

PERIANAN
v
GUNASINGHE AND ANOTHER

COURT OF APPEAL

EKANAYAKE, J.

GUNARATNE, J.

CA 1092/98(F)

DC NUWARA-ELIYA DE/12

SEPTEMBER 25, 2007

Rent Act – Subletting – Supreme Court Rules (1990) – Do they apply to appeals from judgments from the original Court? What is material to prove sub-tenancy? Exclusive possession of a defined area necessary?

Judgment was entered in favour of the plaintiff-respondent on the basis that, the defendant-appellant has sublet the premises.

The 2nd defendant's position was that, he was the tenant of the plaintiff's father.

Held:

- (1) It is necessary to ascertain (1) as to who was the tenant i.e. 1st or the 2nd defendant (2) sub-tenancy and (3) payment, if not action would fail.
- (2) The portion sub-let should be capable of ascertainment as an identifiable entity occupied by the sub-tenant to the exclusion of the tenant.
- (3) A landlord who pleads a sub-tenancy has to discharge the burden of proving that some person not only occupied the premises or some part thereof but that he paid rent for his occupation.
- (4) The necessity for proof of exclusive possession of a defined area is a *sine qua non* of a finding as to sub-letting.
- (5) There is no cogent evidence to prove and discharge the burden of proving sub-letting

Per Anil Gunaratne, J.

*Rules – SC Rules 1990 – refer to Article 140 and 141 of the Constitution which deals with writs and writs of *Habeas Corpus* and not with appeals from

judgments from the original Court."

APPEAL from the judgment of the District Court of Nuwara-Eliya.

Cases referred to:

- (1) *Perera v Seneviratne* 77 NLR 403.
- (2) *Suppiah Pillai v Muttukaruppa Pillai* 54 NLR 572.
- (3) *John Singho v Meeran Bee Bee* 1969 75 CLW 107.

Hugo Anthony with A.P. Kanapathipillai for appellant.

L.C. Kumarasinghe for respondent.

January 14, 2008

ANIL GUNARATNE, J.

This is an appeal from the Judgment of the District Court of Nuwara-Eliya in a rent and ejection case delivered on 15.7.1998 entering judgment in favour of the plaintiff as prayed for in the plaint and damages. The plaintiff-Respondent's position was that the 1st Defendant was the tenant of the premises described in the schedule to the plaint and the premises in dispute referred to in the said schedule to the plaint had been sub-let to the 2nd defendant-appellant. On that basis filed action to eject the defendants. 2nd defendant-appellant filed answer denying above and took up the position that one John Singho (plaintiff's father) rented the premises in dispute to him and paid rent to him and on his demise to his agent.

Plaintiff-respondent's father John Singho was the owner of the business premises which fact is not disputed by either party to this action and that the plaintiff-respondent by deed No. 4765 of 21.3.1979 marked P1 became the owner of the premises in suit. Owner of premises in suit and paragraph 5 of the plaint are recorded as admissions in this case. As such sub-tenancy as raised by the plaintiff and that payment was made for such occupancy would have to be proved. Further in view of the 2nd defendant-appellant's position it would be necessary to ascertain as to who was the tenant i.e. 1st or 2nd defendant? Nevertheless sub-tenancy and payment for occupancy would have to be proved by plaintiff. If not action would fail.

Plaintiff-respondent's position was that his father rented the premises in dispute to one Karuppiyah Pillai, on or about 1953 and on his death the wife of the said Karuppiyah Pillai and thereafter their son the 1st defendant K. Selvarajah became the tenant. The 1st defendant had defaulted and the case had been fixed *ex-parte* against the 1st defendant.

Plaintiff-respondent *inter alia* contends that

- (1) 2nd defendant's name not found in any of the rent receipts marked D1-D41 but the said John Singho, plaintiff's wife and plaintiff had their signature placed on these receipts.
- (2) 2nd defendant had an agreement with Karuppiyah Pillai who was the first person to start the business of Saraswathie Stores which would prove that Karuppiyah Pillai originally rented the stores from John Singho.
- (3) Supports the Judgment of the District Judge.
- (4) 2nd defendant had not obtained permission of the Rent Board to deposit rent with the Nuwara Eliya Development Council.
- (5) 2nd defendant is a partner of Saraswathie Stores. Initially in his evidence 2nd defendant stated he was the owner of Saraswathie Stores, Later on admitted that he is a partner.
- (6) The mandatory requirement in terms of Rule 3(2) of the Supreme Court Rules of 1990, which should contain an averment that jurisdiction of Court not previously invoked not fulfilled.

This Court observed that this is a frivolous objection since the said rules refer to article 140 & 141 of the Constitution which deal with Writs and Writs of *Habeas Corpus* and not with Appeals from Judgments from the Original Court. The particulars of the Petition of Appeal and Notice of Appeal are embodied in Section 758(1) and 755(1) of the Civil Procedure Code. The objection raised do not fall with the above provisions of the Civil Procedure Code.

- (7) Appellant had not prayed in his Petition of Appeal to set aside the Judgment or Order of the learned District Judge.

The 2nd defendant-appellant *inter alia* contends that:

- (a) Plaintiff's father was the original land lord and that the premises were rented from him.
- (b) Rent were paid by the 2nd defendant-appellant to the plaintiff and/or his Agents.
- (c) That by the admission of signatures of plaintiff's father in D1-D4 it is apparent that the plaintiff's father was the landlord and 2nd defendant was his tenant.
- (d) Plaintiff's version in the plaint differ from the material elicited in cross-examination.
- (e) Partnership agreement 2nd defendant-appellant had with Karuppiyah Pillai had no bearing and he died in 1962 long prior to enactment of the rent Act of 1972.
- (f) Document D1-D42 not challenged by plaintiff.

On a perusal of the Judgment of the District Court I find that the learned District Judge having narrated the gist of the evidence of each party, refer to inconsistencies in the evidence. The following may be noted.

- (i) That the receipts issued are not issued in the name of the 2nd defendant, but some of the receipts name Saraswathie Stores of which the 2nd defendant claim to be it's owner. On cross-examination the Trial Court Judge states that the 2nd defendant admitted that he was a share holder and that the other share holder was Karuppiyah Pillai. It is the view of the Trial Court Judge that the above position contradicts the position taken in the answer of the 2nd defendant.

I wish to observe that even if there is a contradiction and the fact that the receipts do not show the name of the 2nd defendant, the fact of sub-tenancy cannot be proved or inferred. One could be a shareholder of a business and also be the tenant. There is an absence of clear evidence to establish sub-tenancy.

- (ii) District Judge has referred to the principles in *Perera v Seneviratne*⁽¹⁾ case which I would refer to in this Judgment.

Even with or without inconsistencies what is material would be to prove sub-tenancy and payment of rent on that account. These two aspects cannot be inferred from the evidence led in the Trial Court.

At the least even if the learned District Judge concludes that the tenant was the 1st defendant such view would not give rise to a sub-tenancy between the 1st defendant and the 2nd defendant in the absence of cogent evidence. I have to observe that the learned District Judge had been misdirected in law and fact on this aspect.

In Suppiah Pillai v Muttukaruppa Pillai⁽²⁾.

In an action for ejection on the ground that the tenant had sub-let portions of the leased premises in breach of Section 9(1) of the Rent Restriction Act, the essential test is whether there is evidence from which one can infer that there is at least some part of the premises over which the tenant has, by agreement, placed the alleged sub-tenant in exclusive occupation. The portion sub-let should be capable of ascertainment as an identifiable entity occupied by the sub-tenant to the exclusion of the tenant.

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But the essential test in every case is whether there is evidence from which one can infer there is at least some part of the premises over which the tenant has, by agreement, placed the sub-tenant in exclusive occupation.

Perera v Seneviratne (*supra*).

A landlord who pleads a sub-tenancy has to discharge the burden of proving that some person not only occupied the premises or some part thereof, but also that he paid rent for his occupation.

The requirement relating to exclusive possession of a defined area of the premises, has been consistently applied in subsequent decisions. The necessity for proof of this element, as a *sine qua non* of a finding as to sub-letting, was taken for granted by Wijetilleke J. in *John Singho v Meerian Beebie*⁽³⁾.

In the circumstances essential requirements as borne out in the above decided cases have not been proved by the plaintiff in the present case to establish sub-tenancy. The examination in chief of the plaintiff itself is very brief which lay more emphasis to prove tenancy rather than establishing sub-tenancy of the 2nd defendant. In the absence of cogent evidence to prove and discharge the burden of proving the requirements as indicated in the case of *Perera v Senaratne (supra)* and the other case law cited above would compel me to set aside the Judgment of the District Court of Nuwara Eliya.

Therefore I allow the appeal and dismiss plaintiff's action with costs, in this Court and in the Original Court.

EKANAYAKE, J. - I agree

Appeal allowed.