1978 *Present:* **Rajaratnam, J., Vythialingam, J. and Sharvananda, J.**

LOKUWITHANAGE ALLEN PERERA

and

BALASURIYAGE JOHN PERERA

S.C. 160/70 (F)—D.C. Colombo 11775/L

Landlord and tenant—Sale of rented premises—Action filed by purchaser on ground that tenant of former owner was in unlawful occupation and a trespasser—Premises no longer habitable at time of sale—Does tenancy subsist—Whether provisions of Rent Restriction Act apply—Defendant failing to raise issue of tenancy at trial—Right of purchaser to obtain decree in ejectment.

Held : That a tenancy comes to an end and so also the statutory protection given by the Rent Restriction Act to the tenant comes to an end with the demolition or collapse of the house. Accordingly the purchaser of premises which had ceased to be habitable and had collapsed at the time of its purchase is entitled to maintain an action to have the former tenant of these premises ejected on the basis that he was in unlawful occupation. In any event, a tenant who seeks to invoke his tenancy of such premises as a defence must not only plead and put in issue the tenancy but must also meet the plaintiff's case that the subject matter of the tenancy had ceased to exist.

Cases referred to :

Giffry v. de Silva, 69 N.L.R. 281.
David Silva v. Madanayake, 69 N.L.R. 396.
Fernando v. de silva, 69 N.L.R. 164.
Issadeen Mohamed v. Singer Sewing Machine Co., 64 N.L.R. 407.

APPEAL from a judgment of the District Court of Colombo.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte* and *Miss P. Seneviratne*, for the plaintiff-appellant.

Miss Maureen Seneviratne, for the defendant-respondent.

Cur. adv. vult

July 20, 1978. RAJARATNAM, J.

The premises in suit, No. 143, Kolonnawa Road, was owned by one Junaid who by deed conveyed the same to the plaintiff on 15.10.66. About a year thereafter he instituted the present action to have the defendant ejected on the ground that he is a trespasser and is in unlawful occupation since October 1966 to the plaintiff's loss and damage of Rs. 25 per month. The answer of the defendant was filed only in June 1969.

In the meantime on 20.8.68 the plaintiff moved for an injunction to restrain the defendant from constructing a house where according to the plaintiff there was a mud and wattle hut in a dilapidated condition. The defendant's position was that he was a tenant of these premises first under one Wickramasinghe and then under one Junaid paying a rent of Rs. 23.05. Junaid had

filed action to eject the defendant in 1965 but the action was dismissed on 16.9.67. In other words when the plaintiff became the owner of these premises on a conveyance, there was the said action pending and it was after Junaid failed in his action to have the defendant ejected that the plaintiff filed his first plaint to have the defendant ejected as a trespasser. The averments in paras 4 and 5 are particularly significant in that the plaintiff averred that defendant was in wrongful and unlawful possession of the premises from October 1966, i.e. the date of the conveyance and had no manner of title or right to the said premises and also that the plaintiff and his predecessors in title were in undisturbed possession of same. The plaintiff nowhere disclosed to Court that the premises were dilapidated, unfit for human habitation and no longer a residential building. It was also not disclosed that the defendant was a tenant of Junaid when the plaintiff became the owner of the premises in suit.

It was the defendant's position that after the dismissal of the action brought by Junaid, he continued to pay rent to Junaid by money order and has done so up to date. It was also his position that he was never informed of any transfer of the premises to the plaintiff. According to him, in April 1968 the roof of the premises caved in and he wrote to Junaid who paid no heed to it. He was compelled he said under the circumstances to repair the premises at his own expense. He denied constructing a new house in the premises.

At the injunction inquiry it was agreed that the enjoining order should be dissolved and the defendant should be allowed to continue with the improvements but that he would not be entitled to compensation for such improvements if an order of ejectment be entered against him (vide proceedings p. 58). This agreement was arrived at on 22.2.69.

It was at this stage that amended plaint was filed on 27.4.69 wherein the plaintiff pleaded for the first time that Junaid had rented the premises to the defendant on a rental of Rs. 23.05 per month but by 15.10.66 before the premises were conveyed to him, the house had collapsed and therefore the contract of tenancy between Junaid and the defendant had been determined. The plaintiff's case was that the defendant had no right to remain in possession after the house had collapsed and he was there as a trespasser. The defendant's position taken up in the answer was that he continued to be a tenant of Junaid and paid rents up to May 1969, that is to say, a month before he filed answer. The defendant also states that if he had been informed of the transfer he would have attorned to the plaintiff.

The issues raised at the trial were as follows :—

(1) Is the plaintiff as the owner of the said land and premises described in the schedule to the plaint entitled to an order for the ejectment of the defendant ?

(2) Is the plaintiff entitled to damages against the defendant from the date of the action ?

(3) If so, in what amount ?

The learned trial Judge answered the issues as follows :—

(1) No, as the defendant is still the tenant of Junaid.

(2) No.

(3) Does not arise,

and dismissed the plaintiff's action with costs.

It will be seen that the defendant has raised no issue as to whether he is entitled to remain in possession as a tenant.

According to the plaintiff a sum of Rs: 3,000 was retained by him as Junaid said that he had a case, i.e. the ejectment case pending against the defendant and possession would be given after the determination of the case. This case as stated earlier was dismissed on 16.9.67. It was the plaintiff's case that no person was in occupation of the premises on the date of purchase. There was a portion of a house in a dilapidated condition, one of the walls of which had come down and only half the roof was resting on a wall. When Junaid 's action was dismissed, Junaid still did not hand over possession and therefore plaintiff filed the present action. The letters P1, P2, P3, P6 and P7 are the correspondence between the Kolonnawa Town Council, the plaintiff and also the defendant with regard to the building which was in a dilapidated condition unfit for human habitation. But these letters cover the period between June 1968 and September 1969.

The learned trial Judge found that these letters disprove the plaintiff's case that the contract of tenancy between Junaid and the defendant had terminated as a result of the collapse of the house prior to October 1966. He also found that if the house so collapsed, there was no necessity for Junaid to have continued the Court of Requests action until September 1967. For this reason, he held that there was a valid contract of tenancy subsisting between Junaid and the defendant in October 1966 and thereafter. The learned trial Judge, however, failed to direct his mind to the fact that if the action continued it does not mean that the house had not collapsed before the termination of the action. If the defendant notwithstanding the collapse of the house refused to give up possession or occupation to Junaid, Junaid

would not have necessarily discontinued the action over his rights he claimed as they stood when he went to Court in 1965. The proceedings of this case, the order and the pleadings are not before us. On the other hand an examination of P1 written in June 1968, indicates that the Medical Officer of Health has found the premises decayed and unfit for human habitation and the premises is described as a dangerous house. On P2 plaintiff has described it as a house unfit for human habitation. She has also stated that the house is not in a position to be repaired and requested the defendant to quit this house. P3 granted the defendant an extension of six months to restore the said house and for repairs.

The Surveyor's report filed on 17.2.69 pursuant to a Commission issued by Court on 16.12.68 reveals that when he visited the premises on 14.2.69 he found *the house an old one* and being demolished in parts by the defendant and new walls to replace the old walls being erected. " A section of the old roof was being replaced by new rafters, new reepers and galvanized sheets by the defendant. Cattle were found tied inside the house and walls (as specified in the plan) do not exist ". By P6, the Town Council wrote again to the plaintiff to repair the house No. 143 to make it suitable for human habitation. This letter is dated 20.9.69.

It is clear that the premises in suit in February 1969 was neither habitable nor occupied but the question before Court is whether on the date of purchase the premises were in a similar condition. On this question Wille on Landlord and Tenant observed at page 249 :

> " In the case of a house being let, if that is completely burnt, the lease comes to an end, even though the land remain, but not where the tenant is still able to exercise many of his rights under the lease, notwithstanding the complete destruction of the buildings ".

On the evidence led by the plaintiff the defendant had left the premises which he had been let and the defendant did not contradict this position.

In the case of *Giffry v. de Silva,* 69 N.L.R. 281, a building which was the subject matter of a lease and rent controlled was burnt down without the fault of the landlord or the tenant, it was held that the tenancy comes to an end even if it fell within the Rent Restriction Act. In this case the frontage and the main roof of the building was completely destroyed by the fire. Two of the walls remained standing. Sansoni, J. observed at page 282 :

> "The law is clear that where a building which is the subject of a lease is burnt down without the fault of the landlord or the tenant, the contract is at an end.....By the contract the tenant is entitled to the use and occupation of the building and if there is no building to use and occupy, there is no existing contract".

I am mindful of the fact that in the above case, the tenant handed over the premises to the landlord as is not the case in the present matter before us. It is clear law again that the statutory protection given by the Rent Restriction Act to the tenant comes to an end with the demolition of the house or the collapse of the house. We must therefore examine the question whether there was any evidence at the trial to the effect that the premises had collapsed by the time the plaintiff became the owner of the premises. The plaintiff gave evidence at page 61 and she stated that no one was living in the premises at the time she bought it in 1966 and there was no habitable house. There was only a portion of a house which was in a dilapidated condition. One of the walls had come down and only half the roof was resting on a wall and the building was in a dilapidated condition. According to the plaintiff the defendant after June 1968 started repairing the existing walls and put up new walls. In any case, there is also the circumstance that from what the Surveyor saw in February 1969, cattle were found tied inside the house and some walls did not exist. The plaintiff's evidence is consistent with the house having been abandoned by the defendant at the time he purchased the house, as it was not habitable because the premises were in a condition as described by the plaintiff. The plaintiff's evidence again was on the basis that when he bought the premises the defendant was in unlawful and wrongful possession having vacated the premises which could not be used for purposes of habitation. It is clear that there was nothing to occupy as a building and that is why the defendant vacated the premises.

At the stage of the cross-examination of the plaintiff, I find that the Court has made this inquiry which is noted in the proceedings (page 72) :

> "I inquire from Mr. Premadasa (Counsel for defendant) whether the question involved in this case is this: Has the subject matter of the contract of tenancy ceased to exist?
>
> Mr. Premadasa states that there is no issue on this point. He states further that that question is not relevant for the purpose of this case".

It is evident that learned Counsel for the defendant advised himself that the question whether the building fit for occupation ceased or did not cease to exist was irrelevant. On the other

hand the plaintiff's case was that the defendant was a trespasser in premises which all along during the relevant time was neither habitable nor occupied but on the other hand was abandoned by the defendant though retained by him to construct a habitable house. It was a grave risk the defendant took when to counter the plaintiff's case and the issue raised he advised himself that it was irrelevant to raise issues on tenancy, and the existence of some portion of the residential premises for use and occupation by him. On the one hand there was the plaintiff's evidence and on the other hand there was no evidence forthcoming from the defendant to meet the plaintiff's case apart from the defendant persistently maintaining that he was the tenant of Junaid and had paid rent to Junaid till February 1970. The tenancy the defendant claimed does not meet the plaintiff's case that the premises ceased to be residential premises for use and occupation as it had collapsed and was unfit for habitation.

It is not possible for this Court to reject the plaintiff's case even accepting the defendant's position that he was a tenant under Junaid. In other words, the plaintiff's case survives the defendant's evidence as he does not deny the position taken up by the plaintiff that the residential premises ceased to exist at the time of his purchase for the use and occupation of it as such by the defendant. The defendant was in a position to give that evidence but did not. The defendant was in a position to cross examine the plaintiff on his case but he did not.

The circumstance that Junaid continued to recover rents till February 1970 even if true does not help the defendant. The defendant, I have noted, has not called Junaid or produced the rent and one fails to understand how and why he continued to pay rent to Junaid instead of to the Rent Board after June 1968 when the plaintiff moved for an injunction.

The correspondence produced though dated after 1968 is consistent with the plaintiff's earlier position, and Junaid's action too in the Court of Requests continuing after the purchase till its dismissal in September 1967 does not cut across the plaintiff's case. In this context and in view of the plaintiff's evidence supporting his case, the defendant's silence on this point and failure to raise an issue which naturally arose from the plaintiff's case was fatal to the defendant. The first issue raised by the plaintiff covers the said issue as far as it related to his case when he raised the issue whether as owner he was entitled to eject the defendant as a trespasser. The defendant did not meet the case of the plaintiff at this point.

The defendant relied on the principle of " Hire goes before sale " and on the decision in the case of *David Silva v. Madanayake*, 69 N.L.R. 396, which quite rightly commended itself to the learned trial Judge who also referred to the decision in *Fernando v. de Silva*, 69 N.L.R. 164, and *Izzadeen Mohamed v. Singer Sewing Machine Co.*, 64 N.L.R. 407. But the principle of " Hire goes before sale " presupposes a hire and not where the subject matter of the hire had ceased to exist. The principle certainly applies to a subsisting hire. A tenant must not only plead the tenancy but meet the plaintiff's case that the subject matter of tenancy had ceased to exist and has been abandoned as unfit for human use and occupation. As Sansoni, J. observed in Giffry's case (*supra*) p. 282 :

> " I do not think that the law in Ceylon is different from the English Law in this respect. In neither country can there be a statutory tenancy in respect of bare land. I think the statement in Mr. R. E. Megarry's book on The Rent Acts (8th Edition) that " the restrictions of the Acts do not inhere in the land after the demolition of the dwelling house, but remain only so long as it is there " which was approved by Evershed, M. R. in *Morleys (Birmingham) Ltd. v. Slater*, is applicable to Ceylon ".

The other cases referred to above have also been decided on this basis of a subsisting tenancy within the scope of the Rent Laws.

It is true unlike in Giffry's case there was no handing over of the premises to the landlord but whether the premises are handed over or abandoned for purposes of habitation, the principle is that tenancy within the Rent Laws apply to buildings that continue to be put into use and occupation. It is not open for a tenant of residential premises to leave the premises because it is unfit for human habitation and use the premises as, for example, a cattle shed and then galvanise himself into action and construct a habitation to suit himself. In this case the law and the authorities relied on by the defendant would have been of avail to him only after he raised an issue and led evidence to meet the plaintiff's case that he was a trespasser under the circumstances.

The learned trial Judge has, with great respect if I may say so, failed to give adequate consideration to the essential part of the plaintiff's case surviving the defendant's case.

Learned Counsel for the defendant-respondent reminded us that we must be slow to interfere on findings of fact. I entirely agree with her submission but on the other hand when an order has been made despite the plaintiff's case supported by evidence surviving the defendant's case which did not cut across the plaintiff's case and in this respect there is no evidence to balance

the probabilities in favour of the defence, I am compelled to set aside the judgment and decree entered below and give judgment for the plaintiff as prayed for in respect of—

(*a*) the declaration that she is entitled to the land and premises described in the schedule,

(*b*) for ejectment of the defendant and all others holding under him the said premises No. 143, Kolonnawa Road, described in the schedule to the amended plaint (p. 30) and

(*c*) for costs here and below.

In respect of damages, I am mindful of the fact that the plaintiff arrived at a settlement with the defendant-respondent (p. 58) that the defendant will not be entitled to a claim for any compensation for improvements if an order for ejectment is entered against the defendant at the trial. In so doing the plaintiff, although he was in a position to restrain the defendant to make the premises once again habitable, permitted improvements thus giving an opportunity for the defendant to hold on to the premises for a longer period. If the defendant was totally restrained as the plaintiff could have, the defendant would have moved out of the premises much earlier. The plaintiff has not exercised his rights as he could have. Moreover the action has been unnecessarily delayed for the last 11 years in the Court below and it cannot be said that it was not due to the plaintiff. In all the circumstances I do not order any sum as damages till the 4th of October, 1967, as prayed for in para (*b*) of the amended plaint. The plaintiff's counsel also at the end of the plaintiff's evidence abandoned the claim for damages up to the filing of the plaint (p. 68). With regard to the damages claimed in para (*c*) of the prayer, no evidence has been led to prove the damages. As stated earlier there were improvements permitted to be made without a right to compensation as agreed by the parties, although the plaintiff was in a position to seek an order from Court to totally restrain the plaintiff from carrying out any improvements to enable him to come back to occupation. There was no inquiry into this issue of damages, no evidence led and an answer to it did not arise below. I therefore order nominal damages at Rs. 5 per mensem from October 1967 till ejectment of the defendant and those holding under him.

I therefore allow the appeal and order judgment for the plaintiff as prayed for in paras (*a*), (*e*), (*d*) and nominal damages at the rate of Rs. 5 per mensem as stated above. Enter decree accordingly.

VYTHIALINGAM, J.—I agree.

SHARVANANDA, J.—I agree.

Appeal allowed.