice, in my judgment invariably lacks coherence and hardly be said to constitute a proper notice. In short the notice contemplated in this respect, as far as the length of it is concerned, should be continuous and indivisible. It lacks the essential characteristic of a *notice to quit*, (emphasis added) no sooner the required period is identified as divisible and interruptible.

It is urged on behalf of the defendant appellant that the action of the plaintiff-respondent was not maintainable in law, without a proper notice of termination of tenancy. Such a notice according to the defendant-appellant should stretch out for a period of one year at least, so as to enable the tenant to find alternative accommodation, before he elects to face the consequences of being dragged into Court. Such a notice has the effect of extending a grace period of one full year to the tenant to find alternative accommodation, with a view to avoid litigation.

The learned Counsel of the defendant-appellant has submitted that the notice to quit, unlike an agreement, represents a unilateral act by the landlord without involving the tenant to consent to it and therefore must be technically perfect as one man's act terminates another man's right. I am unable disagree with this contention.

It is interesting to note the several type of notices required to be given to a tenant, prior to the institution of an action under the Rent Act. The length of notice required to be given varies, depending on

the ground on which the tenancy is terminated and the category in to which the rented premises falls under section 22. As far as an action in ejectment from a residential premises, on the ground of reasonable requirement is concerned, the length of notice required to be given to the tenant, terminating the tenancy, is determined *inter alia* on the following considerations.

(A) Standard rent (determined under section 4)

(B) Date on which the tenancy agreement commenced and

(C) In certain type of residential premises based on whether the landlord is the owner of a single residential premises.

As far as the instant action is concerned, it is section 22 (6) read with 22 (2) (b) of the Rent Act, which determines the length of notice required to terminate the tenancy. As has been correctly held by the learned District Judge, the length of notice required to be given to the tenant in this connection, should extend to a year. Admittedly, the tenant has been given six months notice of the purported termination of tenancy. In terms of section 22 (6), notwithstanding anything in any other law a landlord of any premises referred to in section 22 (2) [save and except when he is the owner of not more than one residential premises] shall not be entitled to institute any action or proceedings for the ejectment of the tenant of such premises, on the ground that such premises is required for occupation as residence for himself or any member of his family, if the Landlord has not given to the tenant of such premises one year's notice in writing of the termination of tenancy. In terms of the aforesaid section, irrespective of the commencement of the date of tenancy, if the landlord is the owner of a single residential premises, perhaps in recognition of the urgent need of the landlord to recover possession of his property, it is laid down that six month's notice of termination of tenancy, would suffice for the institution of proceedings in ejectment.

Mr. Mandaleswaran has submitted on behalf of the defendant-appellant that there is no proper notice to quit and as a result the condition precedent to the institution of the action has not been satisfied by the plaintiff respondent. In the case of *Hilmy* v *De Alwis*[1] cited by the learned District judge, it was held that notice to quit is a condition precedent to the filing of an action. In that case Victor

Perera, J. delivering the judgment of the Supreme Court held that Section 22 (6) had altered the law by providing that if the premises is required by the landlord on the ground of reasonable requirement either for himself or any member of his family, then one year's notice in writing of the termination of tenancy shall be given by the landlord to the tenant. This new provision thus gave the tenant a period of one year to find out alternative accommodation and was a condition precedent to the institution of the action. Emphasizing the significance of one year's notice, the Supreme Court further observed that the requirement of one year's notice, relieved to some extent, a burden that may have been laid on a landlord.

Section 22 (6) of the Rent Act is quite clear on this point. The manner in which this section has been couched, leaves no doubt that no landlord of any premises referred to therein, shall be entitled to institute any action or proceedings for the ejectment of the tenant of such premises, on the grounds referred to therein, unless one year's notice has been given in writing of the termination of the tenancy and during the said period of one year the tenant has failed to hand over vacant possession of the rented premises. This being a condition precedent to the institution of legal proceedings, has to be complied strictly, prior to the institution of an action. Failure to do so, in my opinion undeniably renders the purported action of the landlord, a mere futile exercise.

In the case of *S.Ratnam* v *S.M.K Dheen*(2) it was held that the failure on the part of the landlord to give the tenant proper notice to quit, would disentitle the landlord from maintaining an action, for section 46(2) (i) of the Civil Procedure Code provides that when the action appears from the statement in the plaint to be barred by any positive rule of law, the plaint shall be rejected. Since the defendant-appellant has failed to advert the learned District Judge to the prohibition against the maintainability of the action, when it is barred by positive rule of law, to be precise, without proper notice of termination of tenancy, the court has failed to take such a step under section 46 (2) (i).

In the case of *Divisional Forest Officer* v *Sirisena*(3) it was held that under section 33 (1) of the Forest Ordinance a person whose claim has been rejected under section 32 may within one month from the date of the rejection institute a suit to recover possession of the timber claimed. When such a suit was filed after the lapse of one

month and was therefore barred by a positive rule of law, it was held that it should have been rejected as provided in section 46 (2) (i) of the Civil Procedure Code.

In dealing with the omission on the part of the judge to reject the plaint at the inception, it was stated by Wijetunga, J. in the said case that the failure of the Court to reject a plaint at the time of presentation, where the cause of action is barred by a positive rule of law does not prevent the Court from rejecting the plaint later when the defect is subsequently brought to its notice. Nor is the defendant estopped by the earlier acceptance of the plaint from seeking the rejection of the plaint later. In passing it must be mentioned that if the original Court had recourse to section 46 (2)(i) and rejected the plaint, the plaintiff-respondent in actual fact would have gained in the long run, for such a rejection shall not of it's own force preclude him from presenting a fresh plaint in respect of the same cause of action, provided the defective notice is regularized.

Mr. Mandaleswaran further submitted that conduct of the court, in stepping down from its high pedestal, in acting as landlord to cover the shortfall of six months, by staying writ cannot legally be sanctioned. Taking in to consideration the several legal authorities on the matter and the clear wordings of section 22 (6) of the Rent Act, I find it difficult to justify the step taken by the learned District Judge to keep alive a notice which is of no force or avail in law. In the circumstances, I am of the view that the learned District Judge should have answered issue No. 4 in the negative and 5 in favour of the defendant-appellant.

In any event, the pleadings and the proceedings in the case, amply bare out, that the premises in question has been purchased by the landlord over the head of the tenant. As a matter of fact in terms of paragraph 3 of the plaint, notice of attornment has been given in the year 1996. The premises has been purchased by the plaintiff-respondent from the former landlord of the defendant-appellant, by deed No. 3259, attested by D.C Chinnaiah, Notary of Batticaloa, on 25th May 1996. In terms of subsection 7 of section 22 of the Rent Act, in so far as it is applicable to the instant matter, notwithstanding anything in section 22 (1) to 22 (6), *NO ACTION OR PROCEEDINGS FOR THE EJECTMENT OF A TENANT OF ANY PREMISES SHALL BE INSTITUTED ON THE GROUND OF REASONABLE REQUIREMENT,*

WHERE THE OWNERSHIP OF SUCH PREMISES WAS ACQUIRED BY THE LANDLORD ON A DATE SUBSEQUENT TO THE SPECIFIED DATE BY PURCHASE. (emphasis added) Thus the pleadings and evidence in this case without any ambiguities point to the fact that the landlord has purchased the property, subsequent to the specified date, over the head of the tenant. Consequently, I have no hesitation in concluding that the issues pertaining to the second preliminary objection taken up by the defendant-appellant, as to the maintainability of the action of the plaintiff-respondent, should also be upheld.

In the course of the trial before the commencement of the cross examination of the plaintiff, two additional issues, suggested by the defendant-appellant, which are numbered as 8 and 9 were allowed by Court. By the said issue, the learned trial judge was invited to adjudicate as to the maintainability of the plaintiffs action in the light of the provisions contained in section 22 (7) of the Rent Act, which *inter alia* bars the institution of an action or proceedings for the ejectment of a tenant of any premises referred to in subsection (1) or (2) (i) of section 22, where the ownership of such premises was acquired by the landlord on a date subsequent to the specified date, by purchase. Upon the said issues having been allowed, the plaintiff-respondent in turn suggested two more additional issues, meant to be numbered as 10 and 11, inviting the Court to rule on the question as to whether the subject matter is a residential premises occupied by the owner on 1.1.1980 and let on or after that date. Arising on the said suggested issue the plaintiff-respondent further invited Court to adjudicate as to whether the subject matter is excepted premises in terms of section 2 (4) (c) of the Rent Act.

The learned District Judge by his order dated 30/11/1999, refused to accept the said additional issues *inter alia* on the grounds that such issues would radically alter the entire basis of the plaintiffs action, as the plaintiff-respondent having come to court that the provisions of the Rent Act would apply to the premises in suit, cannot be allowed to resile from that position and take up an entirely different position. In other words the learned trial judge concluded his order stating that the doctrine of "approbate and reprobate" forbids the plaintiff-respondent, from being allowed to take up the position that the premises in question is excepted from the operation of the Rent Act.

Mr. Faiz Musthaffa, P.C. has contended that in order to meet the new position of the defendant-appellant, as to the maintainability of the action in terms of section 22 (7) of the Rent Act, as suggested by issues 8 and 9 that his client should have been allowed to raise the issues relating to the exemption of the premises from the operation of the Rent Act.

The learned Counsel of the defendant-appellant's contention is that the attempt made by the plaintiff-respondent to include the suggested issues 10 and 11, was to take advantage of the omission of the parties and/ or the Court to record the admission that the Rent Act, applies to the premises in suit, notwithstanding the fact that the plaintiff-respondent, defendant-appellant and the Court proceeded on the basis that the Rent Act was applicable to the premises in suit. He has further submitted that in other words that there has been throughout the case an implied admission that the provisions of the Rent Act are applicable to the subject matter.

It is also contended on behalf of the defendant-appellant that issues 8 and 9 arise from the provisions of the Rent Act itself, as opposed to the attempt of the plaintiff-respondent to take the case outside the purview of the Rent Act, by raising the additional issues 10 and 11.

Upon a consideration of the arguments placed by both Counsel, I am of the view that the learned District Judge has rightly held that as stated in the judgment of the *Kandasamy* v *Gnanasekaram*[4] on the basis of common sense and also common justice, that a man should not be allowed to blow hot and cold, to affirm at one time and deny at another.

Even otherwise, it must remembered that the plaintiff-respondent suggested the additional issues, at a belated stage, as late as when the defendant himself had closed his case. In my assessment, if the said issues are permitted, it would not only radically alter the entire basis of the plaintiffs action, but place the defendant-appellant at a remarkably disadvantageous position, causing irreparable loss and immense prejudice to his case. In the circumstances, I am not inclined to endorse the submission made by the learned President's Counsel that the learned District Judge should have allowed the purported consequential issues. My line of

reasoning to justify the refusal of the trial Judge's to accept the additional issues of the plaintiff-respondent is based upon the belatedness of the application of the plaintiff-respondent, namely after conclusion of the trial, linked with the principle relating to the doctrine of "approbate and reprobate".

As regards the notice of tenancy, it must be emphasized that the learned trial Judge has failed to adopt a reasonable and balance approach in interpreting the imperative provisions of the Rent Act. No doubt, the validity of a notice to quit, as was stated by Lindley, J. in the case of *Sidebotham* v *Holland*[5] "Ought not to turn on the splitting of a straw". Nevertheless, it is absolutely irrational to justify a notice of termination of tenancy, which fell short of six months, when if fact the clear intention of the legislature is that the tenant, should be tolerated for one full-year and given the option to find alternative means of shelter, above his head. To disregard these provisions of the law and to resurrect an absolutely void notice, would amount to undermining the legitimate right of the tenant to enjoy the immunity from being sued for one year. Furthermore, he is permitted in law to be in lawful and unencumbered possession of the rented premises, either by the Landlord or at his instance, for one full year even after he is noticed. His possession becomes unlawful only upon the expiration of the period set out in valid notice, which he is legally entitled to have. Any approach by the learned trial Judge, which is capable of rendering such legislative provision and the clear intention of Parliament, meaningless and absurd, should be discouraged.

For the foregoing reasons, I set-aside the judgment and decree of the learned District Judge and enter judgment as prayed for in the answer of the defendant, in the original Court. Accordingly the plaintiff's action stands dismissed, subject to costs payable in this Court and in the District Court by the plaintiff-respondent.

Appeal allowed.