1958 *Present:* **Sansoni, J.**

E. L. ARANOLIS APPUHAMY, Appellant, *and* L. D. DE ALWIS Respondent

S. C. 125—C. R. Colombo, 64,441

Rent Restriction Act, No. 29 of 1948—Section 13, sub-sections 1 (c) and 2—Business premises —" Reasonable requirement " by landlord—Should it be confined to the time of institution of the action ?—Death of landlord pending appeal by tenant —Effect on decree for ejectment.

Plaintiff instituted action on December 5, 1956, asking for ejectment of his tenant, the defendant, from the rented premises on the ground that the premises were reasonably required for the purposes of his business. Admittedly, the plaintiff did not require the premises until December, 1957, in order to start the business.

The trial Judge delivered judgment on June 28, 1957, in favour of the plaintiff. Pending the appeal of the defendant, the plaintiff died in January, 1958.

Held, (i) that the action was maintainable even though the plaintiff's requirement of the premises was not immediate on the date when the action was instituted.

(ii) that the decree for ejectment of the defendant was not affected by the subsequent death of the plaintiff pending appeal.

APPEAL from a judgment of the Court of Requests, Colombo.

N. K. Choksy, Q.C., with *A. Sivagurunathar* and *B. J. Fernando*, for the Defendant-Appellant.

Sir Lalita Rajapakse, Q.C., with *A. Premadasa* and *D. C. W. Wickremasekera*, for the substituted Plaintiff-Respondent.

Cur. adv. vult.

October 13, 1958. SANSONI, J.—

The plaintiff, who is the landlord, filed this action on 5th December, 1956, against his tenant, the defendant, asking for ejectment of the latter from the rented premises on the ground that they were reasonably required for the purposes of his business. The trial took place in April and May, 1957, and the learned Commissioner delivered his judgment on 28th June, 1957. He accepted the evidence of the plaintiff and his brother that they intended to start a business in those premises in December 1957. He held that the premises were reasonably required for that business and ordered that the defendant should be ejected from them.

The defendant has appealed and two grounds were strenuously urged on his behalf. One was that the action should have been dismissed because the business which the plaintiff and his brother intended to

start was not to begin till December 1957 ; therefore, the argument ran, it could not be said that the premises were reasonably required at the time that the action was filed. The other ground was that as the plaintiff died in January 1958 while this appeal was pending and while the decree in his favour was still unexecuted, it was not open to his legal representative (who was substituted in his stead) to enforce the decree.

Having regard to the terms of section 13 (1) of the Rent Restriction Act, No. 29 of 1948, and the decisions of this Court in *Maroof v. Leaff* [1] and *Andree v. de Fonseka* [2] I would hold that, in the words of Gratiaen J. in the latter case, " the reasonableness of the landlord's demand to be restored to possession for the purposes of his business must be proved to exist at the date of institution of the action and to continue to exist at the time ofthe trial ".

I do not, however, think that the plaintiff in the present action was bound to wait until December 1957 to institute proceedings for the ejectment of the defendant, seeing that he required the premises in December 1957 in order to start the new business. The argument for the appellant was in effect that the need of the plaintiff should be immediate when the action is filed. The unreasonableness of such a rule becomes apparent when one considers the history of the present action. It was filed in December 1956, the judgment of the lower Court was delivered in June 1957, we are now in October 1958, and the plaintiff's legal representative has yet to obtain possession of the premises in dispute in order to start the proposed business. Yet it is argued that the filing of the action should have been delayed by another year. I accept the learned Commissioner's findings on the facts and reject the first ground of appeal.

The argument on the second ground was that in view of the plaintiff's death it can no longer be said that the premises are reasonably required for the purposes of his business. Emphasis was laid on the wording of proviso (*c*) of section 13 (1) of the Act where a distinction is drawn between premises required for occupation as a residence, in which case the needs of the landlord as well as any member of his family can be considered, and premises required for the purposes of business, in which case the needs of the landlord's family cannot be taken into account. Another argument was that since the purpose of the Act was to enable the landlord to regain possession, the death of the landlord before he regained possession could only result in his legal representative or any member of his family losing the benefit of a decree entered in the landlord's favour. Reliance was also placed on the provisions of section 13 (2) with regard to the terms of the decree to be entered. Finally, it was submitted that it was not a proprietary right but a mere personal right which the landlord obtained when a decree for ejectment was entered in his favour, and the personal right would die with him.

Strong support for the appellant's argument is to be found in the judgment of Windham J. in *Ismail v. Herft* [3]. The learned Judge held that where a plaintiff died after he obtained a decree for ejectment on the

[1] *(1944) 46 N. L. R. 25.* [2] *(1950) 51 N. L. R. 213.*

[3] *(1948) 50 N. L. R. 112.*

ground that the premises were reasonably required as a residence for himself and his family, the Court of Appeal should satisfy itself that the premises were still reasonably required for his family. He also held that the right to occupy the premises was a personal right which would not pass to his heirs or successors until the landlord had actually entered into occupation. In the recent case of *S. P. K. Kader Mohideen and Co. Ltd. v. S. N. Nagoor Gany* [1] Sinnetamby J. dissented from this judgment and held that the Court cannot look into events that occur subsequent to the date of the institution of the action. The learned Judge based his decision on the provisions of section 13 (1) of the Act and the general principle of law that rights of parties must be determined as at the date of action.

I have already indicated my view as to the time at which the reasonableness of the landlord's demand must be proved to exist. With respect, I would not confine it to the time of institution of the action. It may happen that premises which were reasonably required for occupation at the time of institution of the action will not be so required when the case is heard and the Court has to make its decision. If that should happen, no decree for ejectment should be entered, since proviso (*c*) to section 13 makes the opinion of the Court the decisive factor and that opinion would be expressed in relation to the facts existing when the trial takes place. Take again a case where the premises were reasonably required when the action was filed, and events occur pending the action which strengthen the claim to possession, so that when the respective claims of the parties are balanced at the hearing the plaintiff's need is even greater than it was when the action was filed. In my opinion in such a case the Court should consider the position of the parties at the trial.

The question I have to decide is whether I should follow the judgment of Windham J. which dealt with the precise point which I am now considering, namely, whether a decree for ejectment is affected by the death of the plaintiff in the action. With respect, I must express my dissent from that decision and for doing so I rely on two decisions of the Court of Appeal in England. Although they were not referred to at the argument of the appeal, those decisions seem to me to conclude the matter.

The question first arose in *R. F. Fuggle Ltd. v. Gadsden* [2]. The Court of Appeal in that case had to decide whether it could consider matters which arose after the lower Court had given judgment and which, if they had happened before the hearing, might have affected the finding. Lord Greene M. R. said that the only thing that the Court of Appeal could do in such a case, if it was right to take such a matter into account, would be to send the action back for decision on the issues of fact in the light of the new circumstances. He went on to say: "That, as it seems to me, would be an intolerable result, because there would never be finality. It seems to me that once you allow this Court to examine new facts which have taken place after the judgment on which itself it is not competent to judge, you would completely lose all finality, and nobody would know where he was. It might be suggested that this Court, which on appeal would be making the order, ought not to make it unless it were

[1] *(1958) 60 N. L. R. 16.* [2] *(1948) 2 K. B. 236.*

satisfied as to the reasonableness of making it. In my judgment, when the section talks about being satisfied that it is reasonable to make an order, it means the tribunal of fact must be satisfied that it is reasonabe to make an order; and once the tribunal of fact on adequate evidence is so satisfied the competence of this court to dabble in that matter is completely ruled out."

This judgment was followed in *Goldthorpe v. Bain* [1]. That case dealt with the death of the plaintiff who had obtained an order for possession. One matter which was considered was whether such an order was personal to the plaintiff and ceased at his death. The Court of Appeal held that the order was not personal to the landlord who obtained it, but concerned a proprietary interest of the landlord which passed to his personal representatives. The other ground on which the Judges decided the appeal was that there must be finality. Jenkins L.J. said: "Issues of greater hardship or reasonableness, or the landlord's need of the premises as a residence for himself or some other qualified person, could be tried over and over again, and orders under the Act could thus be varied in their operation without limit or even rescinded after what, in effect, would amount to a rehearing of the whole case. In my view, therefore, one should adhere to the principle that the conditions required to enable an order for possession to be made should be judged at the date when the case is heard and judgment is delivered, and that the validity of the order is not to be affected by any subsequent event."

While appreciating the difference in the wording of the local Rent Restriction Act of 1948 and the English Rent Restriction Act of 1933, I would follow and apply these decisions. I think they deal effectively with the arguments of the appellant's counsel.

The appeal is dismissed with costs.

Appeal dismissed.

[1] *(1952) 2 Q. B. 455.*